




The original of this book is in
the Cornell University Library.

There are no known copyright restrictions in
the United States on the use of the text.

http://www.archive.org/details/cu31924061132183

CORNELL UNIVERSITY LIBRARY
3 1924 061 132 183

# AMERICAN AND ENGLISH RAILROAD CASES.

A complete collection of all the railroad law as decided by the American, English, and Canadian courts of last resort.

Elaborate notes to the more imported cases. As a means of giving the working lawyer a full collection of all the cases on the subjects treated, together with able and judicious criticism upon the points presented, they are simply invaluable.

# AMERICAN AND ENGLISH CORPORATION CASES.

This series presents a full collection of the cases in all the courts of last resort, both in America and England, on the law of private and municipal corporations other than railroad companies.

1.—*SCOPE. Among the topics treated of will be the following:*

PRIVATE CORPORATIONS.—*Agency, Assessments, Building Associations, Dissolution of Corporations, Dividends and Earnings, Ecclesiastical and Religious Corporations, Elections, Mandamus, Officers, Organization, Powers, Stock and Stockholders, Taxation.*

MUNICIPAL CORPORATIONS.—*Assessments, Bonds, Powers, Ordinances, Poor Laws, Streets, Taxes, Intoxicating Liquors, Injuries to Person and Property, etc., etc.*

2.—*NOTES. The annotations are a special feature, being very full and exhaustive.*

These works are issued in monthly Parts, each Part containing not less than 224 pages. Three Parts make a complete volume. When Part 3 is published, the Parts are returned to the publisher by the subscriber, and are bound in best law sheep and returned by mail WITHOUT CHARGE FOR BINDING. The subscription price is $4.50 per volume, including NOTES OF CASES.

**EDWARD THOMPSON CO.,** *Publishers.*

Northport, Long Island, N. Y.

THE

# AMERICAN AND ENGLISH

# ENCYCLOPÆDIA

OF

# LAW.

COMPILED UNDER THE EDITORIAL SUPERVISION OF

JOHN HOUSTON MERRILL,

*Late Editor of the American and English Railroad Cases and the American and English Corporation Cases.*

VOLUME VIII.

NORTHPORT, LONG ISLAND, N.Y.:
EDWARD THOMPSON COMPANY, PUBLISHERS.
1889.

L 94738

COPYRIGHT, 1889,

BY EDWARD THOMPSON COMPANY.

DRUMMOND & NEU,
*Printers,*
1 to 7 Hague Street,
NEW YORK.

# PARTIAL LIST OF CONTRIBUTORS, VOL. VIII.

| | |
|---|---|
| *Fires Caused by Operation of Railroads,* | HON. SAMUEL MAXWELL, of the Supreme Court of Nebraska, and WM. M. MCKINNEY, Editor of Am. & Eng. R. R. Cases. |
| *Fish and Fisheries,* | D. H. PINGREY, of the Bloomington (Ill.) Bar. |
| *Fixtures,* | ISAAC N. PAYNE, of the Detroit Bar. |
| *Floods,* | GEORGE R. VAN DUSEN, of the Philadelphia Bar. |
| *Forcible Entry and Detainer,* | F. H. BOWLBY, of the Rochester (N. Y.) Bar. |
| *Foreclosure of Mortgages,* | W. L. SCOTT, of the Knoxville (Tenn.) Bar. |
| *Foreign Assignments,* | WILLIAM M. ROCKEL, of the Springfield (Ohio) Bar. |
| *Foreign Attachment,* | RUFUS WAPLES, of the Ann Arbor (Mich.) Bar. |
| *Foreign Corporations,* | JNO. HOUSTON MERRILL and LUTHER E. HEWITT, of the Philadelphia Bar. |
| *Foreign Executors and Administrators,* | D. H. PINGREY, of the Bloomington (Ill.) Bar. |
| *Foreign Laws,* | WILLIAM M. ROCKEL, of the Springfield (Ohio) Bar. |
| *Forfeiture,* | JOHN P. KELLY, of the Bellaire (Ohio) Bar. |
| *Forgery,* | JAMES M. KERR, of the Rochester (N.Y.) Bar. |
| *Forma Pauperis,* / *Former Suit Pending,* | WILLIAM M. ROCKEL, of the Springfield (Ohio) Bar. |
| *Forthcoming Bond,* | GEORGE R. VAN DUSEN, of the Philadelphia Bar. |
| *Forwarding Merchants,* | LUTHER E. HEWITT, of the Philadelphia Bar. |
| *Franchise,* | JNO. HOUSTON MERRILL and LUTHER E. HEWITT, of the Philadelphia Bar. |
| *Fraud,* | W. F. ELLIOTT, of the Indianapolis (Ind.) Bar. |
| *Frauds, Statute of,* | WILLIAM CUSHING WAIT, of the Boston Bar. |
| *Fraudulent Conveyances,* | W. F. ELLIOTT, of the Indianapolis (Ind.) Bar. |
| *Fraudulent Debtor,* | D. H. PINGREY, of the Bloomington (Ill.) Bar. |
| *Fraudulent Sales,* | NATHAN NEWMARK, of the San Francisco Bar. |

## *PARTIAL LIST OF CONTRIBUTORS, VOL. VIII.*

| | |
|---|---|
| *Freight*, | JNO. HOUSTON MERRILL and LUTHER E. HEWITT, of the Philadelphia Bar. |
| *Future Acquired Property*, | GEORGE R. VAN DUSEN, of the Philadelphia Bar. |
| *Gambling Contracts*, | J. C. THOMSON, of the St. Paul (Minn.) Bar. |
| *Game and Game Laws*, | D. H. PINGREY, of the Bloomington (Ill.) Bar. |
| *Gaming*, *Gaming Houses*, | JAMES M. KERR, of the Rochester (N.Y.) Bar. |
| *Garnishment*, | N. B. RAYMOND, of the Des Moines (Iowa) Bar. |
| *Gas Companies*, | D. M. MICKEY, of the Chicago Bar. |
| *General Average*, | THEO. M. ETTING, of the Philadelphia Bar. |
| *Gifts*, | EDMUND P. KENDRICK, of the Springfield (Mass.) Bar. |
| *Good Will*, | M. W. HOPKINS, of the Wichita (Kan.) Bar. |
| *Governor*, | GEORGE R. VAN DUSEN, of the Philadelphia Bar. |

# TABLE OF TITLES AND DEFINITIONS.

See Index for numerous sub-titles and definitions contained in the notes.


**FIRES CAUSED BY THE OPERATION OF RAILWAYS**, 1
Fire-works, 20
Firing, 20
Firm, 20
Firmly, 20
First, 21
First-class, 23
Fiscal, 23
**FISH AND FISHERIES**, 23
Fishing-bill, 40
Fit, 40
Fittings, 40
**FIXTURES**, 41
Flange, 65
Flat, 66
Flee, 66
**FLOATING DEBT**, 66
**FLOODS**, 67
Flaw, 71
Floor-cloth, *see* Canvas.
**FLOTSAM**, 72
Flowing, 72
Fluid, 72
**FLYING SWITCH**, 73
Fodder, 73
Fœmus, 74
Folio, 74
Follow, 75
Food, 76
Foot, 76
**FOR**, 79
**FORBEARANCE**, 98
Forbearance as a consideration, 99
Force, 99
**FORCIBLE ENTRY AND DETAINER**, 101
**FORECLOSURE OF MORTGAGES**, 185
Foreign, 280
**FOREIGN ASSIGNMENTS**, 281
**FOREIGN ATTACHMENT**, 288
**FOREIGN CONTRACT**, 328
**FOREIGN CORPORATIONS**, 329
**FOREIGN EXECUTORS AND ADMINISTRATORS**, 414
**FOREIGN GUARDIAN**, 434
**FOREIGN JUDGMENTS**, 434
**FOREIGN LAWS**, 435
**FOREIGN LIEN**, *see* **LIEN**.
**FOREIGN WILLS**, *see* **WILLS**.
Foreigner, 441
**FORESTALLING THE MARKET**, 441
**FORESTS**, 442
Forever, 442
Forfeit, 443
**FORFEITURE**, 443
Forge, 452
**FORGERY**, 452
**FORMA PAUPERIS**, 542
**FORMER ACQUITTAL**, *see* **JEOPARDY**.
**FORMER ADJUDICATION**, *see* **RES ADJUDICATA**.
**FORMER CONVICTION**, *see* **JEOPARDY**.
**FORMER JEOPARDY**, *see* **JEOPARDY**.
**FORMER RECOVERY**, *see* **RES ADJUDICATA**.
**FORMER SUIT PENDING**, 549
**FORNICATION**, 555
**FORSWEAR**, 564
Forth, 565
**FORTHCOMING BOND**, 565
Forthwith, 571
**FORWARDING MERCHANTS**, 573
Fractional, 584
**FRANCHISE**, 584
Fraternity, 634*e*
**FRAUD**, 999
**FRAUDS, STATUTE OF**, 657
**FRAUDULENT CONVEYANCES**, 748
**FRAUDULENT DEBTOR**, 780
**FRAUDULENT SALES**, 786
Free, 898
Freehold, 898
Freeman, 899
**FREIGHT**, 900
Frequent, 980
Fresh, 980
**FRESHET**, 980
From, 981
Front, 982
Fruit, 983
**FUGITIVE FROM JUSTICE**, *see* **EXTRADITION**.
Full, 983
Fund, 983
**FUNERAL EXPENSES**, *see* **EXECUTORS AND ADMINISTRATORS**.
Furnace, *see* Forge.

Furnish, 984
Furniture, 985
Further, 986
Future, 986
**FUTURE-ACQUIRED PROPERTY**, 987
Gag, 992
Gain, 992
Gallon, 992
**GAMBLING CONTRACTS**, 992
**GAME AND GAME LAWS**, 1023
**GAMING**, 1033
**GAMING HOUSES**, 1065
**GARNISHMENT**, 1096
Gas, 1268
**GAS COMPANIES**, 1268
Gasoline, 1291
Gather, 1291
Gelding, 1292
Gem, 1292
General, 1292
General average, 1293
Gentle, 1308
Gentleman, 1308
Genuine, 1308
Getting out, 1308
**GIFTS**, 1308
Gin-house, 1355
Gist, 1355
Give, 1355
Glass, 1356
Go, 1357
Gold, 1357
Good, 1357
**GOOD FAITH**, 1361
Goods, 1362
**GOOD WILL**, 1366
Gorge, 1372
Gotten, 1375
**GOVERNMENT**, 1378
Governor, 1400
Grace, 1410
Grade, 1410
Grain, 1411
Granary, 1412
Grandchild, 1412

THE

AMERICAN AND ENGLISH

# ENCYCLOPÆDIA OF LAW.

---

**FIRES CAUSED BY THE OPERATION OF RAILWAYS.**—(See also EMINENT DOMAIN; FIRE INSURANCE.)


I. Liability, 1.
II. What Care Required, 2.
III. Construction of Engines, 3.
IV. Negligence in Management of Engines, 5.
V. Proof of Origin of Fires, 7.
VI. Burden of Proof, 9.
VII. Where Fire Spreads, 11.
VIII. Fire Communicated from One Building to Another, 13.
IX. Rubbish on Right of Way, 14.
X. Contributory Negligence, 16.
XI. Credibility of Witnesses, 19.


**I. Liability.**—The doctrine is now well settled, both in England and the United States, that when the legislature has authorized the use of fire for the purpose of propelling cars by steam, and every reasonable precaution is observed to prevent injury, the legislative sanction has this effect: that in case damage results from the use of such fire, the company will not be liable unless guilty of negligence.[1]

1. Piggot *v.* Eastern, etc., Ry. Co., 3 C. B. 229; Aldridge *v.* Great Western R. Co., 3 Man. & G. 517; Burlington, etc., R. Co. *v.* Westover, 4 Neb. 268; Leavenworth, etc., R. Co. *v.* Cook, 18 Kan. 261; Kansas, etc., R. Co. *v.* Butts, 7 Kan. 308; Atchison, etc., R. Co. *v.* Riggs, 31 Kan. 622; s. c., 15 Am. & Eng. R. R. Cas. 531; Jackson *v.* Chicago, etc., R. Co., 31 Iowa, 176; McHugh *v.* Chicago, etc., R. Co., 41 Wis. 78; Woodson *v.* Milwaukee, etc., R. Co., 21 Minn. 60; Illinois, etc., R. Co. *v.* Mills, 42 Ill. 407; Frankford, etc., Turnpike Co. *v.* Phila., etc., R. Co., 54 Pa. St. 345; Phila., etc., R. Co. *v.* Yerger, 73 Pa. St. 121; s. c., 2 Am. & Eng. R. R. Cas. 271; Indianapolis, etc., R. Co. *v.* Paramore, 31 Ind. 143; Morris, etc., R. Co. *v.* State, 36 N. J. 553; Borroughs *v.* Housatonic R. Co., 15 Conn. 124; Home Ins. Co. *v.* Penna. R. Co., 11 Hun (N. Y.), 182; Brand *v.* Hammersmith R. Co., L. R. 4 H. L. 171; Rood *v.* N. Y. & E. R. Co., 18 Barb. (N. Y.) 80; Vaughan *v.* Taffvale R. Co., 5 H. & N. 679, Reading R. Co. *v.* Yeiser, 8 Penn. St. 366; Sheldon *v.* Hudson River R. Co., 14 N. Y. 218; Balt., etc., R. Co. *v.* Woodruff, 4 Md. 242; McCready *v.* Railroad Co., 2 Strobh. Law, 356; Flynn *v.* Railroad Co., 40 Cal. 14; Jefferis *v.* Phila., etc., R. Co., 3 Houst. (Del.) 447; Cracknell *v.* Mayor and Corporation of Thetford, L. R. 4 C. P., 629; Smith *v.* L. & S. W. R. Co., L. R. 5 C. P. 98, L. R. 6 C. P. 14.

By the ancient common law as stated in Rolle's Abridgment, "If any fire, by misfortune, burns the goods of another man, he shall have his action on the case against me. If a fire breaks out suddenly in my house, I not knowing it, and it burns my goods, and also my neighbor's house, he shall have his action on the case against me. So if the fire is caused by a servant or a guest, or any person

**II. What Care Required.**—As a railway company is intrusted by the legislature with an agent of an extremely dangerous character for the purpose of propelling its engines and cars, the law requires of such company that it shall exercise the rights and powers so conferred upon it with care, and adopt such precautions as may reasonably be expected to prevent damage to the property of third persons through or near which its railway passes.[1] The measure

who enters the house with my consent. But otherwise if caused by a stranger who enters the house against my will." Action on the case B. Tit. Fire

This harsh rule of the common law was modified by the statute 6 Ann. c. 3 1, substantially re-enacted in 14 Geo. III. c. 78. The common-law rule has not been recognized in this country, Bachelder *v.* Heagan, 18 Me. 32, as it seems to have been founded on a presumption of negligence not susceptible of proof. In Vaughan *v.* Taff Vale R. Co., 5 Hurl. & N. 679, Cockburn, C.J., said: "Although it may be true that if a person keep an animal of known dangerous propensities, or a dangerous instrument, he will be responsible to those who are thereby injured, independently of any negligence in the mode of dealing with the animal or using the instrument; yet when the legislature has sanctioned and authorized the use of a particular thing, and it is used for the purpose for which it was authorized, and every precaution has been observed to prevent injury, the sanction of the legislature carries with it this consequence: that if damage results irom the use of such thing, independently of negligence, the party using it is not responsible." The decision in the case cited was rendered in the year 1860. It was substantially concurred in by the other members of the court, and is now regarded both in England and the United States as a correct statement of the law.

**Statutes imposing Liability.**—Some States have enacted statutes imposing a liability on railroad companies for any damage caused by fire communicated from their locomotives. Such statutes are constitutional, even as applicable to pre-existing railways. Rodemacher *v* Milwaukee & St. P. R. Co., 41 Iowa, 297; Grissel *v.* Housatonic R. Co. (Connecticut, 1887), 32 Am. & Eng. R. R. Cas. 349; Lyman *v.* Boston, etc., R. Co., 4 Cush. (Mass.) 288; Pierce *v.* Worcester, etc., R. Co., 105 Mass. 199.

A railroad corporation is liable, under the *New Hampshire*, statue for the destruction by fire from a locomotive of wood, coal, etc., deposited on land adjoining their line, and there used by a dealer as his stock in trade. Haseltine *v.* Concord R. Co. (N. H.), 6 N. Eng. Rep. 897.

1. Piggot *v.* Eastern, etc., Ry. Co., 3 C. B. 229; Lackawanna, etc., R. Co. *v.* Doak, 52 Pa. St. 379. Willis J., in Vaughan *v.* Taff Vale R. Co., 5 Hurl. & N. 679, said: "Looking at the report of this case in 3 Hurl. & N. 743, I feel that we are obliged to reverse the judgment of the court below, although we do not, in point of law, differ in opinion from that court. There was evidence that the defendants had taken every precaution, and adopted every means in their power, and which science could suggest, to prevent injury. It would have been a question for the jury whether they believed that evidence; but the question submitted to them was not upon the whole evidence, but, taking it as a fact that the defendants had used every precaution which they could consistently with the working of the line, whether the jury did not think that they were guilty of negligence. Now, the definition of negligence is the absence of care, *according to circumstances*. But it is found as a fact that the defendants took all the care which they could under the circumstances.

Therefore, upon that taken as a fact and not merely as evidence of the fact, there is a finding that the defendants only did that which the act of Parliament allowed them to do, and took all possible care to prevent injury."

A railway company is required to exercise care, diligence, and skill to prevent fires from being communicated by its locomotives, and it is liable in case of damage through its negligence. Burroughs *v.* Housatonic R. Co., 15 Conn. 124; Huyett *v.* Phila., etc., R. Co., 23 Pa. St. 373. That is, the company must use ordinary or reasonable care, which is that degree of care which prudent men, skilled in the business, would probably exercise under the circumstances. This care must be in proportion to the danger. The company is required to use greater care to prevent fires in a very dry time than when the ground is covered with snow or in rainy weather; so where property is very much exposed to fire greater precaution must

of prudence required on the part of a railroad company of course differs with the character of the country traversed, and the consequent increase or decrease of risk incident to the use of its engines.[1]

**III. Construction of Engines.**—In the construction of its engines a railway company is bound not only to employ all due care and skill for the prevention of injury to the property of others by the emission of sparks or from any other cause, but it must avail itself of all discoveries which science has put within its reach for

be taken when there is danger of communicating fire to such structure than when there is not such danger. In Milwaukee, etc., R. Co. *v.* Kellogg, 94 U. S. 469, the court say: "Yet it is obvious the immediate and inseparable consequences of negligently firing the elevator would have been very different if the wind had been less, if the elevator had been a low building constructed of stone, if the season had been wet, or if the lumber and the mill had been less combustible. And the defendants might well have anticipated or regarded the probable consequences of their negligence as much more far-reaching than would have been natural or probable in other circumstances."

In Diamond *v.* Northern Pac. R. Co., 6 Mont. 580; s. c., 29 Am. & Eng. R. R. Cas. 117, it was held that it is misleading to charge the jury simply that the railroad company was bound to use the reasonable care and diligence of an ordinarily prudent man in preventing the escape of fire, and in keeping its right of way clear of combustible material, unless accompanied by an explanation that the care required is the ordinary care of an expert engineer or railroad servant. But see Texas, etc., R. Co. *v.* Medaris, 64 Tex. 92; s. c., 29 Am. & Eng. R. R. Cos. 159.

**Failure of Company's Employees to Watch for and Extinguish Fires.**—Where through no neglect of the company the fire started on its own right of way by reason of sparks emitted from the locomotive, and the employees of the company saw it in time to extinguish it before it had travelled further, but they permitted it to burn, whereby it spread to and consumed the premises of the plaintiff, the company was held liable. Kenney *v.* Hannibal, etc., R. Co., 62 Mo. 476. So likewise where the hands of a construction company with notice of a like fire failed to stop the train and extinguish the fire. Rolke *v.* Chicago, etc., R. Co., 26 Wis. 537. And it is no defence that the hands of the company had no license or authority to enter upon the plaintiff's premises to extinguish the fire. Bass *v.* Chicago, etc., R. Co., 28 Ill. 9. The plaintiff may prove that after the fire the company employed more men to walk and watch the track than were employed when the damages occurred. Westfall *v.* Erie R. Co., 5 Hun (N. Y.), 75. But the company is not bound to keep a patrol along its track for that purpose. Baltimore, etc., R. Co. *v.* Shipley, 39 Ind. 251; Indianapolis, etc., R. Co. *v.* Paramore, 31 Ind. 143.

1. Fero *v.* Buffalo R. Co., 22 N. Y. 209; Great Western R. Co. *v.* Haworth, 39 Ill. 346; Pierce *v.* Worcester, etc., R. Co., 105 Mass. 199; Smith *v.* Old Colony R. Co., 10 R. I. 22; Michigan, etc., R. Co. *v.* Anderson, 20 Mich. 244; Webb *v.* Rome, etc., R. Co., 49 N. Y. 420; Frankford, etc., Turnpike Co. *v.* Philadelphia, etc., R. Co., 54 Pa. St. 345; Chicago, etc., R. Co. *v.* Quaintance, 58 Ill. 389; Phila. & Reading R. Co. *v.* Schultz, 2 Am. & Eng. R. R. Cas. 271.

It is well established that the degree of care must be proportionate to the danger. What is ordinary care in a case of extraordinary danger, would be extraordinary care in a case of ordinary danger, and what would be ordindary care in a case of little danger would fall much below this in a case of great danger. F. & B. Turnpike Co. *v.* Phil., etc., R. Co., 54 Pa. St. 345; Smith *v.* Old Colony R. Co., 10 R. I. 22; Fero *v.* Buffalo, etc., R. Co., 22 N. Y. 209; Chicago, etc., R. Co. *v.* Quaintenance, 58 Ill. 289; Pierce *v.* Worcester, etc., R. Co., 105 Mass. 199. If a high wind is blowing from the locomotive toward the combustible material, greater caution must be used. Kellogg *v.* Milwaukee, etc., R. Co., 1 Cent. L. J. 278; s. c. on appeal, 94 U. S. 469. But see Michigan Cent. R. Co. *v.* Anderson, 20 Mich. 244. If a certain season is unusually dry, a railroad company is bound to take extra precautions against fire. Pittsburg, etc., R. Co. *v.* Noel, 77 Ind. 110; s. c., 7 Am. & Eng. R. R. Cas. 24.

that purpose, provided they are such as under the circumstances it is reasonable to require such company to adopt. If, however, the dangers to be avoided are insignificant or not very likely to occur, and the remedy suggested very costly and troublesome, or such as interferes materially with the efficient working of the engine, it is for the jury to say whether the company could reasonably be expected to adopt it.[1]

1. Fremantler *v.* London, etc., Ry. Co., 2 Fost & Fin. 340; 10 C. B. (N. S..) 89. London *v.* Railway Co., 10 C. B. (N. S.) 89; Hoyt *v.* Jeffers, 30 Mich. 181; Brighthope R. Co. *v.* Rogers, 76 Va. 443; s. c., 8 Am. & Eng. R. R. Cas. 710; Baltimore, etc., R. Co. *v.* Woodruff, 4 Md. 242; Fitch *v.* Pacific R. Co., 45 Mo. 322; Kansas, etc. R. Co. *v.* Butts, 7 Kan. 308; Frankford, etc., Turnpike Co. *v.* Phila, etc., R. Co., 54 Pa. St. 345; Phila., etc., R. Co., *v.* Hendrickson, 80 Pa. St. 182; Erie R. Co. *v.* Decker, 78 Pa. St. 293; Burke *v.* Louisville, etc.; R. Co., 7 Heisk. (Tenn.) 452; Steinweg *v.* Erie R. Co., 43 N. Y. 123; Bedell *v.* Long Island R. Co., 44 N. Y. 367; Webb *v.* Rome, etc., R. Co., 49 N. Y. 420; Crist *v.* Erie R. Co., 58 N. Y. 638; Jefferis *v* Railroad Co., 3 Houst. (Del.) 447; Smith *v.* Old Colony R. Co., 10 R. I. 22; Illinois Cent. R. Co. *v.* McClelland, 42 Ill. 355; Bass *v.* Chicago, etc., R. Co., 28 Ill., 9; Toledo etc., R. Co., *v.* Larmon, 67 Ill. 68; Spaulding *v.* Chicago, etc., R. Co., 30 Wis. 110; Toledo, etc., R. Co. *v.* Waud, 48 Ind. 476; Gagg *v.* Vetter, 41 Ind. 228; Pittsburgh, etc. ,R. Co. *v.* Nelson, 51 Ind. 150; Kenney *v.* Hannibal R.Co., 63 Mo. 98; Jackson *v.* Chicago, etc., R. Co., 31 Iowa, 176; Longabough *v.* Virginia City, etc., R. Co., 9 Nev. 271.

It is indeed sometimes said that these contrivances must be the most perfect possible, but the authorities to this effect are scanty and not thoroughly reliable. Indiana R. Co. *v.* Paramore, 31 Ind. 143; St. Louis, etc., R. Co. *v.* Gilham, 39 Ill. 455; Ill. Cent. R. Co. *v.* McClelland, 42 Ill. 355; Chicago, etc., R. Co. *v.* Quaintance, 58 Ill. 389; Ill. Cent. R. Co. *v.* Shanefelt, 8 Ill. 497.

In Burlington, etc., R. Co. *v.* Westover, 4 Neb. 268, it is said: "As to what are reasonable precautions against the escape of fire, the court almost without exception hold that where engines are properly constructed and have all the appliances in general use for preventing the escape of fire, and there is no negligence in their management, the company will not be liable, as experience has shown that it is impossible at all times and under all circumstances to prevent the escape of fire from locomotives in such quantities as to occasion injury; but it has also been fully demonstrated that where engines are properly constructed and have the proper appliances for preventing the escape of fire, and are managed with care, they rarely occasion damage by setting out fire."

In Texas, etc., R. Co. *v.* Levi, 59 Tex. 674; s. c., 13 Am. & Eng. R. R. Cas. 464, the court say: "The evidence tends to show that, by the use of the most approved spark-arresters, it is impracticable to prevent entirely the escape of sparks from locomotives, unless the draught is so closed by the spark-arrester as to prevent the generation of steam. If such be the case, a railway company is authorized to operate its engines with such protection against injury to others by fire as can be given by the use of a high degree of care in the selection and use of such appliances as are approved by prudent and skilful persons, generally engaged in such business, and are found to be best adapted to prevent the escape of fire by which others may be injured, even though as thus operated there may be danger of injury to others from fire escaping from locomotives. The business being authorized by law, no liability can be incurred from its exercise, unless there be a want of care in its prosecution, even though it be attended with some risk of injury to others." See also Brown *v.* Atlanta, etc., R. Co., 19 S. Car. 39; s. c., 13 Am. & Eng. R. R. Cas. 479.

If a railroad company use upon its engine a spark-arrester of an approved pattern in general use, and which, upon a careful inspection by a skilled mechanic, appeared to be in good condition, such company will not be responsible for damage done by a fire occasioned by sparks escaping through such spark-arrester. Hoff *v.* West Jersey R. Co., 45 N. J. L. 201; s. c., 13 Am. & Eng. R. R. Cas. 476. In a number of cases, however, evidence has been admitted to show that by the proper contrivances fire may be effectually prevented from escaping. Anderson *v.* Cape Fear Steamboat Co.,

**IV. Negligence in Management of Engines.**—The law requires that the locomotives of a railway company shall not only have the best and most approved appliances to prevent fire from escaping, but in case any engine shall set out fire and destroy the property of a third person, it will devolve on the company to prove that the engine was properly constructed and operated with due care.[1]

64 N. Car. 399; Steinweg *v.* Erie R. Co., 43 N. Y. 123; Case *v.* North Cent. R. Co., 54 Barb. (N. Y.) 644; Dimmock *v.* North Stratfordshire R. Co., 4 F. & F. 738; Longabough *v.* Virginia City, etc., R. Co., 9 Nev. 271. And some judges have not hesitated to express themselves of a like opinion. Piggott *v.* Eastern Counties R. Co., 3 M. G. & S. 230; Chicago, etc., R. Co. v. Quaintance, 58 Ill. 389.

In Small *v.* Chicago, etc., R. Co., 50 Iowa 338, s. c., 55 Iowa, 582, Beck, J., says: "It may be said, as fire must be used in running an engine, the railroad company cannot dispense with it, and whenever used it is liable to escape through accident, and cannot be certainly controlled. But this conclusion we cannot admit. We are of the opinion that contrivances may be applied to engines that would prove just as effectual in preventing the escape of fire as a fence is in preventing cattle going upon a railroad track. Whether such contrivances are in use we know not, and it is not important to inquire; that they may be applied cannot be doubted when we contemplate the resources which science brings to the aid of machinists; at all events the law, in holding railroad companies liable for damages resulting from fires set out by their engines, presumes they may prevent injuries resulting in that way."

**What Amounts to Negligence in the Construction of an Engine.**—It has been held as a matter of law that an engine which throws burning brands to the distance of one hundred feet has not such safeguards as the law requires. Jackson *v.* Chicago, etc., R. Co., 31 Iowa, 176. See Ill. Cent. R. Co, *v.* McClelland, 42 Ill. 355. But a company is not bound to use everything which mechanical skill or ingenuity can devise, whether it be known or not, or capable of being obtained or not. Before a company can be held liable for not using such improved contrivances, it must be shown, both by use and experience of men, to be superior and effectual. A company is not bound to purchase a patent for every invention which is claimed to be an improvement. Spaulding *v.* Chicago, etc., R. Co., 30 Wis. 110; Toledo, etc., R. Co. *v.* Pindar, 53 Ill. 447; Longabough *v.* Virginia City, etc., R. Co., 9 Nev. 271; St. Louis, etc., R. Co. *v.* Gilham, 39 Ill. 445; Anderson *v.* Cape Fear Steamboat Co., 64 N. Car. 399; F. & B. Turnpike Co. *v.* Phila., etc., R. Co., 54 Pa. St. 545. But if a particular safeguard has been tested and found to meet the purpose, the company must use it. Toledo, etc., R. Co. *v.* Corn, 71 Ill. 493. See Steinweg *v.* Erie R. Co., 43 N. Y. 123; Pittsburgh, etc., R. Co. *v.* Nelson, 51 Ind. 150; Freemantle *v.* London & N. W. Ry. Co., 10 C. B. (N. S.) 89; Dimmock *v.* North Staffordshire Ry. Co., 4 F. & F. 1058; Freemantle *v.* N. W. Ry. Co., 2 F. & F. 340. If a spark-arrester will prevent the fire, it is negligence *per se* not to use it. Anderson *v.* Cape Fear Steamboat Co., 64 N. Car. 399; Bedell *v.* Long Island R. Co., 44 N. Y. 367. But in other cases this is considered a question for the jury. Lackawana, etc., R. Co. *v.* Dook, 52 Pa. St. 379; Kellogg *v.* Milwaukee, etc., R. Co., 1 Cent. L. Jour. 278; Algier *v.* Steamer Maria, 14 Cal. 167; Freemantle *v.* London & Northwestern Ry. Co., 10 C. B. (N. S.) 89.

**Evidence.**—Evidence of the use of the stack by others is admissible on the question of the safety of the stack. F. & B. Turnpike Co. *v.* Phila., etc., R. Co., 54 Pa. St. 345. As is also evidence that the company changed the stack after the accident happened. St. Joseph, etc., R. Co. *v.* Chase, 11 Kan. 471. A general usage as to inspection of each engine as it arrived at the shops may be proven. Chicago, etc., R. Co. *v.* Quaintance, 58 Ill. 389. But evidence of the condition of other engines than the one producing the fire cannot be admitted. Erie R. Co. *v.* Decker, 78 Pa. St. 293.

1. Chicago, etc., R. Co. *v.* Quaintance, 58 Ill., 389; Chicago, etc., R. Co. *v.* Clampit, 63 Ill. 95. If the company show that its engines are the best in use and were carefully inspected every day by a competent person, and that they were skilfully managed, it would seem that it is relieved from liability. Spaulding *v.* Chicago, etc., R. Co., 30 Wis. 110. But this must be shown directly, and evidence of usage is not sufficient. Baltimore, etc., R. Co. *v.* Shipley, 39 Ind. 251. See BURDEN OF PROOF, *infra.*

Whether due care was used in operating the engine is a question of fact to be determined by the jury from all the facts and circumstances in the case.[1]

1. Johnson *v.* Chicago, etc., R. Co., 31 Minn. 57; s. c., 13 Am. & Eng. R. R. Cas. 460. In this case the engineer testified: "I handled the engine very carefully, but did not operate the engine any differently from what I usually did. . . . I handled the engine with a great deal of care upon that occasion while in Farmington." The court say: "It was proper for the jury to consider this evidence in connection with the fact that a very high wind was prevailing; that the place was a village, with buildings standing near the railway track, and where the property of many persons would be exposed to danger from the burning of a single building. While the engineer was, as the verdict shows, ordinarily a careful man in his business, it may still be that the care which he usually exercised was not such as common prudence apparently demanded on this occasion. The fact as to whether proper care was exercised was left to rest only on the opinion of the engineer. None of the facts as to the manner of operating the engine were presented. The reason or necessity for the discharging of an unusual quantity of sparks (if the fact was so) was not explained."

"The expression 'ordinarily prudent man,' or 'ordinary care,' without qualification, suggests merely the care that should be bestowed in cases of ordinary danger. They are expressions inappropriate where the danger is extraordinary, unless they are explained and applied to the subject. If the danger is great the care should be great in proportion. The ordinary care of an engineer on a railroad locomotive is a very high degree of care, and the skill required is a very high degree of skill. Such an engineer is an 'ordinarily prudent man' of his class, and the phrase, thus explained, would be correct." Diamond *v.* Northern Pacific R. Co., 6 Mont. 580; s. c., 29 Am. & Eng. R. R. Cas. 124.

In an action to recover for damages for a fire set by a locomotive the jury found "that the engine from which the fire escaped was of the most improved invention and construction, so far as the appliances for preventing the escape of fire were concerned;" and also found that the engine "was in good condition, so far as all the appliances for preventing the escape of fire were concerned;" and also found that the engineer who managed the engine from which the fire is claimed to have escaped was a "competent, skilful, and careful engineer." There was no evidence introduced tending to show that the engineer mismanaged the engine, or that he was negligent in any respect with regard to its management; and the jury did not find that there was any mismanagement or negligence on the part of the engineer; but in answer to the following question put to the jury, to wit, "How did he so mismanage his engine as to set out the fire?" the jury answered, "We cannot tell." And in answer to the further question put to the jury, to wit, "In what does the negligence of the railroad company in permitting the fire to escape from its engine or train consist?" the jury answered, "We cannot tell." "Under the findings of the jury and the evidence, we must, therefore, consider that the engine was complete and perfect in every respect, so far as the appliances for preventing the escape of fire were concerned, and the engineer was a competent, skilful and careful engineer, and that there was nothing in the case tending to show that he was negligent in the management of his engine; and we cannot imagine where there could be any other room for negligence on the part of the railroad company in permitting the fire to escape which is supposed to have caused the injury." Atchison, etc., R. Co. *v.* Riggs, 15 Am. & Eng. R. R. Cas. 531; s. c., 31 Kan. 622.

The correct rule seems to be, that where, upon the facts proved, different minds may draw different conclusions as to whether or not such facts establish negligence or the absence of it, the question is one proper to submit to the jury. Lincoln *v.* Gillilan, 18 Neb. 114; Philadelphia, etc., R. Co. *v.* Schultz, 93 Pa. 341; s. c., 2 Am. & Eng. R. R. Cas. 271.

The fact that the same engine has set several successive fires on the same trip and the same day tends to show improper construction, operation, or want of repair. Slossen *v.* Burlington, etc., R. Co., 60 Iowa, 215; s. c., 7. Am. & Eng. R. R. Cas. 509.

To overload a locomotive is negligence. Toledo, etc., R. Co. *v.* Pindar, 53 Ill. 447.

The company has the right to use any kind of fuel in common use, even inferior, unless its use was known to it to be hazardous. Collins *v.* New York, etc., R.

**V. Proof of Origin of Fires.**—It devolves on the plaintiff to prove by a preponderance of the evidence that the fire was communicated by sparks or cinders from the railway engines. It need not be shown that any particular engine was at fault, but it will be sufficient if the fire is proved to have been set out by any engine passing over the defendant's railway, and the evidence may be wholly circumstantial, as, first, that it was possible for fire to reach the plaintiff's property from the defendant's engines; and, second,

Co., 5 Hun (N. Y.), 499. But where wood was used in a coal-burning engine it was held that negligence might be inferred. St. Joseph, etc., R. Co., 11 Kan. 47; Chicago, etc., R. Co. *v.* Quaintance, 58 Ill. 389. In New Brunswick R. Co. *v.* Robinson, 11 Sup. Ct. of Canada, 689; s. c., 29 Am. & Eng. R. R. Cas. 132, R. owned a barn situated about two hundred feet from the New Brunswick R. Co.'s line, and such barn was destroyed by fire, caused, as was alleged, by sparks from the defendant's engine. An action was brought to recover damages for the loss of said barn and its contents. On the trial it appeared that the fuel used by the company over this line was wood, and evidence was given to the effect that coal was less apt to throw out sparks. It also appeared that at the place where the fire occurred there was a heavy up grade, necessitating a full head of steam, and therefore increasing the danger to surrounding property. The jury found that the defendant did not use reasonable care in running the engine, but in what the want of such care consisted did not appear by their finding. *Held,* reversing the judgment of the court below, that the company were under no obligation to use coal for fuel, and the use of wood was not in itself evidence of negligence; that the finding of the jury on the question of negligence was not satisfactory, and that therefore there should be a new trial.

So if using a greater amount of steam than is necessary causes the engine to emit an unusually large number of sparks, it is negligence. Great Western Ry. Co. *v.* Haworth, 39 Ill. 346. Under the particular circumstances of the case it was held that putting an unusually large quantity of coal in the firebox was not negligence. Phila., etc., R. Co. *v.* Gerges, 73 Pa. St. 121.

In an action to recover damages for property alleged to have been destroyed by fire set by defendant's engine, an instruction that "negligence may be evidenced in various ways, such as the employment of an unskilful or careless engineer and fireman; and if you find from the evidence that the defendant carelessly or negligently managed its road in this respect, and that by reason of such negligence a fire was set, the defendant is liable,"—in effect directs the jury that if they find that the engineer and fireman were unskilful, and that by reason of such lack of skill the fire was set, then the plaintiff is entitled to recover; and when the complaint in such action alleges that the defendant permitted the engine to be out of repair, and carelessly and negligently used, thus charging that the engineer and fireman were negligent, and there is no allegation that they were unskilful, such instruction is erroneous. Babcock *v.* Chicago, etc., R. Co. (Iowa), 33 N. W. Rep. 628.

**Unlawful Rate of Speed.**—In Martin *v.* West. U. R. Co., 23 Wis. 437, Dixon, J., in delivering the opinion of the court, says (p. 440): "We have no doubt that the danger to buildings and other adjacent property liable to injury and destruction by fire caused by the emission of coals and sparks from the engine when in rapid motion was one of the mishaps which the statute limiting the rate of speed through cities and villages was designed to prevent, and are therefore of the opinion that for losses so occasioned by trains moving at a greater rate of speed than the statute prescribes the company is responsible."

But in an action against a railway company for the value of property destroyed by fire alleged to have been caused by its negligence in running a train, it appeared that the train was running within a village at an unlawful rate of speed, viz., at a greater rate than six miles per hour (R. S. secs. 1809, 4393); and that the train consisted of only two cars, and was running on a straight line; and the grade was not shown. There was no other evidence that the undue speed increased the danger of fire. *Held,* that it was error, as against defendant, to submit that question to the jury. Brusberg *v.* Milwaukee, etc., R. Co., 50 Wis., 231; s.c., 2 Am. & Eng. R. R. Cas. 264.

facts tending to show that it probably originated from that cause and from no other.[1]

1. Field *v.* New York, etc., R. Co., 32 N. Y. 339; Karsen *v.* Milwaukee, etc., R. Co., 29 Minn. 12; s. c., 7 Am. & Eng. R. R. Cas. 501.

It is competent to prove that coals of fire had previously been found on the defendant's track, or had been dropped from its engines at or near the place where the fire was set out. Such proof not only renders it probable that the fire was communicated from the furnace of one of the defendant's engines, but also raises an inference of some neglect that there was something unsuitable and improper in the construction of the engine which caused the fire. Sheldon *v.* Hudson River R. Co. 4 Kern. (N.Y.) 218. To the same effect, Ross *v.* Boston, etc., R. Co., 6 Allen (Mass.), 87; Smith *v.* Old Col. R. Co., 10 R.I. 22; St. Joseph, etc., R. Co. *v.* Chase, 11 Kan. 47; Huyett *v.* Phila., etc., R. Co., 23 Pa. St. 373.

The reason for this proof is very clearly stated in the case of Longabaugh *v.* Virginia City, etc., R. Co., 9 Nev. 271. Witnesses were permitted to testify that previous to the fire which occasioned the injury they had frequently seen fires in the same wood-yard, caused by coals dropped from the defendant's engines, and also at various times at the same place had seen sparks from the defendant's engines of sufficient size to set fire to cord wood. The court in commenting on this say: "Plaintiff's wood caught fire in some manner to him at the time unknown. How did the fire originate? This was the first question to be established in the line of proof. Positive testimony could not be found. The plaintiff was compelled from the necessities of the case to rely upon circumstantial evidence. What does he do? He first shows, as in the New York cases, the improbabilities of the fire having originated in any other way except by coals dropping from defendant's engines. He then shows the presence in the wood-yard of one of the engines of the defendant within half an hour prior to the breaking out of the fire; then proves that fires have been set in the same wood-yard within a few weeks prior to this time from sparks emitted from defendant's locomotives."

Proof of the same character was sustained by the Supreme Court of the United States in Grand Trunk R. Co. *v.* Richardson, 91 U. S. 454. It is said: "The question, therefore, is, whether it tended in any degree to show that the burning of the bridge and the consequent destruction of the plaintiff's property was caused by any of the defendant's locomotives. The question has often been considered by the courts of this country and in England, and such evidence has, we think, been generally held admissible as tending to prove the possibility, and a consequent probability, that some locomotive caused the fire, and as tending to show a negligent habit of the officers and agents of the railroad company."

Maule, J., in Piggott *v.* Eastern Ry. Co., 3 Q.B. 242, held that such evidence was competent. "The matter in issue was whether or not the plaintiff's property had been destroyed by fire proceeding from the defendant's engines; and involved in that issue was the question whether or not the fire could have been so caused. The evidence was offered for the purpose of showing that it could; and for that purpose it was clearly material and admissible." And see Henry *v.* South Pac. R. Co., 50 Cal. 176; Field *v.* New York Cent. R. Co., 32 N.Y. 339; Ross *v.* Boston, etc., R. Co., 6 Allen (Mass.), 86. If the origin of the fire is admitted, it would seem that such evidence is not admissible. Smith *v.* Old Colony R. Co., 10 R. I. 22.

Proof that the same engine on the same trip caused other fires is admissible. Atchison, etc., R. Co. *v.* Bales, 16 Kan. 252; Patton *v.* St. Louis, etc., R. Co., 87 Mo. 117; s. c., 23 Am. & Eng. R.R. Cas. 364; Slosson *v.* Burlington, etc., R. Co., 60 Iowa, 215; s.c., 7 Am. & Eng. R. R. Cas. 509.

At the trial of an action against a railroad corporation for the destruction of the plaintiff's property by fire alleged to have been communicated from a locomotive engine of the defendant on its outward trip, the defendant introduced evidence that the engine was furnished with the ordinary appliances of a cone and netting for arresting sparks, which netting was examined on arrival at the end of the route on the return trip the following day, and found to be whole and in good condition; and that the engine on the return trip was in the same condition and used the same kind of fuel as on the outward trip. *Held*, that it was competent for the plaintiff to show in rebuttal that the engine on the return trip emitted sparks which set fire to property in the same neighborhood. Loring *v.* Worcester, etc., R. Co., 131 Mass. 469.

And proof is admissible to show that the same engine at other times emitted

**VI. Burden of Proof.**—Where the evidence shows that a fire originated from an engine running over the defendant's railway, the sparks. Cleveland *v.* Grand Trunk R. Co., 42 Vt. 449; Nashville, etc., R. Co. *v.* Tyne (Tenn.), 7 Am. & Eng. R.R. Cas. 515; Brighthope R. Co. *v.* Rogers, 76 Va. 443; s. c., 8 Am. & Eng. R. R. Cas. 710. Or that it emitted more sparks than other engines on the same line. Brusberg *v.* Milwaukee, etc., R. Co., 55 Wis. 106; s. c., 7 Am. & Eng. R.R. Cas. 505. And where the witness lived nineteen miles from the place of the fire, he was allowed to testify that engines about where he lived emitted sparks in great quantites. Pennsylvania R. Co. *v.* Stranahan, 79 Pa. St. 405.

Proof is also admissible to show that the same engine at about the time of the injury complained of set out other fires. Phila., etc., R. Co. *v.* Schultz, 93 Pa. 340; s.c , 2 Am & Eng. R.R. Cas, 271; Slosson *v.* Burlington, etc., R. Co., 11 Am.& Eng. R.R. Cas. 67; s. c., 60 Iowa, 215; Lanning *v.* Chicago, etc., R. Co., 68 Iowa, 502; s. c., 25 Am. & Eng. R.R, Cas. 493; Missouri Pac. R. Co. *v.* Kincaid; 11 Am. & Eng R. R. Cas. 83; s. c., 29 Kan. 645; Haseltine *v.* Concord R. Co. (N. H.), 6 N Eng. Rep. 897. It is competent for the plaintiff to prove that two weeks after the fire the same engine was seen to emit such sparks at the point where the fire occurred as would have been sufficient to occasion it. Nashville, etc., R. Co. *v.* Tyne (Tenn.), 7 Am. & Eng. R. R. Cas. 515; and see Pittsburgh, etc., R. Co. *v.* Noel, 77 Ind. 110; s. c., 7 Am. & Eng. R. R. Cas. 524.

But in *Missouri* proof of such matters is held to be collateral and not admissible. Coale *v.* Hannibal, etc., R. Co., 60 Mo. 227; Lester *v.* Kansas, etc., R. Co., 60 Mo. 265.

It is not necessary that the proof should show from which engine the fire escaped. Pittsburgh, etc., R. Co. *v.* Noel, 77 Ind. 110; s. c., 7 Am. & Eng. R. R. Cas. 524; Diamond *v.* Northern Pac. R. Co., 6 Mont. 580; s. c., 29 Am. & Eng. R. R. Cas. 117. But where it appears that the fire must have been caused by one or the other of two locomotives, evidence of other fires kindled by different locomotives before and after the fire complained of is not admissible. Gibbons *v.* Wisconsin V. R. Co., 58 Wis. 335; s. c., 13 Am. & Eng. R. R. Cas. 469.

In some cases it is held that if the fire is discovered by the side of the track shortly after an engine has passed, it may be presumed that it originated in sparks from the engine. Smith *v.* London & N. W. R. Co., L. R. 6 C.P. 14; Burke *v.* Nashville R. Co., 7 Heisk (Tenn.), 451; Reading, etc., R. Co. *v.* Latshaw, 93 Pa. St. 449. The contrary is held by some authorities, even though the day in question be so dry and windy as to lend great probability to the supposition that the fire was kindled by sparks from a passing engine. Karson *v.* Milwaukee, etc., R. Co., 7 Am. & Eng. R. R. Cas. 501; s. c., 29 Min. 12; Brusberg *v.* Milwaukee, etc., R. Co., 7 Am. & Eng. R. R. Cas. 505; s. c., 55 Wis. 106.

In Butcher *v.* Vaca Valley, etc., R. Co. 67 Cal. 518; s. c., 22 Am. & Eng. R. R. Cas. 644, it is held that the fact that the defendant's locomotive passed the field where the fire was first discovered only a few moments before the discovery of it, raised at least some probability, in the absence of proof of any other known cause, that the fire was caused by said locomotive. This probability was strengthened by the facts that a strong wind was blowing from the north, and the fire was first discovered south of where the locomotive had just passed, and that such locomotive was lighter and had shorter flues than some of defendant's engines, and for these reasons would be more liable to emit fire than heavier engines with longer flues. But the foregoing circumstances, under which the fire was kindled, would not, in the absence of any other evidence, justify a finding that the engine was not of approved construction, and properly managed, and an instruction that assumes the contrary is erroneous.

In an action against a railroad company for two fires, one of which was alleged to have been caused by sparks cast from defendant's engine upon plaintiff's premises, on the other upon combustibles on defendant's right of way, there was testimony that soon after a train had passed, smoke was seen in plaintiff's orchard, and that the fire had started on the line between plaintiff's and the company's land, and was going away from the track. It was also testified that engines on that road sometimes threw forty feet beyond the right of way. It also appeared that after the second fire grass and weeds on the right of way were found partially burned. *Held*, that there was evidence to justify the jury in finding that each fire was caused in the manner alleged. Norfolk & W. R. Co. *v.* Bohannan (Va.), 7 S. East. Rep. 236.

same proof in many jurisdictions tends to show negligence on the part of the company in setting out the fire, and it is unnecessary for the plaintiff to show affirmatively by direct evidence any defect in the construction or condition of the engine, or any negligence in its management.[1]

1. Woodson *v.* Milwaukee, etc., R. Co., 21 Minn. 61. The court in discussing the question say: "There is certainly good sense in the rule that proof of proper construction and management of the engine should in all cases be required of the company, which possesses full knowledge of the facts, rather than on the plaintiff, who usually can know little or nothing of the engines or employees of the company:" citing Bass *v.* Chicago, etc., R. Co., 28 Ill. 9; Ill. Cent. R. Co. *v.* Mills, 42 Ill. 407; Spaulding *v.* Chicago, etc., R. Co., 30 Wis. 110.

In Mahoney *v.* St. Paul, etc., R. Co., 35 Minn. 361; s. c., 25 Am. & Eng. R. R. Cas. 471, Gilfillan, C. J. says: "The statute makes the fact of the fire being so scattered *prima facie* evidence of such negligence or defect. The existence of such negligence or defect is still the issue to be presented by the complaint and tried by the jury."

This is the rule adopted by the courts of England. Aldridge *v.* G. W. R. Co., 3 M. & G. 515; Piggot *v.* Eastern, etc., Ry. Co., 3 C. B. 229; Smith *v.* London, etc., Ry. Co., L. R. 6 C. P. 14; Gibson *v.* S. E. Ry. Co., 1 Fost & F. 23.

**Arkansas.**—Tilley *v.* St. Louis, etc., R. Co., 32 Am. & Eng. R. R. Cas. 324.

**Illinois.**—Bass *v.* Chicago, etc., R. Co., 28 Ill. 9; Ill. Cent. R. Co. *v.* Mills, 42 Ill. 407; Toledo, etc., R. Co. *v.* Larmon, 67 Ill. 68. This rule has since been confirmed by statute, chap. 114, § 89, Rev. Stat. of Ill. 1877. Chicago, etc., R. Co. *v.* McCahill, 56 Ill. 28; Chicago, etc., R. Co *v.* Clampit, 63 Ill. 95; Pittsburg, etc., R. Co. *v.* Campbell, 86 Ill. 443; Chicago, etc., R. Co. *v.* Pennell, 110 Ill. 435.

**Iowa.**—By statute sec. 1289 Code. Babcock *v.* Chicago, etc., R. Co., 11 Am. & Eng. R. R. Cas. 64; s. c., 62 Iowa, 593 (overruling Gandy *v.* Chicago, etc., R. Co., 30 Iowa, 420); McCummons *v.* Chicago, etc., R. Co., 33 Iowa, 187; Garrett *v.* Chicago, etc., R. Co., 36 Iowa, 121; Engle *v.* Chicago, etc., R. Co. (Iowa), 37 N. W. Rep. 6.

**Maryland.**—Green Ridge R. Co. *v.* Brinkman, 64 Md. 52; s. c., 23 Am. & Eng. R. R. Cas. 342; Annapolis, etc., R. Co. *v.* Gantt, 39 Md. 115; Baltimore, etc., R. Co. *v.* Shipley, 39 Md. 251. But see Baltimore, etc., R. Co. *v.* Woodruff, 4 Md. 242.

**Michigan.**—Jones *v.* Michigan Cent. R. Co., 25 Am. & Eng. R. R. Cas. 483; s. c., 59 Mich. 437.

**Minnesota.**—Woodson *v.* Milwaukee, etc., R. Co., 21 Minn. 60.

It being shown in an action for the recovery of damages upon the ground of negligence, that the fire was communicated from an engine of the defendant to combustible matter on its right of way, and thence to plaintiff's property adjacent thereto, the statute (Gen. St. 1878, c 34, § 60) raises a presumption of negligence on the part of the defendant, and the burden was upon it of proving the absence of negligence in respect to the condition and management of the engine. Sibelrud *v.* Minneapolis, etc., R. Co. 29 Minn. 58; s. c., 7 Am. & Eng. R. R. Cas. 499; Karson *v.* Milwaukee, etc., R. Co., 29 Minn. 12; s. c., 7 Am. & Eng. R. R. Cas. 501.

The fact, unexplained, that a very unusual volume of sparks was thrown from a railroad engine, whereby fire was set to adjacent property, *held* to be evidence of negligence. Johnson *v.* Chicago, etc., R. Co., 31 Minn. 57; s. c., 13 Am. & Eng. R. R. Cas. 460.

A presumption of negligence arising under the statute, and the burden being upon the defendant to show carefulness in the management of the engine, the testimony alone of the engineer that he "handled the engine very carefully," but "not any differently from what I [he] generally did," *held*, not such proof of carefulness, under the circumstances, as to compel a conclusion by the jury that there was no negligence. Johnson *v.* Chicago, etc., R. Co., 31 Minn. 57; s. c., 13 Am. & Eng. R. R. Cas. 460.

**Missouri.**—Fitch *v.* Pac. R. Co., 45 Mo. 325, overruling Smith *v.* Hannibal & St. Jo. R. Co., 37 Mo. 287; Bedford *v.* Hannibal, etc., R. Co., 46 Mo. 456; Clemens *v.* Hannibal, etc., R. Co., 53 Mo. 366; Coale *v.* Hannibal, etc., R. Co., 60 Mo. 227; Coates *v.* Missouri, etc., R. Co., 61 Mo. 38; Wise *v.* Joplin R. Co., 85 Mo. 178; s. c., 29 Am. & Eng. R. R. Cas. 164.

**Mississippi.**—Mobile & Ohio R. Co. *v.* Gray, 62 Miss. 383; s. c., 23 Am. & Eng. R. R. Cas. 373.

In a number of the States, however, the courts hold that no inference of negligence arises from the mere fact that an injury to adjacent property was caused by fire from an engine; that in addition some fact or circumstance of negligence must be alleged and proved.[1]

**VII. Where Fire Spreads.**—Where the property destroyed is distant from the railway, and the flame reaches it only by passing through intervening fields, the destruction of the property is never-

**Nebraska.**—Burlington, etc., R. Co. *v.* Westover, 4 Neb. 268.

**Nevada.**—Longabaugh *v.* Virginia City, etc., R. Co., 9 Nev. 271.

**South Carolina.**—The injury being proved, the onus is upon the company to disprove negligence, which they may do by showing that they used the most approved mechanical contrivances to prevent the escape of fire, and that on the day in question their engines were managed with due care and skill. Brown *v.* Atlanta, etc., R. Co., 19 S. Car. 39; s. c., 13 Am. & Eng. R. R. Cas. 479.

**Tennessee.**—Burke *v.* Louisville, etc., R. Co., 7 Heisk. (Tenn.) 451; Simpson *v.* East. Tenn., etc., R. Co., 5 Lea (Tenn.), 456.

**Texas.**—Missouri Pac. R. Co. *v.* Bartlett, 32 Am. & Eng. R. R. Cas. 343; Gulf, etc., R. Co. *v.* Benson, 32 Am. & Eng. R. R. Cas. 330. But see Gulf, etc., R. Co. *v.* Halt (Tex. App. 1883), 11 Am. & Eng. R. R. Cas. 72.

**Wisconsin.**—Spaulding *v.* Chicago, etc., R. Co., 30 Wis. 110.

And see Case *v.* Northern Cent. R. Co., 59 Barb. (N. Y.) 644; Bedell *v.* Long Island R. Co., 44 N. Y. 367; Hull *v.* Sacramento Valley R. Co., 14 Cal. 387; Atchison, etc., R. Co. *v.* Stanford, 12 Kan. 354; Gagg *v.* Vetter, 41 Ind. 228.

**1. California.**—Henry *v.* Southern Pac. R. Co., 50 Cal. 176; Hull *v.* Sacramento Valley R. Co., 14 Cal. 387.

**Connecticut.**—Burroughs *v.* Housatonic R. Co., 15 Conn. 124.

**Delaware.**—Jefferies *v.* Phila., etc., R. Co., 3 Houst. (Del.) 447.

**Indiana.**—Indianapolis, etc., R. Co. *v.* Paramore, 31 Ind. 143; Pittsburg, etc., R. Co. *v.* Noel, 77 Ind. 110; s. c., 7 Am. & Eng. R. R. Cas. 524; Pittsburg, etc., R. Co. *v.* Hixon, 110 Ind. 225; s. c., 32 Am. & Eng. R. R. Cas.

**Kansas.**—Atchison, etc., R. Co. *v.* Stanford, 12 Kan. 354; Kansas, etc., R. Co. *v.* Butts, 7 Kan. 308.

**Maine.**—Lowney *v.* New Brunswick R. Co., 78 Me. 479; s.c., 29 Am. & Eng. R. R. Cas. 116.

**New York.**—Sheldon *v.* Hudson River R. Co., 14 N. Y. 218; McCaig *v.* Erie R. Co., 8 Hun (N. Y.), 599; Rood *v.* New York & Erie R. Co., 18 Barb. (N. Y.) 80; Collins *v.* New York Cent. R. Co., 5 Hun (N. Y.), 499.

**North Carolina.**—Ellis *v.* Railroad Co., 2 Ired. 138.

**Ohio.**—Ruffner *v.* Cincinnati, etc., R. Co., 34 Ohio St. 96.

**Pennsylvania.**—Railroad Co. *v.* Yeiser, 8 Pa. St. 366; Pennsylvania R. Co. *v.* Yerger, 73 Pa. St. 121; Reading, etc., R. Co. *v.* Latshaw, 93 Pa. St. 449; s. c., 2 Am. & Eng. R. R. Cas. 267. But see Hyett *v.* Phila., etc., R. Co., 23 Pa. St. 373.

And see Field *v.* New York Cent. R. Co., 32 N. Y. 339; Collins *v.* New York, etc., R. Co., 5 Hun (N.Y.), 499; Sheldon *v.* Hudson River R. Co., 14 N. Y. 218; Macon R. Co. *v.* McConnell, 27 Ga. 481; Aldridge *v.* Railroad Co., 3 M. & G. 515; M. & E. R. Co. *v.* State, 36 N. J. L. 553; McCready *v.* Railroad Co., 2 Strobh. (S. Car.) L. 356; Jefferies *v.* Phila., etc., R. Co., 3 Houst. (Dela.) 447.

But, while in an action against a railroad company to recover damages on account of fire caused by a passing engine, evidence of the single fire may not be sufficient to warrant a finding of negligence against the company, yet when it appears that at or about the same time several fires are by the same engine thus caused, and that only at or about that time were any fires caused by such engine, although used continuously for months; and also that an engine in good order and properly managed does not ordinarily cause fires: *held*, that a jury is justified in finding negligence, and this notwithstanding it is unable to point out specifically wherein the negligence consists. Missouri Pac. R. Co. *v.* Kincaid, 29 Kan. 654; s. c., 11 Am. & Eng. R. R. Cas. 83.

The tendency of legislation and also of the decisions of the courts is to make the proof that fire was communicated from a locomotive *prima facie* evidence of negligence.

theless the direct and natural result of setting out the fire, and if caused by negligence the company is liable; nor will the fact that the fire would not have spread to the property destroyed but for the dry weather and strong wind affect the liability of the company.[1]

1. Burlington R.Co. *v.* Westover, 4 Neb. 268; Kellogg *v.* Chicago, etc., R. Co., 26 Wis. 223. In the opinion of the majority of the court in the latter case Judge Dixon says: (p. 236): "It would be strange indeed if the liability of a party for the negligent destruction of property by fire were to depend upon the fact whether he set fire at once to the property or whether he set fire to some other combustible material at some distance from it, but communicating with it and which it was apparent at the time would inevitably lead to its destruction."

In Salmon *v.* Delaware, etc., R. Co., 14 Am. Law Reg. 560, the Supreme Court of New Jersey say, in speaking of precautions of the landowner against the spreading of fire: "It never would be thought that a person owning land in the vicinity of a canal was bound to raise embankments around such property to guard against its overflow from water escaping by negligence from such artificial aqueduct, and yet the contention for existence of such an obligation would be quite as tenable as is the claim that the present plaintiff was bound to put his property in a condition to withstand fire proceeding from the heedlessness of the defendant."

In *Indiana* the complaint should aver that the company negligently permitted the fire started on its own right of way to extend to the plaintiff's land. It is not sufficient in such cases to aver negligence in causing the first fire. Louisville, etc., R. Co. *v.* Ehlert, 87 Ind. 339; s. c., 11 Am. & Eng. R. R. Cas. 61. In Pittsburgh, etc., R. Co. *v.* Noel, 77 Ind. 110; s. c., 7 Am. & Eng. R. R. Cas. 524, the complaint alleged that "the defendant's locomotive emitted sparks which communicated with said wood and destroyed it . . . through the carelessness of the defendant and his agents and employees without the fault of the plaintiff." This was held sufficient after verdict.

In Butcher *v.* Vaca V., etc., R. Co., 67 Cal. 518; s. c., 22 Am. & Eng. R. R. Cas. 644, where the fire had crossed one "Wilson's fields" before reaching the property of the plaintiff destroyed, it was held that this would not preclude a recovery. The judgment, however, was reversed because of an erroneous instruction.

In Annapolis, etc., R. Co. *v.* Grantt, 39 Md. 115, the court say: "In a case where the fire has not been communicated directly to the plaintiff's property by sparks or cinders from the locomotive, as where it has spread from its first beginning and has thus communicated indirectly to the plaintiff's property, it is a question for the jury to determine from all the facts of the case whether the injury complained of is the natural consequence of defendant's negligence or whether it has been caused by some intervening force or power which stands naturally as the cause of the misfortune."

In Atchison, etc., R. Co. *v.* Stanford, 12 Kan. 354, two fires were kindled by sparks from the defendant's engine. These fires spread, but finally united and passed three or four miles over the land of others before they reached the property of the plaintiff destroyed. The court held that as a matter of law it could not say that the defendant's negligent act was not the proximate cause of the injury. See also St. Jo., etc., R. Co. *v.* Chase, 11 Kan. 47.

In Poeppers *v.* Missouri, etc., R. Co., 67 Mo. 715, the fire spread about eight miles and destroyed the plaintiff's property, and the court sustained a verdict for the plaintiff. The court say: "The evidence showed that there was no intervention of a new agency in the destruction of the plaintiff's property. The fluctuation of the wind at the season of the year when this fire occurred is nothing remarkable or extraordinary, as the testimony in this case shows."

The general rule to be deduced from the cases is that the question whether a fire communicated from another fire started by an act of negligence is a remote or proximate consequence of the negligent act complained of, is one of fact for the jury. Lehigh Valley R. Co. *v.* McKeen, 90 Pa. St. 122; Henry *v.* Southern Pac. R. Co., 50 Cal. 176; Perry *v.* Southern Pac. R. Co., 50 Cal. 578; Clemens *v.* Hannibal, etc., R. Co., 53 Mo. 366; Atchison, etc., R. Co. *v.* Bales, 16 Kan. 252; Louisville, etc., R. Co. *v.* Kuming, 87 Ind. 351; Smith *v.* London R. Co., L. R. C. P. 98; Pennsylvania, etc., R. Co. *v.* Hope, 80 Pa. St. 373.

By the act of 1881 (Conn. S. L. 1881, ch. 92), railroad companies are made

**VIII Fire Communicated from one Building to Another.**—When the servants of a railway company negligently set fire to a building on or near the right of way by sparks from an engine of such company, and fire is thereby communicated to a building or property of the plaintiff which from such cause is injured or destroyed, the company ordinarily will be liable for such injury or loss.[1] One of the most valuable criterions furnished by the authorities is to ascertain whether any new cause has intervened between the fact accomplished and the alleged cause. If a new force or power has intervened of itself sufficient to stand as the cause of the mischief, the other must be considered as too remote; but the fact that the fire is carried from one building to another by the wind supplies no new force or power.[2] If the fire is the consequence of the carelessness of the railway company and the question of remote or proximate cause is raised, the jury should be instructed that, so far as the case turns upon that issue, the company is to be responsible if the loss is a natural consequence of its alleged carelessness which might have been foreseen by any reasonable person, but it is not to be held responsible for injuries which could not have been foreseen or expected as the results of its carelessness.[3]

liable for damage done to property along their roads by fire communicated from their locomotives where there is no contributory negligence on the part of the owner. A fire caught from the sparks of the locomotive on the land of D. The track foreman and his men came upon the ground and were putting out the fire, which they could easily have done, when D requested them to let it burn, as he wished to burn up the bogs. They accordingly left it burning. The fire, however, penetrated to some peat beneath the surface and thus extended to the adjoining land of S, and did damage there. *Held*, that the railroad company was liable to S for this damage. Simmonds *v.* New York, etc., R. Co., 52 Conn. 264; s. c., 23 Am. & Eng. R. R. Cas. 369.

1. Fent *v.* Toledo, etc., R. Co., 59 Ill. 349; Hart *v.* Western R. Co., 13 Metc. (Mass.) 99.

2. Insurance Co. *v.* Tweed, 7 Wall. (U. S.) 44. *Contra.* Pennsylvania Co. *v.* Whitlock, 99 Ind. 16; s.c., 22 Am. & Eng. R. R. Cas. 629.

In Johnson *v.* Chicago, etc., R. Co., 31 Minn. 57; s. c., 13 Am. & Eng. R. R. Cas. 460, the fire was first set to the property of one Niskern, thence to a neighboring barn, and thence to the property of plaintiff, about 60 feet from the point where the fire was first set. *Held*, that the injury was not remote, as a matter of law. *Held also*, that the negligence of Niskern, in leaving combustible matter exposed to the danger of fire from the railroad, was not an intervening cause interrupting the legal relation of cause and effect, as between the negligence of the defendant and the burning of plaintiff's property, but rather that Niskern's negligence was concurrent with that of the defendant, either one of the wrong-doers being answerable for the consequences.

3. Fent *v.* Toledo, etc., R. Co., 59 Ill. 349.

In Perley *v.* Eastern R. Co., 98 Mass. 414, it is said: "The fact, therefore, that the fire passes through the air driven by a high wind and that it is communicated to the plaintiff's property from other intermediate property of other men does not make his loss a remote consequence of the escape of the fire from the engine."

In Chicago, etc., R. Co. *v.* Pennell, 100 Ill. 435, a railway company negligently set fire to a depot by sparks from a locomotive. Fire was communicated from the depot to a hotel in the vicinity which was destroyed. In an action by the owner against the company it was held to be enough if a consequence was so natural and direct that a reasonable person might and naturally would see that the destruction of the hotel was liable to result from the burning of the depot.

In Perley *v.* Eastern R. Co., 98 Mass. 414, the rule as to remote and proximate cause is clearly stated as follows: "If when the cinder escapes through the air, the effect which it produces upon the first combustible substance against which it strikes is proximate, the effect must con-

**IX. Rubbish on Right of Way.**—The general rule is that a railway company must keep its track and right of way clear of all such substances as are liable to be ignited by sparks or cinders from its engines. This is a duty clearly implied in the grant or charter which confers the right to use steam-engines. As fire is a dangerous agent, it is but reasonable to presume that the legislature in making the grant annexed the implied condition that the track and right of way shall be kept in such a condition as to avoid danger from fire spreading therefrom.[1]

tinue to be proximate as to everything which the fire consumes in its direct cause. This is so, whether we regard the fire as a combination of the burning substance with the oxygen of the air, or look merely at the visible action and effect. As a matter of fact, the injury to the plaintiff was as immediate and direct as an injury would have been which was caused by a bullet fired from the train passing over the intermediate lots, and wounding the plaintiff as he stood upon his own lot. It is as much so as pain and disability are proximate effects of an injury, though they occur at intervals through successive years after the injury was received. Yet these are called proximate effects, though the actual effects of the injury may be greatly modified, in every case, by bodily constitution, habits of life, and accidental circumstances."

In Hoyt *v.* Jeffers, 30 Mich. 181, where the plaintiff's house caught fire from sparks from the chimney of the defendant's mill, by means of a woodshed which was contiguous to the house and but a short distance from a barn of the plaintiff, which caught fire from the woodshed, it was claimed that there could be no recovery for the barn. The court, however, held otherwise. It is said: "If such other buildings are satisfactorily shown to have been actually burned by the fire of the Sherman House, caused by the negligence of the defendant, and especially if this was, under the circumstances, the natural and probable as well as the actual result of the fire so caused, I can see no sound principle which can make the defendant's liability turn upon the question whether the building thus burned by the fire of the first were five, six, or fifty feet or the one-hundredth part of an inch from it."

In Smith *v.* London & S. W. Ry. Co., L. R. 5 C. P. 98, certain combustible material left in heaps on the right of way was set on fire by sparks emitted by passing engines. The fire was carried by a high wind across a stubble field and a public road and burned the plaintiff's cottage, situated about two hundred yards from the track. The chief justice says: "I think it was impossible to say there was not evidence from which a jury might be justified in concluding that there was negligence as regards the plaintiff, and that the destruction of the cottage, in which the goods were, was the natural consequence of this negligence. What the defendant's servants ought, as reasonable men, to have contemplated as the result of leaving the accumulation there, and as they did, must depend on all the circumstances."

In Milwaukee, etc., R. Co. *v.* Kellogg, 94 U. S. 469, the defendant from its steamboat, Jennie Brown, negligently set fire to the defendant's elevator, from which fire was communicated to the plaintiff's lumber mill, 538 feet distant. The nearest pile of lumber belonging to the plaintiff in a direct line from the elevator to the mill was 388 feet from the elevator. At the time the elevator caught fire there was a high wind blowing in the direction of the saw-mill. The court held that the proximate cause depended on the question whether or not the burning of the saw-mill might have been foreseen as a natural and probable consequence of setting fire to the elevator, and that that question was one for a jury to decide.

A contrary doctrine to that above stated was held in Ryan *v.* New York Cent. R. Co., 35 N. Y. 210, and in Pennsylvania Co. *v.* Kerr, 62 Pa. St. 353, and in Pennsylvania R. Co. *v.* Whitlock, 99 Ind. 16; s. c., 22 Am. & Eng. R. R. Cas. 629

1. Smith *v.* London, etc., Ry., L. R. 5 C. P. 98; Kellogg *v.* Chicago, etc., R. Co., 26 Wis. 223; Jones *v.* Michigan Cent. R. Co., 59 Mich. 437; s. c., 25 Am. & Eng. R. R. Cas. 482.

In Richmond, etc., R. Co. *v.* Medley, 7 Am & Eng. R. R. Cas., 495; s. c., 75 Va. 499, the supreme court of Virginia use the following language: "A railway company may be supplied with the best engines and most approved apparatus for preventing the mission of sparks, operated by the most skilful

engineers. It may do all that skill and science can suggest in the management of its locomotives, and still it may be guilty of gross negligence in allowing the accumulation of dangerous combustible matter along its track, easily to be ignited by its furnaces, and thence communicated to the property of adjacent proprietors. Conceding that a railroad company is relieved of all responsibility for fires unavoidably caused by its locomotives, it does not follow it is exempt from liability for such as are the result of its negligence or mismanagement. The removal of inflammable matter from the line of the railroad track is quite as much a means of preventing fires to adjoining lands as the employment of the most improved and best constructed machinery. Many of the authorities hold that to allow the accumulation of such matter is *per se* negligence, which will render the company responsible if loss ensues. Others hold, and perhaps with better reason, that it is a question for the jury to determine upon all the circumstances of the case. And this was the view taken by this court in Brighthope R. Co. *v.* Rogers (8 Am. & Eng. R. R. Cas. 710), decided at the present term of this court. All the authorities, with a few exceptions, go to that extent, and the liabilities of the railroad company for this species of negligence is generally conceded."

In Indiana, etc., R. Co. *v.* Oberman, 110 Ind. 538; s. c., 29 Am. & Eng. R. R. Cas. 161, it is held that where a railroad company sets fire to the dry grass and other combustible materials which it has negligently suffered to accumulate on its track and right of way, and, without fault of the adjoining land-owner, permits such fire to escape to his lands, and burn and destroy his property, the railroad company will be liable for the damages, whether such fire was started negligently or otherwise.

In Gibbon *v.* Wisconsin V. R. Co., 66 Wis. 161; s. c., 25 Am. & Eng. R. R. Cas. 479, the supreme court of Wisconsin say: "It was an indisputable fact that the depot grounds and right of way, in the immediate vicinity where the fire was claimed to have originated, were encumbered with a great quantity of combustible material and dry débris, which would readily ignite if a spark or live coal lighted upon it; and the circuit court fairly and rightly submitted the question whether, under the circumstances, it was negligence for the defendant to permit its right of way and grounds to remain in that condition. The jury were clearly and distinctly instructed that in order for the plaintiff to recover they must be satisfied by a fair preponderance of the evidence that the defendant was not only guilty of negligence in allowing its grounds and right of way to be in that condition, but that this negligence was the proximate cause of the destruction of plaintiff's lumber, and that the plaintiff himself was without fault. This ruling was in accord with the doctrine of this court as announced in this case on the first appeal, and in other decisions." See also Bass *v.* Chicago, etc., R. Co., 28 Ill. 9; Ohio, etc., R. Co. *v.* Shanefelt, 47 Ill. 497; Ohio, etc., R. Co. *v.* Porter, 92 Ill. 437; Illinois, etc., R. Co. *v.* Mills, 42 Ill. 407; Illinois, etc., R. Co. *v.* Frazier, 47 Ill. 505; Ill. Cent. R. Co. *v.* Munn, 51 Ill. 78; Rockford, etc., R. Co. *v.* Rogers, 62 Ill. 346; Delaware, etc., R. Co. *v.* Salmon, 39 N. J. 299; Toledo, etc., R. Co. *v.* Ward, 48 Ind. 476; Pittsburgh, etc., R. Co. *v.* Nelson, 51 Ind. 150; Burlington, etc., R. Co. *v.* Westover, 4 Neb. 268; Perry *v.* Southern Pac. R. Co., 50 Cal. 578; Henry *v.* Southern, etc., R. Co., 50 Cal. 176; Flynn *v.* San Francisco, etc., R. Co., 40 Cal. 14; Pittsburgh, etc., R. Co. *v.* Nelson, 51 Ind. 150; Kesee *v.* Chicago, etc., R. Co., 30 Iowa, 78; Kansas, etc., R. Co. *v.* Butts, 7 Kan. 308; Troxler *v.* Richmond, etc., R. Co., 74 N. Car. 377; Kellogg *v.* Chicago, etc., R. Co., 26 Wis. 223; Snyder *v.* Pittsburgh, etc., R. Co., 11 W. Va. 14; Brighthope R. Co. *v.* Rogers, 76 Va. 443; s. c., 8 Am. & Eng. R. R. Cas. 710.

From the fact that a railroad runs through a prairie country, with wild grass growing upon its right of way and adjacent thereto, it cannot be said, as a matter of law, that it is not incumbent upon the railroad company to cut or destroy the wild grass upon its right of way and outside its road-bed. Sibelrud *v.* Minneapolis, etc., R. Co., 29 Minn. 58; s. c., 7 Am. & Eng. R. R. Cas. 99.

Where the company's servants clipped the hedges bordering its line and permitted the clippings to remain fourteen days in August, a passing engine set these on fire, which fire spread to a house 200 yards distant. It was held that there was evidence to go to the jury of negligence. Smith *v.* London, etc., Ry. Co., L. R. 5 C. P. 98. So where the company permitted dry combustible sills to remain near its track, which, being ignited by one of the defendant's engines, communicated the fire to the plaintiff's fence, the company was held liable. Troxler *v.* Richmond, etc., R. Co., 74 N. Car. 377.

Where it is shown by sufficient uncontradicted evidence that the railroad com-

**X. Contributory Negligence.**—Where the plaintiff uses his land in a natural and proper way for the purposes for which it is suitable, he is not chargeable with contributory negligence from a failure to take precautions against the negligence of a railway company.[1]

pany negligently permitted dry grass and other combustible materials to accumulate on its road and right of way, and that fire was communicated thereto from its locomotives in some manner, evidence offered by the railroad to show the kind of stack, fire-box, and ash-pan in use on its locomotives was properly excluded. Indiana, etc., R. Co. *v.* Overman, 110 Ind. 538; s. c., 29 Am. & Eng. R. R. Cas. 161.

It is a question of fact for the jury whether, in any particular place, it is negligence for a railroad company to leave combustible material near the track, on the ground of the company, liable to be ignited by sparks emitted by engines. Gibbons *v.* Wisconsin V. R. Co., 58 Wis. 335; s. c., 13 Am. & Eng. R. R. Cas. 469; 25 Am. & Eng. R. R. Cas. 479; White *v.* Missouri Pac. R. Co., 31 Kan. 280; s. c., 13 Am. & Eng. R. R. Cas. 473; Bass *v.* Chicago, etc., R. Co., 28 Ill. 9; Gulf, etc., R. Co. *v.* Benson (Tex.), 5 S. W. Rep. 822; Jones *v.* Michigan Cent. R. Co., 59 Mich. 437; s. c., 25 Am. & Eng. R. R. Cas. 482; Texas, etc., R. Co. *v.* Medaris, 64 Tex. 92; s.c., 29 Am. & Eng. R. R. Cas. 159; Illinois, etc., R. Co. *v.* Mills, 42 Ill. 407; Ohio, etc., R. Co. *v.* Shanefelt, 47 Ill. 497; Illinois, etc., R. Co. *v.* Frazier, 47 Ill. 505; Rockford, etc., R. Co. *v.* Rogers, 62 Ill. 346.

1. Vaughan *v.* Taff, etc., R. Co., 3 H. & N. 427.

The case above cited has generally been adopted and approved by the courts of this country, but there is some diversity in the decisions. In Kessee *v.* Chicago, etc., R. Co., 30 Iowa, 178, it is held that the failure to provide suitable firebreaks around certain stacks was such an act of negligence as to preclude a recovery for their destruction by fire. This rule has since been changed by statute. West *v.* Chicago, etc. R. Co., 32 Am. & Eng. R. R. Cas. 339; s. c., 35 N. W. Rep. 479). And in Kansas City, etc., R. Co. *v.* Owen, 25 Kan. 419, where the charge and instructions omit all mention of contributory negligence on the part of the plaintiff, and the defendant asks the court to instruct the jury—"It is a circumstance the jury may consider, as going to prove contributory negligence, that the plaintiff stacked his hay near the railroad track, without guarding it in any way from fire. Persons who live near railroads are bound to take notice of the increased danger to their property from fire, and to exercise a proportionate amount of care to protect it,"—*held*, material error to refuse the instruction.

In some States, also, the owners of cultivated land contiguous to a railroad are held to be bound to keep it free from dry grass and weeds, on pain in case of fire of being held guilty of contributory negligence. Ohio & M. R. Co. *v.* Shanefelt, 47 Ill. 497; Ill. Cent. R. Co. *v.* Frazier, 47 Ill. 505; Ill. Cent. R. Co. *v.* Munn, 51 Ill. 78; Toledo, etc., R. Co. *v.* Maxfield, 72 Ill. 95; Kansas R. Co. *v.* Brady, 17 Kan. 380; Coates *v.* Mo., etc., R. Co., 63 Mo. 18; Fitch *v.* Railroad Co., 45 Mo. 322; Murphy *v.* Railroad Co., 45 Wis. 222. *Compare* Smith *v.* Hannibal, etc., R. Co., 37 Mo. 287; Fitch *v.* Pacific R. Co., 45 Mo. 322; Patton *v.* St. Louis, etc., R. Co., 87 Mo. 117; s. c., 23 Am. & Eng. R. R. Cas. 364; Delaware, etc., R. Co. *v.* Salmon, 38 N. J. L. 5; Same *v.* Same, 39 N. J. 299; Kellogg *v.* Chicago, etc., R. Co., 26 Wis. 223; Erd *v.* Chicago, etc., R. Co., 41 Wis. 65; McCready *v.* Railroad Co., 2 Strobh, (S. Car.) 356; Snyder *v.* Pittsburgh, etc., R. Co., 11 W. Va. 141; Pittsburgh, etc., R. Co. *v.* Hixon, 79 Ind. 111; s. c., 8 Am. & Eng. R. R. Cas. 717. But this rule will not apply to woodland. Chicago, etc., R. Co. *v.* Simonson, 54 Ill. 504; Kansas, etc., R. Co. *v.* Butts, 7 Kan. 308; Spaulding *v.* Chicago R. Co., 30 Wis. 110; Kessee *v.* Railroad Co., 30 Iowa, 33. Nor to buildings erected near the line of the road in dangerous contiguity to it. Phila., etc., R. Co. *v.* Hendrickson, 80 Pa. St. 182; Railroad Co. *v.* Chase, 11 Kan, 47; Grand Trunk R. Co. *v.* Richardson, 91 U. S. 454; Burke *v.* Railroad Co., 7 Heisk, (Tenn.) 451.

An owner of land adjoining the right of way of a railroad company is not guilty of contributory negligence in failing to remove dry grass from the right of way of which he owns the fee. Pittsburgh, etc., R. Co. *v.* Jones, 86 Ind. 496; s. c., 11 Am. & Eng. R. R. Cas. 76.

In Burlington, etc., R. Co. *v.* Westover, 4 Neb. 268, however, it is said: "It is

contended that the defendant in error was guilty of contributory negligence in not having firebreaks ploughed around his hedge and straw ricks. The maxim of the law is *Sic utere tuo ut alienum non lædas*"—'Enjoy your property in such a manner as not to injure that of another person.' A railroad company has a perfect right to the full and free use of its own property and franchises, but upon what grounds can it impose conditions upon those owning property along its line in order to shield itself from the negligent use of fire by the company or its employees? All take the risk of injuries unavoidably produced by the use of fire for the purpose of generating steam, but upon what authority is any one to be deprived of the free and ordinary use of his property, in order to prevent its destruction by the negligent use his neighbor may make of his? We know of no such authority." Kellogg *v.* Chicago, etc., R. Co., 26 Wis. 223; Clemens *v.* Hannibal, etc., R. Co., 53 Mo. 366; Patton St. Louis, etc., R. Co., 87 Mo. 117; s. c., 23 Am. & Eng. R. R. Cas. 364; Cook *v.* Champlain, 1 Denio (N. Y.) 91; Fero *v.* Buffalo, etc., R. Co., 22 N. Y. 209; Kalbfleisch *v.* Long Island R. Co., 102 N. Y. 520; s. c., 29 Am. & Eng. R. R. Cas. 179; Lindsay *v.* Winona & St. P. R. Co., 29 Minn. 411; s. c., 7 Am. & Eng. R. R. Cas. 488. And in Karson *v.* Milwaukee, etc., R. Co., 29 Minn. 12; s. c., 7 Am. & Eng. R.R. Cas. 501, it was held that the fact that plaintiff had not ploughed around stacks so as to prevent fire from reaching them was not negligence *per se*. Whether it amounted to negligence was a question of fact to be determined by the circumstances of the case.

In Phila., etc., R. Co. *v.* Hendrickson, 80 Pa. St. '182, the court say: "The conclusion from the cases is very clear that a plaintiff is not responsible for the mere condition of his premises lying along a railroad, but in order to be held for contributory negligence must have done some act or omitted some duty which is the proximate cause of his injury, concurring with the negligence of the company. Farmers may cultivate, use, and possess their farms and improvements in the manner customary among farmers, and are not bound to use unusual means to guard against the negligence of the railroad company, indeed are not bound to expect that the company will be guilty of negligence." And in Philadelphia, etc., R. Co. *v.* Schultz, 93 Pa. 341; s. c., 2 Am. & Eng. R. R. Cas. 271, it was held that it is not contributory negligence on the part of an owner of land along a railway to allow the accumulation of rubbish and brushwood on his property. A land-owner along a railway assumes the risk of fires necessarily following the proper and lawful use of locomotives, but there is no liability on his part to guard against their improper and unlawful use.

In Richmond & D. R. Co. *v.* Medley, 75 Va. 499; s. c., 7 Am. & Eng. R. R. Cas. 493, it was held that no obligation rests upon the owners of property along the line of a railway to keep it in a condition to be always safe from the fires thrown from passing engines. They are not bound to remove combustible material on their own land in order to obviate the consequences of possible or even probable negligence of the company. And in such cases there cannot be contributory negligence on the part of the owner of the property destroyed.

Sowing wheat upon right-of-way land, and failing to remove the stubble therefrom after harvesting, is not negligence *per se*. Slosson *v.* Burlington, etc., R. Co., 60 Iowa, 215; s. c., 7 Am. & Eng. R. R. Cas. 509.

The piling of wood with the consent of the railroad company along the line of the railroad, where it was more liable to and did take fire, does not constitute contributory negligence. Pittsburgh, etc., R. Co. *v.* Noel, 77 Ind. 110; s. c. 7 Am. & Eng. R. R. Cas. 524.

For the owner of a warehouse adjoining a railroad track to permit the windows of a room to remain open, in which are stored cobs, husks, etc., it would seem amounts to contributory negligence, and the plaintiff cannot recover. Great Western R. Co. *v.* Haworth, 39 Ill. 347. But it would seem the contrary in Fero *v.* Buffalo, etc., R. Co., 22 N. Y. 209.

Permitting a roof to be in such a condition that it is liable to take fire easier than if it had a good roof, is not contributory negligence. Phil. & Read. R. Co. *v.* Hendrickson, 80 Pa. St. 183. Nor building a house within thirty yards of the track. Burke *v.* Louisville, etc., R. Co., 7 Heisk. (Tenn.) 451. Nor to stack new-mown hay within thirty rods of the track. St. Joseph, etc., R. Co. *v.* Chase, 11 Kan. 47. Nor suffering a barn roof near the track to become old and decayed, and thereby being very susceptible of taking fire on a windy day. Jefferies *v.* Philadelphia, etc., R. Co., 3 Houst. (Del.) 447. But in Coates *v.* Missouri, etc., R. Co., 61 Mo. 38, to allow shavings to accumulate in a house one hundred feet away, where the doors and

windows are open, it was held would preclude a recovery. See also Macon, etc., R. Co. *v.* McConnell, 27 Ga. 481, to the same effect.

Permitting a pane of glass to be out of the window, whereby a spark from the engine blew through and started a fire which consumed a lot of goods, is not contributory negligence. Martin *v.* Western Union R. Co., 23 Wis. 437. And see Rowell *v.* Railroad Co., 57 N. H. 132.

But where plaintiff's barn stood within two feet of the line fence, and he threw out straw and manure that became very dry and took fire from a spark thrown out by the locomotive, it was held that he could not recover. Collins *v.* New York Cent. R. Co., 5 Hun (N. Y.), 499.

Where the plaintiff had obtained damages for the occupation by the company of a certain width of his land, and then ran his fence outside of that space, it was held that evidence of that fact should be received as bearing on the question of negligence. Railroad Co. *v.* Yeiser, 8 Pa. St. 366; Small *v.* Chicago, etc., R. Co., 50 Iowa, 338.

In an action brought against a railway company by the owner of an orchard to recover damages from fire alleged to have been communicated from the engines of the company to his premises, thereby injuring, burning, and destroying his apple-trees, evidence was presented upon the trial tending to establish that the orchard was situate adjoining the right of way of the railroad company; that the trees were heavily mulched with manure, were wrapped with dry grass, straw, and stalks; that the orchard was covered with old grass and cornstalks; that there was a heavy coating of old vegetation between the trees; that the fire started from red-hot coals or cinders thrown or dropped from the engines of the company upon its right of way; that it ran through the grass and weeds on the right of way to the orchard, and through the orchard into the mulching, dry grass, straw, and stalks around the trees. *Held*, that sufficient evidence was offered in the case to require the court, upon the request of the railway company, to submit to the jury whether the owner of the premises was guilty of contributory negligence, and whether he was guilty of such negligence or not was a question for the jury to decide. Missouri Pac. R. Co. *v.* Cornell, 30 Kan. 35; s. c., 11 Am. & Eng. R. R. Cas. 56.

Where a land owner has notice or knowledge that his property has been set on fire by sparks from a passing train, he must use all reasonable exertions to extinguish the fire. He cannot remain a supine spectator and hold the company liable. Illinois, etc., R. Co. *v.* McClelland, 42 Ill. 355; Kellogg Chicago, etc., R. Co., 26 Wis. 223; McNana *v.* Chicago, etc., R. Co., 41 Wis. 69; Toledo, etc., R. Co. *v.* Pindar, 53 Ill. 447; St. Louis, etc, R. Co. *v.* Hecht, 9 Am. & Eng. R. R. Cas. 222; s. c., 38 Ark. 357; Stebbins *v.* Central Vt. R. Co., 11 Am. & Eng. R. R. Cas. 79; s. c., 54 Vt. 464. But an instruction that if plaintiff had notice that his property had been set on fire, and made no attempt to put it out, he could not recover for any damage subsequently resulting, is erroneous in that it makes no reference to plaintiff's ability to cope with the fire. Tilley *v.* St. Louis, etc., R. Co. (Ark.), 32 Am. & Eng. R. R. Cas. 324.

Damage caused by fire through the negligence of one party, but increased through the negligence of the party suffering the loss, may be recovered up to the time when the contributory negligence began to affect the result; hence, a charge to the jury is erroneous when it would be understood by them that if the plaintiff neglected to do what a prudent man would have done when he learned of the fire, it defeated his right of recovery for the previous as well as subsequent damages. Stebbins *v.* Central Vermont R. Co., 54 Vt. 464; s. c., 11 Am. & Eng. R. R. Cas. 79.

In Fero *v.* Buffalo, etc., R. Co., 22 N. Y. 209, it is said: "It is difficult to maintain the proposition that one can be guilty of negligence while in the lawful use of his own property, upon his own premises. The principle contended for by the defendant's counsel, if carried to its logical conclusion, would forbid the erection of any buildings whatever upon premises in such proximity to a railroad track as would expose them to the possibility of danger from that quarter. The rights of persons to the use and enjoyment of their property are held by no such tenure as this. On the contrary, where one in the lawful use of his property exposes it to accident or injury from the acts of others, he does not thereby lose his remedy for an injury occasioned by the culpable negligence of such other parties."

In a number of cases it is held that the question whether the property owner is negligent is one of fact to be determined by the circumstances of the case. Karsen *v.* Milwaukee, etc., R. Co.,

**XI. The Credibility of the Witnesses** is to be determined by the jury. This is the general rule, but it is peculiarly applicable in cases of alleged negligence. Thus, suppose it was proved that the engine was properly equipped and operated, it is possible, perhaps probable, under the circumstances of a particular case, that the witnesses are mistaken; beside, the jury are to determine the question of negligence from all the facts and circumstances of a case. The witnesses therefore are to state the condition of the engine and how it was operated, not the conclusions; the jury will draw the proper inferences from the testimony.[1]

29 Minn. 12; s. c., 7 Am. & Eng. R. R. Cas. 501; Lindsay *v.* Winona & St. Peter's R. Co., 29 Minn. 411; Kansas Pacific R. Co. *v.* Brady, 17 Kan. 380; Murphy *v.* Chicago, etc., R. Co., 45 Wis. 222; Ross *v.* Boston, etc., R. Co., 6 Allen (Mass.), 87; Birge *v.* Gardiner, 19 Conn. 507; Ohio, etc., R. Co. *v.* Shonefelt, 47 Ill. 497; Erie R. Co. *v.* Decker, 78 Pa. St. 295; Brown *v.* Hannibal, etc., R. Co., 37 Mo. 297; Missouri Pac. R. Co. *v.* Cornell, 30 Kan. 35; s. c., 11 Am. & Eng. R. R. Cas. 56; Kansas City, etc., R. Co. *v.* Owen, 25 Kan. 419; Chicago, etc., R. Co. *v.* Simonson, 54 Ill. 504; Murphy *v.* Chicago, etc., R. Co., 45 Wis. 222; Collins *v.* New York, etc., R. Co., 5 Hun (N. Y.), 499; Diamond *v.* Northern Pac. R. Co., 6 Mont. 580; s. c., 29 Am. & Eng., R. R. Cas. 117–130, and note.

When contributory negligence is claimed, and such negligence consists only in the place in which the plaintiff has put his property and the means used to protect it from fire, there is ordinarily presented only a question of fact to be determined by the jury. Missouri Pac. R. Co. *v.* Kincaid, 29 Kan. 654; s. c., 11 Am. & Eng. R. R. Cas. 83; Texas & Pac. R. Co. *v.* Levi, 69 Tex. 674; 13 Am. & Eng. R. R. Cas. 464; Gibbons *v.* Wisconsin U. R. Co., 58 Wis. 335; s. c., 13 Am. & Eng. R. R. Cas. 339; 25 Am. & Eng. R. R. Cas. 479. But in Post *v.* Buffalo, etc., R. Co., 108 Pa. St. 585, a railroad company constructed a siding near one of their stations to facilitate the shipment of freight. A lumberman, accustomed to load cars at this siding, placed a large amount of lumber near the track, partly on the railroad company's right of way, and partly on ground hired for the purpose, in order that the lumber might be ready for shipment as required and as cars were furnished, and also (as reasonably appeared from the evidence) for storing and seasoning the lumber. This lumber caught fire from sparks thrown out by a locomotive engine running on the road, in an extremely dry season, when fires were of frequent occurrence. In an action by the owner of the lumber against the railroad company to recover damages for the loss thus occasioned, the above facts appeared from the plaintiff's testimony, and the court entered a nonsuit. *Held*, that, conceding the loss to have been occasioned by the negligence of the defendant, nevertheless, the plaintiff, having placed his lumber in a dangerous place with a full knowledge of the danger, was guilty of contributory negligence, and the nonsuit was therefore rightly entered.

In *Illinois* the usual rule of comparative negligence applies in such cases. If the negligence of the land owner is slight compared with that of the company, he is entitled to recover for an injury done by sparks from passing engines. Illinois, etc., R. Co. *v.* Mills, 42 Ill. 407; Ohio, etc., R. Co. *v.* Shanefelt, 47 Ill. 497; Illinois, etc., R. Co. *v.* Frazier, 47 Ill. 505; Illinois, etc., R. Co. *v.* Nunn, 51 Ill. 78; Toledo, etc., R. Co. *v.* Pindar, 53 Ill. 447; Chicago, etc., R. Co. *v.* Simonson, 54 Ill. 504.

1. Longabaugh *v.* Virginia, etc., R. Co., 9 Nev. 271. In Burlington, etc., R. Co. *v.* Westover, 4 Neb. 268, it is said: "When there is no conflict of testimony, and the existence of a fact is clearly proved by undisputed testimony, it would be error to submit the question to a jury as to whether that fact existed or not. It is therefore insisted that the court erred in refusing to give the instruction in question, asked by the plaintiff in error, there being, it is claimed, no conflict of testimony on that point. It is true there is no direct testimony in regard to the character of the construction and appliances of the engines of the defendant in the court below, except that offered by the company. But a case of this kind differs in many respects from a case where the facts are equally within the knowledge of the plaintiff and defendant, such as the want of consideration of a

**FIREWORKS.**—See note 1. (See also EXPLOSIONS.)

**FIRING.**—See note 2.

**FIRM.**—The word "firm" has a recognized legal signification. It is used in treatises on the law of partnership as synonymous with "partnership." Wharton's definition is, "The name or names under which any house of trade is established." [3] (See PARTNERSHIP.)

**FIRMLY.**—See BELIEVE; [4] BOUND.

note. If in a suit on the note between the original parties the defendant plead want of consideration, and introduce proof establishing that fact, if the plaintiff offered no proof he must fail, and there would be no question to submit to the jury. In cases of this kind, however, the means of knowledge are entirely with the company. Witnesses are called on the stand to testify in regard to the condition of an engine and its appliances, on a particular day, perhaps months before the trial. Under such circumstances witnesses of the utmost reliability may be mistaken, and the circumstances connected with setting out the fire may be of such a character as to leave a doubt in the mind of the court and jury as to the correctness of their testimony. Under such circumstances the question of the credibility of the witnesses must be left to the jury," etc.

1. An information charged A. with making and keeping fireworks, explosive preparations and compositions, without a license, it appearing that fog-signals were manufactured and kept upon the premises. Fog-signals are concave pieces of tin filled with gunpowder, and fitted with nipples and percussion-caps, and then firmly attached to each other, in order to secure the greatest amount of explosive power. *Held*, that A. was liable to a penalty, and, *semble*, per one of the judges, that fog-signals are "fireworks." Bliss *v.* Lilley, 3 B. & S. 128.

A policy of insurance was issued upon a stock of fireworks, it being provided that whenever any article subject to legal restriction should be kept in quantities or in a manner not allowed by law, unless the use or keeping was specially provided for, the policy should be void. By a city ordinance fireworks, "excepting works of brilliant-colored fires," were allowed to be kept in limited quantities for a limited time, upon permission, for retailing. Plaintiff purchased and placed in his store a quantity of signal-lights, classed as "works of brilliant-colored fires." A fire occurred, originating in the signal-lights. In an action upon the policy the court directed a verdict for the plaintiff, and this was held error. "We are not to presume that the agreement to insure the plaintiff against loss was intended to cover an article so specially hazardous that he had no right to store it; but that fireworks, in the sense in which the term was used, had reference to such fireworks as were in the prohibition excepted or might by permission be kept for retailing." Jones *v.* Fireman's Fund Ins. Co., 51 N. Y. 318.

"Fireworks," it seems, are not included under "firecrackers," in a policy of insurance. As to whether the former constitute "an article in the line of a German jobber and importer," *compare* the conflicting decisions in Steinbach *v.* La Fayette Fire Ins. Co., 54 N.Y. 90, and Steinbach *v.* Insurance Co., 13 Wall. (U. S.) 183.

2. An indictment alleging that the defendant did kill and murder, etc., the deceased by feloniously, etc., *firing* a pistol, loaded with gunpowder and leaden balls, which he then and there had and held in his hands, etc., was held bad for want of certainty in charging the mode and manner in which the deceased came to his death. "Was he wounded by the balls from the pistol, from which wounds he died? The indictment does not so charge. It does not aver that the pistol was even shot at him. It may have been fired into the air, or at a mob, or at a flock of birds, so far as we are informed by the indictment. It may have been that the deceased was a man in feeble health, and that the sudden and unexpected discharge of a pistol near him caused his death, by the shock or fright it occasioned. If so, it might be important that the indictment should state how long he survived after the discharge of the pistol, that the connection between the discharge and the death might appear." Shepherd *v.* State, 54 Ind. 25.

3. Bolckow *v.* Foster, 25 Grant Ch. (U. C.) 478. And see Ryder *v.* Wilcox, 103 Mass. 28.

4. To the same effect as the case to

**FIRST.**—See note 1.

which cross-reference is made, see Bradley *v.* Eccles, 1 Browne (Pa.), 258.

1. **First Boat.**—Where goods were ordered to be forwarded by the "first boat leaving P. for W.," it was held that the direction meant no more than that they should be forwarded at the earliest opportunity. Johnson *v.* Chambers, 12 Ind. 102.

**First Cost.** — The defendants, carrying on business in manufacturing and upholstering goods, entered into an agreement with the plaintiff, whereby the plaintiff was to manufacture all the upholstered goods sold by the defendants at an advance of 11 per cent upon the actual first cost of goods made and shipped from T.; the percentage to pay cost of packing and shipping the goods and material used as packing to be charged at cost price; the plaintiff to buy all goods required for manufacture (except such frames as the plaintiff should make himself) from the defendants; and the price charged for the goods to be understood as the actual first cost; and the actual first cost value of the goods so manufactured for the defendants to be computed from the prices charged by the defendants to the plaintiff. *Held*, that under the agreement the "actual first cost" en which the plaintiff was to charge an advance of 11 per cent was the price of the material used and the wages paid. Black *v.* Toronto Upholstering Co., 8 Can. L. T. 232.

**First Cousin.**—See COUSIN, and 13 Cent. L. J. 5.

**First Day.**—A provision in a code authorizing an appeal in any suit in equity pending in the supreme court on the "first day of July," *held* to authorize appeals in suits pending on the "first Monday of July," such construction being necessary to give any effect to the statute, as no such causes could be pending in the supreme court prior to tho last-mentioned date. Burch *v.* Newbury, 10 N. Y. 374.

**First Draw.**—The term "the first draw"—the compensation which a pensioner agreed to allow an agent for procuring a pension—construed to mean "the first annuity," not including the arrearages due by the retrospective operation of the act. Trimble *v.* Lord, 5 Dana (Ky.), 518.

**First Half of a Month,** as the time during which parties contract for the performance of an act,—the month containing thirty-one days,—requires that the act be performed by noon of the sixteenth day. Grosvenor *v.* Magill, 37 Ill. 239.

**First Heir Male.**—"A devise to a man and his *first* heir male can have no other effect than a devise to him and *his heir male* in the singular number, without the word *first;* for the heir male and the first heir male must necessarily be the same person; for the heir male must be the immediate heir male, and consequently the first heir male." Otherwise of "first or eldest issue," as that is "a description of the person particularly designed to take, and shall go no further than to that person only." Dubber *v.* Trollope, Amb. 462–3.

Where a testator devised lands in remainder to the "first male heir of the branch of my uncle's family," and at the time the will was made the uncle was dead, having left five daughters, all married; the eldest having several daughters, but no son, and each of the others having sons; and the fourth daughter died before any of her sisters, and during the continuance of the life estates given by the will leaving a son, it was held that this son was the "first male heir." Littledale, J., said: "It will be a subject of more discussion whether he fills the description of *first* within the meaning of the will. His mother having died before any of her sisters, he was the first person who filled the character of heir, if heir is to be taken in that sense of the word, which says that a person cannot be heir till the ancestor be dead; and if that be so, then as he is the first person of the descendants of the daughters that fills the character of heir, he unites in him all the three parts of the description; he is heir, he is male heir, and he is first male heir." Doe *dem.* Winter *v.* Perratt, 5 B. & C. 48. On error to the House of Lords four of the judges held that "first male heir" was not used by the testator to denote a person of whom an ancestor might be living, while the others held that it was used in a popular sense. The judgment of the lower court in favor of the son of the fourth daughter was affirmed. 6 M. & G. 314.

**First Inventor.**—Where an invention has already been made public by a description contained in a work, whether written or printed, which has been publicly circulated, one who afterwards takes out a patent for it is not the "first and true inventor" within the meaning of a statute, whether he has himself borrowed his invention from such publication or not. Stead *v.* Williams, 7 M. & G. 818.

**First Mortgage.** — The words "first mortgage," in *Pennsylvania*, have a fixed,

definite meaning and imply that the lien of the mortgage is prior to that of any other claim. "In the plain, ordinary and popular sense, first mortgage means first lien." Green's Appeal, 97 Pa. St. 342; s. c., 11 Repr. 819.

The clause of the State constitution which reads, "And as a further security, an amount of *first mortgage bonds*, on the roads, lands, and franchises of the respective companies, corresponding to the State bonds issued, shall be transferred to the treasurer of the State, at the time of the issue of State bonds," was held not to give to the State an exclusive lien on the roads, etc., to the extent of the bonds which might be received from them, and it was not necessary that the deeds of trust executed by the companies should specify a priority of lien to such bonds as the companies might deliver to the State in exchange for the bonds. Minn. & Pac. R. Co. *v.* Sibley, 2 Minn. 13. And see the dissenting opinion of Flandrau, J.

**First Privilege.**—In the grant of a grist-mill on a stream "to have the first privilege of water necessary for running the same as a good grist-mill," the phrase "first privilege" "must be construed to mean the right to take so much water as is necessary, subject to no vested prior claim." Hapgood *v.* Brown, 102 Mass. 451.

**First received.**—The expression "moneys first received" under a United States appropriation, in statutes directing the application of the funds derived from the appropriation to two objects successively, in the language of the court "may fairly and justly be interpreted to mean money first received into the treasury and disposable for the objects contemplated by these two acts, not already appropriated to another specific purpose for which the faith of the State had been pledged, and was therefore not to be touched; and that the word *first*, in the mind of the legislature, referred to the first object, the permanent school fund, in preference to the second object, the payment of the public debt, and not at all to the mere date and absolute time of reception. State *ex rel.* Kellogg *v.* Treas., 41 Mo. 23, 24.

**First Son,** in a will, not necessarily "first-born son," but used in the sense of an elder son,—*senior* or *maximus natu*. Lomax *v.* Holmden, 1 Ves. Sr. 290.

**First Term.**—In an act authorizing a continuance at the first term upon the affidavit of the prisoner that he cannot go safely to trial on account of popular prejudice against him, the "first term" was held to mean "the term at which the prisoner is arraigned for trial." John *v.* State, 1 Head (Tenn.), 49.

A law providing that a report of sale should be approved or rejected "at the first term thereof after filing the same," *held* not to mean the same term at which the report was filed, but the succeeding one. Highley *v.* Barron, 49 Mo. 103.

**First tried.** — The term at which a cause could be "first tried," in the sense of a statute declaring that a party seeking a removal from the State to the Federal court should make and file a petition in the suit in the State court, before or at the term at which said cause could be first tried, and before the trial thereof, is the term at which the issues are first made up, the party applying for removal not having been guilty of negligence. Scott *v.* Clint. & Spring. R. Co., 6 Biss. (U. S.) 529. It is some term occurring after the passage of the act, and not a term before its passage. Merch., etc., Natl. Bk. *v.* Wheeler, 13 Blatch. (U. S.) 218. But if the term at which the cause could otherwise be first tried occurs during the time a trial of the cause is stayed by an order of the State court, that is not such a term as is meant. Warner *v.* P. R. Co., 13 Blatch. (U. S.) 231.

**Consent first had.**—Where an act provided that no minor should be enlisted without the consent of his parent, etc., "first had or obtained," it was held that an enlistment by a minor without the knowledge or consent of his parent was valid if the parent gave his consent *after* the enlistment. Com. *v.* Camac, 1 S. & R. (Pa.) 87.

**In the first place.**—If a testator express himself thus, "*imprimis*, or, in the first place, I give so much to A, and in the next place I give so much to B," these words will neither give a preference to A above B, nor to them over the other general legatees, so as to exempt them from the obligation of abating with the other legatees. The reason is they merely point the order in which the bequests are made in succession, and do not import with certainty an intention to prefer one to another. Swasey *v.* Am. Bible Soc., 57 Me. 528; Everett *v.* Carr, 59 Me. 325; Perrine *v.* Perrine, 1 Halst. (N. J.) 133; Blower *v.* Morret, 2 Ves. Sr. 420; 1 Roper on Legacies, 426.

"Just compensation first made," in the Bill of Rights, as an essential requisite to the taking of private property for public use, *held* to require the compensation to precede the seizure of the property. "The word 'first,' used in the Bill of Rights, cannot be regarded as useless; nor are we at liberty to suppose that it

**FIRST-CLASS.**—See note 1.

**FISCAL.**—See note 2.

## FISH AND FISHERIES.


I. **A Common of Fishery—Definition,** 23.
  1. *Fisheries in the Sea and in Navigable Rivers,* 24.
II. **International Fisheries,** 28.
  1. *England and France,* 28.
  2. *United States and the Dominion of Canada,* 29.
  3. *Whale Fisheries,* 30.
III. **Private Fisheries,** 31.
IV. **Statutory Regulations,** 34.
  1. *Constitutionality of Statutes,* 35.
  2. *Construction,* 39.


**I. A Common of Fishery—Definition.**—A common of fishery is a right of fishing in the water covering the soil of another person, or in the river running through another man's land. It is not an exclusive right, but one enjoyed in common with certain other persons in a particular stream.[3] But it appears that there is a difference between a *common fishery* which may mean for all mankind, as in the sea, and *a common of fishery*, which is a right in common with certain other persons in a certain stream.[4] The better division of this subject would be: (1) A right of fishing common to all; (2) A right vested exclusively in one or a few persons.[5]

At one time a franchise was granted to a subject, or it existed by prescription, distinct from the ownership in the soil. It was

was inserted without design or by accident." Thompson *v.* Grand Gulf R. & Banking Co., 3 How. (Miss.) 240; s. c., 34 Am. Dec. 81.

**1.** In a contract, the term "first-class funeral" or "very handsome funeral," when applied to a particular individual, generally has reference to the previous social *status* and pecuniary condition of the person to be interred; for what might be considered extravagant in one case would be seemingly moderate in another. Mackoosky *v.* Manhattan R. Co., 11 N. Y. St. Rep. 649.

"First-class station," in a covenant with a railway company, has a defined and well-understood meaning among persons who have any knowledge of railways. It means a station at which all ordinary and fast trains, and occasional express and special trains, are advertised to stop and take up and set down passengers. "A station at which all trains, other than mail, express, and special, are advertised to stop and take up and set down passengers." Hood *v.* N. E. R. Co., L. R. 8 Eq. Cas. 666.

**2.** Where an assistant-treasurer of the United States is required by statute *inter alia* "to perform all other duties as fiscal agent of the government which might be imposed upon him by any act of Congress," etc., the word "fiscal" does not enlarge the scope of the duties of an assistant-treasurer, so as to authorize the Secretary of the Treasury to impose upon him duties connected with the collection as well as with the custody and disbursement of revenue. It is more reasonable "to construe it as referable to the fiscal duties of each officer within official limits defined by law." Folger *v.* U. S., 13 Ct. of Cl. 93.

The term "fiscal agent" does not mean, neccssarily, the depositary of the public funds, so as, by the simple use of it in a statute, without any directions in that respect, to make it the duty of the city or State treasurer to deposit with him any moneys in the treasury, and confer on such agent power to compel such deposit. State *ex rel.* Baldwin *v.* Dubuclet, St. Treas., 27 La. Ann. 29.

**Fiscal Year.**—Where one of the items in the published account of a county's finances is to be "the amount of the expenditures for all purposes during the fiscal year," the "fiscal year," "so far as it relates to the financial operation of the counties, must mean the current year embraced between the dates of the collector's annual settlements." Moore *v.* State, 49 Ark. 499.

3. 2 Bl. Com. 34.
4. Bennett *v.* Castor, 8 Taunt. 183.
5. 3 Kent's Com. 411.

an exclusive right, and applied to all navigable rivers, without any right in the soil. This was called a *Free Fishery*. But this right of free fishery in a public river was so unjust and unreasonable that it was prohibited by Magna Charta.[1]

*Several Fishery* is a private exclusive right in a navigable river or arm of the sea, accompanied with the ownership of the soil. It is a grant along with the soil, though the soil may be granted without this several fishery. It has been held that a several fishery may exist without the ownership of the soil.[2] A several fishery may exist without the property in the soil. Property in watercourses may be subjected to every kind of restriction by positive agreement.[3]

1. *Fisheries in the Sea and in Navigable Rivers.—Prima facie*, every subject has a right to take fish found upon the sea-shore between high and low water mark. But such general right, under English law, may be abridged by the exclusive right in an individual.[4] In navigable rivers or arms of the sea the right to fish is common and public.[5]

1. C. 16, 20, 47 ; Mayor *v.* Graham, L. R. 4 Exch. 361 ; Tinicum Fishing Co. *v.* Carter, 61 Pa. St. 21.

2. Smith *v.* Kemp, 2 Salk. 637 ; Carter *v.* Mureat, 4 Burr. 2162.

3. Angell's Water-courses (2d Ed.), 6-10, and cases cited. Decisions are in conflict whether the soil is included with this franchise of a several fishery. Angell, after citing cases for and against the doctrine, concludes that this franchise can be granted without the ownership of the soil.

Kent says that these distinctions between common of piscary, free fishery, and several fishery seem to be quite unsettled in the books ; and that the authorities cited by Hargrave (Harg. Co. Litt. lib. 2, No. 181) throw embarrassment in the way of the attempt to mark with precision the line of discrimination. 3 Kent's Com. 410. Blackstone asserts that a free fishery is an exclusive right. 2 Bl. Com. 39. Lord Mansfield says that it was essential to a free fishery that more than one person should have a coextensive right in the same subject. Seymour *v.* Courtenay, 5 Burr. 2814. But it has been held in *Massachusetts* that a free fishery was not an exclusive fishery. Melvin *v.* Whiting, 7 Pick. (Mass.) 79

Under the common law the regulation of the right to take fish, and for their increase and preservation, is a legislative function, and obstructions to the passage of fish were held to be public nuisances, and subject to legislative control. The arbitrary kings after the Conquest claimed the game and fish in the kingdom as a part of their prerogative, and hence conferred on their followers royal franchises to take game and fish, to the exclusion of other people. This being in contravention of the common law, the people struggled to compel the monarchs to restore their ancient rights. The first move that proved successful was in 1215, when King John was compelled to restore these rights by Magna Charta. Succeeding kings disregarded these provisions, but were compelled to affirm them. Lord Coke says that no owner of river banks should in the future so appropriate or keep the river separate to himself so as to prevent others from fishing or having passage to them. Sir Edward Coke says that Magna Charta and the Charta Foresta have been confirmed by thirty-two several acts of Parliament. In *England* the preservation and regulation of the mode and time of taking fish were of public concern. They are distinguished from a mere private right not within the domain of legislation. Parker *v.* People, 111 Ill. 581.

4. Bagott *v.* Orr. 2 B.'& P. 472.

5. Carter *v.* Thurcat, 4 Burr. 2163.

The erection of weirs across rivers was denounced in the earliest periods of the common law. These weirs were considered public nuisances. By the Magna Charta all weirs were ordered to be pulled down, and subsequent acts of Parliament forbid the erection of new ones. However, twenty years' acquiescence may bind parties whose private rights only are affected, yet the public have an interest in the suppression of public nuisances,

though of long standing. Weld *v.* Hornby, 7 East, 195.

A prescriptive right may exist to a several fishery in an arm of the sea. Oxford *v.* Richardson, 4 T. R. 439.

The public cannot acquiesce by immemorial usage in any right of fishing in a river in which, though navigable, the tide does not ebb and flow. Murphy *v.* Ryan, 2 Ir. R. C. L. 143.

In *Pennsylvania* the English doctrine that no rivers are deemed navigable, so as to give the common right of fishing, except those where the tide ebbs and flows, has been held not to be applicable to the great rivers in that State. Hence the owners of the land on the banks of such rivers as the Susquehanna and Delaware, for example, so far up as they have a capacity for public use as commercial highways, have no exclusive right of fishing in the rivers opposite their respective lands. This right is vested in the State and open to all the world. Carson *v.* Blazer, 2 Binn. (Pa.) 475; Shrunk *v.* President, etc., 14 S. & R. (Pa.) 71; Tinicum Fishing Co. *v.* Carter, 61 Pa. St. 21. A similar doctrine is accepted in *South Carolina.* Cates *v.* Wadington, 1 McCord (S. Car.), 580.

In *North Carolina* no general or exclusive right of fishery exists in the navigable waters of the State, and a navigable stream exists when the waters are sufficient in fact to afford a common passage for people in sea vessels. Collins *v.* Benbury, 3 Ired. (N. Car.) 277.

**Right of Fishery.**—It is settled that a right of fishery in navigable or tide waters below high-water mark is a common right; and if one or more individuals set up an exclusive right to a free or several fishery, it must be clearly established by prescription or positive grant. Palmer *v.* Hicks, 6 Johns. (N. Y.) 133; Rogers *v.* Jones, 1 Wend. (N. Y.) 237; Delaware & M. R. Co. *v.* Stump, 8 Gill. & J. (Md.) 479.

But if an individual plants a bed of oysters in a bay or an arm of the sea, and clearly designates the bed by suitable stakes, it is not an interference with the common right of fishing in the bay, but the person who planted the oyster-bed so designated acquires a qualified property in the oysters sufficient to maintain trespass against any person who invades that property. Fleet *v.* Hegeman, 14 Wend. (N. Y.) 42; Decker *v.* Fisher, 4 Barb. (N. Y.) 592; Lowndes *v.* Dickinson, 34 Barb. (N. Y.) 586; Whittaker *v.* Burhans, 62 Barb. (N. Y.) 237. *Compare* Robins *v.* Ackerly, 91 N. Y. 98; Brinkerhoff *v.* Starkins, 11 Barb (N. Y.). 248; Corp. *v.* Goodman, 7 Q. B. D. 106; McCarty *v.* Holman, 22 Hun (N. Y.), 53.

To an action for trespass to a several fishery the defendant pleaded that the *locus in quo* was an arm of the sea, wherein all had a right to fish. The plaintiff joined issue. *Held,* that the defendant was entitled to a verdict if it appeared that the *locus in quo* was in fact an arm of the sea; and that if the plaintiff, admitting that the *locus in quo* was an arm of the sea, still claimed a several fishery, then he was bound to set up the claim in a replication. Crichton *v.* Callery, 19 W. R. 107.

To an action for fishing in the plaintiff's fishery the defendant pleaded that the *locus in quo* was an arm of the sea, in which everybody had the right to fish. He replied a prescription for the sole and several right of fishing, and traversed that every subject had the right and privilege of free fishing in the *locus in quo. Held,* that this was a bad traverse, and the defendant therefore might well pass it by in the rejoinder, and traverse the prescription right of the plaintiff stated in the replication. Richardson *v.* Orford, 2 H. Bl. 182.

A prescriptive right had been exercised from time immemorial by a borough corporation and its lessees, without any qualification except that the free inhabitants of ancient tenements in the borough had from time immemorial without interruption, and claiming as of right, exercised the privilege of dredging for oysters in the *locus in quo* from the 2d of February to Easter eve in each year, and of catching and carrying away the same without stint for sale or otherwise. This usage of the inhabitants tended to the destruction of the fishery, and if continued would destroy it. *Held,* that the claim of the inhabitants was not a *profit à prendre in alieno solo;* that a lawful origin for the usage ought to be presumed, if reasonably possible, and that the presumption which ought to be drawn, as reasonable in law and probable in fact, was that the original grant to the corporation was subject to a trust or condition in favor of the free inhabitants of ancient tenements in the borough in accordance with the usage. Goodman *v* Saltash, 7 L. R. App. Cas. 633, H. L.; reversing 7 L. R. Q. B. Div. 106.

In *England* no public right exists of fishing in non-tidal waters, even where they are to some extent navigable rivers. Pearce *v.* Scotcher, 9 L. R. Q. B. Div. 162.

An information was laid against a party for unlawfully fishing in a river wherein

the prosecutor had a private right of fishing. The river was navigable, and the place where the party fished the water was not salt, and in ordinary tides it was not affected by any tidal movement, except that upon the occasion of very high tides the rising of the salt water in the lower part of the river dammed back the fresh water, and caused it upon those occasions to rise and fall with the flow and ebb of the tide. The defence was that, the river being navigable and tidal at the place in question, there was a presumption that the public had a right to fish there, and that the jurisdiction of the justices was therefore ousted by a reasonable claim of right. *Held*, that the river at the place in question could not be considered as tidal within the meaning of the rule of law which gives the public a right to fish in navigable tidal rivers, and therefore there was no claim of title set up sufficient to oust the justices' jurisdiction. Reece *v.* Miller, L. R. 8 Q. B. Div. 626.

The owner of land through which a stream passes, in which the tides ebb and flow, cannot maintain trespass against a party who fishes in said stream and fastens his boat to a public bridge on a public highway. Parsons *v.* Clark, 76 Me. 476.

Fishing in the great lakes in water remote from the land is a business open to all, and may be carried on even with stakes, if not interfering with navigation or forbidden by law. Lincoln *v.* Davis, 53 Mich. 575.

Where the law gives a general or public right for all parties to fish in a public navigable river, it is unnecessary especially to state such public right. It will suffice to show with brevity that there is a public right; that the defendant prevented the plaintiff from fishing. Ward *v.* Cresswell, Willes, 268; Tenant *v.* Goldwin, 2 Ld. Raym. 1091.

Individuals may, by prescription or grant, have a several fishery in tide-waters. Mayor *v.* Richardson, 4 T. R. 437; Chalker *v.* Dickinson, 1 Conn. 382; State *v.* Sutton, 2 R. I. 434; State *v.* Medbury, 3 R. I. 138; Gould *v.* James, 6 Conn. 365; Paul *v.* Hazleton, 37 N. J. 106.

A public river is a public highway, and this is the distinguishing characteristic. All rights of fisheries in it must be subservient to the right of passage, and must be so exercised as not to prejudice such right when used in a reasonable manner. Mayor *v.* Brooke, 7 Q. B. 339; Young *v.* Hichens, 6 Q. B. 609.

The common right of fishing in navigable waters is founded on such plain principles of natural law that many jurists consider this right as part of the law of nations. *The civil law* held that the right of fishing in rivers, as well as in the sea and ports, was common to all. It, unlike the common law, held that all rivers where the flow of water was perennial belonged wholly to the public, and carried with it the right of fishery, as well as the public use of the banks. Inst. 2. 1, 2.

The exclusive right of the riparian owner in English fresh waters, and the public right of fishing in tidal waters, depend upon the existence of the ownership of the soil of the fresh-water stream by the private owner, and by the sovereign in the public river. Murphy *v.* Ryan, 2 Ir. Rep. C. L. 143; Mayor *v.* Graham, L. R. 4 Ex. 361.

The ownership of the sovereign does not extend beyond the ebb and flow of the tide, although the river may be navigable beyond that point. On this ground, inasmuch as a custom that the public should have *profit à prendre* in private soil could not legally exist. Allgood *v.* Gibson, 34 L. T. 883. The public cannot acquire by immemorial usage any right of fishing in a navigable river above the ebb and flow of the tide. Austin *v.* Amherst, 7 Ch. D. 689. A several fishery in a tidal river which has permanently changed its channel cannot be followed from the old into the new channel. Cobb *v.* Davenport, 33 N. J. 223.

The right of the public to fish does not extend to a large inland navigable but not tidal lake. Bloomfield *v.* Johnston, 8 Ir. R. C. L. 68. Marsh *v.* Colby, 39 Mich. 626; Bristow *v.* Cormican, 3 App. Cas. 641.

The public has no right to fish in private rivers made navigable by acts of Parliament. Hargreaves *v.* Diddams, L. R. 10 Q. B. 582; Mussett *v.* Burch, 35 L. T. 486.

Where the course of the river gradually changes, the right of the riparian owner to fish changes so as to follow the thread of the stream. Miller *v.* Little, 4 L. R. Ir. 302; Foster *v.* Wright, 4 C. P. D. 438.

If any party will appropriate an exclusive privilege in navigable waters and arms of the sea, he must show it strictly by grant or prescription. Parker *v.* Cutler M. Co., 20 Me. 353.

Some decisions deny the existence of any peculiar privilege as appurtenant to the bank of navigable water where the tide ebbs and flows, with the exception of alluvion and dereliction. Stevens *v.* Paterson, etc., R. Co., 34 N. J. 532;

Gould *v.* Hudson R. R.Co., 6 N. Y. 522. The courts have followed the same rule in the case of the owners on the banks of the Mississippi River, in States where the fee of the river bed, below high-water mark, is in the State for the use of the public. Tomlin *v.* Dubuque, etc., R. Co., 32 Iowa, 106, though dissenting opinions were also rendered.

Riparian rights are incident to the ownership of the land on the margin of navigable waters. Potomac Steamboat Co. *v.* Upper Pat. S. Co., 109 U. S. 672.

**A Riparian Owner** on a navigable stream where the title is in him, may use the water in any way not inconsistent with the full enjoyment by the public of the right of navigation, and which does not interfere with the rights of other riparian owners. Morrill *v.* St. Anthony Co., 26 Minn. 222; Thornton *v.* Grant, 10 R. I. 477; Stevens Point Co. *v.* Reilly, 46 Wis. 237. See generally, as to riparian rights, Tinicum Fishing Co. *v.* Carter, 90 Pa. St. 85; Moulton *v.* Libbey, 37 Me. 472; Tinicum Fishing Co. *v.* Carter, 61 Pa. St. 21.

The right of the public to fish in a non-tidal river which is made navigable by locks cannot exist in law. Mussett *v.* Burch, 35 L. T. N. S. 486.

A party had nearly encompassed fish in a net, when the defendant, by rowing a boat to the opening, so disturbed the fish as to prevent the capture. *Held*, that he was not entitled to recover, in trespass, no special custom of the fishery being proven. Young *v.* Hitchins, D. & M. 592.

Oysters deposited artificially, and not attached to the soil, may be a nuisance, and obstruct navigation as well as natural oyster-beds. Colchester *v.* Brooke, 7 Q. B. 339.

A prescriptive right to a several fishery in a navigable river may pass as appurtenant to a manor. Rogers *v.* Allen, 1 Camp. 309.

The soil of a navigable tidal river, where the tide ebbs and flows, is *prima facie* in the crown, and all the right of fishery therein is *prima facie* in the public. But the right to exclude the public therefrom, and to create a several fishery, existed in the crown, and might lawfully have been exercised by the crown before Magna Charta, and the several fishery could lawfully be afterwards made the subject of grant by the crown to a private individual. Malcolmson *v.* O'Dea, 10 H. L. Cas. 593.

A several salmon-fishery in a tidal river, granted by the crown to a subject before Magna Charta, does not, if it reverts to the sovereign, merge in the prerogative of the crown, but may be regranted by the crown to a subject. Northumberland *v.* Houghton, 39 L. R. Ex. 66.

The several fishery of a subject in a tidal river the waters of which permanently recede from a portion of its course and flow through a new channel to the sea, when the soil and land on both sides of the new channel belong to another subject, is not transferred from the old to the new channel. Carlisle *v.* Graham, 4 L. R. Exch. 361; 38 L. J. Exch. 226; 18 W. R. 318.

The salmon-fishings in the open sea around the coast of Scotland, unless parted with by grant, belong exclusively to the crown, and form part of its revenues. Gammell *v.* Woods and Forest, 3 Macq. H. L. Cas. 419.

A party had a license to fish in the upper part of a tidal river. Another party, not the owner of a several fishery, unlawfully fished in the lower part of the river, within the prohibited limits of the mouth. *Held*, that the former was damnified by the latter. Whelan *v.* Hewson, 6 Ir. R., C. L. 283.

In *France*, before the Revolution, in navigable and non-navigable rivers, fishery was not common to all, but belonged to the king and such persons as under him possessed jurisdictional rights. Inst. Droit Français, by Argon, I. 214; Pothier's Traité du Droit de Propriété, No. 52.

The Code Napoleon declared that rivers and navigable or floatable streams, shores, and land between high and low water mark were considered as dependencies of the public domain, and that the right of fishing was under the regulation of law. This doctrine followed closely the seigneurial and feudal rights. Code Napoleon, No. 538, 715. See further, on this subject, Toullier's Droit Civil Français, III. 144, 145, 146; Questions de Droit, by Merlin, VI. t Pecheries, in which it is laid down that though some communes attempted to appropriate the right of fishing to themselves, the claim was overcome by degrees, and that the abolition of the fishing with other feudal rights was for the sole benefit, not of the commune, but of the feudal vassals, who had been given freedom in person and property, and that there no longer existed any seigneurial rights. Toullier has also collected the ancient authorities in support of the seigneurial exclusive right of fishery in all streams non-navigable, and the several decrees of the revolutionary governments abolishing those feudal and

**II. International Fisheries.**—It has generally been admitted that whatever jurisdiction a nation has over the open sea adjacent to its coasts extends to three miles, or at most to the range of a cannon-shot from the shore.[1] But it may be, considering the increased range of modern guns, the doctrine of property to the distance of a marine league would no longer be held.[2] As to narrow seas and waters approaching the shore, European nations do not agree as to jurisdiction.[3]

The right to take fish in the sea over which a nation has jurisdiction according to the rule of international law, may be restrained or regulated by treaty or custom.[4]

1. *England and France.*—The articles between England and France concerning the fisheries in the seas between the Britlsh Isles and France have the force of law.[5]

manorial rights and privileges. It is now the French law that proprietors of the lands on rivers not navigable, or *flottables*, have the exclusive right of fishing therein, as well as the exclusive proprietorship of the soil composing the bed of the river.

**Under the Common Law of England,** no common right can be said to have been more definitely or more jealously guarded than the public right of fishing in tidal waters. Hare's De Jore Maris, c. 4; Coulson's Water, 343; Hall's Sea Shore (2d ed.), 42; Fitzwalter's Case, 1 Mod. 105; Warren *v.* Mathews, 6 Mod. 73; Oxford *v.* Richardson, 4 T. R. 437; Crichton *v.* Collery 19 W. R. 107; Blundell *v.* Catterall, 5 B. & Ald. 268; Malcomson *v.* O'Dea, 10 H. L. Cas. 593. So far as the public right is concerned, there is no difference between the shore of tidal waters and the tidal waters themselves. Bract. lib. 1, c. 12, sect. 6; Coulson's Water, 14, 36, 344; Warren *v.* Mathews, 1 Salk. 357; Ward *v.* Creswell, Willes, 265; Bagott *v.* Orr, 2 Bos. & P. 472; Carter *v.* Moscat, 4 Burr. 2163; Oxford *v.* Richardson, 4 T. R. 437; Hall's Sea Shore (2d Ed.) 174, 191. See Peck *v.* Lockwood, 5 Day (Conn.), 22; Commonwealth *v.* Alger, 7 Cush. (Mass.) 63.

It is not competent for the inhabitants of a town to claim by custom *jura in alieno solo*, amounting to *profits à prendre*. Such rights must be prescribed for in a *que estate*. Waters *v.* Lilley, 4 Pick. (Mass.) 145.

The inhabitants of a town may by custom claim *jura in alieno solo*, which amount to easements. Gateward's Case, 6 Coke, 596; Grimstead *v.* Marlow, 4 T. R. 718; Rome *v.* Ward, 4 El. & Bl. 702; Goodman *v.* Mayor, 7 App. Cas. 633; Perley *v.* Langley, 7 N. H. 233; Post *v.* Pearsall, 22 Wend. (N. Y.) 425; Township Co. *v.* Bishop, 11 Vt. 198; Coolidge *v.* Learned, 8 Pick. (Mass.) 504; Kent *v.* Waite, 10 Pick. (Mass.) 138; Porter *v.* Sullivan, 7 Gray (Mass.), 441; 2 Washb. R. Prop. (1876) 368; Hilliard Real Prop. 274; Vattel, b. 1, §§ 234, 235.

Though the sea-shore, between high and low water mark, be held by grant as private property, the common right still exists to go there and fish, and even to dig and take shell-fish; and if the proprietor of the soil claims an exclusive right, he must show a prescription for controlling the general right at common law. Bagott *v.* Orr, 2 Bos. & P. 472; Peck *v.* Lockwood, 5 Day (Conn.), 22. *Compare* Blundell *v.* Catterall, 5 B. & Ald. 268; Moulton *v.* Libby, 37 Me. 472; Preble *v.* Brown, 47 Me. 284; Weston *v.* Sampson, 8 Cush. (Mass.) 347. These cases, while they may not diametrically conflict with Bagott *v.* Orr, 2 Bos. & P. 472, and Peck *v.* Lockwood, 5 Day (Conn.), 22, do not sustain the doctrine of these two cases, but seem to make it very questionable, as to exclusive rights for controlling the general right at common law.

1. The Queen *v.* Keyn, 2 Ex. Div. 63.
2. Hall's Int. Law, §§. 40–42.
3. 1 Kent's Com. 28.
4. Fennings *v.* Granville, 1 Taunt. 241.
5. 6 & 7 Vict. c. 79, § 1.

These articles provide that all transgressions of the regulations in both countries shall be submitted to the exclusive jurisdiction of the tribunal or magistrates designated by law, who are to settle all differences and decide all contentions between fishermen of the two countries, and the trial and judgment shall take place in summary manner. These tribunals are always to have power to award dam-

2. *United States and the Dominion of Canada.*—The convention of 1818 between the United States and Great Britain now defines the relations of these two powers. In that treaty the United States renounced forever any liberty heretofore enjoyed or claimed by the inhabitants thereof to take, dry, or cure fish on or within three marine miles of any of the coasts . . . belonging to Canada. The American fishermen are admitted to the harbors for the purpose of shelter and of repairing damages, of purchasing wood and obtaining water, and for no other purpose whatever.[1]

ages for injuries over and above the penalties. By § 11 of the act, all offences against this law committed by British subjects are to be settled by justices of the peace, who are also declared to have power of awarding compensation for injuries. Under this act it was held that no action could be maintained for an injury caused by a breach of any of the regulations, as exclusive jurisdiction in such matters was given to the tribunal specified in the act. Marshall *v.* Nicholls, 21 L. J. Q. B. 343; 18 Q. B. 882.

1. Convention of 1818, Art. 1.

The general law of nations, as interpreted by international jurisprudence, provides no agreement that harbors, estuaries, and bays landlocked belong to the territory of the nation which possesses the shores round them, and no agreement as to what is the rule to determine what is a bay for this purpose. "It does not appear to their lordships that jurists and text-writers are agreed what are the rules as to dimensions and configurations which, apart from other considerations, would lead to the conclusion that a bay is or is not a part of the territory of the State possessing the adjoining coasts; and it has never, that they can find, been made the ground of any judicial determination." U. S. Cable Co. *v.* Anglo-Am. Tel. Co., L. R. 2 App. Cas. 394.

The language of the convention of 1818 applies to all bays, whether large or small, on that coast. U. S. Cable Co. *v.* Anglo-Am. Tel. Co., L. R. 2 App. Cas. 420, 421.

This case was followed in the Alabama claims by the Court of Commissioners, when the question arose as to the Chesapeake Bay, whose headlands are about twelve miles apart, and the bay at the widest part twenty miles across, and length two hundred miles. The court say that the fact is the headlands are well marked and twelve miles apart, that it and its tributaries are wholly within the territory of the United States, and that the boundary lines of adjacent States encompass it; that from the earliest days of this government it has claimed it as territorial waters, which right has never been questioned; so it cannot become the highway of nations from one to another; that from the doctrine of international law, this bay was held to be wholly within the territorial jurisdiction and authority of the United States. Stetson *v.* U. S., 32 Alb. L. J. 483.

"A bay," says Daniel Webster, "as is usually understood, is an arm or recess of the sea, entering from the ocean between capes and headlands, and the term is applied usually to small and large tracts of water thus situated; . . . the British authorities insist that England has a right to draw a line from headland to headland and to capture all American fishermen who may follow their pursuits inside of that line. It was undoubtedly an oversight in the convention of 1818 to make so large concession to England since the United States had usually considered that those vast inlets or recesses of the ocean ought to be open to American fishermen as freely as the sea itself, to within three marine miles of the shore." Speech of 1855.

The marine territory of every nation extends to the ports, harbors, bays, mouths of rivers, and adjacent ports of the sea, enclosed by headlands which belong to the same State; and also jurisdiction from these points a distance at sea of a marine league, or a cannon-shot. Over these boundaries the nation has territorial jurisdiction, and its authority to this territory is absolute. It can exclude the ships of every other nation. Gould on Waters, §§ 1–16; 1 Phillimore's Int. Law (3d Ed.), 274; Boyd's Wheat. Int. L. §. 177; 1 Halleck Int L. 134; Queen *v.* Keyn, 2 Ex. D. 63; Direct Cable Co. *v.* Anglo-Am. Tel. Co., L. R. 2 App. Cas. 394.

The treaty of 1818 in regard to Canadian waters was distinctively a fishery treaty, by which the United States renounced the right to fish within a certain three-mile limit from the shore, but our

3. *Whale Fisheries.*—The sea is open to all alike, and no one can appropriate it so as to deprive others of its use.[1] No private

fishermen are allowed to enter bays and harbors for shelter and repairs. The usage of nations permits fishing vessels to seek the ports of a friendly nation to buy provisions, stores, or bait that they may need. But an act of the Canadian Parliament allows the American vessels to be confiscated whenever they are found in Canadian waters for any cause resulting from the exigencies of navigation except that announced in the treaty of 1818. Act approved Nov. 1886.

Under the treaties of 1783 and 1812, the territorial jurisdiction over the northeast Atlantic is limited to three miles, following the sinuosities and indentations of the coast. But this question in this regard is now pending, and is the subject of diplomatic correspondence between Great Britain and the United States government. 3 Whart. Int. Law Dig., § 305. For further information on the fishery treaties, see 3 Whart. Int. L. Dig. Secs. 299 *et seq.*

The Minister of Marine and Fisheries, on March 5, 1876, issued a warning declaring that by the treaty provisions and act of Canadian Parliament all foreign vessels or boats are forbidden from fishing or taking fish, by any means whatever, within three marine miles of any of the coasts, creeks, or bays of Canada, or to enter such bays, harbors, and creeks except for the purpose of shelter and of repairing damages therein, of purchasing wood and obtaining water, and for no other purpose whatever. In 1871 a new treaty was entered into by Great Britain and the United States, which is known as the "Treaty of Washington." The 18th article says: "It is agreed by the high contracting parties that, in addition to the liberty secured to the United States fishermen by the convention between the United States and Great Britain signed at London on the twentieth day of October, 1818, of taking, curing, and drying fish on certain coasts of the British North American colonies therein defined, the inhabitants of the United States shall have, in common with the subjects of Her Britannic Majesty, the liberty, for the term of years mentioned in article 33 of this treaty, to take fish of every kind, except shell-fish, on the sea coasts and shores, and in the bays, harbors, and creeks of the Provinces of Quebec, Nova Scotia, and New Brunswick, and the colony of Prince Edward's Island, and of the several islands thereunto adjacent, without being restricted to any distance from the shore, with permission to land upon the said coasts and shores and islands, and also upon the Magdalen Islands, for the purpose of drying their nets and curing their fish; *provided*, that, in so doing, they do not interfere with the rights of private property or with British fishermen in the peaceable use of any part of the said coasts in their occupancy for the same purpose. It is understood that the above-mentioned liberty applies solely to the sea-fishery, and that the salmon and shad fisheries, and all other fisheries in rivers and the mouths of rivers, are hereby reserved exclusively for British fishermen." The United States government brought this treaty to an end in 1885, as provided for in the 33d article. The treaty of 1783 merged in the convention of 1818. The 18th article of the "Treaty of Washington" (1871) recognizes the continued existence and force of the convention of 1818. So now the fishery rights and liberties are regulated by the convention of 1818.

One American writer says that the convention of 1818 became merged in the Reciprocity Treaty of 1854, and that when the latter was abrogated the former came to an end along with it, and that the treaty of 1783 thereupon revived. 5 Am. Law Rev. 389. Another American writer says the proper course of the United States government is to abrogate the convention of 1818 upon the ground that Great Britain has, on her part, violated the provisions thereof. Pamphlet on Fishery Dispute by Hon. John Jay, 1887.

The treaty of 1783 gave no authority to trade with the shore, but that the United States could lawfully send their own vessels to the British North American waters to supply our own fishermen there, or purchase their cargoes, and that vessels might lawfully anchor in British harbors on their route to their destination.

*Note.*—The fishery treaty drawn by representatives of the English and Canadian governments and the United States, and recommended to the Senate for ratification by the President during the winter of 1887–8, having been rejected by the Senate, until a new treaty is made and accepted that of 1818 is supposed to continue in force.

1. 3 Whar. Int. L. Dig. § 299; Inst. 2, 1, 1; Dom. Lois Civ. liv. prèl. t. 3, S. 1, §§ 5, 6.

property can be had in the sea, which belongs equally to all nations, which is indispensable to the existence of man. All men have the right to navigate the sea and to fish there, to capture all kinds of fishes which it contains.[1]

**III. Private Fisheries.**—By the common law, a right to fish belongs so essentially to the right of the soil in streams or bodies of water, where the tide does not ebb and flow, that if a riparian proprietor owned both sides of the stream, no party but himself can lawfully go upon the limits of his land to take fish from such stream. When he owns upon one side of the stream only, then his right extends to the thread of the stream. Within the limits the proprietor's right to fish is sole and exclusive by the common law, unless restricted by some local law or well-established usage of the State where the land is situate.[2] The right to fish within the limits of one's land boundary, upon and including a stream not navigable, is so far a subject of distinct property or ownership that it may be granted, and will pass by a general grant of the land itself, unless expressly reserved. It can be granted also as a separate and direct property from the freehold of the land, or the land may be granted, while the grantor reserves the right to fish to himself.[3] While the owners of land on the banks of fresh-water rivers, above the ebb and flow of the tides, have the exclusive right of fishing, as well as the right of property, yet such right is always subject to the public convenience; and all erections or impediments made by the owners, so as to obstruct the free use of the river, as a highway for boats or rafts, are deemed nuisances.[4]

1. Dom. Lois Civ. Droit Pub. liv. 1, t. 8, §. 2; Revue des Deux-Mondes, Nov. 1874, t. xvi.

By general custom and usage, certain rules have been adopted in capturing whales. By the general

**Custom of Greenland** whale-fisheries, a whale does not become the property of a party who merely harpoons it; it is necessary that the line shall remain attached to the boat. It is then called a fast fish. If the line becomes detached, then it is a loose fish, and becomes the property of any one who captures and secures it. Aberdeen Arctic Co. *v.* Sutter, 4 Macq. H. L. Cas. 355.

By **General Usages** of whale-fishery a fish is fast when attached by any means, such as the entanglement of the line around it, to the boat of the first striker, even if the harpoon does not continue in the body of the fish. Hogarth *v.* Jackson, 2 C. & P. 595.

Among the *Gallipagos Islands*, the party who strikes the whale even with a loose harpoon is entitled to receive half the produce from him who finally captures and kills it. Littledale *v.* Smith, 1 Taunt. 243, n.

**General Rule.**—He who first strikes a fish must continue his dominion over it until he has reduced it to possession in order for it to become his property. Any other person who kills it acquires the entire property. Fennings *v.* Grenville, 1 Taunt. 241.

If, while a fish is fast to the harpoon of the first striker, any other party unsolicited so disturbs it that it breaks from the first harpoon, and then he strikes it himself with a harpoon and kills it, the fish belongs to the first striker. Skinner *v.* Chapman, M. & M. 59, n.

The time for ships engaged in southern whale-fishery to be out on their voyage, so as to secure the premiums under 28 Geo. III. c. 20, was fourteen lunar months from the time of their clearing out, without regard to the time of their actual sailing. Lacon *v.* Hooper, 6 T. R. 224; 1 Esp. 246.

2. Woolrych on Waters, 87; Waters *v.* Lilley, 4 Pick. (Mass.) 199; Chalder *v.* Dickinson, 1 Conn. 382; McFarlin *v.* Essex Co., 10 Cush. (Mass.) 304.

3. Beckman *v.* Kreamer, 43 Ill. 447.

4. Hooker *v.* Cummings, 20 Johns. (N. Y.) 90.

So far as unnavigable rivers are concerned an exclusive right of fishery may be established by proof of grant or prescription,[1] but the party cannot use his privileges to the injury of the rights of others, nor to impede the passage of fish up the river by any obstruction.[2] The right of fishing in the sea, or in a bay or arm of the sea, and also in navigable or tide waters, is a right public and common to every one. No one can appropriate to himself an exclusive privilege in navigable waters, or in an arm of the sea, without showing a grant or prescription for the same.[3] But no one has any common-law right to pass over another man's land for the purpose of fishing.[4] In *Pennsylvania* the doctrine that no river is navigable, so as to confer the common rights of fishery, except those where the tide ebbs and flows, is not applicable to the great rivers of that State, and that the owners of the land on the banks of such rivers as the Delaware and Susquehanna, so far as they are common highways, have no exclusive right of fishing opposite their respective lands. Such right of fishery is vested in the State and open to all the world.[5]

1. Gould *v.* James, 6 Cow. (N. Y.) 369; Brookehaven *v.* Strong, 1 S. Car. 415; Rogers *v.* Jones, 1 Wend. (N. Y.) 237.

2. People *v.* Platt, 17 Johns. (N. Y.) 195; People *v* Tibbetts, 19 N. Y. 523; Berry *v.* Carle, 3 Greenl. (Me.) 269; Scott *v.* Wilson, 3 N. H. 321; Commonwealth *v.* Charlestown, 1 Pick. (Mass.) 180; Adams *v.* Pease, 2 Conn. 481; Browne *v.* Kennedy, Har. & J. (Md.) 195.

3. Arnold *v.* Mundy, 1 Halst. (N. J.) 1; Martin *v.* Wadell, 16 Pet. (U. S.) 400; Parker *v.* Cutler Man. Co., 20 Me. 353.

4. Blundell *v.* Catterall, 5 B. & A. 268; Cortelyou *v.* Van Brundt, 2 Johns. (N. Y.), 357.

5. Carson *v.* Blazer, 2 Binn. (Pa.) 475; Shrunk *v.* Schuylkill Nav. Co., 14 S. & R. (Pa.) 71; Tinicum Fishing Co. v. Carter, 61 Pa. St. 21.

**The Pennsylvania Doctrine** is accepted by North and South Carolina, and probably in some other States. Executors *v.* Waddington, 1 McCord (S. Car.), 580; Collins *v.* Benbury, 3 Ired. (N. Car.) 277.

**Planting Oysters in Bay or Arm of the Sea.**—An individual may plant a bed of oysters, even in a bay or arm of the sea, and mark it by stakes, and it will not be any impediment to the common right of fishing in such bay. He thus acquires a qualified property in such oysters, sufficient to enable him to maintain trespass against any party who invades such property. Fleet *v.* Hegeman, 14 Wend. (N. Y.) 42; Decker *v.* Fishery, 4 Barb. (N. Y.) 592; Lowndes *v.* Dickerson, 34 Barb. (N. Y.) 586.

A patent to the inhabitants of a town, conveying all lands under water within the bounds of the grant, together with the exclusive right of fishing in the waters of the same, confers this right as the common property of the town, and may be regulated by rules adopted at the town meeting. Rogers *v.* Jones, 1 Wend. (N. Y.) 237.

The *property* which the law gives, *in river fish uncaught*, is of that kind which is called special or qualified property, and is derived out of the place or soil where such fish live. A man has a special property in them so long as they are upon his land, or in the water which flows over it; but he loses such property the moment the fish resort to soil and water of another proprietor. Fleet *v.* Hegeman, 14 Wend. (N. Y.) 42.

**Taking Possession of Oyster-beds.**—While one who enters into the possession of an oyster-bed has better rights than subsequent trespassers, yet he cannot complain if the grantee from the State dumps earth upon the bed, thereby destroying it. Post *v.* Kreischer, 32 Hun (N. Y.), 49.

A by-law of a town, under a pretence of regulating the fishing of clams and oysters within its limits, which prohibits all persons, except inhabitants of the town, to take shell-fish in a navigable river, is void, as it contravenes common rights. Hayden *v.* Noyes, 3 Conn. 391.

**Taking Shell-fish** along the shores of tide-water, between high and low water mark, is a common right to the people,

except where by colonial ordinance the riparian proprietorship was extended to low-water mark. Evans *v.* Turnbull, 2 Johns. (N. Y.) 313; Mather *v.* Chapman, 40 Conn. 382; Peck *v.* Lockwood, 5 Day (Conn.), 22.

A State can prohibit citizens of another State from planting oysters in a river of the former State, where the tide ebbs and flows. Such a right belongs exclusively to citizens of the State. McCready *v.* Virginia, 94 U. S. 391. *Compare Ex parte* McCready, 1 Hughes (C. C.) 597.

A town does not, at common law, unless expressly granted to it, possess any right of property in a fishery within its limits. This right is in the public. Dandolph *v.* Braintree, 4 Mass. 315.

Where a right of fishing is conferred by statute upon particular individuals, it is not assignable. Munson *v.* Baldwin, 7 Conn. 168; Brookehaven *v.* Strong, 1 S. Car. 415; Rogers *v.* Jones, 1 Wend. (N. Y.) 237; People *v.* Tibbitts, 19 N. Y. 523; Connors *v.* Kempshall, 26 Wend. (N. Y.) 404; Gould *v.* James, 6 Cow. (N. Y.) 369; Scott *v.* Wilson, 3 N. H. 321; Beryle *v.* Carle, 3 Me. 269; Commonwealth *v.* Charlestown, 1 Pick. (Mass.) 180.

**In Navigable Streams** any person may take fish, if he can do so without trespassing on the lands of private owners. Commonwealth *v.* Chapin, 5 Pick. (Mass.) 199; Coolidge *v.* Williams, 4 Mass. 140; Freery *v.* Cooke, 14 Mass. 488. He may also take shell-fish on the shores of navigable waters where the tide ebbs and flows, under the same restriction. Parker *v.* Cutter Mill Dam Co., 20 Me. 353. But a right to take shell-fish does not carry with it a right to take the soil or dead shell-fish imbedded therein, except such as necessarily adhere to the living fish taken. Porter *v.* Shehan, 7 Gray (Mass.), 435.

**In New Jersey** it is held that no party can have an exclusive right to take fish from navigable waters. Gard *v.* Carman, 3 N. J. Law, 936. And the right of fishing is not inseparable from the soil. Cobb *v.* Davenport, 32 N. J. Law, 369.

In the absence of a prescription, in States recognizing such a right of fishery, there can be no exclusive right except by grant from the sovereign power. State *v.* Glen, 7 Jones (N. Car.), 321; Collins *v.* Benbury, 5 Ired. (N. Car) 118; 3 Ired. (N. Car.) 277. *The right to regulate* private and public fisheries has been assumed by the States and acted upon so long that it is now accepted as the law. Smith *v.* Levins, 8 N. Y. 472; Com. *v.* Bailey, 13 Allen (Mass ), 541; Dunham *v.* Lamphere, 3 Gray (Mass.), 368.

No person acquires an exclusive right to fish by stocking a stream, or merely by cleaning out a fishing place in a river, or by making valuable improvements. Westfall *v.* Van Arker, 12 Johns. (N. Y.) 424.

A party who plants oysters in a stream and clearly marks the bed has such a right of property that persons navigating the stream are bound to take notice of his rights; and if they wilfully or negligently commit damages to said bed, they are liable therefor. Cobb *v.* Bennett, 75 Pa. St. 326; Major *v.* Brooke, 6 Q. B. 339.

A lease of a fishery does not pass an interest in the land, but gives a right only to take fish from the water, according to the terms of the lease. Cortelyou *v.* Van Brandt, 2 Johns. (N. Y.) 357.

In navigable streams the right of fishing is common, but only the owners of the adjacent lands have the right of drawing seines and taking fish on their own land. Commonwealth *v.* Shaw, 14 Serg. & R. (Pa.) 9; Lay *v.* King, 5 Day (Conn.), 72.

**What are Navigable Streams.**—Most of the States have enlarged the common-law rule as to what are navigable streams. It is the rule now that all streams where the tide ebbs and flows, whether they are in fact navigable or not, and all streams capable of serving the purpose in floating the products of the country, are navigable. Weise *v.* Smith, 3 Oreg. 445; Morgan *v.* King, 35 N. Y. 454; Com. *v.* Hemphill, 26 Wend. (N. Y.) 404; Tomlin *v.* Dubuque, etc., R. Co., 32 Iowa, 106; The Daniel Ball. 10 Wall. (U. S.) 557; The Montebello, 11 Wall. (U. S.) 411; Veazie *v.* Dwinel, 50 Me. 496; Valk *v.* Eldred. 23 Wis. 410; Georgetown *v.* Alexandria Canal Co., 12 Pet. (U.S.) 91.

The actual navigable capacity of streams seems now to be the test, and not the ebb and flow of the tide. If they are in fact navigable for useful purposes in commercial intercourse, they are subject to that servitude. The Daniel Ball, 10 Wall. (U. S.) 557; The Montebello, 11 Wall. (U. S.) 411; Chicago *v.* McGinn, 51 Ill. 269; Wood on Nuisances, 612.

So it must be established as a matter of fact, except in salt-water streams, whether a river is navigable. Rhodes *v.* Otis, 33 Ala. 573; McManus *v.* Carmichael, 3 Iowa, 1. The stream must be navigable in its natural state, unaided by artificial means. Wadsworth *v.* Smith, 2 Fair. (Me.) 276; Morgan *v.* King, 35 N. Y. 454.

**IV. Statutory Regulations.**—Fisheries are in most of the United States, as at common law, the exclusive right of the owners of the banks of rivers not navigable, unless otherwise appropriated by statute; this right, however, unless secured by a particular grant or prescription, is held subject to legislative control.[1] Fish are not the subject of ownership in running streams like animals and fowls which have been domesticated. They pass up and down streams for breeding purposes, and the owner of the soil of the streams has no right to obstruct their passage, for to do so would be to appropriate what belongs to all, which is contrary to common right, and hence nothing short of legislative power can regulate and control the enjoyment of this common ownership. This must be so from common necessity. The power of the legislature to thus control and regulate must be admitted.[2]

The preservation of fish in the waters of a State is of such public concern as to fall within the domain of legislative power.[3] No owner can lawfully obstruct the free passage of fish. This limitation on the action of the proprietor is for the public, and is not extinguished by any inattention or neglect in compelling the owner to comply with it, for no laches can be imputed to the government, and against it no time runs so as to bar its rights.[4] Riparian owners have the exclusive right to take fish on their own lands, but they have no right to abate the passage of fish, and their ownership is subject to legislative control and regulation.[5]

The legislature has the right of regulating the taking of fish in private rivers which are unquestionably private property.[6]

Every owner of a dam holds it on the condition that a sufficient and reasonable passage may be allowed for fish. Holyoke *v.* Lyman, 15 Wall. (U. S.) 500; Stoughton *v.* Baker, 4 Mass. 528; Nickerson *v.* Brackett, 10 Mass. 212; Cottrill *v.* Norrich, 12 Me. 229; Vinton *v.* Welsh, 9 Pick. (Mass.) 92; Commonwealth *v.* Chapin, 5 Pick. (Mass.) 204; Commonwealth *v.* Essex Co., 13 Gray (Mass.), 244.

An owner of a several fishery is *prima facie* the owner of the soil. Parthriche *v.* Mason, 2 Chit. 658 (?)

So also an owner of a several fishery, in ordinary cases, and when the terms of the grant are not known, may be presumed to be the owner of the soil. Somerset *v.* Fogwell, 5 B. & A. 879.

Although a long and exclusive enjoyment of a right to a several fishery in a public navigable river is sufficient *prima facie* evidence upon which to presume that the crown had granted a separate right before Magna Charta, yet the omission of all mention of the right in any probable true inventory, taken since that period, of all the property of the alleged owner of that right, or any reasonable ground exclusive, but in common with other persons, is sufficient to negative such presumption. Edgar *v.* Commissioners, 38 L. T. A. S. 732.

The presumption that the bed and soil of a river belong to the riparian owner does not apply to a large inland, nontidal, and navigable lake. Johnson *v.* Bloomfield, 8 Jr. R. C. L. 68.

The right of fishing, being an incorporeal hereditament, cannot be the subject of an exception in a deed or a lease. Corker *v.* Payne, 18 W. R. 436; 4 Jr. R. C. L. 380.

1. Nickerson *v.* Brackett, 10 Mass. 212; Cattrill *v.* Myrick, 3 Fairf. (Me.) 222; Lunt *v.* Hunter, 16 Me. 1; Moulton *v.* Libby, 37 Me. 472; Preble *v.* Brown, 47 Me. 284; Proctor *v.* Wells, 103 Mass. 216; Weller *v.* Snower, 42 N.J. Law, 341; Jacobson *v.* Fountain, 2 Johns. (N. Y.) 170; Gould *v.* James, 6 Cow. (N. Y.) 369; Rogers *v.* Jones, 1 Wend. (N. Y.) 239.

2. Parker *v.* People, 111 Ill. 581.

3. Eubank *v.* Pence, 5 Litt. (Ky.) 338.

4. Stoughton *v.* Baker, 4 Mass. 522.

5. Vinton *v.* Welsh, 9 Pick. (Mass.) 87.

6. Hooker *v.* Cummings, 20 Johns. (N. Y.) 90.

The States may protect their oyster-fisheries by inflicting the forfeiture of a vessel enrolled and licensed under the United States laws, for a breach of proper State regulation concerning this branch of commerce.[1]

1. *Constitutionality of Statutes.*—Any statute is unconstitutional which, in its scope, grants to a party the power of taking or injuriously affecting private property for private use, upon making compensation, without the consent of the owners.[2] Every owner of an obstruction, in a stream holds it on the condition that a sufficient passage may be allowed for fish, and any statute in contravention of this doctrine is unconstitutional and void.[3] Private individuals cannot acquire prescriptive rights in a stream against the public. If such rights could be sustained, then all the fish in the streams would soon be destroyed, and the production of food decreased perhaps millions of dollars annually, working an oppression to the poor; this being the case, it is one reason why no State can give a riparian owner an absolute right to dam up a stream, and prevent the passage of fish.[4] The police powers of the State are inalienable, and no legislature can lawfully contract not to exercise them or barter them away.[5]

1. Smith *v.* Maryland, 18 How. (U. S.) 71.

The property in the oyster-fisheries in the public bays and rivers in East *New Jersey* is vested in the State by the Revolution of 1776, as succeeding in this respect to the prerogatives and regalities which belonged to the crown, and afterwards vested in the grantees under an act of New Jersey in 1824. Martin *v.* Waddell, 16 Pet. (U. S.) 367.

*Pennsylvania* and *New Jersey* have, by mutual arrangement, concurrent jurisdiction over the waters of the Delaware river to a certain extent, and the exercise of the right of fishery is exercised in conformity to such arrangements. Elmer's Dig. 199.

It is held that the king, before the Revolution, had the right to grant lands in *Maryland*, covered by navigable waters, subject to the right of the public to fish and navigate them; and that this right, subject to the restriction, passed to the proprietors of the State by the royal grant, and that the right was then vested in Maryland. Browne *v.* Kennedy, 5 Harr. &. J. (Md.) 195; Chapman *v.* Haskins, 2 Md. Ch. 485. There is no several fishery in the navigable waters of *New Jersey*. Arnold *v.* Mundy, 1 Halst. (N. J.) 1. But the right of several fishery in navigable waters in front of the owners of the land may and does exist in individuals by usage in several of the States. Angell's Rights of Prop. in Tidewaters, c. 7.

2. Ryerson *v.* Brown, 35 Mich. 333; Loughbridge *v.* Harris, 42 Ga. 500; Sadler *v.* Lougham, 34 Ala. 311; Tyler *v.* Beecher, 44 Vt. 648; Coster *v.* Tidewater Co., 3 C. E. Greene (N. J.), 54.

3. Holyoke *v.* Lyman, 15 Wall. (U.S.) 266; Stoughton *v.* Baker, 4 Mass. 524; Cattrill *v.* Merrick, 12 Me. 229.

4. Parker *v.* People, 111 Ill. 581.

5. Stone *v.* Mississippi, 101 U. S. 814; Beer Co *v.* Massachusetts, 97 U. S. 25; Boyd *v.* Alabama, 9 4 U. S. 645; Com. *v.* Internal Liq., 115 Mass. 153; Metropolitan *v.* Barrie, 34 N. Y. 657; Mugler *v.* Kansas, 123 U. S. 623; Foster *v.* Kansas, 112 U. S. 201; Bartemeyer *v.* Iowa, Co. *v.* Crescent City Co., 111 U. S. 746; 18 Wall. (U. S.) 129 ; License Cases, 5 How. (U. S.) 504; Butchers' Union New Orleans Gas Co. *v.* Louisiana Light Co., 115 U. S. 659.

In *Illinois*, in May 31, 1879, an act was passed that it should be the duty of every person who should own, or who should erect, dams, sloughs, or other watercourses within the State, to place therein suitable fishways for the free passage of fish. This act was held to be within the constitutional power of the legislature to impose this duty as provided in the statute. Also no owner of a dam could, by occupancy or use, for any length of time, acquire a prescriptive right as against the public, so as to prevent the enforcement of the provision of the statute against him. This was a case where the owner of a mill-dam

which had been in use for many years procured the passage of an act of the legislature authorizing him to raise this dam higher, or to erect a new one in its place. This dam, both before and subsequent to this act, was so constructed as entirely to obstruct the passage of fish in the stream on which it was situated. He contended that the act authorizing him to construct the dam and to continue it as it was without any fishway was a contract, and that if he was required to make a fishway, as provided in the act of 1879, it would be to impair the obligations of a contract, and therefore it was unconstitutional. But the court ruled against him, and he was compelled to make a fishway for the free passage of fish up and down the stream. Parker *v.* People, 111 Ill. 581.

Section 1625 of the *Missouri Revised Statutes* forbids the erecting or maintaining any seine net or trap in waters of the State, or in front of the mouth of any stream, slough, or bayou, and prohibits the taking or catching of any fish in the waters of the State by any such means; it further provides that such prohibition shall not apply to waters wholly on the premises of such persons or persons using such device. *Held,* that this last provision applies only to waters which are wholly on the premises of the owner or owners pleading it. If it is a stream, it must have its source and its outlet, and its whole course on the owner's or joint owners' land. If it is a lake or bayou it must be entirely surrounded by the lands of such owner or joint owners in order to be wholly on their premises. The defendant in a prosecution had violated this section in trapping and netting fish from a bayou connected with a lake. The bayou was about one hundred yards wide and ten feet deep at its junction, and extended back into the country for about a mile. The bayou had been surveyed as land, and so appears on the United States surveys. The defendant had the consent and authority of the owners of all the land on each side of said bayou and adjacent thereto, and on which the waters of the bayou are located, to so fish there. *Held,* that he did not come within the exception contained in this section, and the facts would support a conviction. It was held that this section was constitutional, as it did not take private property for public purposes without due process of law. The right of man in animals, *feræ naturæ*, and game, is not strictly private property. It is a qualified property, and may be restrained within reasonable limits to prevent the extermination of such game. State *v.* Blount, 85 Mo. 543.

*Albemarle Sound*, being a navigable water, is not subject to entry. Every citizen of the State of North Carolina has the liberty and privilege of fishing therein. While the owner of a beach may exclude all others, yet he cannot acquire the sole right of fishing in a certain sound independently of all others. To constitute a several fishery there must be right of soil, which no person has in Albemarle Sound. Skinner *v.* Hettrick, 73 N. Car. 53.

A dam having been erected by the authority of the legislature, the defendant could not be regarded as wrongfully maintaining it. But if the fish-way is inadequate, the defendant must be allowed a reasonable time to construct another suitable for the passage of fish. If he fails to do it in a reasonable time the party damaged can collect therefor. Bristol *v.* Water Co., 42 Conn. 403.

Fishing for oysters in the navigable waters of *New Jersey*, is a right common to all citizens, which may be exercised by them at will, except so far as it may be restrained by positive law. Paul *v.* Hazelton, 37 N. J. L. 106.

Where a party, under the *Virginia act* of 1873 relative to the planting of oysters, obtained an assignment of an oyster-bed for the planting and sowing of oysters for one year, and paid the tax, and had the beds staked off as required before May 1, 1874, he has such an exclusive interest in them that he might maintain an action of unlawful detainer against a party who entered upon the beds and held them against him. Power *v.* Tazewells, 25 Gratt. (Va.) 786.

**Prohibiting non-residents** from gathering oysters within the waters of *New Jersey* as enacted by the legislature, Nix. Dig. 131, sect. 7, operates alike as to natural or planted oysters. Such an enactment for the protection of property must be considered as a matter of internal police, and not a regulation of commerce with foreign nations or among the States. Neither does it contravene the provisions of the United States constitution, that the citizens of each State shall be entitled to all the privileges of citizens in the several States. Haney *v.* Compton, 36 N. J. Law, 507.

An adverse user, which is known to have originated without right, within the memory of persons now living, will not of itself make lawful a public nuisance. State *v.* Franklin Falls Co., 49 N. H. 240.

Statutes for the protection of fish in

particular waters are not forbidden by a constitutional restriction upon local legislation. Thus the legislature of *Indiana* has power, notwithstanding such restrictions in the State constitution, to pass the act—sess. act of 1867, 128—limiting the time and mode of taking fish in special waters. State *v.* Boone, 30 Ind. 225.

The *New Hampshire Laws*, 1872, ch. 25, is a revision of and a substitution for all former statutes prohibiting the catching of trout, and as no way is provided for the recovery of the penalty fixed, such penalty may be recovered under the statute, ch. 248, § 1. Purington *v.* Ladd, 58 N. H. 596.

A party owned land through which ran a non-navigable stream connecting with a pond. Legislative authority was given to the town to make such improvements as were necessary to the preservation of alewives in the pond, and the waters connected therewith. The act provided for damages. *Held*, that the value of the fishery to such owner could not be compensated for. Cole *v.* Easthan, 133 Mass. 65.

A grant by colonial government, confirmed by subsequent legislation of the State of *New York*, may confer upon a township exclusive right to an oyster fishery, and the lease of the town confers upon the lessee the right to take oysters. The trustees are not precluded from granting such right because at other times formerly they may have restricted the right of lessees, and not have allowed the taking of oysters from natural beds. Hand *v.* Newton, 92 N. Y. 88.

One who plants oysters in tidal waters on land of the State may maintain trespass against another who carries them away. Metzger *v.* Post, 44 N. J. Law, 74.

The *Virginia act of* 1880 provides that vessels or boats employed in unlawful dredging for oysters in Virginia shall be forfeited. *Held*, that the State thereby acquires no title to the oysters found on such forfeited vessel or boat. McCandlish *v.* Comm., 76 Va. 1002.

When a particular statute regulates the fishing in a certain river, and a subsequent statute contains provisions inconsistent with the former, regulating fishing in all rivers of the State, the provisions of the former statute are not thereby repealed, but fishing in the particular river is governed by the former statute. State *v.* Storgess, 9 Oreg. 537.

*The Maryland acts of* 1884, ch. 518, making it an offence to carry oysters over Maryland waters without a State license, has no application to oysters caught elsewhere than in the State of Maryland. State *v.* Insley, 64 Md. 28.

Where a certain pond exempted from the provisions of the general law prohibiting the taking of fish from ponds, but no exemptions, in the case of such pond, is made from the prohibition against having for sale fish caught in ponds generally, one may be convicted for having for sale fish caught in such pond. State *v.* Beal, 75 Me. 289.

The owner of soil between high and low water mark has the exclusive right to catch fish by means of fixtures attached to such soil. This right he may convey with or without the upland, and with such limitations as he sees fit to impose. Matthews *v.* Treat, 75 Me. 594.

The legislature may protect the passage of migratory fish in their accustomed course in streams, it being a public right. One who owns all the land surrounding a natural pond having an outlet communicating with public waters is liable for taking fish from the pond out of the season of fishing prescribed by statute. State *v.* Roberts, 59 N. H. 256.

*The Vermont act of* 1882, No. 17, sec. 2, prohibiting all net fishing in Lake Champlain, or in rivers emptying into this lake, within ten miles from their mouths, is constitutional and not a prohibition of fishing. Drew *v.* Hilliker, 56 Vt. 641.

A person may be indicted under the *Massachusetts* laws,—statute, ch. 91, § 101—for digging oysters from licensed flats, if in digging quahogs he disturbs and destroys oysters, though he does not take them from the water, and has not intended so to do. Comm. *v.* Manimon, 136 Mass. 456.

The State of *New York* may grant to the inhabitants of towns the exclusive right to use the lands under the public waters for oyster-planting, as provided in act 1868, ch. 73. People *v.* Thompson, 30 Hun (N. Y.), 457.

A State may forbid non-residents catching fish in its waters for manure and oil, and manufacturing manure and oil from fish caught within its waters. Chambers *v.* Church, 14 R. I. 398.

*The New Jersey act of March* 9, 1855, provides that any person owning marsh lands, within the boundaries of which there are creeks detached, or ponds, may plant clams and oysters, and for the preservation of which he is properly to stake off such clam and oyster grounds, so as not to interfere with the passing . . . . of vessels. *Held*, that the mere staking off without planting gave no right to the bed of the creek thus marked out. Birdsall *v.* Rose, 46 N. S. 361.

Under the *Massachusetts* law, Ch. 91, sect. 13, it is required that where application is made to the commissioners of inland fisheries for a lease of a great pond, notice must be given to all cities or towns within whose limits any part of the pond lies; but a lease of such pond to a town is not invalid although such notice is not given where it appears that the pond is entirely within the limits of the town holding the lease. One indicted for illegal fishing in such pond cannot set up as a defence the invalidity of the lease. Com. *v.* Eliot, 146 Mass. 5.

If an indictment which charges the defendant with unlawfully fishing in a pond follows the words of the statute, without a particular detail of facts and circumstances, but with such clearness as to indicate the offence without any uncertainty or ambiguity, it is sufficient. Commonwealth *v.* Richardson, 142 Mass. 71,

Under *Massachusetts statute of* 1884, ch. 212, s. 1, it is provided that possession of lobsters under the required size shall be *prima facie* evidence to convict in all prosecutions under this section. This is not in conflict with the clause imposing a penalty upon selling such lobsters. Commonwealth *v.* Barber, 143 Mass. 560.

It is well settled in *Massachusetts* that there is a public right to take shell-fish on the shore and flats below high-water mark, and within one hundred rods of the upland, until the flats are enclosed by the proprietor. Weston *v.* Sampson, 8 Cush. (Mass.) 347; Dunham *v.* Lamphere, 3 Gray (Mass.), 268; Lakeman *v.* Bunham, 7 Gray (Mass.), 437; Com. *v.* Roxbury, 9 Gray (Mass.), 526; Com. *v.* Bailey, 13 Allen (Mass.), 541; Proctor *v.* Wells, 103 Mass 216; Com. *v.* Manimon, 136 Mass. 456; Parker *v.* Ryder, 144 Mass. 440. See Peck *v.* Lockwood, 5 Day (Conn.), 22; Paul *v.* Hazelton, 37 N. J. Law, 106; Oyster Co. *v.* Baldwin, 42 Conn. 255; Preble *v.* Brown, 47 Me. 284.

**Miscellaneous Points.**—"Eels" are included in the general words "any kind of fish known as river fish." Woodhouse *v.* Etheridge, 6 L. R. C. P. 570; 24 L. T, N. S. 709.

A fishing mill-dam is a fishery within 24 and 25 Vict. c. 109, s. 20. Hodgson *v.* Little, 14 C. B. N. S. 111.

A statute prohibiting persons from wilfully taking, destroying, or spoiling any spawn, fry, or brood of any sea-fish in any weir or other engine or device whatsoever, seems not to comprehend shell-fish; if it does, it means a taking for destruction, and not a taking of oysters' spawn for the purpose of removing it to beds for further growth and maturity, to make it marketable. Bridges *v.* Richardson, 2 M. & S. 568.

If a party takes samlets contrary to statute, but does not know that they are samlets, he cannot be held guilty. Hapton *v.* Thirlwall, 12 W. R. 72; 9 L. T. N. S. 327.

When a statute provides that the meshes or masks of a net shall be two inches and a half broad, the breadth of two inches and a half is to be measured by the length of thread between the adjacent knots. Thomas *v.* Evans, 4 Jur. N. S. 710; 27 L. J. M. C. 172.

In the settlement of the question as to what is river and what is sea, the mouth of the river comprehends the whole space between the lowest ebb and the highest flood mark. The fact of the absence or presence of fresh water is not the basis of decision. Horne *v.* Mackenzie, 6 C. & F. 628.

By statute no person was allowed to fish except by a rod and line under certain restrictions. In violation of this he should forfeit all fish taken and any net or other device. In contravention of this statute two men fished with a net, but caught nothing. *Held*, the net having been used for the purpose of taking salmon contrary to law, it had become forfeited. Ruther *v.* Harris, 1 L. R. Exch. Div. 97.

In *Pennsylvania* an indictment cannot be maintained under the statute of May 5, 1876, against a party fishing in a private stream or pond, where the whole stream or pond is not so far private property as to confine therein fish with which it is stocked. Reynolds *v.* Com., 93 Pa. St. 458.

The *North Carolina Act of* 1875, chs. 115, 183, do not preclude one engaged in seine-fishing from removing stakes put up to operate the pond-net. Hettrick *v.* Page, 82 N. Car. 65.

In *Louisiana* the banks of navigable rivers, though they are the property of those who own the adjacent lands, are subject to the public use so far that vessels may make fast to the shore and to the trees planted there, and be unloaded, and the goods deposited and fishing-nets dried. So any person may fish from those banks, build cabins on the sea-shore for shelter, and dry nets there. Civil Code, arts. 443, 446; Hanson *v.* Lafayette, 18 La. 295.

In *North Carolina* it is held that in a river not navigable for the purposes of navigation the right of fishing belongs to the riparian owner. Ingraham *v.* Threadgill, 3 Dev. (N. Car.) 59.

In *Tennessee* the owners of land on a

2. *Construction.*—These statutes pertaining to the right to take fish are in derogation of the common law and must be construed strictly.[1]

navigable stream above tide-water have title only to ordinary low-water mark, and not to the centre of the stream. Elder *v.* Burns, 6 Humph. (Tenn.) 358.

In *Louisiana* the sea-shore is the space of land over which spreads in the highest water during the winter season. Civil Code, art. 442.

A lease of a fishery of a pond, with the spear sedge and the flags and rushes growing in and about the same, passes the soil. Rex *v.* Old Arlesford, 1 T. R. 358.

By the grant of the fish in a pond, a right of going upon the banks and fishing from them is granted. Reniger *v.* Fogossa, Plowd. 16; Ship. Touch. 89; Lord Darcy *v.* Askwith, Hob. 234.

It is a general rule that anything corporeal or incorporeal, lying in livery or in grant, may be subject of demise; therefore watercourses, fisheries, and all other incorporeal hereditaments are included in the common-law rule and may be demised. Ship. Touch. 268; Com. *v.* Weatherford, 110 Mass. 175; Eastham *v.* Anderson, 119 Mass. 526; Morrill *v.* Markman, 24 Mich. 279; Commissioners *v.* Clark, 33 N. Y. 251; Taylor *v.* Beebe, 3 Rob. (N. Y.) 262.

In *Maine* it is illegal to retain female lobsters if they are captured. But an indictment charging merely that the defendant had in his possession such lobsters charges no offence. State *v.* Hennett, 79 Me. 55.

A party unlawfully fished in a several fishery, but caught no fish. In an action against him by the plaintiff, he was held liable for nominal damages. Patrick *v.* Greenway, 1 Saund. 3466, note.

**Remedy against Wrong-doers.** *Assumpsit* may be brought to recover a remuneration for the use and occupation or enjoyment of a fishery. Davis *v.* Morgan, 4 B. & C. 8; 6 D. & B. 42.

If a party has only a *profit à prendre*, under the common law, his remedy against a wrong-doer who disturbs his right of common of fishery is trespass on the case and not trespass. Welden *v.* Bridgewater, Cro. Eliz. 421; Wilson *v.* Mackreth, 3 Burr. 1827; Smith *v.* Kemp Salk. 637.

Trespass lies for an injury to plaintiff's land covered with water. Smith *v.* Ingraham, 7 Ind. (N. Car.) 175; McKenzie *v.* Hulet, 2 Taylor (N. Car.), 181.

In bringing the action of trespass, it may be charged that the defendant broke and entered the several fishery of the plaintiff, and fished therein for fish, but it is a question whether trespass lies for fishing in a free fishery. Smith *v.* Kemp, 2 Salk. 637; Co. Litt. 46, 122; Richardson *v.* Mayor, 2. H. Bl. 182; Child *v.* Greenhill, Cro. Car. 554.

Trespass lies for dredging for oyster-spat in a common navigable river, contrary to the 13 Rich. II, stat. 1, c. 19; Mayor *v.* Woolvet, 4 P. & D. 26.

When all persons have a general right to fish in a navigable river, it is unnecessary to state such right. It is sufficient to show with brevity that there was a public right; that such a particular place was a navigable river; and that the defendant prevented the plaintiff from fishing. Ward *v.* Caswell, Willes, 268; Tarant *v.* Goldwin, 2 Ld. Raym. 1091.

An action is brought for fishing in a certain river, being the plaintiff's fishery, and the trespass intended by the complaint or declaration is for fishing to the extent of two miles and upwards; if the defendant plead that he is seized in fee of ten acres adjacent to the river, and prescribes for a free fishery in the river along the side of the ten acres, then the plaintiff should new assign and state that the trespass complained of was not only for fishing in the river adjacent to the ten acres, but also above and below the same. This will compel the defendant to answer the whole trespass. 2 Chit. Pl. 361; 1 Saund. 300 C (5th Ed.).

If a commoner be disseised of fishery, under the common law, he was allowed to reinstate himself in the possession by a writ of *novel disseisin*. Now the remedy for a violation of these incorporeal rights is either by an action of ejectment or a special action on the case. Probably the ancient remedies have been superseded in most of the States by more convenient and familiar actions.3 Kent, 419, 3.

**Rights of Common.**—Rights of common are very rare in the United States, and hence but few cases are found in the reports concerning them. See Bell *v.* O. & P. R. Co., 25 Pa. St. 161; Trustees *v.* Robinson, 12 Serg. & R. (Pa.) 29; Livingston *v.* Ten Broek, 16 Johns. (N. Y.) 14; Lyman *v.* Abeel, 16 Johns. (N. Y.) 30; Hall *v.* Lawrence, 2 R. I. 218; Van Rensselaer *v.* Radcliff, 10 Wend. (N. Y.) 639; Worcester *v.* Green, 2 Pick. (Mass.) 429; Smith *v.* Floyd, 18 Barb. (N. Y.) 522; Livingston *v.* Ketcham, 1 Barb. (N. Y.) 592.

1. Dwelley *v.* Dweller, 46 Me, 377;

**FISHING-BILL**, in equity, is a bill that seeks a discovery upon general, loose, and vague allegations; and such a bill is at once dismissed on that ground.[1]

**FIT.**[2]

**FITTINGS.**[3]

Berttes *v.* Nunan, 92 N. Y. 152; Martin *v.* Waddell, 16 Pet. (U. S.) 367; Parker *v.* Mill-Dam Co., 7 Shep. (Me.) 353; Moulton *v.* Libbey, 37 Me. 472.

1. *In re* Pac. R. Comm'n, 32 Fed. Rep. 263,

2. **The Verb.**—Under a lease by which the lessor could terminate the tenancy by notice, provided that if he did so within three years he was to compensate the lessee "for expenditures incurred in fitting up the premises and in removing," the lease having been terminated within the three years it was contended by the lessor that "fitting up the premises" included only the actual alterations and additions made to the house, while the lessee claimed in addition the expenses of furnishing the house. It was held, however, that the terms of the lease covered all the expenses the lessee was at during the term in doing anything to the premises to adapt them to his use, and the expenses of specially fitting any furniture to the premises, that is, the labor and expense of fitting it, and the depreciation in its value. Pratt *v.* Paine, 119 Mass. 439.

The conversion of a merchant vessel into a ship of war is a "fitting out" of such within the meaning of an act forbidding the fitting out and arming of any vessel, with the intent to employ it in the service of any foreign power, to commit hostilities against a power at peace with the United States. 2 Dall. (U. S.) 321.

So under an act prescribing a penalty for the fitting out of a vessel with intent to employ her in the slave trade, "any preparations for a slave voyage which clearly manifest or accompany the illegal intent, even though incomplete and imperfect, and before the departure of the vessel from port, do yet constitute a fitting out." Accordingly, a ship which sailed on her voyage for the purpose of employment in the slave trade, before every equipment therefor was taken on board, was held to be within the meaning of the statute. United States *v.* Gooding, 12 Wheat. (U. S.) 501.

**The Adjective.**—Under a statutory provision that the President may make fit and proper regulations for estimating duties on goods whose cost shall be exhibited in a depreciated foreign currency, he cannot fix an arbitrary value on such foreign currency. The act was "intended to authorize the President to make 'fit and proper regulations' to sustain and carry out the revenue laws relating to foreign coins, and not to violate them." De Forest *v.* Redfield, 4 Blatchf. (C. C.) 478.

**Copper fit for manufacture.** See CASH and COIN.

**Fit for cultivation.**—This phrase imports such "condition of the soil, in its natural condition, as will enable a farmer bringing to business a reasonable amount of skill to raise regularly and annually, by tillage, grain or other staple crops. Staple productions are such productions of the soil as have an established and defined character in the commerce of the country." Keeran *v.* Griffith, 34 Cal. 580.

**Fit for distillation.** See DISTIL.

**If he shall think fit.**—Where a power of removal of a certain class of officers for inability or misbehavior, if he shall think fit, is given to a chancellor, it is for him to determine whether their inability or misbehavior is made out, after hearing evidence, and his determination is final. *Ex parte* Ramshay, 18 Q. B. 193.

3. **Gas Fittings.**—Under an act exempting from distress meters and "fittings for the gas" hired by the gas company to the consumer, the term "fittings for the gas" includes a gas stove. "The expression is as large as it can be, and must include all the apparatus which is used for the supply and the consumption of the gas." Gas Light & Coke Co. *v.* Hardy, 17 Q. B. D. 619; s. c., 56 L. J. R. Q. B. 169.

## FIXTURES.

I. Definition, 41.
II. Tests for Determining what are Fixtures, 43.
III. Parties between whom the Question of Fixtures Arises, 44.
1. *Assignees of a Bankrupt and Other Persons*, 44.
2. *Debtor and Creditor*, 45.
3. *Heir and Executor*, 47.
4. *Landlord and Tenant*, 48.
5. *Mortgagor and Mortgagee*, 50.
6. *Executor of Tenant for Life and Remainderman*, 54.
7. *Tenants in Common*, 54.
8. *Vendor and Vendee*, 55.
IV. Agricultural Fixtures, 57.
V. Domestic Fixtures, 59.
VI. Ecclesiastical Fixtures, 59.
VII. Trade Fixtures, 60.
VIII. Effect of Agreements in Relation to Fixtures, 61.
IX. Time of Removal, 62.
X. Railway Rolling Stock, 64.
XI. Remedies, 64.
XII. Authorities, 65.

**1. Definition.**—A fixture is an article which was a chattel, but which, by being physically annexed or affixed to the realty by some one having an interest in the soil, becomes a part and parcel of it.[1] The annexation may be actual or constructive. Remov-

1. Teaff *v.* Hewitt, 1 Ohio St. 511; Capen *v.* Peckham, 35 Conn. 88; Potter *v.* Cromwell, 40 N. Y. 287; Tiedman Real Prop. § 3; 3 Abbott's N. Y. Dig. 146, n.; Taylor's Land. & Ten. § 544; 1 Wash. Real Prop. 6.

The difficulty of giving a definition of this word which will apply to all cases appears as soon as we begin to examine the law on the subject. The word has been used by many writers in various senses, and this ambiguity has so often been followed even in adjudicated cases that the law on the subject has been thrown into great confusion. Another element of uncertainty is the fact that so many exceptions have been allowed to modify the original idea of a fixture, that now each case must be decided rather upon the circumstances that surround it, than upon any general principle that can be evolved from the law. In fact, so many exceptions to the law have occurred, that many writers and courts have been constrained to throw aside the definition as used in the earlier law on this subject, and to adopt one whose import is almost opposite in meaning. Thus a fixture has been defined to mean a personal chattel annexed to the freehold, and which may be severed and removed by the party who has annexed it, against the will of the owner of the freehold. Pickerel *v.* Carson, 8 Iowa, 544; Sheen *v.* Ritchie, 5 M. & W. 175; *Ex parte* Barclay *et al.*, 5 De G. M. & G. 403; Halben *v.* Runder, 1 C. M. & R. 264; Taylor's Land. & Ten. § 544. note 1; Bouvier's Law Dict. tit. Fixtures; 2 Par. Cont. 431; Amos & Ferard's Law of Fixtures, 2.

For other definitions see 3 Abbott's N. Y. Dig. 146. Henry, J., says: "It is difficult to define the term 'fixtures,' and there is inextricable confusion both in the text-books and adjudged cases as to what is such an annexation of chattels to realty as to make them part and pass by a conveyance of the realty. An attempt to reconcile the authorities on the subject would be futile, and to review them would be an endless task. As was well observed by Kent, J., in Strickland *v.* Parker, 54 Me. 263: 'It is not to be disguised that there is an almost bewildering difference and uncertainty in the various authorities, English and American, on this subject of fixtures, and on the question of what passes by a transfer of the realty. One thing is quite clear in the midst of the darkness, and that is, that no general rule applicable to all cases and to all relations of the parties can be extracted from the authorities.'" Thomas *v.* Davis, 76 Mo. 72. See also 4 Cent. Law Jour. 22.

2. In the early cases the method of annexation was a very prominent element in determining whether or not a certain thing was to be regarded as a fixture or not. Park, B., says "that everything substantially and permanently affixed to the soil is in law a fixture. The principle of law is, that 'quidquid solo plantatur, solo cedit.'" Minshall *v.* Lloyd, 2 M. & W. 450. See also Penton *v.* Robart, 2 East, 88.

In Culling *v.* Taffnall it was held that a barn erected by a tenant on pattens and blocks of timber lying on the ground, but not fixed in or to the ground, was not a fixture, and could be removed by the tenant. Buller's Nisi Prius, 34. Lord Ellenborough in referring to this case

able fixtures are those which the person annexing them to the freehold may legally remove against the will of the owner of the land.[1]

said: "To be sure he might, and that without custom; for the terms of the statement exclude it from being considered as a fixture. It was not fixed in or to the ground." Elwes *v.* Mawe, 3 East, 38. See also Horn *v.* Baker, 9 East, 215; Nansbrough *v.* Maton, 4 A. & E. 884; King *v.* Otley, 1 B. & Ad. 161; Wiltshear *v.* Cottrell, 1 E. & B. 674; Dubois *v.* Kelly, 10 Barb. (N. Y.) 496; Degraffenreid *v.* Scruggs, 4 Humph. (Tenn.) 451.

Lord Chancellor Hardwicke, in commenting on the question of annexation, says: "To be sure in the old cases they go a great way upon the annexation to the freehold, and so long ago as Henry the Seventh's time the courts of law construed even a copper and furnace to be part of the freehold. Since that time the general ground the courts have gone upon relaxing this strict construction of law is that it is for the benefit of the public to encourage tenants for life to do what is advantageous to the estate during their term." Lawton *v.* Lawton, 3 Atk. 13. However, the later cases have in general departed from the ancient rule, that was based largely upon physical annexation, and now other considerations, as use, nature, and intention, enter into the question. Walker *v.* Sherman, 20 Wend. (N. Y.) 636; Hill *v.* Sewald, 53 Pa. St. 271; Voorhis *v.* Freeman, 2 W. & S. (Pa.) 116; Van Ness *v.* Pacard, 2 Pet. (U. S.) 137; Lemar *v.* Miles, 4 Watts (Pa.), 330; Farrar *v.* Stackpole, 6 Me. 154. And see also Lushington *v.* Sewell, 1 Sim. 435; 3 Dane's Abridg. 156. And some cases go so far as to hold that physical annexation is not necessary to convert a chattel into a fixture. Mercur, J., says: "Physical annexation to realty is not necessary to convert a chattel into a fixture. Whether it be such, depends on the business for which the premises are used. Articles necessary or convenient in the transaction of one kind of business would be useless in another. If the article, whether fast or loose, be indispensable in carrying on the specific business, it becomes a part of the realty." Morris' Appeal, 88 Pa. St. 368. See also Voorhis *v.* Freeman 2 W. & S. (Pa.) 116; Meigs' Appeal, 62 Pa. St. 28; Davis *v.* Eastham, 81 Ken. 116. But Cowen, J., suggests that this kind of reasoning would make live-stock fixtures. Walker *v.* Sherman, 20 Wend. (N. Y.) 636. See also Brown *v.* Lillie, 6 Nev. 244; Tillman *v.* De Lacey, 80 Ala. 103; Capen *v.* Peckham, 35 Conn. 88; Winslow *v.* Merchants' Ins. Co., 4 Met. (Mass.) 306; Despatch Line *v.* Bellamy, 12 N. H. 205; Teaff *v.* Hewitt, 1 Ohio St. 511; Hill *v.* Wentworth, 29 Vt. 428.

Constructive annexation arises when the thing is fitted for use in connection with the premises, and is more or less necessary to their enjoyment, but is not firmly attached. Teidman Real Prop. § 5; Walker *v.* Sherman, 20 Wend. (N. Y.) 636. Hence a millstone detached from a mill for repairs,—Liford's Case, 11 Coke, 50,—or by accident,—Goddard *v.* Bolster, 6 Me. 427,—is a fixture. On the same principle, title-deeds, deer in a park, and fish in a pond have been held to belong to and pass with the estate. 3 Dane's Abridg. 156. See also 2 Com. Dig. Biens, B; Farrar *v.* Stackpole, 6 Me. 154; Kittredge *v.* Woods, 3 N. H. 503; Wadleigh *v.* Janvrin, 41 N. H. 503; Pusey *v.* Pusey, 1 Vern. 273; Lord *v.* Wardle, 3 Bing. (N. C.) 680. So, too, windows, doors, blinds, Venetian blinds, Farrar *v.* Stackpole, 6 Me. 154,—fences, Walker *v.* Sherman, 20 Wend. (N. Y.) 636,—and manure,—Kittredge *v.* Woods, 3 N. H. 503; Middlebrook *v.* Corwin, 15 Wend. (N. Y.) 169; Goodrich *v.* Jones, 2 Hill (N. Y.), 142,—belong to the land, as being constructively annexed to it.

1. The law of fixtures has its origin in the exceptions to the rule of law that whatever is annexed to the freehold becomes a part of the realty. The exceptions to this rule have grown so rapidly in number, that it has been found necessary to arrange them into some sort of a system, and in this way the law of fixtures has been gradually built up. Chancellor Kent says: "The law of fixtures is in derogation of the original rule of common law which subjected everything affixed to the freehold to the law governing the freehold; and it has grown up into a system of judicial legislation so as almost to render the right of removal of fixtures a general rule, instead of being an exception." 2 Kent Com. (7th Ed.) 402. See also Dubois *v.* Kelly, 10 Barb. (N. Y.) 496.

In order that a fixture may be removable, it must be capable of being severed from the freehold without serious injury to the freehold, or, in other words, the land must be left in as good condition

**II. Tests for Determining what are Fixtures.**—In order to ascertain whether or not a particular thing is a fixture, it is necessary to apply certain rules that have been agreed upon by the courts in adjudicated cases, and if the article in question meet the requirements of the rules, it is decided to be a fixture. We may safely say that these rules can be reduced to three, which require that the article under consideration shall be—

(1) Actually annexed to the realty or to something appurtenant thereto.

(2) Appropriate to the use or purpose of that part of the realty with which it is connected.

(3) Intended by the party making the annexation to be a permanent accession to the freehold, and what that intention was in making the annexation is inferred from the following facts:

(*a*) The nature of the article annexed.

(*b*) The relation of the party making the annexation.

(*c*) The structure and mode of annexation.

(*d*) The purpose or use for which the annexation has been made.[1]

after severance as before. And the fixture itself must retain its essential character and value as a personal chattel. 2 Kent Com. (7th Ed.) 402; Taylor's Land. & Ten. § 550; Tillman *v.* De Lacey, 80 Ala. 103; Dubois *v.* Kelly, 10 Barb. (N. Y.) 496; Taffe *v.* Warnick, 3 Blackf. (Ind.) 111; Gale *v.* Ward, 14 Mass. 352; Whiting *v.* Brastow, 4 Pick. (Mass.) 310; Hellawell *v.* Eastwood, 6 Ex. 295; Trappes *v.* Harter, 3 Tyrwhitt, 603. *Compare* Longbottom *v.* Berry, 5 Q. B. (L.R.) 123; Capen *v.* Peckham, 35 Conn. 88; Pea *v.* Pea, 35 Ind. 387; Hunt *v.* Potter, 47 Mich. 197.

When fixtures have been detached from the freehold, whether by an act of God or of man, they are personal property. Buckout *v.* Swift, 27 Cal. 433. See also McNally *v.* Connelly, 70 Cal. 3; Citizens' Bank *v.* Knapp, 22 La. Ann. 117; Curry *v.* Schmidt, 54 Mo. 515. *Compare* Goddard *v.* Bolster, 6 Me. 427.

1. Tillman *v.* Delacy, 80 Ala. 103; Capen *v.* Peckham, 35 Conn. 88; Hellawell *v.* Eastwood, 6 Ex. 295; Pea *v.* Pea, 35 Ind. 387; Eaves *v.* Estes, 10 Kan. 314; Dudly *v.* Hurst, 67 Md. 44; s. c., 8 Atl. Rep. 901; Weathersby *v.* Sleeper, 42 Miss. 732; Rogers *v.* Crow, 40 Mo. 91; McRea *v.* Cent. Nat. Bk., 66 N. Y. 489; Potter *v.* Cromwell, 40 N. Y. 287; Crane *v.* Brigham, 11 N. J. E. 29; Quimby *v.* Manhattan, etc., Co., 24 N. J. E. 260; Teaff *v.* Hewitt, 1 Ohio St. 511; Hutchins *v.* Masterson, 46 Tex. 551; Hill *v.* Wentworth, 28 Vt. 428; Green *v.* Phillips, 26 Gratt. (Va.) 752; Taylor *v.* Collins, 51 Wis. 123.

Bartley, C. J., who is the author of the rules given above in this form, says: "This criterion furnishes a test of general and uniform application—one by which the essential qualities of a fixture can in most cases be certainly and easily ascertained, and tends to harmonize the apparent conflict in the authorities relating to the subject. It may be found inconsistent with the reasoning and distinctions in many of the cases, but it is believed to be at variance with the conclusion in but few of the well-considered adjudications." Teaff *v.* Hewitt, 1 Ohio St. 511.

It has been held in many cases that the question of removing the chattel without injury to the freehold or to itself was important in deciding whether a certain article was a fixture or not. Thus in the case of Swift *v.* Thompson, Daggart, J., says: "It is material here to observe that an important part of the description is that they were attached to the building to render them stable, but that they might be removed to any other part of the building or any other place without injury to the freehold. We resort, then, to the criterion established by the rules of the common law: Could this property be removed without injury to the freehold?" Swift *v.* Thompson, 9 Conn. 63. See also Farrar *v.* Chauffetete, 5 Den. (N. Y.) 527; Murdock *v.* Gifford, 18 N. Y. 28; Hunt *v.* Mullanphy, 1 Mo. 508; Bewick *v.* Fletcher, 41 Mich. 625; Vanderpoel *v.* Van Allen, 10 Barb. (N. Y.) 157; Lamphere *v.* Lowe, 3 Neb. 131; McClintock *v.* Graham, 2 McCord (S Car.), 326; Fullam *v.* Stearns,

**III. Parties between Whom the Question of Fixtures arises.**—The relation existing between the parties making claims to chattels annexed to the freehold enters so largely into the question of any particular article being a removable fixture, that the largest part of the law of fixtures is an investigation of the effect of these separate relations of claimants upon the general law. While in the early history of the law it was generally treated as arising between three different classes of persons, now the subject has been so extended that it becomes necessary to discuss the law as it arises among a much larger number of classes of claimants.

1. *Assignees of a Bankrupt and Other Persons.*—It is the general rule in such cases, that fixtures pass with the real estate and not to the assignees of a bankrupt under the provision of the bankruptcy acts relating to goods and chattels.[1]

30 Vt. 443; Bartlett *v.* Wood, 32 Vt. 372.

But according to the later cases, the importance of this rule seems to have lost its force. "The circumstance that the machinery may or may not be removed without great injury to the building or to itself is not now deemed to be controlling." Hunt, C., in Voorhees *v.* McGinnis, 48 N. Y. 278. See also Morrison *v.* Berry, 42 Mich. 389; Quimby *v.* Manhattan, etc., Co , 24 N. J. E. 260; De Graffenried *v.* Scruggs, 4 Humph. (Tenn.) 451; 1 Wash. Real Prop. (5th Ed.) 24.

Many cases hold that the intention of the party making the annexation is the chief element to be considered in determining what are fixtures. Hill *v.* Sewald, 53 Pa. St. 271; Seeger *v.* Pettit, 77 Pa. St. 437; McDavid *v.* Wood, 5 Heisk. (Tenn.) 95; Perkins *v.* Swank, 42 Miss. 349; Allen *v.* Mooney, 130 Mass. 155; Ottumwa, etc., Co. *v.* Hawley, 44 Iowa, 57; Jones *v.* Ramsey, 3 Ill. Ap. 303; Hutchins *v.* Masterson, 46 Tex. 551; Huebschmann *v.* McHenry, 29 Wis. 655–661; Taylor *v.* Collins, 51 Wis. 123–129; Hill *v.* Wentworth, 28 Vt. 428; 4 Cent. Law Jour. 22; Ewell Fixtures, 21, 22. *Compare* Treadway *v.* Sharon, 7 Neb. 37.

It has been held that where permanent annexation to the freehold is intended, an article lawfully annexed becomes a fixture and part of the realty, whether its removal would injure the freehold or not. Morrison *v.* Berry, 42 Mich. 389. And the matter of intention is a question for the jury. Seeger *v.* Pettit, 77 Pa. St. 437.

Campbell, C. J., says: "It has been held in this court that there is no universal test whereby the character of what is claimed to be a fixture can be determined in the abstract. Neither the mode of annexation nor the manner of use is in all cases conclusive. It must usually depend on the express or implied understanding of the parties concerned." Wheeler *v.* Bedell, 40 Mich. 693; court cited Coleman *v.* Stearns Mfg. Co., 38 Mich. 30; Jones *v.* Detroit Chair Co., 38 Mich. 92; Robertson *v.* Corsett, 39 Mich. 777.

Another class of cases hold that the true test of a fixture is the adaptation of the article to the uses and purposes to which the realty is applied, and no regard is had to the character of the annexation. Voorhis *v.* Freeman, 2 W. & S. (Pa.) 119; Pyle *v.* Pennock, 2 W. & S. (Pa.) 390; Farrar *v.* Stackpole, 6 Me. 154.

Park, J., in commenting on this rule, says: "This rule is too extensive in its application, for it includes all the machinery in mechanical and manufacturing establishments, when the connection to the freehold is made for the purpose of keeping them in position for the successful working of them, but with no design on the part of the owner to constitute them a part of the realty." Capen *v.* Peckham, 35 Conn. 88.

Whether a particular article is a fixture or not is a mixed question of law and fact. Tillman *v.* Delacy, 80 Ala. 103; Allen *v.* Mooney, 130 Mass. 155; Leonard *v.* Sticknev, 131 Mass. 541; Campbell *v.* O'Neill, 64 Pa. St. 290; Saint *v.* Pilley, 10 Excheq. (L. R.) 137; Grand Lodge Masons *v.* Knox, 27 Mo. 315.

1. Horn *v.* Baker, 9 East, 215; Clark *v.* Crownshaw, 3 B. & Ad. 804; Coombs *v.* Beaumont, 5 B. & Ad. 72; Ryall *v.* Stevens, 1 Atk. 165; Storer *v.* Hunter, 3 B. & C. 368; Bigler *v.* Newburgh Bank, etc., 26 Hun (N. Y.), 520; Gibbons' Law of Fixtures, 56.

Where by the terms of a lease the lessor was to take the trade fixtures erected by the tenant during his term, at a valuation to be determined three months before the expiration of the

2. *Debtor and Creditor.*—Inasmuch as the right of a creditor to treat chattels annexed to freehold as personal property depends upon the right of the debtor to do so, it follows that whatever fixtures the debtor is at liberty to remove may be seized and severed by an execution creditor.[1] And the purchaser at the sale

term, on the re-entry by the landlord, caused by the forfeiture of the lease, it was held that these trade fixtures went to the landlord and not to the assignees of bankruptcy, the bankruptcy taking place on the day following the execution of the writ of possession. Storer *v.* Hunter, 3 B. & C. 368.

If a tenant stipulate with his landlord that the fixtures set up by him during his term shall not be removed on his becoming bankrupt, the landlord will have a title to the fixtures rather than the assignee of the bankrupt. Coombs *v.* Beaumont, 5 B. & Ad. 72. In this case a steam-engine erected for the purpose of working a colliery to be used by the lessee during his term, but to be held as the property of the landlord, subject to such use, did not pass to the assignee of the bankrupt. Park, J., says: "The steam-engine, if affixed to the freehold, clearly does not pass to the assignees, because it does not come within the description of 'goods and chattels' in 6 G. IV. c. 17, s. 72. This was determined in the case of Horn *v.* Baker, and since that case, as far as my experience goes, I never knew that any distinction was made between such fixtures as would be removable between landlord and tenant."

Trading fixtures not expressly conveyed by the terms of a mortgage will pass to the assignees. Trappes *v.* Hunter, 2 C. & M. 152; *Ex parte* Barclay, 5 De G. M. & G. 403; Waterfall *v.* Penistone, 6 E. & B. 876.

Machinery consisting of looms in a worsted mill, though only attached to the floor for the purpose of steadying them, pass to the mortgagee as fixtures, and not to the assignees of the bankrupt. Holland *v.* Hodgson, 7 C. P. (L. R.) 328.

Filing a petition in liquidation works a forfeiture of the lease, but does not prevent the assignee from taking trade fixtures. *Ex parte* Gould, 13 Q. B. D. (L. R.) 454. Even in case of trade fixtures, if the bankrupt has previously parted with his title to the house or building, either by conveyance absolute or by mortgage, he has *prima facie*, at least, parted with his fixtures. *Ex parte* Barclay, 5 De G. M. & G. 403; Colegrave *v.* Dias Santos, 2 B. & C. 76; Cullwick *v.* Swindell, 3 Eq. Cas. (L. R.) 248; *Ex parte* Cotton, 2 M. D. & D. 725. This is true even if the trade fixtures were erected after giving the mortgage. Walmsley *v.* Milne, 7 C. B. (N. S.) 115; *Ex parte* Belcher, 4 Dea. & Chit. 703; *Ex parte* Reynall, 2 M. D. & De G. 443. *Compare* Waterfall *v.* Penistone, 6 E. & B. 876–890; Hellawell *v.* Eastwood, 6 Ex. 295.

The distinction between landlord's and tenant's fixtures does not apply when the question arises between a mortgagee and the assignee of a bankrupt. Hinchman *v.* Walton, 4 M. & W. 409; Coombs *v.* Beaumont, 5 B. & Ad. 72; Walmsley *v.* Milne, 7 C. B. (N. S.) 115; Longbottom *v.* Berry, 5 Q. B. (L. R.) 123; Sheffield, etc., Co. *v.* Harrison, 15 Q. B. D. 258.

An equitable mortgagee has the same right in contesting the claims of an assignee of a bankrupt as a legal mortgagee. Williams *v.* Evans, 23 Beav. 239; *Ex parte* Price, 2 M. D. & De G. 518; *Ex parte* Barclay, 5 De G. M. & G. 403.

The assignees of a bankrupt trader may remove trade fixtures if it be done before the landlord takes possession of the premises or before they have disclaimed. Saint *v.* Pilley. 10 Exchcq. (L. R.) 137; *In re* Moser, 13 Q. B. D. (L. R.) 738; *Ex parte* Glegg, 19 Chan. Div. (L. R.) 7. As to assignees for benefit of creditors, see Morris' Appeal, 88 Pa. St. 368.

1. Poole's Case, 1 Salk. 368; Minshall *v.* Lloyd, 2 M. & W. 450; Walton *v.* Wray, 54 Iowa, 531; State *v.* Bonham, 18 Ind. 231; Cresson *v.* Stout, 17 Johns. (N. Y.) 116; Farrar *v.* Chauffetete, 5 Den. (N. Y.) 527; Kirwan *v* Latour, 1 H. & J. (Md.) 289; Gale *v.* Ward, 14 Mass. 351; O'Donnell *v.* Hitchcock, 118 Mass. 401; Heffner *v.* Lewis, 73 Pa. St. 302; Lemar *v.* Miles, 4 Watts (Pa.), 330; Lamphere *v.* Lowe, 3 Neb. 131; Tobias *v.* Francis, 3 Vt. 435; 1 Chit. Gen. Prac. 94; Tidd's Prac. (9th Ed.) 1002; Pillow *v.* Love, 5 Hay. (Tenn.) 109.

Stevens, J., says: "Upon the most mature and deliberate examination which we have been able to give the subject, and upon a full consideration of all the leading cases to be found in the books materially relative to the subject, we are of opinion that the same rule should be applied between debtor and creditor that is applied between landlord and tenant. We think that rule more likely to give

has a right to enter upon the premises and remove them.[1] But fixtures erected by the owner of the freehold are not subject to an execution against him.[2]

satisfaction, and answer the ends of justice generally, than either of the others." Taffe *v.* Warnick, 3 Blackf. (Ind.) 111.

However, it has been held that the rule as to fixtures between the owner and purchaser at a sheriff's sale is the same as between vendor and purchaser. Farrar *v.* Chauffetete, 5 Den. (N. Y.) 527; Kirwan *v.* Latour, 1 H. & J. (Md.) 289; Powell *v.* Monson, 3 Mason, 459–467; Goddard *v.* Chase, 7 Mass. 432; Price *v.* Brayton, 19 Iowa, 309; Stillman *v.* Flennikin, 58 Iowa, 450.

A steam-engine erected by a tenant for the purpose of trade is a fixture until detached by the tenant, and if sold by the sheriff it must be sold as a part of the realty. Ruffin, J., in giving the opinion of the court, says: "There can be no doubt, however, that as between the tenant and his creditors an engine of this sort, actually fixed to and in the soil, and which cannot be removed without tearing down the mason work and house which covers it, is until severance a part of the realty. . . . If the creditor could not reach it as realty, the court would go as far in his favor in holding it to be of that species, which would render it liable to sale. But until it is parted from the soil such fixture loses its distinctive character of personalty. For this reason the sale by the constable is absolutely void, for he can in no case sell land. For the same reason the seizure by the sheriff is ineffectual to the end of vesting the property in him as a personal chattel. . . . He must sell the property in the State, and as the kind it is at the time of the sale. The single act of levying an execution does not change the nature of the property. And although the tenant might have a right to sever the fixture from the freehold, until that right be exercised by him or the officer the thing is merged in the soil." Pemberton *v.* King, 2 Dev. L. (N. Car.) 376. *Compare* State *v.* Bonham, 18 Ind. 231.

Manure made upon a farm by a tenant, in the absence of a special contract or custom, belongs to the land, and cannot be sold separately on an execution against him. Sawyer *v.* Twiss, 6 Fost. (N. H.) 345; Middlebrooke *v.* Corwin, 15 Wend. (N. Y.) 169; Wetherbe *v.* Ellison, 19 Vt. 379; Daniels *v.* Pond, 21 Pick. (Mass.) 367; Lassell *v.* Reed, 6 Me. 222. *Compare* Staples *v.* Emery, 7 Me. 201.

Boards in a corn-barn used for a permanent floor, and stone posts deposited upon the farm for the purpose and with the intention of building necessary fences cannot be sold on execution by an officer. Hackell *v.* Amsden, 57 Vt. 432.

If fixtures are erected by the debtor after the sale of the land under an execution and before the sheriff's deed passes to the purchaser, they will pass with the land. Hayes *v.* N. Y. Min. Co., 2 Colo. 273.

A steam-engine and boiler bought by the owner of a mill, and hauled upon the ground with the intention of placing them in the mill, become a part of the realty, and are not subject to a levy of an execution as personal property. Patton *v.* Moore, 16 W. Va. 428; s. c., 37 Amer. Rep. 789. *Compare* Miller *v.* Wilson, 33 N. W. Rep. 128.

Fixtures are subject to a mechanic's lien. Spruhen *v.* Stout, 52 Wis. 517; Appeal of Dickey, 7 Atl. Rep. (Pa. 1887) 577; Ward *v.* Kilpatrick, 85 N. Y. 413; s. c., 37 Amer. Rep. 472; Baum *v.* Covert, 62 Miss. 113.

A fixture erected by a tenant for trade purposes may be levied on and sold or removed by the tenant himself, although there be an agreement between him and his landlord, that in a certain event the fixture was to be the property of the landlord, provided that at the time of the levy or the removal the event had not taken place. Lemar *v.* Miles, 4 Watts (Pa.), 330.

A dancing-hall erected by the owner of land upon cedar posts to be used in connection with his saloon is realty, and not subject to attachment as personal property. Lipsky *v.* Borgmann, 52 Wis. 256.

1. Lamphere *v.* Lowe, 3 Neb. 131; Doty *v.* Gorham, 5 Pick, (Mass) 487; Lemar *v.* Miles, 4 Watts (Pa.), 330.

2. Winn *v.* Ingilby, 5 B. & Ald. 625; Green *v* Phillips, 26 Gratt. (Va.) 752; 1 Chitt. Gen. Prac. 94; Tidd's Prac. (9th Ed.) 1002; 2 Stark. Ev. (5th Am. Ed.) 909.

A clapboard machine and shingle machine in a sawmill were held to pass on a sale of the real estate on an execution, although the owner had mortgaged them as personal property, and the mortgage was recorded in the town-clerk's office. Trull *v.* Fuller, 28 Me. 545.

Engines and machinery for a flouring-mill, erected by lessees under an agreement with the landlord that they should have the right to remove them at the end

3. *Heir and Executor.*—The general rule as to fixtures, when the question arises between an heir and executor, is that nothing, after having been annexed to the freehold, can be severed and removed by the executor unless some good and sufficient reason shall appear why that which has been made a part of the inheritance should be converted into personalty, contrary to the design of the freeholder, as it would appear from the annexation.[1]

of their term, were held to pass as fixtures to the purchaser of their interest in the real estate under the lease. McNally *v.* Connolly, 70 Cal. 3.

Nursery trees planted by the owner of land pass to the heir, and are not subject to an execution until severed. Osborn *v.* Rabe, 67 Ill. 108; Bank of Lansingburg *v.* Crary, 1 Barb. (N. Y.) 542.

A smutter loaned to the owner of a grist-mill and annexed to the mill in the usual manner of attaching such machinery, the owners of the mill to pay a certain rental yearly for the use thereof, passes to the purchaser of the real estate at a judicial sale, without notice of such an arrangement between the parties. Stillman *v.* Flenniken, 58 Iowa, 450.

Trade fixtures, consisting of a stationary mill with engines, boiler, and machinery, erected by two persons upon the land of one of them, cannot be held as realty in favor of an execution purchaser of the land for the debt of the freeholder. Young *v.* Baxter, 55 Ind. 188.

1. Elwes *v.* Mawe, 3 East, 38; Lee *v.* Risdon, 7 Taunt, 188; Fisher *v.* Dixon, 12 Clark & Fin. 312; Winn *v.* Ingilby, 5 B. & Ald. 625; Kinsell *v.* Billings, 35 Iowa, 154; Buckley *v.* Buckley, 11 Barb. (N.Y.) 43; Voorhees *v.* McGinnis, 48 N.Y. 278; Wadleigh *v.* Janvrin, 41 N. H. 503; House *v.* House, 10 Paige (N. Y.), 158; Doak *v.* Wiswell, 38 Me. 569; McDavid *v.* Wood, 5 Heisk. (Tenn.) 95; 2 Redfield on Wills, 145.

Machinery, although generally regarded as personal property, yet when erected by the owner of land for the better enjoyment of the freehold, passes at his death to his heir, and does not belong to the executor as assets. Lord Cottenham, in a case which was decided as if it had arisen between heir and executor, says: "Then the case being simply this, the absolute owner of the land having erected upon and affixed to the freehold, and used for the purpose of the beneficial enjoyment of the real property, certain machinery, the question is, Is there any authority for saying that under these circumstances the personal representative has a right to step in and lay bare the land and take away all the machinery necessary for the enjoyment of the land? Although machinery is generally in its nature personal property, yet with regard to machinery or a manufactory erected upon the freehold for the enjoyment of the freehold nobody can suppose that can be the rule of law." Fisher *v.* Dixon, 12 Clark & Fin. 312. See also Walmsley *v.* Milne, 7 C. B. (N. S.) 115; House *v.* House, 10 Paige (N. Y.), 158. And if the *corpus* of such machinery goes to the heir, all that belongs to that machinery, although more or less capable of being detached and of being used in the detached state, goes with it. Fisher *v.* Dixon, 12 Clark & Fin. 312; Haley *v.* Hamersley, 3 De G. F. & J. 589.

So it has been held that although the fixtures were erected for trade and manufacture, they would nevertheless go to the heir with the estate. "I apprehend, therefore, that the case comes clearly within that of machinery affixed to the land for the purpose of better and more beneficially using and enjoying the land of which he is the owner; and although the means of such use and enjoyment be manufacture and trade, still I am of opinion that all such articles in question as are affixed to the freehold, whether by screws, solder, or any other permanent means, or by being let into the soil, . . . partake of the nature of the soil, and would have descended to the heir along with and as part of the soil itself." Vice-Chancellor Wood in Mathew *v.* Fraser, 2 Kay & J. 536.

However, in McDavid *v.* Wood it was held an interest which the deceased had in a saw-mill went to the executor as assets, and not to the heir as realty, on the ground that it was a trade fixture. McDavid *v.* Wood, 5 Heisk. (Tenn.) 95. *Compare* Pea *v.* Pea, 35 Ind. 387. And in another case it was said that "as between heir and executor, modern notions are far more liberalized and accommodated to the ordinary purposes of those who carry on business than formerly." Pillow *v.* Love, 5 Hayw. (Tenn.) 110.

It has been held that set-pots, ovens, and ranges fixed up by the owner of a house would go to the heir, and could not therefore be seized on an execution

4. *Landlord and Tenant.*—When the question of removal of fixtures arises between, landlord and tenant the law is now well established, both in England and America, that a tenant may sever and remove all fixtures of a chattel nature erected by him upon the leased premises for the purpose of ornament, domestic convenience, or to carry on a trade.[1] The removal must be made without

against the owner. Wynn *v.* Ingilby, 5 B. & Ald. 625. See also Colegrave *v.* Dias Santos, 2 B. & C. 76; The King *v.* Inhabitants, etc., 4 B. & C. 686. Also, salt-pans, wainscot, furnaces, and pictures fixed to the wainscot go to the heir. Lawton *v.* Salmon, 1 H. Black. 258, note. Also nursery trees. Meyers *v.* Schemp, 67 Ill. 469. And manure. Fay *v.* Muzzey, 13 Gray (Mass.), 53; Sawyer *v.* Twiss, 6 Foster (N. H.), 345.

1. 2 Taylor's Land. & Ten. (8th Ed.) 149; Lawton *v.* Lawton, 3 Atk. 13; Penton *v.* Robart, 2 East, 88; Pugh *v.* Arton, 8 Eq. (L. R.) 626; Hayes *v.* N. Y. Mining Co., 2 Colo. 273; Youngblood *v.* Harris, 68 Ga. 630; Thomas *v.* Crout, 5 Bush (Ken.), 37; Conrad *v.* Saginaw Min. Co., 54 Mich. 249; Davis *v.* Buffum, 51 Me. 160; Winslow *v.* Merchants' Insurance Co., 4 Met. (Mass.) 306–310; Deane *v.* Hutchinson, 40 N. J. E. 83; O. R. & N. Co. *v.* Mosier, 14 Oreg. 519; Railroad Co. *v.* Deal, 90 N. Car. 111; Keogh *v.* Daniell, 12 Wis. 181; Gaffield *v.* Hapgood, 17 Pick. (Mass.) 192.

Where a custom is shown of leasing lots in a city, placing buildings thereon for dwelling purposes, and removing them before the expiration of the term, *held*, that although the lease was silent as to the removal of such improvements, it was presumed to be made with reference to the custom. Keogh *v.* Daniell, 12 Wis. 163. See also Van Ness *v.* Packard, 2 Pet. (U. S.) 137; Weathersby *v.* Sleeper, 42 Miss. 732.

A conveyance of leased premises by a landlord does not interfere with the tenant's right to remove his fixtures. Lamphere *v.* Lowe, 3 Neb. 131–136; 1 Wash. Real Prop. § 27. Nor will a lien created by the lease on fixtures to be erected by the tenant to secure the rent be valid against the owner of a chattel mortgage upon such fixtures, having no knowledge of the terms of the lease. Lamphere *v.* Lowe, 3 Neb. 131.

An agreement by a tenant to deliver up in good order all future erections or additions to or upon the premises cannot be extended so as to apply to trade fixtures. Holbrook *v.* Chamberlin, 116 Mass. 155; Cubbins *v.* Ayres, 4 Lea (Tenn.), 329; Bishop *v.* Elliott, 11 Exchecq. 113; Naylor *v.* Collinger, 1 Taunton, 19. *Compare* Elliott *v.* Bishop, 10 Excheq. 495. But it has been held that a boiler under such a clause passes to the landlord. Agnew *v.* Whitney, 10 Phil. (Pa.) 77. See also Gett *v.* McManus, 47 Cal. 56; Thresher *v.* East London, etc., Co., 2 B. & C. 608.

A building erected by a tenant at will without any contract with the land owner, on a brick foundation, over a cellar, is not removable by the tenant. Madigan *v.* McCarthy, 108 Mass. 376. It was also held in this case that the mere assent of the owner of the land to treat the building as personal property would avail nothing until after severance.

When a tenant erects buildings in accordance with the terms of his lease, he will not be allowed to remove them at the expiration of his term. Deane *v.* Hutchinson, 40 N. J. E. 83.

The rigor of the common law has been gradually relaxed in favor of tenants, and the first exceptions from the strict rule, that whatever had once become annexed to the freehold partook of its nature as real property, was in the matter of of trade fixtures. Elwes *v.* Mawe, 3 East, 38; Poole's Case, Salk. 368; Lawton *v.* Salmon, 1 H. Blacks. 259, note. In this case Lord Mansfield says: "All the old cases, some of which are in the year-books and Brooks' Abridgment, agree that whatever is connected with the freehold, as wainscot, furnaces, pictures fixed to the wainscot, even though put up by the tenant, belong to the heir. But there has been a relaxation of the strict rule in that species of cases for the benefit of trade between landlord and tenant, that many things may now be taken away which formerly could not, such as erections for carrying on any trade, marble chimney-pieces, and the like, when put up by the tenant."

The exception having once been made in favor of trade fixtures, it was soon extended so as to apply to ornamental and domestic fixtures. *Ex parte* Quincey, 1 Atk. 477; Lawton *v.* Lawton, 3 Atk. 13; Elwes *v.* Mawe, 3 East, 38. And in *England*, by statute, this exception has been extended to agriculture. 14 & 15

serious injury to the freehold,[1] and while he is still in possession of the premises as a tenant.[2] But the time of removal may be extended by agreement.[3]

Vict., c. 25, s. 3; 38 & 39 Vict. c. 92, s. 53; 2 Smith's Leading Cas. 191. See also AGRICULTURAL FIXTURES, *post*.

A carriage-house, registers and slates, double glass doors, gas-pipes, iron sink, and cupboard were held to be permanent accessions to the freehold, and not removable by an outgoing tenant. Nor could the tenant prove a parol agreement with the landlord that was made at the time of executing a written lease of the premises, allowing him to remove all fixtures erected by him during the term. Appeal of Kenny, 12 Atl. Rep. (Pa.) 589.

**1.** Conrad *v.* Saginaw Min. Co., 54 Mich. 249; Cubbins *v.* Ayres, 4 Lea (Tenn.), 329; McDavid *v.* Wood, 5 Heisk. (Tenn.) 95; Ambs *v.* Hill, 10 Mo. Ap. 108; Allen *v.* Kennedy, 40 Ind. 142; 2 Taylor's Land. & Ten. § 550.

Lord Hardwicke laid down the rule that the principal thing "shall not be destroyed by the accessory." Lawton *v.* Lawton, 3 Atk. 13. When the building is but an accessory to the fixtures, both are removable. Hence, when a building is erected over an engine for its protection, both can be removed as trade fixtures. Nor does it matter whether the building is wood or brick. Lawton *v.* Lawton, 3 Atk. 13; Foley *v.* Addenbrooke, 13 M. & W. 173.

**2.** Poole's Case, 1 Salk. 368; Lyde *v.* Russell, 1 B. & Ad. 394; Minshall *v.* Lloyd, 2 M. & W. 450; Elwes *v.* Mawe, 3 East, 38; Penton *v.* Robart, 2 East, 88; Youngblood *v.* Harris, 68 Ga. 630; Gaffield *v.* Hapgood, 17 Pick. (Mass.) 192; Watriss *v.* First Nat. Bank, 124 Mass. 571; Hayes *v.* Doane, 11 N. J. E. 84; Torrey *v.* Burnett, 38 N. J. L. 457; Loughran *v.* Ross. 45 N. Y. 792; Van Ness *v.* Pacard, 2 Pet. (U. S.) 137.

Some conflict has arisen as to what is meant by the expression "during the term." In Penton *v.* Robart, 2 East, 88, it was held that the tenant's right to remove his fixtures continued as long as he was in possession of the premises, although his term had expired. The case was decided upon the principle that as the tenant still retained possession of the premises the presumption that he had abandoned the fixtures to the landlord was rebutted

It was said in one case "that the rule to be collected from the several cases decided on this subject seems to be this: that the tenant's right to remove fixtures continues during his original term and such further period of possession by him as he holds the premises under a right still to consider himself as tenant." Weeton *v.* Woodcock, 7 M. & W. 14. See also Loan and Discount Co. *v.* Drake, 6 C. B. 796. "If the tenant remain in possession after his term expires, and perform all the conditions of the lease, it amounts to a renewal of the lease from year to year, and I take it he will be entitled to remove fixtures during the year." Woodward, J., in Davis *v.* Moss, 38 Pa. St. 346. See also Kerr *v.* Kingsbury, 39 Mich. 150; Bircher *v.* Parker, 40 Mo. 118.

When the lessee holds over his term and the landlord secures judgment of restitution, which is not immediately enforced, the tenant in the mean time has no right to remove a small dwelling-house erected by him during his term. Smith *v.* Park, 31 Minn. 70.

It has been held that when the tenancy expires on a day certain, and the tenant holds over against the will of the landlord, he forfeits his right to remove fixtures. Cromie *v.* Hoover, 40 Ind. 49; Allen *v.* Kennedy, 40 Ind. 142.

A tenant having mortgaged his fixtures during an unexpired term cannot, by a surrender of his lease before the end of the term, prevent the mortgagor from entering upon the premises and removing them. Loan and Discount Co. *v.* Drake, 6 C. B 796. See also Saint *v.* Pilley, 10 Excheq. (L. R.) 137. Nor will the surrender of the lease by the tenant affect previously acquired rights of his subtenants. Baker *v.* Pratt, 15 Ill. 568; McKensie *v.* Lexington, 4 Dana (Ken.), 130.

Where the landlord agreed to sell trade fixtures for the benefit of the tenant, but failed to do so, it was held that the tenant was entitled to a reasonable time after surrendering the premises to remove the fixtures. Torrey *v.* Burnett, 38 N. J. L. 457.

If the landlord should sever his tenant's fixtures after the tenant had surrendered the premises, the latter cannot claim them as personal property. Stokoe *v.* Upton, 40 Mich. 581.

**3.** Cromie *v.* Hoover, 40 Ind. 49; Torrey *v.* Burnett, 38 N. J. L. 457; Josslyn *v.* McCabe, 46 Wis. 591; Saint *v.* Pilley, 10 Excheq. L. R. 137.

The license to remove fixtures after the expiration of the lease need not be in

5. *Mortgagor and Mortgagee.*—The general rule as to fixtures between mortgagor and mortgagee is that all annexations to the realty pass by the mortgage to the mortgagee unless by express terms the mortgagor except them from the terms of the conveyance.[1] Annexations made after the execution of the mortgage

writing. Torrey *v.* Burnett, 38 N. J. L. 457. But a license to leave certain fixtures on the premises after they have been surrendered cannot be construed as a license to re-enter and remove them. Josslyn *v.* McCabe, 46 Wis. 591.

1. Hitchman *v.* Walton, 4 M. & W. 409; Longstaff *v.* Meagoe, 2 A. & E. 167; Walmsley *v.* Moore, 7 C. B. (N. S.) 115; *Ex parte* Belcher, 4 Dea. & Ch. 703; Longbottom *v.* Berry, 5 Q. B. (L. R.) 123; Merritt *v.* Judd, 14 Cal. 60; Maples *v.* Millon, 31 Conn. 568; Pea *v.* Pea, 35 Ind. 387; Arnold *v.* Crowder, 81 Ill. 56; Winslow *v.* Merchants' Ins. Co., 4 Met. (Mass.) 306; Union Bank *v.* Emerson, 15 Mass. 159; Quimby *v.* Manhattan, etc., Co., 24 N. J. E. 260; Wadleigh *v.* Janvrin, 41 N. H. 503–514; McRea *v.* Cent. Nat. Bank, 66 N. Y. 489; Hoskin *v.* Woodward, 45 Pa. St. 42.

"As between mortgagor and mortgagee, when we have once established the facts that a thing appertains to the real estate, is necessary for its enjoyment, and is permanently attached to the freehold, its character as a fixture resulting to the benefit of the mortgagee is determined." Chancellor Williamson in Crane *v.* Brigham, 11 N. J. E. 29.

Chief Justice Shaw has very clearly stated the law on this branch of the subject in these words: "All buildings erected and fixtures placed on mortgaged premises by the mortgagor must be regarded as permanently annexed to the freehold; they go to enhance the value of the estate, and will therefore inure to the benefit of the mortgagee so far as they enhance the value of the equity of redemption, and thereby inure to the benefit of the mortgagor." Butler *v.* Page, 7 Met. (Mass.) 40. See also Hunt *v.* Hunt, 14 Pick. (Mass.) 374; Winslow *v.* Merchants' Ins. Co., 4 Met. (Mass.) 306.

As the mortgagor has the power to redeem his estate by the payment of the debt, there is no hardship connected with the strict enforcement of the common-law rule as to annexations to the freehold. Graeme *v.* Cullen, 23 Gratt. (Va.) 266–290.

A mortgage upon a mill containing articles of machinery that have become fixtures will not be affected by a chattel mortgage given upon the machinery as personal property. Smith *v.* Waggoner, 50 Wis. 155. See also Adams *v.* Beadle, 47 Iowa, 439; Keeler *v.* Keeler, 31 N. J. E. 181.

Where the mortgagor united with his partner in erecting a small building on blocks, and which was used for the purpose of trade, it was held that it would not pass to the mortgagee under his mortgage. Kelly *v.* Austin, 46 Ill. 156. Walker, J., in giving the opinion of the court, says: "Even a mortgagor may make temporary erections, if they are not attached to the freehold, and remove them before the mortgage is foreclosed, if he does not depreciate the value of the security as it existed when the mortgage was given." *Compare* State Sav. Bank *v.* Kercheval, 65 Mo. 682.

Platform scales erected by the owner of land will pass to the mortgagee on foreclosure. Arnold *v.* Crowder, 81 Ill. 56. See also Bliss *v.* Whitney, 9 Allen (Mass.), 114.

It has been held that when a building is constructed for milling or manufacturing purposes, and is so employed, all the machinery and appliances used in connection with the business, whether attached in any way to the realty or not, become a part of the realty, and a mortgage simply of the land carries with it such machinery and appliances, even without any mention being made thereof. Farrar *v.* Stackpole, 6 Me. 154; Winslow *v.* Merchants' Ins. Co., 4 Met. (Mass.) 306–314; Ege *v.* Kilee, 84 Pa. St. 333; Ottumwa Woollen Mill Co. *v.* Hawley, 44 Iowa, 57; Rochereau *v.* Bobb, 27 La. Ann. 657; Taylor *v.* Collins, 51 Wis. 123. *Compare* Despatch Line, etc., *v.* Bellamy Manfg. Co., 12 N. H. 205. But it seems that the largest number of authorities insist on a physical annexation to the realty to make machinery a part of the freehold. Farmers' Loan and Trust Co. *v.* Minneapolis E. & M. Works, 35 Minn. 543; McKim *v.* Mason, 3 Md. Chan. 186; Burnside *v.* Twitchel, 43 N. H. 390. Mitchell, J., says: "While physical annexation is not indispensable, the adjudicated cases are almost universally opposed to the idea of mere loose machinery or utensils, even where it is the main agent or principal thing in prosecuting the business to which the realty is adapted, being considered a part of the realty for any purpose. To make it a fixture it must not merely be essential to the business of

are subject to the same rules as those made before.[1] Nor does the structure, but it must be attached to it in some way, or at least it must be mechanically fitted, so as in ordinary understanding to constitute it a part of the structure itself. It must be permanently attached to or the component part of some erection, structure, or machine which is attached to the freehold, and without which the erection, structure, or machine would be imperfect or incomplete." Wolford *v.* Baxter, 33 Minn. 12.

In *Alabama* it has been held that mere use of machinery in a cotton-mill is not enough, as between mortgagor and mortgagee, to subject it to the lien of the mortgage on the land. Rogers *v.* Prattville Mfg. Co., 1 South. Rep. 643.

A steam-engine and boiler used in a mill pass as a part of the realty by a mortgage of the estate by the owner. Perkins *v.* Swank, 43 Miss. 349; Sweetzer *v.* Jones, 35 Vt. 317; Harris *v.* Haynes, 34 Vt. 220; Scheifele *v.* Schmitz, 42 N. J. E. 700.

Looms, cards, spinning frames, etc., fastened to the floor in a cotton-mill to steady them, are not fixtures as between mortgagor and mortgagee. McKim *v.* Mason, 3 Md. Chan. 186. See also Swift *v.* Thompson, 9 Conn. 63; Murdock *v.* Gifford, 18 N. Y. 28; Fullam *v.* Stearns, 30 Vt. 443; Bartlett *v.* Wood, 32 Vt. 372. *Compare* Longbottom *v.* Berry, 5 Q. B. (L. R.) 123; Holland *v.* Hodgson, 7 C. P. (L. R.) 328; Ottumwa Woollen Mill Co. *v.* Hawley, 44 Iowa, 57.

It has been held that the law makes a distinction between machinery which furnishes the motive-power for a mill or factory and that which is propelled by the motive-power, the former being considered as realty and the latter as personalty. Case Mfg. Co. *v.* Garver (Ohio, 1886), 13 N. E. Rep. 493; Teaff *v.* Hewitt, 1 Ohio St. 512; Keeler *v.* Keeler, 31 N. J. E. 181; Murdock *v.* Gifford, 18 N. Y. 28; McConnell *v.* Blood, 123 Mass. 47. *Compare* Taylor *v.* Collins, 51 Wis. 123; Ottumwa Woollen Mill Co. *v.* Hawley, 44 Iowa, 57.

Machinery annexed in a substantial manner to a building is not a fixture unless there is such unity of title to the realty and machinery that a conveyance of the realty would of necessity convey the fixtures also. Adams *v.* Lee, 31 Mich. 440; Robertson *v.* Corsett, 39 Mich. 777; Trappes *v.* Hunter, 2 C. & M. 153; Young *v.* Baxter. 55 Ind. 188. See also Globe Marble Mills Co. *v.* Quinn, 76 N. Y. 23.

Machinery annexed to real estate only by belting will not as a matter of law pass to a mortgagee under the mortgage. Carpenter *v.* Walker, 140 Mass. 416; Balliett *v.* Humphreys, 78 Ind. 388.

Electric-light wires fastened to masts in the street and connected with the plant are a part of the machinery, and pass under a mortgage upon the lot upon which the plant is situated. Fechet *v.* Drake (Ariz.), 12 Pac. Rep. 694. See also Regina *v.* North Staffordshire R. Co., 3 E. & E. 392.

Bridges, rails, and other property, which become affixed to and a part of a railroad covered by a prior mortgage, will be held by the lien of such mortgage in favor of *bona fide* creditors as against any contract between the furnisher of the property and the railroad company, containing stipulations that the title to the property should not pass until paid for. Porter *v.* Pittsburg Steel Co., 122 U. S. 267; Dunham *v.* Railway Co., 1 Wal. (U. S.) 254; Fosdick *v.* Schall, 99 U. S. 235–251; Dillon *v.* Barnard, 21 Wal. 430; Hunt *v.* Bay State Iron Co., 97 Mass. 279.

When a chattel mortgage is given on machinery, which is afterwards attached to the mill in such a way as to be easily removed without injury to the freehold, it will be valid against a prior real-estate mortgage. First Nat. Bank *v.* Elmore, 52 Iowa, 541; Eaves *v.* Estes, 10 Kan. 314; Tifft *v.* Horton, 53 N. Y. 377; Henry *v.* Von. Branstein, 12 Daly (N.Y.), 480; Miller *v.* Wilson, 33 N. W. Rep. 128; Burrill *v.* S. N. Wilcox Lum. Co., 32 N. W. Rep. 824; Keeler *v.* Keeler, 31 N. J. E. 181. See also Blancke *v.* Rogers, 26 N. J. E. 563. *Compare* Voorhees *v.* McGinnis, 48 N. Y. 278; Pierce *v.* George, 108 Mass. 78.

A mortgage of a factory *eo nomine* includes *ex vi termini* all machinery and other articles essential to the factory. Delaware, etc., R. Co. *v.* Oxford Iron Co., 36 N. J. E. 452. See also Voorhis *v.* Freeman, 2 W. & S. (Pa.) 116; Hoskin *v.* Woodward, 45 Pa. St. 42; Shelton *v.* Ficklin, 32 Grattan (Va.), 727.

A mortgagee may consent to a fixture remaining personal property, in which case the right of removal is not lost. Eaves *v.* Estes. 10 Kan. 314; Tibbetts *v.* Moore, 23 Cal. 208; Wight *v.* Gray, 73 Me. 297; Foster *v.* Prentiss, 75 Me. 279; Bartholomew *v.* Hamilton, 105 Mass. 239; Tifft *v.* Horton, 53 N. Y. 377; Cullers *v.* James, 66 Tex. 494; Harkey *v.* Cane (Tex.), 6 S. W. Rep. 637.

1. 1. Washburn Real Prop. (5th Ed.),

the favor generally extended to trade fixtures apply when the question arises between mortgagor and mortgagee.[1] The inten-

25; Jones Mort. sect. 436; Winslow *v.* Merchants' Ins. Co., 4 Met. (Mass.) 306; Lynde *v.* Rowe, 12 Allen (Mass.), 100; Corliss *v.* McLagin, 29 Me. 115; Wight *v.* Gray, 73 Me. 297; State Bank *v.* Kerchival, 65 Mo. 682; Coleman *v.* Stearns Mfg. Co., 38 Mich. 30; Burnside *v.* Twitchell, 43 N. H. 390; Blake *v.* Respass, 77 N. Car. 193; Bond *v.* Cope, 71 N. Car. 97; Snedeker *v.* Warring, 12 N. Y. 170; Wood *v.* Whelen, 93 Ill. 153; Sweetzer *v.* Jones, 35 Vt. 317; Tillman *v.* DeLacy, 80 Ala. 103; Roberts *v.* Dauphin Dep. Bank, 19 Pa. St. 71; McKim *v.* Mason, 3 Md. Ch. 186; *Ex parte* Belcher, 4 Dea. & Ch. 703; Cullewick *v.* Swindell, 3 Eq. Cas. (L. R.) 249; Walmsley *v.* Milne, 7 C. B. (N. S.) 115; *Ex parte* Cotton, 2 M. D. & D. 725.

The ground on which it has been held that fixtures erected after the mortgage passed with the land is, that as the mortgagee may suffer by the depreciation of the property, arising from fluctuation in value, from accident, and from neglect, so he may be benefited by its appreciation, whether the same arises from the proper cultivation and improvement of the property, or from any other cause. Roberts *v.* Dauphin Dep. Bank, 19 Pa. St. 71.

If a mortgagor lease the mortgaged premises, and the tenant erect fixtures with an understanding with the mortgagor that they will be removable at the end of the term, they become a part of the realty, and cannot be removed by the tenant. Frankland *v.* Moulton, 5 Wis. 1; Lynde *v.* Rowe, 12 Allen (Mass.), 100. See also Hunt *v.* Bay State Iron Co., 97 Mass. 279. *Compare* Tifft *v.* Horton, 53 N. Y. 377; Sanders *v.* Davis, 15 Q. B. D. 218.

Machinery was placed in a building by the owner of the lot, with the understanding that the owner of the machinery was to take a lease of the premises, but before the lease was executed, the owner of the land gave a mortgage upon the lot, to one who saw the machine on the premises, and was ignorant of the agreement between the owner of it and the owner of the premises. *Held*, that the machinery passed by the mortgage. Southbridge Sav. Bank *v.* Stevens Tool Co., 130 Mass. 547. See also Hunt *v.* Bay State Iron Co., 97 Mass. 279.

If, after the execution of a mortgage on real estate, fixtures are added by a tenant at will of the mortgagor, his right to remove them, after an entry by the mortgagee for the purpose of foreclosure must be determined by the rule which prevails as between mortgagor and mortgagee, and not that which prevails between landlord and tenant. Lynde *v.* Rowe, 12 Allen (Mass.), 100; Wight *v.* Gray, 73 Me. 297.

Where machinery was bought by a mortgagor and placed in a building after the mortgage was given, the vendor of the machinery cannot claim it under a bill of sale with condition that title should revert to the vendor if the note given to secure the price of the machinery were not paid, but it passes under the mortgage to the mortgagee. Thompson *v.* Vinton, 121 Mass. 139; Frankland *v.* Moulton, 5 Wis. 1; Roddy *v.* Brick, 42 N. J. E. 128; Tibbetts *v.* Moore, 23 Cal. 208; Hamilton *v.* Huntley, 78 Ind. 521; s. c., 41 Am. Rep. 593; Bass Foundry *v.* Gallentine, 99 Ind, 525; Davenport *v.* Shants, 43 Vt. 546. *Compare* Tifft *v.* Horton, 53 N. Y. 377. In this case it was held that a steam-engine and boiler put up in an elevator, upon which machinery a chattel mortgage was given before the delivery of it, containing a clause providing that the property should remain personal property until paid for, without reference to the manner in which it was attached to the real estate, did not pass under a mortgage upon the real estate.

Nor will an agreement between vendor and vendee of machinery which becomes fixtures by being attached to the freehold bind a subsequent mortgagee without notice of the agreement, Southbridge Savings Bank *v.* Exeter Machine Works, 127 Mass. 542; Davenport *v.* Shants, 43 Vt. 546.

Buildings erected by a mortgagor after foreclosure of the mortgage pass with the land. Guernsey *v.* Wilson, 134 Mass. 482. See also Mutual Life Ins. Co. *v.* Dowden, 3 Atl. Rep. 351. *Compare* Henry *v.* Von Brandenstein, 12 Daly (N. Y.) 480.

When the chattel is annexed after giving the mortgage, and is of doubtful character, there must be stronger evidence of intention to make a permanent accession to the freehold than if it were annexed prior to or at the time of giving the mortgage. Tillman *v.* De Lacy, 80 Ala. 103; Clore *v.* Lambert, 78 Ky. 224.

1. Merritt *v.* Judd, 14 Cal. 60; Burnside *v.* Twitchell, 43 N. H. 390; Wight *v.* Gray, 73 Me. 297; Winslow *v.* Merchants' Ins. Co., 4 Met. (Mass.) 306;

tion of the mortgagor in making the annexations is to be closely considered in determining whether a fixture erected by him is removable or not.[1] The same rules as to fixtures apply between mortgagor and mortgagee as between heir and executor and between vendor and vendee.[2]

Childress *v.* Wright, 2 Coldw. (Tenn.) 350; Mathews *v.* Fraser, 2 K. & T. 536; Longbottom *v.* Berry, 5. Q.B. (L.R.) 123; Walmsley *v.* Milne, 7 C. B. (N. S.) 115; Cullwick *v.* Swindell, 3 Eq. Cas. (L. R.) 249; Climie *v.* Wood, 3 Ex. (L. R.) 257.

In Climie *v.* Wood, 3 Ex. (L. R.) 257, Kelly, C. B., says: "There have been several cases where the courts have decided that upon the true construction of the mortgage deeds, trade fixtures were removable by the mortgagor, but not one to show that such right exists without a special provision. A mortgage is a pledge for a debt, and it is not unreasonable, if a fixture be annexed to land at the time of a mortgage, or if the mortgagor in possession afterwards annexes a fixture to it, that the fixtures shall be deemed an additional security for the debt, whether it be a trade fixture or a fixture of any other kind. It has already been observed that no authority has been cited to show that trade fixtures may be removed by the mortgagor, but there are several to the contrary."

1. Quimby *v.* Manhattan, etc., Co., 24 N. J. E. 260; Rogers *v.* Brokaw, 25 N. J. E., 496; Jones *v.* Ramsey, 3 Ill. Ap. 303; Robertson *v.* Corsett, 39 Mich. 777; Arnold *v.* Crowder, 81 Ill. 56. Judge Dillon, in discussing the law of fixtures, says: "Whoever traces the history of the growth and development of the law on the subject, will see that the constant tendency of the judicial mind has been towards the emphasizing the importance of intention, actual or presumed, from the character, relations, and purposes of the property as an element of controlling and frequently decisive importance." 4 Cent. L. Jour. 22. And in one case the court says: "If the intention was to render the improvement permanent when erected, there can be no doubt that it became part of the freehold, and no subsequent change of intention changed its character to that of personal property. Dooley *v.* Crist. 25 Ill. 551.

Intent alone will not convert a chattel into a fixture. Walford *v.* Baxter, 33 Minn. 12; Farmers' L. & T. Co. *v.* Minn. E. & M. Works. 35 Minn. 543; Theilman *v.* Carr, 75 Ill. 385; Arnold *v.* Crowder, 81 Ill. 56; Treadway *v.* Sharon. 7 Nev. 37.

It is not the intention to make a thing annexed to or placed upon the freehold personal property that alters its legal character as a fixture, but the intention to make a permanent or temporary annexation. Rogers *v.* Brokaw, 25 N. J. E. 496.

Erections made by the owner of real estate are presumed to be permanent. Arnold *v.* Crowder, 81 Ill. 56; Winslow *v.* Merchants' Ins. Co., 4 Met. (Mass.) 306.

Machinery may remain chattels for all purposes, even though physically attached to the freehold by the owner, if the mode of attachment indicates that it is merely to steady it for its more convenient use, and not to make it an adjunct of the building or soil. Carpenter *v.* Walker, 140 Mass. 416; Hubbell *v.* East Cambridge Bank, 132 Mass. 447; McGuire *v.* Park, 140 Mass. 21.

The fact that annexations to the freehold are called chattels in a deed to the mortgagor does not affect the mortgagee's right to them as fixtures. Quimby *v.* Manhattan, etc., Co., 24 N. J. E. 260. See also Rogers *v.* Brokaw, 25 N. J. E. 496; Lyle *v.* Palmer. 42 Mich. 314. Nor does excepting fixtures from the terms of a mortgage make them personalty. Davis *v.* Eastham, 81 Ken. 116.

An owner of machinery and other things in the nature of fixtures, which may be easily severed from the realty, may treat them as chattels, and by the execution of a chattel mortgage upon them estop himself from asserting as against the mortgagee that they are real estate, and the mortgagee may put his mortgage in evidence to show his right to the possession of the articles mortgaged, without thereby putting the title to real estate in issue. Corcoran *v.* Webster, 50 Wis. 125; Smith *v.* Benson, 1 Hill (N. Y.), 176.

2. Arnold *v.* Crowder, 81 Ill. 56; Burnside *v.* Twitchell, 43 N. H., 390; Wadleigh *v.* Janurin, 41 N. H., 503; Thomas *v.* Davis, 76 Mo. 42; Davidson *v.* Westchester Gaslight Co., 99 N. Y. 558; Montague *v.* Dent. 10 Rich. (S. Car.) 135; Johnson *v.* Wiseman, 4 Met. (Ky.) 357; Weathersby *v.* Sleeper, 42 Miss. 732.

6. *Executor or Tenant for Life and Remainderman.*—As between these two classes of persons, the law of fixtures is not as strict as between heir and executor, nor so liberal as between landlord and tenant. However, it would be safe to lay down the general rule that fixtures erected by a tenant for life, for the purposes of trade, pass at his death to his executor as assets.[1]

7. *Tenants in Common.*—The rule governing fixtures erected upon land by tenants in common is the same as that governing cases of vendor and vendee.[2]

1. Dudley *v.* Warde, Amb. Ch. Rep. 113. See also Elwes *v.* Mawe, 3 East, 38; Lawton *v.* Lawton, 3 Atk. 13; 10 American Jurist. 60. In the case of Lawton *v.* Lawton, 3 Atk. 13, Lord Hardwicke said. "This is not a case between an ancestor and heir, but an intermediate case between a tenant for life and remainderman. In the reason of the thing the situation of the tenant for life comes near to that of a common tenant, where the goods of the public is the material consideration. These reasons of public benefit and convenience weigh greatly with me, and are a principal ingredient in my present opinion."

Inasmuch as the executor of a tenant for life has more favor shown him than the executor of the owner of the land, it follows that whatever an executor of the freeholder could remove would be also removable by the executor of the life tenant. But in some cases the executor has been permitted to remove ornamental fixtures against the will of the heir. 2 Smith's Leading Cas. 197; Harvey *v.* Harvey, 2 Strange, 1218. Hangings nailed to the wall go to the executor. Squier *v.* Mayer, 2 Freem. 249. But pictures and glasses put up instead of wainscot go to the heir, and not to the executor. Cave *v.* Cave, 2 Vern. 508.

Tapestries, pictures in panels, frames filled with satin, attached to the walls, and statues, figures, vases, and stone garden seats, are fixtures, and pass to the remainderman. D'Eyncourt *v.* Gregory, 3 Eq. Cas. (L. R.) 380.

A tenant for life cannot by an agreement with a sub-tenant for years prevent the remainderman from taking possession of the fixtures erected by him during his tenancy, and left on the premises after the termination of the life estate. Haflick *v.* Stober, 11 O. St. 482; White *v.* Arndt, 1 Whart. (Pa.) 91.

In *Massachusetts*, the rights of a tenant for life, in regard to fixtures, are the same as those of an ordinary tenant. Whiting *v.* Braston, 4 Pick. (Mass.) 310.

2. Parsons *v.* Copeland, 38 Me. 537 In this case Tenny, J., in giving the opinion of the court, says: "Whatever was in the 'Woolen Factory,' situated upon the land described and used in the appropriate business thereof, could not have been considered by the commissioners to be temporary for one party more than for the other, and therefore cannot fall within the principle applicable as between landlord and tenant. Hence it is a case where the doctrines which govern between vendor and vendee are to have their most extended influence." In this case it was held that if one of the tenants in common rightfully erected buildings upon the common property for his own use, after a co-tenant had filed his petition for a division, it could not be appraised by the commissioners in partition in estimating the value of the whole property.

Where a boiler, engine, and stack were erected on land of the plaintiff at the joint expense of himself and the defendant, under an agreement to use the same as a common source of power, without limitation as to time, the interests created thereby in the fixtures are in the nature of real estate; and if one of the tenants in common exclude the other from the use and possession of such fixtures, ejectment will lie to enforce the agreement. Hill *v.* Hill, 43 Pa. St. 521.

But a building erected by one tenant in common upon the joint premises, in the absence of any contract allowing it to remain personalty becomes a part of the realty, and is joint property. Aldrich *v.* Husband, 131 Mass. 480.

One co-tenant who has the general oversight of the business of a marine railway, receiving the income and paying the bills, has no right to sell the whole railway; and if he does, his co-tenant may maintain trover against the purchaser, who has removed the rails, etc., and made a new railway upon his own land. Strickland *v.* Parker, 34 Me. 263.

Where in the partition of real estate, between tenants in common, and consisting in part of a woollen factory, it was held that machinery which was not affixed

8. *Vendor and Vendee.*—Between vendor and vendee the strict rule of the common law prevails, and whatever fixtures are annexed to the freehold at the time of the conveyance pass with the estate to the vendee, unless there be some express provision to the contrary.[1] Nor will a verbal reservation be sufficient, but

or fastened to the building or to the land should be treated as personal property. Walker *v.* Sherman, 20 Wend. (N. Y.) 636.

1. Harkness *v.* Sears, 26 Ala. 493. Fratt *v.* Whittier, 58 Cal. 126; Pea *v.* Pea, 35 Ind. 387; Connor *v.* Coffin, 22 N. H. 538; Clore *v.* Lambert, 78 Ky. 224; Johnson *v* Wiseman, 4 Met. (Ky ) 357; Smith *v.* Commonwealth, 14 Bush (Ky.), 31; Kirwan *v.* Latour, 1 H. & J. (Md.) 289; Dispatch Line *v.* Bellamy Mfg. Co., 12 N. Y. 205; Miller *v.* Plumb, 6 Cow. (N. Y.) 665; Farrar *v.* Stackpole, 6 Me. 154; Davis *v.* Buffum, 51 Me. 160; Cohen *v.* Kyler, 27 Mo. 122; Hutchins *v.* Masterson, 46 Tex. 551; Preston *v.* Briggs, 16 Vt. 124.

Eastman, J., says: "As between grantor and grantee, the law is more favorable for the grantee than it is for the tenant. Between them the strict rule of the common law still prevails, and the grantee holds all fixtures, whether for trade and manufacture, or for the purpose of agriculture or habitation." Connor *v.* Coffin 22 N. H. 538. In this case it was held that manure made in the ordinary course of carrying on a farm, and which is on the premises at the time of the sale and conveyance, will pass to the grantee. See also Kittredge *v.* Woods, 3 N. H 503; Stone *v.* Proctor, 2 D. Chip. (Vt.) 114; Parsons *v.* Camp, 11 Conn. 525.

The conveyance of a saw-mill and appurtenances passes the title to the mill chain, dogs and bars being in their proper place when the conveyance was made. Farrar *v.* Stackpole, 6 Me. 154.

In a conveyance of a mill privilege by metes and bounds, there was a distinct clause conveying "the machinery and its appurtenances" of the mill, "with the right to use said machinery in said mill for two years." The mill was not within the metes and bounds named, nor was it, except the two years' use, conveyed by any description. *Held*, that the machinery and its appurtenances passed as personalty. Merrill *v.* Wyman, 15 &t. Rep. 58.

Lamps, chandeliers, and gas fixtures, though often sold with the house, are not fixtures, and will not pass to the vendee, unless there be a special agreement in regard to them. Jarechi *v.* Philharmonic Soc., 79 Pa. St. 403; Vaughn *v.* Haldeman, 33 Pa. St. 522; Rogers *v.* Crow, 40 Mo. 91; Towne *v.* Fiske, 127 Mass. 125; Guthrie *v.* Jones, 108 Mass. 191; McKeage *v.* Hanover Ins. Co., 81 N. Y. 38; s. c., 37 Amer. Rep. 471; Montague *v.* Dent, 10 Rich (S. C. L. R.) 135. However, when the owner of a house, in order to induce the vendee to purchase it, gave him to understand that the gas fixtures were a part of the realty, it was held that such inducement was sufficient evidence that the owner intended to make them a permanent attachment to the house, and that they passed to the vendee. Funk *v.* Brigaldi, 4 Daly (N. Y.), 359.

Partitions, gas-pipes, water-pipes, wash-basins, and water-closets are such fixtures as, in the absence of a contrary intention between vendor and vendee, will pass by a contract of sale and conveyance of the stores and premises containing them; and it is immaterial that such fixtures were put in by the tenant of the vendor, who would have a right to remove them as against the landlord. Smyth *v.* Sturges (N. Y.), 15 N. E. R. 544.

It has been held that by the terms of a deed, which reserved the right to remove furniture, pictures, and carpets, but that none of the permanent fixtures or appurtenances should be removed, the gas fixtures, chandeliers, globes, etc., used in the hotel situated on the lot conveyed passed by the conveyance to the purchaser. Fratt *v.* Whittier, 58 Cal. 125. See also Johnson *v.* Wiseman, 4 Met. (Ken.) 357; Smith *v.* Commonwealth, 14 Bush (Ken.), 31; Chapman *v.* Union Mut. Life Ins. Co., 4 Ill. Ap. 29.

A house, mill, and machinery sold to the owner of land on condition that they should remain personal property, with title in the vendor until paid for, do not become incorporated in the realty until the condition is fulfilled. Harkey *v.* Cain (Tex.), 6 S. W. Rep. 637.

An organ in a church, fixed in a recess made on purpose for it, was held to be real estate, and passed with the premises to the vendee. Rogers *v.* Crow, 40 Mo. 91; Chapman *v.* Union Mutual Life Insurance Co., 4 Ill. Ap. 29.

they must be accepted by the terms of the deed.[1] Parol proof of a usage may be received in explanation of the terms of the deed.[2] Fixtures pass to a *bona fide* purchaser of the real estate, notwithstanding an agreement between the owner of the land and the vendor of the fixtures that they should remain personal property.[3] But such agreements are valid between the parties making

A steam-engine with its fixtures, used to drive a bark mill and pounders to break hides in a tannery, erected by the owner of the land, is real property, and passes by the sale of the land. Oves *v.* Oglesby, 7 Watts (Pa.), 106. See also Morgan *v.* Arthurs & Co., 3 Watts (Pa.), 140. But a steam-boiler and attachments, having been excepted by the terms of the deed, become personal property. Badger *v.* Batavia Paper Mfg. Co., 70 Ill. 302.

A banker's safe, though bricked in, is a removable fixture between vendor and vendee. Moody *v.* Aiken, 50 Tex. 65. *Compare* Tolger *v.* Kenner, 24 La. Ann. 436.

It is not necessary that the reservation of fixtures be made in deed conveying the real estate. Pea *v.* Pea, 35 Ind. 387.

When land is conveyed which is in the possession of a tenant the vendee takes it subject to the right of the lessee to remove tenant's fixtures. Davis *v.* Buffum, 51 Me. 160; Powers *v.* Dennison, 30 Vt. 752; Kerr *v.* Kingsbury, 39 Mich. 150; Dubois *v.* Kelly, 10 Barb. (N. Y.) 496. But it has been held that a building occupied by a person who had erected it in accordance with a license from the owner of the land passes to the vendee, and that such occupation is not such a notice as will affect his rights to claim the building as real estate. Price *v.* Case, 10 Conn. 375.

1. Smith *v.* Price, 39 Ill. 28; McLaughlin *v.* Johnson, 46 Ill. 163; Aldrich *v.* Husband, 131 Mass. 480; McKeage *v.* Hanover Ins. Co., 81 N. Y. 38; Noble *v.* Bosworth, 19 Pick. (Mass.) 314; Connor *v.* Coffin, 22 N. H. 538; Bond *v.* Cope, 71 N. Car. 97; Ripley *v.* Paige, 12 Vt. 353.

A parol license granting to a lessee the right to remove buildings erected by him is valid. Dubois *v.* Kelley, 10 Barb. (N. Y.) 496.

Evidence of oral statements of the purchaser at the time of the purchase of land as to his intention to build a shop thereon and place in it machinery for a manufacturing establishment is admissible as bearing on the question whether machinery actually found upon the land is in the nature of fixtures. Taylor *v.* Collins, 51 Wis. 123.

The verbal sale of brick walls of a burnt building is void, as being within the Statute of Frauds. Myers *v.* Schemp, 67 Ill. 469. See also Hutchins *v.* Masterson, 46 Tex. 551; Landon *v.* Platt, 34 Conn. 517.

A vendor of an engine, boiler, and machinery, knowing that they were to be annexed to real estate, took a chattel mortgage for a part of the purchase price, but failed to register it. The vendee annexed them to real estate which he had already conveyed by mortgage. It was held that the lien of the chattel mortgagee would be protected so far as it would not diminish the security which the real-estate mortgagee would have had if the annexation had not been made. Campbell *v.* Roddy (N. J.), 14 At. Rep. 279. See also Henkle *v.* Dillon (Oreg.), 15 Pac. Rep. 148.

In Sword *v.* Low, 26 Cent. Law Jour. 211, it was held that an agreement between the mortgagor and mortgagee that a steam-engine and boiler attached to realty should remain personal property and be subjected to a chattel mortgage is valid, and that a subsequent mortgage upon the real estate would not hold them as real estate when the mode of attachment was such that they could be removed without injury to the freehold.

A, the owner of real estate upon which was situated a machine shop, executed a mortgage to B, upon the land and machine shop and appurtenances, and afterward executed to C a chattel mortgage upon the tools, patterns, and movable fixtures in the shop. It was held that a verbal agreement between A and B, that the property mortgaged to C should remain personal property and not be covered by the real-estate mortgage, was valid, and that subsequent purchasers and mortgagees could have the advantage of it. Frederick *v.* Devol, 15 Ind. 357. See also Ford *v.* Cobb, 20 N. Y. 344.

2. Farrar *v.* Stackpole, 6 Me. 154.

3. Landon *v.* Platt, 34 Conn. 517; Bringhalff *v.* Munzenmaier, 20 Iowa, 513; Rowand *v.* Anderson, 33 Kan. 264; Knowlton *v.* Johnson, 37 Mich. 47; Richardson *v.* Copeland, 6 Gray (Mass.), 536; Southbridge Savings Bank *v.* Exe-

them where the rights of third persons do not intervene.[1] Fixtures erected by a person in possession of land under a contract of purchase from the owner become a part of the realty.[2]

**IV. Agricultural Fixtures.**—The right to remove fixtures that have been erected for the purposes of agriculture has not received the

ter Works, 127 Mass. 542, Fryatt *v.* Sullivan Co., 5 Hill (N. Y.), 116; Mott *v.* Palmer, 1 N. Y. 564; Keeler *v.* Keeler, 31 N. J. E. 181; Case Mfg. Co. *v.* Garver (Ohio), 13 N. East, Rep. 493; Fortman *v.* Goepper, 14 Ohio St. 558; Brennan *v.* Whitaker, 15 Ohio St. 446; Ridgway Stove Co. *v.* Way, 6 N. E. Rep. 714; Sinker, Davis & Co. *v.* Comparet, 62 Tex. 470; Frankland *v.* Moulton, 5 Wis. 1. *Compare* Ford *v.* Cobb, 20 N. Y. 344; Kinsey *v.* Bailey, 9 Hun (N. Y.). 452; Tifft *v.* Horton, 53 N. Y. 377; Russell *v.* Richards, 10 Me. 429; Tapley *v.* Smith, 18 Me. 12; Sullivan *v.* Jones, 14 S. Car. 362.

Where the owner of a machine adapted for use in a flouring-mill consigns it to himself in the care of another to have it tested in a flouring-mill belonging to a third person, and the machine is set up by that other person in the mill on legs and attached to the floor with screws, and to the main shafting of the mill with belts and pulleys, the machine does not thereby become a fixture as between the owner and purchaser of the realty. Walker *et al. v.* Grand Rapids Flouring Mill Co. (Wis.), 35 N. W. Rep. 332.

Where an engine and boiler were sold to the owner of land, with an agreement that they were to remain personal property until a chattel mortgage executed to the vendor of the machinery for the purchase price was paid, it was held that the owner of the land would be estopped from claiming them as realty as against the vendor, and so would a purchaser at a sheriff's sale of the real estate, as he acquired only the rights of the debtor. Sisson *v.* Hibbard, 75 N. Y. 542. See also Tifft *v.* Horton, 53 N. Y. 377; Badger *v.* Batavia Paper Mfg Co., 70 Ill. 302.

A mortgagee is entitled to buildings which were on the premises mortgaged at the time the mortgage was given, notwithstanding the fact that the life-tenant and mortgagor had agreed that the buildings should remain personal property, and the purchaser at the sale on foreclosure is entitled to the sam efavor. Stevens *v.* Rose (Mich.), 13 West. Rep. 765. In this case the court say: "Under the circumstances of this case and the finding of the jury, the plaintiff is in the position of a *bona fide* purchaser for value, and the defendant cannot set up any latent equities or parol agreements or understandings by which the building was to be personal property, and he have the right to remove it either as a trade fixture or otherwise."

It has been held that a building erected by the license of the owner of the land granted to another person upon the land of the licensor passes to a *bona fide* purchaser of the land who has no knowledge of the license. Prince *v.* Case, 10 Conn. 375. See also Priestly *v.* Johnson, 67 Mo. 632. *Compare* Tapley *v.* Smith, 18 Me. 12.

Where personal property is wrongfully annexed to the realty by the owner of the land, the remedy for the wrong is against the wrong-doer, and not against an innocent purchaser of the land. Voorhees *v.* McGinnis, 48 N. Y. 278. See also Fryatt *v.* Sullivan Co., 5 Hill (N. Y.). 116; Frankland *v.* Moulton, 5 Wis. *v.* Woodruff, etc., Iron Works *v.* Adams, 37 Conn. 233; Mott *v.* Palmer, 1 N. Y. 564; Knowlton *v.* Johnson, 37 Mich. 47.

Railroad ties wrongfully annexed to the realty by a sub-contractor become a part of the realty, and trover will not lie against the railroad company for their conversion. Detroit & B. C. R. Co. *v.* Busch, 43 Mich. 571.

Fixtures erected by one person upon the land of another in accordance with a license or agreement pass under a conveyance of the land to a *bona fide* purchaser. Prince *v.* Case, 10 Conn. 375; Wilgus *v.* Gettings, 21 Iowa, 177; Rowand *v.* Anderson, 33 Kan. 264; Hoax *v.* Seat, 26 Mo. 178; Haven *v.* Emery, 33 N. H. 66; Powers *v.* Dennison, 30 Vt. 752.

Standing trees sold as chattels by the owner of the land pass to a *bona fide* purchaser of the land without notice of the sale. Byassee *v.* Reese, 4 Met. (Ken.) 372. And also fences. Rowand *v.* Anderson, 33 Kan. 264; s.c., 52 Amer. Rep. 529.

1. Badger *v.* Batavia Paper Co., 70 Ill. 302; Sisson *v.* Hibbard, 75 N. Y. 542; Eaves *v.* Estes, 10 Kan. 314; Otto *v.* Specht, 11 Cent. Rep. 244.

2. Westgate *v.* Nixon, 128 Mass. 304; King *v.* Johnson, 7 Gray (Mass.). 239; Perkins *v.* Swank, 43 Miss. 349; Lapham *v* Norton, 71 Me. 83; Hinkley & Egery Iron Co. *v.* Black, 70 Me. 473; Moore *v.* Valentine, 77 N. Car. 188; Central Branch R. Co. *v.* Fritz, 20 Kan. 430. *Compare* Hendy *v.* Dinkerhoff, 57 Cal. 3.

same favor in the *English* courts as that extended to the right of removal of trade fixtures.[1] But in the *United States* there is at least a strong tendency to place both kinds of fixtures on the same footing.[2]

1. Elwes *v.* Mawe, 3 East, 38 In this case, which is a leading one on the subject of fixtures, Lord Ellenborough says: "But no adjudged case has yet gone the length of establishing that buildings subservient to purposes of agriculture, as distinguished from those of trade, have been removable by an executor or a tenant for life, nor by the tenant himself who built them during the term." See also Perkins *v.* Swank, 43 Miss. 349; Gaffield *v* Hapgood, 17 Pick. (Mass.) 192–195; Wing *v.* Gray, 36 Vt. 261–267.

2. Harkness *v.* Sears, 26 Ala. 493; Perkins *v.* Swank, 43 Miss. 349; Dubois *v.* Kelley, 10 Barb. (N. Y.) 496; Lèland *v*, Gassett, 17 Vt. 403; Wing *v.* Gray, 36 Vt. 261.

Judge Story says: "But between landlord and tenant it is not so clear that the rigid rule of the common law, at least as it is expounded in 3 East, 38, was so applicable to the situation as to give rise to necessary presumption in its favor. The country was a wilderness, and the universal policy was to procure its cultivation and improvement. The owner of the soil as well as the public had every motive to encourage the tenant to devote himself to agriculture, and to favor any erections which should aid this result. Yet in the comparative poverty of the country what tenant could afford to erect fixtures of much expense or value if he was to lose his whole interest therein by the very act of erection? His cabin or log hut, however necessary for any improvement of the soil, would cease to be his the moment it was finished. It might therefore deserve consideration, whether in case the doctrine were not previously adopted in a State by some authoritative practice or adjudication, it ought to be assumed by this court as a part of the jurisprudence of such State upon the mere footing of its existence in the common law." Van Ness *v.* Pacard, 2 Pet. (U. S.) 137. In this case a dairyman was allowed to remove a barn from the farm which he had leased, not because it was an agricultural fixture, but rather because it was a trade fixture; and for the same reason cider-mills have been allowed to be removed by farm tenants. Holmes *v.* Tremper, 20 Johns. (N. Y.) 29. *Compare* Wadleigh *v.* Janvrin, 41 N. H. 503.

So it has been held that a saw-mill and machinery erected by the lessee of a farm for the purpose of preparing lumber for market are removable fixtures. Perkins *v.* Swank, 43 Miss. 349. Also a cotton gin and press, and grist-mill. McJunken *v.* Dupree, 44 Tex. 500. But cotton-gins erected by the owner of the land are irremovable fixtures. Latham *v.* Blakely, 70 N. Car. 369; Bond *v.* Cope, 71 N. Car. 97; Degraffenreid *v.* Scruggs, 4 Humph. (Tenn.) 451. The same privilege is extended to nurserymen; and where a nurseryman leases ground for the purpose of carrying on the business of nurturing trees and plants, in the absence of any express agreement the interest of the tenant continues until the purpose is accomplished. King *v.* Wilcomb, 7 Barb. (N. Y.) 263; Penton *v.* Robert, 2 East, 88; Miller *v.* Baker, 1 Met. (Mass.) 27; Wyndham *v.* Way, 4 Taunt. 316.

Nursery trees planted by the owner of the soil pass to the mortgagee on foreclosure, notwithstanding the owner of the trees had given a chattel mortgage upon them, which was recorded prior to the judicial sale. Adams *v.* Beadle, 47 Iowa, 439. See also Maples *v.* Millon, 31 Conn. 598.

Hop-poles put on a farm by a tenant for his temporary use, with the intention of removing them, are removable as between him and his landlord and his landlord's grantee. Wing *v.* Gray, 36 Vt. 261. But if kept on the farm for permanent use, they pass to a vendee. Bishop *v.* Bishop, 11 N. Y. 123.

Fences of all kinds, and without reference to the manner in which they are annexed to the soil, pass with the land as fixtures. Smith *v.* Carroll, 4 Greene (Iowa), 146; Goodrich *v.* Jones, 2 Hill (N. Y.), 142; Glidden *v.* Bennett, 43 N. H. 306; 12 Vt. 353; Rowan *v.* Anderson, 33 Kan. 264; Ropps *v.* Barker, 4 Pick. (Mass.) 239; Mitchel *v.* Billingsley, 17 Ala. 391; Emrich *v.* Ireland, 55 Miss. 390. Even if temporarily detached. Goodrich *v.* Jones, 2 Hill (N. Y.), 142; McLaughlin *v.* Johnson, 46 Ill. 163; Or if erected by mistake, or under claim of right to the land. Emrich *v.* Ireland, 55 Miss. 390. In this case it was held that a purchaser of land, who did not entertain the honest belief that he was the true owner, cannot assume the merit of being a purchaser in good faith, and is responsible in damages for the removal of fences which he himself had placed upon the land. See also

**V. Domestic Fixtures.**—Domestic fixtures are annexations made by a tenant to the dwelling-house which he occupies, to render his occupation more comfortable or more convenient. They are divided into two classes, viz., useful and ornamental. They are removable by the tenant if their removal does not materially injure the dwelling. At the present time the same favors are shown domestic fixtures by the law as those erected for trade purposes, although formerly the latter received the greater favor.[1]

**VI. Ecclesiastical Fixtures.**—Ecclesiastical fixtures are annexations made by the incumbent of an ecclesiastical benefice, and the question whether or not any particular annexation is removable generally arises between the executors of the incumbent and his successor.[2] In respect to such annexations, the general rule is that the same principles apply between the executor of an incumbent and his successor as apply between the executor of a tenant for life and remainderman.[3] The question generally arises with ref-

Wentz *v.* Fincher, 12 Ired. (N. Car.) 297; Burlerson *v.* Teeple, 2 Greene (Iowa), 542; Seymour *v.* Watson, 5 Blackf. (Ind.) 555; Blair *v.* Worley, 1 Scam. (Ill.) 178.

However, it has been held that rails as well as a string of fence may be personal property. Fahnestock *v.* Gilham, 77 Ill. 637. See also Pennybecker *v.* McDougal, 48 Cal. 160.

A lessee of a farm used the old rails, which were the refuse of a farm, and which had been removed for fuel, under an agreement that he could take away firewood "from fallen trees or dead wood." *Held*, that trespass would not lie, and that they were not a partof the realty. Fullington *v.* Goodwin, 7 Vt. 641.

1. Poole's Case, 1 Salk. 368. See also Herlakin's Case, 4 Coke, 64; Cave *v.* Cave, 2 Vern. 508; Harvey *v.* Harvey, 2 Strange, 1141; Lee *v.* Risden, 7 Taunton, 191; Lawton *v.* Lawton, 3 Atk. 13; Snedeker *v.* Warring, 12 N. Y. 170; McCracken *v.* Hall, 7 Ind. 30; 2 Taylor's Land. and Ten., § ,547; Tiedman's Real Prop. § 6; Gibbons' Law of Fixtures, 32.

2. Tyler's Law of Fixtures, 505; Martin *v.* Roe, 7 E. & B. 236. In this. case the incumbent of a benfice erected on the parsonage grounds two hot-houses with brick walls, and glass-work sliding up and down on pulleys, and working in wooden frames which were bedded into mortar. On the death of the rector his successor and executor both claimed the glass-work, but it was held that as the rector himself would have had the right to remove the building while he was alive, the same right should be granted to his executor. Lord Campbell, in giving the opinion of the court, says: "In regard to an ecclesiastical benefice, the character and object of the building to which the chattel is attached, and for which it has been so attached, seem of very great importance in determining whether there was any intention to separate it permanently and irrevocably from the personal estate. Here there is an erection, in itself purely matter of luxury and ornament, which the testator might have pulled down, but which he probably wished to enjoy so long as he lived in the benefice, and therefore did not remove. To this, and for the purpose of completing that luxurious and ornamental creation, a chattel is so attached as to be detached without injury to the freehold. We think the inference is that it never ceased to be a chattel during the testator's life; that it continued to be so at the moment of his death, and therefore passed as part of the personal estate to the executors." See also Huntley *v.* Russell, 13 A. & E. 570.

If an incumbent enter upon a benefice in which there are hangings, grates, iron backs to chimneys, not put there by the last incumbent, but have gone from successor to successor, he is entitled to them; but if the last incumbent placed them there for his own use, they go to the executor. 4 Burn's Eccl. Law (9th Ed.). 413

3. "It may therefore, it is conceived, be laid down that an incumbent will in general be entitled to fixtures of the same description as those which form part of the personal estate of the deceased tenant for life. Amos & Ferard's Law of Fixtures (2d Ed.), 146. See also Gibson's Cod. Jur. Eccl. 752; 2 Smith's Lead. Cas. 197.

erence to matters of ornament or convenience annexed to the buildings on the land held by a resident incumbent.[1]

**VII. Trade Fixtures.**—Fixtures erected by a tenant on leased premises for the purpose of carrying on a trade or a manufactory, and removable by him during the term. They include buildings,[3]

1. Tyler's Law of Fixtures, 507. The ornaments in a bishop's chapel pass to the successor, and not to the executors. Corven's Case, 12 Coke, 106.

2. Harkness *v.* Sears, 26 Ala. 493; Perkins *v.* Swank, 43 Miss. 349; Weathersby *v.* Sleeper, 42 Miss. 732; Holbrook *v.* Chamberlin, 116 Mass. 155; Watriss *v.* First Nat. Bank, 124 Mass. 571; Hill *v.* Sewald, 53 Pa. St. 271; Van Ness *v.* Pacard, 2 Pet. 137.

Sir John Cross, in *Ex parte* Broadwood, 1 Mont. D. & De G. 631, says: "In *Ex parte* Lloyd *in re* Ogden, 3 Dea. & Ch. 765, this court held that an equitable mortgagee of a cotton-mill carried all the fixtures, although they were erected for the purpose of trade, and the mortgagor continued in possession of them at the time of his bankruptcy. It has always seemed to me that the circumstances of fixtures being what are called trade fixtures is of importance only in questions depending between landlord and tenant, and does not affect the consideration of those arising between mortgagor and mortgagee. Much confusion has in my opinion been created in the conflicting cases on this subject by not attending to this distinction." And in Oves *v.* Oglesby it is said: "Privilege for the benefit of trade holds only betwixt landlord and tenant, not betwixt third persons and the owner of the soil." Oves *v.* Oglesby, 7 Watts. (Pa.), 106.

Trade fixtures erected by a tenant are personal property during the continuance of the term. Kile *v.* Giebner (Pa. 1886), 7 Atl. Rep. 157; Walton *v.* Wray, 54 Iowa, 531; Lemar *v.* Miles, 4 Watts (Pa.), 330; Globe Marble Works *v.* Quinn, 76 N. Y. 23; Lamphere *v.* Lowe, 3 Neb. 131. *Compare* Pemberton *v.* King, 2 Dev. (N. Car.) L. 376. And it has been held that during the term, if the interest of the lessees in the land were sold for his debts, trade fixtures pass with the interest in the land as realty to the purchaser at the judicial sale. Dobschuetz *v.* Holliday, 82 Ill. 371; McNalley *v.* Connolly, 70 Cal. 3.

Where the lessees of premises used for manufacturing purposes erected furnaces to take the place of those that they had worn out in their business, they would have no right to remove such furnaces as trade fixtures, since they only took the place of the old furnaces, which had not been sold to them. Hay *v.* Tillyer (N. J.), 14 Atl. Rep. 18.

It has been held that trade fixtures erected by a lessee after a verbal agreement with the landlord for the purchase of the premises became a part of the realty, and were subject to the vendor's lien. Perkins *v.* Swank, 43 Miss. 349. But *compare* Holbrook *v.* Chamberlin, 116 Mass. 155; Smith *v.* Moore, 26 Ill. 392; Moore *v.* Smith, 24 Ill. 513.

3. Robinson *v.* Wright, 2 McArthur (U. S.), 54; Beers *v.* St. John, 16 Conn. 322; Walton *v.* Wray, 54 Iowa, 531; McIver *v.* Estabrook, 134 Mass. 550; Kissam *v.* Barclay, 17 Abbt. Pr. (N. Y.) 360; Beckwith *v.* Boyce, 9 Mo. 560; Railroad Co. *v.* Deal, 90 N. Car. 111; Krouse *v.* Ross, 1. Cranch (C. C.), 368; Van Ness *v.* Packard, 2 Pet. (U. S.) 137; Penton *v.* Robert, 2 East, 88; Wansbrough *v.* Watson, 4 A. & E. 884; Rex *v.* Otley, 1 B. & Ad. 161.

Where land is leased for trade purposes and the lessees erect buildings and fixtures thereon, under the terms of the lease, which provides that on the abandonment of said business the buildings and fixtures shall revert back to the lessees, it was held that they remained personal property, and were not subject to a lien of attachment on the real estate. Melhop *v.* Meinhart, 70 Iowa, 685.

Buildings placed upon the land by agreement or consent of the freeholder remain personal property. Walton *v.* Wray, 54 Iowa, 531; Hines *v.* Ament, 43 Mo. 298; Priestly *v.* Johnson, 67 Mo. 632; Wells *v.* Baunister, 4 Mass, 513; Tapley *v.* Smith, 18 Me. 12; Russell *v.* Richards, 10 Me. 429, Ashman *v.* Williams. 8 Pick. (Mass.) 402; Fuller *v.* Tabor, 39 Me. 519; Weathersby *v.* Sleeper, 42 Miss. 732; Dame *v.* Dame, 38 N. H. 429. *Compare* Prince *v.* Case, 10 Conn. 375.

It does not matter whether the assent is given before or after the erection. Fuller *v.* Tabor, 39 Me. 519.

If the building is erected against the will of the landowner or without his consent, it becomes realty. Bonney *v.* Foss, 62 Me. 248; Cannon *v.* Copeland, 43 Ala. 252; Dart *v.* Hercules, 57 Ill. 446; Washburn *v.* Sproat, 16 Mass. 449; Honzick *v.* Delaglise, 65 Wis. 494.

machinery,[1] store fixtures,[2] steam engines and boilers,[3] gas fixtures,[4] bowling-alleys and appurtenances,[5] etc.

**VIII. Effect of Agreements.**—It is stated by many courts as a general proposition, that the parties between whom the question of fixtures arises may by their agreements determine the character of annexations to real estate; that they may consider as personalty what the law regards as realty, and what the law regards as personalty they may consider as realty, and whatever their agreements the courts will enforce.[6] However, this proposition is subject to several modifications.[7]

A building erected by persons claiming an estate in the land, but who are judicially evicted, can be replevied by them, although others after the eviction had placed the building on a stone foundation. Mills *v.* Redick, 1 Neb. 437. *Compare* Honzik *v.* Delaglise, 65 Wis. 494; Huebschmann *v.* McHenry, 29 Wis. 655; Dart *v.* Hercules, 57 Ill. 446.

But where a railroad company obtained the right of way over certain premises from the person in possession, supposing him to be the true owner, and entered upon the land and placed a railroad upon it, it was held that in proceedings against the true owner to condemn the land for railroad purposes he could not claim the improvements as part of the realty in assessing damages, Oregon R. & N. Co. *v.* Mosier, 14 Ore. 519.

Buildings erected for the purposes of trade or manufacture are removable without reference to their size or the materials of which they are constructed. Railroad Co. *v.* Deal, 90 N. Car. 111; Van Ness *v.* Pacard, 2 Pet. (U. S.) 137; Lawton *v.* Lawton, 3 Atk. 13.

A deed of land "with the buildings thereon," and other property, mentioning specific fixtures, and allowing grantor thirty days to remove property not sold, does not pass trade fixtures. Kirch *v.* Davies, 55 Wis. 287; *Compare* Elliott *v.* Bishop, 10 Ex. 496.

**1.** McNalley *v.* Connolly, 70 Cal. 3; Wheeler *v.* Bedell, 40 Mich. 693; Stokoe *v.* Upton, 40 Mich. 581; Moore *v.* Smith, 24 Ill. 513; Cook *v.* Transportation Co., 1 Den. (N. Y.) 91.

**2.** Josslyn *v.* McCabe, 46 Wis. 591; Guthrie *v.* Jones, 108 Mass. 191.

**3.** McNalley *v.* Connolly, 70 Cal. 3; Merritt *v.* Judd, 14 Cal. 60; Kelsey *v.* Durkee, 33 Barb. (N. Y.) 410; Hayes *v.* N. Y. Mining Co., 2 Colo. 273; Dobschuetz *v.* Holliday, 82 Ill. 371; Lawton *v.* Lawton, 1 Atk. 13. *Compare* Treadway *v.* Sharon, 7 Nev. 37.

Steam engines and boilers erected by a tenant on brick and stone foundations, and bolted down solidly to the ground and walled in with brick arches, and dwellings erected by the tenant for miners to live in, standing on posts or dry stone walls, when such machinery and buildings were intended to be merely accessory to the mining operations under the lease, and when there was no intention in affixing them to the realty, and when they can be removed without material disturbance to the land, are trade fixtures. Conrad *v.* Saginaw Mining Co., 54 Mich. 249; s. c., 52 Am. Rep. 817. See also Cooper *v.* Johnson, 143 Mass. 108.

A steam-engine placed upon land owned by one member of a partnership, by the firm, for the purpose of giving motive-power to machinery, partakes of the nature of the machinery, and is a removable fixture. Robertson *v.* Corsett, 39 Mich. 777.

**4.** McCall *v.* Walter, 71 Ga. 287; Towne *v.* Fiske, 127 Mass. 125; Guthrie *v.* Jones, 108 Mass. 191; Lawrence *v.* Kemp, 1 Duer (N. Y.), 363; Hays *v.* Doane, 11 N. J. E. 84.

**5.** Hanrahan *v.* O'Reilly, 102 Mass. 201. In O'Brien *v.* Kusterer, 27 Mich. 289, it was held that a bar, bar fixtures, cupboard, bowling-alley ways and racks, attached by a tenant to a building occupied by him as a saloon, were permanent fixtures, and not removable as trade fixtures.

**6.** Fratt *v.* Whittier, 58 Cal. 126; Merritt *v.* Judd, 14 Cal. 60; Frederick *v.* Deval, 15 Ind. 357; Warner *v.* Kenning, 25 Minn. 173; Robertson *v.* Corsett, 39 Mich, 777; Foster *v.* Prentiss, 75 Me. 279; Hunt *v.* Bay State Iron Company, 97 Mass. 279; Curtis *v.* Riddle, 7 Allen (Mass.), 185; Brearley *v.* Cox, 24 N. J. L. 287; Sampson *v.* Graham, 96 Pa. St. 405; Sullivan *v.* Jones, 14 S. Car. 362; Smith *v.* Waggoner, 50 Wis. 155; Mansfield *v.* Blackburn, 6 Bing. (N. C.) 426; Penny *v.* Brown, 2 Starkie, 403; Naylor *v.* Collings, 1 Taunton, 19.

**7.** An agreement between the owner

**IX. Time of Removal.**—In the absence of a special contract removable fixtures must be removed during the time for which the premises are demised, or while the relation of landlord and tenant still exists under the original lease.[1] Nor does it matter whether the lease expire by effluxion of time or by re-entry on forfeiture.[2] Where the tenancy is uncertain in duration, as when it depends upon a contingency, or when the lessee is a tenant for life or at will, the law allows a reasonable time for the removal of fixtures.[3] However, the landlord and tenant may stipulate as to

of land and the owner of the fixture that the latter shall remain personal property cannot affect the rights of a *bona fide* purchaser of the land. Roswand *v.* Anderson, 33 Kan. 264; Bartholomew *v.* Hamilton, 105 Mass. 239; Fryatt *v.* The Sullivan Co., 5 Hill (N. Y.), 116; Lacustrine Fer. Co. *v.* L. G. & Fer. Co., 82 N. Y. 476; Smith *v.* Waggoner, 50 Wis. 155 See also, *ante*, VENDOR AND VENDEE, note 4.

The agreement must be governed by the Statute of Frauds. Myers *v.* Schemp, 67 Ill. 469; Trull *v.* Fuller, 28 Me. 545. But it has been held that the agreement may be proven by parol. Frederick *v.* Devol, 15 Ind. 357; Walker *v.* Schindel, 58 Md. 360 See also Mitchel *v.* Freedley, 10 Barr (Pa.), 198.

Where purchase-money mortgagees verbally agreed with the grantee of the mortgagor that on payment to them of a sum sufficient to entitle the grantor to a conveyance he might remove the plant of a marine railway on the premises, it was held that the agreement was binding. Tyson *v.* Post (N. Y.), 15 N. E. Rep. 316.

The fixtures must be of such a nature as to be capable of becoming personal property in order to subject them to an agreement of this kind. Denio J., says: "It is conceded that there must necessarily be a limitation to this doctrine, which will exclude from its influence cases where the subject or mode of annexation is such that the attributes of personal property cannot be predicated of the thing in controversy. Thus a house or other building, which from its size or the materials of which it was constructed, or the manner in which it was fixed to the ground, could not be removed without practically destroying it, would not, I conceive, become a mere chattel by means of any agreement which could be made concerning it. So, of the separate materials of a building and things fixed into the wall so as to be essential to its support, it is impossible that they should by any arrangement between the owners become chattels." Ford *v.* Cobb, 20 N. Y. 344 See also Fortman *v.* Goepper, 14 Ohio St. 558.

1. Pugh *v.* Arton, 8 Eq. Cas. (L. R.) 626; Lyde *v.* Russell, 1 B. & Ad. 394; Penton *v.* Robart, 2 East, 88; Weeton *v.* Woodcock, 7 M. & W. 14; Minshall *v.* Lloyd, 2 M. & W., 460; Lee *v.* Risden, 7 Taunt. 188; Heap *v.* Barton, 12 C. B. 274; Hayes *v.* N. Y. Min. Co., 2 Colo. 273; Griffin *v.* Ransdell, 71 Ind. 440; Dostal *v.* McCaddon, 35 Iowa, 318; Davis *v.* Buffum, 51 Me. 160; Dingley *v.* Buffum, 57 Me. 381; Mason *v.* Fenn, 13 Ill. 525; Kuhlmann *v.* Meier, 7 Mo. Ap. 260; Powell *v.* McAshaw, 28 Mo. 70; State *v.* Elliot, 11 N. H. 540; Torrey *v.* Burnett, 38 N. J. L. 457; Haflick *v.* Stober, 11 Ohio St. 482; White *v.* Arndt, 1 Whart. (Pa.) 91; Preston *v.* Briggs, 16 Vt. 124; Thomas *v.* Crout, 5 Bush (Ken.), 37; Josslyn *v.* McCabe, 46 Wis. 591.

It has been held that when a lease gives the tenant the right to remove his fixtures at the end of the term the law allows him a reasonable time to complete the removal after surrendering possession. Smith *v.* Park, 31 Minn. 70; Kuhlmann *v.* Meier, 7 Mo. Ap. 290.

Where a tenant erected buildings on leased premises, under the terms of the lease allowing him to remove all buildings erected by him during the term, it was held that he could not remove those buildings which he had connected with the buildings on the land prior to his entry, in such a way that the latter would be injured by the removal. Powell *v.* McAshan, 28 Mo. 70.

2. Pugh *v.* Arton, 8 Eq. Cas. (L. R.) 626; Weeton *v.* Woodcock, 7 M. & W. 14; Whipley *v.* Dewey, 8 Cal. 36. But it has been held that the forfeiture must be judicially determined. Keogh *v.* Daniell, 12 Wis. 181.

3. Watriss *v.* Nat. Bank, 124 Mass. 571; Antoni *v.* Belknap, 102 Mass. 193; Loughran *v.* Ross, 45 N. Y. 792; Haflick *v.* Stober, 11 Ohio St. 482; Sullivan *v.*

the removal of fixtures after the expiration of the term.[1] If a tenant go upon the premises to remove fixtures after surrendering the premises to the landlord he will be a trespasser.[2] And where the tenant takes a new lease of the preemises to date from the expiration of his old one, without stipulating for the removal of fixtures erected by him during the tenancy just expiring, he cannot remove them at the end of the renewed lease.[3] Where the tenant leaves his fixtures on the premises after the expiration of his term, he is presumed to have abandoned them to the landlord.[4]

Carberry, 67 Me. 531; Cooper *v.* Johnson, 143 Mass. 108; Martin *v.* Roe, 7 E. & B. 236.

Where the tenant has been restrained by an injunction from removing his fixtures, he will have a reasonable time after its dissolution to remove them. Mason *v.* Fenn, 13 Ill. 525; Bircher *v.* Parker, 40 Mo. 118.

1. Saint *v.* Pilley, 10 Ex. (L. R.) 137; McCracken *v.* Hall, 7 Ind. 30; Torrey *v.* Burnett, 38 N. J. L. 457; Cromie *v.* Hoover, 40 Ind. 49–61; Josslyn *v.* McCabe, 46 Wis. 591.

If the lessor agree to purchase the buildings erected by a tenant, there is an implied promise that the lessee shall have possession of the premises until the fixtures are paid for. Van Rensselaer's Heirs *v.* Penniman, 6 Wend. (N. Y.) 569.

2. Cromie *v.* Hoover, 40 Ind. 49; Railroad Co. *v.* Deal, 90 N. Car. 111; Thomas *v.* Crout, 5 Bush (Ky.), 37.

3. Watriss *v.* First Nat. Bank, etc., 124 Mass. 571; Loughran *v.* Ross, 45 N. Y. 792; Merritt *v.* Judd, 14 Cal. 60; Jungerman *v.* Bovee, 19 Cal. 355; Marks *v.* Ryan, 63 Cal. 107; Hedderich *v.* Smith, 103 Ind. 203; McIver *v.* Estabrook, 134 Mass. 550.

Where a tenant from year to year erected and placed certain buildings and fixtures upon the premises, and without surrendering possession of the premises took a written lease "of the premises, with all the rights and appurtenances thereunto appertaining," but without reserving any right in the lease to remove trade fixtures, it was held that the accepting such a lease was equivalent to absolute surrender of possession without removal of his trade fixtures, and an abandonment of them to his landlord. Carlin *v.* Ritter (Md.), 13 At. Rep. 370. However, it was held that wooden buildings resting upon flat stones lying upon the surface of the ground were not fixtures.

It has been held that the tenant who accepts a new lease of the premises containing no agreement as to his trade fixtures does not lose his right to them. Second Nat. Bank *v.* Merrill Co. (Wis.), 34 N. W. Rep. 514. In this case the court says: "In the case of grantor and grantee the usual *status* of the parties is that, before the grant is made, the whole right is in the grantor, and the grantee is purchasing all his rights; in the case of a tenant having made and owning fixtures and machinery of equal or greater value than the realty on which it stands, and being in actual possession, and with the right to remove the same, treating with his landlord or the grantee of such landlord for a new lease, he is not supposed to treat for a lease of what he already owns, but for a lease of what the landlord owns; and if he accepts a lease which does not in clear terms cover the property which he himself owns, it ought not, as against him and for the purpose of working a release of his right to the landlord, be construed to cover such property." And Judge Cooley, in commenting on the law in reference to this branch of the subject, says: "But why the right should be lost when the tenant instead of surrendering possession takes a renewal of the lease, is not very apparent. There is certainly no reason of public policy to sustain such a doctrine; on the contrary, the reasons which saved to the tenant his right to the fixtures in the first place are equally influential to save him on a renewal of what was unquestionably his before. What could possibly be more absurd than a rule of law which should in effect say to the tenant who is about to obtain a renewal: 'If you will be at the expense and trouble, and incur the loss of removing your erections during the term, and of afterwards bringing them back again, they shall be yours; otherwise you will be deemed to abandon them to your landlord'?" Kerr *v.* Kingsbury, 39 Mich. 150.

4. McCracken *v.* Hall, 7 Ind. 30; Connor *v.* Coffin, 22 N. H. 538; Keogh *v.* Daniell, 12 Wis. 181; Dubois *v.* Kelley, 10 Barb. (N. Y.) 496. But this presumption can never arise as long as the tenant is

But the presumption may be rebutted by proof of an oral agreement to reserve them after the expiration of his term.[1]

**X. Railroad Rolling Stock.**—There is considerable conflict of opinion, both among courts and among text-book writers, on the question whether railroad rolling-stock should be considered personal property or fixtures. However, the tendency seems to be in the direction of regarding such property fixtures.[2]

**XI. Remedies.**—Trover will lie in favor of a tenant for fixtures removable by him, if he is prevented by the owner of the land from removing his fixtures within the time the law allows for removal.[3] But if the fixtures are allowed to remain after the ex-

in possession. Dubois *v.* Kelley, 10 Barb. (N. Y.) 496.

1. McCracken *v.* Hall, 7 Ind. 30; Halleen *v.* Runder, 3 Tyrw. 959; Taylor's Land. & Ten. § 552.

2. Farmers', etc., Trust Co. *v.* St. Jo., etc., R. Co., 3 Dill. (C. C.) 417. In this case Miller, J., says: "In my opinion, rolling-stock and other property, strictly and properly appurtenant to the road, is part of the road, and covered by the mortgage in question, which in terms embraces rolling-stock. The cases are conflicting as to the nature of rolling-stock, but considering the peculiar character of a railroad, the true principle is the one above stated." Judge Dillon, in reviewing the work of Mr. Ewell on Fixtures, says: "The importance of a recent work on the subject is well exemplified by the cases upon the question whether railway rolling-stock is part of the realty. This point cannot yet be considered as settled, in view of the conflict of decisions. We notice that the author, after citing and referring to the cases, expresses the opinion that the better view is, that rolling-stock is personalty. This is doubtful; and we venture to think that finally the views of Mr. Justice Miller, as expressed in the Farmers' Loan & Trust Co. *v.* St. Jo., etc., R. Co., 3 Dill. (C. C. R.) 412, will, where the matter is not controlled by statutable provision, be accepted as the sound doctrine on this subject." 4 Cent. Law Jour. 22.

Where judgment creditors levied upon freight cars, wheels, and firewood of a railroad company, it was held that all the rolling-stock of the road passed by a mortgage upon the road, lands, right of way, franchises, engines, cars, tools, machinery, etc., and that the mortgage covered after-acquired property, and that the execution was not a valid lien. Phillips *v.* Winslow, etc., 18 B. Mon. (Ken.) 431. See also Pierce *v.* Emery, 32 N. H. 484; Milwaukee, etc., R. *v.* Southern, 2 Wal. 609, and note; Howe *v.* Freeman, 14 Gray, 566; James, etc., *v.* Milwaukee R. Co., 6 Wal. (U. S.) 752; Pennock *v.* Coe, 23 How. (U. S.) 117.

In *Illinois*, it is well settled that rolling-stock of a railway is part of the realty, and not subject to execution as chattels. Titus *v.* Ginheimer, 27 Ill. 462; Titus *v.* Mabee, 25 Ill. 232; Palmer *v.* Forbes, 23 Ill. 237. See also State *v.* Northern Cent. R. Co., 18 Md. 193.

In *Georgia*, it was held that the railroad of an insolvent company was not subject to executions at the suits of separate creditors, but should be sold as an entirety, and the proceeds divided. Macon & Western R. Co. *v.* Parker, 9 Ga. 377.

In *New York*, railway rolling-stock is personal property. Hoyle *v.* Plattsburgh, etc., R. Co., 54 N. Y. 314; Randall *v.* Elwell, 52 N. Y. 521; Stevens *v.* Buffalo, etc., R. Co., 31 Barb. (N. Y.) 590; Beardsley *v.* Ontario Bank, 31 Barb. (N. Y.) 619. *Compare* Farmers' Loan & Trust Co. *v.* Hendrickson, 25 Barb. 484. Also in *New Jersey:* Williamson *v.* N. J. Southern R. Co., 29 N. J. E. 311; State *v.* Somerville, etc., R. Co., 28 N. J. L. 21. And in *New Hampshire:* Boston, etc., R. Co. *v.* Gilmore, 37 N. H. 410. And in *Ohio:* Coe *v.* Columbus, etc., R. Co., 10 Ohio St. 372.

In *Wisconsin*, railway rolling-stock is declared by statute to be fixtures. Rev. Stat. 511, § 34. See also Chicago, etc., R. Co. *v.* Borough of Ft. Howard, 21 Wis. 45.

In *Arkansas*, *Illinois*, *Missouri*, *Nebraska*, *Texas* and *West Virginia* railway rolling-stock is declared by the constitution of each State to be personal property. Wood on Ry. 1625.

3. Watts *v.* Lehman, 107 Pa. St. 106; Hilborne *v.* Brown, 12 Me. 162; Russell *v.* Richard, 10 Me. 429; Wansbrough *v.* Maton, 4 A. & E. 884. In the case of Hilborne *v.* Brown, the plaintiff placed a blacksmith shop upon another's land, under a parol license, paying a ground

piration of the lease, the tenant cannot maintain the action.[1] This action will also lie in favor of the owner of the land for fixtures unlawfully removed by the party in possession.[2] When buildings are unlawfully removed from the freehold, the owner of the land may bring the action of replevin for them.[3] Ejectment will lie to enforce an agreement for the common use of fixtures erected at the joint expense of tenants in common.[4] A mortgagee may restrain by injunction a mortgagor or his grantee from removing fixtures that are permanently annexed to the freehold.[5]

**FLANGE.**—See note 6.

rent for the land, and reserving the right to remove the shop at pleasure. The owner of the land conveyed it to the defendants without reserving the building, and it was held that after demand for it, and refusal by the owners of the land to give it up, the action of trover would lie. Hilborne *v.* Brown, 12 Me. 162.

However, it has been held that tenant's fixtures, although removable by the tenant during his term, are parcel of the freehold, and that trover will not lie for them. Mackintosh *v.* Trotter, 3 M. & W. 184. See also Minshall *v.* Lloyd, 2 M. & W. 450.

Where fixtures are erected by one person on the land of another under an implied license, the action of trover will lie against a subsequent purchaser of the land for their conversion, when the fact of the license is known. Wilgus *v.* Gettings, 21 Iowa, 177; Noble *v.* Sylvester, 42 Vt. 146. But the law is otherwise in case the purchaser had no knowledge of the license. Powers *v.* Dennison, 30 Vt. 752.

**1.** White *v.* Arndt, 1 Whart. (Pa.) 91; Darrah *v.* Baird, 101 Pa. St. 265; Overton *v.* Williston, 31 Pa. St. 155; Davis *v.* Buffum, 51 Me. 160; Preston *v.* Briggs, 16 Vt. 124; Lee *v.* Risdon, 2 Eng. C. L. 69.

**2.** Union Bank *v.* Emerson, 15 Mass. 159; McNalley *v.* Connolly, 70 Cal. 3; Westgate *v.* Nixon, 128 Mass. 304.

Trover will not lie against the owner of land for fences built upon his premises by another without his consent, and which were removed by him. Wentz *v.* Fincher, 12 Ired. (N. Car.) 297. See also Doscher *v.* Blackiston, 7 Oreg. 143.

And where fixtures were placed upon the land of a married woman at the request of her husband, the persons placing the fixtures cannot maintain the action of trover for them on the refusal of the wife to allow their removal, after the contract had been rescinded for fraud. Morrison *v.* Berry, 42 Mich. 389; s. c., 36 Amer. Rep. 446.

**3** Central Branch R. Co. *v.* Fritz, 20 Kan. 430; Salter *v.* Sample, 71 Ill. 430; Ogden *v.* Stock, 34 Ill. 522; Mills *v.* Redick, 1 Neb. 437; Huebschmann *v.* McHenry, 29 Wis. 655. Where the building has been permanently annexed to the freehold, it is a question whether it can be replevied from the person who has wrongfully severed it, or not. Cent. Branch R. Co. *v.* Fritz, 20 Kan. 430. See also Salter *v.* Sample, 71 Ill. 430; Mills *v.* Redick, 1 Neb. 437; Hartwell *v.* Kelly, 117 Mass. 235.

Replevin will also lie for machinery that has been unlawfully severed from the freehold. Sands *v.* Pfeiffer, 10 Cal. 259; Gardner *v.* Finley, 19 Barb. (N. Y.) 317; Cresson *v.* Stout, 17 Johns. (N. Y.) 116; Farrant *v.* Thompson, 5 B. & Ald. 826; Balliett *v.* Humphreys, 78 Ind. 388.

Buildings erected under license upon another's land may be replevied after refusal to give them up on the part of the owner of the land. Waters *v.* Reuber, 16 Neb. 99; Weathersby *v.* Sleeper, 42 Miss. 73.

**4.** Hill *v.* Hill, 43 Pa. St. 521.

**5.** Dudley *v.* Hurst, 67 Md. 44; s. c., 8 Atl. Rep. 901. See also Coleman *v.* Stearns Mfg. Co., 38 Mich. 30.

**Authorities.** — Boone Real Estate; Washburn Real Property; Tyler on the Law of Fixtures; Gibbons' Law of Fixtures; Taylor's Land. & Ten.; Jones on Mortgages; Smith's Leading Cases; Central Law Journal; Tiedman Real Property; Sugden Vendors; Bouvier's Law Dic.

**6.** An omnibus wheel, with a disk capable of being lowered against the wheel into a groove in the rail of a tramway, and drawn up when running on the pavement, is a "flange wheel" within the meaning of a statute prohibiting unlicensed persons from using a tramway

**FLAT.**—A level place over which the water stands or flows; the land between high and low water mark.[1]

**FLEE.**[2]—See FUGITIVE.

**FLOATING DEBT.**—That mass of lawful and valid claims against a corporation for the payment of which there is no money in the corporate treasury specifically designed, nor any taxation or other means of providing money to pay particularly provided.[3]

with vehicles having flange-wheels. Cottam *v.* Guest, 6 Q. B. D. 70.

1. Church *v.* Meeker, 34 Conn. 421; Saltonstall *v.* Proprietors of Long Wharf, 7 Cush. (Mass.) 195; Stover *v.* Freeman, 6 Mass. 435; Ball *v.* Slack, 2 Whar. (Pa.) 539; Jones *v.* Janney, 8 W. & S. (Pa.) 443.

In construing a statute which gave to any one who first made "a weir for catching fish on any flat within any river, cove, or harbor" a right of uninterrupted enjoyment thereof, the same court said: "The word itself is obviously one which may be used in different senses, but in this statute it is confined to some place or places within a river, cove, creek or harbor where fish may be taken. It implies, therefore, that it must be a place more or less under water. It is frequently used by nautical men to distinguish it from the channel of a river or harbor; and in this sense, while it includes the idea of being under water, it is used as descriptive of a place not navigable with safety by ordinary vessels, on account of the shallowness of the water. And one of the definitions given of it is 'a shallow or shoal water.'" Accordingly, a structure beginning at a point where the water is six feet deep and extending into water eighteen feet deep is not within the protection of the statute. Stannard *v.* Hubbard, 34 Conn. 370.

2. **Flee from justice.** (See also CRIMINAL PROCEDURE, Vol. IV., p. 785, u. 1.)—This phrase, used in a statutory provision that the limitation of a criminal action shall not run against the State in favor of one "fleeing from justice," "means to leave one's home or residence or known place of abode, with intent to avoid detection or punishment for some public offence." "It is implied also in the definition above given, that mere departure by the defendant from the limits of the district of Kansas, irrespective of the motives and purposes of such departure, is not a fleeing from justice. An offender may flee from justice, within the meaning of the statute under consideration, though he never left the limits of the district; as for example, by secretly concealing himself, or by not being usually and publicly known as being within it." United States *v.* O'Brian, 3 Dill. (C. C.) 381; s. c., 19 Int. Rev. Rec. 18; United States *v.* White, 5 Cranch (C. C.), 38; State *v.* Washburn, 48 Mo. 240. It need not be a fleeing from prosecution begun; it is not necessary that process should have issued. United States *v.* Smith, 4 Day (Conn.), 121; United States *v.* White, 5 Cranch (C. C.), 38.

"One who shall flee" within the meaning of the provision of the Constitution of the United States for the delivering up of fugitives from justice does not include one who was never in the country from which he is said to have fled. Jones *v.* Leonard, 50 Iowa, 106; s. c., 32 Am. Rep. 116.

The terms of this provision "were intended to embrace not only a case where a party after committing a crime actually flees, in the literal sense of that term, from the State where such crime was committed, but also a case where a citizen of one State, who, within the territorial limits of another State, commits a crime, and then simply returns to his own home." *Ex parte* Swearingen, 13 S. Car. 74.

3. People *v.* Wood, 71 N. Y. 374.

**FLOODS.**—(See also DAMS; DRAINS AND SEWERS; RAILROADS; RIPARIAN RIGHTS; SURFACE-WATER; WATERS AND WATER-COURSES.)

I. Definition, 67.
II. Liability for Flood by One who Collects Water on his Property, 67.
III. Streams Subject to Great Freshets, 68.
IV. Duty of Owners of Dams, 69.
V. Responsibility of Railroads for Damages Caused by Floods, 70.

**1. Definition.**—A great flow of water; a body of moving water; especially, a body of water rising, swelling, and overflowing land not usually thus covered.[1]

**II. Liability for Flood by One who Collects Water on his Property.**—One who collects water on his land must keep it in at his peril, and is *prima facie* liable for all damage which is the natural consequence of its escape.[2]

1. Webster's Dict.

Great floods, like other inevitable calamities, are to be borne without complaint." Per Black, J., in McCoy *v.* Danley, 20 Pa. St. 89.

2. The general rule in regard to water is the same as that in regard to any other thing dangerous or liable to do mischief if it escape, viz.:

One who, for his own purposes, brings upon his land, and collects and keeps there, anything likely to do mischief if it escape, must keep it in at his peril, and if he does not do so is *prima facie* answerable for all the damage which is the natural consequence of its escape. He can excuse himself by showing that the escape was owing to the plaintiff's default; or perhaps that the escape was the consequence of *vis major*, or the act of God. Per Blackburn, J., in Fletcher *v.* Ryland, L. R. 2 Exch. Div. 279; 35 L. J. Exch. 154; L. R. 3 Eng. & I. App. 330.

Lord Cranworth says: "If a person brings and accumulates on his land anything which, if it should escape, may cause damage to his neighbor, he does so at his peril. If it does escape and cause damage, he is responsible however careful he may have been, and whatever precautions he may have taken to prevent the damage; . . . and the doctrine is founded in good sense. For when one person, in managing his own affairs, causes, however indirectly, damage to another, it is obviously only just that he should be the party to suffer. He is bound *sic uti tuo ut non lædit alienum*. L. R. 3 Eng. & Ir. Ap. 330; Madras Railway Co. *v.* Zemindar of Carvetinaganum, 20 W. R. 865; 30 L. T. N. S. 770.

But one who stores water on his own land, and uses all reasonable care to keep it safely there, is not liable for damage effected by an escape of the water, if the escape be caused by the act of God, or *vis major;* e.g., by an extraordinary rainfall, which could not reasonably have been anticipated, although if it had been anticipated the effect might have been prevented. Nichols *v.* Mauland, 2 L. R. Exch. Div. 1; 46 L.J. Exch. Div. 174; 33 L. T. N. S. 265.

The plaintiffs hired of the defendant the ground-floor of a warehouse, the upper part of which was occupied by the defendant himself. The water from the roof was collected by gutters into a box, from which it was discharged by a pipe into the drains. A hole was made in the box by a rat, through which the water entered the warehouse and wetted the plaintiffs' goods. The defendant had used reasonable care in examining and seeing to the security of the gutters and the box. In an action by the plaintiffs against the defendant for the damages caused, *held*, that the defendant was not liable, either on the ground of an implied contract or on the ground that he had brought the water to the place from which it entered the warehouse. Carstairs *v.* Taylor, L. R. 6 Exch. 217; 40 L. J. Rep. Exch. 129.

But one who, for his own purposes, so manages his land as to collect there in abnormal quantities anything likely to do mischief if it escape is *prima facie* answerable for the damage consequent upon its escape. The defendants' mines adjoined and communicated with the plaintiffs', and on the surface of the defendants' land were certain hollows and openings, partly caused by water and partly made to facilitate defendants' workings. Across the surface of their land there ran a watercourse. In Novem-

**III. Streams Subject to Great Freshets.**—If a stream is subject to great freshets they must be guarded against, and the measure of

ber, 1871, the banks of the watercourse, (which were sufficient for all ordinary occasions) burst in consequence of exceptionally heavy rains, and the water escaped into and accumulated in the hollows and openings, where the rains had already caused an unusual amount of water to collect, and thence by fissures and cracks water passed into the defendant's and so into the plaintiff's mines. If the land had been in its natural condition the water would have spread itself over the surface, and have been innocuous. The defendants were not guilty of any actual negligence in the management of their mines. In an action by the plaintiff to recover the damage he had sustained, *held*, that the defendants were liable, although they were not guilty of any personal negligence, and although the accident arose from exceptional causes. Smith *v.* Fletcher, 7 L. R. Exch. 305, 41 L. J. Exch. 193.

In King *v.* Truffin, 1 B. & Ad. 874, where the defendants had erected fenders to protect their land in time of flood, Lord Tenterden, C. J., said:

**Damage from Wind and Rain.**—"It has been long established that the ordinary course of water cannot be lawfully changed or obstructed for the benefit of one class of persons to the injury of another. Unless, therefore, a sound distinction can be made between the ordinary course of water flowing in a bounded channel at all usual seasons and the extraordinary course which its superabundant quantity has been accustomed to take at particular seasons, the creation and continuance of these fenders cannot be justified." Angell on Watercourses, § 347.

**Riparian Owner's Liability.**—A riparian owner is entitled to secure the water in the channel of a stream in its natural state up to his neighbor's line; and is not answerable for damage done by high water, however it may have been incurred by obstructions below. He is not liable for loss occasioned by unusual and extraordinary rains or winds. China *v.* Southwick, 12 Me. 238; Monongahela Nav. Co. *v.* Coon, 6 Binney (Pa.), 383; Smith *v.* Agawam Canal Co., 2 Allen (Mass.), 355; Bristol Hydraulic Co. *v.* Boyd, 67 Ind. 236; Curtis *v.* Eastern R. Co., 98 Mass. 428; Boynton *v.* Gilman, 53 Vt. 17; Curtis *v.* Kidder, 24 N. H. 364.

**Floods from Pipe.**—When the precautions of a water company (which had observed the directions of an act of Parliament in laying their pipes) proved insufficient against a winter of extreme coldness, such as no man could have foreseen, it is not sufficient to render them liable for negligence. Blyth *v.* Company of Proprietors of the Birmingham Water Works, 11 Exch. 781; Whitehouse *v.* Birmingham Canal Co., 27 L. J. Exch. 25.

**Extraordinary Frost — Precautions against Frost.**—Although a water company is not liable for the unforeseen result of an extraordinary frost, yet they are bound to take reasonable care to provide against the consequences of ordinary frosts. Steggles *v.* New River Co., 11 W. R. 234; 13 W. R. 413.

**Breakage of Drain.**—A company charged with the duty of repairing a drain held responsible for injury arising from the banks of the drain giving way at a period of extraordinary rainfall, which swelled the drain in consequence of the outlet thereof not being sufficiently widened by other parties, whose duty it was to keep the outlet of a certain width. Harrison *v.* Great Northern Railway Co., 10 Jur. 992; 3 H. & C. 231.

The legal maxim, *Causa propinqua non, remota, spectatur*, governs.

In China *v.* Southwick, 12 Me. 238, an instruction to the jury that if the damage was occasioned by great rains or by the violence of the wind, the defendants were not liable if the jury were satisfied that the head of water raised by defendant's dam was not high enough to do damage to defendant's bridge, was sustained.

**Floods of Rivers.** — The legislative grantees of a right to improve the navigation of a river by erecting dams, locks, etc., if chargeable with no want of attention as to the probable effect of the erection of their works, are not answerable for consequences it was impossible to foresee and prevent. For an act of Providence alone they are not answerable. To fix them with liability for mischief done by a flood or storm, there must be a concurrence of negligence with the act of Providence. Lehigh Bridge Co. *v.* Lehigh Coal and Navigation Co., 4 Rawle (Pa.), 9; Bell *v.* McClintock, 9 Watts (Pa.), 119. When, however, injury arises from causes which might have been foreseen and avoided, as in cases of ordinary periodical freshets, it is but right that he whose superstructure is the immediate cause of the mischief should bear the loss. Bell *v.* McClintock, 9 Watts (Pa.), 119.

care required in such cases must be that which a discreet person would use if he were the owner of the property exposed to damage.[1]

**IV. Duty of Owners of Dams.**—The owner of a dam must use such reasonable care and skill in its construction and maintenance that it will be capable of resisting usual, ordinary, and expected floods.[2]

1. Gray *v.* Harris, 107 Mass. 492; Lapham *v.* Curtis, 5 Vt. 371; Mayor of N. Y. *v.* Bailey, 2 Denio (N. Y.), 433; Washburn *v.* Gilman, 64 Me. 163; Turner *v.* Tuolumne Co. Water Co., 25 Cal. 397; Campbell *v.* Bear River & Auburn W. & M. Co., 35 Cal. 679; Adams *v.* Walker, 34 Conn. 468; Palmer *v.* Waddell, 22 Kan. 352; Atchison, etc., R. Co. *v.* Hammer, 22 Kan. 763; Shaw *v.* Kansas City, St. Jo. etc. R. Co., 71 Mo. 237; Railroad Co. *v.* Carr, 38 Ohio St. 448; Connecticut *v.* Ousatonic Water Co., 51 Conn. 137; McKenzie *v.* Mississippi & Rum. River Boom Co., 29 Minn. 288.

**Act of God.**—Act of God, as applied "to water-courses, would include only floods or extraordinary freshets, and not such rises or high water in a stream as is usual and ordinary, and reasonably anticipated at particular periods of the year." Dorman *v.* Ames, 12 Minn. 463.

**Water stored.**—One who stores water on his own land, and uses all reasonable care to keep it safely there, is not liable for an escape of the water which injures his neighbor, if the escape be caused by an agent beyond his control, such as a storm which amounts to *vis major*, or the act of God, in the sense that it is practically, though not physically, impossible to resist it. Nichols *v.* Marsland, L. R. 10 Exch. 255; 2 Exch. Div. 1.

**Natural or Ordinary State of a Stream.**—The natural state of a stream is that in which the stream is under the ordinary operation of the physical laws which affect it, it may be different at different seasons of the year, and yet be ordinary by the recurrence of the same conditions about the same season every year; it may, ordinarily, be high a portion of the year, low at another portion, and at another it may be at a medium stage: yet as these are ordinary by reason of their annual or frequent occurrence, so that a variance therefrom is an exception, they are the natural condition of the stream. Dorman *v.* Ames, 12 Minn. 452.

The ordinary stage of water in a stream includes its stage in such rises or high water as are usual, ordinary, and reasonably to be anticipated, but does not include such extraordinary freshets as cannot reasonably be anticipated at particular periods of the year. Ames *v.* Cannon River Manufacturing Co., 27 Minn. 245.

"Ordinary stage of water" is used to indicate the stage of water that ordinarily occurs in the spring or other seasons of the year when the stream stands at the highest water-mark. It does not mean that stage of water which continues for the longest period in ordinary seasons. Freshets and floods, which are unusual and occur after great storms, cannot be said to cause an ordinary stage of water. Decorah Woollen Mill Co. *v.* Greer, 58 Iowa, 97

**Ordinarily Recurring Freshets.**—The owner of a dam, although erected on his own land, is answerable to his neighbor for injury to his land in times of ordinary freshets occasioned or enhanced by the dam. In erecting his dam the owner is bound to regard his neighbor's rights and security not only in ordinary stages of water, but in those stages occasioned by ordinarily recurring freshets. Casebers *v.* Mowry, 55 Pa. St. 423; Bell *v.* McClintock, 9 Watts (Pa.), 119; Bristol Hydraulic Co. *v.* Boyer, 67 Ind. 237.

2. He is not responsible for inevitable accidents or for injuries sustained by extraordinary freshets which could not be anticipated or guarded against. If the stream is unceasingly subject to great freshets, they must be guarded against, although they occur only once in several years and at no regular intervals. Mayor of N. Y. *v.* Bailey, 2 Denio (N. Y.), 433; Lapham *v.* Curtis, 3 Va. 371; China *v.* Southwick, 12 Me. 239; Smith *v.* Agawam Canal Co., 2 Allen (Mass.), 355; Wendell *v.* Pratt, 12 Allen (Mass.), 464; Inhabitants of Shrewsbury *v.* Smith, 12 Curt. (Mass.) 177; Gray *v.* Harris, 107 Mass. 492; Brown *v.* Dean, 123 Mass. 254; Hoffman *v.* Tuolumne Co. Water Co., 10 Cal. 413; Fraler *v.* Sears Union Water Co., 12 Cal. 555; Errett *v.* Hydraulic Flume Tunnel Co., 23 Cal. 225; Bristol Hydraulic Co. *v.* Boyes, 67 Ind. 236; Rich *v.* Keshena Improvement Co., 56 Wis. 287; Puch *v.* Wheeler, 2 Dev. & B. (N. Car.) 150; Lang *v* Arnett, 33 Pa. St. 169. See DAMS; Angell on Water-courses, § 336; Washburn on Easements, *288, *289.

In McCoy *v.* Danby, 20 Pa. St. 85, an action on the case for erecting a dam by

**V. Responsibility of Railroads for Damage caused by Floods.**—A railway company is not liable in damages for culpable negligence when the injury results from the failure of the company to provide in the construction of its road-bed against extraordinary floods, unknown to human experience, and which could not have been reasonably anticipated in the construction of the road.[1]

which the water of the stream was penned back so as to overflow the plaintiff's land above, evidence was offered to show the injury which had been caused by the structure at times of ordinary and natural rises in the stream; at regular and periodical rises; at times of high water occurring at the usual flood seasons; and at times of ordinary and common freshets. All this was rejected, and the court held in the charge that there could be no recovery except for damage done by swelling back the water at its ordinary stage, and this was defined to be that situation in which it remains longest, excluding the dry season.

"We find no authority for this rule. One objection to it is the extreme difficulty of its application. In this country there is no dry season properly so called. We have periods of drought which come regularly and at all times of the year. The streams rise immediately after a rain or the melting of the snows, and the fall begins as soon as the rise ceases. That they ever remain in one situation for a preceptible length of time would be hard to prove. . . . If they do, it would require an observation so close and so constant to know in what situation they may remain longest, that no person of ordinary habits could be expected to tell it. . . . One who erects a dam is responsible for all the injury caused by it in times of usual, ordinary, and expected freshets. A flood is another thing. It may not come for years together. When it does come, it is a visitation of Providence, and the destruction it brings with it must be borne by those on whom it happens to fall." Per Black, C.J. See DAMS.

**Flood by Extraordinary High Tide.**—In order that an extraordinary natural event, such as a very high tide, should be, in the legal sense of the words, an act of God, it is not necessary that such an event should never have happened before; it is sufficient that its happening could not have been reasonably expected. If such an event has happened once, but there is nothing to lead to the inference that it is likely to recur, it does not, if it happens a second time, cease to be an act of God. Nitro-Phosphate & Adams Chemical Manure Co. *v.* London & St. Katharine Docks Co., L. R. 9 Ch. Div. 503. In this case it was held an extraordinary high tide, although an act of God, did not excuse the defendant from liability for failure to keep their bank up to the level prescribed by statute; yet they ought to have an opportunity of showing that the damage done by the act of God and the damage done through their negligence should be apportioned.

1. Internat. & Great North. R. Co. *v.* Halloren, 53 Tex. 46; s. c., 3 Am. & Eng. R. R. Cas. 343; Balto. & Ohio & Co. *v.* Sulphur Springs (Pa.), 2 Am. & Eng. R. R. Cas. 166; Gates *v.* Southern Minnesota R. Co. (Minn.) 2 Am. & Eng. R. R. Cas. 237; Great Western R. Co. *v.* Braid, 1 Moo. P. C. C. N. S. 101; Ellet *v.* St. Louis, Kansas City & Northern R. Co., 76 Mo. 516; s. c., 12 Am. & Eng. R. R. Cas. 183, and note; Nithers *v.* North Bend R. Co., 3 H. & N. 969; Rusk *v.* Williams, 27 L. J. n. S. Exch. 357; Memphis & Charleston R. Co. *v.* Reeves, 10 Wall. (U. S.) 176; Ely *v.* St. Louis, Kansas City & Northern R. Co., 77 Mo. 34; s. c., 16 Am. & Eng. R. R. Cas. 342; Sabin & East Texas R. Co. *v.* Hadnot (Texas), 30 Am. & Eng. R. R. Cas. 197; Gillespie *v.* St. L., K. C. & N. R. Co., 6 Mo. App. 554.

There is no liability on a railroad company for not constructing a culvert so as to pass extraordinary floods. Pittsburg, Fort Wayne & Chicago R. Co. *v.* Gilleland, 56 Pa. St. 445. Extraordinary floods are "those unexpected visitations whose comings are not foreshadowed by the usual course of things, and must be laid to the account of Providence, whose dealings, though they may afflict, wrong no one." Per Agnew, J. in Pittsburg, Fort Wayne & Chicago R. Co. *v.* Gilleland, 56 Pa. St. 53.

The ordinary language of the cases in describing a storm or flood for the results of which a railroad company is not liable is "a storm of unusual and extraordinary violence.' Phila. & Reading R. Co. *v.* Anderson, 94 Pa. St. 351. Or "an unusual and extraordinary storm, greater and more destructive than was ever known to happen before or since." Livezey *v.* City of Philadelphia, 64 Pa. St. 106.

**FLOOR.**—A story; a "section of a building between parallel planes." [1]

And the company is not bound to provide against such an unprecedented emergency as a greater flood than was ever before known in the locality, unless it has reason to suspect that such emergency is about to arise. Nashville & Chattanooga R. Co. *v.* David, 6 Heisk. (Tenn.) 261; Same *v.* Ring, 6 Heisk. (Tenn.) 269. In the former case "all the proof shows beyond question that such a flood had never occurred at this place within the memory of man." And the court say: "It might with equal propriety be required that the road should use all reasonable efforts to provide against a flood such as the Deluge in the days of Noah, for in this case there is at any rate one precedent to give warning, while in the other, as far as the proof goes, there was not even one case to indicate to them that such a freshet as the one under consideration might be expected to occur." Floods may be none the less extraordinary in their character because several happen in rapid succession of equal violence." In Pittsburg, Fort Wayne & Chicago R. Co. *v.* Gilleland, 56 Pa. St. 445, the court say: "If all were extraordinary, . . . the surprise at the second and third could not be less than at the first, and it was still more surprising that they should come in this rapid succession. Being extraordinary, neither second nor third could have been expected more than the first. The rule as to extraordinary floods was therefore not changed. But the frequent recurrence of what was supposed to be extraordinary was some evidence that the real character of all these floods had been mistaken by those who testified as to their extraordinary character, and that they were really only ordinary freshets, though measuring up to the highest altitude of that class. It was proper, therefore, to submit this question to the jury, with instruction, if they so found the fact, to apply the rule as to ordinary freshets."

In Gulf, Colorado & Santa Fe R. Co. *v.* Pomeroy, 30 Am. & Eng. R. R. Cas. 200, the plaintiff's crops on his land adjacent to the track of the defendant railroad company were injured by an overflow of a neighboring river (in 1885), caused by insufficient culverts in the defendant's railroad embankment. The overflow was an unusual one, but it was shown that in 1833, 1843, and 1852 similar ones occurred. In an action to recover damages for such injury, *held*, that if the overflow was of such an extraordinary character that the engineers in the construction of the embankment and culvert could not reasonably have been expected to have anticipated and provided against it, then the railroad company was not liable; but if, although the overflow was extraordinary, it might reasonably have been anticipated and provided against, the railroad was liable; and that the occurrence of the previous heavy overflows was sufficient evidence to warrant the jury that the one in question ought reasonably to have been anticipated.

**Goods Injured by Flood.**—Where goods are delayed through the negligence of a carrier, and while so delayed are injured by an unexampled and unprecedented flood in *New York*, the company has been held liable. Michaels *v.* N. Y. C. R. Co., 80 N. Y. 564. But in *Massachusetts* and *Pennsylvania* the flood is considered a remote cause, and the company is not held liable. Denny *v.* N. Y. C. R. Co., 13 Gray (Mass.), 481; Morrison *v.* Davis & Co., 20 Pa. St. 171.

**Duty of Examination of Tracks and Repairs after Floods.**—It is the duty of a railroad company to examine its tracks during and after an extraordinary flood to prevent accidents. International & Gt. N. R. Co. *v.* Halloren, 53 Tex. 46; Hardy *v.* Carolina Cent. R. Co., 74 N. Car. 734. And to repair damage done by flood to fences along its line within a reasonable time. Fielz *v.* Kansas City, St. J. & C. B. R. Co. (Iowa), 13 Am. & Eng. R. R. Cas. 558. See RAILROADS.

**When Overflow-water from River within Rule as to Surface-water.**—Overflow water from a river in time of flood is surface-water within the meaning of the rule that a land-owner has no right, by erecting an embankment, to stop the natural flow of surface-water, or to divert its course, so as to throw it upon the land of his neighbor. Shane *v.* Kansas City, St. Joseph & Council Bluffs R. Co. 71 Mo. 237; s. c., 5 Am. & Eng. R. R. Cas. 64, and note. See SURFACE-WATER.

1. Lowell *v.* Strahan, 145 Mass. 1; s. c., 12 N. E. Rep. 401. A lease of "the first floor" in a building includes the outside of the front wall of that part of the building, and the lessee may place a sign thereon.

In an action on a policy of insurance which contained the provision, "Water on each floor, with hose, and a watchman is to be kept on the premises at night," it was error not to submit the meaning of "floor" to the jury. Evi-

**FLOOR-CLOTH.**—See CANVAS.

**FLOTSAM.**—(See also JETSAM; LIGAN; and WRECK.)—Flotsam is where goods are cast into the sea and continue swimming on the surface of the waves.[1]

**FLOWING.**—(See also FLOODS.) Present participle of the verb "to flow," that is, to inundate, to cover with water; used in the expression "flowing lands."[2]

**FLUID.**—(See also BURNING FLUID; CAMPHENE.)—Any body not solid. The term includes both liquids and gases; whether it means one only of these, or both, must in each case be determined by the surrounding circumstances.[3]

dence that in factory parlance it did not include the basement or the attic was held admissible. N. Y. B. & P. Co. *v.* Washington F. Ins. Co., 10 Bosw. (N. Y.) 428.

1. 1 Blackstone's Com. 292. *Flotsam* is when a ship is sunk, or otherwise perished, and the goods float on the sea. Constable's Case, 5 Coke, 106. But things found floating are not "flotsam," unless they have been at sea in a ship, and separated from it by some peril. Therefore where timber was found floating without an apparent owner at sea, having drifted from the place where it was moored in a river, it was held not to be "wreck" within the meaning of that word as defined by The Merchant Shipping Act of 1854, 17 and 18 Vict. c. 104, although section 2 of said act declared that "wreck shall include jetsam; flotsam; lagan, and derelict found in or on the shores of the sea or any tidal water;" the court, Pollock, C. B., saying: "The action was brought in respect of the decision of two justices upon a claim for services rendered in securing timber, supposed to have been carried out to sea by the tide from above Yarmouth Harbor, in consequence of the fastening having become loose, and found floating in the sea. The question arises whether the justices had jurisdiction. I think that they had not. *Flotsam*, *jetsam*, and *lagan* are terms not applicable to property in such a condition." Palmer *v.* Rouse, 3 Hurl. & N. 505.

2. The act incorporating the Essex Company, and authorizing them to construct a dam across the Merrimack River (St. 1845, c. 143), provided that "any person who shall be damaged in his property by said corporation, in cutting or making canals through his lands or by *flowing* the same, shall have the same remedies as are provided by law for persons damaged by railroad corporations, in the thirty-ninth chapter of the Revised Statutes." Upon a petition for a *mandamus* to require the county commissioners to assess damages against the Essex Company for *flowing* the petitioner's land in Lowell, by erecting a dam across the Merrimack River at Lawrence, pursuant to their act of incorporation, it was held that the provision had reference not only to the form of remedy, but also to the limitation of "three years from the time of taking the land," imposed by Rev. Stat. c. 39, § 58; the court, Shaw, C. J., saying: "The term *flowing lands* has acquired a definite and specific meaning in our law. It commonly imports raising and setting back water on another's land, by a dam placed across a stream or water-course which is the natural drain and outlet for surplus water on such land. This is usually done to enable a party to raise a head of water for mill purposes, regarded by the law as beneficial to the public. Such dam may be authorized either by a general law, as in the case of the Mill Acts, or by specific legislative act as in this act of incorporation. In either case the damage to the land-owner is intended as an indemnity, not for casual or occasional damages, which may be afterwards suffered, by a freshet or flood, but for all the damage he may suffer by all the flowing which may be caused by the erection of such dam. It is the erection of the dam, under the authority of law, which renders it immovable, and which may, and by reasonable estimate will, cause the lands of an owner to be more or less flowed, for which the law provides an indemnity. The right to apply for damages, therefore, accrues when the dam is complete and put into operation; and we are of opinion that the limitation commences and runs from that time." Call *v.* County Commissioners of Middlesex, 2 Gray (Mass.), 232. See also Heard *v.* Middlesex Canal, 5 Met. (Mass.) 81.

3. In an action instituted to restrain

**FLYING SWITCH.**—(See CROSSINGS, Vol. IV. 936. See also RUNNING SWITCH.)—An expression used in railroad parlance. It is thus defined: "To make a 'running switch,' a train approaches with considerable speed, and while so approaching, the car to be left is disconnected; the forward part of the train then passes rapidly over the switch, the rear part is somewhat checked, and the intermediate car to be left is switched off, and the switch is replaced in season for the rear part of the train to unite with the front part thereof, without stopping."[1]

**FODDER.**—Food served to cattle, horses, or sheep in the stall, as distinguished from pasture.[2]

the infringement of letters patent the plaintiff's patent was for regulating the closing of the valves of steam-engines, and preventing them from slamming, by means of a water reservoir; the specification saying: "The reservoir is to contain water, oil, or other 'fluid,' say to two thirds of its height, more or less;" and the claim made being: "I also claim the manner of regulating the closing of the valves, and of effectually preventing them from slamming, by means of a water reservoir." The defendant's patent was one in which the weights that close the valves were prevented from slamming by being cushioned on air. This was held by the court not to be an infringement of the former patent, Nelson, J., saying: "Now, it will be seen that the apparatus described contemplates the use of water, or, at most, of some liquid incompressible in its operation and effect, and not the use of air. Indeed, it is manifest that air could not be used at all, according to the arrangement. And in the claim, which is the summing up of what is deemed the thing discovered, and is required by the statute, a water reservoir is alone specified. But what is, if possible, still more decisive, the patentee, in describing what the reservoir shall contain, also directs the manner. It is 'to contain water, oil, or other fluid, say to two thirds of its height, more or less.' The experts called on the part of the plaintiffs, and their counsel on the argument, maintained that, according to scientific classification, the term 'fluid' included air, and hence this element was embraced in the description. But neither of them undertook to explain how the reservoir could be filled with air to two thirds of its height, agreeably to the direction prescribed. The thing is simply absurd. The whole description shows that that element was not in the contem plation of the patentee. The terms used necessarily exclude it, and so does the description of the several modes pointed out of using the dash-pot for the purposes intended. No doubt the term 'fluid,' in its generic and technically scientific sense, includes air and the gases; but in the sense in which it is used by the patentee, and in the connection in which it is found, it means a fluid that is tangible, that can be seen and handled, like water or oil, and with which a vessel can be filled wholly or in part, at the option of the patentee. These are the only description of 'fluids' that can be used in his reservoir, in the way pointed out by him." Sickels *v.* Youngs, 3 Blatch. (U. S.) 293, 301.

1. Brown *v.* New York Central R. Co., 32 N. Y. 597, note. In this case it was held that to make such a switch over the crossing of the track by a public road, in the populous part of a village, is of itself an act of gross and criminal negligence on the part of the railroad company.

"A flying switch is made by uncoupling the cars from the engine while in motion, and throwing the cars on to the side track, by turning the switch, after the engine has passed it, upon the main track." Greenleaf *v.* Illinois Central R. Co., 29 Iowa, 14, 39.

2. The English General Turnpike Act, 3 Geo. IV. c. 26, enacts by section 32 "that no toll shall be demanded or taken on any turnpike road for any horse, beast, or other cattle, or carriage employed in carrying or conveying, having been employed only in carrying or conveying on the same day any hay, straw, fodder for cattle, and corn in the straw which has grown or arisen on land or ground in the occupation of the owner of any such hay, straw, fodder, or corn in the straw, potatoes or other agricultural produce, and which has not been bought, sold, or disposed of, nor is going to be sold or disposed of." A horse and cart passed through a toll-gate carrying

**FŒNUS.**—That which produced interest on money.[1] A Latin word used in the expression *fœnus nauticum*, of agreements made when money is lent on the hazard of a voyage.[2]

**FOLIO.**—A certain number of words in legal documents; in conveyances, deeds, etc., the *folio* is seventy-two words; in Parliamentary proceedings, ninety words.[3] By statute in Michigan the *folio* is one hundred words.[4]

threshed barley which had grown on land in the occupation of the owner, to a mill to be ground into meal for feeding the owner's pigs. They repassed on the same day, laden with barley-meal obtained from the mill, the produce of another parcel of barley grown by the same owner on the same land, and previously sent to be ground into meal for the same purpose. It was held that the horse and cart were exempt from toll under the above General Turnpike Act; for that both the barley and the barley-meal came within the description of "fodder for cattle," Cockburn, C. J., saying: "In this case I think that the justices were right in holding that the exemption, from liability to toll did exist. It is true that the application of barley or barley-meal as food for cattle may be a modern practice. But the words of the act of Parliament are wide enough to include them within the exemption and the principle of exemption applies. It has been held that clauses of this nature are to be construed liberally in favor of agriculture. No doubt there is some difficulty at first sight in saying that barley in the course of transit to a mill for the purpose of being ground into meal, to be afterwards eaten by cattle, is already *fodder for cattle;* but giving a fair and liberal construction to the words of the statute, I think that everything which is ultimately destined to be used as food for cattle is *fodder* for them, although it may not have gone through the final process which will make it such. Otherwise, this absurd and inconvenient consequence would follow, that if a man passed through a toll-gate with barley intended, in its natural state, as food for cattle, he would be within the exemption; but if he had a crushing machine on his own premises, to reach which with the barley he had to pass through the gate, he would be liable to toll, because of his intention to crush the barley before giving it to his cattle. So, again, it would be strange if a man who was taking turnips to be boiled before giving them to his cattle, as is done in parts of Scotland, was not exempt from toll in respect of them. A variety of similar instances might be adduced. The safer course is to construe the act liberally, in accordance with the spirit in which such enactments ought to be construed, and to hold that the exemption extends to corn destined for the consumption of cattle, although at the time that the exemption is claimed it is in an intermediate stage towards being made into fodder for them." Clements *v.* Smith, 3 El. & El. 238.

1. The Encyclopædic Dictionary.

2. The terms are also applied to contracts for the repayment of money borrowed, not on the ship and goods only, but on the mere hazard of the voyage itself: when a man lends a merchant £1000, to be employed in a beneficial trade, with condition to be repaid with extraordinary interest in case such a voyage be safely performed; which kind of agreement is sometimes called *fœnus nauticum*, and sometimes *usura maritima*. 2 Blackst. Com. 458; 2 Stephen's Com. 93.

3. The Encyclopædic Dictionary, *sub voce*.

4. The term "folio," when used as a measure for computing fees or compensation, shall be construed to mean one hundred words, counting every figure necessarily used as a word; and any portion of a folio, when in the whole draft or paper there shall not be a complete folio, and when there shall be any excess over the last folio, shall be computed as a folio. Compiled Laws of Michigan (1871), § 7459. *Compare* Howell's Annotated Statutes (Mich. 1883), § 9034.

This law has been followed in a Michigan case, in which the plaintiffs, publishers of a newspaper in the village of Sturgis, St. Joseph's county, Michigan, brought suit against the village for the amount of a printing bill. The claim was disallowed on the ground that the publication had been made without any order of the village board, although it was in evidence that some of the village officers took notices to the plaintiffs for publication. The court, Cooley, J., confirmed, however, the instruction to the jury, that a legal folio was one hundred words. Thornton *v.* Sturgis, 38 Mich. 639.

**FOLLOW.**—To go or come after, hence to succeed or come after, go with, accompany, as in the phrase *follow the event*.[1] To pursue ;[2]

1. **Follow the event.**—In an action for libel the plaintiff upon the trial recovered one farthing damages. His counsel asked the trial judge to certify for costs, but the judge refused to do so, or to interfere one way or the other. The plaintiff claimed that he was entitled to costs under the Judicature Act, 1875, Order LV., as follows: "Subject to the provision of the act, the costs of and incident to all proceedings in the high court shall be in the discretion of the court; provided that where any action or issue is tried by a jury, the costs shall 'follow the event,' unless upon application made at the trial for good cause shown, the judge before whom such action or issue is tried, or the court, shall otherwise order." The master, however, refused to tax the costs, on the ground that the plaintiff having recovered less than forty shillings was not entitled thereto. The plaintiff contended that the above order operated as a repeal of all the previous statutes as to costs; the defendant argued that there was no express repeal of the previous enactments with regard to costs in the Judicature Act or Rules; that a reasonable construction might be given to the proviso to Order LV. without interfering with the special provisions of the previous statutes as to costs in particular cases; and that by "following the event" the order meant that the result as to costs was to follow on the finding of the jury in the same manner as it would have done before the act. The court held the plaintiff entitled to costs, Lord Coleridge, C. J., saying: "We are called upon to construe the words of Order LV. There is no doubt that, according to the law that existed previous to the Judicature Act, the plaintiff would not get his costs in this case, inasmuch as the plaintiff only got a farthing damages, and the judge declined to certify or to interfere one way or the other. No question arises in this case of any application to the discretion of the court with regard to costs. The whole matter turns therefore upon the meaning of the words in the proviso to the order, 'the costs shall follow the event.' It must be observed that the order is made 'subject to the provisions of the Act,' and we do not intend to express any doubt that those words govern the proviso as well as the previous part of the order but they do not appear to affect the present case, inasmuch as sec. 67 of the Judicature Act, 1873, which appears to be the only section applicable to this matter, preserves the provisions of the County Courts Act, 1867, as to costs only in cases where relief is sought which can be given in the county court. The present action being an action of libel, which could not be brought in the county court, that section does not apply. It is contended that, because before the act the costs would not have 'followed the event,' inasmuch as the damages obtained by the plaintiff did not amount to a certain sum, therefore the plaintiff does not come within the words of the proviso. In other words, that the true construction of the proviso is that the words 'shall follow the event' mean shall follow the event according as before the act they would or would not have done so. This would require a very considerable interpolation of words into the order, and such as we ought not to make unless some overwhelming necessity for it could be shown to exist either with reference to the intention of the act or the authority of previous judicial decisions. . . The manifest object of the act was to assimilate the practice of law and equity, and to make one rule for all divisions of the one court. . . Here, according to the ordinary meaning of the words, the event was entirely in favor of the plaintiff, and the enactment is that the costs shall 'follow that event.' The reason of the thing is all in favor of giving the words of the order their plain, natural meaning. Whereas before the act the question of costs was often a very difficult one, depending on a multiplicity of statutes, and the rule differed in different courts, now this one short order is to govern them in all cases in a manner intelligible to everybody." Parsons *v.* Tingling, L. R. 2 C. P. Div. 119.

This ruling was followed in Field *v.* Great Northern Railway Co., L. R. 3 Exc. Div. 261; Myers *v.* Defries, L. R. 5 Exc. Div. 15; s. c., L. R. 5 Exc. Div. 180. See EVENT. See also Garnett *v.* Bradley, L. R. 3 App. Cas. 944.

2. **Follow up.**—Where a statute (Gen. Stat. tit. 12, § 123) made it a crime "to disturb or break the peace, or stir up and provoke contention and strife, by following or mocking any person with scurrilous or abusive or indecent language, or gestures, or noise;" and where it appeared that there had been a controversy between one charged with such a crime and another person, in which the accused had become greatly excited, and on the

To walk in, to practice, as a profession or business.[1]

**FOOD.** (See also ADULTERATION.)—Any substance which, taken into the body, is capable of sustaining or nourishing the living.[2]

**FOOT.**—The extremity, bottom, or end of anything.[3] An ex-

next day he assailed the other party with scurrilous and abusive language,—the court held that whether it was a "following up" within the meaning of the statute, or not, it was clearly a mocking. McCurdy, J., saying: "As to the 'following up.' It seems that on the 28th of May a controversy had arisen between the parties, and that the accused had become very much enraged against Kerley, and so continued until the next day, when he went to the place where Kerley was, and abused and insulted him in the manner recited in the information. It would not be a strained interpretation to call this conduct a 'following up.' But however that may be, the outrageous acts of the accused clearly amount to a mocking, within the purview of the statute." State *v.* Warner, 34 Conn. 276.

**1. Follow his business.**—A policy of insurance against accident contained a proviso "that in case such accident shall not cause the death of the insured immediately, but shall cause any bodily injury to the insured of so serious a nature as wholly to disable him from following his usual business, occupation, or pursuits, the company will pay to the insured a compensation in money at the rate of £5 per week during the continuance of such disability." The insured, a solicitor, and registrar of a county court, sprained his ankle severely, and was confined to his bedroom for some weeks, being unable to get down stairs. He was prevented from passing his accounts as registrar, and from attending at various places at which he was required to complete purchases for his clients. In an action brought on the policy of insurance, it was held that inasmuch as the plaintiff was so disabled as to be incapable of following his usual occupation, business, or pursuits, he was "wholly disabled from following his usual occupation, business, or pursuits within the meaning of the policy." Hooper *v.* Accidental Death Ins. Co., 5 Hurl. & N. 546.

**2** But in statutes the use of the word is generally limited to certain kinds or quantities of food.

Thus, where a by-law of the *District of Columbia* provided "that no person shall buy any provision or articles of food in the market, and during the market hours aforesaid, for the purpose of selling the same again in the said market, or in any part of the city; nor shall any person out of the market buy up any provision or article of food coming to said market,—under the penalty of six dollars for every offence." The court decided that *rye-chop* (which was food for horses) was not "provision," nor an "article of food," within the meaning of the by-law. (Burch's Dig. p. 119, art. 9.) Botelor *v.* Corporation of Washington, 2 Cranch C. C. (U. S.), 676.

And statutes which provide that the necessary food for exempt stock shall be free from execution have been held not to exempt food for animals which the debtor does not possess, and has no present purpose of obtaining. Cowan *v.* Main, 24 Wisconsin, 569; King *v.* Moore, 10 Mich. 538; Farrel *v.* Highley, Denio & Hill (N. Y.), 87.

But under a *New York* statute which enacts that "all sheep, to the number of ten, with their fleeces, and yarn or cloth manufactured from the same," shall be exempt from execution (2 R. S. 255, § 169, sub. 4), it was held that the fleeces, or the yarn or cloth manufactured from the fleeces, of ten sheep are exempted from execution while in the hands of a householder, whether he be or be not the owner of sheep. Hall *v.* Penny, 11 Wend. (N. Y.) 44.

**3.** Thus, where a woman died, leaving a will written on the first, second, and third pages of a sheet of foolscap paper, and the last clause appointing executors ended in the middle of the third page, the remainder of the page being left blank, while the attestation clause and the signatures were written at the top of the fourth page, a *caveat* was entered by one of the next of kin, on the ground that the deceased had signed her name at the bottom of the first and second pages, but not on the third page. The court, however, granted probate, as the case was clearly within Lord St. Leonard's Act, 15 & 16 Vic. c. 24, § 1, passed June 17, 1852, which provides as follows: "Where, by an act passed in the first year of the reign of her Majesty Queen Victoria, intituled 'An Act for the amendment of the laws in respect to wills,' it is enacted that no will shall be valid unless it shall be signed at the foot or end thereof, by the testator, or by some other person in his presence, and

pression of linear measurement.[1] Sometimes used figuratively,

by his direction. Every will shall, so far only as regards the position of the signature of the testator, or of the person signing for him as aforesaid, be deemed to be valid within the said enactment as explained by this act, if the signature shall be so placed at, or after, or following, or under, or beside, or opposite to the end of the will, that it shall be apparent on the face of the will that the testator intended to give effect by such his signature to the writing signed as his will; and that no such will shall be affected by the circumstance that the signature shall not follow or be immediately after the foot or end of the will, or by the circumstance that a blank space shall intervene between the concluding word of the will and the signature, or by the circumstance that the signature shall be placed among the words of the testimonium clause, or of the clause of attestation, or shall follow or be after or under the clause of attestation, either with or without a blank space intervening, or shall follow or be after or under or beside the names or one of the names of the subscribing witnesses, or by the circumstance that the signature shall be on a side or page or other portion of the paper or papers containiag the will, whereon no clause or paragraph or disposing part of the will shall be written above the signature, or by the circumstance that there shall appear to be sufficient space on or at the bottom of the preceding side or page or other portion of the same paper on which the will is written, to contain the signature, etc." Hunt *v.* Hunt, L. R. 1 P. & D. 209.

**Foot of the Mountain.**—Where, in a deed, land was described as bounding "on the mountain," and "by the mountain," and "at the foot of the mountain," it was held that these words were too indefinite and uncertain to control the courses, distances, and other references in the deed descriptive of the land, the court, Wilde, J., saying: "In the description of the lands in the deeds and locations in question they are bounded partly 'by the mountain,' or 'on the mountain,' or 'the foot of the mountain.' These references we consider as too indefinite and uncertain to control the courses and distances, and other references by which these lots are described. The foot of the mountain is the most definite reference. But the foot of the mountain may in many cases be uncertain, the rise being so gradual and inconsiderable. The other references are still more loose and indefinite. A mountain lot may be described as bounding on all sides by the mountain. So, if a lot is described as beginning at known monuments, and extending, according to the courses and distances named, far up the side of a mountain, or to its summit, and is there bounded 'by the mountain,' or 'on the mountain,' there would be no necessary inconsistency in the description, so as to render the construction doubtful." The question was therefore held to be one both of law and fact as to whether these words excluded or included a certain part of the mountain, and as such must be submitted to the jury. Williston *v.* Morse, 10 Metc. (Mass.) 17, 26.

1. Where a contract was made for the delivery of a certain number of trees, not less than one foot high, it was held that it was competent for the defendant in an action of covenant for the value of the trees delivered to show what, in the usage of the trade, was meant by trees "one foot high," such evidence tending to explain a doubtful contract, not to contradict an explicit one, the court, Nevins, J., saying: "But it is further objected, that the court below overruled legal and material evidence offered by the defendant on the trial. To get at the point of this objection, it is necessary to refer again to the written contract, which provides in terms that the trees to be delivered were not to be less than one foot high. The plaintiff proved that the trees delivered were one foot high, measuring from the top of the root to the top of the stem. The defendant then proved that, after his return home, he caused these trees to be counted and measured, and that, according to such measurement, there were only 9000 of a foot high and upwards, and that the rest were rejected, as falling short of that measurement. The mode of measurement adopted by the defendant (according to the evidence) was from the top of the root to the extent of the ripe or hard wood, and not to the top of the stem. It became apparent, then, that the discrepancy in the count and measurement of the trees by the different witnesses arose from the different modes of measuring adopted by them. The defendant then offered to prove by witnesses that the mode adopted by him was the lawful and proper rule; that it was the rule well known and practised by all dealers in that article from the commencement of the trade until the time when this contract was made; that this custom

as in the phrase, "to set on foot," that is, to set in action, to start, put in motion.[1]

or usage of measuring mulberry-trees, from the top of the root, or bottom of the stem, to the extremity of the matured or hard wood, was uniform and universal in the execution of all contracts for the sale and delivery of the article, made by dealers therein; that the plaintiff himself and those from whom he had acquired his title to the trees in question were dealers in the article, residing in the neighborhood where that usage prevailed, and were well acquainted with it. All this evidence was offered with the avowed purpose of explaining the true intent and meaning of the parties to this contract touching the phrase 'one foot high,' and not to alter, contradict, or even modify the terms of the contract. This evidence was overruled on the trial, and, I think, erroneously. It is no answer to say that 'tree' is a word of precise and definite signification, or that a 'tree' is a 'tree,' and can be nothing else, and that everybody knows what a tree is. It is the qualification contained in the contract that we are to consider in this case. The trees were to be at least a foot high. This involves the question of measurement, and how were they to be measured —while standing and growing in the ground, or after they had been dug from it? Were they to be measured from the extreme root to the extreme branch (both of which are parts of the tree), or in what other mode were they to be measured, in order to determine their height? It seems to me that the inquiry proposed by the defendant was legitimate and proper, and tended to settle an ambiguity in one part of the contract. It is a well-settled rule of law, that contracting parties are always presumed to make their contracts with reference to the general custom and usage that appertains to the subject-matter of their contract, if any such general custom prevails; and all ambiguous terms or phrases used in expressing such contract may be explained by resorting to such general usage. . . But, apart from the reasonable and well-settled principle of the law of evidence, the nature of the thing contracted for and the object of the parties rendered the evidence lawful. The defendant was the purchaser of these trees, and in his contract he provided that they should be one foot high. For what purpose? Why a foot high rather than six inches high? The plain and obvious answer is, that he might have a tree which, when divided into parts, would produce, when planted, a tree from every part, that is, that each part would vegetate. But all the witnesses proved that the part of the tree which did not consist of ripe or hard wood was entirely worthless, had not in itself a power of vegetation, but, as soon as the tree was removed from the ground, wilted and died. How, then, could the parties have contemplated that worthless part of the stem of the tree as a portion to be paid for by the terms of the contract?" Barton *v.* McKelway, 2 Zabriskie (N. J.), 165, 173.

1. In this sense it is used in the 6th section of the act of Congress of the 20th of April, 1818, entitled "An Act for the punishment of certain crimes," which reads as follows: "That if any person shall, within the territory or jurisdiction of the United States, begin, or set on foot, or provide, or prepare the means for any military expedition or enterprise, to be carried on from thence against the territory or dominion of any foreign prince or state, or of any colony, district or people, with whom the United States are at peace, every person so offending shall be deemed guilty of a high misdemeanor," etc. In charging the grand jury upon this section, McLean, J., said: "To this section your attention is specially solicited. You will observe that the enumerated acts which constitute the offence are all in the disjunctive. To 'begin' the military expedition spoken of is an offence within the statute. To begin it, is to do the first act which may lead to the enterprise. The offence is consummated by any overt act which shall be a commencement of the expedition, though it should not be prosecuted. Or if an individual shall 'set the expedition on foot,' which is scarcely distinguishable from beginning it. To set it on foot may imply some progress beyond that of beginning it. Any combination of individuals to carry on the expedition is 'setting it on foot,' and the contribution of money or anything else, which shall induce such combination, may be a beginning of the enterprise. 'To provide the means for such an enterprise' is within the statute. To constitute this offence, the individual need not engage personally in the expedition. If he furnish the munitions of war, provisions, transportations, clothing, or any other necessaries, to men engaged in the expedition, he is guilty, for he provides the means to carry on the expedition. It must be against a nation or people with

**FOR.**—[Its definition and its use in the phrases:]

**For or on account of,** 79.
**For or in behalf of,** 81.
**For cash,** 82.
**For cause,** 82.
**For collection,** 82.
**For or in consideration of,** 84.
**For whom it may concern,** 87.
**Contracting for,** 89.
**For the future,** 89.
**For giving,** 90.
**For hire or gain,** 91.
**For her own use,** 91.
**For said firm,** 92.
**For his services,** 92.
**For the time being,** 93.
**For the day or train only,** 93.
**For the use,** 94.
**For that,** 94.
**For and during,** 94.
**For the purpose,** 96.
**For value received,** 97.
**"For" as equivalent to "from,"** 97.
**"For" in the sense of "for the use of,"** 97.

A preposition, used in various senses, such as, with a view to, for the purpose of, by reason of, because of, on account of. For examples of the several phrases in which it is used, see the notes.[1]

whom we are at peace." Charge to the Grand Jury, 5 McLean (U. S.), 306.

1. By the terms of a contract of insurance upon the body, tackle, apparel, etc., of a propeller, the insurers were "not to be liable *for* the bursting of the boilers." While the vessel was proceeding on the voyage the boilers burst, whereby the body, tackle, etc., and the boilers were blown to pieces, and sank and became destroyed. In an action upon the policy of insurance, it was held that the insurers were not liable for the damage resulting to the vessel, the court, Denio, C. J., saying: "The complaint was apparently drawn with a view to prevent the question of construction arising upon the exception contained in the policy. As the solution of that question depends upon the particular language used, we must assume that the averments contain verbally accurate extracts from the contract. The position of the defendant, upon that language, is that the insurers were not to be liable for the consequences to the vessel, and its equipments and furniture, resulting from the bursting of the boilers; while the plaintiffs claim that the exemption from liability is limited to damage from the boiler alone. Upon questions of this kind the first resort is to the terms used. It is not said in express language that the defendant is not to be liable for any loss *occasioned* by the explosion of the boiler, but the expression is more deep, and perhaps more indefinite. The company 'is not to be liable *for* bursting of the boilers.' It is unquestionably loss or damage of some kind and to some subject, to which the liability is declared not to extend. The kind of damage was that which would naturally or probably result from such an accident. Such an occurrence would necessarily injure and would probably destroy the boiler itself, but it would also be likely to injure the vessel, and might, as it did in this case, sink and destroy it. The meaning of the sentence depends much on the force of the word 'for.' The defendant was not to be liable *for* bursting the boilers. In my opinion, it is to be understood in the sense of 'on account of,' 'by reason of,' or 'because of.' The word is familiarly used in such a sense; and these are among its established definitions. A man is said to be liable to pay damages *for* the commission of a trespass, or to be imprisoned *for* stealing another's property. What the defendant was not to be liable *for* by this clause were the consequences of the bursting of the boilers. The plaintiffs took the risk of these consequences upon themselves. The nature and extent of the consequences which were embraced in the scope of the provision is another question. They were something which the insurers would be liable *for*, or which it was supposed they would be liable *for*, but for the special provision. The breaking to pieces and sinking of a vessel which was seaworthy at the commencement of the voyage, by a peril insured against, is a thing for which an insurer is of course liable, and the explosion of the boilers of a steam-vessel, without the fault of the assured, is, upon the concession of the counsel on both sides, a peril embraced in this policy. The plaintiff's claim to recover is based wholly upon that position. It has been so held in several cases in this country, and I am not aware that it has ever been contradicted." Strong *v.* Sun Mutua lIns. Co., 31 N. Y. 163.

**For or on account of.**—In an action of *assumpsit* the plaintiff gave in evidence

the following receipt: "Received of Captain E. Smith, 50 barrels of provisions, for account of David M'Kinstry.

"ROBERT PEARSALL.

"5th December, 1803."

It appeared that Pearsall gave this receipt to the master of a vessel, the provisions having been sent to him, as he offered evidence to show, to sell upon commission. He further offered evidence to show that this was his uniform custom, and that he never sold otherwise; that the provisions in question were sold by him at a credit of 60 days, to persons at that time in good credit, and their note taken for the amount; that the purchasers failed before the note fell due, and that the defendant was obliged to take it up. Of all of which he had informed the defendant. Upon this evidence the judge charged the jury that the plaintiff was entitled to recover, and the jury found accordingly. Upon a motion to set aside the verdict, it was held that the receipt was not evidence of a sale of the provisions, and that parol evidence was admissible to show that the provisions were in fact received to sell on commission, and so far to explain the written receipt, the court, Spencer, J., saying: "If the receipt had been in terms more explicit than it is, it would be open to explanation: I mean that kind of explanation not directly contradictory to, but consistent with it. With respect to papers of this kind, the courts have permitted the party to show mistake, fraud, and imposition in obtaining them. It is not necessary in this case to go so far, as the receipt itself is perfectly equivocal, and from the mere reading of it no one could say whether the provisions were received to go on an account held by the defendant against the plaintiff, or whether the defendant meant only to acknowledge that though the provisions were received from Captain Smith they were received by the defendant *for* or *on* account of David M'Kinstry. I should understand the receipt to import the latter, for several reasons: because there is no sum mentioned at which they were received, and because 'for account' denotes with more propriety the ownership of the property, rather than that they were received on an account against him." M'Kinstry *v.* Pearsall, 3 Johns. (N. Y.) 319.

Where a declaration stated that one J. was indebted to the plaintiff in £17 11*s*., and thereupon, in consideration that the plaintiff would, *for and on account of* the said sum, accept the joint and several promissory of J. and one E. for payment thereof six months after date, and would thereby give time to J. for the payment of said debt, the defendant promised to pay the said sum, if the said promissory note were not duly honored and paid; and then averred that the plaintiff, confiding in the said promise, did then accept and receive the said promissory note, *for and on account of* the said sum so due to him from Johnson as aforesaid, and did give time to Johnson for payment thereof, from thence until hitherto,—it was objected by the defendant that the plaintiff was only to give time "thereby" (that is, by taking the note), until the note became due, and that there was no averment that he gave time by taking the note. The court held that the giving a bill "for and on account of" is *prima facie* an agreement to forbear enforcing payment of the debt until the bill be due, Pollock, C. B., saying: "I am of opinion that the plaintiff is entitled to the judgment of the court. With respect to the last objection, the declaration expressly shows not only that the plaintiff did give time by receiving the note, but that he received it under circumstances which compelled him to give time; the case of Kearslake *v.* Morgan (5 Term Reports, 513), having decided that a creditor who receives a negotiable instrument 'for and on account' of a debt is presumed to have received it in present satisfaction, and the receipt operates as a suspension of the remedy on the debt." Walton *v.* Maskell, 2 Dowl. & L. 410.

But the receipt of such negotiable instrument, is a suspension only of the debt, not an extinguishment, unless the instrument be paid. Thus in an action of debt containing two counts, one account by the drawer against the acceptor of a bill of exchange, the other a count upon an account stated, a plea was entered that the acceptance of the bill of exchange was the account stated, and that the debt was the same. To this a replication was filed by way of new assignment, to which the rejoinder was, that after the accruing of the said debt, so newly assigned, the plaintiff drew a bill of exchange upon the defendant for that amount, which the defendant accepted and delivered to the plaintiff, who then took and received the same of and from the defendant "for and on account of," and in payment and discharge of the said debt. The verdict was for the defendant, whereupon the plaintiff took a rule to show cause why judgment should not be entered *non obstante veredicto*, which rule the court made absolute, Whiteman, J., saying: "It has been very properly admitted in this case that if the

words in the plea had been only 'for and and on account of,' the subsequent part of the plea would have rendered the plea bad; for it would appear that the bill was given as a collateral security, which would suspend the cause of action whilst running, but could have no effect when the collateral security failed and the original liability revived. The defendants' counsel, however, contends that the words here used are equivalent to 'satisfaction,' and that therefore the plea in effect states an extinguishment of the plaintiff's cause of action. It is a pity, if it was so meant, that the word 'satisfaction,' which the law knows, was not used. I am always inclined to distrust supposed equivalents. It is plain that if the words 'in payment and discharge of' do not amount to 'satisfaction,' these words are not rendered stronger by the insertion of the words "for and on account of." McDowall *v.* Boyd, 6 Dowl. & D. 149.

A captain of a barge, in the exclusive service of its owner, who was remunerated with half the earnings of the vessel, and had no authority to take any other cargoes but those appointed for him, on one occasion, although ordered to bring the barge back empty from a certain place, and forbidden to take a particular cargo, nevertheless loaded such cargo in the barge, returned therewith, and received £4 in payment. He did not profess to carry the cargo or receive the freight for his master, and the person paying the money did not know for whom he paid it. The captain declared that the barge came back empty, and never accounted for the freight. On indictment found, the jury rendered a verdict of guilty against the prisoner, as a servant of the owner of the barge, of embezzling £2; but the court held that he was not guilty of embezzlement, as the money was not received or taken into possession by him "for, or in the name of, or on the account of, his master or employer," within 24 & 25 Vict. C. 96, § 68; Borill, C. J., saying: "In the former act relating to this offence were the words 'by virtue of his employment." The phrase led to some difficulty, for example, such as arose in Reg. *v.* Snowley (4 C. & P. 390) and Reg. *v.* Harris (Dears. Cr. C. 344). Therefore in the present statute those words are left out; and section 68 requires instead that in order to constitute the crime of embezzlement by a clerk or servant the 'chattel, money, or valuable security . . . shall be delivered to, or received, or taken into possession by him "for, or in the name, or on account" of his master or employer.' These words are essential to the definition of the crime of embezzlement under that section. The prisoner here, contrary to his master's orders, used the barge for his, the servant's, own purposes, and so earned money which was paid to him, not for his master, but for himself; and it is expressly stated that there was no proof that he professed to carry for the master, and that the hirer at the time of paying the money did not know for whom he paid it. The facts before us would seem more consistent with the notion that the prisoner was misusing his master's property, and so earning money for himself, and not for his master. Under those circumstances, the money would not be received 'for,' or 'in the name of,' or 'on account of,' his master, but for himself, in his own name, and for his own account. His act, therefore, does not come within the terms of the statute, and the conviction must be quashed." The Queen *v.* Callum, L. R. 2 C. C. R. 28.

**For or in behalf of.**—In discussing the question whether a principal or his agent is the party liable upon a negotiable instrument, and in what way this question is to be determined, Gray, J., says: "Upon the question what words in a simple contract, made by the hand of an agent of an individual or private corporation, will bind the principal, the line of distinction between the cases, even in the same court, is very narrow. Thus it is well settled that a promissory note made by an agent, without naming his principal in the body of it, but signed '*For* C. D., A. B.,' or 'A. B., agent *for* C. D.,' or 'A. B.,' *for* C. D.' is the note of C. D., the principal. See Long *v.* Colburn, 11 Mass. 97; Emerson *v.* Providence Hat Mfg. Co., 12 Mass. 237; Ballow *v.* Talbot, 16 Mass. 461; Rice *v.* Gove, 22 Pick. (Mass.) 158; Paige *v.* Stone, 10 Metc. (Mass.) 160; *Ex parte* Buckley, 14 M. & W. 469. But it seems to be equally well settled in this court, and supported by English authority, that the mere insertion of 'for' or 'for and in behalf of' the principal, in the body of the note, does not make it the contract of the principal, if signed by the mere name of the agent, without addition." Barlow *v.* The Congregational Society in Lee, 8 Allen (Mass.), 460.

Thus where one covenanted "for himself, his heirs," etc., and under his own "hand and seal," for the act of another, he was held personally bound by his covenant, although in the deed he de-

scribed himself as covenanting "for and on the part and behalf" of said other person, the court saying:

"It is impossible to contend that where one covenants for another he is not to be bound by it; the covenant being in *his own* name 'for himself, his heirs,' etc. There was nothing unusual or inconsistent in the nature of the thing, that one should covenant to another that a third person should do a certain thing, as that he should go to *Rome*. The party to whom the covenant is made may prefer the security of the covenantor to that of his principal. Here the defendant covenants 'for himself,' not in the name of his principal, and puts his own seal to it. There is nothing against law in it, if he will bind himself for his principal. He probably consented to it upon an indemnity." Appleton *v.* Binks, 5 East, 148.

**For Cash.**—See CASH.

**For Cause.**—See CAUSE.

**For Collection.**—See AGENCY; BANKS AND BANKING; COLLECTION.

**Collection Agencies.**—Where a collection agency received acceptances at their office, and gave a receipt for them "for collection," it was held that by giving such receipt they undertook themselves to "collect," not merely to remit "for collection," to some responsible attorney; and having sent the acceptances to one of their agents, who collected the money and failed to pay it over, they were liable therefor, the court, Agnew, J., saying: "It is argued, notwithstanding the express receipt 'for collection,' that the defendants did not undertake for themselves to collect, but only to remit to a proper and responsible attorney, and made themselves liable for diligence in correspondence, and giving the necessary information to the plaintiffs; or in briefer terms, that the attorney in Memphis was not their agent for the collection, but that of the plaintiffs only. The current of decision, however, is otherwise as to attorneys at law sending claims to correspondents for collection, and the reasons for applying the same rule to collection agencies are even stronger. They have their selected agents in every part of the country. From the nature of such ramified institutions we must conclude that the public impression is correct that the agency invited customers on the very ground of its facilities for making distinct collections. It must be presumed, from its business connections at remote points, and its knowledge of the agents chosen, the agency intends to undertake the performance of the service which the individual customer is unable to perform for himself. There is good reason therefore to hold that such an agency is liable for collections made by its own agents, when it undertakes the collection by the express terms of the receipt. If it does not so intend, it has it in its power to limit responsibility by the terms of the receipt. An example of this limited liability is found in the case of Bullitt *v.* Baird, decided at Philadelphia in 1870—the only case in this State upon the subject of such agencies. There the receipt read 'for collection according to our direction,' and proceeds: 'When received by us, to be paid over to King & Baird.' Across the face of the receipt were printed these words: 'N. B. The owner of the within mentioned taking all the risks of the mail, of losses by failure of agents to remit, and also of losses by reason of insurrection or war.' The limitation of the liability of Bullitt and Fairthorn by Mr. Bullitt, himself a good lawyer, is evidence of his belief that a greater liability would arise without the restriction. Recurring to the analogy of attorneys at law, the first point to be considered is the interpretation given by the courts to the terms of a receipt 'for collection.' In our own State we have several decisions in point.

In Riddle *v.* Hoffman's Ex'r, 3 Penrose & Watts (Penn.), 224, Riddle, an attorney in Franklin county gave a receipt in these words: 'Lodged in my hands a judgment bill, granted by Henry H. Morwitz to Henry Hoffman, for the sum of $1200, due with interest since the 15th of May, 1811, which is entered up in Bedford county, which I am to have recovered if it can be accomplished.' Riddle sent this bill to his brother, a practising lawyer in Bedford. The money was made by the sheriff, but by the neglect of the Bedford Riddle was not received from the sheriff, who became insolvent, and the money was thus lost. Hoffman sued the Franklin county Riddle on his receipt and recovered. On a writ of error it was contended that the words of the receipt 'which I am to have recovered if it can be accomplished,' imported only a limited undertaking to have it collected by another, and not to collect it himself. But this court held that the receipt contained an express and positive undertaking 'for the collection' of the money, if practicable, and not merely for the employment of another to that end; and that the defendant was bound by every principle of moral and legal obligation to make good the collection of the judgment by the application of reasonable diligence, skill, and attention.

"The next case is Cox *v.* Livingston, 2 W. & S. (Pa.) 103. This was the receipt: 'Received of Mr. Thos. Cox, of Lancaster, Pa., "for collection," a note drawn in his favor by Mr. Dubbs, calling for $497.65, payable three months after date.' The note was left with an instruction to bring suit. The receipt was dated August 30th, 1837, and Livingston died in January following without having brought suit. Dubbs became insolvent. It was held that Livingston was liable 'for the collection,' though only two terms intervened between the receipt and his death.

"Krause *v.* Dorrance, 10 Barr (Pa.), 462, was *assumpsit* against two attorneys for money collected and not paid by another attorney to whom they sent the note, for collection.' The liability of the original attorneys 'for the collection' was admitted, but the point was made and succeeded, that a demand before suit was necessary. Rogers, J., says expressly they were liable for the acts of the agent whom they employed, but being without fault themselves, a demand was necessary before a resort to an action.

"In Rhines *v.* Evans, 16 P. F. Smith (Pa.), 192, the receipt was: 'Received "for collection" of A. Rhines, one note on Lukens & Beeson, of Rochester, dated October 30, 1857, for $365.' The liability of Evans, the attorney, was conceded, and the question was on the Statute of Limitations, and it was held the action was barred by the lapse of seven years and five months from the date of the receipt. These cases show the understanding of the bench and bar of this State upon a receipt of claims 'for collection.' It imports an undertaking by the attorney himself 'to collect,' and not merely that he receives it for transmission to another 'for collection,' for whose negligence he is not responsible. He is therefore liable by the very terms of his receipt for the negligence of the distant attorney, who is his agent, and he cannot shift responsibility from himself upon his client. There is no hardship in this, for it is in his power to limit his responsibility by the terms of his receipt when he knows he must employ another to make the collection. Bullitt *v.* Baird, *supra*. We find cases in other States holding the same doctrine.

"In Lewis & Wallace *v.* Peck & Clark, 10 Ala. 142, both firms were attorneys. The defendants gave their receipt to the plaintiffs for certain notes 'for collection,' and after collecting the money transmitted it to the payees in the notes instead of the attorneys who had employed them, the payees having, however, indorsed the notes. *Held*, that Peck & Clark were liable to their immediate principals, the plaintiffs, there being no evidence that the payees had given them notice not to pay over to Lewes & Wallace, the original attorneys. This is a direct recognition of the liability of the collecting attorney to the transmitting attorney.

"The case of Pollard *v.* Rowland, 2 Blackf. (Ind.) 22, is more directly in point. Rowland received from Pollard claims 'for collection,' and sent them to Stephen, an attorney in another county. Stephen obtained judgment, and collected the money. *Held*, that Rowland was accountable to Pollard for the acts of Stephen to the same extent that Stephen was, and could make no defence that Stephen could not; and that Rowland was liable to Pollard for the money.

"Cummins *v.* McLain *et al.*, 2 Pike (Ark.), 402, was a case nearly similar to the Pennsylvania case of Krause *v.* Dorrance, 10 Pa. St. 452. The attorney sent the claim to another attorney at a distance, and was held liable, but for the omission of the plaintiff to make a demand he failed to recover. The court say the attorney is liable for the acts of the attorney he employs.

"In a Mississippi case two attorneys, Wilkison & Willison, received of the plaintiff a claim 'for collection,' and brought suit and obtained judgment. They dissolved partnership, Wilkison retiring from the practice; and Willison took another partner, Jennings, who received the money from the sheriff. In a suit against Wilkison, as surviving partner of Willison, he was held liable for the receipt of the money by Jennings. Wilkison *v.* Griswold, 12 Smedes & Mar. (Miss.) 669. In view of these reasons and authorities, we hold that a collection agency, such as the defendants have been found to be, receiving and remitting a claim to their own attorney, who collects the money and fails to pay it over, is liable for his neglect." Bradstreet *v.* Everson, 72 Pa. St. Rep. 124, 133.

Where a note was indorsed "Pay to Rock County National Bank, Janesville, Wisconsin, for collection," and the indorsement signed by the payee or owner of the note, it was held that it merely made the indorsee agent for the indorser to collect the note, and did not vest in him such title as to make him a proper party plaintiff in a suit on it; the court, Gilfillan, C. J., saying, "Two witnesses swear that the plaintiff is the

owner of the note, and that it became such in August, 1870, one of them stating that it acquired its title by indorsement from the Clow Reaper Manufacturing Company, and that it has owned it ever since. If this were all the evidence on the point, the plaintiff would be entitled to a verdict. The indorsements on the note raise the doubt as to the ownership. These are without date, and are unexplained. The Reaper Manufacturing Company indorses the note in blank. The next indorsement is, 'Pay Messrs. Goodsell Bros., or order. Rock County National Bank of Janesville, Wisconsin.' From these two it appears that, previous to the last, the bank became the owner, and then transferred to Goodsell Bros. Then follows this indorsement: 'Pay to Rock County National Bank, Janesville, Wis., "for collection." Goodsell Bros.,' which is the last on the note. If this last indorsement vested in the bank such title as to make it a proper plaintiff in a suit on it, then there is no conflict of evidence, and the verdict should have been for plaintiff. If it does not pass the title and interest in the note out of Goodsell Bros., then the indorsements make it appear that they are the owners, and a conflict is thus raised between the indorsements and the oral testimony. It was held, in some cases, that the beneficial owner of a negotiable bill or note, payable to bearer or indorsed in blank, might institute suit on it in the name of any one who would allow his name to be used for that purpose, and that unless the maker had a defence to the note, good against the real owner, he could not be permitted to show that the plaintiff was not the real party in interest. Morton *v.* Rogers, 14 Wend. (N. Y.) 575; Lovell *v.* Evertson, 11 Johns. (N. Y.) 52; Conroy *v.* Warren, 3 Johns. Cas. (N. Y.) 259, 264.

"Although this rule might be correct at common law, it certainly is not good under the statute of this State, which provides that 'every action shall be prosecuted in the name of the real party in interest.' Gen. Stat. ch. 66, § 26. To this there are exceptions made by § 28, but the case of this indorsement would not come within them. Although this form of indorsement is, and probably has long been, in very common use, we find no case which decides its effect upon the title to the note. There are several cases, in *England*, of indorsements such as 'Pay to A. for the account of' the indorser, or 'Pay to A. or order, for my use,' in which cases it seems to be held that the note and the money, when paid on it, are the property of the indorser. Trenth *v.* Barandon, 8 Taunt. 99; Sigourney *v.* Lloyd, 8 B. & C. 622; Lloyd *v.* Sigourney, 5 Bing. 525. And this, we think, is the case with the indorsement under consideration. It is apparent from the language used that it was not the intention of the indorser to make the indorsee the owner of the note, or of the money after collection, but simply to give him authority on the note to collect it. The relation of the indorser and indorsee is that of principal and agent; the agent cannot be the 'real party in interest' in a suit brought on the note. This being so, there was a question of fact as to the plaintiff's title for the jury to determine upon all the evidence, written and oral, and we cannot say that there is not evidence to sustain the finding." Rock County National Bank of Janesville, Wisconsin, *v.* Hollister, 21 Minn. 385.

Therefore, where a note has been indorsed "for collection" the indorsement is restrictive, and parol evidence to show it absolute is inadmissible. Third National Bank of Syracuse *v.* Clark, 23 Minn. 263.

**For or in consideration of.**—Upon this phrase Lord Hobart says: "I must begin with the consideration of the nature and operation of a grant of one thing *for* another. Whereupon I lay this ground, that regularly this word (*pro*), or in consideration, doth not import a condition, or make the grant defeasable, though the thing taken in lieu be either taken away by the giver wrongfully, or by any other person upon a just title, so as the thing given be wholly lost. And therefore if J. S. give W. Acre to J. N. *for* B. Acre, and so *e converso*, without the word of exchange, it will not be defeasable; nay, more, if they use the proper word of exchange, and that be executed, a wrongful entry of either party will do no hurt, but a rightful eviction will. But without the proper word of exchange, though perhaps it were meant in the nature of an exchange, it will not defeat. But it is true that the word (*pro*) in some cases hath the force of a condition, when the thing granted is executory, and the consideration of a grant is a service or some other like thing, for which there is no remedy but the stopping of the thing granted, as in the case of annuity granted for counsel, or for doing the office of a steward of a court; or the service of a captain, or keeper of a fort. Ughtred's Case, Co. 7 lib. And in those cases the condition is not precedent, and

therefore needs not to be averred performed when the annuity is demanded; and these cases are within the reason of an exchange, where the land given is evicted, for here the failure of counsel or service is a kind of eviction of that that is to be done for the annuity, in as much as he hath no means either to exact the counsel or recompense for it. but to stop the annuity. And it is to be noted that this hath so far the force of a condition, that it being denied once, it doth avoid the annuity; not for that one payment, but forever, which is to be noted for use after in the principal case. 5 H. VIII. 10. I covenant with J. S. to give him ten pounds to serve me a year; in his action for his money he must count for his service done, and it seems, though he hath covenanted *e converso* to serve me, for though in that case I might have an action for the service, yet it is not as of an estate vested of land of inheritance, as the case is here. In another case it works by condition precedent, as in all personal contracts, as, I sell you my horse *for* ten pounds, you shall not take my horse except you pay me ten pounds. 18 E. IV. 5; and 14 H. VIII. 22. Except I do expressly give you day, and yet in this case you may let your horse go, and have an action of debt for your money, and so may the tailor retain the garment till he be paid for the making, by a condition in law." Cowper *v.* Andrews, Hobart, 39.

Therefore it was held that a workman, having bestowed his labor upon a chattel, in consideration of a price fixed in amount by his agreement with the owner, may detain the chattel until the price be paid, and this though the chattel be delivered to the workman in different parcels and at different times, if the work to be done under the agreement be entire, the court, Lord Ellenborough, C. J., saying: "Considering the operation of the word 'for,' as noticed by Lord Hobart, whose opinion is confirmed by the cases he refers to, and by others also, no reason can be assigned for saying that it shall not have the same effect in a contract to grind a load of wheat for 15 shillings, as in a contract to sell a load of wheat for 15 pounds." Chate *v.* Westmore, 5 Maule & Selwyn, 180.

And Lord Chief Justice Holt, in holding that if A, having mortgaged certain lands to B, agree to make a release of his equity of redemption, in consideration of which B agrees to pay A the sum of seven pounds, the making of the release a condition precedent to the payment of the money, he said: "The whole question will be here, whether the plaintiff could have an action before the release. And as to that, it has been urged that in this case there were mutual promises, and the one promise is the consideration of the other, and that then he that brings the action needs not aver any performance of his side; and this likewise would be a true and necessary consequence if the premises were true. But where the one promise is the consideration of the other, and where the performance, and not the promise is it, is to be gathered from the words and nature of the agreement, and depends entirely thereupon; for if in this case there were a positive promise that one should release his equity of redemption, and on the other side that the other would pay seven pounds, then the one might bring his action without any averment of performance; but this agreement is not so, but that the plaintiff should release his equity of redemption, in consideration whereof the defendant was to pay him seven pounds; so that the release is the consideration, and therefore being executory is a condition precedent which must be averred. And whereas there seems to be a variance in the books upon this learning, it will be fit on this occasion to settle it: and I agree the case in Hob. 58 to be good law; for there is a positive agreement that one shall deliver a cow to the other, and that the other shall give him so much money, and therefore the action lies for either side, without performance of his promise; but if by the agreement A were to deliver B a cow, and that *for* it B were to deliver him a horse, there the delivery of the cow would be a condition precedent, and therefore ought to be performed before A can bring his action, and upon this diversity the books are reconcilable. 15 H. VII. 10, pl. 17. If A covenant with B to serve him for a year, and B covenant with A to pay him ten pounds, then A shall maintain an action for the ten pounds before any service; but if A had covenanted to pay ten pounds *for* the said service, there A could not maintain an action for the money before the service performed. And there is great reason for this diversity, for when one promises, agrees, or covenants to do one thing *for* another, there is no reason he should be obliged to do it till that thing *for* which he promised to do it be done; and the word 'for' is a condition precedent in such cases. But upon this head some diversities are to be observed. First, if there be a day set for the payment of money, or doing the thing which

one promises, agrees, or covenants to do *for* another thing, and that day happens to incur before the time the thing *for* which the promise, agreement, or covenant is made, is to be performed by the tenor of the agreement; there, though the words be, 'that the party shall pay the money,' or 'do the thing *for* such a thing,' or 'in consideration of such a thing,' after the day is past the other shall have an action for the money or other thing, although the thing *for* which the promise, agreement, or covenant was made was not performed: for it would be repugnant there to make it a condition precedent; and therefore they are in that case left to mutual remedies, on which, by the express words of the agreement, they have depended. See 48 Edw. III. 2, 3, cited in Ughtred's case, 7 Co. 10, b, where the diversity is taken when there are mutual remedies and not. . . . Secondly, if there be a day for the payment of money, or doing of other act *for* another, and that day is to be after the performance of the thing *for* which the promise, etc., was made, there, if the agreement be to pay the money, or do other thing, 'for' or 'in consideration,' or such other words that would make a condition precedent, these such things, *for* the doing or performing of which the other agrees to pay the money, or do other thing, must be averred to maintain an action; and for this see Sir W. Jones, 318. The executor of A brought an action on the case against B, declaring, that in consideration A in his lifetime did promise to assure certain lands to B before Michaelmas next, B promised to pay him so much money for the land; so the assurance was to be made before Michaelmas, and the money was to be paid for the land and consequently after Michaelmas, for A had time till Michaelmas to make the assurance; and because the assurance was to have been made first, and the money by agreement to be paid for the land, though there were mutual promises, yet it was adjudged the action would not lie for the money without making the assurance first. . . . Ughtred's case has afforded a ground for a variety of opinions upon this question; but such as seem against these diversities laid down by me shall receive a full answer. . . . There are some other scattered authorities in the books of this kind. But let us now see the reason of the thing. What is the reason that mutual promises shall bear an action without performance? One's bargain is to be performed according as he makes it. If he make a bargain, and rely on the other's covenant or promise to have what he would have done to him, it is his own fault. If the agreement be that A shall have the horse of B, and A agree that B shall have his money, they may make it so, and then there needs no averment of performance to maintain an action on either side; but if it appear by the agreement that the plain intent of either party was to have the thing to be done to him performed, before his doing what he undertakes of his side, it must be then averred: as where a man agrees to give so much money *for* a horse, it is plain he meant to have the horse first, and therefore he says the money shall be given *for* the horse. And it would be very dangerous to make every cursory agreement of parties to amount to mutual promises to bear an action without averment of performance; and therefore if two meet, and the one has a horse to sell, and the other would buy one, and they agree on the price, and then part without any earnest, or reducing the matter solemnly into writing, there, though there be no words of condition precedent, such cursory agreement ought not to be admitted as evidence of a mutual agreement; and it ought not to pass for a contract, but rather for a bare communication. But if there be a solemn transaction, as writing, as that A should deliver his horse to B, and no time appointed, and that B should pay so much money to A there, if there be not the word 'for,' or other words of condition precedent, a mutual action will lie, without averment of performance, but if it be only a discourse, without the solemnity of writing, earnest, etc., it ought not to be allowed. . . . Covenants were between A and B that A should bring 500 soldiers to such a place by a day certain, to be transported, and that B should attend there with ships to transport them, and both parties failed; and the question was whether, though A had brought no soldiers, B had broke his covenant, in not being ready with ships? And held that B had broke his covenant, though A had not brought the soldiers. But this differs from our case; for there are two distinct acts to be done; one is to be ready with the soldiers, and the other with the ships; and the performance of the one does not depend upon the other; the doing of the one is not the reward for the doing of the other; but they are distinct acts, and each party to do his part, there was also a day appointed. And this is not a hard case, for they are mutual acts, not depending the one on the other. But in our case the money was

to be paid for the release; and a vast difference. And the seven pounds being to be paid in consideration of making the release, the words 'in consideration' make a condition precedent, which till performed does not entitle the plaintiff to action. Then the seven pounds were not demandable here, and consequently not dischargeable by the general release of all demands." Thorp *v.* Thorp, 12 Modern Rep. 455, 460.

**For whom it may concern.**—(See CONCERN.(—D. effected an insurance on the ship Mohawk, in his own name, "for whom it might concern," being at the time agent of one K., who subsequently sold the ship to N., administrator of C. In an action by N. against D. to recover the amount paid to him as insurance of the ship, it was held that the phrase "whom it may concern" in a policy meant not any and every body who might chance to have an interest in the thing insured, but such only as are in the contemplation of the contract, Buchanan, C. J., saying: "But 'whom it may concern' is a technical phrase, common to policies of insurance, and is understood to mean not any and every body who may chance to have an interest in the thing insured, but such only as are in the contemplation of the contract. Such a policy supposes an agency, and proceeding upon that ground looks only to the principal in whose behalf or on whose account the agent moves in the transaction; and he for whose benefit the insurance is procured is the person in the contemplation of the contract—is he whom it alone concerns. The inquiry, therefore, in such cases, always is for whose benefit, on whose account, was the insurance obtained, and that not appearing upon the face of the instrument is a proper subject of extrinsic evidence, which comes in aid of the policy by pointing out the person to whom it is applicable, the party who is in fact concerned. And this is not confined to policies of insurance; but in the application of every instrument of writing, evidence *aliunde* is necessarily used to designate the proper subject-matter to which it relates. The letters of Kane, therefore, were properly admitted in evidence for the purpose of showing that the defendant effected the insurances as his agent and under the authority derived from him, which disposes of the first exception, leaving the question of property in the ship, and the intention of Kane, at the time of directing her to be insured, to the effect and operation of the other evidence in the cause. It is well settled that where a policy has not the general clause contained in this, or one of similar import, none can avail themselves of it but those who are named as the parties insured or on whose account it is expressed to be made. But it is equally clear that a policy in the name of one, with the general clause 'for whom it may concern,' will cover and protect the interest of any person for whose benefit it was intended, and who authorized it to be effected. And if, in the absence of any express order or authority from the owner, or any previous communication with him upon the subject, such policy is effected in his behalf, the intention at the time of the party effecting it to cover his particular interest will so connect him with the policy as that his adoption of it afterwards will cause it to inure to his benefit; the subsequent adoption of a policy by a party interested and for whose benefit it was intended, being deemed equivalent to his prior order for insurance. On this principle the cases of Routh *v.* Thompson, 13 East, 274, and Hagedorn *v.* Oliverson, 2 Maule & Sel. 485, were decided." Newson *v.* Douglass, 7 Harris & Johns. (Md.) 417; s. c., 16 Am. Dec. 317.

The note upon this phrase in 16 Am. Dec. 323, treats the matter very fully, as follows: "'For whom it may concern' are words often employed in policies of marine insurance. They have received a settled construction in harmony with that placed upon them in this decision [in the previous paragraph]. As is stated in 1 Phillips on Insurance, § 383: 'A policy made in the name of a particular person "for whom it may concern," or with any other equivalent clause, will be applied to the interest of the party or parties, and only the party or parties for whom it is intended, by the person who effects or orders it, if such party has authorized its being made beforehand, or subsequently adopts it.' The intention, therefore, of the party effecting the insurance determines the application of this clause, where there has been no previous authority, and the validity of the insurance depends upon the subsequent ratification of the contract by the person intended. Buck *v.* Chesapeake Ins. Co., 1 Pet. (U. S.) 151; Banday *v.* Union Ins. Co., 2 Whart C. C. (U. S) 391; De Bolle *v.* Pennsylvania Ins. Co., 4 Whart. (Pa.) 68; 1 Parsons on Mar. Ins. 47. Were there a previous authority, the intention of the party ordering the insurance or giving the authority must determine whose interests are concerned. Holmes *v.* United Ins. Co., 2

Johns. Cas. (N. Y.) 329. The question is vital in deciding upon the plaintiff's right to recover on a policy under the general clause referred to. This point was argued with considerable warmth by the supreme court in De Bolle *v.* Pennsylvania Ins. Co., 4 Whart. (Pa.) 68. Judge Kennedy, speaking for the court, adverts to the conclusion arrived at by Phillips on Ins., above quoted, and says: 'This would not only seem to be the fair deduction from the authorities on the subject, but to be supported likewise by reason, principles of sound policy, and natural justice. For if no evidence were required to be given, tending either to show that the plaintiff had, previously to the policy being effected, authorized it, or that it was intended for him, and he permitted to recover without this by merely showing his subsequent adoption of it, the party effecting the policy and having an interest on board of the vessel, which he intended to protect by it, after receiving what he had at stake, in safety, might sell and transfer his policy to others, whose goods on board of the same vessel had been lost by the perils of the sea, without any policy having been effected for the purpose of covering them, and thus expose the underwriters to a risk that was never contemplated in making the assurance. The injustice arising from the operation of such a principle is manifest, and therefore ought not to be sanctioned. It tends to destroy or prevent the equal chance of gain or loss to the parties, which is regarded in some measure as requisite to sustain the validity of the contract. Besides, it is obvious that it would tend to promote gambling policies, which are deemed void by the law of this State,—Pritchett *v.* Ins. Co. of North America, 3 Yeates (Pa.), 458–461,—and to render them valid by subsequent events and the agreements of the party procuring them, with third persons, without or even against the consent of the insurers.' Although a policy 'for whom it may concern' cannot be transferred from one to another, so as to cover different objects owned by different persons not within the intention of either party to the contract, yet it is not essential that the party effecting such an assurance should have in mind any specific individual. He may intend it for whatever person should prove to have an insurable interest in the specified subject, in which case it will be applicable to the interest of any one subsequently ascertained to have such an insurable interest who adopts the insurance. Duncan *v.* Sun Insurance Co., 12 La. Ann. 486. Nor is it necessary that those intended should be known to be so by the broker or by the insurer. Buck *v.* Chesapeake Ins. Co., 1 Pet. (U. S.) 151. In this case the intention of the court was directed to an instruction given below, that in policies of the description under consideration 'there can be no undue concealment as to the parties interested in the property to be insured.' The facts furnished a good illustration of the unsoundness of this general statement. The property insured was that of a belligerent. The court, *per* Johnson, J., said that to affirm the doctrine, as was done below, 'is obviously going much too far, since the underwriter has an unquestionable right to be informed if he makes inquiry. The assured may be silent, it is true, if he will, and let the premium be charged accordingly; but if the inquiry then made should be responded to with information contrary to the verity of the case, this obviously gives a conventional signification to the terms of the policy, which may differ materially from the known and received signification in ordinary cases. He, for instance, who should insure "for whom it may concern," under an express assurance that there is no belligerent interest in the cargo, could not, upon any principle, be held to have made assurance upon belligerent interest. This is no more than an application of the general principle, that assurance is a contract of good faith, and is void whenever imposition is practised.' By this same case it was recognized that a policy 'for whom it may concern' will, in ordinary cases, cover belligerent property. And a like principle was stated in Seamans *v.* Loring, 1 Mason C. C. (U. S.) 128. As a general proposition, the clause we are considering, and others of similar import, apply only to those who were contemplated at the time the insurance was made, and who then had an insurable interest in the subject. 1 Parsons on Marine Ins. 46. citing Routh *v.* Thompson, 11 East, 428; Banday *v.* Union Ins. Co., 2 Wash. C.C. (U.S.) 391; Catlett *v.* Pacific Ins. Co., 1 Paine C. C. (U. S.) 594; Haynes *v.* Rowe, 40 Me. 181; Protection Ins. Co. *v.* Wilson, 6 Ohio St. 553; Seamans *v.* Loring, 1 Mason C. C. (U. S.) 127; Lambeth *v.* Western F. & Mar. Ins, Co., 11 Rob. (La.) 82; Alliance Mar. Ass. Co. *v.* Louisiana State Ins. Co., 8 La. 1, 11; Frierson *v.* Brenham, 5 La., Ann. 540.

"In regard to bringing an action on such a policy, it seems to be the prevailing opinion that either the party named in the policy or the one who proves him-

self to be 'concerned,' may institute proceedings, each in his own name. 2 Parsons on Marine Ins. 44 *et seq.*

"In *Pennsylvania*, one decision doubts the right of a person not named in the policy to bring covenant upon it, but does not dispute his right, when interested and intended to be embraced by the terms thereof, to maintain *assumpsit.* De Bolle *v.* Pennsylvania Ins. Co., 4 Whart. (Pa.) 68.

"In a recent Maine case this question was directly presented, and Appleton, C. J., said: 'A suit in a case of loss may be maintained upon such policy in the name of the party effecting the policy or in the name or names for whose benefit it was made, and who are and are intended to be insured under the clause "on account of whom it may concern," or some similar form of expression, although they are not named in the policy.' Sleeper *v.* Union Ins. Co., 65 Me. 385. Here the part owner of a vessel effected a policy for the benefit of whom it may concern, and upon his death his administratrix was allowed to maintain an action on the policy. In Barnes *v.* Union M. F. Ins. Co., 45 N. H. 21, 28, the adjudications are collected which hold that the agent obtaining the policy for whom it may concern may bring an action in his own name. It is noticeable that in each of these cases last referred to the action was *assumpsit.*" Note to 16 Am. Dec. 317, 323.

**Contracting for.**—In *Minnesota*, in the year 1876, a law was passed entitled "An Act providing for a lien for labor upon logs and timber," which declared in section 14 that "this act is intended only for the protection of laborers for hire, and shall not inure to thebenefit of any person interested in contracting, cutting, hauling, banking, or driving logs by the thousand." In the same year one D. made a contract with one S. for cutting, hauling, and banking a lot of pine logs for S. D. made a sub-contract with E. for hauling and banking these logs, or a portion of them. E. performed labor on this sub-contract to the value of $219, only $5 of which was paid him. S. sold and assigned his logs to K. In the meanwhile E. filed his affidavit of his services for the purpose of having a lien on the logs for the amount due him, and brought suit against D. and his assignee K. therefor. The court below entered judgment in favor of the defendant K., on the ground that E. was not entitled to a lien on the logs under the above statute. Laws 1876, c. 89; Gen. Stats., 1878, c. 32, §§ 63–77. But on appeal the Supreme Court held that this was error, Berry, J., saying: "We are of opinion that the design and effect of these provisions of statute are to give the lien mentioned to every person performing the specified kinds of manual labor (that is to say, labor with his own hands, upon logs or timber. It is apparent that section one, standing alone, would have this effect, at least. But that section is explained and possibly limited by section 14, which declares that the act is intended for the protection of laborers for hire, that is to say, for the protection of those who do labor or work in person. This is an explicit declaration that all such laborers are within the act, and entitled to the lien for which it provides. It is not reasonable to suppose that it could have been the intention of the legislature to impair this explicit declaration (made by way of explanation and construction) by the latter provision of the section in which it occurs. This latter provision should therefore, if possible, be so read as to be consistent with the explicit declaration mentioned. It is obviously inserted for the purpose of distinguishing the contractor (that is to say, the person who takes contracts for the performance of work, which he employs others to do) from a laborer who works himself. We think that the latter provision of section 14 is to be read by omitting the comma found in the printed statute after the word 'contracting.' This is equivalent, in sense, to inserting the word 'for' after the word 'contracting,' so that the provision would read that the act 'shall not inure to the benefit of any person interested in contracting for cutting, hauling, banking,' etc. The punctuation of a statute is of little or no consequence, being ordinarily the work of clerks and printers; and the reading which we suggest not only makes sense, but is consistent with the preceding provisions and the general spirit of the act. We think it sufficiently appears, from the admission of plaintiff and the findings of the court, that the work in this case was performed by the plaintiff as a laborer, not as a contractor." King, Admr. of Emery, *v.* Kelly, 25 Minn. 522.

**For the future.**—Where a decree had been made in relation to certain leaseholds held in tenancy under a charity, namely, Hemsworth Hospital, to the effect that, the court being fully satisfied by the original constitutions of the hospital, as likewise by certain former decrees, that the tenants had a tenant-right of renewal of said leases from the hospital, and ought therefore to have beneficial leases thereof made to them, the

court declared and ordered that the plaintiff should pay "for the future" for the whole but 150 pounds per annum reserved rent to the hospital. On a question of further renewal of the leases, the court, Sir William Grant, M. R.. said: "Some stress was laid in the argument on the words 'for the future,' as implying that in all time to come the plaintiff should have leases made to him at the rent then directed to be paid. The court declared that the said complainant should pay 'for the future' but 150 pounds per annum reserved rent to the said hospital. It is quite clear that the words 'for the future,' as here used, could have no such meaning as is ascribed to them, for Lord Cowper had declared that the rent should not be a fixed rent; and it was reduced so low in that instance as 150 pounds, only with reference to the amount of the fine, which was estimated as equal to 60 pounds per annum of rent, and on account of the sum expended in improvements, which was considered as equivalent to 121 pounds per annum of rent. Upon these data the rent was fixed at 150 pounds, which was not to be the rent payable in all time to come, and therefore the words 'for the future' cannot here have that meaning." Watson *v.* Hemsworth Hospital, 14 Vesey, Jr., 324, 339.

**For giving.**—The statute 2 G. II. c. 24, s. 7, for bribery at an election, provides; "If any person who hath or claimeth to have a vote, etc., shall ask, receive, or take any reward by way of gift, loan, or other device, or agree or contract for any money gift, office, employment, or other reward, whatsoever, 'to give' his vote, or to refuse or forbear 'to give' his vote, in such election," etc., he shall be liable to a certain penalty. A voter received money *after* an election for having voted for a particular candidate, but no agreement for any such payment was made *before* the election. An action for debt for penalties under the statute was brought against him; and the first series of counts in the declaration stated that the defendant, having a right to vote at the said election, did receive of and from one W. S. a large sum of money "for giving" his vote, etc. A second series charged that the defendant, before the election took place, did agree with the said W. S. to receive a sum of money "to give" his vote, etc. At the trial the above facts were proved, and it was objected that the evidence did not support any count in the declaration, as the charge in the first series did not constitute an offence within the statute, unless the words "for giving" in those counts were read "to give." The judge reserved the point, and left the case to the jury, who found for the defendant upon the counts charging the previous agreement, and for the plaintiff upon the others. A rule was then obtained to enter a nonsuit, which the court made absolute. It was argued against the rule that the words "to give," used in the seventh section of the statute, were to be construed "for having given," or the mischief would be very imperfectly remedied, as it is equally criminal to receive money for having voted as for promising to vote, and the commission of bribery would be very much facilitated if it were necessary to show a pre-existing agreement; for the very practice of giving money after an election may raise an expectation of similar payments in future, which will produce quite as much effect upon the minds of the voters as any express promise would do. But Bayley, J., said: "The offence, in the terms of the act, is receiving or agreeing to receive a reward 'to give' or to forbear 'to give' a vote; the plain meaning of which is 'in order that' he may give or forbear to give his vote. The words used are clearly prospective, not retrespective; and such an operation it probably was the intention of the legislature to give them when the act passed. Other parts of the statute may assist us in forming a judgment as to that intention. The first section prescribes an oath to be taken by each elector that he has not received any sum of money, etc., or any promise or security for any money, etc., 'in order to' give his vote. It has been argued that the mischief is as great if money be received for having voted as if it be taken in pursuance of an agreement to vote. Admitting that it be so, still it is plain that the oath only applies to that which passes before the election. The legislature might very easily have introduced into that clause the words, that the voter would not receive money, etc., for having voted, had it been intended to make that an offence." It was further objected that the words "for giving" meant "for having given," and if that be not within the statute, the motion should have been in arrest of judgment, so that the opinion of a court of error might be obtained. But to this the court said, by Bayley, J.: "As to the second question, whether this motion to enter a nonsuit be a proper one, it seems to me that the objection was properly taken at the trial, and does not arise upon the record. If the declaration had stated that the money

was received 'for having given' and not 'for giving' his vote, it would have been otherwise. The expression 'for giving' does not necessarily mean 'for having given,' but is clearly equivocal. Now if an ambiguous expression be used in the declaration, that is cured by verdict, and must afterwards be construed in that sense which would sustain the verdict. Avory *v.* Hoole, 2 Cowp. 825. If, then, it be no offence to receive money for having voted, but it is an offence to receive it in order to give a vote, we should be obliged to presume after verdict that the ambiguous words 'for giving' were used in the latter sense; and as there was no evidence given at the trial sufficient to support such an allegation, I am of opinion that a nonsuit must be entered." Huntingtower *v.* Gardiner, 1 B. & C. 297.

**For hire or gain.**—Section 37 of stat. 7 & 8 G. IV. c. 75, enacts that if (with certain exceptions), "any person not a freeman of the company of watermen and lightermen of the Thames, or apprentice to a freeman or freeman's widow, shall act as a waterman or lighterman, or ply, or work, or navigate any wherry, lighter, or other craft, from or to any place or places, or ship or vessel, within the limits of the act, 'for hire or gain,' he shall forfeit not exceeding £10." Henry Tibble was convicted under this act, and appealed against the said conviction. At the time of the commission of the alleged offence the appellant was not a freeman of the company of watermen, etc., nor entitled to act thereas, nor to work or navigate "for hire" on the river, within the limits of the act. He was the servant of the Great Western Railway Company, and employed, at a fixed weekly salary, for the purpose of assisting in the working and navigating of the company's barges. He did so navigate a barge over a portion of the course within the limits of the act, the barge being rowed by two persons other than the appellant, also servants of the railway company, and not freemen of the watermen, etc. The appellant had the command of the barge, and directed it and steered it. At a certain point in the course a freeman of the company of watermen and lightermen, by arrangement with the railway company, met the barge with his wherry, took it in tow, and towed and worked it for the remainder of the course. Whilst he was so engaged in working the barge with his wherry, the barge was being steered by the appellant. Upon these facts it was argued that the appellant did not "ply, or work, or navigate 'for hire or gain;'" that these words were not intended to designate what is ordinarily called plying on the river; they were not applicable to a person who works in the boat merely in his character of servant of the owner of that boat, employed on the boat. But the court affirmed the conviction, Whightman, J., saying: "It is contended that the appellant did not do this 'for hire or gain,' because he was employed as servant on board the vessel. But that clearly is acting 'for hire or gain.'" Reg. *v.* Tibble, 4 El. & Bl. 888.

**For her own use.**—Where the rights of husband and wife have not been altered by statute, the meaning of these words is sometimes important, thus: "If a gift or legacy, whether specific or otherwise, be given to a married woman, 'for her own use, and at her own disposal,' or direct that the wife's receipt should be a sufficient discharge, notwithstanding any present or future coverture, without other words, this vests the beneficial interest separately in her; and in these cases, if no other trustee be appointed, a court of equity will treat the husband merely as a trustee, and compel him to act accordingly. But if the bequest be to a married woman 'for her own use and benefit' without adding the words 'and at her own disposal,' especially if there be bequests to men by the same words, the wife does not take a separate interest, but her husband is entitled." 1 Chitty Gen. Prac. 61.

An illustration of this may be found in the will of Thomas Marvin, as follows: "I give and bequeath unto my daughter Charlotte, wife of James Abbott of, etc., the sum of £200 'to and for her own use and benefit.'" A commission of bankruptcy issued against James Abbott, and his assignees claimed the £200 legacy. It was held by the Vice-Chancellor, Sir John Leach, that this could not be considered as a gift to the separate use of the wife; following Wills *v.* Sayers (see *infra*); Roberts *v.* Spicer, 5 Maddock, 491.

The case cited above was as follows: J. Kilwick by his will bequeathed to Sayers certain moneys in trust, to apply them and the dividends arising therefrom for the sole and separate use and benefit of his daughter, Mary Wills. And he bequeathed all his household and other goods, plate, linen, etc., unto the same daughter, "for her own use and benefit," and appointed Sayers sole executor of his will. The question was, whether the words "for her own use and benefit," used in the residuary bequest, gave the daughter, who was a married

woman, a separate estate. And the court held that it did not, Sir John Leach, V. C., saying: "A court of equity will execute a trust for the sole and separate use of the wife, when the intention of the donor to that effect is unequivocally declared. A gift to the wife 'for her own use' is no declaration of such an intention; and it is difficult to find any substantial distinction between a gift to a wife 'for her use,' and a gift to a wife 'for her own use.' But if such a distinction could prevail in another case, it could not govern this case. Here the testator, as to the same person with respect to another gift, has appointed a trustee, and expressly directed the application of it to her sole and separate use; he knew, therefore, the technical form of excluding the right of the husband; and I cannot infer that as to this legacy he intended what he has not expressed." Wills *v.* Sayers, 4 Maddock, 409.

**For said firm.**—A recent case on this phrase, decided in Kentucky in 1887, and not yet reported in the State Reports, appears in the form of an abstract in one of the journals, as follows: *"Attorney and Client—Contract.*—S. and others having formed a partnership for the purpose of managing and operating a lottery, entered into a written contract with two attorneys, who were not partners, employing them as special counsel 'for said firm,' and agreeing to pay them $500 per month 'during the existence or operation of said lottery,' the contract reciting that it was in consideration of the services of said attorneys 'in bringing about and consummating the arrangement of business interests between said parties, and the services to be performed by them in the protection of said business.' After thirteen months the firm was dissolved, and appellant, one of the attorneys, having been paid at the rate agreed for the thirteen months, was notified that his services were dispensed with. S. then formed a partnership with others, and continued the operation of the lottery until his death. Appellant now brings this action against appellee, the wife of S., who, as executrix and devisee of S., has been running the lottery since his death, to recover $500 per month from the time of the dissolution of the first firm up to the commencement of this action." And the court, Pryor, C. J., held that under appellant's contract the relation of attorney and client existed as long as the firm with which the contract was made continued to exist, but no longer; and was not perpetual, binding all who might by succession or contract assume control of the lottery to employ its attorney, under the contract. Lochrane *v.* Stewart, 8 Kentucky Law Reporter, 25; s. c., 2 Southwest. Rep. 903.

**For his services.**—Jane D. Poineer, by her will, after providing for the payment of her debts, etc., bequeathed several legacies, and among them one to Henry B. Duncan, in the following language: "Eighth.—I give and bequeath to Henry Benson Duncan, 'for his services' in assisting me at different times, the sum of two thousand dollars." Henry B. Duncan was one of her executors. The will was duly probated, and when the executors' account was filed it appeared that the estate was insufficient to pay all the legacies in full, and also that the executors asked allowance for the payment of the legacy to Duncan, by an item of discharge. To this item an exception was filed. The executors did not offer any proof that services had been in fact rendered by Mr. Duncan to the testatrix, for which an obligation to pay existed at her death, but relied entirely upon the will to justify their payment. The court sustained the exception, McGill, Ordinary, saying: "The burden of proving that a general legacy is entitled to priority is upon him who asserts it, and the proof must be clear, conclusive, and unequivocal. Titus *v.* Titus, 11 C. E. Gr. (N. J.) 111, 117; Shepherd *v.* Guernsey, 9 Paige (N.Y.), 357. There is nothing in this bequest to Mr. Duncan or in the will to indicate that the testatrix intended that this bequest should be paid before the other legacies. The expression 'for his services in assisting me at different times' does not, standing alone, import an indebtedness from her to the legatee for which payment may be exacted by process of law. For aught that appears to the contrary, the services may have been rendered gratuitously, and the legacy may have been given in grateful recognition of them. That the legacy was given because of a sense of moral obligation, or as compensation for services or other favors rendered as a mere voluntary courtesy, will not, if no legal obligation to pay exist at the death of the testatrix, constitute such a valuable consideration as to entitle the legacy of priority in payment. Coppin *v.* Coppin, 2 P. Wms. 291; Turner *v.* Martin, 7 De G. M. & G. 429; Towle *v.* Swasey, 106 Mass. 100. More than six years elapsed between the making of the will and the death of the testatrix, yet no evidence was offered to show that if a legal indebtedness to Mr. Duncan existed at the

making of the will, its payment was enforceable when the testatrix died. The burden of proof, which was upon the executors, was not discharged by the simple production of the will." Duncan *v.* Franklin Township, 43 N. J. Eq. 143; s. c., 10 Atl. Rep. 546.

**For the time being.**—Where the charter of the borough and town of Weymouth and Melcombe Regis provided that the election of mayor was to be made by a majority of an assembly, composed of certain several definite parts of the corporation and other burgesses and inhabitants "for the time being," and on a *quo warranto* filed against one M., charging that he exercised the office of mayor of said borough without any legal warrant, it appeared that at the time of M.'s election to the mayoralty one of the several parts of the corporation, namely the "principal burgesses," of whom the original number was twenty-four, was reduced to eight, by the neglect of those authorized to fill the number up, it was contended that the words "for the time being or the major part of them" must refer to the then existing body, assembled at the time of election, inasmuch as this phrase is applied to other burgesses and inhabitants of the borough, as well as the "principal burgesses" the former of which being an indefinite body, the phrase must have been necessarily intended to apply to the major part of the then existing body. But the court held that, one of the integral parts being reduced below a majority of its proper number, the election was void; Lord Ellenborough, C.J., saying: "No grammatical construction will admit that the words 'for the time being' should refer merely to the word 'inhabitants' as the antecedent last named; they must certainly refer to all the constituent parts of the corporation before named. The only doubt which can be or has been raised in this and other cases is, whether those words do not confine the description to the actually existing state of the corporation at the time of the election? But for this there is no foundation. It is clear that 'for the time being' means no more than *hodierne diurne*. A corporation is a fluctuating body, changing its members from day to day. Certain persons are first named in the charter, on whom the powers are in the first instance conferred *nominatim*, as they die, the same powers are to be continued to others who succeed them. To such the words 'for the time being' refer in succession. The king grants to A, B, etc., who are named as mayor and aldermen in the charter, certain powers; and then he continues the same powers to all other persons who 'for the time being' shall be mayor and aldermen. This is the plain meaning of the words, which obviate all kind of difficulty in the misconstruction of them as applied only to the existing majority at the time. The same words occur in the case of The King *v.* Bellringer, 4 Term Rep. 810, and received the same construction." The King *v.* Morris, 4 East, 17, 26.

In the case cited in the paragraph above, the charter required that the mayor and common clerk "for the time being," and the common council "for the time being," or the major part of them, should all the officers and ministers of a borough. The common council was a definite body consisting of thirty-six members. On a *quo warranto* it appeared that at an election this common council had been reduced to eighteen in number, and that the election was made by a majority of that number; and it was held that a majority of the whole number must meet to form an elective assembly; and that if the corporation be so reduced as that so many do not remain, no election can be had at all. The King *v.* Bellringer, 4 Term Rep. 810.

**For this day and train only.**—A passenger purchased a ticket at a station for a certain point, just as a train was approaching, and going towards that point. After he had boarded the train, he found that it did not stop at the station for which he had taken his ticket, and he was obliged to get off some distance short of his destination and to continue his journey on foot. The ticket was marked, "For this day and train only." He sued the railroad company for selling him a ticket for a train which, as he claimed, was represented to him as about to proceed to his destination and deliver passengers there. He did not claim that this was expressly told him by any representative of the company, but he alleged a custom of the railroad only to sell tickets for approaching trains; and that the marking of the ticket was a representation, when so sold, that the train then coming would stop at the place for which the ticket was sold. The court, Irving, J., held the fact of the alleged custom was not sustained by the evidence, and on the other point said: "Finally, it was contended that, the ticket being marked, 'For this day and train only,' this was of itself a representation. Clearly it was not. Had it been marked 'Good for train No. 26 only,' which train he took, the contention would be plausible; but it was not so marked. Being a

first-class ticket, the evidence is all one way—that it was good till used; and, if it were not, it was good for that whole day, and any train going to Stanton that day, so that he could have taken another train. The ticket's statement could certainly not deceive." Daling *v.* Phila., Wilmington & Baltimore R. Co., 66 Md. 120; s. c., 27 Am. & Eng. R. R. Cas. 84.

**For the use.**—A deed conveying a tract of land containing beds of iron ore, and owned by an iron company, contained the following reservation: "And further referring to the said company the right of mining on the above granted premises, 'for the use' of said company, an amount of ore not exceeding," etc. It was claimed by the grantor that under this clause it had a perpetual right to mine and carry away ore from the land to the extent and upon the terms so provided, and that this right was assignable; while the grantee contended that the right was limited to the actual purposes of the iron company. The court, Wells, J., said: "It is contended that the language, 'for the use of said company,' is a restriction upon the exercise of the rights reserved to the grantor, limiting the purposes for which alone mining could be done; that as the Stockbridge Iron Company at that time was authorized only to manufacture pig-iron at Stockbridge, and to work mines only for its own use, these limits of its corporate powers are to be imported into the deed, and thus furnish the measure of those purposes. Upon this construction the rights would not be assignable, and would have ceased or become suspended when the Stockbridge Iron Company ceased to carry on its business of manufacture at Stockbridge, and sold its furnaces. But we cannot give so restricted a construction, even against a grantor, to language which is commonly employed in conveyances and thereby has acquired a well-known significance. When so employed the phrase is expressive of the right of appropriation or enjoyment, rather than descriptive of the purposes or mode of the use. It does not call for any extrinsic aid for its interpretation. The meaning contended for is not the natural and ordinary one. There is nothing in the context, or in the application of the language to the subject-matter, which creates an ambiguity; and we think the facts in regard to the corporate powers of the grantor, and the entertained purpose of discontinuing its business, are so far extrinsic as not to be competent to raise an ambiguity for the purpose of setting it against the more obvious sense of the terms used." Stockbridge Iron Co. *v.* Hudson Iron Co., 107 Mass. 290, 324.

**For that.**—This is an expression used in declarations to set forth a positive allegation. It is thus discussed in Hammond's Nisi Prius: "A consequence resulted from the special terms in which these newly invented formulæ (i.e., writs on the case) were conceived, affecting the structure of the declaration which followed them. It is a maxim in law, regulating alike every form of action, that the plaintiff shall state his complaint in positive and direct terms, and not by way of recital. 'For that' is a positive allegation; 'for that whereas' (in Latin *quid cum*) is a recital. In a general writ nothing more than the point of the action, in other words, the very cause of complaint, was set forth; and as the declaration ought not to vary from the writ, it will follow that in all declarations founded upon the *brevia formata*, the allegation 'for that' must be used in describing the grievance. But in special writs a recital of those circumstances which lead to and serve to introduce the cause of action invariably precede it, and therefore the declaration properly enough commences with the words 'for that whereas,' to which alone the collateral introductory clauses have reference." Hammond's Nisi Prius, 9.

A curious illustration of this difference is to be found in an early Massachusetts case, in which it was held that a declaration for trespass for an assault and battery is sufficient, though it begins "For that whereas," etc., by way of recital. The judge, Parsons, C. J., in an opinion much too long to quote at length on a matter of law so antiquated, examines the question and the various cases supporting it from the earliest times. This opinion will be found in Coffin *v.* Coffin, 2 Mass. 358.

**For and during.**—Where in a deed creating a lease the *habendum* was in the following form: "to have and to hold said demised premises to said lessees *for and during* their pleasure," etc., the court held, upon an examination of the whole instrument, that these words did not create a strict tenancy at will, but a covenant for perpetual enjoyment by the lessees; Ladd, J., saying: "It is said, further, that this instrument creates simply a tenancy at will, because by its terms the lessees may terminate it at their pleasure. The words are, 'to have and to hold said demised premises to said lessees *for and during* their pleasure.' It is not contended but that a lessor may, by express covenant, grant an estate the duration of which shall depend upon the

pleasure of the grantee, and when that is done there can be no pretence that the estate so created is a tenancy at will in the ordinary legal signification of the term. The question here is, what are the meaning and intention of the parties in this respect as shown by the language of the *habendum* above quoted, read in the light thrown upon it by the rest of the instrument? One covenant is, 'And the said parties agree with each other that all the covenants and agreements herein contained shall extend to and bind their legal representatives.' The inquiry now is, not what estate is created by this clause, but what effect, if any, is to be given it upon the question whether the estate created is or is not a strict tenancy at will, as claimed by the defendants. On its face this clause appears to be important, and must have been so regarded by the parties. It could not have found its way into the instrument without some design. It must have been understood to have some meaning and effect. It certainly cannot be stricken out as senseless or repugnant, and there can be no doubt but that we must give it some effect, if possible. Putting this clause and the words in the *habendum* together, it reads, 'to have and to hold said demised premises to said lessees and their legal representatives *for and during* their pleasure.' Now, whatever else may be meant by the term 'legal representatives' of the lessees, it certainly does not mean the lessees themselves. It is equally certain that it must mean some person or persons to whom the demised premises may legally pass from the lessees, and this, to say the least, implies an assignment either by operation of law or by the act of the lessees themselves. The clear intention, then, was to create an assignable estate. That being so, the intention was not to create a strict tenancy at will, for that is not an interest or estate capable of assignment. The bearing of this covenant, therefore, upon the construction of the words in the *habendum* which we are considering would seem to be conclusive that they were intended as an express covenant for an estate greater than a tenancy at will. Whether that estate was understood by the parties to be a fee-simple, or an estate for life, or a term the length of which was at the option of the lessees, is of no consequence so far as regards this point. It is sufficient that they intended to create an estate which might be conveyed by assignment, and not a mere tenancy at will. The words in the *habendum* are at least equally capable of a construction to tally with the obvious intention of the parties as thus expressed; and without going further, we have no hesitation in holding that such is the construction they must receive, and therefore that the estate granted is not a simple tenancy at will." Cole *v.* Lake Co., 54 N. H. 242, 276.

That "for" is sometimes equivalent to "for and during" has been held in two Kansas cases, under the following circumstances: On a judgment of foreclosure and sale, the sheriff advertised and charged fees for publishing the notice of sale in four consecutive issues of a weekly newspaper. The judgment creditor filed a notice to tax these costs except for one publication in the newspaper, the property not having sold for as much as his judgment, and the district court allowed the taxation on the ground that the statute only required one publication in a newspaper. The language of this statute (sec. 457 of the Civil Code) was, "public notice of the time and place of sale, *for* at least thirty days before the day of sale, by advertisement in some newspaper." The sheriff excepted, and the supreme court sustained the exception, Brewer, J., saying: "Is one insertion of the notice in the newspaper sufficient, or must it be continued through the successive issues of the paper up to the day of sale? The language is, 'public notice of the time and place of sale, for at least thirty days before the day of sale, by advertisement in some newspaper.' The preposition 'for' as used in the language quoted requires, as it seems to us, an insertion in each successive issue of the paper up to the day of sale, the first one being more than thirty days prior thereto. In the authority cited by counsel the language was, 'at least sixty days,' the preposition 'for' being omitted. The difference is obvious." McCurdy *v.* Baker, 11 Kan. 111.

This case was subsequently followed where judgment of foreclosure and for sale of mortgaged premises was entered and the property was sold at the sheriff's sale and bid in. The district court set the sale aside because only one publication was inserted in a newspaper thirty days before the day of sale. The purchaser of the property appealed, and on the argument cited Craig *v.* Fox, 16 Ohio, 563. The supreme court sustained the order of the lower court, Brewer, J., saying: "This question was before the court in the case of McCurdy *v.* Baker, 11 Kan. 111, and we see no reason to change the views therein expressed. True, our attention was not then called to the case of Craig *v.* Fox, 16 Ohio, 563, in which a

different view of a precisely similar statute seems to have been entertained by two justices of the supreme court of Ohio. No decision was made, however, in that case upon the question, the other two justices apparently concurring with the views expressed by this court. The statute requires public notice 'for at least thirty days before the day of sale' by advertisement, etc. The question turns upon the force of the word 'for' in the language quoted. It seems to us to be nearly equivalent to the word 'during.' Such is the common signification of the word, and unless it have that meaning here it is entirely superfluous. If the legislature intended that a single insertion in the paper should be sufficient, they would have expressed this intention much more clearly by omitting 'for' and saying only "at least thirty days.'" Whitaker *v.* Beach, 12 Kan. 492.

In the Ohio case above cited, in which the court, on motion to confirm a sale, set the sale aside because the notice had been published in a paper not of general circulation in the county, only one publication was made, under a statute (Swan's Stat. 474) similar to the Kansas statute. The court, Birchard, C. J., used the following language: "It is urged that these words require consecutive insertions of the notice during the period of thirty days. This construction of the statute has been practised upon very generally in many parts of the State, and were it possible that private rights could be injuriously affected by not adopting and sustaining it, I might hesitate in expressing an opinion that consecutive insertions of the notice are not required. No such right can, however, be affected. I look then to the statute in order to gather the meaning and intention of the legislature. Its words will be answered by one publication inserted in a newspaper thirty days before the day of sale, and will not require an insertion in each paper that may be issued between the date of the first insertion and the sale. Insertions daily or weekly, when intended to be provided for, are always indicated in definite language, as in the advertisement for a tax sale, where this is the form of expression: 'shall cause notice to be advertised four weeks successively.' There is in my opinion, and in the opinion of another member of the court, no objection to the notice of sale on this ground which would induce us to refuse a confirmation of the sale." Craig *v.* Fox, 16 Ohio, 563.

In another Ohio case, the one cited by counsel in McCurdy *v.* Baker, 11 Kansas, 111, *supra*, where the law required "at least sixty days' notice" to be given of the time and place of payment of the instalments of subscription to a company, it was held that a simple notice, given at least sixty days before the time of payment, is sufficient, and that it was not intended that notice should be given sixty consecutive days; the court, Birchard, J., saying: "The third ground for a new trial is that the notice was not published continuously for sixty days. This position stands upon the hypothesis that 'at least sixty days' notice' is equivalent to 'notice *for and during* sixty days.' The words are, however, not equivalent. A notice published once sixty days or more before the time of payment is all that the statute requires. Its letter is complied with by that. We are not left at liberty to imagine or suppose, in this case, that one thing is expressed and another intended, because whenever the legislature have designed that a continuous notice should be given, they have used explicit terms. Had a continuous notice been intended in this class of cases, we should have found words more appropriate to convey that meaning, such as, 'notice by publication, at least sixty days prior to the day of payment, which notice shall be published daily, tri-weekly, or weekly, to the day of payment;' or, 'which notice shall be continued for eight successive weeks prior to the day of payment.'" Muskingum Valley Turnpike Co. *v.* Ward, 13 Ohio, 120.

**For the purpose.**—Under a Massachusetts statute (St. of 1866, c. 253, § 1), which provides a penalty for "whoever kills, or causes to be killed, for the purpose of sale, any calf less than four weeks old, or knowingly sells, or has in his possession with intent to sell, the meat of any calf killed," etc., an indictment was framed charging that the defendant "knowingly, wilfully, and maliciously did kill a certain calf, the said calf being then and there less than four weeks old, with intent then and there the meat of said calf to sell." The defendant moved to quash the indictment, on the ground *inter alia* that it did not appear by said indictment that said calf was killed "for the purpose of sale." This motion was overruled, and the defendant found guilty, whereupon he excepted. The court overruled his objections and sustained the indictment, Foster, J., saying: "The language used, 'with the intent to sell,' we regard as exactly equivalent to the language of the statute, 'for the purpose of sale.' 'With an intent' and 'for a purpose' are expressions almost absolutely identical in meaning.

Under the liquor law, in Gen. Sts. c. 86, §§ 42, 49, they are so used. If the defendant killed the calf with the intent to sell its meat, he did it in part at least for that purpose, whatever other purposes or intentions may have existed in his mind." Com. *v.* Raymond, 97 Mass. 567.

**For value received.**—See BARGAIN AND SALE; SALE; VALUE.

**"For" construed to mean "from."**—A foreclosure suit was brought upon a mortgage, and the defence set up was an extension of the day of payment. The mortgage in suit was due by its terms May 6, 1873. The evidence of an extension offered by the defendant was an instrument in writing, signed by the plaintiff, dated April 18, 1873, acknowledging the receipt of $200 paid by defendant, "the same being interest on $1000 which falls due on or about April 25, 1873, and interest on $1000 which falls due on or about May 5, 1873, being $100 interest on each paid $1000." The instrument then continued: "Further, for and in consideration of the promise and agreement on the part of said Henry R. Sommer" (the mortgagor) "to pay the principal and what interest may then be due on each of said $1000 payment without delay, and without causing me any expense or trouble, at the time hereinafter mentioned, I have and hereby extend the time for the payment of said $2000 until one year from April 21, 1873, and *for* said May 5, 1873, $1000 payments each." It was held that the prepayment of the interest due in 1873 was a sufficient consideration for the extension of the mortgage, of which prepayment the instrument itself was evidence; that, no sum of $1000 appearing to be due from defendant to plaintiff except that due on the mortgage, the presumption was that the payment was on the mortgage, and that the use of the word "for" before the words "said May 5, 1873," was a mistake, that instrument being intended as an agreement to extend payment of the mortgage until a year *from* the date so named; the court, Ryan, C.J., saying: "It is of course impossible not to understand that the word 'for' is applied to the latter date in the same sense as the word 'from' to the former date. And the meaning is very plain, notwithstanding the apparent misuse of the word 'for.' We think that we would be abundantly justified by authority in reading 'from' instead of 'for,' if it were necessary. See Winterfield *v.* Stauss, 24 Wis. 394; and Att'y Gen'l *v.* West Wisconsin R. Co., 36 Wis. 466, and the cases there cited. But we think the word 'for,' of itself, sufficiently explicit to give effect to the agreement. The very learned author of Wedgewood's Dict. Eng. Etym. states that the radical meaning of 'for' is, in front of; and, applying it to time, adds that 'the event of the present moment is before or in front of the train of futurity.' Dr. Webster gives as a correct, popular meaning, in place of. Either gives full expression to the extension of a year from the date of maturity. *Benignior sententia in verbis dubiis est præferenda.* And this construction permits the manifest agreement of the parties to prevail, as it ought." Ready *v.* Sommer, 37 Wis. 265.

**"For" in the sense of "for the use," "enjoyment," or "possession" of.**—A mill-owner made a contract with one Tilton to sell him three hundred barrels of flour at eight dollars per barrel, to be delivered in lots of one hundred barrels, each lot to be paid for on delivery, which was to be made at the depot of the Chicago & Northwestern Railway Co. in Milwaukee. In pursuance of this contract, the plaintiff sent one hundred barrels to the depot, and the railway shipping clerk was told by the teamster who hauled the first load that it was "for Tilton." On the same day Tilton procured from the railway company a bill of lading for the one hundred barrels, and shipped them to Chicago. The mill-owner afterwards received from the company a receipt for the flour, and not being paid therefor by Tilton, brought suit against the railway company. It appeared in the evidence that the shipping clerk knew that the flour came from the plaintiff's mill. A verdict was entered for the plaintiff, and judgment entered thereon. The railway company then appealed, but the court affirmed the judgment, Dixon, C.J., saying: "Mr. Watson, the receiver and shipping clerk of the defendant, the railway company, knew that the flour belonged to the plaintiff. He knew it because he knew it came from the plaintiff's mill, and that the teamster who hauled it was the same who had previously hauled flour for the plaintiff. He himself testified to these facts. He also testified that his only authority for delivering the bill of lading to Mr. Tilton was that the teamster said 'the flour was *for* Mr. Tilton.' This was clearly no authority for delivering the flour to Mr. Tilton; and such delivery was a conversion by the railway company. In the first place, the teamster was not the agent of the plaintiff for any such pur-

**FORBEARANCE.**—(See also CONTRACT; USURY.)—A delay in enforcing rights. The act by which a creditor waits for the payment due him by the debtor after it has become due.[1]

pose. He was a mere servant, having possession of the flour for the purpose of delivering it to the railway company, and nothing more. He had no power, nor semblance of power, by virtue of his employment, to direct the delivery of the flour by the railway company to Mr. Tilton or any one else. The agents and servants of the railway company were bound to know this, and to govern themselves accordingly. . . Special authority from the plaintiff to the teamster for that purpose was not shown, nor attempted to be. In the second place, the statement of the teamster that the flour was 'for' Mr. Tilton did not justify the inference either that it then belonged to Mr. Tilton, or that he was entitled to the possession of it. It was no more than saying that it was intended for him, which was true, but which could not have been understood as implying that it was to be delivered by the railroad company to him without further and specific instructions to that effect from the plaintiff, who was the real owner." Sawyer *v.* Chicago & Northwestern R. Co., 22 Wis. 402; s. c., 99 Am. Dec. 49.

1. Bouvier's Law Dict. *sub voce.*

In deciding that an arrangement between a bank and a trust company, both in the city of New York, whereby an exchange of notes was made between them, upon a premium greater than the legal rate of interest, was within the statute of usury, because the true object of the parties was a loan of money, and the form of an exchange was substituted only as a disguise, the court, Gardiner, J., said: "The statute against usury (1 R. S. 722, §§ 1, 2), prohibiting a greater rate of interest than seven per cent 'for the loan, or *forbearance*, of any money, goods, or things in action,' is applicable only to those loans which are in substance and effect loans of money. . . . The terms 'interest' and *forbearance* cannot be predicated of any other than a loan of money, actual or presumed. Interest is defined to be a certain profit for the use of the loan; and *forbearance*, the giving a further day, when the time originally limited for the return of the loan has passed. (Ord. 30, 24.) Both imply that the thing loaned has an established value, so that the lender on its return, with the compensation fixed by law for the use and risk, may receive a 'certain profit.' Now this is true only of money, which is legally supposed to have a fixed, unchangable value in itself, and to be consequently the true measure of the value of all other property. A fixed rate per cent on money, therefore, in contemplation of law, is supposed to give to the lender a 'certain profit,' because the thing loaned is of the same value at the end of the term as at its commencement." Dry Dock Bank *v.* American Life Ins. & Trust Co., 3 N. Y. 344, 355.

In *Alabama*, prior to 1818, the statutes provided (An Act against Usury, 1805): "That if more than the rate of six dollars for the *forbearance* or giving day of payment of one hundred dollars for one year, etc., . . . shall be taken, etc., . . . by way of any corrupt bargain, loan, etc., . . . the same, together with the whole amount of interest taken, etc., . . . may be recovered by any person paying the same," etc. In 1818 an act was passed as follows: "That any rate of interest, or premium for the loan or use of money, etc., . . . fairly and *bona fide* stipulated and agreed upon by the parties to such contract, expressed in writing. and signed by the party to be charged therewith, shall be legal and recoverable; and no *bona fide* contract shall be vacated or in any manner impaired by reason of any premium or rate of interest so stipuluted and expressed." In an action upon a bond or note to pay a certain sum at a future day, with interest from the date, at 5 per cent a month, if not punctually paid, it was held that the contract for interest from the date was a penalty; and further, to carry interest at a rate above the legal rate the statute of 1818 must be accurately followed, and the contract must be in writing, signed by the party to be charged, and express that it is for a loan of money, and that such interest is recoverable only for the stipulated time of forbearance; the court, Saffold, J., saying: "And if we attach to the term 'loan' its most comprehensive signification, it can only apply to a contract for the return or payment of money at a future day, or for the delivery of something for temporary use which is to be returned to the owner. '*Forbearance* is the giving day for the return of a loan, or, more properly, signifies the giving a further day when the time originally agreed on is passed.' (Ord. 23.) Giving a further day for payment, to constitute *forbearance*, requires, I apprehend, not merely a passive indulgence, but an ex-

**FORBEARANCE AS A CONSIDERATION.**—See BILLS AND NOTES, Vol. II. 361 ; CONTRACTS, Vol. III. 86.

**FORCE.**—See note 1.

press agreement to that effect; and it is to be observed that the term *forbearance*. could it enlarge the operation of this statute, is not to be found in it, and is not omitted in any other on the same subject, yet I consider *forbearance*, when stipulated for, tantamount to a loan." Henry and Winston *v.* Thompson, 1 Minor (Ala.), 209, 232.

1. Physical force, however slight, against the person or possession of another, is, in itself and essentially, without regard to the motive, unlawful, and is the gist or gravamen of the action of trespass *vi et armis*. Smith *v.* Rutherford, 2 S. & R. (Pa.) 358; Am. Notes to Scott & Shephard, 1 Am. Ldg. Cas. (8th Am. Ed.) 883. Force, in this connection, is not merely actual force, but also implied force; and the law implies force wherever the injury is immediate to the person or property of another. Jordan *v.* Wyatt, 4 Gratt. (Va.) 157. See TRESPASS.

Force is also an element of importance in criminal law, for all intentional injuries by physical force, to person or property, are indictable. Bishop's Crim. L. 556, 574. But where force is a necessary element of crime—as robbery or rape—it must not be physical; it may be mental, occasioned by threats or the like. 2 Whart. Cr. L. 1698.

Where, under statute, force is a necessary incident of rape, an averment of violence will include it. Gutierrez *v.* State, 44 Tex. 587; State *v.* Johnson, 67 N. Car. 55; Comm. *v.* Fogarty, 8 Gray (Miss.), 489; *contra*, State *v.* Blake, 39 Me. 322. And in burglary, breaking includes force. Under a statutory provision requiring a forcible breaking, proof of constructive breaking at common law is sufficient. Ducher *v.* State, 18 Ohio, 308.

An averment in an indictment for manslaughter that the prisoner did "compel and force" A and B, who were working a windlass, to leave it, whereby the deceased was killed, is not proved by evidence that the prisoner was working with A and B, and on leaving off they were not strong enough to work the windlass and had to let it go. "Compel and force" must be taken in this case to mean active force. Rex *v.* Lloyd, 1 C. &. P. 301. But under a statute forbidding the forcible passing of a toll-gate without paying toll, it is sufficient to establish the offence to prove a passing, after refusal of permission to pass without payment, without the consent and against the will of the gate-keeper. It is not necessary that resistance by force should have been made or violence offered. Turnpike Co. *v.* Fowler, 24 N. J. 205. Likewise, under an indictment for forcibly confining and detaining negroes on board a vessel with intent to make them slaves, it is not necessary to prove physical force. "This word, 'forcibly,' which is the material element in the crime charged, does not mean physical or manual force. Even the crime of robbery, in which force is a peculiar element of the crime, it being the taking violently the property of another from his person, need not be accompanied with, or consist of, actual force. Any conduct, on the part of the robber, putting the person deprived of his goods in bodily fear and terror, is equivalent to actual force. And so in this case. These negroes were collected at the place, where they were put on board, in barracoons, and were there under restraint by the person who furnished them at the ship's side. They were in bondage at the time, and under the control of those persons, who transferred them to the vessel. They came upon the deck of the vessel in that condition; and it would be strange indeed if it was made necessary by the law that it should be shown that they made personal, physical resistance at the time against being put on board and detained on board, under all these circumstances. It is sufficient that they were under moral restraint and fear—their wills controlled by this superior power exercised over their minds and bodies." United States *v.* Gordon, 5 Blatchf. (C. C.) 18.

**Force and arms.**—By the ancient common law, the use of the words "with force and arms" was necessary in indictments for crimes of a forcible nature. Their necessity was abolished by statute 37 Hen. VIII. c. 8; but they are still used, even in indictments where the ancient common law did not require them. 2 Bishop's Crim. Pr. 648; Bishop's Direc. & F. 43; Chitty's Cr. L. 240 sq.; 1 Whar. Cr. L. (17th Ed.) 403. The statute 37 Hen. VIII. c. 8 is in force in most of the States, having been either re-enacted or regard-

ed as a part of their common law. Report of the Judges, 3 Bin. (Pa.) 595, 620; Rob. Dig. Brit. Stats. in force in Pa., 324; Comm. *v.* Scannel, 11 Cush. (Mass.) 547; State *v.* Duncan, 6 Ired. (N. Car.) 236; Taylor *v.* State, 6 Humph. (Tenn.). 285; Rice *v.* State, 3 Heisk. (Tenn.) 215; State *v.* Elliott, 7 Blackf. (Ind.) 280; State *v.* Temple, 3 Fairf. (Me.) 214; State *v.* Hanley, 47 Vt. 290. In the last case other words implying force had been used. There is no American case in which the use of these words in an indictment is held necessary. Bishop's Direc. & F. 43.

**Forced Sale** (see EXECUTION; EXEMPTION; HOMESTEAD). — In many of the States there are constitutional and statutory provisions exempting homesteads from forced sale or alienation. Different views have been taken of the meaning of these expressions. "A forced sale," it was said in Defour *v.* Camfranc, 11 Mart. (La.) 610, "results from a sale made at the time and in the manner prescribed by law, in virtue of an execution issuing on a judgment already rendered by a court of competent jurisdiction." This definition was adopted in Howard *v.* North, 5 Tex. 304; Sampson *v.* Williamson, 6 Tex. 102; Milton *v.* State (Tex.), 6 S. W. Rep. 303. A "forced sale" must be made by an order or decree of a court. Wing *v.* Cropper, 35 Ill. 256. And see La. Civ. Code, 2602.

On the other hand, a "forced sale" was held not to be synonymous with "sale on execution" in Peterson *v.* Hornblower, 33 Cal. 266. "The latter may be and often is voluntary in every respect. When the owner consents to a sale under execution or other legal process, the sale is not forced, but it is as voluntary, within the full import of the term, as it is when he directly effects the sale and executes the convyeance. Its quality as being voluntary or forced depends, not upon the mode of its execution, but upon the presence or absence of the consent of the owner." This was cited with approval in Patterson *v.* Taylor, 15 Fla. 336, in which it was held that a sale to which a mortgagee had expressly given his consent in the mortgage deed was not a forced sale. Nor is a sale under a deed of trust. Moran *v.* Clark (W. Va.), 4 S. E. Rep. 303.

A constitutional exemption of the kind here treated extends to any compulsory disposition of the homestead, whether denominated a sale or otherwise. A forced dispossession by ejectment by a mortgagee is as much within the prohibition as a forced sale under judicial process. Lanahan *v.* Sears, 102 U. S. 318. "The constitution obviously intended that the homestead should be exempted from the operation of any species of execution, or from any forced disposition of the property, whether partial or total, which would disturb the family in the quiet and uninterrupted possession of their home, with the property thereto attached. The beneficence of the provision has a much wider range than to protect the family from a sale which would utterly extinguish all right in the property. It shields them also from any extents or deliveries of the property, or from any forcible appropriation of its rents, issues, and profits. It protects the domestic sanctuary from every species of intrusion which, under color of law, would subject the property, by any disposition whatever, to the payment of debts." Hemphill, C.J., in Sampson *v.* Williamson, 66 Tex. 102.

**Forced Heirs.**—By the Civ. Code of La., *Donationes inter vivos* or *mortis causa* cannot exceed two thirds of the donor's property if he have a child or a parent, one half if he have two children, and one third if he have three or more. In these cases "the heirs are called 'forced heirs,' because the donor cannot deprive them of the portion of his estate reserved for them by law except in cases where he has a just cause to disinherit them." Art. 1495.

**By force** (see BY).—"By reason of," "in consequence of." Fischer *v.* Hope M. L. I. Co. of N. Y., 8 Jones & S. (N. Y.) 291.

**With force** is equivalent to "forcibly" in an indictment. United States *v.* Bachelder, 2 Gall. (C. C.) 15.

## FORCIBLE ENTRY AND DETAINER.


**I. Definition**, 101.
**II. Nature of the Action**, 102.
1. *Distinction between Forcible Entry and Forcible Detainer*, 103.
2. *The Different Remedies*, 104.
3. *The Remedy made Applicable to Tenants Holding Over*, 105.
4. *When the Remedy does Not Apply*, 106.
**III. What Constitutes a Forcible Entry**, 106.
1. *Forcible Detainer After Unlawful Entry*, 109.
**IV. What Constitutes a Forcible Detainer**, 110.
1. *Holding Over*, 112.
**V. What Force or Violence is Sufficient**, 112.
1. *Threats and Intimidation*, 116.
**VI. The Possession Necessary**, 117.
1. *What Constitutes Possession*, 119.
2. *Abandonment of Possession*, 124.
3. *Color of Title*, 126.
4. *Pre-emption*, 126.
**VII. Title, How Far Considered**, 126.
**VIII. Who may Bring the Action**, 129.
**IX. Against Whom the Action may be Brought**, 137.
**X. Notice to Quit, and Demand for Possession**, 139.
1. *Time and Manner of Service of Notice*, 142.
**XI. Procedure**, 143.
1. *Jurisdiction*, 143.
2. *Commencement of the Action*, 146.
*a. The Summons or Warrant*, 146.
*b. Service of Process*, 146.
*c. The Inquisition*, 147.
*d. Indictment*, 148.
3. *Venue*, 150.
4. *The Complaint*, 150.
*a. Complainant's Estate and Possession*, 151.
*b. Allegations of the Entry and Detainer*, 152.
*c. The Description of the Property*, 153.
*d. Allegations in Cases of Landlord and Tenant*, 155.
*e. Form and Verification*, 157.
5. *Answers and Defences*, 157.
*a. Statute of Limitations*, 157.
*b. Pleas in Abatement*, 158.
*c. Defences in General*, 159.
6. *The Disposition of the Issues*, 163.
7. *Amendments*, 164.
8. *Abatement of the Action*, 165.
9. *Evidence*, 165.
*a. What must be Proved and Burden of Proof*, 165.
*b. Admissibility and Materiality*, 166.
*c Competency of Witnesses and Sufficiency of Evidence*, 169.
*d. Objections to the Admission of Evidence*, 170.
10. *Verdict*, 170.
11. *Damages*, 172.
*a. Right to the Recovery of*, 172.
*b. Elements of*, 172.
*c. Double and Treble Damages*, 173.
12. *Judgment*, 174.
*a. What Judgment may be Rendered*, 174.
*b. Form of*, 175.
*c. Costs*, 176.
*d. Effect and Conclusiveness of*, 176.
13. *Enforcement of the Judgment*, 177.
*a. Execution*, 177.
*b. Restitution of Possession*, 177.
14. *Appeals and Reviews*, 179.
*a. When Appeal may be Taken*, 179.
*b. Questions Considered*, 180.
*c. The Relief Granted*, 181.
*d. Review by Certiorari and Other Writs*, 181.
*e. Stay of Execution on Appeal*, 182.
*f. Liability of Sureties on Undertaking*, 183.


**I. DEFINITION.**—A forcible entry and detainer is a violent taking and keeping possession, by one, of any lands and tenements occupied by another, by means of threats, force or arms, and without authority of law.[1]

1. Bouv. Dict. 598; State *v.* Gilbert, 2 Bay (S. C.), 355; State *v.* Cargill, 2 Brev. (S. C.) 445; People *v.* Field, 52 Barb. (N. Y.) 198; People *v.* Fields, 1 Gans. (N. Y.) 222; Com. *v.* Shattuck, 4 Cush. (Mass.) 141; Henderson's Case, 8 Gratt. (Va.) 708; State *v.* Pridgen, 8 Ired. (N. Car.) 84; Com. *v.* Dudley, 10 Mass. 403; State *v.* Wilson, 3 Nev. 125. See 4 Black. Com. 148; 1 Russ. on Cr. (9th Ed.) 421.

**II. NATURE OF THE ACTION.**—Forcible entry and detainer is essentially an action given to protect the actual possession of real estate against unlawful and forcible invasion, to remove occasion for acts of violence in defending such possession, and to punish breaches of the peace committed in the entry upon or the detainer of real property.[1] The main object, therefore, being to preserve the public peace, and prevent parties from asserting their rights, real or supposed, by force and violence, the action will lie irrespective of the question as to whether the defendant had the legal right of possession, or a right of entry,[2] the gist of the action being the entry and detainer by force and violence, and the ousting from a peaceable possession, contrary to law.[3]

1. Dotson *v.* State, 6 Coldw. (Tenn.) 545.

**Remedy Applicable to Real Property Only.**—The process of forcible entry and detainer cannot be maintained for a building standing on the land of another by his consent, it being merely personal property. Field *v.* Higgins, 35 Me. 339. See also Kassing *v.* Keohane, 4 Ill. App. 460.

2. Greeley *v.* Spratt, 19 Fla. 644.

**Tenant Cannot be Ejected by Force.**—The statute of forcible entry and detainer takes away the owner's common-law right forcibly to enter upon his tenant's holding over after the determination of his term. Reeder *v.* Purdy, 41 Ill. 279.

Under Ind. Rev. St. 1881, § 5237, providing that any person "having right to possession" of premises who is ousted may maintain an action for restitution, *held*, that a person in actual peaceable possession was entitled to maintain such action when ousted, though by the real owner. Judy *v.* Citizen, 101 Ind. 18.

The party in peaceable possession cannot be legally ejected by force. The question of right does not at all arise in the action of forcible entry and detainer, and the defendants cannot set up their right as a defence for their forcible entry. Beeler *v.* Cardwell, 33 Mo. 84.

The Missouri Act of 1845, p. 12, that "any person" who "shall enter upon any lands with force or strong hand" "shall be deemed guilty of a forcible entry," construed to include the owner. Emerson *v.* Sturgeon, 59 Mo. 404.

The action under Mont. Ter. Cod. St. 163, ch. 3, § 636, for forcible entry and unlawful detainer, does not supersede that of ejectment. The defendant cannot disprove the plaintiff's title. Boardman *v.* Thompson, 3 Mont. 387.

**Question Submitted to Jury.**—In an action of forcible entry and detainer the issue to be submitted to the jury is whether the plaintiff was lawfully, that is, peaceably, in possession of the premises sought to be recovered and the defendant unlawfully entered; the right of entry or of possession is not involved in the issue. Beeler *v.* Cardwell, 29 Mo. 72.

3. In a suit for forcible entry and detainer, the force is the subject of inquiry, and evidence to prove the right of possession is inadmissible. Beauchamp *v.* Morris, 4 Bibb (Ky.), 312; Smith *v.* Dedman, 4 Bibb (Ky.), 192; Cammack *v.* Macy, 3 A. K. Marsh. (Ky.) 296.

Where a person claiming only an incorporeal right in land is dispossessed by a person having title and right of entry, he has no remedy by action at common law, but must resort to the statutory action of forcible entry and detainer. Fuhr *v.* Dean, 26 Mo. 116.

**Landlord and Tenant.**—An indictment for forcible entry may be sustained against a landlord for forcibly ejecting a sub-tenant, after the termination of the tenancy and the removal of the principal tenant. The use of force and violence is an offence of itself, for which he who uses it may be indicted and punished, whatever may be the legal rights of the parties. The lawfulness of the entry in no way excuses the violence used to obtain the possession: this is an offence against the public, for which an indictment will lie. Commonwealth *v.* Kensey, 2 Pars. (Pa.) Sel. Cas. 401.

**Entry in Ejectment.**—A prevailing plaintiff in ejectment is guilty of forcible entry, if he enter without the aid of the process of the court. Davis *v.* Lee, 2 B. Mon. (Ky.) 300.

**A Trespasser** may maintain an action of forcible entry. Lorimier *v.* Lewis, 1 Morr. (Iowa) 253.

In *Alabama*, to sustain an action for forcible entry and detainer, the plaintiff must show that defendant has forcibly entered his premises, and that he actually detains the possession, either by himself

**1. Distinction between Forcible Entry and Forcible Detainer.**—Forcible entry and forcible detainer are in substance and in principle but one offence, and are treated of in the books together as forcible entry and detainer;[1] but they are distinct and different acts;[2]

in person, or by another, to whom, after obtaining it by force, he has delivered it to be kept for him; and the fact that the person for whom he gives the possession has been his tenant before the premises went into the possession of the plaintiff makes no difference. McGonegal *v.* Walker, 23 Ala 361.

**The Arkansas Doctrine.**—Forcible entry and detainer is a tort, pure and simple. Force is the gist of the action. The remedy is designed to protect the actual possession, whether rightful or wrongful. It must accordingly be shown that the defendant entered without the consent of the person in actual possession, and that the entry or subsequent holding of possession was with force and strong hand.

**Constructive Possession,** or evidence that the plaintiff is entitled to possession, or a scrambling possession, as in Anderson *v.* Mills, 40 Ark. 192, is not sufficient; and a peaceable entry, though unlawful, is not sufficient. Nor does a refusal to give possession, unless put out by law, constitute unlawful detainer. Johnson *v.* West, 41 Ark. 535.

The Act of March 2, 1875, is a re-enactment of chapter 72, title "Forcible Entry and Detainer," of Gould's Digest, and the action of forcible entry and detainer can be maintained only in a case of a forcible entry, or a turning out by force, or where the plaintiff has parted with the possession under some contract or agreement, express or implied, that the possession shall be restored to him. It is not intended to take the place of the action of ejectment, but to restore possession forcibly or unlawfully detained, without regard to the ownership or title to the property. Force is the gist of the action, and must be actual and hostile. Implied force, as where the entry is peaceable, but unlawful, is not sufficient. Hall *v.* Trucks, 38 Ark. 257.

In forcible entry and detainer, force is the gist of the action. Unlawful detainer is founded on a breach of contract. The court is inclined to the opinion that forcible entry and detainer and unlawful detainer cannot be joined, and that it is good case of demurrer, where it appears, on the face of the declaration, that the premises sought to be recovered are one and the same. McGuire *v.* Cook, 13 Ark. 448.

In *Florida*, where the plaintiff had peaceably occupied the premises for several weeks, and was dispossessed by force without process of law by defendant, it is not material, in a proceeding for forcible entry and detainer, whether the plaintiff was originally a trespasser, or that defendant may have had a legal right of possession. The gist of the proceeding under the statute is the forcible entry, and ousting plaintiff from a peaceable possession, contrary to law. Greeley *v.* Spratt, 19 Fla. 644.

In *Illinois*, where a party's land is in the actual possession of another, even though unlawfully, he has no right forcibly to repossess himself, but must resort to the action of forcible entry and detainer, or the action of ejectment. Allen *v.* Tobias, 77 Ill. 169.

One in peaceable possession, if forcibly expelled from the premises, may maintain forcible entry. Baker *v.* Hays, 28 Ill. 387.

**The Missouri Doctrine.**—The law forbids a forcible entry with or without title, and it is immaterial whether the intruder is a mere trespasser or enters under a paramount title, for if he has the right to the possession he must resort to the authority of the law to obtain it. Dilworth *v.* Fee, 52 Mo. 130.

In forcible entry and detainer the *status quo* is to be restored without regard to the question of who has otherwise the better claim to the possession. Hyde *v.* Fraher, 25 Mo. App. 414.

In *Ohio* the remedy of forcible entry and detainer extends to all cases of entry or maintenance of possession by actual force, and is not limited to the cases enumerated in the 19th section of the statute regulating proceedings in forcible entry and detainer. Yager *v.* Wilber, 8 Ohio, 399.

In *West Virginia*, if the defendant has entered unlawfully, the plaintiff is entitled to recover without any regard to the question of his right of possession; and this though the land from which he is ousted is the land of the party who ousted him. Moore *v.* Douglass, 14 W. Va. 708.

1. 2 Bish. Cr. L. § 489.

In *California* and *Nevada* the gist of the action for "forcible entry and unlawful detainer" is the forcible entry; the detainer is consequential and not independent ground of relief. (McMinn *v.* Bliss, 31 Cal. 122) Peacock *v.* Leonard, 8 Nev. 84.

2. A forcible entry and a forcible detainer are distinct offences, although they

the former being consummated upon the forcibly taking possession, while the latter consists of the use of force in detaining the possession of property upon which a wrongful entry has been made.[1]

**2. The Different Remedies.**—In the United States, as well as in England, the remedy for a forcible entry and detainer is twofold: by indictment at common law, and by proceedings under the several statutes relating to forcible entry and detainer.[2] The common-law remedy is purely criminal in its nature, but the action under the statutes is a civil remedy, the sole object of which is to regain a possession which has been invaded; and the only judgment that can be rendered is, that the plaintiff have restitution of the premises of which he has been unlawfully deprived.[3] The

may be charged in the same indictment. The former was an offence at common law, and the latter is punishable only by statute. Commonwealth *v.* Toram, 2 Pars. (Pa.) Sel. Cas. 411.

1. 2 Whart. Cr. L. § 1083; Dickinson *v.* Maguire, 9 Cal. 46.

In *Indiana* the word "or" in the first line of section 12, 2 Rev. Stat. 1852, 492, is equivalent to "and"; and the remedy applies where there has been an unlawful and forcible entry, or an unlawful and forcible detainer after a peaceable entry. O'Connell *v.* Gillespie, 17 Ind. 459.

**Original Entry Unlawful—Missouri Doctrine.**—An action for forcible entry and detainer cannot be sustained by proof of an unlawful detention only; but, unless the original entry was also unlawful, it will be necessary to prove further a demand of possession in writing, and a refusal by the defendant. Drehman *v.* Stifel, 41 Mo. 184.

The words "unlawful or forcible" in the second section of the Wisconsin act to prevent forcible entries and detainers refer to one and the same class of cases. Ferrell *v.* Lamar, 1 Wis. 8.

2. Commonwealth *v.* Shattuck, 4 Cush. (Mass.) 141.

An indictment will lie at common law for forcible entry and detainer. State *v.* Jones, 14 S. Car. 344; Cruiser *v.* State, 18 N. J. L. (3 Harr.) 206; Henderson's Case, 8 Gratt. (Va.) 708; State *v.* Wilson, 3 Mo. 125; Com. *v.* Shattuck, 4 Cush. (Mass.) 141. And in *New Jersey* the right was not taken away by the statute of 1798. Cruiser *v.* State, 18 N. J. L. (3 Harr.) 206.

**The Common Law.**—It was the doctrine of the common law of England from the time of the Norman Conqueror until the statute of 5 Rich. II. ch. 8. "Of Forcible Entry and Detainer"—a period of nearly three hundred years,—that a man had a right of entry, he was permitted to enter with force and arms; and to retain his entry by force where his entry was lawful. But this indulgence of the common law (permitting forcible entries into lands withheld from the rightful proprietors) having been found by experience to be very prejudicial to the public peace, by giving an opportunity to powerful men, under the pretence of feigned titles, forcibly to eject their weaker neighbors, it was thought necessary, by severe laws, to restrain all persons from the use of such violent methods of doing themselves justice; and to this end the statute above referred to was enacted by the English Parliament. This statute was followed by others of the like import in England, and similar statutes on the subject have been enacted in many of the States of the American Union. 3 Wait Actions and Def. 395.

In *Maine* the statute 5 Rich. II. ch. 7, respecting entry *manu forte*, is part of the common law. Harding's Case, 1 Me. (1 Greenl.) 22.

In *South Carolina* the statutes 5 Rich. II. ch. 8; 8 Hen. VI. ch. 9, and 31 Eliz. ch. 11, relating to forcible entries and detainers, are all of force, by virtue of § 2 of the Act of 1712, for putting certain English statutes in force. State *v.* Speirin, 1 Brev. (S. Car.) 119.

But in *New Hampshire* the repeal by the Rev. Stat. of 1791, regulating proceedings in forcible entry, etc., repealed the English law thereon so far as it had been adopted in that State. State *v.* Morgan, 59 N. H. 322.

3. Robinson *v.* Crummer, 10 Ill. (5 Gilm.) 218.

"The common law affords no civil remedy against a person who, having a right, enters forcibly; but the injured party must appeal to the statutory action of forcible entry and detainer." Fuhr *v.* Dean, 26 Mo. 116; s. c., 69 Am. Dec. 484; Tucker *v.* Phillips, 2 Metc. (Ky.) 416.

civil and the criminal remedy cannot be pursued in the same proceeding; a writ of restitution cannot generally be awarded on conviction in a criminal case.[1] In many of the States the criminal remedy has, to a large extent, fallen into disuse and been superseded by the civil one;[2] the remedy having become by gradual additions, in effect, a private as well as a public one.[3]

**3. The Remedy made Applicable to Tenants Holding Over.**—In some of the States the remedy of forcible entry and detainer has been enlarged by statute and given to landlords, vendees, mortgagees, trustees, and other persons against whom the possession of lands is withheld by a tenant, vendor, grantor, mortgagor, or other person after the right to hold possession has expired or been disposed of.[4] The remedy thus enlarged and extended is founded upon contract, express or implied by law;[5] and it has

1. State *v.* Walker, 5 Sneed (Tenn.), 259.

2. 2 Whart. Cr. L. § 1083.

**Statutory Change.**—An information *qui tam* will lie under the Connecticut statute previous to the revision of 1821, for forcible entry and detainer. Dutton *v.* Tracy, 4 Conn. 79.

In *Illinois,* the action of forcible entry and detainer has been changed to a civil proceeding. Thompson *v.* Sornberger, 59 Ill. 326.

The proceedings authorized by Mo. Laws 1870, § 65, are criminal in their nature, and must be conducted in the name of the State. Gilmore *v.* Dawson, 64 Mo. 310.

In *New York,* although the statute of forcible entry and detainer renders the forcible entry of a person having right indictable, yet it does not extend so far as to authorize an action of trespass against him. Hyat *v.* Wood, 4 Johns. (N. Y.) 150.

3. See Wood *v.* Phillips, 43 N. Y. 152; Small *v.* Gwinn, 6 Cal. 447; Bowers *v.* Cherokee Bob, 45 Cal. 495.

4. Ragan *v.* Harrell, 52 Miss. 818.

**The Arkansas Doctrine.**—Unlawful detainer is a statutory remedy for the benefit of landlords against tenants who hold over after the expiration of their term. It is founded on breach of contract implied by law, if not expressed, and may be maintained either by the lessor, his heir or assignee to whom the land passes. Johnson *v.* West, 41 Ark. 535.

The action of unlawful detainer rests on contract, express or implied, between the parties; *r.e.*, on the relation of landlord and tenant. Miller *v.* Turney, 13 Ark. 385.

It was held in *Georgia,* that a statute providing a remedy against intruders on real estate gives no remedy against persons holding over. Murdock *v.* Miller, 21 Ga. 368.

**The Massachusetts Doctrine.**—Forcible entry under the statute lies where the parties are not landlord and tenant, but where one peaceably enters and detains without right against the owner who has a constructive possession. McKissack *v.* Bullington, 37 Miss. 535.

**The Missouri Statute** (Rev. Code 1835, § 278) giving the action for a forcible detainer contemplates a case where the plaintiff has been in lawful possession, and in which the defendant, or those under whom he claims, having peaceably obtained possession, held over after a demand made in writing. Blount *v.* Winright, 7 Mo. 50. Nor can a purchaser at a sheriff's sale maintain an action against the defendant in execution. Hatfield *v.* Wallace, 7 Mo. 112.

The remedy given by Wis. Rev. Stat. ch. 151, extends only to cases where the tenant, at and before the time of demand made in writing that he deliver possession, is holding over after the determination of the lease, or contrary to its conditions and covenants, or after rent has become due according to its *ters,* and remained unpaid for three days, i.e., where he is a wrongdoer at the time of such demand made. Ela *v.* Bankes, 32 Wis. 635.

**Determining Character of Tenancy.**—Where no time is mentioned and no annual rent reserved in a letting, the character of the tenure as to time will be controlled by the intervals between the payments; monthly or weekly payments implying monthly or weekly tenancies. Steffens *v.* Earl, 40 N. J. L. 128.

5. Johnson *v.* West. 41 Ark. 535; Miller *v.* Turney, 13 Ark. 383; Smith *v.* Laffery, 27 Ark. 46.

been held that such a cause of action, being founded upon a breach of contract, cannot be joined with a cause of action for forcible entry and detainer under the original statutes, the latter sounding in tort.[1]

**4. When the Remedy does Not Apply.**—The remedy is not applicable in a case of peaceful entry by one under color of title in himself, or as tenant of some person other than the plaintiff or his assignor, and who obtains and maintains his possession peaceably;[2] and the action involves no exercise of equitable jurisdiction;[3] nor can it be maintained for a mere trespass on land;[4] nor where the entry was made under due process of law;[5] nor where the detainer is forcible after such entry under process of law.[6]

**III. What Constitutes a Forcible Entry.**—Forcible entry is defined to be the offence or wrong of taking possession, by exercise of strength or compulsory power, of lands or tenements against the will of the person entitled to the possession, and without authority of law. The two wrongs of forcible entry and forcible detainer are distinguishable in nature, but, being usually combined, are commonly connected under one name—forcible entry and detainer. The degree of force, or the particular wrongful acts necessary to support the action, are usually defined by the statutes giving and regulating the remedy.[7] But in all cases, unless there

1. Smith *v.* Laffery, 27 Ark. 46.

Where an action of forcible entry and detainer is brought before a justice of the peace under Comp. Laws Kan. 1865, art. 13, ch. 81, and there is joined therewith a claim for damages growing out of the same transaction, *held*, that the proceeding is a summary one, and cannot be joined with other causes of action, although arising out of the same transaction. Ow *v.* Wickham (Kan.), 16 Pac. Rep. 335.

2. Winterfield *v.* Stauss, 24 Wis. 394; Ferrell *v.* Lamar, 1 Wis. 8; People *v.* Fields, 1 Lans. (N. Y.) 222; McHan *v.* Stansell, 39 Ga. 197; Farmer *v.* Hunter, 45 Mich. 337.

3. Kellogg *v.* Lewis, 28 Kan. 535.

4. Castro *v.* Tewksbury, 69 Cal. 562.

A simple trespass upon premises, without menaces or any circumstance of force or terror in respect of the person, is not sufficient to constitute a forcible entry and detainer. People *v.* Smith, 24 Barb. (N. Y.) 16; Merrill *v.* Forbes, 23 Cal. 379; Greer *v.* Wroe, 1 Sneed (Tenn.), 246; Foster *v.* Kelsey, 36 Vt. 199.

A wrongful entry on land, and the cutting and carrying away of timber where the poseession of the land is not divested, does not render the wrong-doer liable for forcible entry and detainer. Grughler *v.* Wheeler, 12 B. Mon. (Ky.) 183. See also Rouse *v.* Dean, 9 Mo. 301.

5. An action of forcible entry and detainer cannot be sustained where it appears that the defendant was placed in possession of the premises by a sheriff, by virtue of a writ of possession, and the entry was peacefully acquiesced in by the plaintiff, from whom the possession was taken. Wyatt *v.* Monroe, 27 Tex. 268.

Forcible entry does not lie against a sheriff who, in levying an attachment, assumes control of premises for twenty hours or so. Link *v.* Harrington, 23 Mo. App. 429. But see White *v.* Sheriff, 32 La. An. 130.

6. Vess *v.* State, 93 Ind. 211.

7. Abbott's L. Dict.

Forcible entry and detainer was a public offence in England, made so by statute. 4 Bl. Com. 148; 1 Russ. on Cr. (9th Am. Ed.) 421. In this, as in many other States of the Union, it is a tort, to be redressed by a civil action, which the statute gives. It is an action summary in its form and machinery, to gain possession of realty which has been tortiously taken, or is tortiously withheld. It is purely possessory, and cannot be maintained unless the plaintiff has had prior possession. Title cannot be inquired into. Weldon *v.* Schlosser, 74 Ala. 355.

The action of forcible entry and detainer

is some use of force or of threats and intimidation, there is no forcible entry. It is not, however, necessary that the force or violence should be used against the person of the occupant; forcibly breaking into a house in the absence of the occupant,[2] intimidat-

may be maintained in three cases: (1) when the entry is forcible, (2) when the entry is simply unlawful and the detainer forcible, (3) when the entry was lawful and the holding over forcible. But in all cases there must be something of personal violence, either threatened or actual. Dickinson *v.* Maguire, 9 Cal. 46. See Huffaker *v.* Boring, 8 Ala. 87; Ladd *v.* Dubroca, 45 Ala. 427; Butts *v.* Voorhees, 13 N. J. L. (1 Green.) 13; Berry *v.* Williams, 21 N. J. L. (1 Zab.) 423; State *v.* Wilson, 94 N. C. 839; Harrow *v.* Baker; 2 Greene (Iowa), 201; People *v.* Smith, 24 Barb. (N. Y.) 16; Williard *v.* Warren, 17 Wend. (N.Y.) 257; Com. *v.* Keeper of Prison, 1 Ashm. (Pa.) 145; Edwick *v.* Hawkes, 18 Ch. Div. 211. *Compare* Hall *v.* Trucks, 38 Ark. 257; Winterfield *v.* Strauss, 24 Wis. 394; Com. *v.* Shattuck, 4 Cush. (Mass.) 141; Saunders *v.* Robinson, 5 Met. (Mass.) 343.

**Manner of Entry.**—An entry may be forcible not in respect of a violence actually done to the person of a man, as by beating him if he refuse to relinquish his possession; but in respect of any other kind of violence in the manner of the entry, as by breaking open the doors of a house, whether any person be in it at the time or not, especially if it be a dwelling-house, and perhaps also by any act of outrage after the entry, as by carrying away the party's goods, etc., which being found in an assize of novel disseisin, will make the defendant a disseisor with force and subject him to fine and imprisonment. 1 Russ. on Cr. (9th Am Ed.) 426

**Purpose of Entry.**—If a person who pretends a title to lands merely go over them, either with or without a great number of attendants, armed or unarmed, in his way to the church or market, or for a like purpose, without doing any act which either expressly or impliedly amounts to a claim of the lands, he cannot be considered as making an entry within the meaning of the statute: otherwise, if he make an actual claim with any circumstances of force or terror. Drawing a latch and entering a house seems not to be a forcible entry according to the better opinion; so if a man open a door with a key, or enter by an open window, or if the entry be without the semblance of force, as by coming in peaceably, enticing the owner out of possession, and afterwards excluding him by shutting the door, without other force, these will not be forcible entries. 1 Russ. on Cr. (9th Am. Ed.) 427.

1. State *v.* Camp, 23 Vt. 551.

**Entry by Owner in Absence of Tenant.**—When the owner of a dwelling-house which the tenant has just left, having a right of entry therein, finds the doors open and no one in the house, he may lawfully enter into and retain possession of the house, and remove the tenant's furniture in a careful manner and store it. Rollins *v.* Mooers, 25 Me. 192.

One who has legal right to possession will not be liable under the statute of forcible entry and detainer if, in the absence of the occupant, leaving no one on the premises, he enters and takes possession, although he is obliged to force a door in order to do so. Mussey *v.* Scott, 32 Vt. 82.

An indictment for a forcible entry into the field of the prosecutor cannot be supported by evidence that the defendant peaceably entered the field, but while there threw stones against the house of the prosecutor situated adjoining the field, the prosecutor at the time being in the house and not in the field. State *v.* Smith, 2 Ired. (N. C.) L. 27.

But see Brumfields *v.* Reynolds, 4 Bibb (Ky.), 388, where it was held that when a person settled a tenant upon land and afterwards purchased the residue of the tenant's term, and after the tenant's removal allowed the premises to stand unoccupied, the bare entry of another upon the premises, with or without title, amounted to a forcible entry.

And also Croff *v.* Ballinger, 18 Ill. 200, holding that an entry into the possession of another against his will, however quietly it may be done, is a forcible entry in legal contemplation.

**Construction of Kentucky Statute.**—The last section of the act concerning forcible entries and detainers applies exclusively of forcible entries, Brubaker *v.* Poage, 1 T. B. Mon. (Ky.) 123.

2. Mason *v.* Powell, 38 N. J. L. 576.

A took possession of a house and premises by locking the door and closing the windows, and B applied to his agent and demanded possession, which was refused. B was afterwards found in possession of the house, claiming under an adverse title to A. *Held,*

ing him by the use of threats or menace,[1] and generally any circumstances either of actual violence or reasonably exciting fear of such violence, either to person or to property, will be sufficient.[2]

that it was to be inferred that he obtained possesion by breaking the doors or windows open, and that this constituted a forcible entry. Davidson *v.* Phillips, 9 Yerg. (Tenn.) 93; S. P. Jarvis *v.* Hamilton, 19 Wis. 187.

Tearing down a fence and moving a building upon lands occupied by complainant, though in his absence and without violence to any person,—held to warrant a finding of forcible entry; and declarations of the trespasser that he would not leave unless forced by law, a finding of forcible detainer. Steinlein *v.* Halstead, 42 Wis. 422.

A landlord having the right of immediate possession, may take it without legal process if he can do so peaceably; but he has no right forcibly to remove his tenant's goods, or to commit an assault upon him in so doing. Commonwealth *v.* Healey, 4 Allen (Mass.), 318.

1. A house was occupied as a schoolhouse by consent of A, who claimed the right to the possession of the land on which it was situated. Before the termination of the school, B took possession of the house, declaring that, if any person attempted to dispossess him, he would shoot him. *Held*, that this was a forcible entry and detainer; and that, if held after the termination of the school, it was a forcible detainer of the premises of A. for which the writ lies. Vanhook *v.* Story, 4 Humph. (Tenn.) 59.

A purchased a farm, inclosed with others by a common fence. Soon after B, an owner of one of the other farms so inclosed, entered on A's land to plough it; and upon A's objecting, B threatened him with a pistol. *Held*, that B's conduct was a forcible entry, and that no separate fence or cultivation of the land by A, his grantor having cultivated it, was necessary in order to enable A to maintain an action for forcible entry and detainer. Hussey *v.* McDermott, 23 Cal. 413.

2. Hopkins *v.* Colloway, 3 Sneed (Tenn.), 11; Cammack *v.* Macy, 3 A. K. Marsh (Ky.), 296; McMinn *v.* Bliss, 31 Cal. 122; Holmes *v.* Holloway, 21 Tex. 658; State *v.* Pollok, 4 Ired. (N. C.) L. 305; Hendrickson *v.* Hendrickson, 12 N. J. L. (7 Hals.) 202; Brick *v.* Middleton, 12 N. J. L. (7 Hals.) 266; Butts *v.* Voorhees, 13 N. J. L. (1 Green) 13.

**The California Forcible Entry Act** (Stat. 1865–6, § 766) explained with special reference to the question what sort of entry is necessary to make one amenable to the provisions of the act. Treat *v.* Forsyth, 40 Cal. 484.

If the plaintiff is in peaceable possession, and the defendant forcibly enters upon him, he can maintain forcible entry and detainer, though the title is in the defendant. McCauley *v.* Weller, 12 Cal. 500.

**Causing Arrest of Occupant.**—A peaceably entered into unoccupied premises. B procured A's arrest without a warrant, and while A was in custody took forcible possession of the premises, and removed A's goods. *Held*, that A could maintain an action of forcible entry and detainer. Pratt *v.* Stone, 10 Ill. App. 633.

The wife of O's outgoing tenant delivered the key of the house to T, the next neighbor, to be delivered to O; but T took poesession of the house without O's permission. O finding T absent, broke into the house and removed T's furniture into the street, and afterwards, at T's instance, put it upon another lot, having refused T's request to put it back into the house. O then went to buy a lock, leaving the house in possession of an agent. T caused O and the agent to be arrested and taken to a justice's office by a constable, who soon after released them; meanwhile T took possession of the house without O's leave. *Held*, that O could maintain against T an action of forcible entry and detainer. Martindale *v.* Tibbett, 16 Ind. 200.

**One Forcible Entry no Excuse for Another.**—A mortgagee having entered to foreclose, put A in possession, and agreed to sell him the mortgage for a fixed sum within a fixed time, before which time, however, A bought the equity and conveyed it to B. The time having expired without payment by A, the mortgagee forcibly entered, without notice to quit to A or B, and leased to C, who, while he was in possession under the lease, was forcibly expelled by B, who knew of the lease. *Held*, that C might maintain an action of forcible entry and detainer against B for possession. Lawton *v.* Savage, 136 Mass. 111.

**Entry by Landlord Entitled to Possession.**—When a tenant holds over beyond the period fixed by his lease, and the landlord makes forcible entry for any purpose, the tenant cannot maintain trespass *quare clausum*. But the landlord cannot justify a personal injury committed on the tenant

**1. Forcible Detainer After Unlawful Entry.**—A forcible detainer relates back and constitutes a forcible entry and detainer when it follows an unlawful entry; thus, if, after a peaceable entry, the defendant uses violent and abusive language and threatens to strike, or does other acts calculated to and which do intimidate the owner, it makes a case of forcible trespass;[1] but not so if the original entry was lawful.[2]

in such entry. Sampson *v.* Henry, 13 Pick. (Mass.) 36.

A lessee is entitled to possession of the premises leased, and if the lessor forcibly enter and eject him, the lessor is guilty of a forcible entry and detainer under the Missouri Rev. Code of 1835, 280. Michau *v.* Wilcox, 6 Mo. 346.

A party who participates in the forcible entry upon the lot in the peaceable possession of another is guilty at the same moment of the detainer, and if he continue to support and assist the party entering, in remaining upon the lot, he continues the detainer, and may be properly joined as a defendant in the action for the forcible entry and detainer. Blumenthal *v.* Waugh, 33 Mo. 181.

**Collusion with Tenant.**—A proceeding for forcible entry and detainer does not lie against one whose entry was peaceable and without collusion with a tenant. Farmer *v.* Hunter, 45 Mich. 337.

A, having been in possession of land, put B in possession, to keep the same as agent for himself. B delivered the possession to C, without the fraud of C or any knowledge that B acted beyond his right. *Held*, that forcible entry and detainer could not lie by A against C. Moore *v.* Agee, 7 Mo. 289.

**Taking Surrounding Land.**—An action of forcible entry and detainer will lie for taking actual possession of a belt of land entirely surrounding a lot occupied by the plaintiff and enclosing said belt by a fence. Gass *v.* Newman, 1 Head. (Tenn.) 136.

**Part of Railroad Bridge.**—The stringers of Cataract Bridge rested one end on an abutment in the city of Saco, the other on a pier in which plaintiffs' railroad and the city had each an interest, but which the plaintiffs were bound to maintain. To these stringers beams were fastened and projected at right angles beyond the sides of the bridge. On these beams outside of the limits of the highway, and over the east branch of the Saco river, and over land in which the plaintiffs had no interest, the defendant built, by permission of the city, a shop. *Held*, that the railroad could not maintain the process of forcible entry and detainer against the defendant for a part of their bridge. Boston & M. R. R. Co. *v.* Durgin, 67 Me. 263.

**False Affidavit.**—Where a landlord proceeds to remove his tenant for holding over, under Ga. Code sec. 4077, and his affidavit upon which the arrest issued is false, an indictment will not lie for forcible entry. The crime is perjury. Sewell *v.* State, Ga. 496.

**Where Boundary is in Question.**—One who bought the land of one of two adjoining landowners pending a question between them as to their boundary, *held*, bound under the circumstances by the true line, and not entitled to maintain forcible entry and detainer against the other owner for moving the division fence to correspond with the true line, as agreed on between the two before the sale, although he thereby enclosed a part of the land apparently included in plaintiff's purchase. Cramer *v.* Stethem, 1 Mo. App. 144.

**Entry Under Contract to Repair.**—When one receives the key to a house in order that he may make repairs therein, and is in possession and at work on the repairs in obedience to express directions, and using reasonable diligence to complete the work, when suit is brought against him for forcible entry and detainer, the action is premature, and he cannot be held. And it makes no difference that in effecting an entrance into the house, in obedience to such orders, he is compelled to overcome obstacles placed there by plaintiff himself. Seifert *v.* Withington, 63 Mo. 577.

1. State *v.* Wilson, 94 N. Car. 839; Dickinson *v.* Maguire, 9 Cal. 46; Davis *v.* Woodward, 19 Minn. 137.

If one find a man out of his house, and forcibly withhold him from returning to it, and send persons to take peaceable possession of it in the party's absence, this, according to the better opinion, is a forcible entry. 1 Russ. on Cr. (9th Am. ed.) 426.

**Forcible Detainer after Surreptitious Entry.**—If a possession surreptitiously obtained, is maintained by force, the entry will be considered forcible. Burt *v.* State, 2 Treadw. (S. Car.) Const. 489.

2. The defendants are guilty of a forcible detainer, if the entry was unlawful

**IV. WHAT CONSTITUTES A FORCIBLE DETAINER.**—Forcible detainer is defined to be the offence or wrong of keeping possession of real property by strength and arrangement for compulsory exclusion of an adverse claimant, and without authority of law. A forcible detainer may take place after either a forcible or a peaceable entry; but is commonly spoken of in the phrase, forcible entry and detainer.[1] The force or intimidation required to constitute the offence is the same as that required to render an entry for the purpose of taking possession, forcible.[2]

and the detainer forcible, whether they originally obtained possession peaceably or otherwise; but where the entry was peaceable, and made in good faith under a claim of title, they are not liable for an unlawful detainer, even if they resist the entry of the prior possessor. Conroy *v.* Duane, 45 Cal. 597.

**Detainer of Neglected Claim.**—One who peaceably enters upon a mining claim which has been worked for prospecting purposes by another, but which the latter has not worked or occupied for several months, is not guilty of a forcible entry; and the mere fact that the one who makes such entry does not deliver possession to the other upon demand, does not make him guilty of a forcible detainer. Laird *v.* Waterford, 50 Cal. 315.

**The New York Doctrine.**—To authorize proceedings for forcible detainer, the entry must be an unlawful entry, followed by a forcible detainer. People *v.* Fields, 1 Lans. (N. Y.) 222.

Every forcible entry is forbidden; but a forcible detainer after a peaceable entry is not, unless the latter is unlawful. In either case the law gives no remedy to any one who is not entitled to the possession. Hoffman *v.* Harrington, 22 Mich. 52.

Proof that the plaintiff was lawfully possessed of the premises, and that the defendant entered into and detained, or unlawfully detained, the same is enough in the first instance. McCartney *v.* Auer, 50 Mo. 395.

**Detainer from Tenant.**—A landlord entitled to repossession may not re-enter during the tenant's temporary absence, without legal warrant, and hold forcible possession. Mason *v.* Hawes, 52 Conn. 12; s. c., 52 Am. Rep. 552.

1. Abbott's L. Dict.

**The Common Law.**—Forcible detainer is where a man, who enters peaceably, afterwards detains his possession by force; and the same circumstances of violence or terror which will make an entry forcible will also make a detainer forcible. From whence it seems to follow, that whoever keeps in his house an unusual number of people, or unusual weapons, or threatens to do some bodily hurt to the former possessor if he dare return, is guilty of a forcible detainer, though no attempt be made to re-enter; and it has been said that he will also come under the like construction who places men at a distance from the house, in order to assault any one who shall attempt to make an entry into it; and that he is in like manner guilty who shuts his doors against a justice of the peace coming to view the force, and obstinately refuses to let him come in. This doctrine will apply to a lessee who, after the end of his term, keeps arms in the house to oppose the entry of the lessor, though no one attempt an entry; or to a lessee at will detaining with force after the will is determined; and it will apply in like manner to a detaining with force by a mortgagor, after the mortgage is forfeited, or to the feoffer of a disseisor after entry or claim by the disseisee. And a lessee resisting with force a distress for rent, or forestalling or rescuing the distress, will also be guilty of this offence.

But a man will not be guilty of the offence of forcible detainer for merely refusing to go out of a house, and continuing therein in despite of another. So that it is not a forcible detainer if a lessee at will, after the determination of the will, denies possession to the lessor when he demands it, or shuts the door against the lessor when he would enter; or if he keeps out a commoner, by force upon his own land. 1 Russ. on Cr. (9th Am. ed.) 427.

2. 2 Whart. Cr. L. § 1083.

A finding of a forcible detainer is not justified by evidence that the party holding possession of the premises detained, declared that he would remain until put off by force of law. Hodgkins *v.* Jordan, 29 Cal. 577.

Forcible entry and detainer cannot be maintained where there is nothing to show that defendant detained the prem-

While all reasonable and necessary force may lawfully be used by one to defend his lands and tenements, of which he is in the actual possession, against another who comes to dispossess him without right, yet if a man undertakes to retain what he knows to be a wrongful possession, by force or by numbers, reasonably exciting terror, he is guilty of a forcible detainer.[1]

ises by force, or by threats of personal violence. The action cannot be made a substitute for the action of ejectment. Taylor *v.* Scott, 10 Oreg. 483.

In *Illinois*, under the act of 1819, actual force is necessary to constitute a forcible detainer, and the inquisition can be held at any place other than the premises. Bloom *v.* Goodner, 1 Ill. (Breese) 63. But see Atkinson *v.* Lester, 2 Ill. (1 Scam.) 407.

In *Indiana*, proceedings in a case of forcible detainer may be supported, under the statute, without proof that the entry was unlawful. Barton *v.* Osborn, 6 Blackf. (Ind.) 145.

Where, as in *Oregon*, the action lies, "where the possession shall be held by force," it is not maintainable when the facts show no indication of a purpose to resist the owner's entry by force. Harrington *v.* Watson, 11 Oreg. 47.

1. 1 Bishop Cr. L. § 536.

**Threats of Bodily Harm**, to the former possessor, communicated to him by others, constitutes forcible detainer; and character for violence of the party making them may be proved to show that the plaintiff was under a reasonable fear of harm. Ladd *v.* Dubroca, 45 Ala. 421.

Evidence does not sustain an action of forcible entry and detainer which tends to prove only that the defendant peaceably entered vacant land belonging to her plaintiff, which was surrounded by a fence, but on which the plaintiff did not reside, and built a house thereon, and resided in it, and told agents of the plaintiff that he would not leave the lot, and that it would take a pretty good force to put him off. Polack *v.* McGrath, 25 Cal. 54.

**Detainer of Lands Held under Authority of Law.**—That the accused stood on the steps with a cane in his hand, and refused admittance to one who had been put in possession the day before by legal process, *held*, not to render him guilty under Mo. Rev. St. State *v.* Richards, 15 Mo. App. 331.

A prosecution cannot be maintained under Ind. Rev. Stat. 1881. § 1972, against one who forcibly holds lands under a writ regular on its face, based on a judgment of court having jurisdiction, though it was unlawfully issued. Vess *v.* State, 93 Ind. 211.

**Threats of Prosecution.**—A removed from a house and lot, leaving a few articles in the house and on the lot, and fastening the door. In the night of the second day afterward, the door being proved to have been still fast on the evening of that day, B entered into the house and put a tenant in possession, directing him to prevent any person, and A particularly, from taking possession, and threatening to beat and prosecute any one who should enter on the premises. There was no direct proof, however, that B broke open the door. On the complaint against B for a forcible entry and detainer, held, that the evidence would justify a finding against the defendant as to the forcible entry, and that it was clear against him as to the forcible detainer, which, under the statute of Indiana, entitled the plaintiff to restitution. Evill *v.* Conwell, 2 Blackf. (Ind.) 133.

**Dispossession of Tenant Refusing to Attorn.**—A lessor at an execution sale purchased the lessee's interest in the premises, and took a sheriff's deed therefor, but a tenant of the lessee refused to attorn or surrender possession to him, locked up the premises and left them before the expiration of the lease. The lessor took possession next day. *Held*, to be a disseisin, and, after a written demand from the lessee, to be an unlawful detainer, within Wagn. (Mo.) Stat. 642, § 83 (distinguishing 52 Mo. 327): May *v.* Luckett, 54 Mo. 437.

**Worm Fence on Line.**—Unlawful detainer will not lie against an adjoining owner for building a worm fence half beyond the dividing line. Pettigrew *v.* Lancy, 48 Mo. 380; Springer *v.* Sullivan County, 48 Mo. 384.

**Farm in Two States.**—Where a party was in the unlawful possession of a farm lying partly in Massachusetts and partly in Connecticut, and the owner entered on the Massachusetts side and demanded possession of the whole, and the other party, being then a short distance on the Connecticut side, and having an ox goad in his hand, thereupon threatened violence to the owner with that weapon if

**1. Holding Over.**—In cases where the remedy has been extended by statute to include tenants holding over, grantors and vendors refusing to yield possession, etc., the force required to constitute a forcible detainer is constructive only; and all that is necessary is that the tenant, grantor, or other person having possession refuses to yield it to the person entitled thereto, after his right to it has been duly terminated or parted with.[1]

**V. WHAT FORCE OR VIOLENCE IS SUFFICIENT.**—In order to constitute a forcible entry and detainer, there must be something of actual force, or of threats and appearance of ill usage;[2] and it may

he did not leave the farm, upon which the owner abandoned his demand of possession. *Held*, that this was a forcible detainer of that part of the farm lying in Massachusetts. Benedict *v.* Hart, 1 Cush. (Mass.) 487.

1. Doty *v.* Burdick, 83 Ill. 473; Davis *v.* Woodward, 19 Minn. 137.

**Refusal to Perform Agreement.**—If the tenant has notified the landlord that he will not cultivate the land according to agreement, and intends to hold possession without paying rent, the landlord may treat the lease as rescinded and recover possession by unlawful detainer. Buckner *v.* Warren, 41 Ark. 532.

In *California*, an action of unlawful detainer, for holding over after the expiration of the term cannot be maintained unless the time during which the defendant was to occupy the land had expired when the demand for possession was made by the plaintiff; and the above rule holds good whether the agreement under which the defendant occupies is a lease, or an agreement to farm the land for a portion of the crop. Rogers *v.* Hackett, 49 Cal. 121.

The fact that the agreement under which the defendant occupies is a verbal one, and that by its terms it was to continue for two years, does not change the rule.

**Notice.**—It is sufficient to maintain an action of forcible detention under Code Civil Proc. Neb. ch. II., that the party in possession refuses to vacate the premises on lawful notice. Post *v.* Bohner (Neb.), 36 N. W. Rep. 508.

By the *Maine* Statute of 1824, ch. 268, a mere refusal to deliver possession of the land when demanded would not support the process of forcible entry and detainer; but this is sufficient under the statute after thirty days' notice to quit. Clapp *v.* Paine, 18 Me. 264.

If a party agree to surrender premises when demanded, and, upon demand made refuses to surrender, this will be a wilful and unlawful holdin gunder the *Tennessee* act of 1821, ch. 14; such a person is not entitled to a notice to quit. Trousdale *v.* Darnell, 6 Yerg. (Tenn.) 431.

In *New Hampshire*, if a tenant refuses to leave at the time fixed in a notice to quit, the leassor may peaceably remove the tenant's goods, doing no unnecessary damage. Weeks *v.* Sly, 61 N. H. 89.

**The Refusal.**—The holding over of a tenant without a refusal to deliver up the premises, actual or constructive, does not constitute a forcible detainer. Shepard *v.* Thompson, 2 Bush, (Ky.) 176.

A, tenant for life in land, with remainder in fee to B, conveyed in 1851 to defendant road all right. "title, interest, and estate of, in, and to so much of her land in W. county as may be laid out for the constructon of its railroad." In 1881 A died, the railroad having taken no steps to acquire the right of way except conveyance from A; and three years afterward B brought unlawful detainer against the railroad. *Held*, that he was entitled to judgment (Richardson, J., dissenting). Hope *v.* Norfolk & Western R. R. Co., 79 Va. 283. No right of action accrued till A's death. Ib.

2. State *v.* Cargill, 2 Brev. (S. C.) 445; Curry *v.* Hendry, 46 Ga. 631; Frazier *v.* Hanlon, 5 Cal. 156; O'Callaghan *v.* Booth, 6 Cal. 63.

**Where the Relation of Landlord and Tenant Does not Exist.** a party entitled to the possession of lands or tenements cannot maintain the summary process by complaint provided by the Rev. Stat. ch. 104, in cases of forcible entry and detainer, unless there be an actual forcible entry or detainer by violence or threats of violence, in taking or keeping possession, or some act or threat of force adapted to alarm the party or deter him, from an apprehension of forcible resistance. Such complaint is not sustained by proof of a mere unlawful entry into a house, after the owner has forbidden such entry, and a refusal to leave it after repeated orders to leave it, without

be stated, in a general way, that, in order to maintain an action for forcible entry and detainer, there must have been either actual violence, or circumstances tending to excite fear of such violence, whether to the person, or to goods, houses, or enclosures;[1] and the same kind and degree of force is necessary in forcible detainer as in forcible entry.[2] It will be found, however, that the above general doctrine has undergone considerable modification in some of the States: in some a mere unlawful entry is sufficient to sustain the action; in others the action will lie where the entry was by fraud or stealth; and under the Kansas statute the action may be maintained in all cases, where the defendant is a settler or occupier of lands or tenements, without color of title, and to which the complainant has the right of possession.[3]

proof of any violence or threats of violence, or any show of a determination forcibly to make the entry, or forcibly to resist the entry of the owner. Saunders *v.* Robinson, 5 Metc. (Mass.) 343.

An action for an unlawful detainer can be maintained under the statute, where the relation of landlord does not exist, and the actual possession of the complainant has been wrongfully invaded, without showing that the entry was accompanied with such force and violence as would sustain an indictment at common law for forcible entry. Jarvis *v.* Hamilton, 16 Wis. 574.

1. Butts *v.* Voorhees, 1 Green (N. J. L.), 13; Hopkins *v.* Calloway, 3 Sneed (Tenn.), 11; Holmes *v.* Halloway, 21 Tex. 658; Com. *v.* Dudley, 10 Mass. 403; 5 Wait's Pr. 292.

In *Connecticut*, where a jury find a defendant guilty upon a complaint of forcible entry and detainer, they must find the force, or the verdict will be bad. Bull *v.* Olcott, 2 Root (Conn.), 472.

The policy of the *California* statute of forcible entry and detainer, providing a remedy for an unlawful entry as well as a forcible entry, is, to avoid nice distinctions as to what constitutes force in an entry upon lands. Moore *v.* Goslin, 5 Cal. 266.

Under the statute of *California*, where the plaintiff's evidence fails to disclose anything approximating to force, violence, or any effort at intimidation or threats of force or violence on the part of defendants at the time they entered into the possession of the premises in controversy, or at any time thereafter, he does not make out such a case as entitles him to the summary remedy provided by the act. Buel *v.* Frazier, 38 Cal. 693.

2. Commonwealth *v.* Dudley, 10 Mass. 403; People *v.* Rickert, 8 Cow. (N. Y.) 226.

The defendant having entered peaceably, said to the former possessor: "It will not be well for you, if you ever come upon the premises again, by day or night." On indictment under the statute (1 R. L. 96, 98–6), *held*, that it should be left to the jury to find whether this was a threat of personal violence, and so a forcible detainer, within the statute. They having found that it was, the court will not disturb their verdict nor grant a new trial. Under such indictment, the defendant's title is not to be investigated. McNair *v.* Rempublicam, 4 Yeates (Pa.), 326.

3. Price *v.* Olds, 9 Kan. 66.

And see Fowler *v.* Knight, 10 Ark. 43; Smith *v.* Hoag, 45 Ill. 250; Stephens *v.* McCloy, 36 Iowa, 659; Burt *v.* State, 2 Treadw. Const. (S. Car.) 489; Doty *v.* Burdick, 83 Ill. 473; Davis *v.* Woodward, 19 Minn. 137; Judy *v.* Citizen, 101 Ind. 18; Mason *v.* Powell, 38 N. J. L. 576; Ainsworth *v.* Barry, 35 Wis. 136; Sleinlein *v.* Halstead, 42 Wis. 422; Warren *v.* Kelly, 17 Tex. 544; Holmes *v.* Holloway, 21 Tex. 658; Childress *v.* Black, 9 Yerg. (Tenn.) 317; Blackwell *v.* State, 74 Ga. 816; Olinger *v.* Shepherd, 12 Gratt. (Va.) 462; Emsley *v.* Bennett, 37 Iowa, 15, Emerson *v.* Sturgeon, 59 Mo. 404; Mussey *v.* Scott, 32 Vt. 82; Foster *v.* Kelsey, 36 Vt. 199; Mitchell *v.* Davis, 23 Cal. 381; Warren *v.* Ritter, 11 Mo. 354; Bliss *v.* Johnson, 73 N. Y. 529. *Compare* Willard *v.* Warren, 17 Wend. (N. Y.) 257; Hall *v.* Trucks, 38 Ark. 257; Johnson *v.* West, 41 Ark. 535; Yager *v.* Wilber 8 Ohio, 399; Saunders *v.* Robinson, 5 Metc. (Mass.) 343; Com. *v.* Shattuck, 4 Cush. (Mass.) 141; Pike *v.* Witt, 104 Mass. 595; Gray *v.* Finch, 23 Conn. 495; Wood *v.* Phillips, 43 N. Y. 152; Butts *v.* Voorhees, 1 Greene (N. J.), 13; Com. *v.* Keeper of Prison, 1 Ashm. (Pa.) 140; Hoffman *v.* Harrington, 22 Mich. 52; Seitz *v.* Miles, 16 Mich. 465; Curry *v.* Hendry, 46 Ga. 631; Minor *v.* Duncan, 54 Ga.

The physical force necessary to constitute the offence or wrong, where the entry is required to be forcible, must be greater than the amount used in a mere trespass ;[1] the entry or detainer must usually be accompanied with some circumstances of actual violence or terror.[2] The entry may be said to be forcible not only in respect of the violence actually done to the person of the occupant, as by beating him if he refuse to relinquish his possession, but also in respect to any other violence in the manner of the entry ; as by breaking open the doors of a house, whether any person be in it at the time or not, or by breaking an enclosure.[3]

516; Buel *v.* Frazier, 38 Cal. 693; Conroy *v.* Duane, 45 Cal. 597; Tucker *v.* Phillips, 2 Metc. (Ky.) 416; Grughler *v.* Wheeler, 12 B. Mon. (Ky.) 183; Hopkins *v.* Calloway, 3 Sneed (Tenn.), 11; Dennison *v.* Smith, 26 Mo. 487; Cathcart *v.* Walter, 14 Mo. 17; Wunsch *v.* Gretel, 26 Mo. 580.

1. Gray *v.* Finch, 23 Conn. 495; Shaw *v.* Hoffman, 25 Mich. 162; State *v.* Pollok, 4 Ired. L. (N. Car.) 305; Jarvis *v.* Hamilton, 16 Wis. 574. *Compare* Willard *v.* Warren, 17 Wend. (N. Y.) 257; State *v.* Godsey, 13 Ired. L. (N. Car.) 348; State *v.* Johnson, 1 Dev. & B. L. (N. Car.) 324.

**The provisions of the Code of Tennessee** relative to forcible entry were not intended to settle the title to real estate at the expense of the State, but to protect the actual possession of real estate against unlawful and forcible invasion; and to remove occasions for acts of violence and breaches of the peace. To support an indictment under that statute there must have been such wrongful and wilful invasion of the possession of another as would enable the party in possession to maintain an action of trespass for the injury. Any facts that would constitute a defence to an action of trespass would constitute a defence to the indictment; and the possession of the prosecutor in such indictment would be *prima facie* evidence of title in him. Stuckey *v.* Carleton, 66 Ga. 215.

2. A mere refusal to deliver possession, when demanded, will not warrant the process for forcible entry and detainer, under the statute of Massachusetts of 1784, ch. 8; but the possession must be attended with such circumstances as might excite terror in the owner, and prevent him from claiming his rights; such as apparent violence offered in deed or word to the person, having unusual offensive weapons, or being attended by a multitude of people. Commonwealth *v.* Dudley, 10 Mass. 403.

An entry is not forcible unless the occupant is forcibly expelled, and is not complete until the expulsion. Hoffman *v.* Harrington, 22 Mich. 52.

3. 2 Bish. Cr. L. § 507.

An entry by forcing open a fastened window, after being refused the key and trying to get through the back door, held to be a "forcible entry" within Wis. Rev. Stat. ch. 151, as to forcible entry and unlawful detainer. Ainsworth *v.* Barry, 35 Wis. 136.

Where one who is not on friendly terms with the owner of a dwelling-house comes there armed with a gun, a revolver, and a knife, and immediately after entering uses violent, threatening language (the owner being present), and on being forcibly ejected by an inmate of the house, again comes to the other door and forces it open against the owner, who is struggling to keep it closed, he is guilty of a forcible trespass, although the owner may have not forbidden him, in terms, from entering. State *v.* Bordeaux, 2 Jones L. (N. Car.) 241.

**Entry in the Night-time.**—Where a party of four or five men enter a building occupied by another, in the night time, during the hours of sleep, and take possession, and avow the intention of keeping possession, and actually do keep possession, it is sufficient evidence of force to maintain the action of forcible entry and detainer. Scarlett *v.* Lamarque, 5 Cal. 63.

**The Bare Removal of the Fence** of the plaintiff will not convert his entry or detainer into a forcible one, if defendant takes possession peaceably. McGonegal *v.* Walker, 23 Ala. 361.

The two defendants, with a workingman, went to a tenement in the occupation of the plaintiff, but in which there was no one at the time, and the door of which was fastened with a padlock, demanded the key from the plaintiff's servant, and on his refusal ordered their workman to enter the premises through a hole in the floor. The workman did so; and by his assistance, and with the aid of an axe which they brought with them, they removed the padlock, and

In respect to the amount or degree of such force necessary to constitute a forcible entry and detainer, while there is a wide difference in the decisions of the different States, the prevailing rule would seem to be, that it must amount to a breach of the peace, or that it would necessarily lead to a breach of the peace, if the person in possession were not overawed, and thus induced to forbear to resist it;[1] and this force may be exercised on the land or elsewhere, and it is not necessary that it should have been used in the very act of entry, if it be employed with the immediate intent to enter;[2] neither need the person whose possession is invaded be upon the premises in person, nor need the force be exercised against him personally; if he is in possession by his wife, children, servants, or agents, and the force is applied to them, it is sufficient;[3] but it is no forcible entry for a man to enter premises of which his wife is in possession;[4] and any entry, however made, in order to constitute a forcible entry and detainer, must be in the prosecution of, and based upon, a claim of the lands so entered upon.[5]

entered and kept possession of the premises. They used no violence in word or act to the plaintiff's servant. *Held*, that there was not such a forcible entry as would support an action on the Gen. Stat. of California, ch. 137. Pike *v.* Witt, 104 Mass. 595.

1. State *v.* Ross, 4 Jones (N. Car.), 315; Com. *v.* Rees, 2 Brewst. (Pa.) 564. See Willard *v.* Warren, 17 Wend. (N. Y.) 257; Com. *v.* Shattuck, 4 Cush. (Mass.) 141; State *v.* Cargill, 2 Brev. (S. Car.) 445.

To constitute a forcible entry and detainer, it is not necessary that violence and outrage upon person or property should be resorted to. If the actual possession of another be taken and held under circumstances which show that it will not be surrendered without a breach of the peace, it is a forcible entry and detainer. Childress *v.* Black, 9 Yerg. (Tenn.) 317.

Every man having a right of entry into lands may assert the right, providing he commits no such acts of violence as will subject him to criminal prosecution. Langdon *v.* Potter, 3 Mass. 215.

**Contra.**—Under the statute of forcible entry, actual violence amounting to a breach of the peace is not necessary in any case. Force and violence, short of a breach of the peace, are sufficient where the entry is required to be forcible. Smith *v.* Hoag, 45 Ill. 250. And see also Jarvis *v.* Hamilton, 16 Wis. 574.

**What Force or Violence sufficient in Alabama.**—Taking possession of the premises of another, and sending away his slaves, constitute the force necessary to maintain the action. But taking peaceable possession, under color of title, would not support the action. Botts *v.* Armstrong, 8 Port. (Ala.) 57.

**Instruction to Jury.**—In an action of forcible entry and detainer, an instruction to the jury that, if the entry was made in the night, while the plaintiff was in the actual and peaceable possession of the premises, and the defendant took possession with the avowed intention of keeping possession, and actually did keep possession, it is sufficient evidence of force to maintain the action, is erroneous, as not observing the proper distinction between a forcible entry and a forcible detainer, and in omitting to connect the instruction, with a demand made for the possession, which was shown in evidence. Fogarty *v.* Kelley, 24 Cal. 317.

If the owner of a tenement has gained peaceable possession of a portion thereof, upon the termination of his tenant's estate therein, he may use necessary force to overcome the tenant's resistance to his having possession of the residue. Mugford *v.* Richardson, 6 Allen (Mass.), 76.

2. 2 Bish. Cr. L. 508.

3. 3 Bac. Ab. Forcible Entry, (b).

4. Morris *v.* Bowles, 1 Dana (Ky.), 97.

5. Besides such circumstances of violence or terror as are above mentioned, the entry must also be accompanied with a claim of the lands, etc., so entered upon; for it is obvious that if one who pretends a title to lands barely go over them either with or without a number of attendants, armed or unarmed, in his way to the

**1. Threats and Intimidation.**—An entry or a detainer will be considered forcible when it is accompanied by the use of threats, combined numbers or demonstrations, calculated to, and which do inspire alarm or terror in the person evicted or kept out, or which give him just cause to fear that some bodily harm will be done him if he refuses to yield the possession, whether there be any actual force or not,[1] and three persons have been held to be a sufficient combination;[2] but where the act is done by one person, if there is no actual violence, it must consist of actual threatening demonstration, in distinction from this constructive force of combined numbers; [3] and this demonstration, as well as the show of numbers and force, must be such us to overawe and intimidate the occupant and cause the surrender of possession.[4] Threats to kill,

church or market, or for such like purpose, without doing any act which, expressly or impliedly, amounts to a claim to such lands, he cannot be said to make an entry therein within the meaning of these statutes, and no one can be in danger of those statutes by entering with force into a tenement whereof he himself had sole and lawful possession, both at and before the time of such entry; as by breaking open the door of his own dwelling-house, or of a castle which is his own inheritance, but forcibly detained from him by one who claims the bare custody of it. 2 Bish. Cr. L. § 509.

**1.** Harrow *v.* Baker, 2 Greene (Iowa), 201; Commonwealth *v.* Dudley, 10 Mass. 403; State *v.* Pollok, 4 Ired. (N. Car.) 305; State *v.* Cargill, 2 Brev. (S. Car.) 445; Butts *v.* Voorhees, 13 N. J. L. (1 Green) 13; People *v.* Fields, 1 Lans. (N. Y.) 222; State *v.* Pearson, 2 N. H. 550; Com. *v.* Shattuck, 4 Cush. (Mass.) 141; Com. *v.* Rees, 2 Brewst. (Pa.) 564; Rex *v.* Smith, 5 Car. & P. (Eng.) 235.

**2.** State *v.* Pollok, 4 Ired. (N. Car.) 305; State *v.* Armfield, 5 Ired. (N. Car.) 207.

**3.** Burt *v.* State, 3 Brev. (S. Car.) 413; State *v.* Pollok, 4 Ired. (N. Car.) 305.

**4.** Strong *v.* State, 105 Ind. 1; State *v.* Ross, 4 Jones L. (N. Car.) 315.

**The Rule in California.**—When a band of armed men enter an enclosure, and begin to build a house, and refuse to yield possession to the person who has been peaceably occupying the premises, and make a show of force, it is forcible entry and detainer. Watson *v.* Whitney, 23 Cal 375.

Under 2 Indiana Revised Statutes, p. 462, § 12, the plaintiff, to maintain an action of forcible entry or detainer, must prove that he was in possession prior to the entry or detainer, and that the defendant's possession was taken or kept by such a show of force as reasonably to intimidate the plaintiff. Archey *v.* Knight, 61 Ind. 311.

**Show of Arms without Threats.**—Code of Civil Proc., California, § 1159, provides that every person is guilty of forcible entry who enters by breaking open doors, windows, etc. Section 1160 provides that a person is guilty of forcible detainer who, by force, or by menaces and threats of violence, unlawfully holds, etc. In an action for forcible entry and detainer, defendant had entered, during plaintiff's absence, through a window, and had put plaintiff's things out in the yard. On plaintiff's return defendant stood at the window with a pistol in his hand, and told plaintiff not to come around there, but did not threaten to shoot. *Held*, that there was force, within the meaning of the statute, although the pistol was not loaded. Bank of California *v.* Taaffe *et al.*, 18 Pac. Rep. (Cal.) 781.

**Moving Line Fence.**—D. was in the peaceful possession of a field, and his son was engaged in ploughing oats therein when M. came into the field with five or six men at first, two remaining to the end, who pulled down the dividing fence tween D. and M., and set it up within the field where the oats were sowed, and retained possession of the part so fenced off, the son of D. being alone in the field during all this time. *Held*, that the conduct of M. evinced a sufficient show of force to entitle D. to the summary remedy of forcible entry and detainer. Minor *v.* Duncan, 54 Ga. 516.

**The Massachusetts Rule.**—A mere refusal to deliver possession, when demanded, will not warrant the process for forcible entry and detainer, under the statute of 1784, ch. 8; but the possession must be attended with such circumstances as might excite terror in the owner and

maim, or beat those who resist the attempt to take possession, and any words or acts which plainly imply a purpose of using force against any one who shall make any resistance, is sufficient;[1] but it seems that the threats must be of personal injury or damage, and that threats of injury to one's goods, chattels, or personal property are usually held not to be sufficient.[2]

**VI. THE POSSESSION NECESSARY.**—In order to maintain an action for a forcible entry or a forcible detainer, the complainant must prove that at the time of the ouster complained of he was in the actual and peaceable possession of the demanded premises.[3] A constructive

prevent him from claiming his rights: such as apparent violence offered in deed or word to the person, having unusual offensive weapons, or being attended by a multitude of people. Commonwealth *v.* Dudley, 10 Mass. 403.

**Building Outside of Tenant's Enclosure.**—Where one, having a right to enter on lands in possession of a tenant at sufferance, went, with four others, and commenced building on land outside the tenant's enclosure, without invading his dwelling, or molesting his enclosure, without any display of arms or actual breach of the peace, *held* not to be indictable. State *v.* Ross, 4 Jones L. (N. Car.) 315.

Whenever a man, either by his behavior or speech at the time of his entry, gives those who are in possession of the tenements which he claims just cause to fear that he will do them some bodily hurt if they will not give way to him, his entry is esteemed forcible, whether he cause such terror by carrying with him an unusual number or servants, or by arming himself in such a manner as plainly intimates a design to back his pretensions by force, or by actually threatening to kill, maim, or beat those who shall continue in possession, or by giving out such speeches as plainly imply a purpose of using force against those who shall make any resistance.

And there is no necessity that any one should be assaulted; for if the entry be with such number of persons and show of force as is calculated to deter the rightful owner from sending them away, and resuming his own possession, that is sufficient. But forcible entry is not proved by evidence of mere trespass: there must be proof of such force, or at least such a show of force as is calculated to prevent any resistance. And though a man enter peaceably, yet if he turn the party out of possession by force, or frighten him out of possession by threats, it is a forcible entry. But threatening to spoil the party's goods, or destroy his cattle, or to do him any similar damage, which is not personal, if he will not quit the possession, seems not to amount to a forcible entry. 1. Russ on Cr. (9th Am. Ed.) 426.

1. Buel *v.* Frazier, 38 Cal. 693; Bank of California *v.* Taaffee *et al.*, 18 Pac. Rep. (Cal.) 781.

A strong man went to the dwelling-house of another, who was then absent, and remained there against the will of the wife, and using to her insulting language; the husband returned and ordered the intruder out, but he refused to go for some time, and then went into the yard, with a club in his hand, threatening and cursing. *Held*, that this was sufficient to support an indictment, for a forcible entry in the presence of the husband, and a detainer. State *v.* Caldwell, 2 Jones L. (N. Car.) 468.

2. 2 Bish. Cr. 507.

3. Russell *v.* Desplous, 29 Ala. 308; Singleton *v.* Finley, 1 Port. (Ala.) 144; Wright *v.* Mullens 2 Stew. & P. (Ala.) 219; Childess *v.* McGehee, Minor (Ala.), 131; Spiers *v.* Duane, 54 Cal. 176; Conroy *v.* Duane, 45 Cal. 597; Warburton *v.* Doble, 38 Cal. 619; Treat *v.* Stuart, 5 Cal. 113; Voll *v.* Butler, 49 Cal. 75; Sanchez *v.* Loureyro, 46 Cal. 641; Barlow *v.* Burns, 40 Cal. 351; Cummins *v.* Scott, 23 Cal. 526; Phelps *v.* Baldwin, 17 Conn. 209; Mann *v.* Brady, 67 Ill. 95; Thompson *v.* Sornberger, 59 Ill. 326; Judy *v.* Citizen, 101 Ind. 18; Emsley *v.* Bennett, 37 Iowa, 15; Neely *v.* Butler, 10 B. Mon. (Ky.) 48; Pogue *v.* M'Kee, 3 A. K. Marsh. (Ky.) 127; Stewart *v.* Wilson, 1 A. K. Marsh. (Ky.) 255; Armstrong *v.* Hendrick, 67 Mo. 542; Miller *v.* Northrup, 49 Mo. 397; McCartney *v.* Alderson, 45 Mo. 35; Goerges *v* Hufschmidt, 44 Mo. 179; Wade *v.* McMillen, 29 Mo. 18; Ferguson *v.* Lewis, 27 Mo. 249; Burns *v.* Patrick, 27 Mo. 434; Wood *v.* Dalton, 26 Mo. 581; Reed *v.* Bell, 26 Mo. 216; Hussier *v.* Zallee, 24 Mo. 13; Bennet *v.* Montgomery, 8 N. J. L. (3 Hals.) 48; Mairs *v.* Sparks, 5 N. J. L. (2 South.) 513; People *v.* Fields, 1 Lans.

and scrambling possession is not sufficient.[1] The question in-

(N. Y.) 222; People *v.* Carter, 29 Barb. (N. Y.) 208; People *v.* Van Nostrand, 9 Wend. (N. Y.) 50; Commonwealth *v.* Keeper of the Prison, 1 Ashm. (Pa.) 140; Commonwealth *v.* Conway, 1 Brewst. (Pa.) 509; Pennsylvania *v.* Leach, Add. (Pa.) 352; Pennsylvania *v.* Waddle, Add. (Pa.) 41; Pennsylvania *v.* Robinson, Add. (Pa.) 14; Rust *v.* State, 2 Brev. (S. Car.) 413; Jarvis *v.* Hamilton, 16 Wis. 594.

**Widow's Possession in Behalf of Heirs.**—Where the widow has the right of possession in behalf of the heirs, she can bring summary proceedings without waiting for the assignment of her dower to her. Moody *v.* Seaman, 46 Mich. 74.

**Tennessee Doctrine.**—A party to be guilty of forcible entry and detainer under the act of 1821 must enter into possession of the premises when actually adversely holden. Lane *v.* Marshall, Mart. & Y. (Tenn.) 255.

**Must be Actual, not Constructive.**—Every unlawful entry upon the possession of another is, in law, a forcible entry; but such possession must be actual, not constructive. Two persons cannot be in possession of the same land at the same time; and wherever the unlawful entry of one dispossesses the other, an indictment for forcible entry may be maintained. Burt *v.* State, 3 Brev. (S. Car.) 413.

There must be actual seizin in order to maintain trespass, and also to prosecute a writ of right, or a writ for forcible entry and detainer. Neely *v.* Butler, 10 B. Mon. (Ky.) 48.

Possession *nomine proprio* is of the essence of the possessory action in *Louisiana*. Dooley *v.* Gibson, 32 La. Ann. 192.

**The Mississippi Rule.**—Under proceedings for a forcible entry and detainer, the plaintiff may show his right of possession, though he has never had actual possession of the premises. Spears *v.* M'Kay, 1 Miss. (Walk.) 265.

A tortious possession of land may become lawful by agreement of the parties, express or implied; and in that case unlawful detainer will lie to recover the possession, upon demand in writing, after the termination of such lawful possessory interest. Bates *v.* Ridgeway, 48 Ala. 611.

In *Illinois*, the action of forcible entry and detainer has been changed to a civil proceeding, and no express time of limitation has been prescribed, and the plaintiff to recover must show that he had at the time of the alleged entry the actual possession of the premises described. A mere constructive possession, such as the fee-simple title thereto, is not sufficient, as the question of title is not in any sense involved. Thompson *v.* Sornberger, 59 Ill. 326.

The statute of forcible entry and detainer is a derogation of the common law, and to be strictly construed. The action can only be maintained by one actually, peaceably, and exclusively in possession. House *v.* Keiser, 8 Cal. 499.

1. Voll *v.* Butler, 49 Cal. 74.

As between two parties struggling for the possession, neither can maintain an action of forcible entry and detainer against the other until he has acquired an actual possession, which has ripened into a peaceable occupation. Voll *v.* Butler, 49 Cal. 74.

**What is a Scrambling Possession.**—In order to maintain an action for forcible entry and detainer, actual and peaceable possession by the plaintiff at the time of the entry complained of, although contested in the courts, is sufficient. This is not a "scrambling possession," that being a struggle for possession on the land itself. Spiers *v.* Duane, 54 Cal. 176.

In order to maintain an action for forcible entry or forcible detainer, it was incumbent on the plaintiffs to prove that at the time of the ouster complained of they were in the actual and peaceable possession of the demanded premises, as contradistinguished from a constructive and scrambling possession, and that the defendants either made a forcible entry, or forcibly detained the premises from them. Conroy *v.* Duane, 45 Cal. 597.

While a scrambling possession is not to be encouraged, yet the one of two claimants of title who first obtains actual possession is entitled to protection in that possession until his title is adjudged void. Coonradt *v.* Campbell, 25 Kan. 227.

A, claiming title to premises under a deed from B, who was in possession and denied A's right, and refused to give him possession, succeeded, in attempting to gain possession, in crossing the threshold of the house without actual resistance, but was then resisted and made no further progress, B continuing his possession uninterrupted. *Held*, that A never had such possession as entitled him to maintain an action on Mass. Gen. St. ch. 137, for forcible entry and detainer. Williams *v.* McGaffigan, 132 Mass. 122.

volved in the action is the fact of possession only, and not the right to possession. A person may render himself liable to this action by entering upon his own premises, by force or violence, even when he has the right to immediate possession.[1]

**1. What Constitutes Possession.**—In general, any use of the premises which shows an intention to hold possession, for the purpose of cultivation, improvement, or applying them to the uses for which they may be fitted, is sufficient ;[2] but such possession must

A obtained possession of premises occupied by B, by force, in B's absence, and in A's absence B soon after repossessed himself thereof by like violence. *Held*, that A's temporary occupation was not such quiet and peaceable possession as would enable him to maintain forcible entry and detainer under the Revised Statutes. Harrington *v.* Scott, 1 Mich. 17.

In an action of forcible entry and detainer, the plaintiff, to recover, must show an actual peaceable possession of the premises; and a mere constructive entry, such as the fee-simple title draws to it, is not sufficient. McCartney *v.* McMullen, 38 Ill. 237.

1. Tivnen *v.* Monahan, 18 Pac. Rep. (Cal.) 144; Jones *v.* Shay, 50 Cal. 508; Barlow *v.* Burns, 40 Cal. 351; Emsley *v.* Bennett, 37 Iowa, 15, Stephens *v.* McCloy, 36 Iowa, 659; Neely *v.* Butler, 10 B. Mon. (Ky.) 48; Powell *v.* Davis, 54 Mo. 315; King *v.* St. Louis, etc., Co., 34 Mo. 34; People *v.* Field, 1 Lans. (N. Y.) 222; People *v.* Leonard, 11 Johns. (N.Y.) 504; Burt *v.* State, 3 Brev. (S. Car.) 413; Davidson *v.* Phillips, 9 Yerg. (Tenn.) 93; s. c., 46 Am. Dec. 393; Olinger *v.* Shepherd, 12 Gratt. (Va.) 462. *Compare* Tucker *v.* Phillips, 2 Metc. (Ky.) 416; Wood *v.* Phillips, 43 N. Y. 152; Hightower *v.* Fitzpatricks, 42 Ala. 597.

**The Gist of the Action.**—When the plaintiff had peaceably occupied premises for several weeks, and is dispossessed by force without process of law, by defendant, it is not material, in a proceeding for forcible entry and detainer, whether the plaintiff was originally a trespasser, or that defendant may have a legal right to the possession. The gist of the proceeding, under the statute, is forcible entry and ousting plaintiff from a peaceable possession contrary to law. Greely *v.* Spratt, 19 Fla. 644.

2. Bradley *v.* West, 60 Mo. 59; De Graw *v.* Prior, 53 Mo. 313; Johnson *v.* Hoffman, 53 Mo. 504; Miller *v.* Northup, 49 Mo. 397.

In an action for forcible entry, in order to constitute possession in the plaintiff, it is not necessary that he should stand upon the land, or keep servants or agents there; but any acts done by himself on the premises, indicating an intention to hold possession, is sufficient. Bartlett *v.* Draper, 23 Mo. 407.

While to entitle plaintiff to maintain forcible entry and detainer, his possession must have been actual, any overt act indicating dominion and a purpose to occupy will satisfy this requirement. Willis *v.* Stevens, 24 Mo. App. 494.

**Landlord Taking Possession.** — The owner of premises had leased them for one year, and, at the expiration of the term, went to the farm, and carried there a load of goods, and the tenant carried them up stairs into a room, and stated that he rendered up possession, and the landlord performed some acts preparatory to occupying the house, and left with the intention of returning on the following Monday, and had a deed for the whole premises, *held*, that this showed a sufficient possession of the premises to enable the landlord to maintain forcible entry and detainer against one taking forcible possession before his return. Huftalin *v.* Misner, 70 Ill. 205.

**Intention.**—In an action of forcible entry and detainer, proof that plaintiff entered upon the land and ploughed a few furrows across a portion of it, does not make out such a case of actual possession on his part as to warrant a verdict in his favor. Something more is necessary, showing an intention to possess, accompanied with acts indicative of that purpose. The visiting and looking after, and superintending of unoccupied land are acts going to show such intent. Edwards *v.* Cary, 60 Mo. 572.

**Nocturnal Entry.**—" Peaceable possession " cannot be based upon a nocturnal entry upon premises used and improved at the time and for several months previously, under claim of title and with the intruder's knowledge. Newton *v.* Doyle, 38 Mich. 645.

A entered on some wild land, remained there two days, cleared a small portion from brushwood and timber, and left. During his absence B took possession and began the erection of a substantial

be *bona fide*, and not sham. Thus, where the occupant was driven off by the stress of weather, and returned when permitted, such temporary absence would not destroy his possession. On the other hand, where he attempted to get possession for a foreign purpose, and, going upon the land, ploughed a half day or so and departed, it was not sufficient;[1] and it is immaterial in what capacity or relation such possession is held, whether as owner, tenant, or agent.[2] The specific acts, conditions, and circumstances which are required to constitute a sufficient possession are various in number and character, and differ widely according to the peculiar circumstances of each particular case and the construction of the statutes of the different States.[3]

house. Whereupon A again entered, put up a box-house, had the sheriff turn B out, and left the house, leaving the door locked and some effects behind; upon which B entered the box-house through the window or by unlocking the door, and placed a tenant of his therein. *Held*, that A could not maintain forcible entry and detainer. Johnson *v.* West, 41 Ark. 535.

A lawful and actual entry, either by the plaintiff in person or by his agent, with a view to holding possession, notwithstanding a subsequent temporary absence, is sufficient to enable him to maintain the action. Powell *v.* Davis, 54 Mo. 315.

**Placing Goods on Premises Occupied by Tenant.**—In forcible entry, it appearing that plaintiff had purchased a building of leased premises from the tenant without the knowledge of the owner, placing his buggy in the same, and allowing goods of the tenant to remain, and that after the expiration of the lease the owner of the premises, in plaintiff's absence, entered on the same, opened the doors of the building, threw out the goods therein, and threw down a fence erected after the expiration of the lease, a finding "that plaintiff was never in the peaceable possession of the premises," and "defendant did not, with force or violence or strong hand, enter upon or break into said building or premises," is justified by the evidence. Tivnen *v.* Monahan (Cal.), 18 Pac. Rep. 144.

1. De Graw *v.* Prior, 60 Mo. 56; McHan *v.* Stansell, 39 Ga. 197.

**Possession Obtained by Trespass.**—A, being in possession of a house under claim of ownership, and leasing it to tenants, after the last one left locked it up while searching for a new tenant, during which time B, under claim of title, entered a back room and deposited some goods there, which A, upon discovery, removed. *Held*, that B's entry being a trespass, he could not maintain forcible entry and detainer. Anderson *v.* Mills, 40 Ark. 192; Ainsworth *v.* Barry, 35 Wis. 136. *Compare* Mason *v.* Powell, 38 N. J. L. 576; Hopkins *v.* Calloway, 3 Sneed (Tenn.), 11.

2. Emsley *v.* Bennett, 37 Iowa, 15.

**3. Residence on Premises—Fencing.**—Neither a good and substantial fence, nor a residence upon land, are necessary to a peaceable and actual possession, so as to enable the possessor to maintain forcible entry and detainer. Fences are a means by which the possession of land may be taken and held, but are not the only means. There may be an actual possession without fences or inclosure of any kind. Goodrich *v.* Van Landigham, 46 Cal. 601.

Actual previous residence upon premises is not indispensable to their actual possession Gray *v.* Collins, 42 Cal, 152; Jarvis *v.* Hamilton, 16 Wis. 574.

One whose dwelling is on the land, and who is raising a crop upon it, is "occupant" for the purpose of maintaining proceedngs for forcible entry, etc., notwithstanding his being absent for some weeks immediately before the entry complained of. Leroux *v.* Murdock, 51 Cal. 541.

**Constant Presence of Claimant**—The possession of uncultivated land necessary to support an action of forcible entry and detainer on behalf of the owner, does not require the constant presence of plaintiff, either in person or by agent. Any acts done by him on the premises, showing an intention to hold possession, for the purpose of cultivation and improvement, will be sufficient. Thus, where the plaintiff traced out the boundaries, threw up mounds at the corners of part of the land, and when defendant came on the ground ordered him off with the assertion that the land belonged to plaintiff, *held*, that proof of these facts would sup-

port a verdict. Bradley *v.* West, 60 Mo. 59.

A continuous presence is not essential, if there is intent to occupy. Miller *v.* Northup, 49 Mo. 397.

Erecting half a cabin and deadening tree, without occupying the land, are not sufficient evidence of possession to maintain the action. Pennsylvania *v.* Lemmon, Add. Pa. 315.

**Holding Land and Fencing It in** is such possession as will support an action for forcible entry and detainer, even if the possession be acquired unlawfully; and the fences being swept away by water, any act indicating an intention to hold the possession will give the actual posession. King *v.* St. Louis, etc., Co., 34 Mo. 34.

One claiming a vacant lot, enclosed the lot by building a fence joining with another fence, and a brick wall, sufficient to keep out domestic animals, and informed all persons that the premises were appropriated. *Held*, that this was sufficient actual possession to maintain forcible entry and detainer against parties breaking down and destroying the fence in a forcible manner under claim of ownership. Allen *v.* Tobias, 77 Ill. 169.

Where one entered peaceably upon a vacant lot, under a *bona fide* claim of title, and enclosed the lot with a wire fence, held that this was actual possession, and that an entry by another in his absence, destroying the fence and refusing to surrender possession on demand, was a forcible entry and detainer within Kan. Comp. L. 727, § 158. Campbell *v.* Coonradt, 22 Kan. 704.

Building a few rods of fence, cutting some brush, or ploughing a few furrows, will not constitute such possession as to enable plaintiff to maintain forcible entry and detainer against a tenant who has been in possession for more than one year under a written lease from one who claimed adversely to plaintiff. Gallagher *v.* Connell (Neb.), 36 N. W. Rep. 566.

Fences are not necessary to a peaceable and actual possession of the land; neither is a residence. Valencia *v.* Couch, 32 Cal. 339. *Compare* Pa. *v.* Lemmon, Add. Pa. 315; Wilbur *v.* Cherry, 39 Cal. 660.

**Possession of Vendee.**—A purchaser of lands at a sale under a mortgage or deed of trust, who has never had actual possession, cannot maintain an action of unlawful detainer for their recovery. Womack *v.* Powers, 50 Ala. 5.

A removal from the house by the vendor thereof, and delivery by him of the keys to the vendee, with the intention of giving him possession, gives a sufficient possession to the vendee to support an action of forcible entry and detainer by him. Hoffstetter *v.* Blatner, 8 Mo. 276.

**Possession of Landlord.**—Under the statute in relation to forcible entry and detainer, after the termination of a tenancy, there is in the landlord such a possession, or right of possession, as will sustain this action against the tenant, or a trespasser, without a formal re-entry. Wall *v.* Goodenough, 16 Ill. 415.

A., tenant of land under P., yielding to the wrongful demand of J., and the sheriff, without being ejected, attorned to J., supposing that J. was entitled to the possession under a certain writ, which in fact gave him no such right. *Held*, that J. acquired no possession thereby which would enable him to maintain forcible entry and detainer against P. for taking possession of the land. Beaty *v.* Jones, 1 Coldw. (Tenn.) 482.

A landlord who becomes entitled to the possession of premises by the determination of a lease under an arrangement with his tenant, cannot maintain a proceeding for a forcible entry and detainer for an entry made while the tenant was in possession. McKeen *v.* Nebus, 9 Ala. 507; Hays *v.* Porter, 27 Tex. 92.

An agreement to occupy, to take care of, and purchase, when the tenant is able, is not a tenancy subject to forcible entry and detainer. Reeder *v.* Bell, 7 Bush (Ky.), 255.

**Surveying, Marking, and Staking.**—Where the plaintiff shows no deed, or other color of title, the fact that he had made a partial survey of the lands, running certain lines, but without staking off the land, is not sufficient proof of actual possession; and the fact that he had given permission to other persons, on several occasions, to burn lime on an undescribed portion of the lands, with wood obtained elsewhere, is not sufficient to show actual possession of any particular part of the land; but a recovery may be had for the portion of land covered by an uncompleted log house, on proof that it was erected by a workman employed by him, notwithstanding a temporary suspension of the work before the completion of the house. Clements *v.* Hays, 76 Ala. 280.

Where plaintiff, who had no color of title, simply ran certain lines without staking off the land, and gave permission to several persons on different occasions to burn lime on undescribed portions of the land, *held*, that there was no evidence of sufficient possession for him to main-

tain forcible entry and detainer, but that he could recover for a portion of land covered by an uncompleted log house erected by a workman employed by him. Clements *v.* Hays, 76 Ala. 280.

Where defendants in unlawful detainer had been in continued uninterrupted possession of the lot in controversy for four years, *held*, that plaintiff's entry on the lot, which had been enclosed, and putting up posts, was not such a taking possession as entitled her to bring the action within two years thereafter. Hays *v.* Altizer, 24 W. Va. 505.

On or about the day that defendants began to use lots, that had been vacant a long time, as a stone-yard, plaintiffs erected about them a fence, which was within forty-eight hours removed and another fence built by defendants. *Held*, that the building of a fence by plaintiffs was not such a possession as would support an action for forcible entry and detainer. Dyer *v.* Reitz, 14 Mo. App. 45.

A survey by a claimant of a lot of land, the staking of the corners, the putting up of boards with the inscription, "keep out," the piling of lumber upon it, and the grading of it for building purposes, is such a possession of it as will enable him to maintain an action for forcible entry and detainer against an adverse claimant who suddenly interrupts that possession. St. Louis Agricultural, etc., Asso. *v.* Reinecke, 21 Mo. App. 478.

**Limitations in Missouri.**—Plaintiff cannot recover in an action of forcible entry and detainer who has not been in possession for three years prior to the institution of his suit. Such an action has nothing to do with the title to land. Miller *v.* Tillmann, 61 Mo. 317.

An actual inclosure of the premises by the plaintiff, or those under whom he claims, or other evidence of possession, at or within five days of the date of the alleged entry of defendant, must be shown in order to maintain an action for forcible or unlawful entry and detainer. Wilbur *v.* Cherry, 39 Cal. 660.

**Possession by Agent.**—Proof that the property in question is in the management of an authorized agent of the plaintiff, who rents and takes charge of it, although without a power of attorney, is sufficient evidence of possession to support a suit of forcible entry and detainer in the name of the principal. Minturn *v.* Burr, 16 Cal. 107.

Where a sheriff, in executing a writ of *hab. fa.*, delivered the possession of the premises to the plaintiff's agent, *held* to be both in law and in fact the possession of the plaintiff, and he may maintain a warrant for a forcible entry upon such possession. Higginbotham *v.* Higginbotham, 10 B. Mon. (Ky.) 369.

Plaintiff was in possession, through his servant and employee, of the premises in question, when the defendants, after entering peaceably thereon, forcibly ejected the servant therefrom. *Held*, it was not necessary that plaintiff should be there in person; the employee's possession was that of the employer; it does not require the actual personal presence of the employer to constitute possession in him. Baker *v.* Dickson, 62 Cal. 19.

There may be a forcible entry where a person's wife, children, or servants are upon the lands to preserve the possession, because whatever a man does by agents is his own act; but his cattle being upon the ground do not preserve his possession, because they are not capable of being substituted as agents; and therefore their being upon the land continues no possession. 1 Russ. on Cr. (9th Am. Ed.) 425.

**Possession under Void Writ.**—In a proceeding under the Florida act of 1868, relating to forcible entry and unlawful detainer, the plaintiff claimed that he was lawfully put into possession of the premises by virtue of a writ of possession, issued in a former similar proceeding against the husband of one of the appellants. On the trial the writ of possession and the proceedings in the former case being produced, it appeared that no judgment had been entered therein. *Held*, that the writ of possession was void, and did not give the plaintiff a lawful possession, or right of possession; and the defendant, having re-entered without force or violence, was not guilty of an unlawful entry. Stark *v.* Billings, 15 Fla. 318.

**Possession under Contract.**—On indictment for forcible entry of a dwelling-house, it appeared that the prosecutor took possession of the house under a contract with one of the defendants, in consideration of labor performed, that he should occupy the house for one year, and that he did occupy the house under the contract until driven out by threats, and the exhibition of a deadly weapon by defendants. *Held*, that the prosecutor's possession was sufficient to lay a foundation for the commission of the crime charged. State *v.* Smith (N. Car.), 6 S. E. Rep. 84.

Although one who contracted to erect a building on the land of the latter was in the peaceable occupancy of the premises for that purpose, yet if he asserts and maintains possession to the exclusion

of the owner, he may be removed and fined under § 3360 R. S. Platteville *v.* Bell, 66 Wis. 326.

Where the testimony shows that the defendant is in possession under a contract for title, the action should be dismissed. Dawson *v.* Dawson, 17 Neb. 671; Keller *v.* Klopper, 3 Colo. 132; Nightingale *v.* Barens, 47 Wis. 389; Sims *v.* Humphrey, 4 Denio (N. Y.), 185; Hays *v.* Connelly, 1 A. K. Marsh. (Ky.) 291; McCombs *v.* Wallace, 66 N. Car. 481.

The vendor of lands cannot maintain an action of unlawful detainer against a purchaser, who, having originally entered as tenant under a lease, which was afterwards abrogated, has continued in possession under an executory agreement for the purchase of the lands, and has failed to comply with the stipulations of said contract, whereby he has forfeited all rights under it. Alderman *v.* Boeken, 25 Kan. 658. And see Peeder *v.* Bell, 7 Bush (Ky.), 255.

**Payment of Taxes and Acts of Ownership.** —Proof of title in plaintiff, with payment of taxes and acts of ownership, without showing that such acts of ownership were also acts of possession, is not evidence of peaceable possession. McCartney *v.* Alderson, 45 Mo. 35.

In actions under the *Missouri* statute respecting forcible entry and detainer, proof of title in the plaintiff, with payment of taxes and acts of ownership merely, is not evidence of peaceable possession. But it is not necessary to be always on the land, provided the occupation of the owner is intended to be permanent. Miller *v.* Northup, 49 Mo. 397.

**Exercising Control of Another's Land.** — Where the widow and her son, the only heir of one who died seized of land, continued in possession thereof for twenty-eight years after the death of the owner, dower never having been assigned, and no claim made thereof by the widow, and the son exercised entire control over the land, and worked it as his own, *held*, that it would be presumed that the mother lived there as a member of her son's family, and not under claim of dower, and that the possession of the son was such as to enable him to maintain forcible entry and detainer against an intruder. Thompson *v.* Sornberger, 78 Ill. 353.

A father erected a barn on his lot, and allowed his son to occupy and use the same in common with himself for many years, without any rent or contract respecting the same, and the son finally took exclusive possession thereof, and kept the owner out of the same. *Held*, in an action of forcible entry and detainer, by the father against the son, for possession, that the plaintiff was entitled to recover. Dunstedter *v.* Dunstedter, 77 Ill. 580.

No surrender short of an actual delivery of premises to the landlord warrants a forcible ejectment. Flaherty *v.* Andrews, 2 E. D. Smith (N. Y.). 529.

**Occupant of Rooms in Another's Dwelling.** —The proprietor of a school employed a person as steward and servant in the establishment, and assigned for his lodging rooms a house situated within the curtilage, but not connected with the dwelling-house of the proprietor by any common roof or covering, and for which lodging rooms the steward paid no rent. *Held*, that the house occupied by the steward was not, in law, his dwelling-house, but was the dwelling-house of the proprietor of the school, and that no indictment would lie against the proprietor for an entry and expulsion of the steward from such house, provided there was no injury to his person or other breach of the peace. State *v.* Curtis, 4 Dev. & B. L. (N. Car.) 122.

**In California,** under Code Civil Proc. § 1160, which provides that the action of forcible entry will lie where plaintiff has been "in peaceable and undisturbed possession" for five days preceding such entry, when defendant came to plaintiff on the evening of the day the latter took possession, and wanted to know by what authority he was there, but no hostile demonstrations were made, plaintiff's possession is sufficient to enable him to bring the action. Bank of California *v.* Taaffe *et al.*, 18 Pac. Rep. (Cal.) 781.

**Retaining Possession.** — Locking the doors of a house and keeping the keys, closing the windows and driving a portion of the stock upon the premises, constitute evidence of an actual possession of land, which will authorize a recovery in forcible entry and detainer. Davidson *v.* Phillips, 9 Yerg. (Tenn.) 93. *Compare* Hopkins *v.* Buck, 3 A. K. Marsh. (Ky.) 110.

T., who for nearly ten years had not had possession of the house, unlocked the door, entered under claim of ownership during the temporary absence of R., who had meanwhile had interrupted possession, and a part of whose furniture had been removed, locked and nailed up the house, and retired, leaving his coat and pocket-book within. *Held*, that T. had no such possession as would support an action for forcible entry against a tenant of R. Wray *v.* Taylor, 56 Ala. 188.

When the owner of an unfurnished livery-stable could not agree with one

**2. Abandonment of Possession.**—Where the lands and tenements have been abandoned the action cannot be sustained.[1] But it must have been more than a mere temporary abandonment; it must be accompanied by an intention not to return; and mere lapse of time is not conclusive upon the question of such intention, though properly considered as bearing upon it.[2]

seeking to rent it, and, after the time when the proposed lease was to go into effect, rented it to another, who went into possession, the proposed lessee does not acquire the right to maintain action against the party so entering for unlawful entry and detainer, by hitching horses in the unfurnished stable. Blake *et al. v.* McCroy. 4 So. Rep. (Miss.) 339.

**Using a Way by the Owner of an Easement Therein**, is not equivalent to possession, on which a claim requiring possession as a predicate may be based. Lachman *v.* Barnett, 10 Fev. 269.

In order to constitute a forcible entry, the possession must be quiet, peaceable, and actual, and the entry accompanied by actual force and intimidation; and unless such possession and such entry are established, surety of the peace cannot be granted against further repetition. Commonwealth *v.* Keeper of Prison, 1 Ashm. (Pa.) 140.

**Peaceably.**—The word "lawfully" in the statute is equivalent to "peaceably." Beeler *v.* Cardwell. 29 Mo. 72; s. c., 77 Am. Dec. 550; McCartney *v.* Alderson, 45 Mo. 39.

**Husband and Wife.**—Where the plaintiff and his wife resided together on the premises, and he deserted her, leaving her in the actual occupancy, her possession is presumed (unless the contrary affirmatively appear) to be possession under and in his right, so that the action may be brought by her in his name. Davis *v.* Woodward, 19 Minn. 137.

1. Laird *v.* Waterford, 50 Cal. 315; De Graw *v.* Prior, 60 Mo. 56; Hodgkins *v.* Price, 132 Mass. 196; Mounger *v.* Burks. 17 Ala. 48.

2. Mitchell *v.* Carder, 21 W. Va. 277.

One's mere removal of his goods from the premises is not an abandonment of his possession, and if such possession be lawful, although only that of tenancy by sufferance, he may maintain an action of forcible entry against any party entering against his will. Knight *v.* Knight, 3 Ill. App. 206.

A party having purchased a piece of wood land, entered upon it, built a log-cabin, made rails, etc., and left it for a temporary purpose, and was absent about two weeks, leaving his tools in the cabin, intending to move into it in a short time. During his absence, another party, who had rented the land from another claimant, went to it, completed the cabin, inclosed it with a fence, made a door to the cabin, and locked it up, with some articles of his own in it, and went away. The first party finding the place on his return as the other had left it, resumed and retained possession, and the other brought an action of forcible entry and detainer against him. *Held*, that the defendant's acts did not show any abandonment of the possession; that his possession continued during his temporary absence, and that he was not ousted by the entry and acts of the plaintiff, which were trespasses. Haley *v.* Palmer, 9 Dana (Ky.), 320.

**Refusal to complete Purchase.**—Where a vendee leased lands to his vendor for a term, and at the expiration of the term refused to take possession, declaring that he would not abide by the purchase, he cannot maintain forcible entry and detainer against a stranger who entered on the abandonment of the vendor. McCracken *v.* Woodfork, 3 A. K. Marsh. (Ky.) 524.

**Building Destroyed by Fire.**—A, the owner of land with a building thereon, leased the premises to B, and during the term the building was destroyed by fire, and B wholly abandoned the actual use and occupation of the estate, which was then conveyed by A to C, who erected a new building thereon, and leased it to several tenants. B contended that he had a right of possession under his lease, and, before the execution of the new building, assigned the lease to D, who, several years afterwards, but during the term of the lease, with the assistance of several men, at an unreasonable hour in the morning, forcibly entered the building and took possession thereof, but was ejected therefrom by the tenants upon their arrival. D then brought an action for forcible entry and detainer against C, under Mass. Gen. Stat. ch. 137. *Held*, that the same could not be maintained. Hodgkins *v.* Price, 132 Mass. 196.

The mere act of nailing up the doors of a house does not amount to retaining possession. Hopkins *v.* Buck, 3 A. K.

Marsh. (Ky.) 110. See Davidson *v.* Phillips, 9 Yerg. (Tenn.) 93; Wray *v.* Taylor, 56 Ala. 188.

If one leaves his dwelling-house for merely a temporary purpose in charge of a member of the family, he cannot, in law, be said to have quit the possession so as to make the unlawful entry of a trespasser an entry in his absence. State *v.* Sheperd, 8 Ired. L. (N. Car.) 195.

**Relinquishment of Contract of Sale.**—A entered a complaint against B for an unlawful detainer, in which he alleged that C purchased certain lands from D, and leased them for a term of years to B; that before the expiration of the lease B died without having divested himself of the title, and that C thereupon rescinded the contract with his administrator, and relinquished all right or claim to the lands, of which B was informed, and to which he consented and agreed; and that the administrator then sold the lands under an order of the orphans' court, at which sale A became the purchasers.

*Held*, 1st. That C, never having been the tenant of D or his representative, the possession of B cannot be regarded as "by, from, under, or in collusion with" C as tenant.

2d. That the allegation that B was informed of, and consented and agreed to, the rescission and relinquishment of B, is not the averment of the fact of tenancy, but merely of a circumstance from which it might be inferred, and is therefore insufficient.

3d. That if the relinquishment of C could operate to pass his estate or right, it created a new estate or right in D's administrator or heirs, the sale of which the orphans' court had no power to direct. Mounger *v.* Burks, 17 Ala. 48; Botts *v.* Armstrong, 8 Port. (Ala.) 57; Hardisty *v.* Glenn, 32 Ill. 62; Vanhorn *v.* Tilley, 1 T. B. Mon. (Ky.) 50; Prewitt *v.* Burnett, 46 Mo. 372; Harris *v.* Turner, 46 Mo. 438; Olinger *v.* Shepherd, 12 Gratt. (Va.) 462; Moore *v.* Douglass, 14 W. Va. 708.

**A, holding under a junior patent,** extended his fences and inclosed a part of his tract, which was occupied adversely by B under a title bond, though B did not show that his claim was connected with the elder patent. *Held*, that the enclosure gave a possession of so much only of the interference as it included; and that a subsequent enclosure of more of the interference was a tortious entry, for which a writ of forcible entry and detainer could be maintained. Stith *v.* Jones, 7 Dana (Ky.), 434.

Proceedings under the Kansas Justices' Act, art. 13, concerning forcible entry and detainer, may be held in all cases where defendant is a settler or occupant of land without color of title, and to which the complainant has a right of possession, although the complainant may never have had the actual possession of the land. Price *v.* Olds, 9 Kan. 66.

But the rule is otherwise when the party in possession is a mere intruder. In such a case the possession must be confined to the land actually occupied. Harris *v.* Turner, 46 Mo. 438.

Where a testator died seized of an es tate in fee, and before his devisee entered, a person who had no right, made an entry and got possession of the lands devised, and continued to hold the same without right. *Held*, that this made the latter "an occupier without color of title," within the meaning of the *Ohio* statute, and that the devisee could maintain forcible detainer against him to obtain possession. Brown *v.* Burdick, 25 Ohio St. 260.

Where, after one had been in possession of land fors everal years, an adverse claimant entered and locked the barn and gate upon the land, and ploughed and planted the same, but the other party did not acquiesce in such acts, and resumed his possession, and leased the premises to a tenant, *held*, that the acts of the adverse claimant did not constitute such a possession, unless justified by a title, as would enable him to maintain forcible entry and detainer against the tenant. Cox *v.* Cunningham, 77 Ill. 545.

In an action of forcible entry and detainer for the possession of a tract of timber land, the plaintiff proved that he had in cultivation two tracts of land, one adjoining the timber land and the other about a mile and a half from it; the firewood for the use of both farms was cut from the timber land; that he had a deed for the timber land, and had paid taxes and cut timber on the land in dispute for twenty years. *Held*, that this was sufficient evidence of possession to sustain an action of forcible entry and detainer. Pensoneau *v.* Bertke, 82 Ill. 161.

**Purchaser of Equity of Redemption.**—The complainant, in an action of forcible entry and detainer, holding mortgages of the premises in controversy, consisting of a lot of land with a house on a portion of it, purchased the respondent's right in equity to redeem, at a sheriff's sale of the same on execution; and, in the temporary personal absence of the respondent, his family still being in the house, the complainant entered peaceably

**3. Color of Title.**—Actual possession of part of a tract of land under a *bona fide* claim and color of title to the whole is a sufficient possession of the residue to support an action of unlawful and forcible entry and detainer against one entering on the residue without right.

**4. Pre-emption.**—One who claims land by virtue of the pre-emption laws of the *United States* cannot sustain the action[1] unless he has occupied or inclosed the same.

**VII. TITLE, HOW FAR CONSIDERED.**—The question of title cannot be tried in an action of forcible entry and detainer, the right of possession alone being involved.[2] But it is frequently necessary

and unobstructed into a possession of a part of the land, but did not enter the house; and, while so in possession, the respondent returned and expelled him by force. *Held*, that the action could be maintained. Dyer *v.* Chick, 52 Me. 350.

1. Barlow *v.* Burns, 40 Cal. 351; McCorkle *v.* Yarrell, 55 Miss. 576; Edwards *v.* Batts, 5 Yerg. (Tenn.) 441; Cummins *v.* Scott, 20 Cal. 83; Preston *v.* Kehoe, 15 Cal. 315; Stark *v.* Barnes, 4 Cal. 412.

2. Lecatt *v.* Stewart, 2 Stew. (Ala.) 474; Milner *v.* Wilson, 45 Ala. 478; Dumas *v.* Hunter, 25 Ala. 711; Clark *v.* Stringfellow, 4 Ala. 353; Voll *v.* Hollis, 60 Cal. 569; Dennis *v.* Wood, 48 Cal. 361; Hoag *v.* Pierce, 28 Cal. 187; Dutton *v.* Tracy, 4 Conn. 79; Bliss *v.* Bange, 6 Conn. 78; Walls *v.* Endel, 17 Fla. 478; Stuckey *v.* Carleton, 66 Ga. 215; Stuckey *v.* Force, 66 Ga. 215; Poulan *v.* Sellers, 20 Ga. 228; Slate *v.* Eisenmeyer, 94 Ill. 96; Thompson *v.* Sornberger, 59 Ill. 326; Pearson *v.* Herr, 53 Ill. 144; Smith *v.* Hollenback, 51 Ill. 223; Brooks *v.* Bruyn, 18 Ill. 539; Nicholson *v.* Walker, 4 Ill. App. 404; Wheelan *v.* Fish, 2 Ill. App. 447; Shoudy *v.* School Directors, 32 Ill. 290; Smith *v.* Hoag, 45 Ill. 250; Vess *v.* State, 93 Ind. 211; Settle *v.* Henson, 1 Morr. (Iowa) 111; Hunt *v.* Wilson, 14 B. Mon. (Ky.) 44; Mansfield *v.* Duvall, 2 Bibb (Ky.), 582; Miller *v.* Tillmann, 61 Mo. 317; Prewitt *v.* Burnett, 46 Mo. 372; Harvie *v.* Turner, 46 Mo. 447; Van Eman *v.* Walker, 47 Mo. 169; Goerges *v.* Hufschmidt, 44 Mo. 179; Bell *v.* Cowan, 34 Mo. 251; Spalding *v.* Mayhall, 27 Mo. 377; Gibson *v.* Tong, 29 Mo. 133; Stone *v.* Malot, 7 Mo. 158; Boardman *v.* Thompson, 3 Mont. 387; Myers *v.* Koenig, 5 Neb. 419; Grohonsky *v.* Long, 20 Neb. 362; Mercereau *v.* Bergen, 15 N. J. L. (3 Green) 244; Younge *v.* Freeman, 15 N. J. L. (3 Green) 30; Allen *v.* Smith, 12 N. J. L. (7 Hals.) 199; Kelly *v.* Sheehy, 60 How. Pr. (N. Y.) 439; People *v.* Leonard, 11 Johns. (N. Y.) 504; Shortess *v.* Wirt, 1 Oreg. 90; McGhee *v.* Grady, 12 Lea (Tenn.), 89; Allison *v.* Casey, 4 Baxter (Tenn.), 587; Settle *v.* Settle, 10 Humph. (Tenn.) 504; Philips *v.* Sampson, 2 Head (Tenn.), 429; Black *v.* State, 3 Yerg. (Tenn.) 588; McNair *v.* Rempublican, 4 Yeates (Pa.), 326; Warren *v.* Kelly, 17 Tex. 544; Corbett *v.* Nutt, 18 Gratt. (Va.) 624; Newton *v.* Leary, 64 Wis. 190; Respublica *v.* Shryber, 1 Dall. (Pa.) 68; Beezley *v.* Burgett, 15 Iowa, 192; Kepley *v.* Luke, 106 Ill. 395; Winterfield *v.* Strauss, 24 Wis. 394; Mitchell *v.* Davis, 23 Cal. 381; Bowers *v.* Cherokee Bob, 45 Cal. 495; Emerson *v.* Sturgeon, 59 Mo. 404; Beeler *v.* Cardwell, 29 Mo. 72; Warren *v.* Ritter, 11 Mo. 354; Dilworth *v.* Fee, 52 Mo. 130; Sullivan *v.* Enders, 3 Dana (Ky.), 66; Herndon *v.* Bascom, 8 Dana (Ky.), 113; Dotson *v.* State, 6 Coldw. (Tenn.) 545; Gass *v.* Newman, 1 Head (Tenn.), 136; McLean *v.* Spratt, 20 Fla. 515; Turnley *v.* Hanna, 82 Ala. 139; Snoddy *v.* Watt, 9 Ala. 609; Cummings *v.* Kilpatrick, 23 Miss. 106; Rabe *v.* Tyler, 10 S. & M. (Miss.) 441; State *v.* Pollok, 4 Ired. (N. Car.) 305; s. c., 42 Am. Dec. 140; Dustin *v.* Cowdry, 23 Vt. 631; Hildreth *v.* Conant, 10 Metc. (Mass.) 298; Carter *v*, Newbold, 7 How. Pr. (N. Y.) 166; People *v.* Van Nostrand, 9 Wend. (N. Y.) 50; Porter *v.* People, 7 How. Pr. (N. Y.) 441; People *v.* Fields, 1 Lans. (N. Y.) 222; Wells *v.* De Leyer, 1 Daly (N. Y.), 39; Barto *v.* Abbe, 16 Ohio, 408.

**The Florida Act of 1849**, for the relief of occupying claimants who improved lands belonging to another, supposing them to be their own "by reason of a title in law or equity," does not apply to a proceeding under the act of 1848, as to forcible detainer. The latter determines only the right of present possession, and does not involve the title of either party. Mountain *v.* Roche, 13 Fla. 581.

In McCauley *v.* Weller, 12 Cal. 500, the court said: "The action of forcible entry and detainer is a summary proceeding to recover possession of premises forcibly or

unlawfully detained. The inquiry in such cases is confined to the actual, peaceable possession of the plaintiff and the unlawful or forcible ouster or detention by defendant—the object of the law being to prevent the disturbance of the public peace, by the forcible assertion of a private right. Questions of title or right of possession cannot arise; a forcible entry upon the actual possession of plaintiff being proven, he would be entitled to restitution, though the fee-simple title and present right of possession are shown to be in the defendant. The authorities on this point are numerous and uniform."

Simple possession is sufficient evidence of title to enable the occupant to maintain the action. People *v.* Fields, 1 Lans. (N. Y.) 222; Dotson *v.* State, 6 Coldw. (Tenn.) 545.

In an action of forcible entry and detainer, if the defendant entered forcibly, he cannot show his right to the possession of the land, but he must give up his forcible possession, and he will then be in a position to litigate, in a proper action, any valid title he may have. Mitchell *v.* Davis, 23 Cal. 381.

The defendant cannot show an equitable title in himself to the premises. Taylor *v.* White, 1 T. B. Mon. (Ky.) 37.

In an action of forcible entry and detainer where plaintiff had been in possession for the period required by statute to enable him to bring the action, and the court refused to admit documents showing title in plaintiff as bearing on defendant's good faith, but received them to show that defendant's title had been transferred to plaintiff, no injury could have been produced by this admission for that purpose, as no finding was made upon the subject of title. Bank of California *v.* Taaffe *et al.*, 18 Pac. Rep. (Cal.) 781.

**Title as a Defence.**—In a case of forcible entry and detainer, a defendant cannot set up a title in himself, and rely on that as a defence. Altree *v.* Moore, 1 Oreg. 350; Bliss *v.* Bange, 6 Conn. 78.

In forcible entry and detainer, the defendant is precluded from setting up that the complainant's title is not such as he has set forth in his complaint. Drake *v.* Newton, 23 N. J. L. (3 Zab.) 111; Allen *v.* Smith, 12 N. J. L. (7 Hals.) 199.

A suit for forcible entry and detainer cannot be maintained under the Code, where the defendant pleads a title paramount, nor can the question of title be investigated in this form. Bosworth *v.* Farrenholtz, 4 Greene (Iowa), 440.

A was in possession of certain premises, as tenant-at-will of B, who claimed title under C. D levied an execution against C on the premises, alleging that the deed to B was void. *Held*, that the process of forcible entry and detainer under Rev. Stat. ch. 104, would not lie by D against A, the question of title not having been determined between D and B. Green *v.* Tourtellott, 11 Cush. (Mass.) 227.

**Public Lands.**—In an action of forcible entry and detainer, between occupants of public lands, under the act of 1829, ch. 22, the title of the party turned out of possession cannot be inquired into. Pettyjohn *v.* Akers, 6 Yerg (Tenn.) 448.

The defendant cannot show that the land in controversy is a part of the public domain to oppose the plaintiff's allegation of seizin in fee, that being immaterial in this proceeding. Cunningham *v.* Green, 3 Ala. 127.

In *Wisconsin*, under Rev. Stat. ch. 117, concerning forcible entries and unlawful detainers, the nature of the complainant's estate is not a natural averment, where the entry complained of was with force and strong hand. Eastman *v.* White, 3 Chand. (Wis.) 196.

In the action of forcible entry and detainer, or forcible detainer, the title to the land cannot be inquired into for any purpose. The question of title is immaterial. The right to possession is all that is involved or can be determined. Nor is the rule in this regard changed under the statute extending the remedy by forcible detainer in favor of a purchaser of land at an execution sale, where the possession is withheld from him by the execution debtor. Kepley *v.* Luke, 106 Ill. 395.

In *Illinois* the mere filing by the defendants of an answer claiming title to the premises will not deprive a justice of the peace or county judge of jurisdiction; but if it should appear from the evidence that the question involved was one of title, and not for possession of the premises, the case must be dismissed. Pettit *v.* Black, 13 Neb. 142.

In *Colorado*, in an action of unlawful detainer before a justice of the peace against a tenant holding over, the effect of raising the question of title is to remove the cause to another court, and not to defeat it altogether. Klopfer *v.* Keller, 1 Colo. 410.

In an action of forcible entry and unlawful detainer, neither title nor right of possession being involved, it is erroneous to admit quit-claim deeds in evidence, as tending to show possession. Lachman *v.* Barnett, 16 Nev. 154.

In proceedings under the unlawful detainer act against a tenant to recover possession, the tenant cannot show as a defence that his lessor had no title, or that

on the part of both the plaintiff and the defendant to introduce deeds or other evidences of title in order to show the right to possession.[1] And such evidence may properly be used to establish the extent and boundaries of the land claimed, and on the question of damages, and the good or bad faith of the entry or detainer.

his title was defective, or that it was only an equitable title. McLean *v.* Spratt, 20 Fla. 515.

Where the defendant in an action for forcible entry and unlawful detainer answers claiming to be rightly in possession, on the ground that, under a contract with the plaintiff, he has been erecting a building for the latter upon the premises, and that he has not been paid in full for his work, the question of title to the land does not and cannot arise. Platteville *v.* Bell, 66 Wis. 326.

**Intervention.**—The policy of the law being to confine the inquiry, in proceedings in forcible entry and detainer, to the question of the right of possession only, a third party, who, in such a proceeding before a magistrate, claims possession by virtue of his superior title, cannot intervene, since the magistrate cannot try the question of title. Texas Land Co. *v.* Turman, 53 Tex. 619.

**Certifying Case to Higher Court.**—Where the statute so provides, the case may be certified to a higher court where the issue of title is raised. McNamara *v.* Culver, 22 Kan. 661; Tibbetts *v.* O'Connell, 66 Ind. 171; Jordan *v.* Walker, 56 Iowa, 686.

An action of forcible detainer, upon being certified to the district court upon a plea of title, is not changed to an action for the recovery of real property; and a second trial is not a matter of right. McNamara *v.* Culver, 22 Kan. 661.

1. Price *v.* Olds, 9 Kan. 66; Conaway *v.* Gore, 27 Kan. 122; Dennis *v.* Wood, 48 Cal. 361; Morgan *v.* Higgins, 37 Cal. 59; Conroy *v.* Duane, 45 Cal. 597; Anderson *v.* Mills, 40 Ark. 192; Dortch *v.* Robinson, 31 Ark. 296; Camley *v.* Stanfield, 10 Tex. 546; s. c., 60 Am. Dec. 219; Texas Land Co. *v.* Turman, 53 Tex. 619; Pearson *v.* Herr, 53 Ill. 144; Brooks *v.* Bruyn, 18 Ill. 539; Huftalin *v.* Misner, 70 Ill. 205; Slate *v.* Eisenmeyer, 94 Ill. 96; Nicholson *v.* Walker, 4 Ill. App. 404; Cox *v.* Cumingham. 77 Ill. 545; Winterfield *v.* Strauss, 24 Wis. 394; Gillett *v.* Mathews, 45 Mo. 307; Silvey *v.* Summer, 61 Mo. 253; Mather *v.* Hood, 8 Johns. (N. Y.) 44; Settle *v.* Settle, 10 Humph. (Tenn.) 504; Philips *v.* Sampson, 2 Head. (Tenn.) 429; Dotson *v.* State, 6 Coldw. (Tenn.) 545; Allison *v.* Casey, 4 Baxt. (Tenn.) 587; Turnley *v.* Hanna, 82 Ala. 139; Lalonette *v.* Lipscomb, 52 Ala. 570; Loring *v.* Willis, 4 How. (Miss.) 383; Cummings *v.* Kilpatrick, 23 Miss. 106; Clymer *v.* Powell, 56 Miss. 672; Rabe *v.* Fyler, 10 S. & M. (Miss.) 441; s. c., 48 Am. Dec. 763; Walls *v.* Endel, 17 Fla. 478; Crawford *v.* Morris, 5 Gratt. (Va.) 90; Emerick *v.* Tavener, 9 Gratt. (Va.) 220; s. c., 58 Am. Dec. 217.

**Instruction to the Jury.**—In an action of forcible entry and detainer to recover possession of the house and premises described in the suit, the circuit judge admitted title papers to be read to the jury, informing them that they could not inquire into the title, but only into possession, and that the papers were read to them only to show the character of the holding of the parties. *Held*, that this was not objectionable. Settle *v.* Settle, 10 Humph. (Tenn.) 504.

Under Code, ch. 34, § 1, an action of unlawful detainer will lie, though it turns altogether upon the validity of the title under which the defendant claims to hold possession, but it determines only the right of possession. Corbett *v.* Nutt, 18 Gratt. (Va.) 624.

**Object of the Evidence.**—The defendant in an action of forcible entry and detainer may show that his grantor took up the premises under the possessory act of 1852, although such act was not fully complied with, where the object of such evidence is limited to proving the extent of the defendant's possession. Hoag *v.* Pierce, 28 Cal. 187.

**Certificate of Sale and Sheriff's Deed.**—In an action of unlawful detainer, where the defendant, having purchased the premises at a sheriff's sale under execution against a plaintiff, received the possession from an under tenant of plaintiff's lessee after the expiration of the original tenancy, the record of the judgment under which the land was sold, and the sheriff's deed for the premises, are not admissible evidence for the defendant, even "to show that his possession was lawful." Such evidence goes to the merits of the title, and is therefore inadmissible. Clay's Dig. 251, § 5; Code, § 2859. Dumas *v.* Hunter, 25 Ala. 711.

**Under the Georgia Act of 1853-4,** to

**VIII. WHO MAY BRING THE ACTION.**—In general, the person who was deprived of and who has the legal right to the possession is the proper person to institute the proceedings, in whatever char-

protect owners of lands and tenements against intruders, title is admissible as evidence of the right of possession; and the counter affidavit of the occupant must set forth that he, in good faith, claims a legal right to the possession. Poulan *v.* Sellers, 20 Ga. 228.

In an action of forcible entry and detainer, a defendant may introduce evidence of title in himself not for the purpose of establishing or trying title, but for the purpose of showing that his entry, if wrongful, was not made with a wrongful intent, but in good faith; and the fact that he does so does not entitle the plaintiff, in rebuttal, to introduce evidence showing title in himself. Dennis *v.* Wood, 48 Cal. 361.

**Boundaries, Damages, Fraud, etc.**—As a general rule, the title cannot be inquired into in this form of action; yet it is admissible to look to the title to define the boundaries; or, in view of the question of damages, or rents to be recovered in an action brought by a mere intruder against the rightful owner of the land; or where the claimant by fraud induces another to take a lease, or to enter under him upon a false representation as to his title. In such cases, and perhaps others, the title may be looked to upon the question whether the case made out constitutes, in law, a wrongful entry or detainer. Philips *v.* Sampson, 2 Head (Tenn.), 429.

Although an action of forcible entry and detainer does not involve the title to the premises, a deed to the plaintiff is admissible to establish the extent of his claim, and to show the *animus* with which the defendant entered in connection with the possession and improvements on premises adjoining. So held, where the deed showed that the wood lot in question had been conveyed to the plaintiff by the same grantor and at the same time as the plaintiff's arable land; and consequently, that the plaintiff had a sufficient possession to maintain the action, although not an actual *pedis possessio*. Pearson *v.* Herr, 53 Ill. 144.

While, as a general rule, title is not a matter of inquiry or defence in actions of forcible entry and detainer, yet evidence of title in a defendant who has taken possession may be competent to show the purpose with which the entry was made, and to uphold the possession when obtained. Conaway *v.* Gore, 27 Kan. 122. See Jordan *v.* Walker, 52 Iowa, 647; Nicholson *v.* Walker, 4 Ill. App. 404.

A party may introduce a deed or deeds in evidence when necessary to show his right to the possession of the premises. Smith *v.* Kaiser, 17 Neb. 184; Gillett *v.* Mathews, 45 Mo. 307.

Where an action of unlawful detainer is brought by a vendee of land against a person who had been in actual possession of a part of the land for eight years before the vendee bought, and is based upon an alleged subsequent renting by the defendant of the vendee, the proof being conflicting, it is not error to allow the defendant to introduce in evidence his title paper from the vendor to show the character of his holding, upon a proper charge to the jury that they could not inquire into the title, but only into the possession; and in the absence of the charge it will be presumed that a proper charge was given. McGhee *v.* Grady, 12 Lea (Tenn.), 89.

A conveyance to one of the defendants may be relevant and competent evidence to show the extent of the possession claimed by him. Turnley *v.* Hanna, 82 Ala. 139. *Compare* Lachman *v.* Barnett, 16 Nev. 154; Walls *v.* Endel, 17 Fla. 478; Conroy *v.* Duane, 45 Cal. 597.

It is competent for the defendant to prove that prior to the entry the plaintiff disclaimed to him any interest or claim in the premises; and, if proven, such fact will constitute a defence to the action. Dudley *v.* Lee, 39 Ill. 339.

Evidence of a parol agreement for title is not admissible. Mecham *v.* McKay, 37 Cal. 154.

**Landlord and Tenant.**—A tenant holding over may defend his possession by showing that after lease he purchased the landlord's title at execution sale, and he may lawfully attorn to a third party, who, after the date of his lease, had thus purchased. Texas Land Co. *v.* Turman 53 Tex. 619. See Silvey *v.* Summer, 61 Mo. 253.

But a tenant cannot attack the title of his landlord. Conroy *v.* Duane, 45 Cal. 597; Walls *v.* Endel, 17 Fla. 478; Slate *v.* Eisenmeyer, 94 Ill. 96.

In an action of forcible entry and detainer a denial by the defendant of the plaintiff's title does not necessarily raise the question of title so as to oust a justice of the peace or county judge of jurisdiction, and the court may proceed with the trial until it is clear that the question of title is involved. Smith *v.* Kaiser, 17 Neb. 184.

acter or capacity this possession or right of possession may have been held.[1] Thus the action may be maintained by one who holds possession under color of title;[2] and in many of the States the remedy is given to grantees and vendees against their grantors and vendors and others who detain the premises from them after their right to possession accrues;[3] and in some to the vendor

1. People *v.* Fulton, 11 N. Y. 94; Martin *v.* Patchin, 4 Mo. App. 567; Baker *v.* Cooper, 57 Me. 388; Hoffman *v.* Harrington, 22 Mich. 52; Brush *v.* Fowler, 36 Ill. 53; Pensoneau *v.* Heinrich, 54 Ill. 271; Mann *v.* Brady, 67 Ill. 95; Rice *v.* Brown, 77 Ill. 549; Dudley *v.* Lee, 39 Ill. 339; Coonradt *v.* Campbell, 29 Kan. 391; Burdette *v.* Corgan, 27 Kan. 275; Sullivan *v.* Enders, 3 Dana (Ky.), 66; Holderman *v.* Middleton, 6 Bush (Ky.), 44; Chiles *v.* Stephens, 1 A. K. Marsh. (Ky.) 334; Barton *v.* Learned, 26 Vt. 192; Dustin *v.* Cowdry, 23 Vt. 631; Laird *v.* Winters, 27 Tex. 440; Hightower *v.* Fitzpatrick, 42 Ala. 597; House *v.* Camp, 32 Ala. 541; Liss *v.* Wilcoxen, 2 Col. 85. *Compare* Walker *v.* Thayer, 113 Mass. 36; Pitkin *v.* Burch, 48 Vt. 521; Burns *v.* Patrick, 27 Mo. 434; Wood *v.* Dalton, 26 Mo. 581; Womack *v.* Powers, 50 Ala. 5.

An action for forcible entry and detainer is purely possessory, the question of title not being involved, and cannot be maintained by a person who has not had prior possession. Welden *v.* Schlosser, 74 Ala. 355.

An estate for years is sufficient to support proceedings for forcible entry and detainer. Mead *v.* Daniel, 2 Port. (Ala.) 86.

2. Olinger *v*, Shepherd, 12 Gratt. (Va.) 462; Moore *v.* Douglass, 14 W. Va. 708; Mitchell *v.* Carder, 21 W. Va. 277; Prewitt *v.* Burnett, 46 Mo. 372; Harris *v.* Turner, 46 Mo. 438; Vanhorne *v.* Tilley, 1 T. B. Mon. (Ky.) 50.

Under the act prescribing the mode of maintaining and defending possessory actions on lands belonging to the United States, S. entered upon a portion of land unoccupied, marked it out, so that the boundaries thereof might readily be traced, resided upon it, and was turned out by B. *Held*, that by an action of forcible entry and detainer S. might recover the land, but not a fine or treble damages. Stark *v.* Barnes, 4 Cal. 412.

Where a tenant enters upon the inclosed and cultivated portion of a tract of land, under a lease for the whole, and claiming the entire tract, he has thereby such a possession of the inclosed portion of land as will enable him to maintain the action of forcible entry and detainer against any one who may forcibly enter upon that portion. Hardisty *v.* Glenn, 32 Ill. 62.

Taking peaceable possession under color of title would not support the action. Botts *v.* Armstrong, 8 Port. (Ala.) 57.

3. Lowe *v.* Moore, 134 Mass. 259; Compton *v.* Ivey, 59 Ind. 352; Jewett *v.* Mitchell, 72 Me. 28. And see Pitkin *v.* Burch, 48 Vt. 521; Warren *v.* James, 130 Mass. 540.

A warrant of forcible detainer may be maintained by a purchaser of the reversion against a tenant of his vendor. Herndon *v.* Bascom, 8 Dana (Ky.), 113; Mason *v.* Bascom, 3 B. Mon. (Ky.) 269.

**Who are Included in the Provision.**—The action of unlawful detainer allowed by the *Tenn. Code*, § 3344, "Where the defendant enters by contract, either as tenant or assignee of tenant, or as personal representative of a tenant, and in either case wilfully and with force holds over the possession from the landlord or assignee of the remainder," does not lie in favor of a purchaser at a sale under a trust deed against a tenant of the maker of the deed if the maker has remained in possession of the land up to the sale without disavowing the right of the trustee to possession or holding adversely to him. Ballow *v.* Motheral, 5 Baxt. (Tenn.) 600.

In *Illinois*, where land has been sold by virtue of the powers contained in a trust deed, the action of forcible detainer is given to the purchaser at the sale, by statute, to recover the possession of the premises sold from the party to such trust deed, and the term "party" in such statute includes any one holding the possession of the premises under the maker of the deed. Preston *v.* Zahl, 4 Ill. App. 423.

In such cases the plaintiff should show that the possession of the defendant is wrongful as against himself, and this is usually done by proving that the defendant went into possession under the party to the trust deed under the lien attached to the land. Preston *v.* Zahl, 4 Ill. App. 423.

**Entry under Plaintiff—Trust Deed.**—To maintain an action of unlawful detainer it is requisite that the party who unlawfully withholds the land should have

against the vendee where he has failed or refused to comply with the conditions of the contract under which he holds or has forfeited it.[1]

entered under the plaintiff; hence where certain lands were conveyed in trust to secure a debt, and were sold under a power of sale by the trustees, the purchaser could not maintain an action of detainer against the owner. Burford *v.* Nolan, 30 Miss. 427.

**Against Grantor.** — A grantee may maintain forcible entry and detainer against his grantor, the latter not defending under any other title, and the deed purporting to convey the whole, but in fact conveying only an undivided half of the described premises. Jewett *v.* Mitchell, 72 Me. 28.

**Against Tenant of Grantor.**—After the owner of land has conveyed it he cannot maintain an action of forcible entry and detainer against a tenant in possession; and it is immaterial that he has agreed with grantee to obtain possession for him. Purdy *v.* Rakestraw, 13 Ill. App. 480.

A tenant cannot be removed under the forcible entry and detainer act by a purchaser of the premises and an assignee of the lease where he has not attorned to him. Reay *v.* Cotter, 29 Cal. 168.

A purchaser from a lessor cannot maintain the action of unlawful detainer on account of a mere holding over after the termination of the lease, pending which the purchase was made, even though the defendant may be estopped from denying the plaintiff's title. Divine *v.* Brown, 35 Ala. 596.

**Vendee against Vendor.**—A party claiming a town lot under an executory contract cannot maintain an action or proceeding of unlawful entry and detainer under *W. Va. Code*, ch. 50, § 211, against his vendor or his alienee who has the legal title where the entry was without force, and made under claim of right to the possession, and where such party was not in the actual possession of the lot when the entry was made. Supervisors *v.* Ellison, 8 W. Va. 308.

1. Monsen *v.* Stevens, 56 Ill. 335; Wilburn *v.* Hanes, 53 Ill. 207; Williamson *v.* Paxton, 18 Gratt. (Va.) 475; Beard *v.* Bricker, 2 Swan (Tenn.), 50; Sullivan *v.* Ivey, 2 Sneed. (Tenn.) 487.

**Failure to give Good Title.**—In an action for possession where defendant is in possession under a written contract with plaintiff to convey by general warranty deed, and there was an undisclosed vendor's lien and judgments against plaintiff outstanding at the time, and the title was not in him, and the defendant having, in good faith, paid nearly all the contract price as agreed, and part of the vendor's lien to avoid a sale of the land, being able and willing to pay the balance of the purchase price, demanded a deed, which plaintiff failed to give; plaintiff cannot maintain his action without alleging and showing his ability and willingness to convey the legal title by general warranty deed. Rosenberger *v.* Bowen (Va.), 5 S. E. Rep. 699.

**Land Subsequently Conveyed to Third Person.**—A vendor of land cannot maintain an action of unlawful detainer against one in possession under an executory contract of sale, with which he has failed to comply, where the former has subsequently conveyed the land to a third person. Such action must be brought by the latter. Dobson *v.* Culpepper, 23 Gratt. (Va.) 352.

When a party borrows money and conveys land to secure its repayment, and takes back a contract for the reconveyance of the land upon payment, the relation of vendor and vendee will not exist, and the making the loan cannot maintain forcible detainer to recover possession upon default of payment by the party in possession. Such a case is not within the *Ill.* Statute of 1861. West *v.* Frederick, 62 Ill. 191.

A, by a verbal contract, agreed to sell land to B, who entered accordingly, demanded a deed, and offered to pay. On A's refusal to carry out the contract, B paid C for the land and took a deed from C. C's title was that which A, under his contract, was to have obtained from B. *Held*, that A could not maintain unlawful entry and detainer against B. Ragsdale *v.* Phelps, 90 Mo. 346.

**The Remedy at Law and in Equity.**—A vendor of land, while the contract of sale remains executory and before a deed is made to the purchaser, continues to be invested with the legal title, and (unless the provision in the Code, ch. 135, § 20, applies) may recover possession by an action at law, at least after making demand of the possession, even though the vendee may be entitled in equity to a specific execution of the contract, and to have the action at law in the mean time enjoined. Williamson *v.* Paxton, 18 Gratt. (Va.) 475.

The case would be unaffected at law

So with respect to purchasers at judicial purchase sale.[1]

by a parol agreement of the vendor, however explicit, to waive the forfeiture, or in equity, unless there had been part performance. Williamson *v.* Paxton, 18 Gratt. (W. Va.) 475.

Where the trustee of a wife, with power to sell the land and reinvest at his discretion, sold to one who forfeited the contract of sale by non-compliance with its conditions, *held* that no unauthorized dealing of the wife with the purchaser could entitle him to hold possession after the forfeiture. Williamson *v.* Paxton, 18 Gratt. (W. Va.) 475.

In unlawful detainer, under *Colorado* Rev. Stat. 333, § 5, if the complaint alleges a tenancy and a holding over, and the evidence shows that the defendant went in under an agreement to purchase, the plaintiff cannot recover. Keller *v.* Klopfer, 3 Col. 132.

Under the *Illinois* act of Feb. 20, 1861, amending Rev. Stat. 1845, ch. 43, and permitting the vendor of the land to maintain an action of forcible detainer against the vendee, where the latter has entered into possession of the premises under a contract of purchase, but before obtaining a deed of conveyance to the same, and fails or refuses to comply with the terms of the contract, the vendor may avail himself of the remedy without first putting the vendee *in statu quo*. The proceedings do not amount to a rescission of the contract, and the vendee cannot at any time obtain a decree for a specific performance. Wilburn *v.* Haines, 53 Ill. 207.

**The Opposite Doctrine.**—In some States the action cannot be maintained by a vendor of real estate against a purchaser who is in possession under his contract of purchase and has made default in the payment of a part of the purchase price, even though the contract provides that time is of the essence of the contract, and a failure to pay promptly as the payments become due shall work a forfeiture of the contract and the vendor be entitled to the possession of the land. Chicago, etc., *v.* Shupa, 16 Neb. 341; Nightingale *v.* Barens, 47 Wis. 389; Sims *v.* Humphrey, 4 Denio (N. Y.), 185; Hay *v.* Connelly, 1 A. K. Marsh. (Ky.) 393; McCombs *v.* Wallace, 66 N. Car. 481.

1. Lehman *v.* Whittington, 8 Ill. App. 374; Rice *v.* Brown, 77 Ill. 549; Pensoneau *v.* Heinrich, 54 Ill. 271; Liss *v.* Wilcoxen, 2 Cal. 7, 85; Barto *v.* Abbe, 16 Ohio, 408. And see Necklace *v.* West, 33 Ark. 682; Woodside *v.* Ridgeway, 126 Mass. 292; Womack *v.* Powers, 50 Ala. 55.

**Applies only where there is a Privity between the Parties.** — The summary remedy which the statute of forcible entry and detainer (Session Laws 1840, 84, § 5) provides for obtaining possesion, after redemption expired, of premises sold on mortgage foreclosure or under execution, applies only where there is a privacy between the parties, and not where the grantee of a purchaser on sale under execution seeks to recover possession from a person holding adversely to the judgment debtor. Royce *v.* Bradburn, 2 Dougl. (Mich.) 377.

The act of 1822, in relation to the proceedings of unlawful detainer (*Hutch. Code*, 813, art. 7, § 3), does not apply to the case of a vendee at execution sale, where the party in possession of the premises or those under whom he claims did not come into the possession originally as tenants to the defendant in the execution. Cummings *v.* Kilpatrick, 23 Miss. 106.

The purchase of land at a sheriff's sale cannot recover the possession from one in possession under a mortgage executed by the judgment debtor prior to the judgment under which his title is obtained, even though the mortgage entered after the sheriff's sale under an arrangement with the mortgagor to allow rent by way of credits on the mortgage debt. Dickason *v.* Dawson, 85 Ill. 53.

In *Massachusetts*, if land is sold under a power contained in a mortgage, the grantee of the purchaser cannot maintain an action against the mortgagor to recover possession of the land. Warren *v.* James, 130 Mass. 540.

**Under the Statute of Illinois** the purchaser at a foreclosure sale may maintain forcible entry and detainer against the party in possession of the premises, but the plaintiff must show that the party claiming the possession is holding under the mortgagor. Lehman *v.* Whittington, 8 Ill. App. 374.

**A Sold under a Distress Warrant** a house built by B on land leased to him by A, and being himself the purchaser afterwards brought forcible entry and detainer to recover possession. *Held*, that as his only right thereto was under the sale, the action would not lie because, if the house were regarded as real estate, he could not have levied upon it as the personal property of the tenant; and if as personal property, he could not obtain possession by this form of action. Kassing *v.* Keohane, 4 Ill. App. 460.

**Sheriff's Deed Given in Less than Twelve Months.**—The sheriff is not authorized to

While the possession of an agent is usually the possession of his principal, he may nevertheless acquire such a possession as to entitle him to maintain the action.[1] A landlord cannot

make a deed of land sold under execution until the expiration of twelve months from the sale; and a deed made less than twelve months from the sale will not entitle the grantor to maintain unlawful detainer for the land. Dortch *v.* Robinson, 31 Ark. 296.

**A Purchaser under a Tax Sale** cannot recover possession in *Ohio* by proceeding under the statute for forcible entry and detainer against one having a deed in fee for the land. Kelley *v.* Hunter, 12 Ohio, 216. But *compare* Barto *v.* Abbe, 16 Ohio, 408.

**Possession Necessary.**—A lessee who has never been in possession of the premises, and who acquires title through a purchaser at a mortgagor's sale, neither the purchaser nor the mortgagee having ever been in possession, cannot maintain an action on *Mass.* Gen. St. ch. 137, for forcible entry and detainer. Woodside *v.* Ridgeway, 126 Mass. 292.

The process of forcible entry and detainer is not available against one who is in possession of the premises under a decree of a court of chancery, though the plaintiff may have been wrongfully disposed. His remedy must be by petition for reinstatementor by ejectment to enforce his paramount title. Scott *v.* Newsom, 4 Sneed (Tenn.). 457.

Within the meaning of the provision of the statute in reference to summary proceedings to recover lands (2 R. S. 512, § 28, subd. 4, amended by chap. 101, Laws of 1879), which authorizes the removal, as a tenant, of any person holding over and continuing in possession of real estate sold under execution against such person after title under said sale has been perfected, any person in possession under the title which the purchaser has acquired is a tenant, and may be removed. The statute is equally applicable to the judgment debtor, and all who hold under him under pretence of title acquired from him, posterior to the judgment. Accordingly *held*, that a person in possession under a lease executed by a receiver appointed in an action brought by executors, who held as such a leasehold interest in the premises, was a tenant within the meaning of the said provision; and that one who had purchased the interest of the executors upon sale under execution issued by order of the surrogate, upon a judgment against them as executors recovered prior to the appointment of the receiver, the supreme court having given leave that the execution be levied and enforced upon property in the hands of the receiver or the executors, could maintain summary proceedings to remove such tenant; that under the order of the supreme court the receiver was in effect the person against whom the execution was issued. People *v.* McAdam, 84 N. Y. 287.

1. Where a personal representative has been in actual possession, he may bring the action either in his representative or individual character. Spear *v.* Lomax, 42 Ala. 576. See Emsley *v.* Bennett, 37 Iowa, 15.

One who is in possession of premises under agreement to keep possession of them, together with articles of furniture, for the owner, has such an interest as will enable him to maintain an action of forcible entry and detainer. House *v.* Camp, 32 Ala. 541.

In an action of forcible entry and detainer, it was shown that originally J. owned the land in controversy, and while so owning it put it into the possession and control of R., who was to have the use of the same in consideration of his improving it. Afterward J. sold and conveyed the land to B., and B., through his attorney, K., instructed R. to take charge of the premises for B., B. and B. supposing that R. took charge of the property as the agent of B. Afteward R. leased the property to L., and, about the time that L.'s lease terminated, C., the defendant in the forcible entry and detainer suit, and S., in collusion with L., attempted to take possession of the property in the absence and without the knowledge of R. or B.; but before C. obtained complete possession R. entered upon the premises, and then C., in connection with S. and L., by force took complete possession of the property, and afterward held the same by force. Afterward, while C. was so in the possession of the property, B. commenced this action of forcible entry and detainer against C. for the possession of the property, and the complaint was sworn to by R. as the agent of B. *Held*, that B. may maintain the action. Burdette *v.* Corgan, 27 Kan. 275.

Upon a writ of restitution in favor of S., the sheriff returned that he "put S., by his representative M., in peaceable possession, etc." It appeared also that M. had afterward continued to exercise some control over the premises, as if in the

bring the action while his tenant is in possession; it should be brought by the tenant.[1] But in those States where the remedy has been extended by statute to include cases of holding over by tenants, the landlord may maintain the action against his tenant, and usually against any sub-tenant or assignee of a tenant holding over.[2] The action may be brought

capacity of agent for S. During this condition of affairs, D. entered upon the premises. *Held*, that M. could not maintain an action against D. under the forcible entry and unlawful detainer statute, by reason of want of possession on his part. Mitchell *v.* Davis, 20 Cal. 45.

1. Treat *v.* Stuart, 5 Cal. 113; Bennet *v.* Montgomery, 8 N. J. L. (3 Hals.) 48; McCartney *v.* Alderson, 49 Mo. 456; Holderman *v.* Middleton, 6 Bush (Ky.), 44; Trabue *v.* Talbot, 6 J. J. Marsh (Ky.), 602; Hudgens *v.* Temple, 12 B. Mon. (Ky.) 198; Quertemus *v.* Breckenbridge, 5 Dana (Ky.), 125; Yoder *v.* Easley, 2 Dana (Ky.), 245; Mann *v.* Brady, 67 Ill. 95; Hays *v.* Porter, 27 Tex. 92. And see Langworthy *v.* Myers, 41 Iowa, 18; Bradley *v.* Hume, 18 Ark. 284; Lecatt *v.* Stewart, 2 Stew. (Ala.) 474.

**Lessee Against Former Lessee Holding Over.**—One who, as lessee from the owner, is entitled to possession to real property, may maintain proceedings to recover possession under the statute relating to unlawful detainers against a prior lessee of such owner holding over after the expiration of his term. Burton *v.* Rohrbeck, 30 Minn. 393.

A covenant in a lease of a hotel, that the lessor may retain and occupy a room therein, and board there, is not a reservation of the room from the operation of the lease; and for a forcible entry into this room the lessee alone can complain. Polack *v.* Seafer, 46 Cal. 270.

2. Kelly *v.* Teague, 63 Cal. 68; Patchell *v.* Johnson, 64 Ill. 305; Douglass *v.* Anderson, 28 Kan. 262. But see Fifty Associates *v.* Howland, 11 Metc. (Mass.) 99; Wolfe *v.* Angevine, 57 Miss. 767; Holland *v.* Reed, 11 Mo. 605; Elliott *v.* Lawless, 6 Heisk. (Tenn.) 124.

An heir may maintain forcible detainer aganist the tenant of his ancestor, who holds over, without first reducing the premises to actual possession. Turley *v.* Foster, 2 A. K. Marsh. (Ky.) 204.

**Unlawful Detainer May be Maintained only where the Relation of Landlord and Tenant Exists**; not to dispossess one from land of which he is in possession under a contract to purchase which he has failed to perform. Mason *v.* Delancy, 44 Ark. 444.

Under the act of March 2, 1875, as under Gould's Dig. ch. 72, an action of unlawful detainer will not lie on the right of possession merely; but the relation of landlord and tenant, express or implied, must exist between the plaintiff and the defendant. Dortch *v.* Robinson, 31 Ark. 296.

A party cannot recover possession of the premises under the act allowing an action of unlawful detainer to be brought against a tenant holding over or failing to pay rent unless the relation of landlord and tenant exist by convention. Thus, if the owner of a hotel leases the same, and then enters into such a partnership with the lessee as to destroy the lease, he cannot afterwards maintain an action of unlawful detainer against his partner and former tenant. Pio *v.* Cuyas, 48 Cal. 639.

Although a mortgagor or purchaser pay a certain sum as rent, yet, if it is only interest on the purchase-money or debt, he will not be a lessee nor will he be within Comp. Stat. ch. 44, §§ 15, 23, or 30, respecting forcible entry and detainer, for which all title, both legal and equitable, must have ceased. Davis *v.* Hemenway, 27 Vt. 589.

A and her husband's tenant obtained an award as to differences between them as to the rent, and as to when tenant should deliver up possession. A's husband had absconded, but, after the award authorized his brother to extend tenant's lease. A served notice on tenant to quit in consequence of his failure to yield possession according to the award, and brought an action of forcible detainer on his non-compliance with her notice. *Held*, that she could not maintain it, as the relation of landlord and tenant did not exist between them. Luttrell *v.* Caruthers, 5 Ill. App. 544.

**Forfeiture of Lease.**—If the tenant disputes the title under which he entered, from that moment his possession becomes tortious, and the landlord may acquire possession by process of forcible entry and detainer, and this principle is strictly applicable to all who succeed to the possession from or through the tenant. Fusselman *v.* Worthington, 14 Ill. 135.

Where a tenant used leased premises for the unlawful sale of liquor, whereby

under the act of April 18, 1870 (67 Ohio Laws, 101) he forfeits his lease, the landlord may maintain an action of forcible detention before a justice, to recover the premises. He is not required to sue in equity. So held where the landlord was not chargeable with leasing the premises for the unlawful business. Justice *v.* Lowe, 26 Ohio St. 372.

The provisions of the statute in relation to summary process for recovering possession of leased premises apply only where leases terminate by lapse of time or by reason of some express stipulation in them; and a lessor having leased land with a condition that the land leased should not be used for certain purposes, which was broken, cannot avail himself of the summary process if there is no stipulation that the lease should terminate upon the breach. Lang *v.* Young, 34 Conn. 526.

**Against Tenant Entering by Collusion of Fraud.**—An action for an unlawful detainer under the statute cannot be maintained unless the defendant entered as a tenant of the estate, or is in possession of the same by, from, under, or by collusion with such tenant; but it need not be shown that the tenancy was created by the plaintiff, if he is entitled to the possession as a remainderman, or as owner of the reversion. Stinson *v.* Gosset, 4 Ala. 170; Snoddy *v.* Watt, 9 Ala. 609.

Where judgment is rendered in favor of a landlord against his tenant, for the possession of the demised premises, in an action of forcible detainer for holding over after the expiration of the term, and such tenant, by collusion, sublets the premises to another person, he remaining in the same as before; and the sub-letting is secret, and unkuown to the landlord at the time of the suit, and such subtenant is dispossessed,—the latter will not be entitled to maintain an action against the landlord and officer, in trespass, for executing the writ of possession; and the same rule applies if the subletting is a mere pretense to hold the possession through another. Miller *v.* White, 80 Ill. 580.

Where a party obtains possession of land, which he has purchased, by collusion with the tenant of an adverse holder, he only holds in the same capacity as the tenant, and the lessor can recover possession by forcible entry and detainer, whether entitleg to retain it or not. McCartney *v.* Hunt, 16 Ill. 76.

**Action Brought by Second Lessor.**—Lessees for a term of years are "assigns" within the meaning of the act of 1865, which amends the act of forcible entry and detainer so as to apply to a tenant holding over against "the lessor, his heirs or assigns." A lessor for years who refuses to surrender possession upon the expiration of his term, is therefore liable to an action brought under the act by one to whom a second lease has been made by the owner, to commence upon the determination of the first lease. Ball *v.* Chadwick, 46 Ill. 28.

**Re-entry by Tenant.**—Where a lessee after the expiration of his lease, delivers possession to the lessor, and afterward re-enters the premises, the latter cannot maintain an action against him under section 13 of the act concerning forcible entries and unlawful detainers. Walls *v.* Preston, 28 Cal. 224.

**Under-tenant.** — An under-tenant in possession of demised premises under a lease from the original tenant, cannot lawfully be dispossessed in proceeding under the statute relating to forcible entry and unlawful detainer by the landlord against the tenant, to which such undertenant is not made a party. Bagley *v.* Sternberg, 34 Minn. 470.

**Grantee of Lessor.**—In 1871 A obtained a judgment of against B in an action of unlawful detainer, and then, without taking possession, leased the land to B until 1876; A conveyed to C. *Held*, that C might, under Wag. Mo. St. p. 642, § 3, maintain against B an action of unlawful detainer, if B refuse to surrender possession at the termination of his lease, Wag. Mo. St. p. 646, § 27, not applying to such an action. Kaulleen *v.* Tillman, 69 Mo. 510.

**Agreement to Extend Lease.**—A lessor cannot maintain forcible entry and detainer against a lessee who holds his written agreement leasing the tenement to him "for five years, and as much longer as he desires," at a certain rate per annum, if the lessee performs all that is required of him by the terms of the lease, although the original five years have long since elapsed, and the lessor has given the lessee notice to quit. As between the parties to such a lease, the right of occupation by the lessee, so long as he fulfils its conditon, is not liable to be defeated at the option of the lessor. The lessor is estopped by the receipt of the rent, and by his own written agreement, from asserting that the lessee's possession is unlawful. Sweetser *v.* McKenney, 65 Me. 225.

**Request to Surrender Possession.**—In an action under the statute (Comp. Stat. 307, 308), to get possession of land, the action is given to any person entitled to the possession, and against the lessee who

by joint tenants and tenants in common, or by one or more of them,[1] and usually by a tenant in common against his co-tenant;[2] and a tenancy at will is sufficient to sustain it,[3] and it may also be maintained by executors and administrators,[4] receivers,[5] and gen-

holds over, or any person holding under him. And where defendant conveyed to B at will, and agreed to surrender possession to B, or his grantee when requested, and B. deeded to P., and P. to the plaintiff, and all three requested the defendant to surrender the premises to the plaintiff, and the defendant refused, *held*, that the plaintiff could sue the defendant for posesssion of the premises, under the statute, and that, after notice, the defendant's right as lessee was determined, and he was estopped from setting up the adverse right of B. or B.'s grantee. Barton *v.* Learned, 26 Vt. 192.

**No Bar to Another Action.** — The fact that a landlord may invoke the remedy of forcible entry and detainer does not prevent his maintaining a formal suit for the possession of the land. Juneman *v.* Franklin, 67 Tex. 411.

1. Wood *v.* Phillips, 43 N. Y. 152; Bowers *v.* Cherokee Bob, 45 Cal. 495; Turner *v.* Lumbrick, 1 Meigs (Tenn.), 7; Rabe *v.* Fyler, 10 S. & M. (Miss.) 440.

One tenant in common may sue in forcible entry and detainer without joining his co-tenant. Turner *v.* Lumbrick, 1 Meigs (Tenn.), 7; Jones *v.* Phillips, 10 Heisk. (Tenn.) 562.

A joint-warrant of forcible entry in favor of three, when two only have a title, cannot be maintained. Thomas *v.* Jones, 2 A. K. Marsh. (Ky.) 356.

An action of forcible entry and detainer is not the proper remedy for a person who has made a verbal agreement with others that they should mine on land claimed by him under the possessory act until they struck coal, receiving two thirds of the claim therefor; and afterwards all were to prosecute the work jointly, the plaintiff paying one third and the defendants two thirds of the expenses; and where the defendants have located the land under the possessory act, the plaintiff having failed to perform the necessary act to complete his title. Henderson *v.* Allen, 23 Cal. 519.

2. Mason *v.* Finch, 2 Ill. 495; Jamison *v.* Graham, 57 Ill. 94; Taylor *v.* White, 1 T. B. Mon. (Ky.) 37; Presbrey *v.* Presbrey, 13 Allen (Mass.), 281; Mumford *v.* Brown, 1 Wend. (N. Y.) 52; Eads *v.* Rucker, 2 Dana (Ky.), 111; Hershey *v.* Clark, 27 Ark. 528; Bowers *v.* Cherokee Bob, 45 Cal. 495; Henderson *v.* Allen, 23 Cal. 519; Lick *v.* O'Donnell, 3 Cal. 59.

3. McDonald *v.* Gayle, Minor (Ala.), 98; Jones *v.* Shay, 60 Cal. 508; Com. *v.* Bigelow, 3 Pick. (Mass.) 31.

**Against Owner after Notice to Quit.**— Under that statute, if a tenant at will of a dwelling-house holds over his term, and therefore, after due notice to quit, the landlord forcibly enter and eject him, his family, and effects, from the house, the entry is unlawful, and the tenant may recover his damages therefor in an action of trespass *quare clausum fregit;* and it will make no difference that the tenant had agreed to leave by a certain day named, and that if he did not leave, the landlord might put him out and his effects in any way he chose. Dustin *v.* Cowdry, 23 Vt. 631.

In *Virginia*, where a tenant agrees by a writing under seal that he will surrender possession when requested by the purchaser, he is a mere tenant at will or suffrance, and is not entitled to notice to quit. In such a case the landlord is the proper person to institute forcible entry and detainer. Harrison *v.* Middleton, 11 Gratt. (Va.) 527.

4. Beezley *v.* Burgett, 15 Iowa, 192; Rice *v.* Brown, 77 Ill. 549; Lass *v.* Eisleben, 50 Mo. 122; Winningham *v.* Crouch, 2 Swan (Tenn.), 170; Moody *v.* Ronaldson, 38 Ga. 652; Spear *v.* Lomax, 42 Ala. 516.

**Parties.**—To an action of unlawful detainer against one holding under a lease from the ancestor, the heirs at law are not proper plaintiffs; the right of possession and the action passes to the administrator or executor as an asset. Scott *v.* Floyd, 16 Fla. 151.

A process for forcible entry and detainer will not abate because the plaintiffs in describing their possession, state that they are possessed as executors. Edmonds *v.* Morrill, Brayt. (Vt.) 20.

Under the statutes a devisee cannot maintain an action of forcible detainer against a tenant of his testator. Picot *v.* Masterson, 12 Mo. 303.

Unless executors have a vestiture of title they cannot maintain this action. Prewitt *v.* Durham, 5 T. B. Mon. (Ky.) 17.

5. The receivers of an insolvent bank, where an execution in favor of the bank has been legally extended on real estate, and seisin delivered to such receivers, may in their own names maintain an ac-

erally by any person whose possession or right of possession has been unlawfully invaded.[1]

**IX. AGAINST WHOM THE ACTION MAY BE BROUGHT.**—As a general rule, the person in actual possession of the premises detained at the time of the commencement of the action is the one against whom it should be brought.[2] The right is not restricted to an

tion of forcible entry and detainer against the execution debtor, if he continue in possession without the consent of such receivers. Baker *v.* Cooper, 51 Me. 388.

1. **Mortgagee Taking Possession.** — A mortgagee who has not taken possession is not, within Mass. Gen. Stat. ch. 137, such "person entitled to the premises" as may be "restored to the possession" by an action of forcible entry and detainer. Nor is the purchaser under the power of sale entitled, if neither he nor the mortgagee has taken possession. Boyle *v.* Boyle, 121 Mass. 85; Walker *v.* Thayer, 113 Mass. 36.

**Mortgagor Preventing Mortgagee from Taking Possession.**—The statute relating to forcible entry and detainer does not apply to the case of a mortgagor in possession who has prevented the mortgagee from taking actual possession or excluded him from taking possession. Reed *v.* Elwell, 46 Me. 270; Sawyer *v.* Hanson, 24 Me. 542.

An action under Rev. Stat. ch. 104, § 2, for forcible detainer, may be maintained by a mortgagee in possession after entry to foreclose, against one who has entered in a peaceable manner but without right, and afterwards holds possession by force. Mitchell *v.* Shanley, 15 Gray (Mass.), 319.

**Equitable Mortgage.** — The process of forcible entry and detainer lies by an equitable mortgagee against the equitable mortgagor; although otherwise where the parties to the suit are parties to a legal instead of an equitable mortgage. Jewett *v.* Mitchell, 72 Me. 28.

A possessory action by an owner not entitled to possession as against an equitable assignee of a mortgage cannot be maintained against one holding under such equitable assignee. Chamberlain *v.* Derry, 138 Mass. 546.

**A Mortgagee before Foreclosure** cannot maintain forcible entry and detainer against the mortgagor or those claiming under him. Bragdon *v.* Hatch, 77 Me. 433; Roach *v.* Cosine, 9 Wend. (N.Y.) 227. See Womack *v.* Powers, 50 Ala. 5; Way *v.* Raymond, 16 Vt. 371.

**A Mortgagee in Possession** cannot be ousted by the executive debtor, or by one claiming under him. Nicholson *v.* Walker, 4 Ill. App. 404.

**The Guardian of an Imbecile** cannot maintain an action of unlawful detainer in his own name under the *Wisconsin* statute against a tenant who holds over contrary to the terms of a lease executed by some imbecile person before he was put under guardianship. The statute gives the remedy only to the lessor, his heirs, executors, administrators, or assigns; and in such a case the action should be in the name of the ward. King *v.* Cutts, 24 Wis. 625.

**Husband and Wife.**—Where a husband and wife have lived for a long time together in a dwelling, although he deserts her, leaving her only in actual occupancy of the premises, the constructive possession remains in him sufficiently to enable him to maintain proceedings of forcible entry against one who enters unlawfully. Davis *v.* Woodward, 19 Minn. 137,

Where a wife to whom her mother has conveyed land, reserving a life estate therein, left her husband, who lived with the grantor on the land, and after the death of the grantor refused to surrender the estate to the wife's lessee, *held*, that an action under Mass. Gen. Stat. ch. 137, to recover possession, could not be maintained. The husband's possession gave no right to the plaintiff or his grantor as against a tenant wrongfully holding over. Whitney *v.* Dart, 117 Mass. 133.

**Person Dispossessed under Proceedings to which he was not a Party.**—A person in the quiet possession of real estate, claiming as owner, waiving his right to an injunction to restrain others from dispossessing him by a writ of possession to which he is not a party, can resort to an action of forcible entry and detainer to restore to him the possession from which he has been forcibly and unlawfully ejected. Brush *v.* Fowler, 36 Ill. 53; Laird *v.* Winters, 27 Tex. 440; Chiles *v.* Stephens. 1 A. K. Marsh. (Ky.) 334; Martin *v.* Patchin, 4 Mo. App. 567.

But in *Kentucky*, while pursuing that process, he cannot succeed in a motion for restitution. Stephens *v.* Chiles, 1 A. K. Marsh. (Ky.) 335.

2. Orrick *v.* St. Louis, 32 Mo. 315; Preston *v.* Kehoe, 10 Cal. 445; Rice *v.* Brown, 77 Ill. 549; Kelly *v.* Teague, 63 Cal. 68; Rooney *v.* Gillespie, 6 Allen

action against the disseizor, but it may be maintained against his representatives and against those in possession under him.[1] And where the entry and detainer was forcible, the action may be maintained against one having a right of possession, and even against the owner himself.[2] And even though the defendant did not participate in the act, if it was done under his direction and procurement it is sufficient.[3]

It may be maintained against a husband and wife and other joint parties where the forcible entry and detainer complained of was the joint act of both[4]; but not against two or more holding in severalty.[5]

Where a tenant holds over after the expiration of his term or after his term has been forfeited or duly terminated in the States where the remedy is made applicable to such cases, the action must usually be brought against the tenant.[6] But where the per-

(Mass.), 74; Bird *v.* Fannon, 3 Head (Tenn.), 12; Ewing *v.* Bowling, 2 A. K. Marsh. (Ky.) 36; Gray *v.* Nisbet, 2 A. K. Marsh. (Ky.) 35; Floyd *v.* Ricks, 11 Ark. 451; Russell *v.* Desplous, 25 Ala. 514; Fogle *v.* Chaney, 12 B. Mon. (Ky.) 138. And see Russell *v.* Desplous, 29 Ala. 308.

**One in Possession of Land under Contract.**—The proceeding is authorized to remove one in possession of land under a contract with the owner to erect a building for him, and who asserts and maintains possession to the exclusion of the rightful owner. Platterville *v.* Bell, 66 Wis. 326.

An action of forcible entry and detainer cannot be maintained against the husband of one of several heirs, who, with his wife, takes peaceable possession of the house of her mother after the death of the latter, by one who was boarding with the mother under an agreement which had not expired at the time of taking possession. Cofoid *v.* Bishop, 11 Ill. App. 117.

**Railroads.**—Both on general principles and under the *Arkansas* statutes, a railroad company, like an individual, is within the operation of the forcible entry and detainer act. If such a company acquires possession by violence, it must restore it, without regard to whether it or plaintiff has the better right. Iron Mountain & Helena R. Co. *v.* Johnson, 119 U. S. 608.

1. People *v.* McAdam, 84 N. Y. 287; Jackson *v.* Warren, 32 Ill. 331.

2. Emerson *v.* Sturgeon, 59 Mo. 404.

3. Minturn *v.* Burr, 20 Cal. 48.

4. State *v.* Harvey, 3 N. H. 65.

**Accessories.**—A single person may commit a forcible entry, as well as a number. But all who accompany a man when he makes a forcible entry will be deemed to enter with him, whether they actually come upon the lands or not; so if severa come in company, where their entry is no lawful, and all of them except one enter in a peaceable manner and that one only uses force, it is a forcible entry in them all, because they came in company to do an unlawful act; but it is otherwise when one had a right of entry, for then they only come to do a lawful act, and therefore it is the force of him only who used it. And he who barely agrees to a forcible entry made to his use without his knowknowledge or privity is not within the statutes, because he did not concur in or promote the force. 1 Russ. on Cr. (9th Am. Ed.) 427.

**Parties Defendant.**—In unlawful detainer by the husband's vendor to recover possession of premises contracted for in his name, but as trustee for his wife, she is not a necessary party. Williamson *v.* Paxton, 18 Gratt. (Va.) 475.

**Failure to Serve a Defendant.**—A warrant of forcible entry and detainer against two, but executed upon one only, may be proceeded upon against him who has been served, but no further proceedings can be had therein against the other. Harman *v.* Odell, 6 Gratt. (Va.) 207.

5. Gould *v.* Hendrickson, 9 Ill. App. 171; Reynolds *v.* Thomas, 17 Ill. 207.

6. Casey *v.* King, 98 Mass. 503; Floyd *v.* Ricks, 11 Ark. 451; Ewing *v.* Bowling, 2 A. K. Marsh. (Ky.) 36; Gray *v.* Nesbet, 2 A. K. Marsh. (Ky.) 35; Kelly *v.* Teague, 63 Cal. 68; Wheeler *v.* Conan, 25 Me. 283.

**Privity of Parties.**—An action for unlawful detainer cannot be maintained, either under the general statute (Clay's Dig. 251) or under the especial act applicable to Mobile (Pamphlet Acts, 1847–8, 99), against one who, "within three years last past, unlawfully entered upon

son in possession is a sub-tenant, he occupies the place of the tenant and is liable to the action.[1]

**X. NOTICE TO QUIT, AND DEMAND FOR POSSESSION.**—No notice to quit or demand for possession is necessary where the possession was obtained illegally and where the parties cannot be considered as

and took possession of" premises then in the plaintiff's possession, "and has since unlawfully kept and detained the possession thereof from him." This remedy only lies against a tenant who holds over after the expiration of his term, or against one who obtains or holds possession by, from, under, or by collusion with such tenant. Russell *v.* Desplous, 25 Ala. 514. See also Russell *v.* Desplous, 29 Ala. 308.

When a tenant holds over after the expiration of his lease, although it was for more than a year, and by parol, a warrant for a forcible detainer will lie against him and a previous notice to quit is not necessary. Harrison *v.* Marshall, 4 (Ky.) Bibb, 524.

**Forfeiture of Lease.**—A tenant disclaiming to hold under his landlord, and refusing to pay rent, is not entitled to notice to quit, but is instantly liable to a warrant of forcible detainer. Bates *v.* Austin, 2 A. K. Marsh. (Ky.) 270.

Where a tenant claims to hold adversely to his landlord it is evidence of refusal to give up the premises, sufficient to justify an ejectment. Hoskins *v.* Helm, 4 Litt. (Ky.) 309.

**Tenant at Will after Notice to Quit.**—Rent, payable quarterly by A, a tenant at will, was in arrear, and the landlord, for that reason, gave him written notice to quit, and leased the premises to B for years. *Held*, that B might maintain an action, on the Rev. Stat. ch. 104, against A for possession of the premises, without first making an entry or giving further notice to quit; although A had no notice that the landlord had leased the premises to B. Hildreth *v.* Conant, 10 Metc. (Mass.) 298.

1. Reed *v.* Hawley, 45 Ill. 40; Fogle *v.* Chaney, 12 B. Mon. (Ky.) 138; Bird *v.* Fannon, 3 Head (Tenn.), 12.

A held land as tenant of B, B assigned his interest to C, and C to D. A rented from D after he bought, and, by an arrangement with A, E entered on the land as tenant, and died there. E's son disclaimed D's title, *Held*, that he was liable to the process for forcible entry and detainer without notice to quit Goodlet *v.* Cleaveland, 12 B. Mon. (Ky.) 430.

**The Execution of a Bond for a Deed**, by the owner of a tenement, to one who occupies it under an oral lease, does not change the nature of the tenancy. And a deed by the owner to a third person will terminate such a tenancy, and entitle the purchaser to maintain a process for the recovery of the tenement, under the statutes respecting forcible entry and detainer, against the tenant or one holding under him, although in the bond the owner agreed that when a certain sum should have been paid thereon he would stop charging rent, but instead thereof charge interest upon the sum remaining unpaid; and although before the delivery of the deed that sum had been paid or tendered. Rooney *v.* Gillespie 6 Allen, (Mass.), 74.

An action of unlawful detainer of demised premises will lie against a city. Rains *v.* Oshkosh, 14 Wis. 372.

**Sub-tenant Not Made a Party.**—A sub-tenant who is not a party to a judgment of forcible entry and detainer against the tenant cannot, under the Illinois statute, making him expressly liable to the action, be put out of his possession under the writ, unless he entered "*pendente lite.*" Leindecker *v.* Waldron, 52 Ill. 283.

**Executor of Deceased Person.**—The executor of a deceased person, who succeeds to the possession of leased premises held by the deceased at the time of his death but makes default in the payment of rent, is not within the provisions of § 1661 of the Code of Civil Procedure, and a summary action for an unlawful detainer as defined by that section cannot be brought against him. Martel *v.* Meehan, 63 Cal. 47.

**One Who Withholds Possession after Delivery of Master's Deed.**—When a remedy by an action of forcible entry and detainer is sought under the second clause of the act of 1861, it is not restricted to the nominal party against whom the decree was rendered, but may be employed against any one who, even after the expiration of the time of redemption from the sale under the decree, and after the execution and delivery of the master's deed to the purchaser, by collusion with the defendant in the decree, obtains and holds the possession of the premises without the knowledge or consent of the purchaser. Jackson *v.* Warren, 32 Ill. 331.

landlord and tenant.[1] But where the remedy is applicable to cases of landlord and tenant a notice is usually necessary to terminate the tenancy. Thus the action cannot be maintained[2] against a tenant at will until his estate has been duly terminated by notice to quit;[3] and where the lessor elects to end a tenancy for the breach of a covenant contained in the lease, a demand for the performance of the covenant is a necessary prerequisite.[4]

1. Mallory *v.* Hananer Oil Works, 81 S. W. Rep. (Tenn ) 396; Petty *v.* Malier, 15 B. Mon. (Ky.) 591; Crane *v.* Dod, 2 N. J. L. (1 Pen.) 340; Kilburn *v.* Ritchie, 2 Cal. 145; Gladwin *v.* Stebbins, 2 Cal. 103. But see Warren *v.* Kelly, 17 Tex. 544; Thorn *v.* Reed, 1 Ark. 480.

**2. A Tenancy from Month to Month** can only be determined by a month's notice; and forcible detainer does not lie until the end of the month. Seem *v.* McTees, 24 Ill. 192; Prickett *v.* Ritter, 16 Ill. 96.

**Stipulation in Lease for Continuance of Possession after Expiration of Term.**—When a written lease contains a stipulation, that the lessee may, after the expiration of the term, "continue to occupy by month," but does not bind him to do so, each party has an equal right, after the expiration of the term, to put an end to the tenancy by the month, by giving reasonable notice, and in the absence of statutory regulations, if a lease contains no provision as to the notice necessary to put an end to the tenancy, reasonable and sufficient notice is "the interval between the times of payment of rent, or the length of time by which the letting was first measured;" and when the tenancy is by the month, a month's notice must be given. McDevitt *v.* Lambert, 80 Ala. 536.

**Party Holding under a Grantor.**—An action of forcible detainer lies against a party in possession of land under the grantor in a deed of trust, by the purchaser at the trustee's sale, and a demand of possession upon such occupant will be sufficient. Rice *v.* Brown, 77 Ill. 549.

3. Martin *v.* Splivalo, 56 Cal. 128; King *v.* Connolly, 51 Cal. 181; Wheeler *v.* Wood, 25 Me. 287.

In an action under the "forcible entry and detainer act," to recover possession of land against the defendant who has originally entered under an executory contract of purchase, and who failed to pay the purchase money, it having been stipulated that on such failure defendant should consider himself as a tenant at will, a previous notice to quit is necessary in order to sustain the action. Raynor *v.* Haggard, 18 Mich. 72.

**Sale of Leased Premises.**—A landlord terminates a lease at will by selling and conveying the leased premises, and the tenant is thenceforth a tenant at sufferance, and liable to the grantee, without notice to quit, in the process provided by Rev. Stat. ch. 104, § 4. Benedict *v.* Morse, 10 Metc. (Mass.) 223.

**Waiver of Right to Notice.**—A tenant at will waives his right to a notice to quit by acts constituting a declaimer of the relationship of landlord and tenant. Simpson *v.* Applegate (Cal.), 17 Pac. Rep. 237.

**Holding Over after Forfeiture of Contract of Sale.**—The summary proceedings under *Mich.* Comp. Laws, chap. 211,—to dispossess one who holds contrary to the covenants of an executory contract,—is not available where there are no covenants regulating possession. So held where a contract of sale provided that in case of default in payment, the vendor should be discharged from all obligations, and all payments made be forfeited as stipulated damages, without further notice. In such case the purchaser was a tenant at will, and entitled to three months' notice to quit. Ranson *v.* Babcock, 40 Mich. 330.

**A Tenant at Sufferance** is not by Rev. Stat. ch. 60, § 26, entitled to notice to quit; and if he hold possession unlawfully by force, is immediately liable to the process prescribed by Rev. Stat. ch. 104, § 4. Kinsley *v.* Ames, 2 Metc. (Mass.) 29; Hollis *v.* Pool, 3 Metc. (Mass.) 350.

4. Johnson *v.* Hargrove, 81 Va. 218.

To create a forfeiture so as to support, under the Act of 1865, an action of forcible detainer, for non-payment of rent, four things must occur—there must be a default in paying the rent, a demand of the same, and ten days' notice to quit, and a failure to pay the rent before the expiration of the ten days' notice. Cone *v.* Woodward, 65 Ill. 477.

A tenant disclaiming to hold under his landlord forfeits his term, and in such case a notice to quit is not a condition precedent to bringing an action of unlawful detainer. Ladd *v.* Riggle, 6 Heisk. (Tenn.) 620.

Where the occupant of land had held the same under a written lease from the owner for the term of one year, and has

Besides the notice to terminate the tenancy, another notice or demand for possession is required which is distinct and different from the former notice.[1] This latter notice, however, is in many of the States incorporated with the demand for the performance of a covenant in the form of an alternative demand for performance or possession of the premises.

The notice should show clearly who claims to be entitled to the

held over for nearly two years, and has neglected to pay any rent therefor, according to the terms of his lease, or otherwise, his right to remain in possession will terminate in 30 days after written notice to quit, given to him by the owner; and at the expiration of that time, he will be liable to the process of forcible entry and detainer under Rev. Stat. ch. 28, § 5. Wheeler *v.* Cowan, 23 Me. 283.

**Waiver of Notice by Stipulation in Lease.**—Where it was agreed, in a lease, that on failure for 10 days to pay the rent, the lessor should have the right to re-enter, or bring suit for forcible detainer, and it was further provided "that the mere nonpayment of rent for 10 days shall be sufficient to enable the lessor to maintain suit without giving notice" *held*, that no demand of rent or notice was necessary to enable the lessor to maintain suit for forcible entry. Eichart *v.* Bargas, 12 B. Mon. (Ky.) 462.

In *Nevada* no formal demand for rent need be made to entitle a lessor to be restored to the leased premises under the statute upon the failure of the lessee to pay such rent, except the written demand to be made, after the rent had been three days past due. Hooper *v.* Meyer, 1 Nev. 433.

1. McDevitt *v.* Lambert, 80 Ala. 536; McLean *v.* Spratt, 19 Fla. 97; Lichty *v.* Clark, 10 Neb. 472; Martin *v.* Splivalo, 56 Cal. 128; King *v.* Connolly, 51 Cal. 181; Dutton *v.* Colby, 35 Me. 505; Nason *v.* Best, 17 Kan. 408.

*Illinois* Stat. 1865, 107, § 2, contemplates two notices,—one to quit, and the other of the landlord's intention to declare and insist upon a forfeiture,—the legislature thereby intending to give the tenant 10 days' notice, within which he might pay the arrears of rent, and thus prevent a forfeiture. On their expiration, without the payment of the arrears of rent, the tenancy terminates, and the landlord may then bring suit and recover possession. Chadwick *v.* Parker, 44 Ill. 326.

Where it appeared that the summons is in a process of unlawful detainer was issued previous to demand and notice in writing given for the delivery of possession, the judgment was reversed. Mead *v.* Kirkpatrick, 8 N. J. L. (3 Hals.) 308.

Where, as in *Missouri*, a forcible detainer act makes a demand a prerequisite to the right of action, such demand must be deemed an indispensable prerequisite. Hyde *v.* Goldsby, 25 Mo. App. 29.

**One Who is put in Possession under an Agreement for the Purchase of Land** cannot be ousted by ejectment before his lawful possession is determined by demand of possession or otherwise; and, under Code 608, ch. 134, the action of unlawful detainer stands on the same footing in that respect. Williamson *v.* Paxton, 18 Gratt. (Va.) 475.

**Party Remaining in Possession after Foreclosure.**—Under the statute of *Illinois* the purchaser at a foreclosure sale may maintain forcible entry and detainer against the party in possession of premises; but the service of a written demand is a prerequisite to the suit, and therefore must be strictly proved. Lehman *v.* Whittington, 8 Ill. App. 374.

In *Kansas* the law applies from the signature of a notice to quit, if that of a person who afterwards commences the action for a forcible detainer, that he is acting as claimant in his own behalf. Conaway *v.* Gore, 22 Kan. 216.

Where a tenant violates a covenant other than that to pay rent, an action for unlawful detainer under the *Cal.* Code, § 1161, does not lie in a mere notice to deliver possession; there must be a three days' notice in writing to perform the covenant or to deliver possession. Opera House, etc., Assoc. *v.* Bert, 52 Cal. 471.

Where a tenant from year to year holds over after a tenancy determined by notice to quit, such notice will be sufficient as a demand and notice under the statute, in *New Jersey*, for delivering the possession, in order to support a complaint of unlawful detainer. Townley *v.* Rutan, 21 N. J. L. (1 Zab.) 674.

Under the *Nebraska* statute no other notice, to a tenant who holds over after his estate has terminated by his failure to pay rent, than a notice to quit, is necessary to serve as a foundation for the action of forcible detention. Hendrickson *v.* Beeson, 21 Neb. 61; Young *v.* Smith, 28 Mo. 65; Knech. *vs* Mitchell, 67 Ill. 86.

possession of the premises and who makes the demand,[1] and it should be made by the person for whose use the premises are demanded, or his duly authorized agent or attorney.[2] If it is substantially accurate it is sufficient.

**1. Time and Manner of Service of Notice.**—The time and manner of service is generally prescribed by statute, and differs in the different States.[3] But as a general rule, when personal service can-

1. Nason *v.* Best, 17 Kan. 408.

2. Kennedy *v.* Hitchcock, 4 Port. (Ala.) 230; Doran *v.* Gillespie, 54 Ill. 366; Post *v.* Bohner (Neb.), 36 N. W. Rep. 208; Dimmett *v.* Appleton, 20 Neb. 208.

A notice to quit describing the premises as "The N. E. ¼ of section 28, T. 7, R. 7," *held*, sufficient. Cummings *v.* Winters, 19 Neb. 719.

**Demand.**—A notice to remove from and deliver up possession of a building on certain premises is not a sufficient demand under Code Civ. Proc. *Cal.*, § 1160, subd. 2, providing every person is guilty of a forcible detainer "who in the night-time unlawfully enters on real property, and who, after demand made for the surrender thereof, for the period of five days, refuses to surrender the same to such former occupant;" and until such demand, no right of action accrues. Tivnen *v.* Monahan (Cal.), 18 Pac. Rep. 144.

**3. Time of Service.**—In *Alabama*, the statutory notice, or demand in writing, which is necessary to the maintenance of an action of unlawful detainer (Code, § 3697), is distinct from the notice which, in case of a tenancy by the month, is necessary to put an end to the tenancy and terminate the defendant's rightful possession; and this statutory notice cannot be given while the defendant is in rightful possession. McDevitt *v.* Lambert, 80 Ala. 536.

In *California*, by the terms of an award between a landlord and his tenant, the tenant was to quit the premises on the 9th. The notice to quit necessary to sustain the action was given on the 3d, and the action was commenced on the 10th. *Held*, that under the award the plaintiff had no right to give notice to quit until thr 10th, and then by the forcible entry act the defendant had six days in which to remove; so the suit was premature. Ray *v.* Armstrong, 4 Cal. 208.

An action for unlawful detainer cannot be maintained against a tenant at will without first terminating the tenancy by giving at least thirty days' notice in writing to quit, and afterwards giving three days' notice in writing to surrender the possession. Martin *v.* Splivalo, 56 Cal. 128; King *v.* Connolly, 51 Cal. 181.

In *Illinois*, the demand in writing for possession required to be made upon a tenant to authorize an action of forcible detainer against him, under the act of 1845, should be made after the determination of the time for which the premises were let. A demand made before that time will not avail. Doran *v.* Gillespie, 53 Ill. 366.

In *Iowa*, an action for forcible entry and detainer is maintainable only after a three days' notice. *Held*, that an unnecessary thirty days' notice should be deemed to satisfy the statute. Shuver *v.* Klinkenberg, 67 Iowa, 544.

In *Kansas*, when a tenant repudiated his lease, *held*, that he could not claim a right to a new notice to quit, because the landlord did not bring forcible detainer for a year after his first notice. Douglas *v.* Anderson, 32 Kan. 350.

Where, prior to a notice to terminate a tenancy for non-payment of rent, defendant had claimed that he was not plaintiff's tenant, *held*, that the fact that the statutory ten days given defendant in which to leave had not expired when another notice was served, as the foundation for forcible detainer, did not invalidate the second notice. Douglas *v.* Parker, 32 Kan. 593.

In *Maine*, before the process of forcible entry and detainer is instituted, thirty days' notice to quit should be given after the termination of a tenancy at will. Dutton *v.* Colby, 35 Me. 505.

In *Michigan*, the statute requires that a landlord should demand possession of premises in writing from his tenant at least twenty days before summary proceedings under its provision to recover the possession. *Held*, that a demand requiring the tenant to quit the premises in ten days, but which was served twenty days before proceedings instituted, was sufficient. Chamberlain *v.* Brown, 2 Dougl. (Mich.) 120, note.

In *Missouri*, a person in possession of land under a contract to purchase, who received notice to quit on the same day, but before, the summons was served on him, is not guilty of an unlawful detainer in holding over. Young *v.* Ingle, 14 Mo. 426.

not be effected, it will be sufficient if notice is left with the husband, wife, or servant of the tenant, at his usual place of residence, whether upon the demised premises or elsewhere, and its nature and contents explained at the time, and this whether the tenant received the notice or not.[1]

**XI. PROCEDURE.**—In the action of forcible entry and detainer, as a general rule the procedure is the same as that used in ordinary actions, except as to the matters peculiar to this action which require a different method; though in some States a method of procedure is prescribed specially for this class of cases.

**1. Jurisdiction.**—The action of forcible entry and detainer is a statutory action, and jurisdiction thereof has been conferred by statute upon the justices of the peace of most of the States,[2] and

In *Nebraska*, the notice to leave required of Neb. Comp. St. p. 648, to be served three days before the commencement of an action for forcible entry and detainer may be served as well before as after the expiration of the term. Hawley *v.* Robeson, 14 Neb. 435.

In *New Jersey*, a notice to quit on the day corresponding with the date of letting and entry is sufficient. Steffens *v.* Earl, 40 N. J. L. 128.

In *Ohio*, the statutory notice to leave the premises, required to be given in an action of forcible entry against a tenant holding over his term, may be served as well before as after the expiration of the term. Leutzey *v.* Herchelrods, 20 Ohio St. 334.

*The Tennessee Act*, having limited no time at which a written notice to quit is to be given before the commencement of proceedings, if demand is made by written notice, and the tenant refuses to surrender, he may be proceeded against at any time. Marley *v.* Rogers, 5 Yerg. (Tenn.) 217.

**Manner of Service.**—In *Illinois*, under the statute of Illinois, which requires a demand in writing before the action of forcible detainer can be maintained, the facts of the delivery of a copy of the "demand in writing for possession" to the party against whom it is proposed to bring such action, cannot be proved by an indorsement on the original paper either by an officer or by a private person, whether sworn to or not. Service must be proved by a witness. Vennum *v.* Vennum, 56 Ill. 430.

The written demand for possession should be delivered to the defendant himself. It is not sufficient that it be served "by delivering a copy to a person above the age of twelve years, residing on the premises." Doran *v.* Gillespie, 54 Ill. 366.

In an action of forcible detainer the notice to quit cannot be established by merely producing a copy with an affidavit of service—the witness serving it must himself appear. Ball *v.* Peck. 43 Ill. 482.

Where a wife joined her husband in a trust deed of premises whereof he was seized in fee, only to pass her right of dower and homestead, a demand upon her, by one claiming under the deed, to surrender the possession, *held*, to be insufficient to support an action of forcible detainer. Wheelan *v.* Fish, 2 Ill. App. 447.

In *Massachusetts*, a notice to quit served upon one of two tenants in common is notice to both. Grundy *v.* Martin, 143 Mass. 279.

A lease expiring on the last day of September, demand of possession was made on the 9th of October following, and refused; on the same day, but after the refusal, suit was brought to recover possession. *Held*, that the suit was not prematurely brought. Spear *v.* Lomax, 42 Ala. 576.

In *Missouri*, if the act prescribes the character and manner of service of the demand, the directions must be followed. Hyde *v.* Goldsby, 25 Mo. App. 29.

In *New York*, where the affidavit of service of notice stated that the party was not on the premises, and that the notice was "put upon the house in a conspicuous place," *held* not to be sufficient; and the conviction was set aside, and restitution ordered. Forbes *v.* Glashan, 13 Johns. (N. Y.) 158.

1. Taylor's Landlord and Tenant, § 484.

2. Witz *v.* Haynes, 43 Ind. 470; Ginn *v.* Rogers, 9 Ill. (4 Gilm.) 131; Haskins *v.* Haskins, 67 Ill. 446; Newton *v.* Leary, 64 Wis. 190; Gates *v.* Winslow, 1 Wis. 650; Barton *v.* Learned, 26 Vt. 192; Dibell *v.* Brinkerhoff, 22 Mich. 371; Sil-

the limitation of their jurisdiction in civil cases to actions where the amount in dispute does not exceed a certain amount does not apply to forcible entry and detainer;[1] but they have no jurisdiction in cases where the title to real property comes in question, and in

vey *v.* Summer, 61 Mo. 253; Johnson *v.* Ervine, 3 Metc. (Ky.) 251; Armstrong *v.* Paul, 1 Nev. 134; Mather *v.* Hood, 8 Johns. (N. Y.) 44; Small *v.* Gwinn, 6 Cal. 447; Hart *v.* Moon, 6 Cal. 161; Beck *v.* Glenn, 69 Ala. 121. And see Brummagim *v.* Spencer, 29 Cal. 661; Caulfield *v.* Stevens, 28 Cal. 118.

In *California*, the jurisdiction of justices of the peace in forcible entry and detainer arises from the *quasi* criminal character of such cases, which fall under the head of "special cases," as that term is used in the constitution. Small *v.* Gwinn, 6 Cal. 447.

There must be either a forcible entry, or the relation of landlord and tenant must exist, before a justice can take jurisdiction in an action of forcible entry and detainer. Steiner *v.* Priddy, 28 Ill. 179

Justices of the peace have jurisdiction in actions to recover the possession of real estate, only where the relation of landlord and tenant exists; or, where there has been an unlawful or forcible entry into lands, and either a peaceable or forcible detainer thereof; or, where, having peaceably obtained possession, one unlawfully and forcibly keeps the same. Short *v.* Bridwell, 15 Ind. 211.

In *Nevada*, a justice of the peace continued to have jurisdiction in actions of fraudulent entry and detainer after the constitution of this State went into effect, until the district courts in which jurisdiction in such actions is vested by the constitution were created and became operative. Armstrong *v.* Paul, 1 Nev. 134.

Where a complaint in writing, in a forcible detainer suit, is transmitted with the papers on an appeal from a justice, and his transcript shows that a complaint was filed, though his file-mark is not on the complaint, this is sufficient to give jurisdiction to both the justice and circuit court. Reynolds *v.* Gage, 91 Ill. 125.

Justices of the peace have exclusive original jurisdiction of actions for forcible entry and detainer brought in Jo Daviess county. Ginn *v.* Rogers, 9 Ill. 4 Gilm.) 131.

1. Hart *v.* Moon, 6 Cal. 161; Silvey *v.* Summer, 61 Mo. 253; Weston *v.* Haley, 27 Vt. 283; Dibell *v.* Brinkerhoff, 22 Mich. 371.

In actions against tenants unlawfully holding over, and in forcible entry and detainer, the jurisdiction of justices of the peace is special, and unlimited as to amount. Sturgeon *v.* Hitchens, 22 Ind. 107.

A justice of the peace, when trying a complaint in the nature of a forcible entry and detainer, under the statute of *Michigan* is not bound by any of the provisions of the justice's act. Comp. Laws, ch. 117. Dibell *v.* Brinkerhoff, 22 Mich. 371. All questions, other than title, properly in issue are triable before the justice. Newton *v.* Leary, 64 Wis. 190.

Where, in a forcible entry and detainer suit, the relation of landlord and tenant does not exist, but the title to the land is shown to be in controversy, a justice must dismiss the suit; he has no jurisdiction to proceed. Hughes *v.* Mount, 23 W. Va. 130.

In forcible entry and detainer, the mere filing by defendants of an answer claiming title to the premises will not deprive a justice of the peace or county judge of jurisdiction; but if it should appear from the evidence that the question involved was one of title, and not for possession, the case must be dismissed. Pettit *v.* Black, 13 Neb. 142.

**Removal to Higher Court.**—Where, in an action of forcible entry and detainer before a justice of the peace, the *petitio* does not set up title in the plaintiff, an answer averring title in the defendant is not responsive, and does not require the removal of the action to the circuit court. Jordan *v.* Walker, 56 Iowa, 686.

In a forcible entry and detainer suit, under the *Wisconsin* statute the question of title cannot be put in issue. All other questions properly in issue are triable before the justice. Newton *v.* Leary, 64 Wis. 190.

Cases of forcible entry and detainer cannot be removed to a superior or appellate court by unnecessarily involving the title to land in the issue, by false pleading. Abbot *v.* Norton, 53 Me. 158.

*Rev. Stat. ch.* 88, § 10, *of Wisconsin*, denies to a justice of the peace jurisdiction of any action in which the title to real estate shall come in question. A justice may, nevertheless, have jurisdiction of the process of forcible entry and detainer, that process not being resorted to for the determination of title to the premises detained. Gates *v.* Winslow, 1 Wis. 555.

such case must dismiss the suit or it must be removed to a higher court. And where a justice exceeds his jurisdiction he becomes a trespasser.[1] The action being statutory, the other courts of limited jurisdiction, as well as the justice's courts, can entertain the action only when the power is conferred on them by statute; and the statutory regulations of the various States on this subject differ to such an extent that it is impossible to deduce any general rule from the decisions of the courts.[2]

1. Haskins *v.* Haskins, 67 Ill. 446.

2. In *Alabama*, the county courts have no jurisdiction by *certiorari* or otherwise, of cases of forcible entry and detainer. Dunham *v.* Carter, 2 Stew. (Ala.) 496.

In *California*, the action of forcible entry and detainer, being a summary one provided by statute, does not belong to the district courts, by virtue of their original common-law jurisdiction; and, although the county court is authorized to try these cases *de novo* on appeal, such a trial is an exercise of appellate and not original jurisdiction. Townsend *v.* Brooks, 5 Cal. 52; S. P. O'Callaghan *v.* Booth, 6 Cal. 63.

The proceedings in unlawful detainer are purely statutory in their nature, and the county court is a court of special and limited jurisdiction; and it is, therefore, essential to the validity of the proceedings that the statute be strictly complied with. Iburg *v.* Fitch, 57 Cal. 189.

*Section* 3 *of the California Act of April* 2, 1866,—which makes persons entering lands or tenements in the night-time, or during the absence of the owner, and refusing to surrender possession on demand, guilty of forcible detainer,—is not in conflict with that section of the constitution of the State which confers upon the county courts jurisdiction over actions for "forcible entry and detainer." Mecham *v.* McKay, 37 Cal. 154. *Compare* Shelby *v.* Houston, 38 Cal. 410.

*The Recorder of Sacramento City* has no jurisdiction in cases of forcible entry and unlawful detainer; but an action commenced before the recorder having been transferred to a magistrate having jurisdiction, by consent of parties, the appearance of the defendant and his consent fixing the time of trial were a waiver of his right to be brought in by complaint and summons. Cronise *v.* Carghill, 4 Cal. 120.

In *Georgia*, on the 26th of October, 1867, a justice of the inferior court had authority to administer the oath required to eject an intruder upon land. Collins *v.* Rutherford, 38 Ga. 29.

In *North Carolina*, an indictment for this offence will lie in the superior courts, and a writ of restitution may be awarded by them. State *v.* Butler, Cam. & N. (N. Car.) 331; 1 Tayl. (N. Car.) 262.

*The Indiana Statute* confers jurisdiction, in cases of forcible entry and detainer, upon justices of the peace, and also upon courts of common pleas. Witz *v.* Haynes, 43 Ind. 470.

In *Kentucky*, a writ of forcible entry and detainer can only be issued by a justice of the peace; and a county judge, though having the power of a justice in criminal and penal and other special cases enumerated in Rev. Stat. yet has no power to issue this writ. Johnson *v.* Erwine, 3 Metc. (Ky.) 251.

In *Nevada*, the constitution gives the county courts jurisdiction of actions of forcible entry and detainer, and the nature of such action for the purposes of such jurisdiction is shown by the statutes. Hoopes *v.* Meyer, 1 Nev. 433.

*The New York Statute of* 1857, to reduce the several acts relating to the district courts in the city of New York into one act, which professes to reorganize these courts and define the duties and powers of the justices thereof, not having expressly conferred upon them jurisdiction of proceedings for forcible entry and detainer, the omission to do so must be deemed intentional, and the former laws conferring such jurisdiction are thereby repealed, Brown *v.* Cromien, 50 How. Pr. (N. Y.) 192.

In *Tennessee*, the justices of the peace and the circuit courts have concurrent jurisdiction of the action. White *v.* Suttle, 1 Swan (Tenn.), 169.

In *West Virginia*, the court of appeals has jurisdiction in cases of unlawful entry and detainer, in which the question of possession alone is in controversy; possession is an important element of title, and one which comes within the provision of the constitution, giving jurisdiction in controversies concerning the title or boundaries of land. Gorman *v.* Steed, 1 W. Va. 1.

**2. Commencement of the Action.**—*a. The Summons or Warrant.*—The summons or warrant must be substantially in the form prescribed by the statutes.[1] And it should be issued by the court on an affidavit or complaint,[2] and be made returnable and be returned to the court at a fixed time.[3]

*b. Service of Process.*—The statutes of the several States usually require a personal service of process when it can be made with due diligence, and prescribe other modes of service when the party to be served cannot be found,[4] the manner of the service and of

1. Smith *v.* White, 5 Dana (Ky.), 376; Supervisors *v.* Ellison, 8 W. Va. 308.

In *Arkansas*, the summons in an action of forcible entry and detainer need not contain a literal copy of the plaint. The substance thereof is sufficient. A substantial and not literal compliance with a form of proceeding prescribed by statute is sufficient. Russell *v.* Wheeler, Hempst. (U. S.) 3.

In a complaint of forcible entry and detainer the law does not require it to be stated in the warrant that the complaint was made under oath. Lithgow *v.* Moody, 35 Me. 214.

**Contents of Warrant.**—Where a person was arrested for a forcible entry, *held*, that there should appear in the warrant sufficient averments of force and of a disturbance of the peace to support an indictment for that offence. Hunt *v.* Ballew, 9 B. Mon. (Ky.) 390.

Under section 500 of the *Kentucky* civil code, a warrant for forcible detainer which discloses no interest nor right to the possession of the premises in the plaintiff is fatally defective; and to maintain a proceeding for a forcible detainer it is essential that the relation of landlord and tenant should be alleged, or in some form appear on the face of the warrant. Taylor *v.* Monohan, 8 Bush (Ky.), 238.

In a proceeding for unlawful detainer, the plaintiff must prove the detainer at the date of the warrant; but if the warrant does not allege the detainer, that may be aided by the complaint, if it states the fact. Kincheboe *v.* Tracewells, 11 Gratt. (Va.) 587.

2. An affidavit, and not a mere verbal complaint under oath, is the indispensable jurisdictional foundation for the justice's entire proceeding in forcible detainer, and must precede the summons. Stolberg *v.* Ohnmacht, 50 Ill. 442.

A complaint in a summary proceeding for the recovery of the possession of land should not be dismissed because the summons was not issued until the day after the complaint was sworn to. Gruler *v.* McRoberts, 48 Mich. 316.

Under Rev. Stat. ch. 128, §§ 1, 2, the same magistrate must receive the complaint under oath and issue a warrant. Labaree *v.* Brown, 38 Me. 482.

**Minute of Time of Exhibition.**—Upon a complaint brought under the sixth section of the act of *Vermont*, to prevent forcible entry and detainer, of February, 1797, it is not necessary that the magistrate issuing the process should minute on the complaint the time of its exhibition. Allen *v.* Ormsby, 1 Tyler (Vt.), 345.

Where an action appears to be brought under the third section of the act of forcible entry and detainer, it must bear the minute of the time of the exhibition, etc., required by the fifth section of the Statute of Limitations. Hall *v.* Brown, 2 Tyler (Vt.), 64.

**A Recognizance for Prosecution**, taken on the issuing of process on a complaint for forcible entry and detainer, under the *Connecticut* statute, before the magistrate signing such process, is valid. Dutton *v.* Tracy, 4 Conn. 79.

3. Gorman *v.* Steed, 1 W. Va. 1.

A warrant for forcible entry must be executed within thirty days from its date. Humphrey *v.* Jones, 3 T. B. Mon. (Ky.) 261.

Under the *New Hampshire* statute, in relation to the process of forcible entry and detainer, where the warrant is made returnable on the same day when it is issued it is irregular. State *v.* Sawyer, 5 N. H. 398.

A summons in forcible entry and detainer, dated 24th July, 1817, returnable 26th July, was held sufficient under the statute. Pullen *v.* Boney, 4 N. J. L. (1 South.) 125.

4. Hemstreet *v.* Wassum, 49 Cal. 273.

The service of notice of inquiry, in forcible entry and detainer, in *New York* must be either by fixing a notice in writing on some suitable and public place on the premises, as the front door of the house, or by delivering the notice personally to the party against whom the complaint is made, if on the premises. Forbes *v.* Glashar, 13 Johns. (N. Y.) 158.

Where the affidavit of service of notice

the return being usually the same as that provided in civil actions generally.[1]

*c. The Inquisition.*—An inquisition or inquest is an inquiry or investigation made by a justice to whom complaint is made, by a jury of the county, as to the entry and detainer and as to the right of possession with a view to the restitution of possession in a proper case.[2]

Restitution may be refused even when the defendant is convicted, it being dependent upon the right of possession.[3]

stated that the party was on the premises and that the notice was "put upon the house in a conspicuous place," it was held not to be sufficient, and the conviction was set aside and restitution ordered. Mather *v.* Hood, 8 Johns. 44.

Where a sheriff's return of a writ of "forcible detainer" shows a personal service upon the defendant in substantial compliance with the statute, his failure to return a bond does not invalidate the service, though it may subject him to liability as an officer. Keller *v.* Henry, 24 Ark. 575.

In *New Jersey*, service of a summons by leaving a copy fastenned to the door of the house which is said to be in possession of the defendant, as he was not therein is not sufficient. Miller *v.* Doolittle, 5 N. J. L. (2 South.) 845.

If in a forcible-entry proceeding the tenant is served by a copy left, instead of personally, he may appear and deny the jurisdiction. State *v.* Marshall, 24 S. Car. 507.

In *Minnesota*, a summons served by reading it in the presence of the defendant is not sufficient. Tallman *v.* Gilman, 1 Minn. 179.

In *Kentucky*, the service of a warrant of forcible entry and detainer must be by notice to each defendant in person, not by copy left. Lewis *v.* Outten, 2 Dana (Ky.), 92.

In *New Hampshire*, if in the service of the warrant the body of the respondent be not arrested four days before the day of trial, a copy of the warrant must be left at the usual place of abode of the respondent a like number of days before the trial. State *v.* Sawyer, 5 N. H. 398.

1. Hemstreet *v.* Wassum, 49 Cal. 273.

2. 2 Bish. Cr. L. §§ 494, 495; Watson *v.* College, 2 Jones L. (N. Car.) 211.

3. 2 Bish. Cr. L. § 514; 2 Whart. Cr. L. § 1111.

An inquisition under the statutes 8 Hen. VI. ch. 9, or 21 Jac. I. ch. 15, which entitles the parties ousted to a writ of restitution, must show what estate he had in order that it may appear whether he is within the statutes, which he is not, if he is tenant at will or by sufferance; and where the indictment alleges merely that the prosecutor "was seized and possessed" of the premises "for a term of time," without saying for what time, whether for life or years, or that it was still subsisting, judgment was arrested. State *v.* Speirin, 1 Brev. (S. Car.) 119.

In proceeding by inquisition for a forcible entry and detainer, before a writ of restitution can be awarded the jury must find by their verdict that the party forcibly dispossessed had either a freehold or a term of years in the land of the possession of which he has been deprived. Mitchell *v.* Fleming, 3 Ired. L. (N. Car.) 123; State *v.* Anders, 8 Ired. L. (N. Car.) 15.

On an application for process, under the act relative to forcible entries and detainers, an affidavit that the complainant was "lawfully and peaceably possessed of the premises in question, as tenant thereof, under the executors of A., deceased, who was the owner of the same," without setting forth the nature of the estate by virtue of which such possession was held, is sufficient within the provisions of the statute, upon objection made after inquisition, finding the complainant to be tenant at will. People *v.* Reed, 11 Wend. (N. Y.) 157.

In *Kentucky*, on a warrant of forcible detainer, the inquisition found "that the right of possession was in the plaintiff," and on a traverse the jury found the defendant guilty of forcible detainer. *Held*, that the inquisition was defective, and that the finding on a traverse could not cure the defect. Todd *v.* Bates, 3 Bibb (Ky.), 100; Penny *v.* Skirvin, 9 B. Mon. (Ky.) 238.

The only legal inquiry in the possessory action is, "Was the plaintiff the actual possessor as alleged, and did the defendant disturb him?" and plaintiff need only show possession for a year and a day. Lange *v.* Baranco, 32 La. Ann. 697.

The proceedings in an inquisition of

In most of the States civil process for regaining possession has practically taken the place of the inquisition and restitution upon criminal prosecution.[1]

*d. Indictment.*—In a criminal prosecution for forcible entry and detainer the indictment must allege the forcible entry or the forcible detainer,[2] that the complainant was in peaceable possession at the time of the entry.[3] And in some States it is also necessary

forcible entry, etc., were quashed because the defendant was stated in the inquest to have been "possessed," but no estate or term was laid. Respublica *v.* Campbell, 1 Dall. (Pa.) 354.

An allegation in the inquisition, that the prosecutor was disseized, necessarily implies a previous seizin. Commonwealth *v.* Fitch, 4 Dall. (Pa.) 212.

**Practice on Inquisition.**—Where an inquisition or forcible entry and detainer is found by a jury, and the defendant tenders his plea in writing, denying the force, the general practice is to certify the proceedings to the superior court. State *v.* Dillon, 3 Hayw. (Tenn.) 174.

Where the justice acts upon his own view, without any inquisition by a jury, he can only punish the party guilty of the force, but cannot meddle with the possession. And if he orders restitution of possession it is irregular. Matter of Shotwell, 10 Johns. (N. Y.) 304.

An inquisition of forcible entry and detainer, purporting to be taken "on the oaths or affirmations" of A, B, and C, is bad unless it states that those who were affirmed were Quakers, or conscientiously scrupulous of taking an oath. State *v.* Putnam, 1 N. J. L. (Coxe) 260.

In *New York*, where the justice of the peace proceeds under the second section of the statute of session 11, ch. 6, it is not necessary that he should previously go in person and record the force. People *v.* Anthony, 4 Johns. (N. Y.) 198.

The remedy given by that section is distinct from that given by the former section. People *v.* Anthony, 4 Johns. (N. Y.) 198.

If defendant has no notice of an inquisition of forcible entry and detainer it is a fatal defect. State *v.* Stokes, 1 N. L. (Coxe) 392.

**Election to Proceed by Indictment.**—An objection to an inquisition that the relator has elected to proceed by indictment is of no avail. Sherill *v.* Nations, 1 Ired. L. (N. Car.) 325.

**Matters of Form.**—It is not necessary that the justice before whom an inquisition of forcible entry and detainer is taken should sign it. Covenhoven *v.* State, 1 N. J. L. (Coxe) 258.

An inquisition of forcible entry and detainer is not vitiated by the dates being expressed in figures; this proceeding is in some respects a civil suit. Covenhoven *v.* State. 1 N. J. L. (Coxe) 258.

1. 2 Bish. Cr. L. § 514.

2. People *v.* Runkel, 9 Johns. (N. Y.) 147; Blackwell *v.* State, 26 Ind. 204.

An indictment for forcible entry alleging that the plaintiff and another person "unlawfully, forcibly, injuriously, and with strong hand did break and enter" into a house of A and keep possession of the same, A being there and forbidding their entry, is good at common law. If the defendant has title, it should appear in defence, and not by a negative averment in the indictment. State *v.* Whitfield, 8 Ired. L. (N. Car.) 315.

The statute 5 Richard II. c. 7, respecting entry *manu forte* is part of the common law of the State. Harding's Case, 1 Greenl. 22.

Forcible entry into a dwelling-house is indictable at common law, though the force be alleged only in the formal words *vi et armis*. Commonwealth *v.* Fitch, 4 Dall. (Pa.) 212.

3. An indictment lies at common law for a forcible entry and detainer, inasmuch as it disturbs the peace; and in such an indictment it is not necessary to allege that the party ousted had any estate in the land, but it is sufficient to aver that he was in quiet possession. State *v.* Speirin, 1 Brev. (S. Car.) 119.

The allegations that the prosecutor "was seized" and "that his possession thereof continued," etc., are not cause for an arrest of judgment on the ground of repugnancy; the latter clause being surplusage. Respublica *v.* Shryber, 1 Dall. (Pa.) 68.

In an indictment for forcible entry, etc., the prosecutor need not state "when" he was seized of the premises. Respublica *v.* Shryber, 1 Dall. (Pa.) 68.

**Possession of Married Woman.**—An indictment for forcible entry alleging the possession to be in a married woman who has a husband in full life, and where there is no separation, is not good. The possession is in the husband, and ought

to set forth his estate in the premises.[1] It must describe the premises with legal certainty.[2] And it may be stated generally, that every fact necessary to constitute the offence must be set forth. An indictment to be good must set forth with plainness and certainty all the essential facts constituting the offence; the charge must be explicit enough to support itself, for if all the facts alleged in the indictment be true, and yet constitute no offence, the indictment is insufficient.[3] And while forcible entry and forcible detainer are sometimes separate offences, it has still been held that they may both be charged in the same count of the indictment.[4]

to be so laid. Commonwealth *v.* Kensey, 2 Pars. Sel. Cas. (Pa.) 401.

1. An indictment for forcible entry and detainer under the *New York* statute (R. L. 98) must set forth a seizin or possession within the purview of the act, or whether the estate of the relator be a freehold or a term of years; and on the traverse the allegation as to his estate must be proved by the relator. People *v.* Nelson, 13 Johns. (N. Y.) 340.

Though the defendant cannot justify the force by showing a title in himself, he may controvert the facts by which the relator attempts to show a title in himself. Mather *v.* Hood, 8 Johns. (N. Y.) 44.

The indictment must show the continuance of the term at the time the writ is moved for, and that the party was possessed of a term of years. State *v.* Butler, Cam. & N. (N. Car.) 331; 1 Tayl. (N. Car ) 262.

2. In a prosecution by information for a forcible entry and detainer, any variance between the description of the premises, as laid in the information and the evidence, will be fatal. Ball *v.* State, 26 Ind. 155.

Under an indictment for forcible entry a description of the premises was held sufficient that gave the number of acres, county, town, and the two adjoining tracts of land. Dean *v.* Commonwealth, 3 Serg. & R. (Pa.) 418. And see Commonwealth *v.* Jackson, 1 Grant Cas. (Pa.) 262; Torrence *v.* Commonwealth, 9 Pa. St. 184; Vanpool *v.* Commonwealth, 13 Pa. St. 391.

An indictment was arrested for want of certainty, the words being "a certain message with the appurtenances for a term of years in the district of Spartenberg." It was adjudged that the place where was not described with sufficient legal certainty. State *v.* Walker, 2 Brev. (S. Car.) 255.

An indictment for forcible entry into a messuage and tract of land without giving the number of acres was held bad on a writ of error. McNair *v.* Rempublicam, 4 Yeates (Pa.), 326.

The term "messuage" in an indictment is sufficiently descriptive of the premises. State *v.* Butler, Cam. & N. (N. Car.) 331; 1 Tayl. (N. Car.) 262.

3. State *v.* Eason, 70 N. Car. 88.

In an indictment it is enough if the complainant or the party injured and the injury are named and stated with sufficient certainty to enable the court to ascertain the injury and award restitution; and any variance not essential in the name or description of a corporation will not vitiate the proceedings. People *v.* Runkel, 9 Johns. (N. Y.) 147.

An indictment for forcible entry and detainer under the statutes of 8 Hen. VI. ch. 9, or 21 Jac. I. ch. 15, need not show that the inquisition was taken at the place alleged to be forcibly entered; although it is otherwise as to a conviction under the statute 15 Ric II. ch. 15. State *v.* Speirin, 1 Brev. (S. Car.) 119.

4. While a defendant may be indicted and convicted under one indictment for forcible entry and detainer, both together constituting one offence, yet each may constitute a separate offence; and under an indictment for forcible entry and detainer, in order to support a verdict of guilty, both branches of the offence must be proved. In the absence of any proof of forcible detainer a verdict of guilty is not supported by the evidence. Blackwell *v.* State, 74 Ga. 816.

A and B were indicted for forcible entry and detainer, the indictment containing but one count. Before plea filed their counsel moved to quash the writ, which the court refused to do. The jury returned a verdict of not guilty, but that the defendants pay the costs. Defendants then moved in arrest of judgment that the offences with which they were charged were distinct and separate, that

**3. Venue.**—Generally, the action may be brought in any township in the county within which the land lies;[1] though in some of the States the venue seems to be governed by the residence of the parties and not by the locality of the land, and the action is brought in the county or town where the parties reside.[2]

**4. The Complaint.**—The general rules of pleading govern in forcible entry and detainer upon all points not specially provided for in the statutes relative to that subject.[3] And a complaint is ordinarily sufficient if it allege all the facts required by the several statutes of forcible entry and detainer,[4] a substantial performance of these requirements being all that is necessary.[5] The complaint is usually in the nature of a declaration, and it must set forth the venue, show the facts necessary to give the court jurisdiction, and describe the premises with such certainty as to appraise the defendant of what is demanded, and afford a guide to

they were coupled in one count, and that the indictment was therefore void for duplicity. The court sustained the motion and arrested the judgment. *Held* to be error. The indictment was good, and judgment or sentence should have been entered thereon. Commonwealth *v.* Miller, 107 Pa. St. 276.

1. Murphy *v.* Lucas, 2 Ohio, 255; Quinebaug Bank *v.* Tarbox, 29 Conn. 510; Boxley *v.* Collins, 4 Blackf. (Ind.) 320.

2. Billings *v.* Chapin, 2 Ill. App. 555.

A justice of the peace of one county may administer the oath and issue the warrant necessary to dispossess a tenant holding over in another county. Du Bignon *v.* Tufts, 66 Ga. 59.

Under Special Laws 1874, c. 565, the municipal court for the town of Brunswick has jurisdiction of the process of forcible entry and detainer where both parties live in that town, and the land is situated therein, and the damages alleged do not exceed fifty dollars. Woodside *v.* Wagg, 71 Me. 207. But see Hoffman *v.* Parsons, 27 Minn. 236, where it was held that a justice of the peace of a town in Ramsey County, Minn., may properly, within his own town, issue a summons and entertain proceedings in forcible entry and detainer, though the parties to the proceedings reside in St. Paul, and the premises which are the subject thereof are within the limits of that city.

3. More *v.* Del Valle, 28 Cal. 170; Clark *v.* Gage, 19 Mich. 507.

The precisions required by *Michigan* Comp. Laws, §§ 4976, 4986, in a complaint in forcible entry and detainer, in identifying the premises intended, should be measured by the rules of pleading rather than by those which govern contracts. Clark *v.* Gage, 19 Mich. 507.

In an action of unlawful detainer brought by a judgment debtor to recover lands which had been sold under execution against him, and which he had attempted to redeem, the pleadings are the same as in an ordinary action of that kind; and if issue is joined on the plea of not guilty, he must show a sale by the sheriff, a purchase by the defendant or the person under whom he holds, a delivery of possession by him to the purchaser, a payment or tender of the purchase-money, with ten per cent per annum interest, and all lawful charges, and a notice in writing to the tenant in possession to quit. Jonsen *v.* Nabring, 50 Ala. 397.

4. Rivereau *v.* St. Ament, 3 G. Gr. (Iowa) 118; Ish *v.* Chilton, 26 Mo. 256; Simons *v.* Marshall, 3 G. Gr. (Iowa) 502; Shaw *v.* Gordon, 2 Greene (Iowa), 376; Royce *v.* Bradburn, 2 Dougl. (Mich.) 377.

5. An averment of a fact need not be in direct and express terms: it is sufficient that the fact appears by necessary implication from the words used. Lee *v.* Stiles, 21 Conn. 500.

All the facts required to be stated in an affidavit were set forth in the complaint, which was verified, while there was no other affidavit. *Held*, that this was a substantial compliance with section 3 of the statute requiring the complaint to be in writing, and to be accompanied by an affidavit. Porter *v.* People, 7 How. Pr. (N. Y.) 441.

**Including Personal Property** in an affidavit, may be regarded as surplusage, and does not vitiate the entire proceeding. Du Bignon *v.* Tufts, 66 Ga. 59.

the sheriff in executing the writ of restitution;[1] though in some States a verbal complaint is sufficient.[2]

(*a*) *Complainant's Estate and Possession.*—The complaint should show that the complainant had the right of possession at the time of the commencement of the action, or that he was in possession actual or constructive.[3]

In some States it is held that the estate of the complainant, in the lands forcibly entered upon, must be shown.[4] But in others

1. Murphy *v.* Lucas, 2 Ohio, 255; Treat *v.* Bent, 51 Me. 478.

2. Under the *Virginia* Code, 556, ch. 134, in proceedings for unlawful detainer, the only complaint necessary is that contained in the summons; and if a case began before this statute was enacted it may go on under the provisions of that chapter. Olinger *v.* Shepherd, 12 Gratt. (Va.) 462.

The *Texas Act* of 1848 to regulate proceedings in forcible entry and detainer does not expressly require the complaint to be in writing, although that was probably intended in requiring the justice to issue his summons "on complaint upon oath of the party aggrieved," etc. But where the complaint was not set out in writing in the sumomns, accompanied by the affidavit of the party, and no objection was taken before the justice, *held*, that the objection could not be taken on the return to a *certiorari* in the district court. Clay *v.* Clay, 7 Tex. 250.

In *Tennessee*, the act of 1821, ch. 14, regulating the proceedings in an action for forcible entry and detainer, required a written complaint or statement, descriptive of the premises claimed and of the injury to the possession, to be filed with the justice who tried the action. The act of 1842, ch. 86, does not require any written complaint, but that the matter of the complaint should be incorporated in the warrant. It gives concurrent jurisdiction to the current court and to justices of the peace. If the action be instituted before two justices, the description must be contained in the warrant; if in the circuit court, in the declaration. While *v.* Suttle, 1 Swan (Tenn.), 169; Bush *v.* Dunham, 4 Mich. 339; Bryan *v.* Smith, 10 Mich. 229; State *v.* Pearson, 2 N. H. 550; People *v.* Fulton, 11 N. Y. (1 Kern.) 94.

**Manner of Pleading Possession.**—A declaration under the act of 1848 must set out the facts of the case, that the court may see whether they come within the statute, which only applies to certain cases. An allegation that the plaintiff is entitled to the possession, states his own conclusions of law, and not the facts of the case, as is necessary, and is therefore bad. Cooper *v.* Marchbanks, 22 Tex. 1.

3. Corlies *v.* Corlies, 17 N. J. L. (2 Harr.) 167; Walters *v.* Rogers, 9 Ala. 834; Ward *v.* Lewis, 1 Stew. (Ala.) 26; Cunningham *v.* Green, 3 Ala. 127; McRae *v.* Tillman, 6 Ala. 486; Van Aspen *v.* Townsend, 38 Ala. 572; and see Davis *v.* Woodward, 19 Minn. 137.

**Construed against the Pleader.**—The allegations of a complaint must be construed most strongly against the pleader, and when he says he is in possession, and at another time avers the contrary, the complaint shows no ground of action. Dickinson *v.* Maguire, 9 Cal. 47.

**Sufficiency of the Allegation.**—A complaint for forcible entry and detainer cannot be maintained which merely alleges that the plaintiff was entitled to possession, and that the defendant entered forcibly and kept him out, without averring that the plaintiff had actual or constructive possession, or that the relation of landlord and tenant existed. Whitaker *v.* Gautier, 8 Ill. (3 Gilm.) 443.

Nor is it sufficient to allege that A entered forcibly upon the premises of which the plaintiff was in possession, and that A afterward transferred the possession to the defendants, who have since forcibly kept possession. Ballance *v.* Curtenius, 8 Ill. (3 Gilm.) 449.

4. People *v.* Field, 52 Barb. (N. Y.) 198; Van Anken *v.* Decker, 2 N. J. L. (1 Pen.) 108: Barnes *v.* Nicholson, 2 N. J. L. (1 Pen.) 326; Banks *v.* Murray, 5 N. J. L. (2 South.) 849; Wall *v.* Hunt, 9 N. J. L. (4 Hals.) 37; Berry *v.* Williams, 21 N. J. L. (1 Zab.) 423.

The omission in a complaint for a forcible entry, of the estate of the plaintiff in the premises, is perhaps demurrable, but it is certainly so when the complaint does not show that the plaintiff was in possession at the time of the entry. Walters *v.* Rogers, 9 Ala. 834.

**A Complaint in Unlawful Detainer by Two Plaintiffs,** seeking recovery of the whole premises detained by a defendant, showed that the two plaintiffs were each separately in possession of the tract of

this has been entirely dispensed with.[1] And the object of this requirement would seem to be to show that the possession or right of possession of the complainant was legal and sufficient.[2]

(*b*) *Allegations of the Entry and Detainer.*—The complaint must allege that either the entry or the detainer was with force or with strong hand.[3] In some States both the forcible entry and the forcible detainer must appear;[4] but generally alleging either a forcible entry or a forcible detainer, will be sufficient.[5] In Ken-

land; that each separately rented his undivided interest in the lands to the same defendant, but at different times and upon different terms; that the terms of each lease have expired, and that each plaintiff had separately demanded possession of the undivided interest which he had rented to the defendant, and that the defendant refused to deliver possession after such demands. *Held*, bad on demurrer, for misjoinder of parties plaintiff. Ware *v.* Warwick, 47 Ala. 295.

When the action of unlawful detainer is brought by heirs, it is unnecessary to aver in the complaint that they are the only heirs; this is matter of defence. Hightown *v.* Fitzpatrick, 42 Ala. 597.

1. The act of 1842, ch. 86, regulating the action of forcible entry and detainer, dispenses with the necessity of stating in the writ the plaintiff's interest in the estate. The averrment that he is entitled to the possession is sufficient. Rhodes *v.* Comer, 2 Sneed (Tenn.), 40.

2. The legislature, in framing the statute of forcible entry and detainer, intended to require the relator to disclose the nature of his right to the possession—how, and from whom it was acquired—so that it would appear that his right was a legal and valid one. A complaint merely alleging that the relator and his grantor have been in possession for more than five years, and that the right to the possession still continues, is not a sufficient compliance with the statute. Since, however, possession is *prima facie* evidence of ownership in fee, and the defect in the complaint is not such as to deprive the court of jurisdiction if no objection is raised at the trial. People *v.* Field, 52 Barb. (N. Y.) 198.

Under the *New York* statute relative to forcible entries and detainers, which requires that the complaint shall show that the complainant has some estate in the premises then subsisting, or some other right to the possession thereof, stating the same, a complaint which alleges that the complainant "had a good and legal right and estate to said premises, and that he still has a legal right to the possession of said premises," does not state the right, but the legal conclusion, and is therefore not a compliance with the statute. People *v.* Field, 58 Barb. (N. Y.) 270.

3. McEvoy *v.* Igo, 27 Cal. 375; s. p., Owen *v.* Doty, 27 Cal. 502; State *v.* Pearson, 2 N. H. 550; Carpenter *v.* Shepherd, 4 Bibb (Ky.), 501; McBrayer *v.* Wash, 6 J. J. Marsh. (Ky.) 464. And see Swartzwelder *v.* United States Bank, 1 J. J. Marsh. (Ky.) 38. See Davis *v.* Woodward, 19 Minn. 137.

4. Lewis *v.* Stith, 2 Litt. (Ky.) 294; Tipton *v.* Swayne, 4 Mo. 98.

In an action under the *Minnesota* Rev. Stat. ch. 87, a declaration that the defendants forcibly entered and did detain certain described lands, and demanded restitution of the premises, is fatally defective. Fallman *v.* Gilman, 1 Minn. 179.

In an action for unlawful and forcible entry and detainer, a complaint which follows the language of the statute, and charges "that the defendant made unlawful and forcible entry into the premises in question, then in possession of the claimant, and that the defendant continues unlawfully to hold, and with force and a strong hand to detain, the same from him, contrary to the form of the statute in such case made and provided," contains a sufficient statement of a cause of action. Jarvis *v.* Hamilton, 16 Wis. 574.

5. A complaint alleging that the plaintiff is the owner of the premises, that the defendant is a sub-tenant in possession under plaintiff, and holds unlawfully and against plaintiff's right, and forcibly detains the possession, is sufficient under the *Michigan* statute. Kusterer *v.* Wise, 59 Mich. 382.

Under Comp. Laws, 4975, of *Michigan*, providing that "when any forcible entry shall be made, or when an entry shall be made in a peaceable manner, and the possession shall be unlawfully held by force, the person entitled may recover;" if the complainant alleges an entry and holding by force, the case

tucky an allegation in the alternative of either the one or the other is enough.[1] But in any event, a complaint not showing that the entry and detainer are unlawful, is fatally defective.[2] The time of the entry is immaterial if before the commencement of the action, and may be proved on a different day from that alleged, and the particular circumstances of force and intimidation attending the entry are matters of proof, and not of pleading.

*c. The Description of the Property.*—The complaint may describe the premises generally.[3] But the description must be sufficieutly accurate to readily identify and locate the premises for the possession of which the action is brought.[4] As to what is a sufficient

must be considered as one of forcible entry only. Seitz *v.* Miles, 16 Mich. 456.

In *Alabama*, a count, in a complaint for forcible entry and detainer, that "the defendant entered on said lands peaceably, and by force or threats detains the same," sufficiently describes the wrong, and is not bad on demurrer. Ladd *v.* Dubroca, 45 Ala. 421.

A complaint, after alleging the forcible entry and detainer of the premises, proceeded thus: "detaining and holding the same by such words, circumstances, or acting as had a material tendency to excite fear or apprehension of danger." *Held*, that the allegation of force was as direct and full as the statute requires. Huffaker *v.* Boring, 8 Ala. 87.

In an action of forcible detainer, a complaint alleging "that the said B. has ever since the first day of January, 1870, unlawfully and forcibly detained, and still does detain, from the undersigned, possession," etc., of the premises, is sufficient to give a justice of the peace jurisdiction of the case. Brown *v.* Burdick, 25 Ohio St. 260.

A complaint alleged that the plaintiff was entitled to the immediate possession of certain premises, and that the defendant unlawfully detained said premises. *Held*, such complaint was insufficient under the act concerning forcible entry and detainer. Andrae *v.* Heinritz, 19 Mo. 310.

1. McBrayer *v.* Wash, 6 J. J. Marsh. (Ky.) 464; Carpenter *v.* Shepherd, 4 Bibb (Ky.). 501.

2. Blaco *v.* Haller, 9 Neb. 149; Caswell *v.* Ward, 2 Dougl. (Mich.) 374; Royce *v.* Bradburn, 2 Dougl. (Mich.) 377; Bliss *v.* Winston, 1 Ala. 344.

But see Tagal *v.* Wallace, 48 Ga. 408, in which it was held that a warrant for forcible entry only, which shows upon the face that the entry was more than three years before the issuing of the warrant, and which contains no allegation or charge of forcible detainer, is demurrable as insufficient in law, and should be dismissed on motion, since the statute, in terms, provided that in no case shall the person in possession be turned out if he has been three years in peaceable possession of the premises. Jarvis *v.* Hamilton, 16 Wis. 574.

3. Moore *v.* Massie, 3 Litt. (Ky.) 196; Ladd *v.* Riggle, 6 Heisk. (Tenn.) 620; Allen *v.* Gibson, 4 Rand. (Va.) 468; Silvey *v.* Summer, 61 Mo. 253; Cairo, etc., R. R. Co. *v.* Wiggins Ferry Co., 82 Ill. 230.

4. Grant *v.* Marshall, 12 Neb. 488; Castro *v.* Gill, 5 Cal. 40; O'Hagan *v.* Crossman (N. J.), 14 Atl. Rep. 752; Nason *v.* Best, 17 Kan. 408; Cairo, etc., R. R. Co. *v.* Wiggins Ferry Co., 82 Ill. 230; Supervisors *v.* Ellison, 8 W. Va. 308; Schaumtoeffel *v.* Belm, 77 Ill. 567; Lewis *v.* Steele, 1 Minn. 88; Applegate *v.* Applegate, 16 N. J. L. (1 Harr.) 321; Klingensmith *v.* Faulkner, 84 Ind. 331; Gorman *v.* Steed, 1 W. Va. 1; Murphy *v.* Lucas, 2 Ohio, 255. *Compare* Silvey *v.* Summer, 61 Mo. 253; Moore *v.* Massie, 3 Litt. (Ky.) 296; Houghton *v.* Potter, 23 N. J. L. (3 Zab.) 338; Dunne *v.* Trustees of Schools, 39 Ill. 578.

There can be no recovery of any premises not described in the complaint. Lamme *v.* Buse, 70 Mo. 463.

In a writ of unlawful detainer, under the *Virginia* act of 1814, the omission of state in the complaint, the estimated quantity of land in dispute, is not fatal if the complaint contains a reasonably certain description. Allen *v.* Gibson, 4 Rand. (Va.) 468.

The sufficiency of the complaint as regards the description of the premises is governed by the rules of pleading. Clark *v.* Gage, 19 Mich. 507.

It is no objection to a complaint for a forcible entry and detainer, that it is unnecessarily prolix in describing the premises sought to be recovere.d If it furnishes data from which a diagram of the *locus in*

description in any case will be governed by the circumstances of that particular case.[1] If the complaint fails to particularly

*quo* may be drawn, its locality and bounds ascertained, it is sufficient. Bell *v.* Hillcrease, 11 Ala. 685.

A complaint in forcible entry is not invalid because it embraces more land than the plaintiff is entitled to recover. The verdict and judgment may be for so much as the jury find is detained. Jarvis *v.* Hamilton, 19 Wis. 187.

The words, "a certain house and appurtenances," in a summons for unlawful detainer, import land within the meaning of ch. 134 of the West Virginia code of 1860, to the extent of the land on which the house stands and the garden attached to it, but no further. Hawkins *v.* Wilson, 1 W. Va. 117.

1. "Three and one-half acres off" a specified tract, is not a good description of the land in a complaint. Klingensmith *v.* Faulkner, 84 Ind. 331.

**Schoolhouse Property.**—W. Va. Acts 1864, p. 13, as to unlawful detainer, intends the premises to be described in the summons with convenient certainty, having reference to delivery of possession. A description, "One certain schoolhouse and lot situated in Kanawha county, and State of West Virginia, in the school district of Union, and subdivision No. 15 of said school district," *held*, not to be sufficiently certain. Board of Education *v.* Crawford, 14 W. Va. 790.

**Requisites of Warrant.**—In a warrant for forcible entry and detainer of a schoolhouse, a description as "a schoolhouse in the 10th civil district of Union county, known as Miller's schoolhouse," *held*, to be sufficiently certain. Butcher *v.* Palmer, 1 Heisk. (Tenn.) 431.

In *New Jersey*, under the statute, "the lands of S. B., situate in the township of W., county of M.," was held a sufficient description of lands in the complaint. Pullen *v.* Boney, 4 N. J. L. (1 South.) 125.

A complaint for forcibly detaining the "messuage or dwelling-house" of the plaintiff is too loose and uncertain. Applegate *v.* Applegate, 16 N. J. L. (Harr.) 321.

In *Alabama*, in an action for forcible entry and detainer, the following description was held sufficient: "A certain lot and house in the city of Wetumpka, in said county, in that part of said city known as "Miller's Survey," being known as the east half of lot 21, in said survey, on which is a house recently occupied by Mrs. B. M. D. House *v.* Camp, 32 Ala. 541.

"Lot, and storehouse in said lot, No. 47, in the city of Montgomery, of which said lot she was seized and possessed of heretofore, to wit, on the 1st day of June, 1865," *held*, sufficient description on demurrer. Spear *et al. v.* Lomax, 42 Ala. 576.

In *California*, a declaration describing land by a certain name is as good a description as one by metes and bounds, if it can be rendered sufficiently certain by the evidence. The fact that a Spanish name can be translated into English so as to mean nothing, does not alter or affect its potency as a name descriptive of a place. Castro *v.* Gill, 5 Cal. 40.

In *Georgia*, in an affidavit under the Code, § 4072, to eject intruders, a description of the premises as "fifty acres of what is known as Elliott's Bluff, a survey of land situate on south side of Crooked River, in Camden county, Georgia," *held*, to be fatally indefinite, and accordingly the judgment to property set aside on motion. Orme *v.* King, 60 Ga. 523.

A complaint for forcible detainer showed that A was the owner and entitled to the possession of two tracts of land, amounting to 200 acres, and that he rented about 15 acres of one tract to B for one year, and that after the expiration of the year B unlawfully withheld the whole of the premises from A; that C unlawfully entered into the possession of the same premises under B, and that they both forcibly and unlawfully withheld them from A. *Held*, that the complaint was insufficient to give the court jurisdiction as it did not show that either of the defendants entered into the premises, except the 15 acres, under a lease or in any way with the assent of the plaintiff, and therefore there was nothing stated from which to presume that the relation of landlord and tenant existed; and, as no forcible entry and detainer was pretended, the court could only acquire jurisdiction by the relation of landlord and tenant being shown, and that even to the 15 acres it was defective according to the statute, which provides that the complaint shall particularly describe the lands. Beel *v.* Pierce, 11 Ill. 92.

In *Illinois*, a complaint describing the premises sought to be recovered in an action of forcible entry and detainer, as "a part of the north half of the northeast quarter of section 15," etc., "with the house situate thereon," *held*, not sufficient to give jurisdiction for uncertainty in the description. Schauntoeffel *v.* Belm, 77 Ill. 567.

In *West Virginia*, the description of land in the summons in an action of un-

describe the premises, and the description given include the premises in controversy, and no objection is made in the trial court, it will be waived.[1]

(*d*) *Allegations in Cases of Landlord and Tenant.*—Where the remedy has been made applicable to cases of landlord and tenant, the complaint must show that the relation of landlord and tenant existed ;[2] that the tenancy has been terminated ;[3] that the

lawful detainer, as "a certain tract or parcel of land, lying and being in the county of Ritchie, near Gorman's tunnel, and containing about 10 acres," is not sufficiently certain to maintain the action. Gorman *v.* Steed, 1 W. Va. 1.

**Summons and Complaint.**—A description of land, in the summons in an action of forcible entry and detainer of the premises in question, which did not state the town or county in which the land was situated, *held*, defective for want of certainty. Supervisors *v.* Ellison, 8 W. Va. 803.

In *Missouri*, a complaint in an action of forcible entry and detainer, brought in the county of M., described the property in dispute as "south of O. river," the county lying north of O. river. Enough was recited elsewhere in the complaint to identify the property with land situated in M. county. *Held*, that the words describing it as "south of O. river" might be rejected as surplusage, and that the description was sufficient for the purposes of that action. Great strictness and accuracy of description is not essential in these complaints. Silvey *v.* Summer, 61 Mo. 253.

In *Minnesota*, the statute requires the complaint to "particularly" describe the premises; that is, with such particularity that the officer may know what premises he is to restore to the owner. Lewis *v.* Steele, 1 Minn. 88.

1. Grant *v.* Marshall, 11 Neb. 488; Jarvis *v.* Hamilton, 16 Wis. 574.

An objection to a judgment, that the declaration does not contain a particular description of the land sued for, cannot avail after trial upon the general issue, in an action of unlawful detainer. Farr *v.* Farr, 21 Ark. 573.

In an action for forcible entry and detainer, where the description of the premises was sufficient otherwise to clearly identify them, *held*, that an error in the complaint and judgment, in speaking of a lot as in a norteasterly instead of a northwesterly corner of a larger lot, was immaterial, and the judgment was affirmed. Paul *v.* Silver, 16 Cal. 73.

2. Woodman *v.* Ranger, 30 Me. 180; Bell *v.* Pierce, 11 Ill. 92; Taylor *v.* Monohan, 8 Bush. (Ky.) 238; Cairo, etc., R. Co. *v.* Wiggins Ferry Co., 82 Ill. 230; Boylston *v.* Valentine, 16 N. J. L. (1 Harr.) 346; Dunne *v.* Trustees of Schools, 39 Ill. 578; Jackson *v.* Adams, 1 Wilson (Ind.) 398. But see Dunning *v.* Fimon, 46 Me. 546; Sweeney *v.* Mines, 31 Mo. 240; Beel *v.* Pierce, 11 Ill. 92; Hightower *v.* Fitzpatrick, 42 Ala. 597.

A complaint under the statute Rev. Code 1855, ch. 1016, § 33, is sufficient, although it does not show from whom the defendant hired the premises, or who was the landlord, or to whom the rent was due and payable. Sweeney *v.* 34 Mo. 240.

In a proceeding under N. J. Rev. Stats., p. 1300, § 123, to eject a tenant, an affidavit in these words: "that deponent leased said premises to S., by the month, to commence on the first day of May last, at the monthly rent of $10," is a sufficient statement of tenancy. Steffens *v.* Earl, 40 N. J. L. 128.

A complaint in an action under Gen. Stat. 1888, ch. 84, § 11, need not state that plaintiff is the owner, or that he is entitled to the possession of the demised premises, if it show a leasing by him to defendant, and an entry and possession by the latter under such leasing. Engels *v.* Mitchell, 30 Minn. 122.

3. Jackson *v.* Adams, 1 Wilson (Ind.), 398; Dunne *v.* Trustees of Schools, 39 Ill. 578; Cairo, etc., R. Co. *v.* Wiggins Ferry Co., 82 Ill. 230; Alexander *v.* Westcott, 37 Mo. 108.

In an action of unlawful detainer under § 5, ch. 35, Rev. Stat. 333, the plaintiff maintains and proves a demand in writing for possession of the premises which he seeks to recover. Doss *v.* Craig, 1 Colo. 177. The omission to make such demand is not cured by plea of title in defendant, nor by verdict. Doss *v.* Craig, 1 Colo. 177.

A complaint alleging a lease for a month, that it had expired, and that defendant refuses to surrender possession, *held*, to show an unlawful detention of the premises. Fry *v.* Day, 97 Ind. 348.

**Tenancy at Will.**—An action for unlawful detainer cannot be maintained against a tenant at will without first ter-

complainant has a present right of possession;[1] and that the tenant holds over and remains in possession of the premises.[2]

minating the tenancy by giving at least thirty days' notice in writiug to quit, and afterwards giving three days' notice in writing to surrender the possesion; and these things must be made to appear by express averments in the complaint. So held in a case where the tenants, within three days after the termination of the tenancy, served upon the landlord written notice that they would not surrender the premises. Martin *v.* Splivalo, 56 Cal. 128.

A complaint in forcible detainer, held to contain three fatal defects: First, in merely reciting that due notice in writing had been served, without stating that the demand had been made after the end of the term of letting; second, in alleging that the written demand was served by copy on a person over twelve years, not on the defendant himself; and third, in not showing the authority of the person serving the demand. Doran *v.* Gillespie, 54 Ill. 366.

**Termination on Failure to Pay Rent.**—When the lessor reserved a right to enter, on failure of the lessee to pay rent at the specified time, and to hold until the rent was paid, he must prove the defendant in arrears to entitle himself to the possession of the premises, in an action of forcible detainer. Levett *v.* Bickford, 8 Humph. (Tenn.) 614.

In an action of forcible detainer for a failure to pay rent, if the complaint does not aver that a demand for the rent was made, it is insufficient to support a judgment of forfeiture. Cone *v.* Woodward, 65 Ill. 477.

A process of forcible entry and detainer, by a landlord against a sub-tenant, need not set forth particularly how or when the demand for possession was made, nor what the terms of the lease were; nor need it negative the defence, in advance, that the defendant had a right to attorn to another; nor is such sub-tenant entitled to six months' notice to quit. Ballance *v.* Fortier, 8 Ill. (3 Gilm.) 291.

In a suit for unlawful detainer against a city, the complaint alleged that the rent, falling due Aug. 29, had remained more than three days unpaid; that on Oct. 4 the plaintiff demanded in writing delivery of possession, which defendant had refused, and still unlawfully detained, etc. *Held*, that the complaint was sufficient. Rains *v.* Oshkosh, 14 Wis. 372.

**Holding Over after Sale under Foreclosure.**—In an action under Comp Stat., ch. 77, to recover possession of real estate, the plaintiff alleged that the defendant had title on a certain day, that he executed a mortgage to the plaintiff, and that, after default, a foreclosure by advertisement was had. The complaint set out particularly each step, and a sale and purchase by the plaintiff, and that the time of redemption had expired, and "that, under and by virtue of said mortgage and foreclosure thereof as aforesaid, this plaintiff is seized in fee simple of said premises," and entitled to immediate possession thereof. *Held*, on demurrer, that the complaint was iusufficient in not alleging that the mortgage contained a power of sale, which was the only foundation upon which foreclosure by advertisement could be made. Pinney *v.* Fridley, 9 Minn. 34.

**Vendor and Vendee.**—In order to give a justice of the peace jurisdiction of an action of forcible detainer, as between the vendor and vendee of land under the act of 1861, the following elements must be shown by the complaint: (1) Relation of vendor and vendee must exist; (2) the vendee must have obtained possession of the land under the contract; and (3) that he has failed or refused to comply with his contract before obtaining a deed of conveyance of the premises. Haskins *v.* Haskins, 67 Ill. 446.

1. Alexander *v.* Westcott, 37 Mo. 108.

A complaint against a tenant holding over must show that the plaintiff has a present right of possession, and it must describe the premises with reasonable certainty. The county is sufficiently identified by locating the property in the city of Indianapolis, and State of Indiana; and if a complaint is good under the act of May 13, 1852, concerning the unlawful detention of lands, and the recovery thereof, it is unimportant whether it is sufficient under § 595 of the Code. Jackson *v.* Adams, 1 Wilson (Ind.), 398.

A claimed land in possession of B; B filed an affidavit that he held the land as tenant of C, who claimed a legal right to the possession, etc., and C also filed his affidavit. *Held*, that neither affidavit was such as the act of 1854 required. Cardin *v.* Standly, 20 Ga. 105.

2. An allegation that defendants entered upon the premises as tenants until October 1, 1865, and, after the expiration of their lease, refused possession on demand in writing, but unlawfully retains and withholds the same, is sufficient; but if the complaint fails to aver that a de-

(*c*) *Form and Verification.*—In general a complaint cannot be objected to for mere matters of form.[1] It is sufficient if a substantial cause of action appear;[2] and the verification must usually be made by a party, or, under some circumstances, his agent or attorney,[3] and may be taken before a justice of the peace of the State.[4]

**5. Answers and Defences.**—(*a*) *Statute of Limitations.*—A period is usually limited by law within which an action of forcible entry and detainer must be brought, after quiet and peaceable possession has been obtained by the disseizor or the party holding over. The prevailing limitation is three years.[5] This possession must be adverse; possession under contract with the rightful owner is not enough to set the statute running.[6] And the limitation begins

mand in writing was made to deliver the possession thereof to any one lawfully entitled thereto, it is defective. Spear *v.* Lomax, 12 Ala. 576.

A complaint which shows that the time for which the premises were let has expired, and that the tenant persists in holding the premises after demand made in writing for the possession thereof, is sufficient in respect to the necessity of showing plaintiff's possession and defendant's intrusion. Cairo, etc., R. Co. *v.* Wiggins Ferry Co., 82 Ill. 230; Dunne *v.* Trustees of Schools, 39 Ill. 578.

**What Allegation is Sufficient.**—A complaint made in writing, before two justices of the peace, that the complainant is entitled to the possession of a house and lot in the town of ——, wherein one Wells lives, and that said Wells refuses to give possession of said house and lot, though he has been notified to do so in writing, is insufficient in an action of forcible entry and detainer. Wells *v.* Hogan, 1 Ill. (Breese) 337.

A complaint for an unlawful detainer, in holding over leased premises after the expiration of the tenancy, which states that the plaintiff is the owner, and entitled to the possession of the premises (describing them), and that he leased them to the defendant for a year from a certain time, and that the defendant wilfully continued to, and does now, hold over the possession of the premises, after the expiration of the time they were demised, although due demand in writing had been made upon him for possession, is sufficient. Alexander *v.* Wes cott, 37 Mo. 108.

**Need not Allege that Holding Over is Wrongful.**—The complaint in an action against a tenant for holding over, brought under the forcible entry and detainer act, need not allege that such holding over is wrongful, if this appears indirectly from the allegations. Uridias *v.* Morrell, 25 Cal. 31.

1. Townley *v.* Rutan, 21 N. J. L. (1 Zab.) 674.

2. Houghton *v.* Potter, 23 N. J. L. (3 Zab.) 338.

The form of complaint for unlawful detainer given in "Ewing's Justice" is sufficient. Townley *v.* Rutan, 21 N. J. L. (1 Zab.) 674.

**Objections, How Made.**—An objection to the sufficiency of the complaint, in an action of forcible entry and detainer, must be made by motion to quash before trial. Such defect cannot be taken advantage of on the trial, or for the first time on appeal. Leary *v.* Pattison, 66 Ill. 203.

**Language of the Statutes.**—In unlawful detainer, if the affidavit is in the language of the statute, and the land proved as described therein, it is sufficient. Torrey *v.* Cook, 11 Miss. (3 Smed. & M.) 60.

**The Rule in California.**—Forcible entry and detainer are distinct causes of action, and should be separately stated in different courts. If not so stated, the complaint would be bad on demurrer; if not demurred to, the objection would be waived. Valencia *v.* Couch, 32 Cal. 339.

3. When the complaint for forcible entry and detainer shows that the complainant lives in the county in which the estates lie, it cannot be signed and sworn to by his agent or attorney unless it shows that the complainant is "out of the State, or sick, or, for other reasons, unable to attend personally before the court." Treat *v.* Bent, 51 Me. 478.

4. Crow *v.* Morris, 15 Ga. 303.

5. Miller *v.* Tillman, 61 Mo. 317.

6. Forcible entry and detainer cannot be maintained under the statute or 1824, ch. 268, against one who has been in quiet possession three years or more, whether such possession has been in submission or opposition to the title of the true owner. Morton *v.* Thompson, 13 Me. 162.

Proceedings for restitution under

to run from the time of the wrongful entry, or from the time of the expiration or forfeiture of the lease or contract under which the possession was formerly held.[1]

The possession for the time limited must be the possession of the party pleading it; the possession of several cannot be united to bring the case within the statute.[2]

(*b*) *Pleas in Abatement.*—Formal defects in the procedure may be taken advantage of by a plea in abatement, as in other actions.[3]

*Minnesota* Gen. Stat. 1878, ch. 84, cannot be maintained against a tenant who has been in possession of the premises more than three years under a lease, his term not having ended. Brown *v.* Brackett. 26 Minn. 292.

The *Iowa* Code, § 2372, provides that thirty days' peaceable and uninterrupted possession, with the knowledge of the plaintiff, after the cause of action accrued shall bar an action of forcible entry and detainer. Under this section, *held*, that the knowledge of the plaintiff of the adverse holding was absolutely essential to the bar. Fultz *v.* Black, 3 Iowa, 569.

A person taking possession in good faith, and in violation of no law, is not liable to be turned out by an action of forcible entry and detainer, because the person from whom he purchases may, years before, have made an entry by force. Clark *v.* Barker, 44 Ill. 349.

Where the action is of the nature of a writ of right, it is incumbent on the plaintiff to prove his seizin within the time limited by law, and failing to do so he cannot recover, because it is the foundation of his title. Ellis *v.* Murray, 28 Miss. 129.

In an action of forcible entry and detainer, consent to defendant's possession will not be presumed from the plaintiff's silence for any shorter period than the one year prescribed in section 943. Boardman *v.* Thompson, 25 Iowa, 487.

One who was in possession of land under a written contract for its purchase, and who had paid a part of the purchase-money and made lasting and valuable improvements., sold his interest by parol to A, who entered and also made permanent and valuable improvements. *Held*, that A was not, after two years' possession, liable to an action of forcible entry and detainer. Alderman *v.* Boeken, 25 Kan. 628.

Where one in possession under an inchoate contract for the purchase of land turns his possession over to a third party, the latter will not be subject to an action of unlawful detainer by the original vendor under section 3 of the Missouri forcible entry and detainer act (Wag. Stat. 642); and even where the possession is obtained under demise or lease, or by disseizin,—contemplated by that statute,—if defendant has been in uninterrupted occupation for three years, he will be protected. Hannibal, etc., R. Co. *v.* Hill, 60 Mo. 281.

R., who was absent from the State, was entitled to the possession of certain land here upon payment of the purchase-money. Part he paid himself, and the remainder he procured C. to pay, authorizing C. to take possession and hold it, rent free, until his (R.'s) return. *Held*, that C.'s possession for more than three years under his arrangement was not adverse to R.'s claim, and that it could not be pleaded as a defence to a suit of unlawful retainer by R. Carter *v.* Reagan, 23 Ark. 74.

1. An entry into unimproved land with the intention of fitting it for cultivation, is within the statutes against forcible entries, and the act of limitation begins to run from the time of such entry. Humphrey *v.* Jones, 8 T. B. Mon. (Ky.) 261.

Under the limitation section of the forcible entry and retainer law (Digest ch. 71, § 18) the limitation does not commence running in favor of one in the possession under a lease until the expiration of the lease. Burke *v.* Hale, 9 Ark. 328.

2. Thompson *v.* Holt, 9 Humph. (Tenn.) 407.

3. An action of forcible detainer, begun in a justice's court, where defendant pleaded in abatement the pending of a former suit, it is error of the court, after deciding adversely to defendent on his plea to render judgment against him without requiring plaintiff to give evidence to sustain his demand. Steele *v.* Grand Trunk Junction R. Co.,(Ill.)17 N. E. Rep. 483.

**By What Supported.**—A plea in abatement of an action of forcible entry and detainer is not supported by proof of pending of another action for forfeiture of a lease of the premises for non-pay-

(*c*) *Defences in General.*—The general denial, or the plea of not guilty, is always a good defence; it puts in issue all the material allegations of the complaint, and under it the statutes usually allow all matters of excuse, justification, or avoidence to be proved.[1] That the entry was made under a *bona fide* claim to rightful possession, and in a peaceable manner, is also good.[2] So,

ment of rent. Steele *v.* Grand Trunk Junction R. Co., 20 Ill. App. 366.

In an action of forcible entry and detainer, a variance between the affidavit filed by the plaintiff and the writ may be pleaded in abatement, as in a case where the affidavit was for unlawful detainer and the writ for forcible entry and detainer. Sumner *v.* Spencer, 9 Ark. 441.

The record of conviction, under the first section of the act of session 11, ch. 11, to prevent forcible entries and detainers, is not traversable; and if it shows that the justice had jurisdiction, and proceeded regularly, it is conclusive, and a bar to any suit brought against the justice. Mather *v.* Hood, 8 Johns. (N. Y.) 44.

That a complaint bears date two years subsequent to the other proceedings in the case, will be considered a mere clerical error, and not available. Powers *v.* David, 6 Ala. 9.

**In Kentucky.**—In an action of forcible entry aud detainer, matter in abatement only is not an available defence. Jones *v.* Overton, 4 Bibb. (Ky.) 234.

1. Watson *v.* Whitney, 23 Cal. 375; Henderson *v.* Allen, 23 Cal. 519; McGlynn *v.* Moore, 25 Cal. 348.

Where, in an action for the forcible detention of real estate, commenced and tried before a justice of the peace, and taken up by appeal, the defendant pleaded "not guilty," *held*, that, although every material allegation in the petition, not specifically denied by the answer, should be taken as true, yet the instruction to the jury asked by the defendant should have been given; "that a plea of not guilty was a sufficient denial of the plaintiff's petition; and that it was sufficient to put the plaintiff upon proof of every material allegation set up in his petition. McKenney *v.* Hopkins, 20 Iowa, 495 s. p., Oleson *v.* Hendrickson, 12 Iowa, 222.

Where the complaintant, in a proceeding of forcible entry and detainer, alleged that the defendant entered upon the premises with force and strong hand, and disseized and dispossessed the plaintiff thereof, and with great force and strong hand continued to hold possession thereof, and to deforce and keep the complainant out of the possession thereof; to which the defendant pleaded not guilty, and the jury found that the defendant was guilty, in manner and form as the complainant in his complaint had alleged, and that the complainant have restitution, etc.,—*held*, that "not guilty" was a good plea in this action, as it put in issue the material facts alleged. Raymond *v.* Bell, 18 Conn. 81.

Pleading the general issue to a complaint, under the statute of forcible entry and detainer (Rev. Stat. 490, ch. 5), is a waiver of irregularities in the summons and notice. Falkner *v.* Beers, 2 Dougl. (Mich.) 117.

Denial that defendant "entered unlawfully" admits the entry, and tenders issue only on its unlawfulness. Leroux *v.* Murdock, 51 Cal. 541.

2. Townsend *v.* Chapman, 45 Cal. 673; Powell *v.* Lane, 45 Cal. 677; Bird *v.* Fannon, 3 Head (Tenn.), 12; Russel *v.* Chambers, 43 Ga. 478; Paige *v.* Dodson, 46 Ga. 223; Nichols *v.* Chandler, 46 Ga. 479; Dawson *v.* Dawson, 17 Neb. 671; Brown *v.* Beatty, 76 Ala. 250; Poulam *v.* Sellers, 20 Ga. 228.

Where, to a statutory proceeding to dispossess an intruder, the defendant filed a counter-affidavit following the statute literally, except that he alleged that "he does in good faith claim a legal title to the possession," this was equivalent to a statement that he claimed the right of possession, and was sufficient; and the counter-affidavit was not demurable. Pratt *v.* Fountain, 73 Ga. 261.

**Entry for the Purpose of Pre-emption.**—That land in dispute is a part of the public domain; that it has been drawn from entry and sale; and that the defendant, by the advice of his attorney and the government land-offices, entered upon the land for the purpose of securing a prior right to a homestead, and with a *bona fide* intention to acquire such right as soon as the land be open for entry, are not facts sufficient to justify an entry upon the actual occupancy of another; nor are such facts a good defence to an action of unlawful detainer. Randall *v.* Falkner, 41 Cal. 242.

Where, in the statutory proceeding to dispossess an intruder, defendants' coun-

if the party taking possession holds under a contract for title,[1] or if he was put in possession by legal process[2]. He may set up that he entered upon different land from that sued for,[3] or that the land taken is a part of a railroad,[4] and, generally, any facts which negative the cause of action of the plaintiff or explains or avoids it;[5] but equitable defences

ter-affidavit alleged that he claimed the legal title to the possession, instead of that he claimed the right of possession, *held*, equivalent, and therefore not demurable. Pratt *v.* Fountain, 73 Ga. 261.

1. Dawson *v.* Dawson, 17 Neb. 671.

Unlawful detainer cannot be maintained against a person who originally entered under a lease, but continues in possession under a contract for purchase. Brown *v.* Beatty, 76 Ala. 250.

In an action of unlawful detainer against a tenant holding over, for the purpose of disproving the tenancy, the defendant may show that he entered as a purchaser, and not as a tenant; and this, whether the argument to purchase be good or bad. Klopper *v.* Killer, 1 Colo. 410.

2. Janson *v.* Brooks, 29 Cal. 214.

3. Gill *v.* Jones, 57 Miss. 367.

4. An action of unlawful detainer does not lie to recover possession of part of a railroad; as this would involve the right and duty of exercising franchises, and these are not "lands and tenements," within the statute. Gibbs *v.* Drew, 16 Fla. 147.

The rights of a plaintiff in forcible detainer, *held*, not to be affected by the fact that a railway company had, before the suit, surveyed a part of the premises, which part, after the suit was brought, had been condemned for a right of way. Lesher *v.* Sherwin, 86 Ill. 420

5. In an action of unlawful detainer, brought against C., a vendee, by P., a vendor, who had given bond for title, taking three notes for the purchase-money, t he first being unpaid at maturity and C. having gone into possession, proof that, before the first note fell due, P. had transferred the notes to L., and had procured the legal title to be vested in L., *held*, to be a good defence. Clymer *v.* Powell, 56 Miss. 672.

**Contract to Re-purchase**—A.'s land was sold-upon the foreclosure of a mortgage upon it, to O., who procured a sheriff's deed, subject to A.'s right to redeem for one year. A. agreed verbally with B., that B. should advance him money wherewith to redeem, and to receive deeds to the land from O. and A., and execute a bond to A. to reconvey within a certain time upon the repayment. This contract was executed except as to the bond. B. sued A. in forcible entry and detainer, claiming that A. was a tenant at will, and had had due notice to quit. *Held*, that A. had a good defence, and that the title to the land was not involved. Jordan *v.* Walker, 52 Iowa, 647.

**Statutory Change After Contract.**—C. borrowed money of B., and gave his notes, secured by a trust deed. C. attorned to the trustee as his tenant, and covenanted to immediately surrender possession upon sale by the trustee for default in payment of the notes. C. failed to keep his agreement, and, after sale by the trustee, was sued in an action of forcible entry and detainer, under Ill. Rev. Stat. 1874, § 535, passed subsequent to the covenant. *Held*, that this statute did not impair the contract; that the validity of the prodeedings under the sale could not be questioned; and that ursury in the contract between C. and B. could not be shown. Chapin *v.* Billings, 91 Ill. 539.

**Collusion to Obtain Tax Title.**—Proof of collusion between a mortgagor of land and the holder of a tax title, to enable the latter to buy at the tax sale, and recover judgment in ejection, and obtain possession thereunder, rebuts the defence of such sale, judgment, and eviction when set up in proceedings of forcible entry brought by one claiming under the mortgagee, and entitles him to recover possession. Frazier *v.* Gates, 61 Ill. 180.

Where two parties claim title to a certain lot, and one takes possession and fences it, and the other shortly thereafter tears down the fence and takes forcible possession, *held*, that, in action of forcible entry and detainer by the former, the latter cannot defend by proof that the former took such possession for the purpose of obtaining the advantages of possession, and because he knew of defendant's claim of title and that he was intending to take possession. Coonradt *v.* Campbell, 25 Kan. 227. See Allen *v.* Tobias, 77 Ill. 169.

**Husband and Wife.**—A husband sued, with his wife, in forcible detainer, and, filing a joint and several answer defend-

cannot be set up on an appeal from the decision of a justice of the peace.[1]

In landlord or tenant cases, the tenant is usually estopped to deny his landlord's title;[2] but he may attorn to another claiming title, and defend on that ground.[3] That the term has not expired is a good defence;[4] and also fraud on the part of the landlord in obtaining a lease when the property was already held

ing his possession by averments of her right, puts himself in the position of a privy for the purposes of the action. De la Mar *v.* Hurd, 4 Colo. 442.

It is no ground for a nonsuit, that the *femme covert*, or one not guilty, is sued in this action. The plaintiff may recover against such as he proves guilty. Alexander *v.* Reed, 3 T. B. Mon. (Ky.) 246.

**Compliance With Order.**—A writ of forcible entry and detainer is not barred by an order of a county court giving leave to build a mill dam, unless the statute has been strictly complied with. Wolf *v.* Coffey, 4 J. J. Marsh, 41.

1. Gruenewald *v.* Schaales, 17 Mo. App. 324.

2. McLean *v.* Spratt, 20 Fla. 515.

In a suit by a landlord against a tenant, for forcible entry and detainer, a certificate of homestead entry granted to the tenant, cannot be interposed as a defence, because the title to the property cannot be tried in such proceedings, and the title so set up would be antagonistic to that of the landlord. Where, however, the tenant procures the title of his landlord either by direct conveyance or through the operation of the law, as by tax sale, it may be set up as a defence. Silvey *v.* Summer, 61 Mo. 253.

An answer, in an action against a tenant for unlawful detainer, which avers that a person not a party to a suit had formerly brought an action to quiet title to the demanded premises, and that such person was at the time in the actual possession of the premises, claiming title in fee thereto, is not ambiguous or uncertain. Douglas *v.* Dakin, 46 Cal. 49.

Where, under the landlord act of 1863, the tenant pleaded, to the jurisdiction of the alderman, that, since the demise, the premises have passed by sheriff's sale to a third person, to whom he had attorned, *held*, that the plea was fatally defective in not setting out that the sale was under a judgment against the landlord and passed his estate. Heritage *v.* Wilfong, 58 Pa. St. 137.

If upon the trial of a case of unlawful detainer, the defendant sets up title in himself, plaintiff may prove that the defendant entered into the premises under a parol lease from himself, though the lease proved was to continue more than a year. Adams *v.* Martin, 8 Gratt. (Va.) 107.

3. In a suit by a landlord against his tenant, under section 13 of the forcible entry and detainer act, the tenant may show in defence that he was evicted by judgment in ejectment recovered against him by one D., under whom he now holds; but it is essential that he show that notice of the ejectment suit was duly given to the landlord, proof of oral notice being sufficient. Wheelock *v.* Warschauer, 21 Cal. 309.

Where the land is sold at an execution sale, the tenant, if the execution debtor, may attorn to the purchaser, and he may resist the suit of such debtor, on a writ of forcible detainer, by proof of the sale and attornment. Bowser *v.* Bowser, 8 Humph. (Tenn.) 23.

If a tenant is evicted after notice to his landlord after threatened invasion by an adverse title, his tenancy ceases, and he is at liberty to take a lease from the successful plaintiff in ejectment, and an action of forcible entry cannot be maintained against such tenant by the first landlord. Steinback *v.* Krone, 36 Cal. 303.

4. Ogg *v.* Sheehan, 17 Neb. 323.

Where a tenant is sued for unlawful detainer, it is not necessary, in order to make out his defence, that he should show all the terms of the contract of rent; it is sufficient if he shows that he is in as the tenant of the plaintiff, for a term which is unexpired when the proceeding is instituted. If the holding for the entire term is, by the contract of lease, made to depend upon some act to be done by him before its commencement or during its continuance, the plaintiff must show this or he will be deemed to have waived it. Rainey *v.* Cappo, 22 Ala. 288.

In an action for forcible entry and detainer, the fact that the plaintiff's lease, under which he was in possession at the time of the defendant's entry, expired before the trial of the action, is no bar to a recovery. Townsend *v.* Van Aspen, 38 Ala. 572.

under a contract of sale.[1] In *Kentucky*, it is held that, if the defendant did not originally enter as a tenant of the plaintiff, or those whose estate he hath, the plaintiff cannot recover;[2] and the real relation of the parties may always be shown.[3] Defences by way of set-off and counter-claim do not generally seem to be permitted.[4]

**1.** In an action of unlawful detainer against a person admitting that he signed a lease from plaintiff, but claiming to have signed it through mistake, and to have been put in possession by plaintiff's intestate under an executory contract of purchase, with the terms of which he had complied, *held*, that this defence was available if the mistake was induced by the lessor by misrepresentations amounting to fraud. Locke *v.* Frasher, 79 Va. 409; Alderson *v.* Miller, 15 Gratt. (Va.) 279. But see Simons *v.* Marshall, 3 G. Gr. (Iowa) 502.

**2.** Mattingly *v.* Lancaster, 2 A. K. Marsh. (Ky.) 30; Helen *v.* Slader, 1 A. K. Marsh. (Ky.) 320; Hay *v.* Connelly, 1 A. K. Marsh. (Ky.) 393; Nelson *v.* Cox, 2 A. K. Marsh. (Ky.) 150; Gray *v.* Gray, 3 Litt. (Ky.) 465; Norton *v.* Sanders, 7 J. J. Marsh. (Ky.) 12; Quertemus *v.* Breckinridge, 5 Dana (Ky.), 125; Ecklar *v.* Ecklar, 3 B. Mon. (Ky.) 387; Kirk *v.* Taylor, 8 B. Mon. (Ky.) 262; Goldsberry *v.* Bishop, 2 Duv. (Ky.) 143. But in McMurty *v.* Adams, 3 Bush. (Ky.) 70, in which it was held that, under § 501 of the Civil Code, to maintain "forcible detainer," it is not material whether the tenant received possession of the demised premises from his landlord or became his tenant after obtaining possession of them.

**3.** In an action by an alleged landlord against a tenant, for unlawful detention of property, the defendant may show that the real relation between the parties is that of mortgagor and mortgagee. Steele *v.* Bond, 28 Minn. 267.

**Contract to Lease to Another.**—A, being tenant of B for a term ending June 30, 1866, cannot reply to a proceeding instituted against him by B to obtain restitution of the possession of the premises, that B has made a contract of lease of the same to C, to commence July 1, 1866. Gelston *v.* Sigmund, 27 Ind. 345.

**Vendor and Vendee.**—In forcible detainer by a vendor against a purchaser in possession under the contract, who has failed to comply therewith, the purchaser is estopped to deny the vendor's right to possession. Lesher *v.* Sherwin, 86 Ill. 420.

**4.** Where a lease contains the stipulation that "the lessee doth promise to quit and deliver up the premises to the lessor or his attorney, peaceably and quietly, at the end of the term, and that the lessor may enter to view and make improvements, and to expel the lessee if he shall fail to pay the rent agreed upon," and during the lease the lessee builds on the premises a cottage, and after the expiration of the lease the lessee continues, with the assent of the lessor, to occupy the premises, but thereafter makes default in the payment of rent, and then repudiates the lease and disclaims to hold under his landlord, such lessee, by the erection of his improvements on the leased premises, in the absence of any evidence of failure of title of his landlord, has not such an interest therein that the action of forcible detainer against him will not lie. Douglass *v.* Anderson, 28 Kan. 262.

To a landlord's suit for unlawful detainer, the tenant set up a counter-claim for damages resulting from the dilapidated condition of the leased premises. *Held*, that a demurrer to the counter-claim was properly sustained. Van Every *v.* Ogg, 59 Cal. 563.

In an action of forcible entry and detainer, where defendant pleaded that he had erected a bake-oven and building on the lot, at a cost of $500, under an agreement with the lot-owner that he would pay him their actual cost at any time he desired to give up possession, and that in pursuance of said contract he offered to take $400 for said improvements, which the lot-owner refused to pay, *held*, upon the facts stated, not to constitute a defence. Connolly *v.* Giddings (Neb.), 37 N. W. Rep. 939.

To an action of unlawful detainer, defendant answered that he and plaintiff had, since the commencement of the suit, submitted the matter in controversy to arbitration, on agreement that plaintiff should take defendant's furniture at a price assessed by the arbitrators, pay him back the excess, if any, over the rent due, upon which the defendant was to give up the furniture to him; also, that the arbitrators had acted, and found what the excess was, and that defendant was ready to carry out his part of the agreement. The answer also asked for specific per-

**6. The Disposition of the Issues.**—Going to trial without objection is a waiver of all irregularities and formal defects in the proceedings up to that time.[1] The trial is usually by jury, and the jury is selected and composed as in ordinary cases,[2] and the parties are entitled to produce witnesses before the jury, and to examine and cross-examine them, and sum up the evidence;[3] and it is the duty of the court to charge the jury as to the law of the case in hand,[4] and submit the proper questions of fact to them in like manner.[5]

formance, and a transfer of the cause to the equity docket. *Held*, not good as a counter-claim or as a bill for specific performance. Collins *v.* Karatopsky, 36 Ark. 316.

**Verbal Plea Good.**—It seems that the traverse to the indictment, under the second section of the *New York* statute of session 11, ch. 6, need not be in writing. The People *v.* Anthony, 4 Johns. (N. Y.) 198.

1. Grice *v.* Ferguson, 1 Stew. (Ala.) 36; Wright *v.* Lyle, 4 Ala. 112; Payne *v.* Martin, 1 Stew. (Ala.) 407; Snoddy *v.* Watt, 9 Ala. 609; Matlock *v.* Thompson, 18 Ala. 600; Houghton *v.* Potter, 23 N. J. L. (3 Zab.) 338; Jarvis *v.* Hamilton, 16 Wis. 574.

2. **No Jury to Assess Damages on Nonsuit.**—In a nonsuited action of unlawful detainer, the defendant cannot call a jury solely to assess damages; his remedy is on the plaintiff's bond. Strong *v.* Whatley, 23 Ark. 76.

The *Ohio* Act of 1831 concerning forcible entry and detainer provides for a jury in the court of common pleas to assess the rents and damages only when the judgment of a justice is affirmed there upon *certiorari*. Aubrey *v.* Almy, 4 Ohio St. 524.

**Jurors' Oath.**—It is sufficient if the justice's record state that the jury were sworn "according to law;" but if the oath be set out, and do not conform to the statute, it is bad. Graham *v.* Busby, 34 Miss. 272; Wilson *v.* Pugh, 32 Miss. 196. See Holt *v.* Mills, 12 Miss. (4 Smed. & M.) 110.

A recital in the record that the jury were duly sworn to inquire of the forcible detainer, is sufficient, without stating that they were to try the cause according to the law and to the evidence. M'Rae *v.* Tillman, 6 Ala. 486.

**Sheriff's Return.**—It is not error for the sheriff, in an action for unlawful detainer, to return a panel of 24 jurors if 12 only are sworn on the jury. Adams *v.* Decker, 11 N. J. L. (6 Hals.) 84.

In forcible entry and detainer, the justice must enter on his docket the return of the sheriff to the *venire*. Prickett *v.* Prickett, 12 N. J. L. (7 Hals.) 186.

In an action of unlawful entry and detainer, under *W. Va.* Code, ch. 50, §§ 211–218, it is proper that some answer or plea be entered or filed by the defendant if he appears and makes defence; and if the justice renders judgment in favor of the plaintiff, and the defendant appeals to the circuit court, if no answer or plea appears by the record to have been entered or filed before the justice or in the circuit court, it is error to swear the jury "to try the matter in difference between the parties." Supervisors *v.* Ellison, 8 W. Va. 308.

3. People *v.* Reed, 11 Wend. (N.Y.) 157.

4. In an indictment under the 12th section, ch. 64, Bat. Rev., for removing a part of the crop, etc., when there is no conflicting testimony as to the notice of the lien, it is error for the presiding judge to refuse to charge that, if the jury believe the defendants had no notice of the lessor's lien, they would not be guilty. When on trial, it was proved that the defendants had a license from the tenant, and such fact is not charged in the indictment, the judgment will be arrested. State *v.* Seers, 71 N. Car. 295.

An instruction given for the plaintiff, in an action of forcible entry and detainer, which, by its terms, cuts off all consideration of an actual adverse possession in the opposite party, is erroneous. Blanchard *v.* Pratt, 37 Ill. 243.

In an action of forcible entry against one of several persons, an instruction that, if the jury find that the plaintiff was forcibly ousted from the premises, they will find for the plaintiff, is erroneous unless "by the defendant" be inserted after "ousted." Ross *v.* Roadhouse, 36 Cal. 580.

5. **The Question, What Acts Constitute Possession** is for the court; whether such acts have been done, is a question for the jury. And the court may, under proper instruction, leave the whole question to the jury where there is any evidence tending to show *bona fide* prior possession by plaintiff. DeGraw *v.* Prior, 60 Mo. 56.

The court possesses the same power in respect to the disposition and arrangement of the causes on its calendar as in other cases in general.[1]

**7. Amendments.**—In all matters of mere variance or omission, as a variance between allegation and proof,[2] or between the complaint and the justice's indorsement of the summons,[3] or an omission to enter judgment of restitution,[4] the error may be corrected by amendment; but, in general, such changes as the introduction of a new party,[5] the change from one cause of action to an-

It is proper, in an action of forcible entry and detainer by the purchaser of certain property, against a lessee in possession, to submit to the jury the question whether the plaintiff, by proper conveyances, has succeeded to the rights and remedies of the lessor. Gillett *v.* Mathews, 45 Mo. 307.

It is error for the judge to rule on the trial that it was for the jury to say whether a barn, the eaves of which projected over the plaintiff's close, was a suitable structure, and of reasonable dimensions for a fence, and that if it was, its erection was not a trespass, if it came onto the plaintiff's land no more than a fence of ordinary width would do. Smith *v.* Smith, 110 Mass. 302.

**A judgment in ejectment** is conclusive evidence that the defendant has been in possession; and if he is removed by the *hab. fa.*, and is again bound on the land, whether his last entry was in his own right or that of another, a jury may infer that it was tortious, and, if so, he is liable to a writ of forcible entry and detainer. Kercheval *v.* Ambler, 4 Dana (Ky.), 166.

On an indictment under the *New York* Statute of Session 11, ch. 6, to prevent forcible entries and detainers, the jury may find the defendant guilty of the detainer only. Dutton *v.* Tracy, 4 Conn. 79.

**1. Failure to Convene on an Adjourn Day.**—In a proceeding of forcible entry and detainer, the court is constituted and then adjourns to a day certain. The court failing to meet on the day to which it is adjourned, the cause is not discontinued, but stands adjourned, by operation of law, to the next term of the county court. Mann *v.* Gwinn, 8 Gratt. (Va.) 58.

**Removal to Circuit Court.**—A case of unlawful detainer which has been pending in a county court more than a year may be removed, on motion, to the circuit, and placed there at the head of the civil causes. Harrison *v.* Middleton, 11 Gratt. (Va.) 527.

**Failure of the Jury to Agree.**—A jury, on a trial for forcible entry and detainer under the *Connecticut* statute, after having the cause committed to them for two days under consideration, and having come into court three times, and again retired, declared in open court that they never could agree. The court thereupon dismissed the jury, and caused another to be summoned and empanelled. It was held that such proceedings were legal. Dutton *v.* Tracy, 4 Conn. 79.

**Release of Security.**—On trying a traverse of forcible detainer, the court cannot release the security given by the traverser to the justice and take a new bond and security. Jack *v.* Carneal, 2 A. K. Marsh. (Ky.) 518; Holeman *v.* Carneal, 2 A. K. Marsh. (Ky.) 602.

**2.** A variance between the complaint and the testimony, in an action of forcible entry and detainer, is immaterial; and if the complaint charges one offence and the testimony makes another, the court should direct the complaint to be amended so as to conform to the testimony. If this be not done, the judgment will not, for that reason alone, be reversed on appeal; but the court below will be directed to cause the complaint to be amended, if the record shows that upon request it refused to do so; but not otherwise. Shelby *v.* Houston, 38 Cal. 410.

**3.** A complaint for forcible entry and detainer, in an action commenced in a justice's court, should not be stricken from the files after the cause has been removed to the city court of Mobile because of a variance between it and the justice's indorsement, on the summons, of the cause of action. Van Aspen *v.* Townsend, 36 Ala. 582.

**4.** Where, on a writ of forcible detainer, judgment was rendered for the plaintiff, but judgment for restitution was omitted, the circuit court may amend, at a subsequent term, by entering judgment for restitution. Norton *v.* Sanders, 7 J. J. Marsh. (Ky.) 12.

**5.** A warrant, in an action of forcible entry and detainer, after traverse, is not amendable by introducing a number of new parties plaintiff. Power *v.* Sutherland, 1 Duv. (Ky.) 151.

An affidavit that the tenant does not

other,[1] or the striking out of a material allegation[2] cannot be effected in this manner.

8. **Abatement of the Action.**—The action of forcible entry and detainer abates upon the death of a party during its pendency;[3] but this rule does apply where the party dying is one of two or more joint parties;[4] nor will an action abate where the estate of the plaintiff has terminated during its pendency.[5]

9. **Evidence.**—(*a*) *What Must be Proved, and Burden of Proof.*—Under the plea of not guilty, or a general denial, every fact necessary to a recovery must be proven,[6] including the force or violence in making the entry, as well as the subsequent detention,[7] the possession, or right of possession, of the party turned out,[8] the time of the forcible entry or detainer,[9] the description of the premises as alleged,[10] and, where the action was brought before a court of limited jurisdiction, the facts necessary to give the court jurisdiction of the case.[11]

hold under one cannot be amended to show that he does not hold under two joint owners. Lockett *v.* Usry, 28 Ga. 345.

1. Where defendant was wrongfully dispossessed under a writ in an action for unlawful detainer, *held*, that the action could not be changed by amendment so as to allow the plaintiff to have judgment in ejectment, although the material allegations in ejectment were embraced in the complaint, and proved. Necklace *v.* West, 33 Ark. 682.

2. Where a complaint was filed under the forcible entry and detainer act, containing a statement of the estate of the complainant in the premises, and, upon the trial, a motion was made by complainant's counsel to strike out the statement, which motion was allowed, *held* (1) that there was no power in the justice to order the amendment, and the complaint remains in legal contemplation, as when filed, and so there is no defect in the complaint; (2) that, inasmuch as, by force of the construction heretofore given to § 23 of the act, proof of the estate of the complainant was no part of his case; therefore, that the fact of the allowance of the amendment could not affect the proof in the case, and no presumption arises therefrom that legal proof of complainant's case was not offered at the trial. State *v.* Bayley, 42 N. J. L. 132.

3. Moran *v.* Eldridge, 2 W. Va. 574; Havins *v.* Bickford, 9 Humph. (Tenn.) 673.

Where the defendant, in a proceeding of unlawful detainer, dies pending an appeal by the plaintiff below, the cause cannot be revived. Chapman *v.* Dunlap, 4 Gratt. (Va.) 86. But see Brewington *v.* Stephens, 31 Mo. 38, in which it is held that an action of forcible entry and detainer does not abate by the death of the defendant. Since it is an action for damages, and also for the possession of land, it should be continued against the heirs and the administrator. If the heirs have no interest in the premises, they can disclaim, and the suit can proceed against the administrator.

4. Carlisle *v.* Rawlings, 18 Mo. 166.

5. Casey *v.* King, 98 Mass. 503.

6. Gallagher *v.* Connell (Neb.), 36 N. W. Rep. 566.

7. Latimer *v.* Woodward, 2 Dougl. (Mich.) 368; Davis *v.* Ingersoll, 2 Dougl. (Mich.) 372, note.

The statute of 1809–10 dispensing with proof of actual force in certain cases of forcible entry and detainer is not retrospective, but prospective only. Reed *v.* Rawson, 2 Litt. (Ky.) 189.

8. Stiles *v.* Homer, 21 Conn. 507.

9. Hoffman *v.* Harrington, 25 Mich. 146.

10. In a suit under the act concerning forcible entry and unlawful detainer, for entry upon land claimed under the act of 1852, the plaintiff must prove that the defendant entered upon land within the lines described in the affidavit required by said act; and testimony of witnesses that the entry was within the lines of "plaintiff's claim," as pointed out by him, without identifying these with the lines of the affidavit, is sufficient to sustain the action. Cummins *v.* Scott, 20 Cal. 83.

11. Where a plaintiff, in unlawful detainer, relies on a judgment of a justice of the peace to establish his title, the jurisdiction of the justice as to the subject-matter of the suit in which the judgment was rendered must be shown. It is not

In landlord and tenant cases, the termination of the tenancy, either by expiration of the agreed time or by due notice or demand for possession, must be proved,[1] as well as the holding over,[2] and the fact that the parties occupy the position of landlord and tenant.[3]

The burden of proof is usually on the complainant; and it is incumbent on him to prove that his possession has been invaded by the acts complained of.[4]

(*b*) *Admissibility and Materiality.*—Title, not being an issue, evidence to disprove the complainant's title is inadmissible.[5] But

sufficient that the judgment appears to be in debt, and for an amount of which the justice has jurisdiction. But, if the record does not show that the justice had jurisdiction, the fact may be proved by evidence *aliunde*. Liss *v.* Wilcoxen, 2 Colo. Ter. 85.

**1.** In a suit by a landlord against his tenant, under section 13 of the Act of Forcible Entry and Detainer, the plaintiff must show that before suit brought he had made a written demand for possession; also that he had terminated the tenancy by notice to quit. Sullivan *v.* Cary, 17 Cal. 80.

In forcible entry and detainer by purchaser, under a mortgage against the mortgagor, the plaintiff must not only prove a demand upon the defendant, but that he refused or neglected to surrender possession; and the latter fact is not to be presumed from the fact of defendant's possession before the demand. Hersey *v.* Westover, 11 Ill. App. 197.

**2.** Murphy *v.* Dwyer, 11 Ill. App. 246; Reed *v.* Grant, 4 Cal. 176.

**3.** If tenancy of two or more defendants is averred in the complaint, such tenancy should be proved as averred. Snedeker *v.* Quick, 12 N. J. L. (7 Hals.) 129.

K. executed to H. a lease of property, which H. had been occupying as tenant of K.'s grantor, the term to continue to January 1, 1875. K. sold to L. In forcible detainer by L., against H., *held*, that L. need not prove a delivery of lease to H., nor adduce further evidence of attornment than this promise of H., with knowledge of the conveyance from K. to L. Hayes *v.* Lawver, 83 Ill. 182.

An answer that the defendant occupies, etc., under a written lease from the plaintiff for a term unexpired, will not oblige the plaintiff, replying in rebuttal on a breach of a clause therein—in this instance against sub-letting—to produce the lease, if he had already made a *prima facie* case. Zink *v.* Wilson, 3 W. Va. 503.

**4.** Stiles *v.* Homer, 21 Conn. 507.

In an action for unlawful detainer, brought under *Minnesota* Gen. Stat. 1878, ch. 84, § 11, in the municipal court of St. Paul, the plaintiff cannot obtain judgment of restitution simply upon the defendant's default to answer, but must prove his right to restitution. Hennessey *v.* Penderson, 28 Minn. 461.

**Pleading and Proof.**—Under the plea of "not guilty," plaintiff must prove every fact necessary to enable him to recover. Gallagher *v.* Connell (Neb.), 36 N. W. Rep. 566.

In an action of forcible entry and detainer, the question of title cannot, under the laws of *Missouri*, be considered. All that devolves on the plaintiff in such action is to show that he was lawfully possessed of the premises, and that the defendant unlawfully entered and detained the same. Goerges *v.* Hufschmidt, 44 Mo. 179.

**5.** Dutton *v.* Tracy, 4 Conn. 79; Fortier *v.* Ballance, 10 Ill. 41; Wheelen *v.* Fish, 2 Ill. App. 447; Walls *v.* Endel, 17 Fla. 478.

Upon an inquisition of forcible entry and detainer, proof of an equitable title in the prosecutor is irrelevant and improper. Mansfield *v.* Duvall, 2 Bibb (Ky.), 582.

In an action for forcible entry and detainer, title cannot be given in evidence by the defendant to prevent restitution. Respublica *v.* Schryber, 1 Dall. (Pa.) 68.

Neither title nor right of possession being involved in *Nevada*, it is erroneous to admit quitclaim deeds in evidence as tending to show possession. Lachman *v.* Barnett, 16 Nev. 154.

**Under the statute providing for ejectment for forcible entry and detainer,** the complainant in such action need not adduce evidence to his title. He must show that defendant entered the premises, and detained the possession of the same from the plaintiff. Bell *v.* Cowan, 34 Mo. 251.

**Land Sold as a Lot, and Not as a Street.**—The authorities of a town put A into possession of a piece of land, an angle

evidence of title is sometimes material to show the purpose with which the entry was made, and the character and extent of the possession;[1] though evidence of an adverse title cannot be given, even to prove the extent of the defendant's possession.[2] And in

formed by the intersection of two streets, which A held for thirty years, when the town sold it to B, and, after ten days' notice to A, put him into possession by force. A sued B and the town in an action of forcible entry and detainer. *Held*, that the deed from the town to B was admissible in evidence to show that the land was sold as a lot, and not as a street, etc., and that therefore the town, after the sale to B, had no right to dispossess him. Dennis *v.* Rainey, 8 Bax. (Tenn.) 501.

In forcible entry, it appearing that plaintiff has never made demand for possession, as required by Code Civil Proc., § 1160, subd. 2, and the court having rightly found "that plaintiff was never in the peaceable possession of the premises," and that defendant did not, with force or violence, or with strong hand, enter upon or break into said building or premises, the admission in evidence of a deed of the premises from defendant to another, made before the commission of the alleged wrong, if error, is harmless, and no ground for reversal of judgment. Tivnen *v.* Monahan (Cal.), 18 Pac. Rep. 144.

**Certificate of Pre-emption.**—In a process of forcible entry and detainer, a certificate of the register of the land office of the United States, that the defendant had filed in that office his declaration as the foundation of a claim for pre-emption of the premises, is incompetent evidence for any purpose. Gates *v.* Winslow, 1 Wis. 650.

1. Conaway *v.* Gore, 27 Kan. 122.

In an action for a forcible detainer, a lease to plaintiff under which he had formally been in possession, *held*, admissible to show the extent of such possession at the time of the alleged forcible detainer. Murphy *v.* Snyder, 67 Cal. 451.

Where actual possession of a part of premises is shown to be in the plaintiff, in an action of forcible entry and detainer the plaintiff's deed for the premises is proper evidence for the purpose of showing the extent of his possession. Huftalin *v.* Misner, 70 Ill. 205.

In an action for forcible entry and detainer, a return of an officer upon an execution, in a suit to which defendants were not parties, commanding the officer to put the complainant into possession of the lands in controversy, is *prima facie* evidence of the facts stated in it, as against strangers, though not admissible to prove the title of the complainant. Dutton *v.* Tracy, 4 Conn. 79.

Where the plaintiff, after introducing evidence tending to show an actual possession of the demanded premises by C., up to the time of the alleged forcible entry, introduced in evidence, against the defendant's objection thereto, a deed of the premises from C. to plaintiff, dated the month prior to said entry, for the avowed purpose of showing that at the time of such entry the apparent possession of the premises by C. was the possession of plaintiff. *Held*, that there was no error in admitting the deed; and that the fact sought to be established by the deed might properly have been proved by parol evidence. Morgan *v.* Higgins, 37 Cal. 59.

Where, in an action of forcible entry and detainer against a married woman, the record of a judgment in ejectment against her husband, and of her expulsion thereunder, was admitted in evidence against her objection. *Held*, that it was erroneous to exclude testimony that she was in possession under a homestead right in herself and children, as widow of a former husband, and independent of any right of the husband, defendant in the ejectment suit. Morrissey *v.* Stephenson, 86 Ill 344.

**In California,** a deed of the premises is not admissible in evidence, in an action of forcible entry and detainer, for the purpose of showing possession in the plaintiff at the time of the alleged entry of defendant; for a deed shows transfer of title to the grantee, but does not tend to show actual transfer of possession. Nor is it admissible to show a right of possession in the plaintiff; for the right of possession cannot be litigated in proceedings of forcible entry. Sanchez *v.* Loureyro, 46 Cal. 641.

2. Slate *v.* Eisenmeyer, 94 Ill. 96.

The defendant, having entered peaceably, not denying the fact of plaintiff's prior possession, but claiming under an entry certificate as a homestead, he cannot adduce evidence of such entry certificate for the purpose of showing that his subsequent refusal to surrender the possession on demand was not unlawful. Weldon *v.* Schlosser, 74 Ala. 355.

general every fact which tends to establish the character or extent of the possession of the complainant is admissible.[1] So, all facts which tend to establish fraud and collusion, or force, in the entry and detainer are usually admissible in evidence;[2] and proof as to

**1. Letters of Agent in Possession.**—The plaintiff in forcible entry and detainer may prove his possession of the premises by letters of his agents, received in the usual course of the mail, showing their possession as his agents. Julian *v.* Lacey, 14 Mo. 434.

**Evidence of Former Possession.**—On the trial of a complaint for a forcible entry and detainer, the defendants offered evidence to prove that the former owner of the land in question, under whom they claimed title, had been in undisputed possession thereof at one time during his ownership, and within eight years before the commission of the acts complained of. *Held*, that such evidence was admissible, though liable to be deprived of all force by evidence of possession acquired by the complainant subsequently. Hale *v.* Wiggins, 33 Conn. 101.

The complainant in forcible entry and detainer offered in evidence a lease of a barn (which barn, it was admitted, formerly stood on the land in question), executed to him by one of the defendants more than sixteen years before. It was held that it was admissible, though of little weight, to show possession of the complainant at the time. Dutton *v.* Tracy, 4 Conn. 79.

**Defence of Scrambling Possession.**—The defendant cannot, for the purpose of showing that the plaintiff had only a scrambling possession, introduce evidence to show that, during the whole period of the plaintiff's possession, third persons, with whom the defendants were not in privity, were stopping near the demised premises, awaiting an opportunity to take possession, when they could do so without force; but he may prove that, before the entry complained or, he had made attempts to take possesion, but was prevented by an exhibition of force by the plaintiff. Nor where the plaintiff entered without resistance, and remained for some weeks in the undisturbed possession, can the defendant prove that before his entry they had, under a claim of title, inclosed and occupied the premises, and were thus occupying it when he entered. Bowers *v.* Cherokee Bob, 45 Cal. 495.

**Knowledge of Entry of Defendant.**—In a case of forcible entry and detainer against G., F., and N., the plaintiff claimed that he had been in possession of the premises in question, his own right, for more than five years next before the alleged forcible entry, and on his cross-examination testified that, when he was informed by F. that said F. and G. had previously driven his (the plaintiff's) cattle off from the land in controversy, he informed F. that, if that was so, he would be sued. *Held*, that the plaintiff might be further inquired of as to his knowledge that G , before that time, had levied an execution on said premises, as tending to show that the plaintiff's knowledge of the acts of the defendants, from which he might infer that the defendants had made an entry upon said premises before said conversation. Gray *v.* Finch, 23 Conn. 495.

The question whether the complainant was in possession of the premises in controversy, with the knowledge and consent of the defendant, is material and important; but evidence upon the question, to be admissible, must clearly show such knowledge. Healy *v.* Russell, 35 Conn. 24.

**Evidence of Possession on Plea of Not Guilty.**—In a suit for forcible entry, where the defendant pleads not guilty, the issue is upon the defendant's forcible entry; therefore, records of other suits, between other parties, with respect to the property or possession, are *prima facie* irrelevant. To show relevancy, the privity or connection between the parties to the records and those before the court should first be suggested or shown. Horsefield *v.* Adams, 10 Ala. 9.

**2.** Under an indictment for forcible entry and detainer, evidence is admissible that the defendant, in forcibly entering, etc., assaulted and beat the party in possession. Higgins *v.* State, 7 Ind. 549.

The owner of land is liable, in forcible entry and detainer, if he makes a forcible entry upon the actual possession of the plaintiff. Therefore, it is not error to refuse to allow the defendant to prove a mortgage of the premises, and that he entered under the mortgagee. Huftalin *v.* Misner, 70 Ill. 205.

**Evidence Negativing Collusion.**—Where the petition charged that the defendant obtained possession through collusion with a tenant of the plaintiff, *held*, that proof negativing the averment of collusion was competent, and its competency was in no way affected by the fact of plaintiff's presence or absence when defendant obtained possession. Smith *v.* Meyers, 45 Mo. 434.

damages may be given.[1] It has been held that evidence is not admissible on the part of the defendant to show that the entry was made in good faith and under claim and color of title;[2] and evidence of the former proceeding, where the case has been removed to a higher court on account of the question of title being involved, is not admissible in the higher court.[3]

Any fact tending to prove the relation of landlord and tenant, the termination of the lease, and the holding over, is usually admissible in cases of landlord and tenant;[4] and the rule which requires that the proof shall support the allegation is as applicable to the action of unlawful detainer as to any other.[5]

(*c*) *Competency of Witnesses and Sufficiency of Evidence.*—The question of the competency of witnesses is governed by the rule in ordinary cases, parties in interest, in many of the States, being considered incompetent to testify;[6] and the force and effect of the evidence being a question for the jury, any evidence on a point, with the qualification that it must directly tend to support the issue of some part thereof, is usually sufficient.[7]

1. Evidence of the price which the lot brought at public renting, about the time of the expiration of the possessory interest of the defendant, is admissible to aid in arriving at the value of the rent. Spear *v.* Lomax, 42 Ala. 576.

2. Voll *v.* Hollis, 60 Cal. 569.

3. Neumoyer *v.* Andreas, 57 Pa. St. 446.

4. In an action of unlawful detainer, upon the trial a lease to the defendant from a third party is not admissible in evidence. Holland *v.* Green, 62 Cal. 67.

A tenancy may be inferred from the conversations and actions of the parties. An express contract need not be proven. Ladd *v.* Riggle, 6 Heisk. (Tenn.) 620.

Evidence proving that the tenant had, after the expiration of his lease, taken another term from one whom the plaintiff had authorized to lease, is proper in a traverse in forcible detainer. Allison *v.* Thompson, 1 Litt. (Ky.) 131.

In an action of unlawful detainer, if the title to the land is admitted, the notice to quit may be read in evidence, but not a summons in a like action in a municipal court, claiming the same premises as evidence in the circuit court. Zink *v.* Wilson, 3 W. Va. 503.

In an action of forcible detainer against a sub-lessee, the notice of the termination of the lease to the lessee and sub-lessee are admissible, even though lessee was a tenant at will. Reynolds *v.* Gage, 91 Ill. 125.

In unlawful detainer by the heirs against one who entered under a lease from the administrator, they may introduce the record of his final settlement, on which they were represented as heirs, to prove heirship. Lalonette's Heirs *v.* Lipscomb, 52 Ala. 570.

5. Klopper *v.* Keller, 1 Colo. 410.

6. **Under the New Jersey Statutes**, a complainant, in forcible entry and detainer against a husband and his wife, is not a competent witness, and is not made so by the subsequent admission of the defendants as witnesses for themselves. Yetman *v.* Dey, 33 N. J. L. (4 Vr.) 32.

**In Pennsylvania**, in forcible entry and detainer, the wife of the prosecutor may prove the force, but only the force. Respublica *v.* Shryber, 1 Dall. (Pa.) 68.

**In Virginia**, where the defendant claimed under a deed to himself and another as joint tenants, that other person is not a competent witness for him to sustain his right of possession. Adams *v.* Martin, 8 Gratt. (Va.) 107.

7. See Pauley *v.* Chapman, 2 Rob. (Va.) 235.

**Time of the Possession.**—A complaint, alleging a forcible detainer on a certain day within three years before suit, is sustained by evidence of such detainer on any day within such time. Warren *v.* Ritter, 11 Mo. 354.

Facts showing merely a possession by the plaintiff several years prior to the alleged forcible entry,—as, the existence of remains of an old fence or wall built by him,—are evidence of possession at the time of the alleged entry, sufficient to sustain the action. Hassett *v.* Johnson, 48 Ill. 68.

A complaint which claims the whole house is not sustained by evidence that plaintiff was possessed of only part of the

(*d*) *Objections to the Admission of Evidence.*—In some of the States it is made the duty of a justice, on the trial of forcible entry and detainer cases, to state upon his docket his reasons for admitting or rejecting evidence which has been objected to;[1] but a failure to do so is no cause for reversing a judgment, the requirement being directory only.[2] An objection to the admission of evidence on a single specified ground is a waiver of all other grounds of objection.[3] To reserve an exception to the introduction of certain proof, it must not only appear from the bill of exceptions that an objection was made to the introduction of the proof, but that the party excepted to the ruling of the court thereon.[4]

**10. Verdict.**—In an action for forcible entry and detainer, a general verdict, in effect, finds every essential fact necessary to authorize it;[5] and a finding that the defendant is guilty, as in the complaint alleged, if supported by proper allegations in the complaint, is sufficient.[6] Generally, a verdict which contains the substance of what is required[7] by the statutes on the subject will be

house upon which a forcible entry was made. House *v.* Wilder, 47 Ill. 510.

In actions under the statutes concerning "forcible entries and unlawful detainers," where plaintiff declared upon a lease of the premises by him to the defendant, evidence of a lease of all plaintiff's interest in the premises is not sufficient to sustain the action. Chandler *v.* Kent, 8 Minn. 524.

**Allegation of Entry and Proof of Detainer.**—Where, in an affidavit of forcible entry, etc., the allegation contained in the affidavit of the ptaintiff, and in the precept of a justice ordering a jury, is for a forcible entry only, and the proofs make out a case of forcible detainer only, the plaintiff cannot recover. Jordan *v.* Rouse, 1 Jones (N. Car.) L. 119.

**Failure to Support the Charge.**—In an indictment for forcible entry and detainer at common law, if the verdict is a general one, and the evidence fails to support either branch of the charge, there must be a *venire de novo.* State *v.* Ward, 1 Jones (N. Car.) L. 290.

**Projecting Eaves of Barn.**—A declaration that the defendant forcibly entered the plaintiff's close and built a part of his barn on the close, and thereby put and kept the plaintiff out of the possession and occupation of a part of the close, is supported by proof that the eaves of the barn projected over the close; and it is error for the judge to rule on the trial that it was for the jury to say whether the barn was a suitable structure and of reasonable dimensions for a fence, and that, if it was, its erection was not a trespass if it came onto the plaintiff's land no more than a fence of ordinary width would do. Smith *v.* Smith, 110 Mass. 302.

**Known and Recognized Boundary.**—In an action of forcible entry and detainer, that boundary line between adjoining tracts will be adopted which is well known and recognized, and not that which may have been established by recent survey. Prewitt *v.* Burnett, 46 Mo. 372.

1. Clark *v.* Stringfellow, 4 Ala. 553; Houghten *v.* Potter, 23 N. J. L. (3 Zab.) 348; Sauniere *v.* Wode, 18 N. J. L. (3 Har.) 296; Snediker *v.* Quick, 13 N. J. L. (1 Green) 306.

2. Clark *v.* Stringfellow, 4 Ala. 353; Houghten *v.* Potter, 23 N. J. L. (3 Zab.) 338.

3. McDevitt *v.* Lambert, 80 Ala. 536.

4. Spear *v.* Lomax, 42 Ala. 576.

5. Gorman *v.* Steed, 1 W. Va. 1; Smith *v.* Kilick, 10 Ill. (5 Gilm.) 293; Altree *v.* Moore, 1 Oreg. 350; Williams *v.* McMillan, 18 Ohio, 167; Beck *v.* Glenn, 69 Ala. 121.

The verdict of guilty, where it directly answers the issue, is sufficient to entitle the complainant to restitution without any special finding. Raymond *v.* Bell, 18 Conn. 81.

6. Williams *v.* McMillan, 18 Ohio, 167; Altree *v.* Moore, 1 Oreg. 350.

7. A verdict, on a writ of unlawful detainer, in these words "We, the jury, find for the plaintiff the premises in the summons mentioned," is in proper form. Lawson *v.* Dalton, 18 W. Va. 766.

In an action of unlawful detainer, a verdict in the form "We, the jury, find for the plaintiff for the premises sued

upheld.[1] In some States it must state that the premises are detained by force;[2] and the statement of the possession of the complainant, without designating the quality of his estate, is sufficient.[3] In *Indiana*, it is necessary for each juror to sign the verdict;[4] and in *Kentucky*, technical strictness in the language of the verdict is not required. The statement that the jury do not think or believe the defendants guilty will authorize a judgment in their favor.[5] The forcible entry should be shown. The statement that the defendant is guilty of withholding possession is not enough.[6] And, where the issue is forcible detainer, a verdict of forcible entry is erroneous;[7] but in *Kentucky*, where the issue is forcible entry and detainer, or forcible entry or detainer, the finding of either is sufficient.[8] And in *New Jersey*, when the action is against two as tenants, and only one is a tenant and in possession, a verdict cannot be found against him. It must be rendered in favor of both.[9] But in *California*, a verdict may be found in favor of one defendant and against another.[10] A verdict should be sustained

for, and assess the rents at $151," *held*, to be sufficiently definite. Beck *v.* Glenn, 69 Ala. 121.

In an action of forcible detainer, the jury simply found the defendant "guilty." Held, that it was sufficient, although it would have been more formal to add "in manner and form as alleged in the complaint." Smith *v.* Killeck, 10 Ill. (5 Gilm.) 293; but see Wall *v.* Goodenough, 16 Ill. 415.

A verdict in these words: "We, the jury, find for the plaintiff the premises in the summons mentioned" is in proper form, and the court may enter up judgment thereon. Lawson *v.* Dalton, 18 W. Va. 766; and see Mann *v.* Bryant, 12 W. Va. 516.

1. Murphy *v.* Lucas, 2 Ohio, 255.

2. Boxley *v.* Collins, 4 Blackf. (Ind.) 320; Bull *v.* Olcott, 2 Root (Conn.), 472.

A verdict, on a suit of unlawful detainer, "We, the jury, find that the defendants are unlawfully in possession, and withholding from the plaintiff the premises in the summons mentioned," *held*, not to be fatally defective. Mann *v.* Bryant, 12 W. Va. 516.

3. Sherrill *v.* Nations, 1 Ired. (N. Car.) L. 525.

A verdict is sufficient which describes the plaintiff's estate as "the owner of said house," without alleging whether he had any present estate of freehold or term of years from which he was forcibly kept out, etc. Grassett *v.* Smith, Phil. (N. Car.) L. 164.

4. Ward *v.* Crane, 3 Blackf. (Ind.) 393; Test *v.* Devers, 2 Blackf. (Ind.) 80.

5. Pollard *v.* Otter, 4 Dana (Ky.), 516; Jones *v.* Skiles, 1 A. K. Marsh. (Ky.) 54; Wheatley *v.* Price, 3 J. J. Marsh. (Ky.) 167; Rowe *v.* Rowell, 4 J. J. Marsh. (Ky.) 153; Breckinridge *v.* Quertemus, 4 Dana (Ky.), 493; Case *v.* Roberts, 4 Dana (Ky.), 596; Belcher *v.* Barrett, 4 Metc. (Ky.) 307.

6. Preston *v.* Kehoe, 15 Cal. 315; Wall *v.* Goodenough, 16 Ill. 415.

7. Sinclair *v.* Sanders, 3 J. J. Marsh. (Ky.) 303. See People *v.* Fields, 1 Lans. (N. Y.) 222; Raymond *v.* Bell, 18 Conn. 81.

In an action of "forcible entry and detainer," a verdict for "forcible detainer" only cannot be sustained, unless there is evidence in the record to support such verdict, although there may be evidence which would have justified a verdict of forcible entry. Hamrick *v.* Darnell, 43 Ga. 433.

8. Swartzwelder *v.* U. S. Bank, 1 J. J. Marsh. (Ky.) 38; Case *v.* Roberts, 4 Dana (Ky.), 596; McBrayer *v.* Wash, 6 J. J. Marsh. (Ky.) 464; Carpenter *v.* Shepherd, 4 Bibb (Ky.), 501.

9. Snediker *v.* Quick, 12 N. J. L. (7 Hals.) 129.

10. A verdict in favor of one defendant and against another, in forcible entry and detainer, is conclusive on the points that the plaintiff was peaceably in actual and exclusive possession, that the one defendant unlawfully and forcibly entered, and that the other did not assist in the trespass. Fremont *v.* Crippen, 10 Cal. 211.

Under an indictment charging forcible entry into a messuage and ten acres of arable land, the eviction to have been from the messuage, and the detainer from the messuage and land, the defend-

if the facts proven entitle the party to the protection of the statute.[1]

**11. Damages.**—(*a*) *Right to the Recovery of.*—Damages are not a necessary incident to a verdict for the plaintiff in a suit of forcible entry and detainer.[2] In some States it is optional with the plaintiff, having recovered judgment for possession, whether or not he will make an additional claim for damages;[3] in others the right to the recovery of damages is considered as belonging to the successful plaintiff,[4] unless specially restricted by statute;[5] and in still others the right is withheld.[6] In any event, the damages allowed cannot exceed the sum specifically claimed by the plaintiff.[7]

(*b*) *Elements of.*—The damages to be recovered must be the natural and proximate consequence of the act complained of.[8] The value of the rents and profits is an element of damage to be considered;[9] but the question of loss of profits is one decided

ant may be convicted of the detainer and acquitted of the entry. Commonwealth *v.* Rogers, 1 Serg. & R. (Pa.) 124.

On an indictment under section 11 of the statute (ch. 6) to prevent forcible entries and detainers, the jury may find the defendant guilty of the detainer only. People *v.* Anthony, 4 Johns. (N. Y.) 198.

1. People *v.* Fields, 1 Lans. (N. Y.) 222.

**The recordari** should be dismissed if it appears that, on regular proceedings before the justice, the jury has found that the relator had an estate in fee-simple in the land, and was forcibly ejected therefrom by the defendant. Little *v.* Martin, Phil. (N. C.), L. 240.

2. Hicks *v.* Herring, 17 Cal. 566.

3. Hicks *v.* Herring, 17 Cal. 566; Dustin *v.* Cowdry, 23 Vt. 631.

4. Hitchcock *v.* Pratt, 51 Mich. 263; Spillman *v.* Walt, 12 Heisk. (Tenn.) 574; Eads *v.* Woolbridge, 27 Mo. 251; Walter *v.* Cathcart, 18 Mo. 256; Brockway *v.* Thomas, 36 Ark. 518; Tomlin *v.* Green, 39 Ill. 225.

Under the Statute of Forcible Entry and Detainer, the party forcibly put out of the possession, even by him who has title and right of entry, is entitled to restitution, and may subject the disseizor to punishment by fine, and may sustain an action of trespass upon the statute, and recover threefold damages for the expulsion and detainer. Dustin *v.* Cowdry, 23 Vt. 631.

And the party thus ejected may, if he so elect, waive the penalty under the statute, and sustain an action of trespass *qu. cl.* against such disseizor, and the defendant will not be permitted to set up title in himself as a defence to such action. Dustin *v.* Cowdry, 23 Vt. 631.

**A lease authorized a confession of judgment in ejectment** in case of non-payment of rent. *Held*, that the tenant had no claim for damages sustained by reason of the exercise, by the landlord, of the right to eject under a writ of possession. Reams *v.* Pancoast, 111 Pa. St. 42.

Where the evidence showed that the tenant was in peaceable possession of the premises under an actual right; that he never agreed that the landlord might, under any pretext, forcible expel him; and that the landlord entered upon the premises, and evicted the tenant and his family, together with all their personal effects;—a verdict for $500 is not excessive. Moyer *v.* Gordon (Ind.), 113 Ind. 282.

5. Spear *v.* Lomax, 42 Ala. 576.

6. Fitch *v.* People, 16 Johns. (N. Y.) 141; Minor *v.* Knowles, 1 Root (Conn.), 142.

No claim for rent can be made, in a suit for forcible entry and detainer, under our statute. Clark *v.* Snow, 24 Tex. 242.

In forcible entry and detainer, where the jury find for the defendant they cannot assess damages against the plaintiff; he has no remedy upon his bond. Fowler *v.* Knight, 10 Ark. 43.

A forcible detainer suit cannot be maintained against two or more holding in severalty; nor can a judgment for money or damages be had in this form of action. Gould *v.* Hendrickson, 9 Ill. App. 171.

7. Moore *v.* Dixon, 50 Mo. 424. But see Holmes *v.* Horber, 21 Cal. 55; Tewksbury *v.* O'Connell, 25 Cal. 262.

8. Anderson *v.* Taylor, 56 Cal. 131; s. c., 38 Am. Rep. 52.

9. In an action on an appeal bond, in

differently in different States.[1] And damages are not recoverable for injury to credit; nor for bodily or mental pain;[2] nor for injuries suffered to lands other than those from which the plaintiff was actually ousted or kept out;[3] nor for damages to personal property on the premises.[4]

(*c*) *Double and Treble Damages.*—In some of the States the statutes allow the damages recovered to be doubled;[5] and in others they are permitted to be trebled.[6] In *Indiana*, increased damages are not permitted, on the grounds that the act for which

forcible entry and detainer, the rental only can be recovered as damages. Tomlin *v.* Green, 39 Ill. 225.

The sum of the rents, with such additional damages as the plaintiff had sustained in the way of his business, should be the measure of damages for the verdict of the jury, and double that sum for the judgment of the court. Cathcart *v.* Walter, 14 Mo. 17. This rule was doubted in Walter *v.* Cathcart, 18 Mo. 256.

Where the statute does not explicitly direct otherwise, the jury, in an action of unlawful detainer, should assess the value of the rent. To authorize a court to take such question from the jury, the law should be clear and imperative. Spear *v.* Lomax, 42 Ala. 576.

**In Tennessee**, in forcible detainer, rents are recoverable only incidentally; the acton is primarily possessory. Spillman *v.* Walt, 12 Heisk. (Tenn.) 574.

The plaintiff is entitled to recover damages as an incident to the recovery of possession in this form of action, except for damages to the freehold. White *v.* Suttle, 1 Swan. (Tenn.) 169.

**For What Time.**—In an action of forcible entry and detainer, the plaintiff can recover the value of rents and profits from the date of the entry to the rendition of judgment, without regard to whether he would have had the right to the possession of the premises during the whole of that time or not. Roff *v.* Duane, 27 Cal. 565.

**Waste and Other Injury.**—If the jury find for the plaintiffs, in an action of forcible entry and detainer, they may assess damages for all waste and injury committed upon the premises, as well as for all rents and profits of said premises, up to the time of the verdict. Eads *v.* Wooldridge, 27 Mo. 251.

The effect of section 12 of the *California* Forcible Entry and Unlawful Detainer Act is to put rents upon the same footing with other damages, their amount during the period of detention to be ascertained by estimating their monthly value. Howard *v.* Valentine, 20 Cal. 282.

**Demand for Damages.**—The complaint, in forcible entry and detainer, need not aver the value of the rents and profits, which may, nevertheless, be awarded as damages. Holmes *v.* Horber, 21 Cal. 55.

1. **In Michigan**, loss of profits is a proper element of the damages recoverable in an action of trespass for forcible entry and detainer. Hitchcock *v.* Pratt, 51 Mich. 263.

Evidence of loss of profits in the defendant's business, by being deprived of a business stand by a writ of unlawful detainer, is not admissible in proof of his damages sustained by action. Brockway *v.* Thomas, 36 Ark. 518.

2. Anderson *v.* Taylor, 56 Cal. 131; s.c., 38 Am. Rep. 52.

3. In an action of forcible entry and detainer, damages cannot be recovered for the detention of the whole of a tract of land when the ouster of the plaintiff is shown to be of a part only. Thompson *v.* Smith, 28 Cal. 527.

In an action of forcible entry and detainer, damages sustained by the landlord to premises adjoining the demised premises, in consequence of the tenant's holding over, cannot be recovered. Kower *v.* Gluck, 33 Cal. 401.

4. An allegation in a complaint in an action of forcible entry and detainer, that the defendant, since his alleged entry, has used the plaintiff's stock in trade and tools, and appropriated them to his own use, and that they will be rendered valueless if the defendant be not restrained by legal process, is improper. Gillam *v.* Sigman, 29 Cal. 637.

5. Labeaume *v.* Nelson, 34 Mo. 591; Feedler *v.* Schroeder, 59 Mo. 364; Parker *v.* Beeman, 28 Ga. 475.

6. Iburg *v.* Fitch, 57 Cal. 189; Tewksbury *v.* O'Connell, 25 Cal. 262; Shaw *v.* Hoffman, 25 Mich. 162; Houser *v.* Melcher, 40 Mich. 185; Thayer *v.* Sherlock, 4 Mich. 173; Dustin *v.* Cowdry, 23 Vt. 631.

damages are given is punishable criminally.[1] In *Michigan*, the right to increase damages extends only to injuries directly incident to the forcible entry and detainer, and not to those caused by acts of mere trespass, nor to the value of personal property within the premises entered and detained.[2] Such treble damages may be given in *California*, even though not claimed in the complaint.[3] And, in *Georgia*, it is held that a tenant cannot withdraw his claim so as to remove his liability for increased rent.[4]

**12. Judgment.**—(*a*) *What Judgment may be Rendered.*—In some States the action of forcible entry and detainer is given for the sole object of regaining a possession which has been unlawfully invaded, and no judgment for damages in such actions can be given,[5] while in others the judgment may be for damages or for both damages and restitution of possession.[6] Restitution may be ordered, even though the defendant has not appeared in the action;[7] and a forfeiture of a lease will support such a judg-

1. In an action by a tenant against his landlord, for forcibly entering upon, and ejecting the tenant from, the leased premises, such actions being punishable as criminal offences, actual compensatory damages only are recoverable; and the motive with which they are done is immaterial, and not proper to be pleaded or proved. Moyer *v.* Gordon (Ind.), 113 Ind. 282.

2. Shaw *v.* Hoffman, 25 Mich. 162.

The plaintiff, being in possession of a certain building, the defendant forcibly entered it, ejected him therefrom, and forcibly and with strong hand held him out; and also at the same time took and carried away, and converted to his own use, certain specified articles of personal property belonging to the plaintiff. The jury, on general issue pleaded, rendered a general verdict for the plaintiff for $650. On motion for treble damages under the act allowing such damages. *held*, that said act applied only to such damages as resulted from the eviction and detainer, and refused the motion. Thayer *v.* Sherlock, 4 Mich. 173.

In an action by a complainant in forcible entry and detainer, for treble damages, under *Michigan* Comp. Laws, § 6717, only what the jury specifically reports as "damages" can be trebled. This cannot include losses resulting to the complaintant from the breach of the defendant's express promise to surrender possession; and it is doubtful if it covers loss of profits for goods which the complainant was prevented from exposing for sale on the premises. Houser *v.* Melcher, 40 Mich. 185.

To such action for treble damages, the provision of Mich. Comp. Laws, ch. 185, for general pleading, does not apply. Houser *v.* Melcher, 40 Mich. 185.

3. Tewksbury *v.* O'Connell, 25 Cal. 262.

4. Parker *v.* Beeman, 28 Ga. 475.

5. Poe *v.* Bradley, 44 Ark. 500; Robinson *v.* Crummer, 10 Ill. (5 Gilm.) 218.

In an action of forcible entry and detainer, the judgment should be only for possession and costs, and not for rents. Walker *v.* McGill, 40 Ark. 38.

**Procedure.**—In an unlawful detainer, where it appears that the plaintiff was in possession when the action was brought, judgment should be for defendant. Hurst *v.* Dulany (Va.). 5 S. E. Rep. 802.

If the plaintiff, in an action of forcible entry and detainer, dismiss his suit after the execution of the writ, as he has a right to do, the court ought to render judgment that the defendant be restored to the possession of the improvement, and for costs. Fleeman *v.* Horen, 8 Ark. 353.

**In Tennessee**, a writ of restitution cannot be ordered on conviction in a criminal process. State *v.* Walker, 5 Sneed (Tenn.), 259.

6. Farwell *v.* Easton, 63 Mo. 446; Kingman *v.* Abington, 56 Mo. 46; King *v.* Lawson, 98 Mass. 309. And see Johnson *v.* Tuggle, 27 Miss. 836; Atchley *v.* Latham, 39 A. K. Marsh. (Ky.) 164; Spear *v.* Lomax, 42 Ala. 576; Gayle *v.* Overton, 1 J. J. Marsh. (Ky.) 549.

7. Under the Civil Code, where the traverser of a verdict of a jury in a case of forcible entry and detainer fails to appear when the cause is called for trial, a judgment for possession may be rendered in favor of the traversee, although no issue on the traverse was joined. Dibble *v.* Porter, 1 Duv. (Ky.) 190.

ment.[1] In *New York*, the judgment of restitution may also impose a fine, but it is not always necessary that it should do so.[2] A joint judgment may be entered against defendants acting jointly.[3] Where the estate of the plaintiff terminates during the pendency of the action, he is still entitled to judgment for his damages and costs.[4] But a plaintiff can only recover for what he had been dispossessed of before the commencement of the action;[5] and, in such action, judgment cannot be rendered against the surety on defendant's appeal bond.[6] The general rule is that no judgment can be given for anything not asked for in the complaint or warrant.[7]

(*b*) *Form of.*—A regular judgment must be entered; an entry by the justice, in his docket, after the verdict, of "judgment given accordingly," is not sufficient.[8] And it must describe the land so

1. In an action under Minn.Gen. Stat., ch. 84, commenced Feb. 10, 1879, the finding was that on Jan. 7, 1879, plaintiff was, had since been, and then was, owner in fee of certain premises; that defendant wrongfully and unlawfully was detaining the same from plaintiff, who was entitled to the immediate possession thereof, in that on or about said January 7th plaintiff leased said premises to the defendant for the term of one month from that day, defendant agreeing to pay $12 as rent for said term in advance—that is, on said January 7th; that defendant entered into possession under said lease, but had paid no part of the rent. *Held*, that this finding entitled plaintiff to restitution of said premises under section 11 of the act. Wright *v.* Gribble, 26 Minn. 99.

2. On an indictment under the second section of the *New York* statute of session 11, ch. 6, to prevent forcible entries and detainers, a fine is required to be imposed on a party only where there is a conviction, upon view, according to the first section of the act. People *v.* Anthony, 4 Johns. (N. Y.) 198.

The supreme court, on awarding restitution, is not required by statute to impose a fine. People *v.* Runkel, 9 Johns. (N. Y.) 147.

3. In a proceeding under the *Missouri* statute, where one defendant comes into possession subsequently to the other, and holds for a short time, a joint judgment for the rents and profits is not improper, if they have been acting in concert to hold as agents of a third party so as to shift the burden of proof of title. Kingman *v.* Abington, 56 Mo. 46.

In an action against a tenant and his sub-tenants for unlawful detainer, judgment was rendered by the *San Francisco* court against the sub-tenants for restitution, and afterwards against the tenant for treble damages. *Held*, not to be a compliance with the statute, and therefore erroneous, the court being one of special and limited jurisdiction. Iburg *v.* Fitch, 57 Cal. 189.

4. Where a plaintiff in forcible entry and detainer had a good cause of action when the suit was commenced, but his own tenancy, which was for years, terminated during the pendency of action, *held*, that he was entitled to costs and such a judgment as would give him the benefit of his recognizance and rent until his estate terminated. King *v.* Lawson, 98 Mass. 309.

5. Upon the trial of a case of forcible entry and detainer, it appeared that the defendant took forcible possession of a part of the plaintiff's land before the commencement of the suit, and part afterwards. *Held*, that in this proceeding the plaintiff could recover only so much of the land as he was dispossessed of before suit brought. White *v.* Suttle, 11 Humph. (Tenn.) 449.

6. Gruenewald *v.* Schaales, 17 Mo. App. 324.

7. Feedler *v.* Schroeder, 59 Mo. 364; Gayle *v.* Overton, 1 J. J. Marsh. (Ky.) 549.

In an action of unlawful entry, where no demand for rent is set up in the complaint, it is error to render judgment for rent. Johnson *v.* Tuggle, 27 Miss. 836.

The plaintiff in forcible entry and detainer may recover according to his proof, although it be less than set forth in his declaration. Atchley *v.* Latham, 3 A. K. Marsh. (Ky.) 164.

8. Crane *v.* Dod, 2 N. J. L. 340; and see Weller *v.* Parke, 3 N. J. L. 661; Cowman *v.* Barber, 3 N. J. L. 688; Kerr. *v.* Phillips, 5 N. J. L. 818.

An entry in the following words: "Parties appeared ready for trial. After hear-

that it can be identified as that mentioned in the complaint,[1] though a defective description in the judgment may be aided by reference to a sufficient description in the complaint.[2]

(*c*) *Costs.*—The successful party should have judgment for costs;[3] and in proceedings of this character they are to be taxed by the same rules as when before circuit court commissioners or other officers having jurisdiction of such cases.[4]

(*d*) *Effect and Conclusiveness of.*—The judgment in forcible entry and detainer is conclusive as to all matters necessarily involved in and decided by the action; as, the right to possession at the time of the entry, and the force, and, in another class of cases, the relation of landlord and tenant, and the wrongful holding over;[5] And a judgment of a justice of the peace is subject to the

ing the evidence, the court declares in favor of the plaintiff against the defendant. Costs taxed to defendant, $6.85." was held to be an insufficient recital of judgment for the restitution of premises. Allen *v.* Corlew, 10 Kan. 70.

A judgment thereon that the plaintiff have a restitution of the messuages, lands, and tenements, etc., cannot be supported. Applegate *v.* Applegate, 16 N. J. L. 321.

In an action of unlawful detainer against a tenant holding over after expiration of his term, the jury in a justice's court found "in favor of the plaintiff." and the justice merely made an entry that "The court renders judgment according to the verdict." *Held*, that there was no judgment. Swift *v.* Cornes, 20 Wis 397. But see Clay *v.* Clay, 7 Tex. 250, in which it was held that, in a case of forcible entry and detainer before a justice, where the jury returned a verdict for the plaintiff, and the justice made an entry on his docket, opposite to the verdict, of "Judgment rendered, 17th April, 1849," there was a sufficient entry of judgment.

1. Thiman *v.* Meier, 25 Mo. App. 306.
2. House *v.* Camp, 32 Ala. 541.
3. Walker *v.* McGill, 40 Ark. 38; Fleeman *v.* Horen, 8 Ark. 353; Allen *v.* Corlew; 10 Kan. 10; Poe *v.* Bradley, 44 Ark. 500; King *v.* Lawson, 98 Mass. 309.
4. Dibell *v.* Brinckerhoff, 22 Mich. 371.

**A Charge for Constables' Fees** for attending on a jury, in an action of forcible entry and detainer, is not a legal charge. Smith *v.* Williamson, 11 N. J. L. 313.

In *New York.*—The complainant, on an award of restitution in his favor, is not entitled to recover attorney and counsel fees as part of his costs and expenses authorized to be assessed in his favor by section 14. People *v.* Townsend, 6 How. (N. Y.) Pr. 178.

A certificate of the payment of costs, and securities given for further costs, is sufficient without any bond for condemnation money, in forcible entry and detainer cases founded on section 15 of the 9th division of the Penal Code. Taylor *v.* Gay, 20 Ga. 77.

**Disregarding Errors.**—An affidavit, on motion in the supreme court for a retaxation of costs in proceedings for forcible entry and detainer commencing before a county judge, and brought to the supreme court by *certiorari*, is not deemed asmade in the original proceeding, within section 471 of the Code; and therefore an error in entitling it in the county court instead of in the supreme court may be disregarded. People *v.* Townsend, 6 How. (N. Y.) Pr. 178.

5 A judgment for restitution, in forcible entry and detainer, for part of a tract of land, is conclusive of the right of possession, at the date of such entry, as to the whole tract; and, when the restitution is made, the *status quo* is restored, and all constructive possession arising out of the defendant's actual possession under color of title is extinguished. Bradley *v.* West, 68 Mo. 69.

The rule that a judgment, on a plea in abatement, is final in an action for specific recovery of land or goods, applies to an action under the *Illinois* forcible entry law. Steele *v.* Grand Trunk Junction R. Co., 20 Ill. App. 366.

The issue embraced in a suit for the forcible entry and detainer of certain premises cannot be retried after judgment, because the subsequent suit may embrace premises not included in the first. The consequences of the first judgment cannot be avoided by a mere enlargement of the claim. Harvie *v.* Turner, 46 Mo. 444.

The record of conviction, under the first section of the *New York* act of ses-

same rules as those of the higher courts.[1] But a judgment is not conclusive as to anything not contained within the issues, and is no bar to an action for anything not necessarily settled and decided thereby.[2]

**13. Enforcement of the Judgment.**—(*a*) *Execution.*—It would seem that a judgment for damages in forcible entry and detainer can be collected by execution, the same as any judgment for money only.[3]

(*b*) *Restitution of Possession.*—Restitution of possession of premises will be awarded one whose peaceable possession was forcibly interfered with, without regard to the question whether the defendant had or had not any rights in the property.[4] And

sion 11, ch. 6, to prevent forcible entries and detainers, is not traversable; and, if it shows that the justice had jurisdiction and proceeded regularly, it is conclusive, and a bar to any suit brought against the justice. Mather *v.* Hood, 8 Johns. (N. Y.) 44.

Where, by the contract of partnership, the committee was to have possession of the properties of all the contracting companies for the space of three years, and an action of unlawful detainer was brought by one of the companies to recover its property at the end of two years, *held*, that the contract was, as to the remainer of the term, unexecuted, and could be repudiated as *ultra vires*. Mallory *v.* Hananer Oil-works (Tenn.), 20 Am. & Eng. Corp. Cas. 478; s. c., 8 S. W. Rep. 396.

A judgment for plaintiff, in an action of unlawful detainer, is conclusive as to the existence of the relation of landlord and tenant, and as to defendant's wrongful holding over. Norwood & Kirby, 70 Ala. 397.

1. A justice's judgment in a case of forcible entry, under statute March 13, 1853, art. 19, is a judgment within the Code, § 511, and, as such, may be reversed, vacated, or modified by the court of common pleas. Kelly *v.* Nichols, 10 Ohio St. 318.

**2. Inquiries to Other Lands.**—A recovery, in forcible entry and detainer, of a part of a lot of land, is not a bar to an action of trespass alleged to have been committed on another part of the same lot. McDonald *v.* Lightfoot, 1 Morr. (Iowa) 450.

A defendant in an action of forcible entry and detainer is not prejudiced by the excess of a judgment against him for more land than he claims. Johnson *v.* West, 41 Ark. 535.

A judgment for unlawful detainer, under the *Alabama* Rev. Code, §§ 3311–12 is no bar to an action for previous damages not therein included. Belshaw *v.* Moses, 49 Ala. 283.

**Against Third Party in Possession.**—Judgment without execution by landlord against lessee, does not prevent lessee's bringing action against a third person for possession. Kelly *v.* Clancy, 15 Mo. App. 519.

**Crops Growing on Premises.**—An action of forcible entry and detainer by a landlord against his tenant, for the restitution of the whole or a part of a farm, does not necessarily involve the ownership of the corn grown by the tenant upon the farm during his occupancy. And a judgment in such action is no bar to an action by the tenant against the landlord for the conversion of such corn, or to any after-action brought by either party. Waite *v.* Teeters, 36 Kan. 604.

**Action for Title.**—A justice's judgment in a forcible detainer proceedingis no bar to another action as to the title of the premises. Dale *v.* Doddridge, 9 Neb. 138.

**3. Abuse of Execution.**—The officer is liable for acts of undue haste, oppression, and injury, amounting to abuse of process, committed in executing a judgment for complainant in forcible entry. Andrea *v.* Thatcher, 24 Wis. 471.

**Stay of Execution.**—After judgment in the circuit court, in unlawful entry and detainer, from which no appeal was taken, an entry was made to the effect that defendant petitioned for improvements made on the premises, and that, by consent of plaintiff's attorney, a stay of excution was granted. *Held*, that the court had no authority to grant a stay of execution, and at the subsequent term an execution for damages (the judgment for possession having been satisfied) might issue. Sims *v.* Kelsay, 75 Mo. 68.

4. Baker *v.* Dickson, 62 Cal. 19. *Compare* Holland *v.* Green, 62 Cal. 67.

where the proceedings are quashed or reversed on appeal or *certiorari*, it is a general rule to award a writ of restitution to restore the possession to the defendant;[1] but this is not a matter of right, and depends upon the exercise of a sound discretion by the court.[2]

In executing the writ of possession, the officer may enter the premises forcibly, if necessary; and, having entered, it is his duty to remove all property, as well as the person, of the defendant, doing as little damage and using as little force as possible in order to effect his purpose.[3] And a misdescription of the character of

Where a party has been put out of possession of land by an abuse of the process of law, there must be restitution as a matter of course, unless some new matter has intervened in the meantime. And until restitution is made no application for an injunction will be entertained. Perry *v.* Tupper, 71 N. Car. 380, 385. See Perry *v.* Tupper, 70 N. C. 538.

**Restitution When an Appeal Has Been Taken.**—On the dismissal of an appeal by the defendant in a case of forcible detainer, the court may award restitution. Harlem *v.* Scott, 3 Ill. (2 Scam.) 65.

Where the circuit court affirms a judgment of a justice of the peace, it is not error to remand the cause to the justice to issue a writ of restitution. Murry *v.* Harper, 3 Ala. 744.

On appeal by a plaintiff in forcible detainer, to the district court, and a verdict, "We find the defendant guilty, and that plaintiff only had possession of the land that the house occupied," *held*, that a motion by the plaintiff to be put in possession was properly overruled, it not appearing that the right of the plaintiff to the possession had not expired before the final trial. McLaughlin *v.* First Nat. Bank, 23 Iowa 202.

**In Maryland,** an inquisition of forcible entry and detainer was quashed as to the detainer and affirmed as to the forcible entry, and restitution was awarded. Proprietary *v.* Brown, 1 Har. (Ind.) 428.

**The Pennsylvania Act of 1865** making the *certiorari* a *supersedeas* does not apply to writs of possession issued upon proceedings in forcible entry under the act of 1772 in that regard. Guarantee Co. *v.* De Coursey, 10 Phila. (Pa.) 88.

**One Copartner Dispossessing Another** should, on a finding in an action for forcible entry and detainer in favor of the latter, be restored to his joint possession. Robertson *v.* Robertson, 2 B. Mon. (Ky.) 235.

**Restitution Against Third Parties Ousting Defendant.**—A defendant in forcible entry, against whom judgment is rendered, which is afterwards reversed, but who does not lose possession of the property under or through the judgment, is not entitled to be restored to possession as against third parties who have ousted him during the pendency of the action. Bowers *v.* Cherokee Bob, 46 Cal. 280.

**After Judgment in Ejectment.** — A plaintiff successful in forcible entry should not be restrained from having restitution because the defendant has recovered judgment in ejectment from the premises. Dedman *v.* Smith, 2 A. K. Marsh. (Ky.) 260.

The writ of restitution obtained in an action of forcible entry and detainer does not determine either the right of property or the right of possession, and constitutes no defence to an action of ejectment. Mitchell *v.* Hagood, 6 Cal. 148.

1. Commonwealth *v.* Bigelow, 3 Pick. (Mass.) 31; Runyon *v.* Hale, 10 Ark. 476; s. c., *Ex parte* Williamson, 8 Ark. 424; Kennedy *v.* Hamer, 19 Cal. 374; Watson *v.* College, 2 Jones (N. C.) L. 211.

2. Towle *v.* Smith, 27 Wis. 268; Kennedy *v.* Hamer, 19 Cal 374.

Although an execution on a judgment for the complainant in forcible entry and detainer be levied after a *supersedeas* by writ of error, the court, in an exercise of sound discretion, will not order restitution of the estate so levied upon where it appears from the record that the complainant was forcibly dispossessed of such estate by the party moving for restitution. Dutton *v.* Tracy, 4 Conn. 79.

Upon the reversal of a judgment for the plaintiff in a process of forcible entry and detainer, no restitution of possession is awarded. Bird *v.* Bird, 2 Root (Conn.), 411; Bull *v.* Alcott, 2 Root (Conn.), 472.

Where the case itself shows that the issuing of the writ would work manifest oppression and injustice, it will be refused. Watson *v.* College, 2 Jones (N. Car.), 211.

3. Miller *v.* White, 80 Ill. 580.

An officer executing a writ of possession is bound to remove all persons in

the possession to which the plaintiff is entitled, or of the premises, in the writ, is not necessarily fatal, as the complaint may be looked to in aid of it.[1] As a general rule, all persons in possession of the premises may be dispossessed under the writ;[2] but it is held, in *Kansas*, that the officer has no right to remove a party who does not hold under the defendant in the writ.[3] A bond is sometimes required to be given to the sheriff or other officer who executes the writ.[4]

**14. Appeals and Reviews.**—(*a*) *When Appeal may be Taken.*—The question as to what judgments and determinations may be reviewed or appealed from, being generally governed by statutory regulations, varies largely in the different States. In *Mississippi*, an action of forcible entry and detainer may be taken by a writ of error on appeal from the circuit court to the supreme court,[5] but a proceeding before a magistrate cannot be removed to the high court of errors and appeals by such a writ;[6] and, in *California*, no

possession. The test is that the plaintiff must be so established in his possession, by the officer, that any person entering upon him, *se invito*, will be indictable for a forcible entry. The officer is not bound to remove the tenant's goods, but may do so as the agent of the plaintiff. Union Township *v.* Bayliss, 40 N. J. L. 60.

**Co tenants.**—In an action of forcible entry and detainer against a co-tenant, the writ of restitution should only put the plaintiff in joint possession with the defendant. McHose *v.* South St. Louis Fire Ins. Co., 4 Mo. App. 514.

A plaintiff in whose favor a writ of possession had issued rode about the lands with the sheriff, who said to him: "Here is your land; I put you in possession." But the tenants who were in possession were not dispossessed, nor was any notice given them to yield possession. *Held*, not an execution of the writ. Lankford *v.* Green, 62 Ala. 314.

1. McHose *v.* South St. Louis Fire Ins. Co., 4 Mo. App. 514.

In unlawful entry and detainer, the complaint upon which the original writ was issued by the justice, under W. Va. Acts 1864, § 13, may be looked to by the court in aid of the description of the premises contained in the writ. Moore *v.* Douglass, 14 W. Va. 708.

2. In the absence of any showing to the contrary, one not specially named in a writ of possession, but in possession of the premises when the action of forcible entry was brought, will be presumed to have occupied the land *pendente lite*, and to be a proper subject for removal under the writ. Thomasson *v.* White, 6 Baxt. (Tenn.) 148.

Servants of a defendant in forcible entry and detainer may be dispossessed under the writ of restitution. The non-residence of the defendant is immaterial. De Graw *v.* Prior, 68 Mo. 158.

On a warrant of forcible detainer, the tenant cannot resist restitution to him from whom he acquired possession. Ball *v.* Lively, 2 J. J. Marsh. (Ky.) 181.

**In South Carolina.**—A defendant, having pleaded guilty to an indictment for forcible entry and detainer, his son-in-law took possession of the premises before a writ of restitution issued; which, when issued, gave to the sheriff the power to turn him out. State *v.* Gilbert, 2 Bay. (S. Car.) 355.

**Removal of Cestui que Trust in Action Against Trustee.**—A held a written lease as trustee of B, who was in possession. *Held*, a writ of possession, obtained by the landlord in forcible entry and detainer against A, that the officer was bound to remove B. Danforth *v.* Stratton, 77 Me. 200.

**Proof of Lawfulness of Possession.**—Such a writ, without the record, may be proof of the lawfulness of a party's possession; otherwise, the return of the officer thereon. Thomasson *v.* White, 6 Baxt. (Tenn.) 148.

3. Wallace *v.* Hall, 22 Kan. 271.

4. The provision in the statute that a writ of possession shall not be executed unless a bond is given to the sheriff "or other person" does not refer to the defendant in the action as such "other person," but to the sheriff or other officer to whom the writ is directed. Mitchell *v.* Gibson, 14 Ark. 224.

5. Gill *v.* Jones, 57 Miss. 367.

6. Robertson *v.* Williams, 6 How. (Miss.) 579.

appeal can be taken from a verdict in an action against a tenant for holding over.[1] In *Minnesota*, there is no appeal from an order overruling a demurrer from the municipal court of Minneapolis to the supreme court;[2] and, in *Ohio*, the supreme court cannot directly review the proceedings of a justice of the peace, even though leave to file a petition in error in the common pleas may have been refused.[3] An appeal, however, being a valuable right and in furtherance of justice, the laws relating to it are to be liberally construed.[4]

(*b*) *Questions Considered.*—It is a general rule that objections not taken in the court below will not be noticed on error or appeal unless the complaint is so defective that it cannot be made the foundation for a judgment.[5] The failure of the record to show the formal organization of the court below cannot be considered;[6] and, where there is evidence on both sides in the court below, the court on appeal will not usually interfere.[7] The general rule seems to be that all questions which affect the substantial rights of the parties are to be considered in other cases in general.[8]

1. Carter *v.* Howell, 26 Ga. 397.

2. Gray *v.* Hurley, 28 Minn. 388.

3. Carroll *v.* O'Conner, 25 Ohio St. 617.

4. State *v.* Clark (Neb.), 38 N. W. Rep. 832.

**Repeals by Implication not Allowed.**—The rule not allowing repeals by implication, unless in a case of plain and unavoidable repugnancy, applied to the *Tennessee* Code, §§ 3363, 3373a, and 3373b, regulating the possession on an appeal in an action for unlawful detainer. Buchanan *v.* Robinson, 59 Tenn. 147.

**Affect of Change of Action by Amendment.**—Where an action of forcible entry and detainer has been so altered, by striking out a part of the complaint, as to resolve it into an action for possession and damages, and the appellee obtained and is maintaining a decree obtained in the latter form, he cannot object that, being originally framed as an action of forcible entry and detainer, the court has no jurisdiction on appeal. Mullen *v.* Wine, 9 Colo. 167.

**Where Brought to Trial.**—Appeals to the district court, in forcible entry and detainer proceedings, in Ramsey county, Minn., may properly be brought to trial at the special terms held every Saturday under and in pursuance of the order of said court, made on March 11, 1876, and subsequently filed and entered *nunc pro tunc* as of that date under said court's direction. Hoffman *v.* Parsons, 27 Minn. 236.

5. Hilliard *v.* Carr, 6 Ala. 557; Clay *v.* Clay, 7 Tex. 250; Hightown *v.* Fitzpatrick, 42 Ala. 597.

Where proceedings commenced before a justice of the peace, on forcible entry and detainer, are removed to an appellate court, the case must be tried upon the record without a declaration or jury; and the justice has no right to enter, upon his minutes, other evidence than such as is made ground for exceptions. Aldridge *v.* Hightower, 4 Port. (Ala.) 418.

**Errors Not Excepted to.**—When both parties acquiesce in the instructions of the circuit court, the supreme court will not consider them on appeal. Johnson *v.* West, 41 Ark. 535.

6. Brown *v.* Ashford, 56 Miss. 677.

7. **Review.**—Where, on a jury trial for forcible entry and detainer, defendant admits the entry and force, but sets up that plaintiff was holding as his (defendant's) tenant, and there is evidence both ways on this point, mainly by the parties themselves, as witnesses, and the jury find for plaintiff under an instruction that the case turns upon the nature of plaintiff's holding, whether in his own right or as tenant, a refusal to grant a new trial, is not erroneous, unless the verdict is most manifestly contrary to the evidence. Monroe *v.* Carter, 48 Ga. 174.

8. **Question of the Statute of Limitations.**—Where the jury find a verdict for the plaintiff in an action of unlawful detainer, brought before a justice, and taken by appeal to the circuit court, if it is proven on the trial that the defendant had been in the actual continuous possession of the land in controversy for more than two years, and it does not appear that the cause of action arose within two

(*c*) *The Relief Granted.*—In an action of forcible entry and detainer, upon reversal on appeal, the cause may be remanded,[1] and a new trial may be ordered;[2] or, where a judgment is erroneous only as to some particular part, and proper as to the balance, it may be corrected as to that part and affirmed as to the residue.[3]

(*d*) *Review by Certiorari and other Writs.*—In some States the review may be effected by means of the writ of *certiorari* or *recordari*,[4] in some of which this remedy would seem to be exclusive,[5] and in others either the appeal or the review may be taken.[6] The

years prior to the commencement of the action, it is the duty of the court, on the motion of the defendant, to set aside the verdict and direct a new trial. Hays *v.* Altizer, 24 W. Va. 505.

**Denial of Motion to Remand.**—Overruling a motion in an action of forcible entry and detainer, that the cause be remanded pursuant to 2 *Indiana* Rev. Stat., 607, § 12, to be certified by the justice of the peace to the circuit court, as to the title of real estate having been put in issue, is not a ground for a new trial; it must be assigned independantly in the supreme court, as error. Tibbetts *v.* O'Connell, 66 Ind. 171.

**Failure to Fill Recognizance.**—Where the defendant in a process of forcible entry and detainer asserts no right in the premises except by virtue of a contract with the complainant, he cannot be defaulted in the appellate court for want of the recognizance called for by *Maine* Rev. Stat., ch. 94, § 6, when the case has been tried in the court below, and judgment rendered in his favor there. Sweetser *v.* McKenney, 65 Me. 225.

**Failure to Take Advantage of Plaintiff's Entry.**—A defendant, after appealing to the court of common pleas from a judgment rendered against him by a justice of the peace in a suit on Rev. Stat., ch. 104, § 4, to recover possession of a tenement voluntarily removed from the tenemant, and the plaintiff thereupon took and kept possession thereof. The defendant afterwards entered his appeal and was defaulted. *Held*, that the plaintiff was entitled to judgment, the defendant not having taken advantage, at the term when he entered his appeal, of the plaintiff's entry and possession, by way of plea *puis darrein continuance*. Crosby *v.* Wentworth, 7 Metc. (Mass.), 10.

**Failure to Prosecute.**—In forcible entry and detainer cases, where the detainer fails to prosecute his appeal in the circuit court, the judgment of the justice may be affirmed. Feedler *v.* Schroeder, 59 Mo. 364.

1. Turnley *v.* Stinson, 1 Ala. 456.

2. In proceedings under the act of assembly, after verdict for the plaintiff the court may grant a new trial to the defendant; and, upon the dissolution of the court, the plaintiff must proceed *de novo*. Hammock *v.* Wilson, 2 Va. Cas. 321.

The circuit court, having set aside the proceeding in a case of forcible entry and detainer in *Arkansas*, brought there by *certiorari*, can rightfully order a trial *de novo*. Nicks *v.* Rogers, Hempst. 80. This decision was an affirmance in an equal division of the court.

3. A judgment in forcible entry and detainer, which is erroneous in regard to costs, will not be wholly reversed on that account, but will be corrected as to costs and affirmed as to the residue. Smith *v.* Williamson, 11 N. J. L. 313.

4. People *v.* Smith, 24 Barb. (N. Y.) 16; People *v.* Runkle, 9 Johns. (N. Y.) 147; Lane *v.* Marshall, Mart. & Y. (Tenn.) 255; Knapp *v.* Gamsby, 47 Mich. 375; Smith *v.* Williamson, 11 N. J. L. 315; Walter *v.* McSherry, 21 Mo. 76; Newton *v.* Leary, 64 Wis. 190; Day *v.* Johnson, 4 Coldw. (Tenn.) 231.

5. No appeal lies from erroneous proceedings in forcible entry and detainer; the remedy is by writ of *recordari* or of false judgment. Rev. Code, ch. 62, § 23, applies only to appeals from the ordinary subjects of jurisdiction of justices of the peace. Grissett *v.* Smith, Phill. (N. Car.) L. 164.

6. Knapp *v.* Gamsby, 47 Mich. 375, and see Griffin *v.* Griffin, Phill. (N. Car.) L. 167.

In an action of forcible detainer, at any time before the writ of possession is executed either party may take the cause to the circuit court by *certiorari*, and an appeal will also lie within the two days allowed by law, as in other cases; and it is sufficient reason, for not appealing, that the party was unable to give the security required within two days, as required by law. Day *v.* Johnson, 4 Coldw. (Tenn.) 281.

*Mandamus* will not lie to compel the

granting the *ceritorari* to review is a matter of course,[1] and it would be competent for the court to require an additional recognizance in a case brought up from a justice, by *certiorari*, without superseding the old one;[2] but it is not required to do so.[3] The court to which the case is taken can only reverse or affirm; it cannot order a writ of restitution.[4] But in some States a retrial may be ordered,[5] and the proceedings may be quashed if irregular.[6]

(*e*) *Stay of Execution on Appeal.*—Pending an appeal, an injunction will not be issued to restrain the execution of a warrant in forcible entry and detainer;[7] this object being usually accomplished by an undertaking given by the appellant, for which provision is made in the statutes of most of the States.[8] It is the duty of a justice to approve a proper bond.[9] And defects and ir-

county court to enter judgment for treble damages in a forcible entry suit appealed from the decision of a justice of the peace, as the remedy by appeal is sufficient. Early *v.* Mannix, 15 Cal. 149.

1. People *v.* Runkle, 9 Johns. (N. Y.) 147.

2. Walter *v.* McSherry, 21 Mo. 76.

The statute which directs that a recognizance be entered into for prosecuting a *certiorari* does not apply to cases of forcible entry and detainer. Martin *v.* Hillyer, 11 N. J. L. 22.

3. A plaintiff who resides in this State, and brings a *certiorari* to remove a judgment rendered against him in an action of forcible entry and detainer will not be required to file a security for costs, though it is proved that he is unable to pay the costs, if the decision is against him. Smith *v.* Williamson, 11 N. J. L. 315.

4. Newton *v.* Leary, 64 Wis. 190.

5. **In Tennessee.**—The act of 1821, ch. 14, providing for the removal of cases of forcible entry and detainer, by *certiorari*, from the cognizance of a justice of the peace to the circuit court, authorizes a retrial of the facts in said court by a jury. Lane *v.* Marshall, Mart. & Y. (Tenn.) 255.

Reversal on *certiorari* in forcible entry proceedings does not, in *Michigan*, secure a new trial, but ends the proceeding. The statute provides for an appeal on which a new trial can be had, as of right. Knapp *v.* Gamsby, 47 Mich. 375.

6. People *v.* Smith, 24 Barb. (N. Y.) 16.

The finding of the jury, on an inquisition of forcible entry and detainer, before a justice of the peace, cannot be traversed in the superior court, to which it has been carried by *recordari*. If there be an irregularity or error in law in the proceedings, or if the verdict of the jury be insufficient to support the judgment of the justice, it will be quashed. State *v.* Griffin, 71 N. Car. 304.

No exception lies to the refusal of a judge in the superior court to suspend action on motion of an aggrieved defendant to dismiss an appeal from a justice's judgment in forcible entry and detainer, to allow him to file a petition for writs of *certiorari*, *mandamus*, and *supersedeas*. The presiding judge may, in his discretion, have the application after the dismissal and *procedendo*. Griffin *v.* Griffin, Phill. (N. Car.) L. 167.

7. Coster *v.* Van Schaick, 64 How. (N. Y.) Pr. 100.

A tenant against whom a judgment has been rendered for forcible detainer is not entitled to have process enjoined for appeal, unless he has actually taken the appeal. Curd *v.* Farrar, 47 Iowa, 504.

8. See State *v.* Clark (Neb.), 38 N. W. Rep. 832; Sherrill *v.* Madry, 6 Lea (Tenn.), 231; Merrill *v.* Hinckley, 49 Me. 40; Warner *v.* Howard, 121 Mass. 82; Coonradt *v.* Campbell, 29 Kan. 391; Henrie *v.* Buck (Kan.), 18 Pac. Rep. 228; Ladd *v.* Riggle, 6 Heisk. (Tenn.) 620; Hurt *v.* Dougherty, 3 Sneed (Tenn.), 418.

A defendant in an action of forcible entry and detainer cannot dispense with the necessity of giving bond and security for rent, as required by the act of 1842, ch. 186, by taking the pauper's oath. Norton *v.* Whitesides, 5 Humph. (Tenn.) 381.

9. In an action of forcible entry and detainer, where, after judgment, a party desires to appeal to the district court, and a bond is presented to such justice in proper form, signed by at least two sufficient securities, it is the duty of the justice to approve the same, and the sureties on an appeal bond need not sign the same in the presence of the justice. If the justice requires proof of the genuineness of the signatures, or of the sufficiency of the sureties, he should make it known when

regularities may be corrected by amendment,[1] or by the substitution of a new undertaking;[2] and the appeal may be dismissed if they are not so corrected.[3] The undertaking should usually be for a specific sum;[4] but it need not be for a sufficient sum to cover the rent of the premises pending the litigation.[5] But, in *Illinois*, the appeal bond must be conditioned for the payment of all rents becoming due, if any, from the commencement of the suit until the determination thereof; and when it is conditioned to pay all rents that may have accrued, and fails to provide for the rents to become due, it is wholly insufficient.[6]

(*f*) *Liability of Sureties on Undertaking.*—Any breach of the conditions of the undertaking—as, a judgment against the petitioner for a *certiorari*, or a judgment against the appellant—will render the sureties liable.[7] The amount for which the sureties

the bond is received by him, or soon thereafter; otherwise, the objection will be waived. State *v.* Clark (Neb.), 38 N. W. Rep. 832.

1. **Appeal Bond.**—The *Illinois* act of 1853 allowing amendments to an appeal bond applies to actions of forcible entry and detainer. In such case the court may require an additional bond to secure rents accruing previous to the term of the court to which the cause is continued, and, in default of compliance, may dismiss the appeal. Rider *v.* Bagley, 47 Ill. 365.

2. In an action of forcible entry and detainer, if the affidavit and recognizance are defective, the appellant has a right to file sufficient ones within such time as will not delay the other party; and it is error for the circuit court to refuse to permit it to be done. Hamilton *v.* Jeffries, 15 Mo. 617.

3. Wood *v.* Tucker, 66 Ill. 276.

4. Warner *v.* Howard, 121 Mass. 82.

5. Upon an appeal by the defendant from a judgment against him in the circuit court in a suit of unlawful detainer, the plaintiff moved to dismiss the appeal for want of an appeal bond in a sufficient sum to cover the rent of the premises pending the litigation, or for a receiver. *Held*, that both motions must be disallowed. Sherrill *v.* Madry, 6 Lea (Tenn.), 231.

Where a defendant, in an action of forcible entry and detainer, adjudged guilty, appeals, the recognizance need not require payment of such "reasonable rent of the premises as the magistrates shall adjudge," if no rent is adjudged by the magistrates to be payable. Merrill *v.* Hinckley, 49 Me. 40.

A bond given by the defendant on appeal to the circuit court, conditioned "to pay and satisfy all costs, damages, and *rents* as may be awarded," is not a good statutory bond as to the *rents*. And if afterwards, on appeal in error to the supreme court, a bond is given conditioned to prosecute said appeal with effect, or, in case of failure, "to abide by and perform the judgment of the court in the premises," the supreme court have no authority to give judgment upon the bond for the rents accrued pending the appeal, nor to remand the cause to the circuit court to have such rents ascertained. Ladd *v.* Riggle, 6 Heisk. (Tenn.) 620.

6. Wood *v.* Tucker, 66 Ill. 276.

7. Judgment against the petitioner for a *certiorari* in forcible entry and detainer is a breach of the condition to prosecute with effect in his bond. By appeal in error, the operation of such judgment is suspended; but, if the appeal is abated, the judgment revives, and is a breach from the day it was rendered; and it is not satisfied by a judgment against the petitioner for costs, but the defendant may bring an action for breach of the second condition, to recover "damages for the unlawful detention." Hurt *v.* Dougherty, 3 Sneed (Tenn.), 418.

Where the condition of a bond is that "If, upon a further trial of the case, judgment shall be rendered against the defendant, he shall pay double the use and occupation of said property, pursuant to the judgment," and the judgment subsequently rendered against the appellant, in the forcible entry action, did not determine the liability for the use and occupation of the property, no such liability exists or can be enforced against the sureties. Henrie *v.* Buck (Kan.), 18 Pac. Rep. 228.

**Who May Prosecute Undertaking.**—The bond prescribed by the act of 1835, ch. 84, to be given to the defendant in *certiorari* in cases of unlawful detainer of land, in order to secure him in costs and damages for detention, is not a covenant real run-

will be held liable differs in different States; but it is generally based on the rental value of the premises.[1]

ning with the land, and action for breach may be brought by the personal representative. Hurt *v.* Dougherty, 3 Sneed (Tenn.), 418.

1. A judgment may be rendered on the bond against the obligors jointly, for whatever amount the sureties are liable under the evidence, to be assessed by the jury. Spear *v.* Lomax, 42 Ala. 576.

B forcibly dispossessed A from land, and erected improvements thereon. A obtained judgment in a suit of forcible entry and detainer, and B appealed, giving the usual bond to pay double the rental value of the lot. A prevailed in the district court, and B gave a *supersedeas* bond, and took the case to the supreme court by writ of error, where A also prevailed. Pending the suit, B attempted to remove his improvements, and A obtained an injunction and gave an injunction bond. The injunction was finally dissolved on the ground that A was sufficiently protected by the appeal bond. B brought suit on the injunction bond, and A set up the appeal and *supersedeas* bonds by way of counter-claim. *Held*, that A was entitled to double the rental value of the lot and the improvements, and that this liability was not affected by the *supersedeas* bond. Coonradt *v.* Campbell, 29 Kan. 391.

In an appeal from the judgment of a justice, in an action of forcible entry, the undertaking given by the appellant was found insufficient by the district court. A new undertaking was given, prospective in form, and containing no language which indicated an intention to extend the liability of the obligors for the use of the premises back of the time when the undertaking was executed. *Held*, that the sureties thereto were not liable for the use and occupation of the premises prior to the time when the undertaking was given, and that testimony concerning the same was admissible. Henrie *v.* Buck (Kan.), 18 Pac. Rep. 228.

In an action against the sureties upon an undertaking, wherein they admit the execution of the same, but deny any liability thereunder, the jury trying the case should, under the Civil Code, *Kansas*, §§ 267, 288, return a general verdict assessing the full amount of recovery to which plaintiff is entitled. Henrie *v.* Buck (Kan.), 18 Pac. Rep. 228.

**In Tennessee**, it was held that no judgment could be rendered on the appeal bond for rents accrued, pending the appeal. Ladd *v.* Riggle, 6 Heisk. (Tenn.) 620.

**Judgment for Costs.**—Upon an appeal from a justice of the peace, in an action of forcible entry and detainer, the appellate court, upon dismissing the appeal, has no jurisdiction to enter judgment for costs against the security in the appeal bond. Such a judgment would be void, and an execution and sale of lands under it would confer no title upon the purchaser. Keary *v.* Baker, 33 Mo. 603.

## FORECLOSURE OF MORTGAGES.

I. Definitions, 185.
1. *Strict Foreclosure*, 185.
2. *Foreclosure by Entry and Possession*, 186.
3. *Foreclosure by Sale*, 186.
4. *Various Modes Considered*, 186.
II. When the Right of Foreclosure Accrues, 188.
III. When Right of Foreclosure is Barred, 197.
IV. Foreclosure by Sale the Prevailing Mode, 204.
1. *Nature of the Remedy*, 204.
V. Proceedings in Foreclosure Sales, 205. [205.
1. *In what Courts to be Brought*,
2. *Parties in Foreclosure Suits*,
3. *Pleadings*, 229. [206.
4. *Defences*, 230.
5. *Proceedings Before Sale*, 231.
6. *Receiver*, 234. [Sale, 240.
VI. Decree for Foreclosure and
1. *Conclusiveness of Decree*, 245.
2. *By Whom the Sale Should be Made*, 245.
VII. Conduct of Sale, 246.
VIII. Sale Not Within Statute of Frauds, 248.
IX. Duty of Officer Conducting Sale, 248.
X. Rights, Relations, and Obligations of Purchaser at the Sale, 249.
XI. Report of Sale, and Action Thereon, 254.
1. *Opening the Biddings*, 254.
2. *Confirmation of the Sale*, 257.
3. *Setting Aside Sale, and Resale*, 258.
XII. Judgment for Deficiency, 264.
XIII. Disposition of the Proceeds of Sale, 269.
XIV. Remedies Against the Purchaser, 272.
XV. Rights of the Purchaser, 273.
XVI. Appeal, 277.
XVII. Foreclosure in Power of Sale Mortgages, 278.
XVIII. Foreclosure of Chattel Mortgages, 278.

**I. Definition.**—Foreclosure in its most comprehensive sense is a proceeding on the part of the mortgagee, or other owner of the mortgage claim, either judicial or *in pais*, by means of which the property mortgaged is applied, either directly or through its proceeds, towards the payment of the mortgage debt by the barring or foreclosing of the mortgagor's right to redeem.[1]

Foreclosure is of four kinds: Strict foreclosure, foreclosure by entry and possession, foreclosure by advertisements, and foreclosure by sale.[2]

1. *Strict Foreclosure* is a proceeding in equity, instituted by the mortgagee, for the purpose of requiring the mortgagor to pay the debt within a time to be specified in the decree; otherwise, to be forever barred of his right to redeem; and by virtue of which the mortgagee becomes invested with the absolute title to the land after the expiration of the time limited for redemption.[3]

1. In Hilliard on Mortgages, it is defined as "The process by which a mortgagee himself acquires or transfers to a purchaser an absolute title to the property of which he has previously been only the conditional owner or upon which he has previously had a mere lien or incumbrance." Vol. 2, p. 1. This definition is too narrow. See Rapalje & L. Law Dict., vol. I. p. 530.

2. These various modes of procedure, except that by advertisement, were derived from the civil law. 2 Story Eq. Jur., §§ 1008, 1009, 1024.

3. By the civil law, "in cases where a sale could not be made effectual, a decree might be obtained, in the nature of a foreclosure, by which, after certain judicial proceedings, the absolute dominion of the property would be passed to the mortgagee." 2 Story Eq. Jur., § 1024. The severity of the proceeding has been mitigated by enlarging the time from one specified period to another within which the mortgagor may redeem, as the chancellor's discretion may be moved by the peculiar equities of the case. Perine *v.* Dunn, 4 Johns. Ch. (N. Y.) 140.

**Origin of Strict Foreclosure.**—As early as the reign of Charles I., courts of equity began to interpose, at the instance of the mortgagor, to relieve him from the hard-

2. *Forcclosure by Entry and Possession* is of two kinds: An act *in pais*, on the part of the mortgagee, by his entering upon the mortgaged lands and holding them for a reasonable time, during which he receives the rents, and must apply them on the debt, and within which the mortgagor may redeem, but, if the mortgagor fails, the right to redeem becomes foreclosed, and the mortgagee becomes invested with the absolute estate in the land;[1] a judicial proceeding by writ of entry, in which a conditional judgment is entered providing that, upon default of the mortgagor to perform the conditions of the mortgage within a specified time, possession of the premises shall be delivered to the mortgagee and the right to redeem be forever barred.

3. *Foreclosure by Sale* is a judicial proceeding instituted by the mortgagee, for the extinction of the equity of redemption and for a sale of the premises; in which, upon the default of the mortgagor to redeem within the time limited in the decree, a sale of the mortgaged premises is ordered; and in which, at the sale made in pursuance of the decree, the purchaser gets title to the land, freed from the equity of redemption.. [But there may be, and frequently are, cases of foreclosure sales where the sale is made subject to redemption.][2]

4. *Various Modes Considered.*—In all these various modes of foreclosure the mortgagee, or purchaser in case of sales, becomes the absolute owner of the land (except in the special class of cases where the sale is subject to redemption); and the land or its proceeds becomes either payment in full of the debt or payment *pro tanto*, according to its value, or amount realized upon the sale.[3]

Strict foreclosure is very rarely resorted to in the American courts. In a large majority of the States it is not recognized. It

ship of the assertion of the legal rights of the mortgagee, by permitting him to redeem after condition broken, and after the mortgagee had entered into possession, upon the payment or tender of the debt within a reasonable time, to be specified in the decree. And out of this arose the custom of mortgagees—thus anticipating the exercise of such right by the mortgagor—of themselves filing a bill to foreclose the right to redeem, by obtaining a decree requiring the mortgagor to pay the debt within a time to be specified in the decree, or to be forever barred, and the mortgagee's estate thereupon to become absolute. Such was the origin of strict foreclosure in the English courts. 2 Jones on Mort. (2d Ed.), § 1538.

1. The ordinary limitation of time within which a mortgage was redeemable after the mortgagee had entered upon the premises was twenty years. Corbett *v.* Barker, 1 Anst. 138; Cholmondeley *v.* Clinton, 2 Jac. & Walk. 191. This time has been greatly shortened in the American States where this mode of procedure is still recognized. 2 Jones on Mort. (2d Ed.), §§ 1144, 1145, and note 2.

2. The purchaser gets the title as against all the parties to the foreclosure suit, and only against these; and, therefore, if persons having an interest in the equity of redemption—subsequent encumbrances or others—have not been brought in as parties to the suit, he buys subject to their rights and interests. Wiltsie on Mortgage Foreclosure, § 61; 2 Jones on Mort. (2d Ed.), §§ 1396, 1431.

3. Briggs *v.* Richmond, 10 Pick. (Mass.) 392; Johnson *v.* Candage, 31 Me. 28; Spencer *v.* Harford, 4 Wend. (N. Y.) 381; Globe Ins. Co. *v.* Lansing, 5 Cow. (N. Y.) 381; Hatch *v.* White, 3 Gall. (U. S.) 152; Tooke *v.* Hartley, 2 Dick. 785; 2 Jones on Mort. (2d Ed.) § 950.

is permitted, in exceptional cases, in *Alabama*,[1] *California*,[2] *Illinois*,[3] *Minnesota*,[4] *New York*,[5] and *Wisconsin*.[6] In *Connecticut*[7] and *Vermont*[8] it is the usual mode of procedure.

The pleadings in strict foreclosure suits are substantially the same as in other suits in equity; and all persons having an interest in the mortgaged premises should properly be made parties. The decree bars the equity of redemption unless the mortgaged debt be paid by a day certain, designated in the decree.[9] If the debt is paid, the property is to be restored to the mortgagor and proper conveyance made;[10] if there is failure to pay, the title will be vested absolutely in the mortgagee, and a writ of assistance or other appropriate process issued to put the mortgagee in possession.[11] In the latter particular, the practice in the American courts differs from that in the English courts, where the decree merely forecloses the mortgagor's equity of redemption, and leaves the mortgagee to his legal remedies to obtain possession.[12]

It is only where the land is of sufficient value to pay the debt that a strict foreclosure operates as a satisfaction of it; otherwise, it is a payment *pro tanto*.[13]

Foreclosure *in pais* by entry and possession, exists in only four of the American States, viz., *Maine*, *New Hampshire*, *Massachusetts*, and *Rhode Island*. In each of these States it is regulated by statute.[14]

1. Hitchcock *v.* U. S. Bank, 7 Ala. 386.
2. Goodenow *v.* Ewer, 16 Cal. 461.
3. Stephens *v.* Birchnell, 27 Ill. 445; Sheldon *v.* Patterson, 55 Ill. 507.
4. Heyword *v.* Judd, 4 Minn. 483.
5. Benedict *v.* Gilman, 4 Paige (N. Y.) 58; Blanco *v.* Foote, 32 Barb. (N.Y.) 535.
6. Landon *v.* Burke, 36 Wis. 378.
7. Genl. Laws 1877, §§ 1417–1428.
8. G. S. 1862, ch. 29, §§ 74–79, ch. 40, §§ 7–11; Paris *v.* Hulett, 26 Vt. 308. It does not prevail in *Missouri*. O'Fallon *v.* Clopton, 89 Mo. 284.
9. The time is within the discretion of the court. Johnson *v.* Donnell, 15 Ill. 97; Clark *v.* Rayburn, 8 Wall. (U. S.) 318.
10. Kendall *v.* Treadwell, 5 Abb. (N. Y.) Pr. 16.
11. Landon *v.* Burke, 36 Wis. 378; Buswell *v.* Peterson, 41 Wis. 82.
12. Sutton *v.* Stone, 2 Atk. 101; Seaton's Decrees, 140.
13. Paris *v.* Hulett, 26 Vt. 308; Edgerton *v.* Young, 43 Ill. 470; Vansant *v.* Allman, 23 Ill. 30; Spencer *v.* Harford, 4 Wend. (N. Y.) 381; Morgan *v.* Plumb, 9 Wend. (N. Y.) 287; Bassett *v.* Mason, 18 Conn. 136; New Haven Pipe Co. *v.* Work, 44 Conn. 230; Smith *v.* Packard, 19 N. H. 575; Newell *v.* Wright, 3 Mass. 150; Amory *v.* Fairbanks, 3 Mass. 562.
14. 2 Jones on Mort. (2d Ed.), §§ 1238–1246. In Jones *v.* Bowler & Stone, 74 Me. 310, it was held that it would not suffice that a consent in writing to enter had been given the mortgagee; there must be an actual entry upon the premises after such written consent; and that the mortgagee sending a lease, signed by himself, to the mortgagor, who took the lease, but did not sign it, and continued in possession, is not such actual entry; it cannot be regarded as the entry of the mortgagee, or that the mortgagor is holding possession for the mortgagee; that a purchaser from the mortgagee, becoming such after the lapse of a year from the giving of the written consent, stood in the position of the mortgagee, as he had notice from the records that his vendor had acquired title through a mortgage, and consequently such purchaser took only such title as his vendor could convey. The mortgagor had made a seasonable demand, both on the mortgagee and his vendee, to render a true account of the amount due upon the mortgage, which they refused to do. It was held that there had been no foreclosure, and that the mortgagor was entitled to redeem.

In case where the mortgagee, before the expiration of three years from the date of his entry upon the land for the purpose of foreclosure of a mortgage

When the time for redemption after entry has expired without redemption having been made, the foreclosure becomes complete, the mortgagee becomes invested with the absolute title, and the debt is extinguished to the extent of the value of the land.[1]

Foreclosure by writ of entry exists only in those States where entry *in pais* is recognized. In this proceeding a conditional judgment is entered, providing that the mortgage debt be paid within a specified time; otherwise, that the mortgagee be put in possession.[2]

In order to have this remedy, a legal estate or interest in the land must exist in the mortgagee, his assignee, or representative, as it is a proceeding at law.[3] The legal consequences of possession so obtained, upon the respective estates and interests of the parties in the premises, and upon the mortgage debt, are the same as in case of possession by act *in pais*.[4]

**II. When the Right of Foreclosure Accrues.**—Ordinarily, the right to foreclosure accrues upon the maturity of the debt, and its non-payment;[5] but it may accrue upon the happening of any event

thereon, had received the proceeds of other security held by him for the same debt, but not sufficient to liquidate it, this does not, of itself, sufficiently evince an intent on his part to waive his right of foreclosure. Tompson *v.* Tappan, 139 Mass. 506.

A certificate of entry, under Gen. Stats., ch. 140, §§ 1, 2, sworn to by the mortgagee before himself as a justice of the peace, is invalid, and of no avail for the purpose of foreclosure. Judd *v.* Tryon, 131 Mass. 345.

Where an assignee of a mortgage, in possession for breach of condition before foreclosure, had cut and carried away trees growing on the land, the heirs at law of the mortgagor cannot maintain trover against him for the same. Place *et al. v.* Sawtell, 142 Mass. 477.

A real estate mortgage gives only a lien on the land and its rents and profits, to be enforced, as in other cases, in the district court, even although the mortgage contain a stipulation which seems to give the mortgagee the right, after condition broken, to take possession of the mortgaged premises and to receive the rents and profits; it is not operative to transfer the title to the mortgagee of the rents and profits. Seckler *v.* Delfs, 25 Kan. 159.

1. 2 Jones on Mortg. § 1264 (2d Ed.).

2. 2 Jones on Mortg. § 1276 (2d Ed.); Doten *v.* Hair, 16 Gray (Mass.), 149; Fletcher *v.* Carey, 103 Mass. 475; Palmer *v.* Fowley, 5 Gray (Mass.), 545; Holbrook *v.* Bliss, 9 Allen (Mass.), 69; Sparhawk *v.* Wills, 5 Gray (Mass.), 427; Walcott *v.* Spencer, 14 Mass. 409; Amidown *v.* Peck, 11 Metc. (Mass.) 467.

3. 2 Jones on Mortg. §§ 1247, 1280 (2d Ed.).

4. 2 Jones on Mortg. (2d Ed.), ch. 29.

**Statutory Foreclosure.**—For requirements under the *Arkansas* statute, see Perkens & Sumner *v.* Keller & Angel, 43 Ark. 53. Under the *Michigan* statute, Herbert *v.* Butte, 42 Mich. 489. Failure to serve tenant in possession, with notice, does not prevent statutory foreclosure, under the laws of *Minnesota*, from being effectual as to the mortgagor, it appearing that the mortgagor, who was in possession of a part of the land, although not residing on it, was duly served. Holmes *v.* Crummet, 30 Minn. 23; Miller *v.* Miller, 48 Mich. 311; Crater *v.* Smith, 42 N. J. Eq. 348; Belmont *v.* Cornen, 48 Conn. 338.

5. See Kelly *v.* Bogardus, 51 Mich. 522; Wilkinson *v.* Flowers, 37 Miss. 579, 584; s. c., 57 Am. Dec. 78; James *v.* Fisk, 17 Miss. (1 Smed. & M.) 144, 150; s. c., 47 Am. Dec. 111.

**Necessity for Demand.**—See Burnham *v.* Allen, 67 Mass. (1 Gray) 496; Locklin *v.* Moore, 57 N. Y. 362; Hills *v.* Place, 48 N. Y. 520; s. c., 8 Am. Rep. 558; 36 How. (N. Y.) Pr. 26; Pusey *v.* New Jersey & L. R. Co., 14 Abb. (N. Y.) Pr. 439; Hirst *v.* Brooks, 59 Barb. (N. Y.) 134; Gillett *v.* Balcom, 6 Barb. (N. Y.) 170; Caldwell *v.* Cassidy, 8 Cow. (N. Y.) 271; Nelson *v.* Bostwick, 5 Hill (N. Y.), 307; s.c., 40 Am. Dec. 310; Walcott *v.* Van Santvoord, 17 Johns. (N. Y.) 248; s. c., 8 Am. Dec.

which constitutes a default by the terms of the mortgage.[1] If

396; Huxton *v.* Bishop, 3 Wend. (N. Y.) 13; Watkins *v.* Crouch, 5 Leigh (Va.), 522; Rumboll *v.* Ball, 10 Mod. 38. And it is not necessary to make a demand before suit, even where the note is payable on demand in a particular place; in such case, however, it may be shown in defence that the party was ready at the appointed place to make payment, in which case, if he brings the money into court he will be relieved from interest and costs. Carley *v.* Vance, 17 Mass. 389; Green *v.* Goings, 7 Barb. (N. Y.) 652, 655; Caldwell *v.* Cassidy, 8 Cow. (N. Y.) 271; Place *v.* Union Express Co., 2 Hilt. (N. Y.) 19, 31; Gay *v.* Paine, 5 How. (N. Y.) Pr. 108; Walcott *v.* Van Santvoord, 17 Johns. (N. Y.) 248; s. c., 8 Am. Dec. 396; Foden *v.* Sharp, 4 Johns. (N. Y.) 183; Locklin *v.* Moore, 5 Lans. (N. Y.) 308; Nazro *v.* Fuller, 24 Wend. (N. Y.) 376; Hurton *v.* Bishop, 3 Wend. (N. Y.) 13; Fullerton *v.* Bank of United States, 26 U. S. (1 Pet.) 604; bk., 7 L. ed. 28; Bank of United States *v.* Smith, 24 U. S. (11 Wheat.) 171; bk. 6, L. Ed. 443; Fenton *v.* Goundry, 13 East. 459.

**When No Time of Payment is Specified,** the debt is due immediately. Gillett *v.* Balcom. 6 Barb. (N. Y.) 170. See also Selleck *v.* French, 1 Conn. 32; Broth *v.* Brown, 103 Ind. 23; s. c., 1 West. Rep. 128; Green *v.* Brebilbis, 1 G. Greene (Iowa), 552; Francis *v.* Castleman, 4 Bibb (Ky.), 282; Taylor *v.* Knox, 1 Dana (Ky.), 391; s. c., 5 Dana (Ky.), 463; Goodloe *v.* Clay, 6 B. Mon. (Ky.) 236; Swett *v.* Hooper, 62 Me. 54; Jillson *v.* Hill, 70 Mass. (4 Gray) 316; Dodge *v.* Perkins, 26 Mass. (9 Pick.) 369; Weeks *v.* Hasty, 13 Mass. 218; Eaton *v.* Truesdeil, 40 Mich. 1, 6; Phill *v.* Phillips. 11 N. Y. 406, affirming 1 Duer (N. Y.), 369; People *v.* County of New York, 5 Cow. (N. Y.) 331; Rensselaer Glass-factory *v.* Reid, 5 Cow. (N. Y.) 587; Clark *v.* Barlow, 4 Johns. (N. Y.) 183; Rhoads *v.* Reed, 89 Pa. St. 436; Heath *v.* Page, 63 Pa. St. 108; s. c., 3 Am. Rep. 533; Northern Pa. R. Co. *v.* Adams, 54 Pa. St. 94; Hummel *v.* Brown, 24 Pa. St. 313; Lessee Dilworth *v.* Sinderling, 1 Binn. (Pa.) 488; s. c., 2 Am. Dec. 469; Cheesborough *v.* Hunter, 1 Hill (S. C.), 400; Smetz *v.* Kennedy, Riley (S. C.), 218; Aikin *v.* Peay, 5 Strobh. (S. C.) 15; s. c., 53 Am. Dec. 684; Roberts *v.* Cocke, 28 Gratt. (Va.) 207; Young *v.* Godbe, 82 U. S. (15 Wall.) 562; bk. 21, L. ed. 250; Brewster *v.* Wakefield, 63 U. S. (22 How.) 118, 127; bk. 16, L. ed. 301; Sheehy *v.* Mendeville, 11 U. S. (7 Cr.) 208, 217; bk. 3, L. ed. 317; United States *v.* Gurney, 8 U. S. (4 Cr.) 333; bk. 2, L. ed. 638; Rapelie *v.* Emory, 1 U. S. (1 Dall.) 349; bk. 1, L. ed. 170; Farquhar *v.* Morris, 7 T. R. 124; Bayley on Bills (5th Ed.), § 14, p. 59; Thompson on Bills, § 1, p. 32.

1. The insolvency of the mortgagor having put it out of his power to perform an agreement to secure the performance of which the mortgage had been given, a foreclosure was allowed before the expiration of the time for performance. Harding *v.* Mill, 34 Conn. 458.

On the other hand, the non-payment of the debt will not authorize the foreclosure of a mortgage given as a security "in case any of the notes prove to be insolvent or worthless" when it was not shown that any of the notes were worthless or that the maker was insolvent. Fetrow *v.* Merrewether, 53 Ill. 275.

A mortgage of personal property provided that the mortgagor should not suffer the property to be attached on mesne process. The property was attached, however, by the mortgagor's consent and procurement, but the attachment was held to be void, and that the mortgagor had no attachable interest in the property. It was nevertheless held to be a breach of this condition in the mortgage. Crocker *v.* Atwood, 144 Mass. 588. See the recent case of Trustee sof the Canandaigua Academy *v.* McKechnie *et al.*, 90 N. Y. 618, as to what will constitute the happening of the event provided for in the mortgage for the maturing of the debt.

A stipulation in the mortgage that the mortgagee would "not assign or dispose of the mortgage until his future advance, amounting to $4000, had actually been made," does not prevent the foreclosure for the sum actually advanced and due thereon, although not amounting to $4000. Baldwin *v.* Flag, 36 N. J. Eq. 48.

Where the mortgage contained no provision for foreclosure upon non-payment of interest, although given for the security of the payment of the note with interest, a foreclosure cannot be had until the principal sum becomes due. Brodribb *v.* Tibbets, 58 Cal. 6.

The failure of mortgagor to pay taxes, *held*, such default as to justify the advertisement of the property for sale. Building Asso. No. 1 of Baltimore City *v.* Kratz, 55 Md. 394.

Where a mortgage had been given to secure a bond for support of husband and wife during their lives, the breach necessary to be shown in the foreclosure proceeding need not be shown to have occurred during the lifetime of the husband,

the time for the payment of the mortgage be extended,[1] of course

who died first; nor is it necessary to the suit to show that the widow had made any claim for her support on the administrator of deceased mortgagor before the suit was commenced. Plummer, Adm'r, *v.* Doughty, 78 Me. 341.

1. See Reed *v.* Home Saving Bank, 127 Mass. 295; Burt *v.* Saxton, 1 Hun (N. Y.), 551; Sharpe *v.* Arnott, 51 Cal. 188; Pendleton *v.* Rowe, 34 Cal. 149; Maher *v.* Lanfrom, 86 Ill. 513; Flynn *v.* Mudd, 27 Ill. 323; Redman *v.* Deputy, 26 Ind. 338; Lee *v.* West Jersey Land Co., 29 N. J. Eq. (2 Stew.) 377; Tompkins *v.* Tompkins, 21 N. J. Eq. (6 C. E. Gr.) 338; Massaker *v.* Mackerley, 9 N. J. Eq. (1 Stockt.) 440; Union Central Life Ins. Co. *v.* Bonnell, 35 Ohio St. 365; Albert *v.* Grosvenor Investment Co., L. R. 3 Q. B. 122.

**Consideration for Extension.**—An agreement for an extension of time, based upon a valid consideration, suspends the right to foreclose until the expiration of such time. Maher *v.* Lanfrom, 86 Ill. 513; Flynn *v.* Mudd, 27 Ill. 332; Warner *v.* Campbell, 26 Ill. 282; Trayser *v.* Trustees of Asbury University, 39 Ind. 556, 567; Carlton *v.* Tardy, 28 Ind. 452; Calbin *v.* Wiggam, 27 Ind. 489; Redman *v.* Deputy, 26 Ind. 338; Loomis *v.* Donnolan, 17 Ind. 198; Dickerson *v.* Board, etc., 6 Ind. 128; s. c., 63 Am. Dec. 373; Harbert *v.* Dumont, 3 Ind. 346; Reed *v.* Home Sav. Bank, 127 Mass. 295; Fowler *v.* Brooks, 13 N. H. 240 Bailey *v.* Adams, 10 N. H. 162; Tompkins *v.* Tompkins, 21 N. J. Eq. (6 C.E. Gr.) 338; Massaker *v.* Mackerley, 9 N. J. Eq. (1 Stockt.) 440; Newsam *v.* Finch, 25 Barb. (N. Y.) 175; Prentice *v.* Fellows, 3 Den. (N. Y.) 512; Burt *v.* Saxton, 1 Hun (N. Y.), 551; Union Central Life Ins. Co. *v.* Bonnell, 35 Ohio St. 365; McComb *v.* Kittridge, 14 Ohio, 348; Austin *v.* Dorwin, 20 Vt. 38; Creath's Admr. *v.* Sims, 46 U. S. (5 How.) 192; bk. 12, L. ed. 111. *In re* Betts, 4 Dill. C.C. 93; Albert *v.* Grosvenor Investment Co., L. R. 3 Q. B. 123.

An agreement for extension without consideration is void. See Sharpe *v.* Arnott, 51 Cal. 188; Pendleton *v.* Rowe, 34 Cal. 149; Massaker *v.* Mackerley, 9 N. J. Eq. (1 Stock.) 440; Trayser *v.* Trustees of Asbury University, 39 Ind. 556, 567.

**Payment of Interest in Advance** is a sufficient consideration. Maher *v.* Lanfrom, 86 Ill. 513, 517; Flynn *v.* Mudd, 27 Ill. 323; Narner *v.* Campbell, 26 Ill. 282; Redman *v.* Deputy, 26 Ind. 338. But prompt payment of interest of demand is not. Pendleton *v.* Rowe, 34 Cal. 149.

**Giving of Additional Security** is sufficient consideration. Trayser *v.* Trustees of Asbury University, 38 Ind. 556, 567.

**Payment on Note Before Due** is a sufficient consideration. Newsan *v.* Finch, 25 Barb. (N. Y.) 175.

**Agreement with Third Person** respecting the equity of redemption is a sufficient consideration where such third person acts upon that agreement. See Loomis *v.* Donovan, 17 Ind. 198; Fellows *v.* Prentiss, 3 Den. (N. Y.) 512; s. c., 45 Am. Dec. 484; Charlton *v.* Tardy, 28 Ind. 452; Galvin *v.* Wiggin, 27 Ind. 489; Redman *v.* Deputy, 26 Ind. 338; Dickerson *v.* Board of Commissioners of Ripley Co., 6 Ind. 128; s. c., 63 Am. Dec. 373; Harbert *v.* Dumont, 3 Ind. 346; Fowler *v.* Brooks, 13 N. H. 240; Bailey *v.* Adams, 10 N. H. 162; McComb *v.* Kittridge, 14 Ohio, 348; Austin *v.* Dorwin, 21 Vt. 38; Creath's Admr. *v.* Sims, 46 U. S. (5 How.) 192; bk. 12, L. ed. 111; Reed *v.* Home Sav. Bank, 127 Mass. 295.

**Extension of Time by Parol** is valid when founded on sufficient consideration. See Dodge *v.* Crandall, 30 N. Y. 295; Dearborn *v.* Cross, 7 Cow. (N. Y.) 48; Townsend *v.* Empire Stone-dressing Co., 6 Duer (N.Y.), 208; Fish *v.* Hayward, 28 Hun (N. Y.), 456; Lattimore *v.* Harsen, 14 Johns. (N. Y.) 430; Flemming *v.* Gilbert, 3 Johns. (N.Y.) 528; Keating *v.* Price, 2 Johns. Cas. (N. Y.) 22; De la Croix *v.* Bulkley, 13 Wend. (N. Y.) 71; Tompkins *v.* Tompkins, 21 N. J. Eq. (6 C. E. Gr.) 338; Flynn *v.* Mudd, 27 Ill. 323; Stevens *v.* Cooper, 1 Johns. Ch. (N. Y.) 429; s. c., 7 Am. Dec. 652; Van Houten *v.* McCarty, 4 N. J. Eq. (3 H. W. Gr.) 141, King *v.* Morford, 1 N. J. Eq. (1 Saxt.) 274, 280; Cox *v.* Bennett, 13 N. J. L. (1 J. S. Gr.) 165, 171. *In re* Betts, 4 Dill. C. C. 93; s. c., 7 Rep. 225.

This is true notwithstanding the general rule that it is not permissible to vary, supply, or contradict the terms of a written instrument by parol evidence, particularly where it is under seal. Stevens *v.* Cooper, 1 Johns. Ch. (N. Y.) 425; s. c., 7 Am. Dec. 499; Hill *v.* Syracuse, B. & N. Y. R. Co., 73 N. Y. 35; Van Bokkelen *v.* Taylor, 62 N. Y. 185; Baker *v.* Higgins, 21 N. Y. 379; Brewster *v.* Silence, 8 N. Y. 207, 213; Cork *v.* Eaton, 16 Barb. (N. Y.) 439; Taylor *v.* Baldwin, 10 Barb. (N. Y.) 586; Egleston *v.* Kinckerbacker, 6 Barb. (N.

the mortgage cannot be foreclosed until the expiration of the extended time,[1] unless made without consideration; in which case the agreement for extension may be disregarded and the foreclosure at once enforced.[2]

Y.) 464; Sayre *v.* Peck, 1 Barb. (N. Y.) 464; Patterson *v.* Hull, 9 Cow. (N. Y.) 747, 754; Austin *v.* Sawyer, 9 Cow. (N. Y.) 41; Wright *v.* Taylor, 1 Edw. Ch. (N. Y.) 226; Webb *v.* Rice, 6 Hill (N. Y.), 219; Hull *v.* Adams, 1 Hill (N. Y.), 601; Meads *v.* Lansingh, 1 Hopk. Ch. (N. Y.) 124, 134; Bayard *v.* Malcom, 1 Johns. (N. Y.) 453, 467; Mann *v.* Mann, 1 Johns. (N. Y.) 231; Parkhurst *v.* Van Portland, 1 Johns. Ch. (N. Y.) 274; Crosier *v.* Aser, 7 Paige Ch. (N. Y.) 187; Jarvis *v.* Palmer, 11 Paige Ch. (N. Y.) 650; Loober *v.* Le Roy, 2 Sandf. (N. Y.) 202; Russell *v.* Kinney, 1 Sandf. Ch. (N. Y.) 38; Evans *v.* Wells, 22 Wend. (N. Y.) 323, 337; Lee *v.* Evans, 8 Cal 432; Beckley *v.* Munson, 22 Conn. 299; Mann *v.* Smyser, 76 Ill. 365; Harlow *v.* Boswell, 15 Ill. 56; Cincinnati, U. & F. W. R. R. Co. *v.* Pearce, 28 Ind. 502; Pilmer *v.* State Bank, 16 Iowa, 321; Jack *v.* Naber, 15 Iowa, 450; Peters *v.* Davis, 29 Mo. 184; Reed *v.* Jones, 8 Wis. 272; Stevens *v.* Cooper, 1 Johns. Ch. (N. Y.) 425; Webb *v.* Rice, 6 Hill (N. Y.), 219; Evans *v.* Wells. 22 Wend. (N. Y.) 324, 339; Powell *v.* Monson & B. Mfg. Co., 3 Mason C. C. 358.

1. Looms *v.* Donavan, 17 Ind. 198; Frayser *v.* Trustees of Indiana University, 39 Ind. 556; Tompkins *v.* Tompkins, 21 N. J. Eq. 338.

2. Massaker *v.* Mackerley, 1 Stock. Eq. (N. J.) 440.

The mortgagee may pursue all his remedies concurrently. He may sue at law and obtain judgment upon the debt secured by the mortgage, while at the same time he proceeds by bill in equity to foreclose the mortgage. Pettibone *v.* Stevens, 15 Conn. 29; Juchter *v.* Boehm, 63 Ga. 71; Andrews *v.* Scotton, 2 Bland (Md.), 629; McCall *v.* Lenox, 9 S. & R. (Pa.) 302; Ayres *v.* Wattson, 57 Pa. St. 360; Longworth *v.* Flagg, 10 Ohio, 300; Knetzer *v.* Bradstreet, 1 Greene (Iowa), 382; Downing *v.* Palmateer, 1 T. B. Mon. (Ky.) 64; Burtis *v.* Bradford, 122 Mass. 129; Thuber *v.* Jewitt, 3 Mich. 295; Satterwhite *v.* Kennedy, 3 Strobh. (S. Car.) 457; Chapman *v.* Clough, 6 Vt. 123.

The cost of the suit at law will become a part of the mortgage debt in the foreclosure proceeding. Pettibone *v.* Stevens, 15 Conn. 19. And, where the mortgagor is unsuccessful in a suit to restrain the mortgagee from foreclosing, and judgment is rendered in favor of the defendant upon his answer, the amount of the debt will be ascertained, and the suit treated as one to foreclose, and the costs of the restraining suit made a lien upon the mortgaged property. Reimer *v.* Schlitz, 49 Wis. 273.

Where the mortgage contained a covenant that mortgagor should "pay all expenses of collecting said debt, including attorneys' fees, and that said money shall be secured by this mortgage," the mortgagees having recovered judgment at law upon the mortgage debt, and had paid their attorneys for prosecuting the suit, it was held, on a bill filed by them to foreclose the mortgage, to reimburse them the amounts so paid their attorney, that the suit would be sustained for a reasonable amount, to be determined by the proofs adduced. L'Engle & Hartridge, Adm'rs *v.* L'Engle, 22 Fla. 131.

Where the mortgage provided that the mortgagee should not "institute any proceeding to foreclose" until the maker and indorser had been sued to insolvency, the right to take possession is postponed until the happening of this contingency, and the mortgagee cannot maintain ejectment before that time. Grandin *v.* Hurt, 80 Ala. 116.

A mortgagee has the right to pay taxes on the land, or redeem the same from tax sale; and the amounts so paid are a valid claim against the mortgagor, and enforceable as a part of the mortgage debt; and whatever amount is due, including taxes, at time of foreclosure, constitutes an indivisible demand, and cannot be separated and enforced by separate suits. Johnson *v.* Payne, 11 Neb. 269.

D. had mortgaged land in which W. owned the equity of redemption. W. deeded the land to S., and as a part of the trade agreed to pay a certain portion of the amount due on D.'s mortgage, and gave S. a mortgage on the land taken from S. in the trade, to secure this agreement. Subsequently S. quitclaimed the land, subject to D.'s mortgage, the grantee assuming the mortgage debt as a part of the purchase price. W. failed to pay D. what he had agreed to pay on D.'s mortgage, and it was held that S. was, in consequence of this failure, entitled to foreclose the mortgage given to him by W. Stuart *v.* Warden, 42 Mich. 154.

Where a mortgage is given to secure

Where the entire debt may be treated as due upon any default in payment of interest,[1] or other instalment[2] at the election of the

several debts falling due at different times, or a single debt due in instalments, the mortgage may be foreclosed when the first becomes due, and the court will control the surplus so as to protect the portions not due. Hatcher *v.* Chancery, 71 Ga. 689.

A note, secured by mortgage, contained the following clause: "Any interest remaining due and unpaid shall be added monthly to the principal, and bear interest at the same rate;" and the mortgage provided that, in case of default in payment of the principal sum, or interest thereon, or any part thereof, according to the terms of the note, the mortgagee might sell the premises in the manner prescribed by law, and out of proceeds of sale retain principal sum, with interest, costs, charges, and attorneys' fees; and a subsequent mortgage between the same parties provided that all arrearages of monthly interest then existing, or thereafter to accrue upon the prior note, shall bear interest from the date respectively at which they have accrued or shall accrue, at a higher rate than that expressed in the note. It was held that, construing the note and mortgage together, that on default of the monthly payment of interest the mortgagee might foreclose; and that an action of foreclosure was compliance with terms of mortgage as to sale; and that the clause giving right to sell in case of default refers to default in payment of interest, and not to a default in adding it, when unpaid, to the principal debt; this was the privilege of the mortgagee, not the right of the mortgagor. Brickell *v.* Batchelder, 62 Cal. 623.

**1. Failure to Pay Interest.**—The parties may make the whole mortgage debt due upon the failure to perform a single condition; as, on failure to pay interest,—see McLean *v.* Pressley, 56 Ala. 211; Pope *v.* Durant, 26 Iowa, 133; Holden *v.* Gilbert, 7 Paige Ch. (N. Y.) 208; Hosie *v.* Gray, 71 Pa. St. 398;—and such condition will be enforced by the courts,—Richards *v.* Holmes, 59 U. S. (18 How.) 143; bk. 15, L. ed. 304. See Pope *v.* Durant, 26 Iowa, 233; Holden *v.* Gilbert, 7 Paige Ch. (N. Y.) 208.

**Effect of Such a Condition** is not a penalty, but a provision for the earlier maturing of a debt on the happening of the contingency specified. Stillwell *v.* Adams, 29 Ark 346; Grattan *v.* Wiggins, 23 Cal. 16; Jones *v.* Lawrence, 18 Ga. 277; Morgenstern *v.* Klees, 30 Ill. 422; Taber *v.* Cincinnati L. & C. R. Co., 15 Ind. 459; Hunt *v.* Harding, 11 Ind. 245; Smart *v.* McKay, 16 Ind. 45. See Cecil *v.* Dynes, 2 Ind. 166; Hough *v.* Doyle, 3 Blackf. (Ind.) 300; Greenman *v.* Pattison, 8 Blackf. (Ind.) 465; Andrews *v.* Jones, 3 Blackf. (Ind.) 440; Mobray *v.* Leckie, 42 Md. 474; Schooley *v.* Romain, 31 Md. 575; Salmon *v.* Clagett, 3 Bland Ch. (Md.) 125; Magruder *v.* Eggleston, 41 Miss. 284; Goodman *v.* Cincinnati & C. R. Co., 2 Disney (Ohio), 176; Baker *v.* Lehman, Wright (Ohio), 522; Richards *v.* Holmes, 59 U. S. (16 How.) 143; bk. 15, L. ed. 304. In the absence of a clause making the whole debt due on breach of a condition, the mortgage cannot be foreclosed for the whole amount, nor the entire mortgaged premises sold to satisfy the partial default. Mussina *v.* Bartlett, 8 Port. (Ala.) 284; Greenman *v.* Pattison, 8 Blackf. (Ind.) 465; Adams *v.* Essex, 1 Bibb (Ky.), 149; s. c., 4 Am. Dec. 623; Caufman *v.* Sayre, 2 B. Mon. (Ky.) 202; Magruder *v.* Eggleston, 41 Miss. 284; James *v.* Fisk, 17 Miss. (9 Smed. & M.) 144, 153; s. c., 47 Am. Dec. 111; Suffern *v.* Johnson, 1 Paige Ch. (N. Y.) 450; s.c., 19 Am. Dec. 440.

**2.** See Grattan *v.* Wiggins, 23 Cal. 16, 28; Jones *v.* Lawrence, 18 Ga. 277; Adams *v.* Essex, 1 Bibb (Ky.), 149; s.c., 4 Am. Dec. 623; Caufman *v.* Sayre, 2 B. Mon. (Ky.) 202; West Branch Bank *v.* Chester, 11 Pa. St. 282; Richards *v.* Holmes, 59 U. S. (18 How.) 143; bk. 15, L. ed. 304; Stanhope *v.* Manners, 2 Eden, 197; Gladwyn *v.* Hitchman, 2 Vern. 135.

**Failure to Pay Instalment** may be made a condition for the maturing of the whole debt, in which case a failure to pay an instalment works a forfeiture of the mortgage. Whitcher *v.* Webb, 44 Cal. 127; Ottawa Northern Plank Road Co. *v.* Murray, 15 Ill. 336; Noell *v.* Gaines, 68 Mo. 649; Beisel *v.* Artman, 10 Neb. 181; Ackerson *v.* Lodi Branch R. R. Co., 31 N. J. Eq. (4 Stew.) 42; Voorhis *v.* Murphy, 26 N. J. Eq. (11 C. E. Gr.) 434; McLean *v.* Pressley, 56 Ala. 211; Andrews *v.* Jones, 3 Blackf. (Ind.) 440; Indiana & I. C. R. Co. *v.* Sprague, 103 U. S. (13 Otto) 756; bk. 26, L. ed. 554. And in such case an action for foreclosure and sale of the premises may be commenced at once. See Rubens *v.* Prindle, 44 Barb. (N. Y.) 336; Dwight *v.* Webster, 32 Barb. (N. Y.) 47; s. c., 19 How. (N. Y.) Pr. 349; 10 Abb. (N. Y.) Pr. 128; Ferris *v.* Ferris, 28 Barb. (N. Y.) 29; s. c., 16 How. (N. Y.) Pr. 102; Grattan *v.* Wiggins, 23 Cal. 16; Morgenstern

mortgagee or trustee, the whole debt is nevertheless not due until the election has been exercised;[1] and a sale before such election could not be authorized, even by an act of the legislature.[2]

*v.* Klees, 30 Ill. 422; Ottawa Northern Plank Road Co. *v.* Murray, 15 Ill. 336; Mobray *v.* Leckie, 42 Md. 474. See also McDonald *v.* Vinson, 56 Miss. 497.

1. See Macloon *v.* Allen 49 N. Y. 448; Rubens *v.* Prindle, 44 Barb. (N. Y.) 336; Ferris *v.* Ferris, 28 Barb. (N. Y.) 29.

**The Mortgagee is not Estopped to Exercise His Right of Election** by the commencement of an action to foreclose prior to the expiration of the time limited for the payment of the money; or by the acceptance of an instalment of principal falling due before filing an amended supplemental complaint. See Odell *v.* Hoyt, 73 N. Y. 343; Malcolm *v.* Allen, 49 N. Y. 448; Lawson *v.* Barron, 18 Hun (N. Y.), 414.

**Waiver of Right of Election,** respecting: Wilson *v.* Bird, 28 N. J. Eq.(1 Stew.) 153.

Election that mortgage debt become due. See Harper *v.* Ely, 56 Ill. 179, 189; Randall *v.* Middleton, 26 N. J. Eq. (10 C. E. Gr.) 543; Malcolm *v.* Allen, 49 N. Y. 448.

**Notice of Election,** it seems, need not be given. See Randall *v.* Middleton, 26 N. J. Eq. (10 C. E. Gr.) 543; Harper *v.* Ely, 56 Ill. 179, 189; Malcolm *v.* Allen, 49 N. Y. 448.

Notice of elections, it seems, need not be given. See Hoodless *v.* Reid, 112 Ill. 105; Marston *v.* Brittenham, 76 Ill. 611; Princeton Loan & Trust Co. *v.* Munson, 60 Ill. 371, 375; Heath *v.* Hall, 60 Ill. 334; Harper *v.* Ely, 56 Ill. 179. Buchanan *v.* Berkshire Life Ins. Co., 96 Ind. 510, 520; English *v.* Carney, 25 Mich. 178, 184; Young *v.* McLean, 63 N. C. 576; Hunt *v.* Keech, 3 Abb. (N. Y.) Pr. 204; Howard *v.* Farley, 3 Robt. (N. Y.) 599, 602. *Compare* Dean *v.* Applegarth, 65 Cal. 391; Malcolm *v.* Smith, 49 Wis. 200, 215, 217; Marine Bank *v.* International Bank, 9 Wis. 57, 68; Basse *v.* Gallegger, 7 Wis. 442, 446; s. c., 76 Am. Dec. 225; Hall *v.* Delaplaine, 5 Wis. 206; s. c., 68 Am. Dec. 57.

Such notice, given by a duly authorized agent or attorney, is sufficient. Rosseel *v.* Jarvis, 15 Wis. 571.

**Who May Exercise Option.**—Such option may be exercised by the mortgagee,—See Heath *v.* Hall, 60 Ill. 344; Princeton Loan & Trust Co. *v.* Munson, 60 Ill. 171; Harper *v.* Ely, 58 Ill. 179;—his assignee,—Heath *v.* Hall, 60 Ill. 344, 349), or any person for whose benefit the provision is inserted,—Mallory *v.* West Shore & H. R. R. Co., 35 N. Y. Super. Ct. (3 J. & S.) 174; Fellows *v.* Gilman, 4 Wend. (N. Y.) 414.

But the right to exercise such option is an indivisible condition, and cannot be exercised by an assignee in part only of the debt. See Marine Bank of Buffalo *v.* International Bank, 9 Wis. 57.

**Relieving from Forfeiture.**—The court has no power to relieve from forfeiture,—see Savannah & M. R. Co. *v.* Lancaster, 62 Ala. 555; Mowbry *v.* Leckie, 42 Md. 474; Schooley *v.* Romain, 31 Md. 557, 574; Magruder *v.* Eggleston, 41 Miss. 284; Bennett *v.* Stevenson, 53 N. Y. 508; Ferris *v.* Ferris, 28 Barb. (N. Y.) 29, 33; Hale *v.* Gouverneur, 4 Edw. Ch. (N. Y.) 207; O'Connor *v.* Shipman, 48 How. (N. Y.) Pr. 126; Noyes *v.* Clark, 7 Paige Ch. (N. Y.) 179; s. c., 32 Am. Dec. 620; Gowlett *v.* Hanforth, 2 W. Bl. 958; Steel *v.* Bradfield, 4 Taunt. 227;—except possibly in cases of fraud,—see Noyes *v.* Clark, 7 Paige Ch. (N. Y.) 179; s. c., 32 Am. Dec. 720;—or a denial in good faith and upon reasonable grounds, though the party is liable to pay the interest in arear, or claim that he has paid it even though in error as to such liability,—see Wilcox *v.* Allen, 36 Mich. 160. However, where the only questions are as to a proper tender at the prescribed time, though it must be determined upon the trial, see Bennett *v.* Stevenson, 53 N. Y. 508, 510; Asendorf *v.* Meyer, 2 Daly (N. Y.), 278; Lynch *v.* Cunningham, 6 Abb. (N. Y.) 94; Thurston *v.* Marsh, 5 Abb. (N. Y.) Pr. 389; s. c., 14 How. (N. Y.) Pr. 572; Spring *v.* Fisk, 21 N. J. Eq. (6 C. E. Gr.) 175.

2. Randolph *v.* Middleton, 26 N. J. Eq. 543. The clause in this mortgage was as follows: "In case default shall be made in the payment of any half-year's interest on any of said bonds at the time and in the manner in the coupon issued therewith provided, the said coupon having been presented for payment, and the payment of the interest specified therein having been demanded, and such default shall continue for the space or period of three months after the interest expressed in said coupon shall have become due, and from and after the coupon shall have been presented, and the payment thereof demanded as aforesaid; then and thereupon, the principal of all of the said bonds shall, at the election of the trustees, became immediately due and payable." Beasley, C. J., in the course of his opinion says: "The principal moneys secured by the mortgage were not to fall due until the first day of

Generally, the act of the mortgagee in proceeding to enforce the mortgage sufficiently shows this election.[1] Where the debt

May, 1900, unless by force, upon the contingency mentioned, of the exercise of the option of the trustees, as specified in the clause just quoted. There is nothing in the case to show that the trustees have in any manner elected that these principal moneys shall become due by reason of the default in the payment of the interest due upon the bonds. The consequence, then is that, as the case stands before the court, these principal moneys must be regarded as not due until the year 1900. Now, it is clear that the effect of the present decree is to divert at once the lien of this encumbrance on the land, and to make these moneys payable forthwith; and this is done by force of the act of 1870, in which the decree takes root. The inquiry arises, therefore, Has the legislature the competency to produce such a result? I have failed to find an affirmative answer to this question. It is certain, in a contract for a loan of money, the time fixed for repayment is a material matter; so that, to hasten or postpone such a period, is to alter such contract in point of substance. If I lend a sum of money on a credit of ten years, it seems certain that I cannot be compelled, to accept repayment at any period short of the time so fixed, by force of any legislative act which can subseqnently be framed. The constitution of the State, if it be of any avail, must annul any such law. This proposition is so plain it will not bear discussion. And it likewise seems equally plain that it applies, with its entire force, to the facts now presented. The money is not due on this mortgage, except at the will of the trustees, for over twenty years. This act of the legislature was passed after the making of the mortgage; and yet this act, entering into the decree appealed from, has directed a sale of the property to pay this money forthwith. If this statute authorizing, in case of the insolvency of corporations of this class, the appointment of a receiver and the sale of the corporate property free from all encumbrance, had been in existence at the time of the execution of this mortgage, an entirely different problem would have been presented for solution. In such a condition of things, it might well be held that such a provision of the general law would enter into the substance of the contract, and become a part of it; this would be in harmony with practice and theoretical principles. But the law now in question, and which, by the form in which the case has been put, is the only statute now applicable, was not enacted at the time these parties agreed for this term of credit; and the consequence is, if it is to prevail against this stipulation, its action in effecting such a result must be quite arbitrary."

1. See Leonard *v.* Tyler, 60 Cal. 299; Heath *v.* Hall, 60 Ill. 344; Princeton Loan & Trust Co. *v.* Munson, 60 Ill. 371. In Noonan *v.* Lee, 2 Black (U. S.), 499, it was held that notice of such election must be given before the filing of the bill. It is not unusual for mortgages and deeds of trust to contain special clauses providing that, upon default in the payment of taxes, or instalment of interest, the entire debt shall at once become due, and a sale of the property be made for its payment. Such provisions in mortgages are enforceable by foreclosure proceedings immediately upon such default. Pope *v.* Durant, 26 Iowa, 233; Stanhope *v.* Manners, 2 Eden. 197; Jones *v.* Lawrence, 18 Ga. 277; Goodman *v.* C. & C. R. Co., 2 Disney (Ohio), 176; Smart *v.* McKay, 16 Ind. 45; Andrews *v.* Jones, 2 Blackf. (Ind.) 440; Stillwell *v.* Adams, 29 Ark. 346; Grattan *v.* Wiggins, 23 Cal. 16; Mobray *v.* Leckie, 42 Md. 474; Morgenstern *v.* Klees, 30 Ill. 422; Magruder *v.* Eggleston, 41 Miss. 284; Lowenstein *v.* Phelan, 17 Neb. 429; Fulgham *v.* Morris, 75 Ala. 245. It is held that such provisions are not in the nature of penalties, but agreements as to the event upon which the debt shall mature. Andrews *v.* Jones, 3 Blackf. (Ind.) 444; Richard *v.* Holmes, 18 How. (U. S.) 143. Courts of equity will not relieve against such provisions, except upon grounds of fraud, accident, or mistake. Bennett *v.* Stevenson, 53 N. Y. 508; Noyes *v.* Clark, 7 Paige (N. Y.), 179. Nor will it be relieved against by the mortgagor paying into court such accrued instalment. Ferris *v.* Ferris, 28 Barb. (N. Y.) 29. It is not necessary to wait for the maturity of the debt before proceeding to foreclose and have a sale of the property, when it is payable in instalments. The default in the payment of any instalment gives the right to immediate foreclosure, unless the terms of the mortgage itself, either expressly or by implication, repels this construction; and it must be construed most strongly against the mortgagor. So held where the mortgage debt was evidenced by a writing, in form

of a promissory note, by which mortgagors were to deliver 24 bales of cotton, in three annual instalments of 8 bales each, and the mortgage, setting out this note provided, "that, if we [they] pay the said note on or before the same becomes due," with costs of recording, the mortgage to be void; "but if we [they] fail to pay said sum when due," the mortgagee was authorized to take possession of any or all of said property, and sell the same at public outcry for cash; and, out of the proceeds, after paying costs and expenses, and all costs of collecting, to pay "the amount, with interest, that may be due on the debt above mentioned," and residue to mortgagors. Johnson *v.* Buckhaulls, 77 Ala. 276. And, where the breach of the condition was the failure to pay interest on the debt secured, the foreclosure may be had, although the mortgage does not provide for the foreclosure for such default. Scheibe *v.* Kennedy, 44 Wis. 564.

Where the deed of trust provides for the immediate maturity of the whole debt in case of default in payment of interest upon it, at the opiton of the creditor, and the creditor exercises this option upon such default, a tender of less than the whole debt will not prevent the enforcement of the trust for the entire debt. Detweiler *v.* Breckenkamp, 83 Mo. 45.

Where a mortgage provided that all the notes might be declared due on default in the payment of any one of them, the fact that the payment of one of the notes depended upon the mortgagee procuring an outstanding portion of the title for the mortgagor will not prevent the mortgagee from declaring such note due on the mortgagor's failure to pay any of the prior notes within the time specified in the mortgage, these prior notes being subject to no conditions. And, upon his so declaring, a sale may be had for the entire debt. Wisnel *v.* Chamberlin, 117 Ill. 568.

Where a mortgage purported to be for money loaned, payable "on demand" by a printed clause, with written condition that interest should be paid semi-annually, and, on failure so to do, a foreclosure might be had for both principal and interest; with a further provision that, on death of mortgagee the money loaned should belong to the mortgagor, if living, and, if not, to her surviving children, and that the mortgage should thereupon become null and void, a foreclosure cannot be had so long as the interest is paid as stipulated. And, when diligent effort to pay promptly is shown, whether prevented by unavoidable causes or by act of the mortgagee, a default and consequent forfeiture cannot be maintained. So held in Bolman *v.* Lohman, 79 Ala. 63.

While the proceeds of a foreclosure sale must be applied *in the order of their maturity*, where several notes, secured by mortgage, mature at different times, yet where the whole mortgage debt becomes at once due, by the terms of the mortgage, upon any default in payment, the several holders are entitled to have the proceeds applied *pro rata*. Marine Bank, 9 Wis. 57, distinguished; Pierce *v.* Shaw *et al.*, 51 Wis. 316.

Where the mortgage provides that, on default in payment of any one of a series of notes secured by it, and which were payable at different times, "then each and all shall fall due, and this mortgage become absolute as to all said notes remaining unpaid at the happening of such default," such stipulation relates to the remedy by foreclosure, or other proceedings under the mortgage, and foreclosure may be had for the whole debt upon the default. The stipulation is for the advantage of the mortgagee, as a remedy on the mortgage; but does not vary or extinguish the obligations of the notes themselves for general purposes; and therefore, to charge indorsers, demand and notice must be made at the maturity of the notes, as provided for in the notes themselves. McClelland *v.* Bishop, 42 Ohio St. 113.

It is not essential that the instrument should provide in express terms that the whole debt shall become due upon default in respect to any instalment; to give it that effect, if such intention can be gathered from the whole instrument, it will be enforced accordingly. Pope *v.* Durant, 26 Iowa, 233. See also Kramer *v.* Rebman, 9 Iowa 114.

In Gladwyne *v.* Hitchman, 2 Vern. 411, it was held that the right of foreclosure as to the entire debt existed because of default in respect to payment of interest, although no clause stipulating for such right was contained in the mortgage. See also Edwards *v.* Martin, 25 Law J. (U. S.) Ch. 284; Burrows *v.* Mollory, 2 Jones & La. T. 521.

Where the decree for sale of the entire property to pay an instalment which was past due provided that a lien should be retained on the property to secure the unmatured instalments, and the mortgagee became the purchaser at the sale, it was held that this operated as a satisfaction of the entire debt, and that an action at law could not be maintained on

provided for in the mortgage is payable on demand, no demand is necessary before proceeding to foreclose, the institution of the foreclosure suit constituting a sufficient demand.[1] In indemnity mortgages, the surety, or indorser for whose benefit the mortgage has been executed, cannot ordinarily enforce the foreclosure until he has paid the debt for which he has become liable.[2] When,

the notes. Mines *v.* Moore, 41 Ill. 273; Weirner *v.* Heintz, 17 Ill. 259; Hughes *v.* Frisby, 81 Ill. 188.

Where the mortgagee, proceeding to foreclose upon an instalment due, has a sale of the entire estate, this will of course release the security as to the amounts not due. Smith *v.* Smith, 32 Ill. 198: Poweshiek *v.* Dennison, 36 Iowa, 244. The right to sell for non-payment of taxes arises when the mortgagee has himself paid the taxes, and the mortgagor has failed to reimburse him. Williams *v.* Townsend, 31 N. Y. 411. There may be conduct on the part of the mortgagee which will operate as a waiver of his right to enforce a foreclosure for the whole debt before its maturity; as, where he accepts the interest after the default has occurred,—Sire *v.* Weightman, 25 N. J. Eq. 102;—or where he has refused to receive the amount when tendered,—Ewart *v.* Irwin, 1 Phila. 78; 7 Leg. Int. 134;—or where the failure to pay promptly was occasioned by his own conduct,—McCotter *v.* De Groot, 19 N. J. Eq. 531.

Where a mortgage was given on land to secure $500, and lawful interest thereon, which amount had been retained by the mortgagor, on a sale of the land to him to the mortgagee, out of the purchase-money, as an indemnity against an alleged right of dower in the land, the principal debt to be paid only on the extinguishment of the claim, the mortgage may be foreclosed for arrears of interest, although the dower claim has not been extinguished; and the dower claimant is not a necessary party to the foreclosure suit. Van Doren *v.* Dickerson *et al.*, 33 N. J. Eq. 388.

The mortgagor is not entitled to days of grace on instalments of interest; and where the mortgagee had his option to declare the whole debt due, upon default of payment of the interest, within ten days after it became due, and it was to become due on the first day of a certain month, notice of his option given on the twelfth of the month was given at the proper time. Macloon *v.* Smith, 49 Wis. 200.

Where the principal debt becomes due *pendente lite*, in an action to foreclose mortgage for default in payment of interest, the judgment should be for the whole amount of debt and interest. Cooke *v.* Pennington, 15 S. Car. 185.

1. Gillett *v.* Balcom, 6 Barb. (N. Y.) 370.

2. Lewis *v.* Richey, 5 Ind. 152; Ketchum *v.* Jauncey, 23 Conn. 123; Grant *v.* Ludlow, 8 Ohio St. 1; Planters Bank *v.* Douglas, 2 Head (Tenn.), 699; Holmes *v.* Rhodes, 1 Bos. & Pul. 638; Penny *v.* Foy, 8 Barn. & Cress. 11; Thomas *v.* Allen, 1 Hill (N. Y.). 145; Hodgsden *v.* Bell, 7 T. R. 97; Tilford *v.* James, 7 B. Mon. (Ky.) 837; Forbes *v.* McCoy, 15 Neb. 632, which holds also that mortgage given after mortgagee became surety will not be presumed to be without consideration.

See Pond *v.* Clarke, 14 Conn. 334; Francis *v.* Morter, 7 Ind. 213; Butler *v.* Le Dewey, 12 Mich. 178; National State Bank *v.* Davis, 24 Ohio St. 190, 195; Ohio Life Ins. & T. Co. *v.* Reeder, 18 Ohio, 35, 46; McConnell *v.* Scott, 15 Ohio, 401: s. c., 45 Am. Dec. 583; Cramer *v.* Farmers & Mechanics' Bank of Steubenville, 15 Ohio, 253; Colvin *v.* Buckle, 8 Mees. & W. 680. Because where a surety receives a mortgage indemnifying him against all loss, costs, or damage, the condition of such mortgage is not broken until after such security has been obliged to pay the debt or some part of it. See Platt *v.* Smith, 14 Johns. (N. Y.) 368; Howell *v.* Smith, 8 Johns. (N. Y.) 249; Rodman *v.* Headden, 10 Wend. (N. Y.) 500; Pond *v.* Clark, 14 Conn. 334; Shepard *v.* Shepard, 6 Conn. 37; McLean *v.* Ragsdale, 31 Miss. 71; Colvin *v.* Buckle, 8 Mees. & W. 680. Also Beckwith *v.* Windsor Mfg. Co., 14 Conn. 594. But where a surety has been compelled to pay the whole or part of the debt, he may maintain an action to foreclose before his damage is ascertained. See Rogers *v.* Jones, 1 McC. (S. C.) Eq. 221.

Where an indemnity mortgage is given to secure against damages occasioned by neglect or misconduct, and action to foreclose cannot be maintained until after judgment for such negligence or misconduct: See Grant *v.* Ludlow, 8 Ohio St. 1. See also Tilford *v.* Janes, 7 B. Mon. (Ky.) 337; Planters' Bank *v.* Douglass, 2 Head (Tenn.), 690.

however, the condition is not only to save the surety harmless, but also that the mortgagor shall pay the debt, the surety may foreclose upon the failure of the mortgagor to pay.[1] In the latter class of cases, the creditors whose debts are thus provided for, although they are not in terms made beneficiaries in the mortgage deed, may, nevertheless, under the doctrine of equitable subrogation, proceed to enforce the mortgage by foreclosure and sale.[2]

**III. When Right of Foreclosure is Barred.**—The right of foreclosure is of course extinguished by payment of the debt.[3] It

1. Hall *v.* Nash, 10 Mich. 303; Thurston *v.* Prentiss, 1 Mich. 193; Butler *v.* La Due, 12 Mich. 173; Francis *v.* Porter, 7 Ind. 213; Ellis *v.* Martin, 7 Ind. 652. In an indemnity mortgage containing an express agreement of mortgagor to pay the debt, upon his failure to pay on maturity of the debt, and his liability has been ascertained and fixed, the mortgagee may at once, without having paid the debt, or any part of it, foreclose, and recover therein, as damages, compensation for the total probable loss. Reynolds *v.* Shirk, 98 Ind. 480.

**Indemnity Mortgage.**—The lapse of time, which is generally the criterion by which the right to foreclose is usually determined, does not govern in the case of an indemnity mortgage. See Ellis *v.* Martin, 7 Ind. 652; Francis *v.* Porter, 7 Ind. 213; Lewis *v.* Ritchey, 5 Ind. 152; Butler *v.* Landue, 12 Mich. 173; Dye *v.* Mann, 10 Mich. 291; Thurston *v.* Prentis, 1 Mich. 192. However, in case of an indemnity mortgage, right of action does not accrue until the whole or some part of the mortgage debt has been paid, or the principle has defaulted thereon. Platt *v.* Smith, 14 Johns. (N. Y.) 363; Powel *v.* Smith, 8 Johns. (N. Y.) 219: Rodman *v.* Eadjuncy, 23 Conn. 196; Beckwith *v.* Windsor Mfg. Co., 14 Conn. 594; Bond *v.* Clarke, 14 Conn. 334; Shepard *v.* Shepard, 6 Conn. 37; Francis *v.* Porter, 7 Ind. 213; McLean *v.* Ragsdale, 31 Miss. 301; Ohio Ins. & Trust Co. *v.* Reeder, 14 Ohio. 35; McConnell *v.* Scott, 15 Ohio, 401; s. c., 45 Am. Dec. 583, Cramer *v.* Trustees of Farmers & Mechanics' Bank of Steubenville, 15 Ohio, 524.

**As to When Right to Foreclose Accrues in an Indemnity Mortgage,** which contains an express agreement to pay the debt therein described, see Gilbert *v.* Wynan, 1 N. Y. 550; s. c., 49 Am. Dec. 359; Wright *v.* Whiting, 40 Barb. (N. Y.) 245; Thomas *v.* Allen, 1 Hill (N. Y.), 145, overruling Douglass *v.* Clark, 14 Johns. (N. Y.) 177; Porter *v* Jackson. 17 Johns. (N. Y.) 239; *In re* Negus, 7 Wend. (N. Y.) 499; Reynolds *v.* Shirk, 98 Ind. 480. See also Maylott *v.* Gough, 96 Ind. 496; Loehr *v.* Colburn, 92 Ind. 24; Bodkin *v.* Merritt, 86 Ind. 540; Durham *v.* Craig, 79 Ind. 117; Gurnell *v.* Cue, 72 Ind. 34; South P. M. Assoc. *v.* Cutler & S. Lumber Co., 64 Ind. 560; Duvall *v.* McIntosh. 23 Ind. 529; Johnson *v.* Britton, 23 Ind. 105; overruling Tate *v.* Booe, 9 Ind. 13; Veddle *v.* Stone, 12 Ind. 625; Wilson *v.* Stillman, 9 Ohio St. 467; s. c., 75 Am. Dec. 477; Holmes *v.* Rhodes, 1 Bos. & P. 638; Loosemore *v.* Radford, 9 Mees. & W. 657; Hodgson *v.* Bell, 7 T. R. 97.

2. This doctrine is well settled, and fully sustained by the authorities. Moses *v.* Murgatroyd, 1 Johns. Ch. (N. Y.) 119, 147; Homer *v.* Savings Bank, 7 Conn. 478; Jones *v.* Quinnipiack, 29 Conn. 25; Osborn *v.* Noble, 46 Miss. 449; Paris *v.* Hulett, 26 Vt. 308; Breedlove *v.* Stump, 3 Yerg. (Tenn.) 257; Tilford *v.* James, 7 B. Mon. (Ky.) 337; Haven *v.* Foley, 18 Mo. 136; Roberts *v.* Colvin, 3 Gratt. (Va.) 358; Eastman *v.* Foster, 8 Metc. (Mass.) 19; Ware *v.* Otis, 8 Greenl. (Me.) 387; Van Order *v.* Durham, 35 Cal. 136; Riddle *v.* Bowman, 27 N. H. (7 Fost.) 236; Kramer's Appeal, 37 Pa. St. 71; Aldrich *v.* Martin, 4 R. I. 520; Siebert *v.* Tone, 8 Kan. 52; Rankin *v.* Wilsey, 17 Iowa, 463; Constant *v.* Matteson, 22 Ill. 546; Moore *v.* Moore, 4 Hawks (N. Car.), 358; Boyd *v.* Parker, 45 Md. 182; Ohio L. & I. Co. *v.* Reeder, 19 Ohio, 46; Safford *v.* Wade, 51 Ala. 214.

In Homer *v.* Savings Bank, 7 Conn. 478, the court, after reviewing the authorities, say: "The principle to be extracted from the cases is this: That, when collateral security is given, or property assigned for the protection or payment of a debt, it shall be made effectual for that purpose; and that not only to the immediate party to the security, but to others who are entitled to the debt. And, to make them thus effectual, a court of chancery will lend its aid. And the reason is that it is the intent of the transaction."

3. The question of payment has most

frequently arisen, under the doctrine of presumption, from lapse of time. The mortgage debt is presumed to have been paid after the lapse of twenty years from the time the right to enforce the mortgage had accrued, without any assertion of the right during that period by the mortgagee, or any recognition of liability on the part of the mortgagor. Hughes *v.* Edwards, 9 Wheat. (U. S.) 489, where it is said: "In respect to the mortgagee, who is seeking to foreclose the equity of redemption, the general rule is that, where the mortgagor has been permitted to retain possession, the mortgage will, after a length of time, be presumed to have been discharged, by payment of the money, or a release, unless circumstances can be shown sufficiently strong to repel the presumption; as, payment of interest, a promise to pay, an acknowledgment by the mortgagor that the mortgage is still existing, and the like." White *v.* Ewer, 2 Vent. 340; Crittenden *v.* Brainard, 2 Root (Conn.), 485; Reynolds *v.* Green, 10 Mich. 355; Collins *v.* Torrey, 7 Johns. (N. Y.) 278; Newcomb *v.* St. Peter's Church, 2 Sandf. Ch. (N. Y.) 636; Wilkinson *v.* Flowers, 37 Miss. 579; Bacon *v.* McIntire, 8 Metc. (Mass.) 87; Chick *v.* Rollins, 44 Me. 104; Bartlett *v.* Bartlett, 9 N. H. 398; Durham, *v.* Greenly, 2 Harr. (Del.) 124; Kennedy *v.* Denoon, 3 Brev. (S. Car.) 476; Stockton *v.* Johnson, 6 B. Mon. (Ky.) 408; Forsyth *v.* Ripley, 2 Greene (Iowa), 181; Sweetser *v.* Lowell, 33 Me. 446; Abbott *v.* Godfroy, 1 Mich. 178; McQueen *v.* Fletcher, 4 Rich Eq. (S. Car.) 152; Smith *v.* Benton, 15 Mo. 371; Martin *v.* Bowker, 19 Vt. 526; Crook *v.* Glenn, 30 Md. 55; Peck *v.* Mallons, 10 N. Y. 509; Jackson *v.* Woods, 12 Johns. (N. Y.) 242.

**Rebuttal of Presumption of Payment.**—The facts and circumstances which may serve to rebut this presumption of payment are as various and diversified as human transactions themselves; but they should be of such character as to clearly show some unequivocal recognition of the debt on the part of the mortgagor, or some explanation, of a most satisfactory character, of the failure of the mortgagee to assert the debt during this period; as: That the mortgagor died insolvent before the debt fell due, and the purchaser of his equity also became insolvent before its maturity, and had removed from the State, and never afterwards returned,—Brobst *v.* Brock, 10 Wall. (U. S.) 510;—or, an indorsement of credit on a bond, made by the obligee within the period,—Dabney *v.* Dabney, 2 Rob. (Va.) 622;—or that the debtor had not the opportunity of making payment,—McKindor *v.* Littlejohn, 1 Ired. (N. Car.) 66; Wood *v.* Deen, 1 Ired. (N. Car.) 230;—payments by the executor or administrator of the debtor.—Richardson *v.* Peterson; 2 Harr. (Del.) 366;—the want of a person against whom to bring the suit.—Brice *v.* Brice, 2 Ired. (N. Car.) 87; Park *v.* Peck, 1 Paige (N. Y.). 477; Belmont *v.* O'Brein, 12 N. Y. 394; Stout *v.* Levan, 3 Pa. St. 235; Eby *v.* Eby, 5 Pa. St. 435;—payment of interest on the debt, or any portion of the principal.—Martin *v.* Bowker, 19 Vt. 526; N. Y. Life Ins. Co. *v.* Covert, 3 Abb. Dec. (N. Y.) 350;—that the debtor had removed to and resided in a different State from that of the creditor during the period,—Mann *v.* Manning, 12 Smed. & M. Ch. (Miss.) 615;—that there was no one, from the death of the mortgagee until administration was granted, who could receive payment and discharge the mortgage,—Abbott *v.* Godfroy, 1 Mich 178.

Part payment keeps alive the right to foreclose, not only against the party paying, but as against all others adversely interested to the mortgagee. 2 Jones on Mort. (2d Ed.), § 1198.

On the other hand, intervening facts and circumstances may suffice to establish payment within a shorter period than twenty years. Bander *v.* Snyder, 5 Barb. (N. Y.) 63. The lapse of fourteen years, taken in connection with other circumstances tending to prove payment, "such as having settled an account in the intermediate time without any notice having been taken of such a demand" as that now attempted to be enforced were held sufficient. Oswald *v.* Leigh, 1 T. R. 271, Buller, J. See also Moore *v.* Smith, 81 Pa. St. 182; Henderson *v.* Lewis, 9 S. & R. (Pa.) 379. The cases, however, do not militate against the general doctrine that no lapse of time short of twenty years will *per se* raise the presumption of payment.

Where the mortgage had never been recorded, and where there was an indorsement indicating that nearly all the entire amount had been paid, and some evidence of a counter-claim that would have extinguished it, and the mortgagee had died twenty-nine years before the foreclosure suit was instituted, and no attempt to procure administration, or any steps or effort to enforce the mortgage until after the mortgagor's death, it was held that the foreclosure suit was properly dismissed. Burrow *v.* Debo, 47 Mich. 242.

may also be barred by the Statute of Limitations applied in equity, by analogy, to the limitations of real actions at law.[1]

By the English statutes, and the earlier statutes enacted in this country, the period was twenty years.[2] But it has been reduced in

1. See Morgan *v.* Morgan, 10 Ga. 297; Sloan *v.* Graham, 85 Ill. 26; Castner *v.* Walrod, 83 Ill. 171; Kane *v.* Herrington, 50 Ill. 239; Manning *v.* Warren, 17 Ill. 267; Clay *v.* Clay, 7 Bush (Ky.), 95; Bank of United States *v.* Dallam, 4 Dana (Ky.), 574; Fenwick *v.* Macey, 1 Dana (Ky.), 276; Thomas *v.* White, 3 Litt. (Ky.) 177; Smith *v.* Carney, 1 Litt. (Ky.) 295; Ashley *v.* Denton, 1 Litt. (Ky.) 86; Frame *v.* Kenny, 2 A. K. Marsh. (Ky.) 145; s. c., 12 Am. Dec. 367; Breckenridge *v.* Churchill, 3 J. J. Marsh. (Ky.) 12; Brunk *v.* Means, 11 B. Mon. (Ky.) 214; Rodgers *v.* Moore, 9 B. Mon. (Ky.) 401; Ayres *v.* Waite, 64 Mass. (10 Cush.) 72; Ayer *v.* Stewart, 14 Minn. 97; McCleane *v.* Shepherd, 21 N. J. Eq. (6 C. E. Gr.) 76; Kane *v.* Bloodgood, 7 Johns. Ch. (N. Y.) 90; s. c., 11 Am. Dec. 417; Livingston *v.* Livingston, 4 Johns. Ch. (N.Y.) 287; s. c., 8 Am. Dec. 362; Neely's Appeal, 85 Pa. St. 387; Shelby *v.* Shelby, Cooke (Tenn.), 179; s. c., 5 Am. Dec. 686; Cocke *v.* McGinnis, 1 Mart. & Yerg. (Tenn.) 361; s. c., 17 Am. Dec. 809; Pitzer *v.* Burns, 7 W. Va. 63, 69; Carroll *v.* Green, 92 U. S. (2 Otto) 509; bk. 23, L. ed. 738; Wagner *v.* Baird, 48 U. S. (7 How.) 258; bk. 12, L. ed. 681; Badger *v.* Badger, 2 Cliff. C. C. 137; Willis *v.* Robinson, 4 Bligh, 119. See also Kane *v.* Bloodgood, 7 Johns. Ch. (N. Y.) 90; s. c., 11 Am. Dec. 417; Sturt *v.* Mellish, 2 Atk. 610; Lockey *v.* Lockey, Prec. Ch. 518; Hovenden *v.* Annesley, 2 Sch. & Lef. 607.

Some States hold that in equity lapse of time operates only by way of evidence affording a presumption of payment. Livingston *v.* Livingston, 4 Johns. Ch. (N.Y.) 287; s. c., 8 Am. Dec. 562. Others hold that courts of equity are bound by the statutes of limitations as much as courts of law. See Shelby *v.* Shelby, Cooke (Tenn.), 179; s. c., 5 Am. Dec. 686; Love *v.* Watkins, 40 Cal. 517; Boyd *v.* Blankman, 29 Cal. 19; Lord *v.* Morris, 18 Cal. 484; Kelly *v.* Hurt, 61 Mo. 463; White *v.* Sheldon, 4 Nev. 280; Anderson *v.* Baxter, 4 Oreg. 105; Oregon Code Civ. Proc., § 378.

2. **Lapse for Twenty Years** raises a presumption of payment. Bailey *v.* Jackson, 16 Johns. Ch. (N.Y.) 210; s. c., 8 Am. Dec. 309; Livingston *v.* Livingston, 4 Johns. Ch. (N.Y.) 287; s. c., 8 Am. Dec. 562; Swart *v.* Service, 21 Wend. (N. Y.) 36; s. c., 34 Am. Dec. 211; Ludlow *v.* Van Camp, 6 N. J. Eq. (2 Halst.) 113; s. c., 11 Am. Dec. 529; Wanmaker *v.* Van Buskirk, 1 N. J. Eq. (1 Saxt.) 685; s. c., 23 Am. Dec. 748; Gulick *v.* Loder, 3 N. J. L. (1 J. S. Gr.) 68; s. c., 23 Am. Dec. 711; Henderson *v.* Lewis, 9 Serg. & R. (Pa.) 379; s. c., 11 Am. Dec. 733; Ordinary *v.* Steedman, Harp. (S. Car.) L. 387; s. c., 18 Am. Dec. 652; Yarnell *v.* Moore, 3 Coldw. (Tenn.) 176; Carter *v.* Wolfe, 1 Heisk. (Tenn.) 700; Anderson *v.* Settle, 5 Sneed (Tenn.), 203; Atkinson *v.* Dance, 9 Yerg. (Tenn.) 424; s. c., 30 Am. Dec. 422; Rodgers *v.* Judd, 5 Vt. 236; s. c., 26 Am. Dec. 301. But such presumption may be rebutted. See Brock *v.* Savage, 31 Pa. St. 422; King's Exrs. *v.* Coulders Exrs., 2 Grant Cas. (Pa.) 30; Cope *v.* Humphrey, 14 Serg. & R. (Pa.) 21; Lesley *v.* Nones, 7 Serg. & R. (Pa.) 410; Tilghman *v.* Fisher, 9 Watts (Pa.), 442; Bellas *v.* Lavan, 4 Watts (Pa.), 297.

**Adverse Possession by Mortgagor** for twenty years bars foreclosure. See Belmont *v.* O'Brien, 12 N. Y. 394; Jackson *v.* Shauber, 7 Cow. (N. Y.) 198; Jackson *v.* Wood, 12 Johns. (N. Y.) 245; s. c., 7 Am. Dec. 312; Jackson *v.* Pratt, 10 Johns. (N. Y.) 38; Collins *v.* Torry, 7 Johns. (N. Y.) 278; s. c., 5 Am. Dec. 273; Giles *v.* Baremore, 5 Johns. Ch. (N. Y.) 550; Haskell *v.* Bailey, 22 Conn. 569; Elkins *v.* Edwards, 8 Ga. 326; Harris *v.* Mills, 28 Ill. 46; Chick *v.* Rollins, 44 Me. 104; Blethen *v.* Dwinal, 35 Me. 556; Boyd *v.* Harris, 2 Md. Ch. Dec. 210; Bacon *v.* McIntire, 49 Mass. (8 Metc.) 87; Howland *v.* Shurtleff, 43 Mass. (2 Metc.) 26; s. c., 35 Am. Dec. 384; Thayer *v.* Mann., 36 Mass. (19 Pick.) 535; Inches *v.* Leonard, 12 Mass. 379; Nevitt *v.* Bacon, 32 Miss. 212, 226; s. c., 66 Am. Dec. 609; Tripe *v.* Marcey, 39 N. H. 439; Evans *v.* Huffman, 5 N. J. Eq. (1 Halst.) 354; Roberts *v.* Welch, 8 Ired. (N. Car.) Eq. 287; Richmond *v.* Aiken, 25 Vt. 324; Hughes *v.* Edwards, 22 U. S. (9 Wheat.) 489; bk. 6, L. ed. 141; Trash *v.* White, 3 Bro. Ch. 288, 291; Hillary *v.* Waller, 12 Ves. 265.

The general presumption, however, is that the mortgagor and his grantee hold subordinate to the mortgagee. See Boyd *v.* Beck, 29 Ala. 703; Noyes *v.* Sturdivant, 18 Me. 104; Bacon *v.* McIntire, 49 Mass. (8 Metc.) 87; Tripe *v.* Marcey, 39 N. H. 439; Zeller *v.* Eckert, 45 U. S. (4 How.) 295; bk. 11, L. ed. 982; Hall *v.* Surtees, 5 Barn. & Ad. 687.

**Recognition of Mortgage** rebuts presumption. Heyer *v.* Pruyn, 7 Paige Ch. (N. Y.) 465; s. c., 34 Am. Dec. 355; Drayton *v.* Marshall, Rice (S. Car.), Eq. 383, 384; s. c., 33 Am. Dec. 84; Wright *v.* Eaves, 10 Rich. (S. Car.) Eq. 582; Hughes *v.* Edwards, 22 U. S. (9 Wheat.) 489; bk. 6, L. ed. 142.

**Possession Must be Hostile** to divest mortgagee of right to foreclose. See Medley *v.* Elliott, 62 Ill. 532; Parker *v.* Banks, 79 N. Car. 480; Martin *v.* Jackson, 27 Pa. St. 504; Rockwell *v.* Servant, 63 Ill. 424; Jamison *v.* Perry, 38 Iowa, 14. Possession does not become antagonistic simply by neglect and refusal to pay interest, and the like. See Jones *v.* Williams, 5 Ad. & El. 291; Patridge *v.* Bere, 5 B. & Ald. 604. But possession after breach raises presumption of adverse possession. See Wilkinson *v.* Flowers, 37 Miss. 579; s. c., 75 Am. Dec. 78.

**Presumption from Mortgagor's Possession.**—Debts secured by mortgage are defeated by the same presumptions arising from lapse of time and laches as other demands. See Jackson *v.* Wood, 12 Johns, (N. Y.) 245; s. c., 7 Am. Dec. 315; Jackson *v.* Pratt, 10 Johns. (N. Y.) 381; Collins *v.* Torry, 7 Johns. (N. Y.) 278; s. c., 5 Am. Dec. 273; Giles *v.* Baremore, 5 Johns. Ch. (N. Y.) 552; Howland *v.* Shurtleff, 43 Mass. (2 Metc.) 26; s. c., 25 Am. Dec. 344; Inches *v.* Leonard, 12 Mass. 379.

The doctrine of presumption arising from possession by the mortgagor for more than twenty years is now fully established in this country. See Jackson *v.* Wood, 12 Johns. (N. Y.) 245; Jackson *v.* Pratt, 10 Johns. (N. Y.) 381; Collins *v.* Torry, 7 Johns. (N. Y.) 278; Giles *v.* Baremore, 5 Johns. Ch. (N. Y.) 522; Newcomb *v.* St. Peter's Church, 2 Sandf. Ch. (N. Y.) 636; McDonald *v.* Sims, 3 Ga. 383; Fild *v.* Wilson, 6 B. Mon. (Ky.) 479; Bacon *v.* McIntire, 49 Mass. (8 Metc.) 87; Howland *v.* Shurtleff, 43 Mass. (2 Metc.) 26; s. c., 35 Am. Dec. 384; Inches *v.* Leonard, 12 Mass. 379; Hoffman *v.* Harrington, 33 Mich. 392; Reynolds *v.* Green, 10 Mich. 355; Wilkinson *v.* Flowers, 37 Miss. 212; McNair *v.* Lot, 34 Mo. 285; Martin *v.* Bowker, 19 Vt. 526; Hughes *v.* Edwards, 22 U. S. (9 Wheat.) 489; bk. 6, L. ed. 142. Such presumption, however, is not conclusive, and may be repelled by circumstances. See Moore *v.* Cable, 1 Johns. Ch. (N. Y.) 386; Cheever *v.* Perley, 93 Mass. (11 Allen) 584; Wanmaker *v.* Van Buskirk, 1 N. J. Eq. (1 Saxt.) 685; Booker *v.* Booker, 29 Gratt. (Va.) 605; s. c., 26 Am. Rep. 401; Hughes *v.* Edwards, 22 U. S. (9 Wheat.) 489; bk. 6, L. ed. 142.

**Lapse of Time and Neglect to Enforce Mortgage,** at most, are simply grounds of presumption, not evidence of payment. Hillary *v.* Waller, 12 Ves. 239, 252), and may afford a sufficient answer in an action to foreclose. See Jackson *v.* Wood, 12 Johns. (N. Y.) 245; Jackson *v.* Pratt, 10 Johns. (N. Y.) 381; Collins *v.* Torry, 7 Johns. (N. Y.) 278; Jackson *v.* Hudson, 3 Johns. (N. Y.) 375; Demarest *v.* Wynkoop, 3 Johns. Ch. (N. Y.) 135; Chuck *v.* Rollins, 44 Me. 104; Crook *v.* Glenn, 30 Md. 55; Bacon *v.* McIntire, 49 Mass. (8 Metc.) 87.

**Rebuttal of Presumption** by payment of interest, promise to pay, or acknowledgment of the debt: Cook *v.* Parhan, 63 Ala. 456; Coldcleugh *v.* Johnson, 34 Ark. 312; Lock *v.* Caldwell. 91 Ill. 417; Murphy *v.* Coats, 32 N. J. Eq. (6 Stew.) 424; Snavely *v.* Pickel, 29 Gratt. (Va.) 27; Pears *v.* Laing, L. R. 12 Eq. 41.

**Parol Evidence to Rebut Presumption** must show some positive act which is a recognition of the debt,—Jarvis *v.* Albro, 67 Me. 310;—such as a part payment,—Schmucker *v.* Sibert, 18 Kan. 104. See Pease *v.* Catlin, 1 Ill. App. 88; Clawson *v.* McCune, 20 Kan. 337;—or a positive new promise,—Crone *v.* Citizens Bank of La., 28 La. Ann. 449.

**Presumption of Payment rebutted** by showing ignorance of defendant's residence,—Bailey *v.* Jackson, 16 Johns. 210; s. c., 8 Am. Dec. 309;—or that the commencement of suit was prevented by war, —Hale *v.* Pack, 10 W. Va. 145;—or by showing any other circumstances which make payment or discharge improbable. Snavely *v.* Pickle, 29 Gratt. (Va.) 27; Brobst *v.* Brock, 77 U. S. (10 Wall.) 535; bk. 19, L. ed. 1002.

**Relationship Between the Parties** may rebut presumption of payment. Wanmaker *v.* Van Buskirk, 1 N. J. Eq. (1 Saxt.) 685; s. c., 23 Am. Dec. 748; Leman *v.* Newhan, 1 Ves. sr. 51.

**Statute Begins to Run** when right to foreclosure accrues. Prouty *v.* Eaton, 41 Barb. (N. Y.) 409; Jackson *v.* Wood, 12 Johns. (N. Y.) 242; s. c., 7 Am. Dec. 315; Wilkinsons *v.* Flowers, 37 Miss. 575; s. c., 75 Am. Dec. 78; Nevitt *v.* Bacon, 32 Miss. 212, 227; s. c., 66 Am. Dec. 609; Benson *v.* Stewart, 30 Miss. 49.

Where it begins to run, will not be suspended by a subsequent disability. Demarest *v.* Wynkoop, 3 Johns. Ch. (N. Y.) 129; s. c., 8 Am. Dec. 467; Johnson *v.* Moore, 13 Johns. (N. Y.) 513; s. c., 7 Am. Dec. 398; Ruff's Adm'r *v.* Bull, 7 Harr. & J. (Md.) 14; s. c., 16 Am. Dec. 290; Thompson *v.* Smith, 7 Serg. & R.

(Pa.) 209; s. c., 10 Am. Dec. 453; Adamson *v.* Smith, 2 Mill (S. C.) 267; s. c., 12 Am. Dec. 665; Faysoux *v.* Prayther, 1 Nott. & McC. (S. C.) 296; s. c., 9 Am. Dec. 691; Fitzhugh *v.* Anderson, 2 Hen. & Mumph. (Va.) 289; s. c., 3 Am. Dec. 625.

**Action on Note Barred** does not bar action upon mortgage. Nevitt *v.* Bacon, 32 Miss. 212; s. c., 66 Am. Dec. 609; Trotter *v.* Erwin, 27 Miss. 772; Bush *v.* Cooper, 26 Miss. 611; s. c., 59 Am. Dec. 270; Miller *v.* Trustees of Jefferson College, 13 Miss. (5 Smed. & M.) 561; Green *v.* Gastin, 56 Miss. 751; Wilkinson *v.* Flowers, 37 Miss. 579; s.c., 75 Am. Dec. 78; Miller *v.* Helm, 10 Miss. (2 Smed. & M.) 597. But an action will be barred by the same lapse of time that would bar an action for the mortgaged premises. Jackson *v.* Wood, 10 Johns. (N. Y.) 242; s. c., 7 Am. Dec. 315; Wilkinson *v.* Flowers, 37 Miss. 579; s. c., 75 Am. Dec. 78; Nevitt *v.* Bacon, 32 Miss. 212, 227; s. c., 66 Am. Dec. 609; Benson *v.* Stewart, 30 Miss. 49. It is true that uninterrupted possession for twenty years after condition broken, without any demand of principal or interest, or any claim on the part of the mortgagee, raises a presumption that the debt has been paid, in the absence of circumstances rebutting such presumption. See Barned *v.* Barned, 21 N. J. Eq. (6 C. E. Gr.) 245; Hays *v.* Whitall, 13 N. J. Eq. (2 Beas.) 242; Wanmaker *v.* Van Buskirk, 1 N. J. Eq. (1 Saxt.) 685; s. c., 23 Am. Dec. 748; Evans *v.* Huffman, 5 N. J. Eq. (1 Halst.) 360; Harrington *v.* Slade, 22 Barb. (N. Y.) 161; Bailey *v.* Jackson, 16 Johns. (N. Y.) 210; s. c., 8 Am. Dec. 309; Giles *v.* Baremore, 5 Johns. Ch. (N. Y.) 545; Livingston *v.* Livingston, 4 Johns. Ch. (N. Y.) 287; s. c., 8 Am. Dec. 562; Heyer *v.* Pruyn, 7 Paige Ch. (N. Y.) 465; s. c., 34 Am. Dec. 355; Swart *v.* Service, 21 Wend. (N. Y.) 36; s. c., 34 Am. Dec. 211; Perkins *v.* Cartmell, 4 Harr. (Del.) 275; Records *v.* Melson, 1 Houst. (Del.) 139; Van Duyn *v.* Hepner, 45 Ind. 589; Jarvis *v.* Albro, 67 Me. 310; Baltimore & O. R. Co. *v.* Trimble, 51 Md. 99; Cheever *v.* Perley, 93 Mass. (11 Allen) 584; Proctor *v.* Creighton, 66 Mass. (12 Cush.) 437; Ayres *v.* Waite, 64 Mass. (10 Cush.) 76; Bacon *v.* McIntire, 49 Mass. (8 Metc.) 87; Howland *v.* Shurtleff, 43 Mass. (2 Metc.) 26; s. c., 35 Am. Dec. 384; Sheafe *v.* Gerry, 18 N. H. 245; Howard *v.* Hildreth, 18 N. H. 105; Downs *v.* Sovy, 28 N. J. Eq. (1 Stew.) 55; Barned *v.* Barned, 21 N. J. Eq. (6 C. E. Gr.) 246; Hayes *v.* Whitall, 13 N. J. Eq. (2 Beas.) 242; Wanmaker *v.* Van Buskirk, 1 N. J. Eq. (1 Saxt.) 685; s. c., 23 Am. Dec. 748; Evans *v.* Huffman, 5 N. J. Eq. (1 Halst.) 360; Todd's Appeal, 24 Pa. St. 429; Bank of United States *v.* Biddle, 2 Pars. Cas. (Pa.) 31; Drayton *v.* Marshall, Rice (S. C.) Eq. 373; s. c., 33 Am. Dec. 84; Atkinson *v.* Dance, 9 Yerg. (Tenn.) 424; s. c., 30 Am. Dec. 422; Booker *v.* Booker, 29 Gratt. (Va.) 605; s. c., 26 Am. Rep. 401; Whipple *v.* Barnes, 21 Wis. 327; Hughes *v.* Edwards, 22 U. S. (9 Wheat.) 489; bk. 6, L. ed. 142; N. Y. Code Civ. Proc. §§ 365, 379; Belmont *v.* O'Brien, 12 N. Y. 394; Jackson *v.* Wood, 12 Johns. (N. Y.) 242; Jackson *v.* De Lancey, 11 Johns. (N. Y.) 365; s. c., 13 Johns. (N. Y.) 537; Jackson *v.* Pierce, 10 Johns. (N. Y.) 278; Jackson *v.* Hudson, 3 Johns. (N. Y.) 375; Giles *v.* Baremore, 5 Johns. Ch. (N. Y.) 545; Dunham *v.* Minard, 4 Paige Ch. (N. Y.) 441; Chick *v.* Rollins, 44 Me. 104; Blethere *v.* Dwinal, 35 Me. 556; Cheever *v.* Perley, 93 Mass. (11 Allen), 584; Gould *v.* White, 26 N. H. 178; Evans *v.* Hoffman, 5 N. J. Eq. (1 Halst.) 354. But the ruling of statutes of limitations against the note secured does not bar an action to foreclose. See Brost *v.* Corey, 15 N. Y. 510; Waltermire *v.* Westover, 14 N. Y. 16; New York Life Ins. & T. Co. *v.* Covert, 29 Barb. (N. Y.) 441; Pratt *v.* Heaggins, 29 Barb. (N. Y.) 285; Gillette *v.* Smith, 18 Hun (N. Y.), 12; Heyer *v.* Pruyn, 7 Paige Ch. (N. Y.) 465; s. c., 34 Am. Dec. 355; Jones *v.* Merchants' Bank of Albany, 4 Robt. (N. Y.) 227; Ware *v.* Curry, 67 Ala. 274; Scott *v.* Ware, 64 Ala. 174; Bizzell *v.* Nix, 60 Ala. 281; s. c., 31 Am. Rep. 38; Birnie *v.* Main, 29 Ark. 591; Hough *v.* Bailey, 32 Conn. 289; Haskell *v.* Bailey, 22 Conn. 573; Belknap *v.* Gleason, 11 Conn. 160; s. c., 27 Am. Dec. 721; Browne *v.* Browne, 17 Fla. 607; s. c., 38 Am. Rep. 96; Elkins *v.* Edwards, 8 Ga. 325; Wright *v.* Le Claire, 3 Iowa, 231; Crooker *v.* Holmes, 65 Me. 195; Ozmun *v.* Reynolds, 11 Minn. 473; Trustees of Jefferson College *v.* Dickson, Freem. Ch. (Miss.) 482; Savings Bank *v.* Ladd, 40 N. H. 463; Fisher *v.* Mossman, 11 Ohio St. 46; Larey *v.* May, 16 Ohio, 66; Sparhawk *v.* Buell, 9 Vt. 74; Cole *v.* Withers, 33 Gratt. (Va.) 186; Wyat *v.* Carnithew, 21 W. Va. 516; Pitzer *v.* Burns, 7 W. Va. 77; Knox *v.* Galligan, 21 Wis. 470; Wiswell *v.* Baxter, 20 Wis. 680; Almy *v.* Wilbur, 2 Woodb. & M. C. C. 404. See also Waltermire *v.* Westover, 14 N. Y. 820; Jackson *v.* Sackett, 7 Wend. (N. Y.) 94; Baldwin *v.* Norton, 2 Conn. 163; Kellar *v.* Sinton, 14 B. Mon. (Ky.) 307; Crain *v.* Paine, 58 Mass. (4 Cush.) 483; Eastman *v.* Foster,

49 Mass. (8 Metc.) 19; Thayer *v.* Mann, 36 Mass. (19 Pick.) 536; Trotter *v.* Erwin, 27 Miss. 771; Wood *v.* Augustine, 61 Mo. 46; Cookes *v.* Culbertson, 9 Nev. 199; Mackie *v.* Lansing, 2 Nev. 302; Reed *v.* Edwards, 2 Nev. 262; Henry *v.* Confidence Gold & Silver Co., 1 Nev. 619; Langworth *v.* Taylor, 2 Cin. Sup. Ct. Rep. (Ohio), 39; Meyer *v.* Beal, 5 Oreg. 530; Harris *v.* Vaughn, 2 Tenn. Ch. 483; Richman *v.* Aiker, 25 Vt. 324; Kennedy *v.* Knight, 21 Wis. 340; Whipple *v.* Barne, 21 Wis. 327; Cleveland *v.* Harrison, 15 Wis. 670; Union Bank of La. *v.* Stafford, 53 U. S. (12 How.) 327, 340; bk. 13, L. ed. 1008; Townsend *v.* Jenison, 50 U. S. (9 How.) 413; bk. 13, L. ed. 880; McElmoyle *v.* Cohen, 38 U. S. (13 Pet.) 312; bk. 10, L. ed. 177; Hughes *v.* Edwards, 22 U. S. (9 Wheat.) 489; bk. 6, L. ed. 142; Sturges *v.* Crowninshield, 17 U. S. (4 Wheat.) 122, bk. 4, L. ed. 529; Sparks *v.* Pico, 1 McAll. C. C. 497; Higgins *v.* Scott, 2 Barn. & Add. 413; Spears *v.* Hartley, 3 Esp. 81.

The reason is that the mortgage has a legal import more extensive than the note, which is a mere evidence of the debt. Borst *v.* Covey, 15 N. Y. 506; Heyer *v.* Pruyn, 7 Paige Ch. (N. Y.) 465; Baldwin *v.* Norton, 2 Conn. 161; Elkins *v.* Edwards, 8 Ga. 325; Joy *v.* Adams, 26 Me. 330; Balch *v.* Onion, 58 Mass. (4 Cush.) 559; Thayer *v.* Mann, 36 Mass. (19 Pick.) 535; Michigan Ins. Co. *v.* Brown, 11 Mich. 265; Wilkinson *v.* Flowers, 37 Miss. 579; s. c., 75 Am. Dec. 78; Nevitt *v.* Bacon, 32 Miss. 212; 66 Am. Dec. 609; Trotter *v.* Erwin, 27 Miss. 772; Miller *v.* Trustees of Jefferson College, 13 Miss. (5 Smed. & M.) 561; Whipple *v.* Barns, 21 Wis. 327; Wiswell *v.* Baxter, 20 Wis. 680; Richmond *v.* Aiken, 25 Vt. 324. *Compare* Haskell *v.* Bailey, 22 Conn. 569. The mortgage remains in full force until the debt which it secures is paid, except where the mortgagee loses his rights by negligence. Joy *v.* Adams, 26 Me. 330.

**A Contrary Rule** prevails in some States. Lent *v.* Morrill, 25 Cal. 492; McCarthy *v.* White, 21 Cal. 495; Lord *v.* Morris, 18 Cal. 482; Emory *v.* Keighan, 94 Ill. 543; Brown *v.* Rockhol, 49 Iowa, 282; Clinton Co. *v.* Cox, 37 Iowa, 570; Hubbard *v.* Missouri V. L. Ins. Co., 25 Kan. 172; Schmucker *v.* Sibert, 18 Kan. 104; s. c., 26 Am. Rep. 765; Huxley *v.* Cox, 9 Neb. 230; Blackwell *v.* Barnett, 52 Tex. 326; Ross *v.* Mitchell, 28 Tex. 150; Daggs *v.* Ewell, 3 Woods C. C. 344.

Where such a rule prevails, a grantee of the mortgagor may avail himself of the statute of limitations. Wood *v.* Goodfellow, 43 Cal. 185; Lent *v.* Shear, 26 Cal. 361; Grattan *v.* Wiggins, 23 Cal. 16; McCarthy *v.* White, 21 Cal. 495; Lord *v.* Morris, 18 Cal. 428; Medley *v.* Elliott, 62 Ill. 532; Pollock *v.* Maison, 41 Ill. 517; Harris *v.* Mills, 28 Ill. 44; Schmucker *v.* Sibert, 18 Kan. 104; s. c., 26 Am. Rep. 765; Low *v.* Allen, 41 Me. 248.

**The Statute Does Not Bar or Discharge the Debt** or in any way destroy the obligation. Sichel *v.* Carrillo, 42 Cal. 493. The debt remains unsatisfied, and is a sufficient consideration to support a new promise. Sichel *v.* Carrillo, 42 Cal. 493.

**Removal of the Bar of the Statute** is effected by acknowledgment. Danforth *v.* Culver, 11 Johns. (N. Y.) 146; s. c., 6 Am. Dec. 361; Lord *v.* Shaler, 3 Conn. 132; s. c., 8 Am. Dec. 160; Mellick *v.* De Selhorst, 1 Ill. (Breese) 171; s. c., 12 Am. Dec. 172; Bell *v.* Rowland, Hard. (Ky.) 301; s. c., 3 Am. Dec. 729; Seaward *v.* Lord, 1 Me. (1 Greenl.) 163; s. c., 10 Am. Dec. 50; Bangs *v.* Hall, 20 Mass. (2 Pick.) 379; s. c., 13 Am. Dec. 437; Jones *v.* Moore, 5 Binn. (Pa.) 573; s. c., 6 Am. Dec. 428; Fries *v.* Boisselet, 9 Serg. & R. (Pa.) 128; s. c., 11 Am. Dec. 683; Glenn *v.* McCullough, 1 Harp. (S. Car.) L. 484; s. c., 18 Am. Dec. 661; Lee *v.* Perry, 3 McC. (S. Car.) 552; s. c., 15 Am. Dec. 650; Burden *v.* McElhenny, 2 Nott & McC. (S. Car.) 60; s. c., 10 Am. Dec. 570; Olcott *v.* Scales, 3 Vt. 173; s. c., 21 Am. Dec. 585. Respecting what promises will remove the statutory bar, see Lord *v.* Shaler, 3 Conn. 132; s. c., 8 Am. Dec. 160; Glenn *v.* McCullough, 1 Harp. (S. Car.) L. 484; s. c., 18 Am. Dec. 661; Burden *v.* McElhenny, 2 Nott & McC. (S. Car.) 60; s. c., 10 Am. Dec. 570; Danforth *v.* Culver, 11 Johns. (N. Y.) 146; s. c., 6 Am. Dec. 361; Bell *v.* Roland, Hard. (Ky.) 301; s. c., 3 Am. Dec. 729; Newhouse *v.* Redwood, 7 Ala. 599; McCormick *v.* Brown, 36 Cal. 180; Kimmel *v.* Schwartz, 1 Ill. (Breese) 282; Gray *v.* Lawridge, 2 Bibb (Ky.) 285; Hopkins *v.* Stout, 6 Bush (Ky.), 384; Smith *v.* Dawson, 10 B. Mon. (Ky.) 114; Fischer *v.* Hess, 9 B. Mon. (Ky.) 617; French *v.* Frazier, 7 J. J. Marsh. (Ky.) 431; Heard *v.* Manner, 5 J. J. Marsh. (Ky.) 259; Rochester *v.* Buford, 5 J. J. Marsh. (Ky.) 33; Hord *v.* Lee, 4 T. B. Mon. (Ky.) 36; Lansdale *v.* Brashear, 3 T. B. Mon. (Ky.) 332; McLean *v.* Thorp, 4 Mo. 259; Shaw *v.* Newell, 2 R. I. 269; Belote *v.* Wynne, 7 Yerg. (Tenn.) 541; Bell *v.* Morrison, 26 U. S. (1 Pet.) 363; bk. 7, L. ed. 179. See also Blakeman *v.* Fonda, 41 Conn. 561; Wachter *v.* Albee, 80 Ill. 47; Carroll *v.* Forsyth, 69 Ill. 127; Collins *v.* Bane, 34 Iowa, 385; Gray *v.* McDowell, 6 Bush (Ky.), 475; Citizens' Bank *v.* Johnson, 21

nearly all of the States; and by the English statute which went into

La. Ann. 128; Parker *v.* Shuford, 76 N. C. 219; Miller *v.* Baschore, 83 Pa. St. 356; Senseman *v.* Hershman, 82 Pa. St. 83.

**Acknowledgment of Debt** accompanied by a conditional promise to pay will remove the bar. Sedgwick *v.* Gerding, 55 Ga. 264; Carroll *v.* Forsyth, 69 Ill. 127; Norton *v.* Colby, 52 Ill. 199; Parsons *v.* Northern Illinois Coal & I. Co., 38 Ill. 433; Ayers *v.* Richards, 12 Ill. 148. The acknowledgment or promise must be made by the debtor or by some one in his behalf; and must be made to the creditor or his agent, and not to a mere stranger. Wakeman *v.* Sherman, 9 N. Y. 85; Bloodgood *v.* Bruen, 8 N. Y. 362; Ringo *v.* Brooks, 26 Ark. 540; Farrell *v.* Palmer, 36 Cal. 187; Keener *v.* Crull, 19 Ill. 189; Collins *v.* Bane, 34 Iowa, 385; Roscoe *v.* Hale, 73 Mass. (7 Gray) 274; Taylor *v.* Hendrie, 8 Nev. 243; Johns *v.* Lantz, 63 Pa. St. 324; Kyle *v.* Wells, 17 Pa. St. 286; s. c., 55 Am. Dec. 555; Christy *v.* Flemington, 10 Pa. St. 129; s. c., 49 Am. Dec. 590; F. & M. Bank *v.* Wilson, 10 Watts (Pa.), 261; Georgia & T. Ins. Co. *v.* Ellicott, Taney C. C. 130; 3 Parsons on Contr. (5th ed.) 86; Sibert *v.* Wild, 16 Kan. 176; s. c., 22 Am. Rep. 280; Trammell *v.* Salmon, 2 Bail. (S. Car.) 308; Robbins *v.* Farley, 2 Strobh. (S. Car.) 348.

**Payment on Debt** is evidence of promise, and removes bar. See Newlin *v.* Duncan, 1 Harr. (Del.) 204; s. c., 25 Am. Dec. 66; Hunt *v.* Bridgham, 20 Mass. (2 Pick.) 581; s. c., 13 Am. Dec. 458; Reid *v.* McNaughton, 15 Barb. (N. Y.) 179; Carshore *v.* Huyck, 6 Barb. (N. Y.) 588; Bell *v.* Morrison, 26 U. S. (1 Pet.) 370; bk. 7, L. ed. 182; Ross *v.* Jones, 89 U. S. (22 Wall.) 593; bk. 22, L. ed. 730; Wenman *v.* Mohawk Ins. Co., 13 Wend. (N. Y.) 167; s. c., 28 Am. Dec. 464; Kincaid *v.* Archibald, 10 Hun (N. Y.), 11; New York L. Ins. & T. Co. *v.* Covert, 29 Barb. (N. Y.) 435; Jarvis *v.* Albro, 67 Me. 310.

**Where There are Several Persons Interested** in the equity of redemption, and interest is paid by one, this will not remove the bar as to the others. Pears *v.* Laing, L. R. 12 Eq. 51, 54; Roddman *v.* Morley, 1 De G. & J. 1.

**Payment by Agent** or other interested person removes bar. Ward *v.* Carttar, L. R. 1 Eq. 29. However, payment by a stranger does not. Chinnery *v.* Evans, 11 H. L. Cas. 115.

**Mortgagee, After Remedy Barred,** has a right to retain possession until the debt is paid. Chase *v.* Peck, 21 N. Y. 581; Siahler *v.* Singner, 44 Barb. (N. Y.) 606; Munroe *v.* Merchant, 26 Barb. (N. Y.) 383; Casey *v.* Buttolph, 12 Barb. (N. Y.) 637; Jackson *v.* Delancy, 13 Johns. (N. Y.) 537; s. c., 7 Am. Dec. 403; Moore *v.* Cable, 1 Johns. Ch. (N. Y.) 385; Watson *v.* Spence, 20 Wend. (N. Y.) 260; Phyfe *v.* Riley, 15 Wend. (N. Y.) 248; s. c., 30 Am. Dec. 55; Van Duyne *v.* Thayre, 14 Wend. (N. Y.) 234; Bussey *v.* Page, 14 Me. 132; Pace *v.* Chadderdon, 4 Minn. 499; Pettengill *v.* Evans, 5 N. H. 54; Henry *v.* Confidence Gold & Silver Mining Co., 1 Nev. 619; Den *v.* Wright, 7 N. J. L. (2 Halst.) 175; s. c., 11 Am. Dec. 546; Harris *v.* Haynes, 34 Vt. 220; Hennesy *v.* Farrell, 20 Wis. 42. So also may an assignee of a mortgagee, in possession. Jackson *v.* Bowen, 7 Cow. (N. Y.) 13; Jackson *v.* Minkler, 10 Johns. (N. Y.) 480; Madison Ave. Baptist Church *v.* Baptist Church in Oliver St., 73 N. Y. 82; Trimm *v.* Marsh, 54 N. Y. 599; s. c., 13 Am. Rep. 623; Winslow *v.* McCall, 32 Barb. (N. Y.) 241; Bolton *v.* Brewster, 32 Barb. (N. Y.) 389; Watson *v.* Spence, 20 Wend. (N. Y.) 261, 264; Jackson *v.* De Lancey, 11 Johns. (N. Y.) 365; s. c., 13 Johns. (N. Y.) 537; Randall *v.* Raab, 2 Abb. (N. Y.) Pr. 307, 314; Casey *v.* Buttolph, 12 Barb. (N. Y.) 637, 640.

The reason of this is said to be because, independent of statute, the mortgagee is the absolute owner at law after default of payment. Edwards *v.* Farmers' F. Ins. Co., 21 Wend. (N. Y.) 467, 484; Jackson *v.* Pierce, 10 Johns. (N. Y.) 414; Smith *v.* Shuler, 12 Serg. & R. (Pa.) 240; Simpson's Lessee *v.* Ammons, 1 Binn. (Pa.) 175.

**Less than Twenty Years** in some States raises a bar to foreclosure. See Henderson *v.* Lewis, 9 Serg. & R. (Pa.) 379; s. c., 11 Am. Dec. 733; Lesley *v.* Nones, 7 Serg. & R. (Pa.) 410; Husky *v.* Maples, 2 Coldw. (Tenn.) 25; Leiper *v.* Erwin, 5 Yerg. (Tenn.) 97; Freeman on Judgments, §§ 464, 465; 2 Greenl. Ev. § 528; Atkins *v.* Dance, 9 Yerg. (Tenn.) 424; s. c., 30 Am. Dec. 422; Blackburne *v.* Squib, Peck (Tenn.), 64; Yarnell *v.* Moore, 3 Coldw. (Tenn.) 176; Carter *v.* Wolfe, 1 Heisk. (Tenn.) 700; Anderson *v.* Settle, 5 Sneed (Tenn.), 203.

**The General Doctrine** is that the fact that the Statute of Limitations has run upon the note, or other debt secured by the mortgage, does not affect the enforcement of the mortgage by appropriate remedies; for, although the remedy for the collection of the debt is barred, the debt itself is not extinguished. Jervis *v.* Woodruff, 22 Conn. 548; Pratt *v.* Huggins, 29 Barb. (N. Y.)

operation January 1, 1879, the period has been reduced to twelve years.[1]

**IV. Foreclosure by Sale the Prevailing Mode.**—Foreclosure by sale is the prevailing method for obtaining payment of mortgage debts in the courts of the American States; being the mode adopted by all of them with the exception of *Maine*,[2] *New Hampshire*, *Massachusetts*, and *Rhode Island*. In *Illinois*, *Delaware*, and *Pennsylvania*, when the foreclosure is by *scire facias* a sale of the premises is ordered.

Foreclosure by sale is the method adopted in the United States courts. It is also the method now generally adopted in the English courts under the provisions of the Chancery Improvement Act.[3] While foreclosure sales are now largely regulated by statutes, they are still based upon the principles of equity jurisdiction; and these principles are constantly invoked and applied in the course of the proceeding, even in those States where the Code system is adopted.[4]

1. *Nature of the Remedy.*—Foreclosure by sale is not strictly a proceeding *in rem*, but is in the nature of such remedy. The primary purpose is to enforce the lien on the land, and in this respect it is properly a proceeding in *rem;* but inasmuch as, secondarily, the rights and equities of all parties in interest are to be adjusted, and, now in a majority of the courts, a personal judgment against the mortgagor for any deficiency existing after the application of the proceeds of the sale to the debt, may be taken, it partakes largely of the nature of a proceeding *in personam* as well. It

277; Eastman *v.* Foster, 8 Metc. (Mass.) 19; Kennedy *v.* Knight, 21 Wis. 340; Nevitt *v.* Bacon, 32 Miss. 212; Bush *v.* Cooper, 26 Miss. 599; s. c., 59 Am. Dec. 270; Donnelly *v.* Simonton, 13 Minn. 301; Crain *v.* Paine, 4 Cush. (Mass.) 483; Elkins *v.* Edwards, 8 Ga. 326; Wood *v.* Augustine, 61 Mo. 46; Baldwin *v.* Norton, 2 Conn. 161; Fisher *v.* Mossman, 11 Ohio St. 42; Kellar *v.* Sinton, 14 B. Mon. (Ky.) 248; Birnie *v.* Maine, 29 Ark. 591; Harris *v.* Vaughn, 2 Tenn. Ch. 483; Ohio Life & F. Ins. Co. *v.* Winn, 4 Md. Ch. 253; Browne *v.* Browne, 17 Fla. 607. But in the States of *Illinois*, *Kansas*, *Texas*, *Iowa*, *Nebraska*, *Nevada*, and *California*, and perhaps in one or two other States, when the debt is barred the remedy for the enforcement of the mortgage is barred also. Harris *v.* Mills, 28 Ill.; 44 Schumucker *v.* Sibert; 18 Kan. 104; Ross *v.* Mitchell, 28 Tex. 150; Duty *v.* Graham, 12 Tex. 427; s. c., 62 Am. Dec. 534; Clinton Co. *v.* Cox, 37 Iowa, 570.

1. Real Property Limitation Act of 1874. 37 & 38 Vict. ch. 57, § 8. See Duncan *v.* Cobb, 32 Minn. 460, as to foreclosure under *Minnesota* statutes.

Payment of part of the mortgage debt, pending foreclosure proceedings, does not necessarily operate to prevent the foreclosure from becoming effectual at the end of the statutory period of three years. Welch *v.* Sterns, 74 Me. 71.

An enumeration of the reduced periods in the American States will be found in 2 Jones on Mortgages (2d Ed.), § 1183, note 4.

2. The foreclosure may also be by advertisement. 2 Jones Mort. (2d Ed.), § 1240.

3. 15 & 16 Vict., ch. 86, § 48; Newman *v.* Selfa, 33 Beav. 522; Belaney *v.* Cockle, 18 Jur. (Eng.) 465. The mode of procedure in the *Irish* courts requires a sale of the premises. 3 Jo. & Lat. 586.

In *Pennsylvania*, when there is an abuse of trust under the mortgage deed, equitable proceedings to control the execution of the power may be resorted to. Bradley *v.* Chester Valley R. Co., 36 Pa. St. 141.

4. The advantages of sale of the premises in foreclosure proceedings, over strict foreclosure and foreclosure by entry and possession, are apparent. It is the more equitable course of procedure, and more effectually subserves the interests and rights of all persons in any way inter-

may be said to be a combination of both, and to be a remedy *sui generis*.[1]

**V. Proceedings in Foreclosure Sales.**— Proceedings to foreclose mortgages by a sale of the premises are equitable in their character, and the principles of equity jurisprudence, as well as the methods of procedure in equity suits, are constantly adhered to.

1. *In What Courts to be Brought.*—The courts in which foreclosure suits are to be brought are designated by statute in many of the American States;[2] and when not so designated, they are properly brought in the court which has equity jurisdiction.[3]

ested in the mortgaged premises, for the reason that all the various and conflicting equities of the parties can be adjusted out of the surplus proceeds of the sale. It is also more consonant with the modern doctrine of mortgages, which regards them as not creating an estate in the land, involving, as a logical consequence, the investiture of the mortgagee with an absolute estate in the land upon condition broken, but as constituting a mere lien upon it as making the land but a security for the debt; and that therefore no judicial proceeding for the enforcement of the mortgagee's rights should be predicated upon, or result in an absolute estate in the mortgagee. Out of the proceeds of the sale, all rights and interests can be protected, so far as priorities will allow; and all conflicting claims can be adjusted, and a final distribution of the proceeds be made with justice to the rights of all persons concerned. See Story Eq. Ju. § 1025.

1. In most of the States there are statutory requirements for the bringing of the suit in the county where the land lies. And, where a sale of the land is to be decreed, the jurisdiction should be local, even without such requirement. Caufman *v.* Sayre, 2 B. Mon. (Ky.) 202; Chadbourne *v.* Forster, 29 Iowa, 181; Boome *v.* Beers, 6 Conn. 198; Penniman *v.* Hollis, 13 Mass. 429; Amidown *v.* Peck, 11 Metc. (Mass.) 467.

A mortgagee as such is not entitled to bring ejectment, nor to institute his suit of foreclosure as auxiliary to the ejectment. Livingston *v.* Hays, 43 Mich. 129.

In *Vermont* the court of chancery has jurisdiction to foreclose a mortgage, no matter in what form it may exist. Ross *v.* Shurtleff, 55 Vt. 177.

In *California*, under § 72 of Code of Civil Procedure, "there can be but one action for the recovery of a debt . . secured by mortgage." *Held*, that where mortgagee had obtained final judgment in Ohio upon a note secured by mortgage on land in California he could not afterwards maintain an action for foreclosure. Ould *v.* Stoddard, 54 Cal. 613.

A mortgage may be foreclosed in favor of both creditors at the same time, where it is a single mortgage to secure two creditors to the amounts respectively due them; it is not objectionable as joining distinct and separate claims in the same action. Chamberlain *v.* Beck, 68 Ga. 343.

As to proper mode of procedure under Rev. Stat. § 3157, of *Wisconsin*, as to foreclosure suits in case of instalments due and not due, see Schroder *v.* Laubenheimer, 50 Wis. 480.

2. For an enumeration of the statutory provisions of the several States, see 2 Jones on Mort. (2d Ed.) ch. 30.

**Regulating Statutes** have been passed in California, Florida, Indiana, Iowa, Kansas, Kentucky, Minnesota, Missouri, Nebraska, Nevada, North Carolina, Ohio, Oregon, South Carolina, and Wisconsin. See Byron *v.* May, 2 Chand. (Wis.) 103; Chouteau *v.* Allen, 70 Mo. 290; Warehime *v.* Carroll Co. Building Assoc., 44 Md. 512; State Bank of Illinois *v.* Wilson, 8 Ill. 57.

3. Shaw *v.* Norfolk Co. R. Co., 71 Mass. (5 Gray) 162; McElrath *v.* Pittsburgh & S. R. Co., 55 Pa. St. 189.

**Power of Sale in Mortgage** will not deprive courts of equity of jurisdiction. Alabama Life Ins. & T. Co. *v.* Pettway, 24 Ala. 544; Carradine *v.* O'Connor, 21 Ala. 573; Warehime *v.* Carroll Co. Build. Assoc., 44 Md. 212; Morrison *v.* Bean, 15 Tex. 267; Walton *v.* Cody, 1 Wis. 420; Byron *v.* May, 2 Chand. (Wis.) 103. The reason for this is said to be to enable the mortgagee, who cannot purchase at his own sale, but can on sale made by officer of court, to become the purchaser. Marriott *v.* Givens, 8 Ala. 694; McGowan *v.* Branch Bank of Mobile, 7 Ala. 823; Benjamin *v.* Cavaroc. 2 Woods C. C. 168.

**Foreclosure in Federal Courts.**—As to foreclosure in Federal courts, see 17 U. S. Stat. 193; Benjamin *v.* Cavaroc, 2 Woods C. C. 168; Case of Broderick's Will, 88 U. S. (21 Wall.) 503, 520; s. c. *sub nom.* Kelly *v.* McGlynn, bk. 22, L. ed. 599; Thompson *v.* Central O. R. Co., 73 U. S (6 Wall.) 134, 137; bk. 18, L. ed. 765; Bennett *v.* Butterworth, 52 U. S. (11

Under the Code system, in which the distinction between the forms of procedure at law and in equity, as well as the courts of law and equity themselves, are abolished, with but one form of procedure and but one court in which to conduct them, the rules and principles of equity jurisdiction are nevertheless applied in the conduct of the foreclosure suits as fully as in courts of those States which still retain the separate equity tribunals;[1] for these foreclosure suits properly rest upon the inherent jurisdiction of equity in the administration of trust estates.[2]

2. *Parties in Foreclosure Suits.*—All persons who have any interest in the mortgage debt, and also the owner of the equity of redemption, are necessary parties.[3] Whether subsequent encum-

How.) 669, 674, 675; bk. 13, L. ed. 859; Robinson *v.* Campbell, 16 U. S. (3 Wheat.) 212; bk. 4, L. ed. 372; Barber *v.* Barber, 62 U. S. (21 How.) 582; bk. 16, L. ed. 226; Dodge *v.* Woolsey, 59 U. S. (18 How.) 331, 347; bk. 15, L. ed. 401; United States *v.* Howland, 17 U. S. (4 Wheat.) 108; bk. 4, L. ed. 526; Cropper *v.* Coburn, 2 Curt. C. C. 465; Gordon *v.* Hobart, 2 Sumn. C. C. 401; Levy *v.* Haake, 53 Cal. 267; Johnson *v.* Stimmel, 89 N. Y. 117; Thurber *v.* Blanck, 50 N. Y. 86.

**Where Debt Payable in Another County.**—As to jurisdiction of the court when land lies in another county, see Iowa Loan & T. Co. *v.* Day, 63 Iowa, 459; Equitable L. Ins. Co. *v.* Gleason, 56 Iowa, 47; Chadbourne *v.* Gilman, 29 Iowa, 181.

**Where Property Situated in Two States.**—An equity code in either State has jurisdiction to foreclose the whole. Mead *v.* New York, H. & N. R. Co., 45 Conn. 199, 223; Toller *v.* Carteret, 2 Vern. 494; Penn *v.* Baltimore, 1 Ves. Sr. 444. The better practice is thought to be, however, to bring a separate suit in each State. *In re* United States Rolling-stock Co., 55 How. (N. Y.) 236; Farmers' L. & T. Co. *v.* B. & M. T. Co., 44 Hun (N. Y.), 400.

**Where Land Lies Out of the State.**—As to practice in such cases, see House *v.* Lockwood, 40 Hun (N. Y.), 532; Ewer *v.* Coffin, 55 Mass. (1 Cush.) 23; Phelps *v.* Holker, 1 U. S. (1 Dall.) 261; bk. 1, L. ed. 128; Kilburn *v.* Woodworth, 5 Johns. (N. Y.) 37; Robinson *v.* Ex'rs of Ward, 8 Johns. (N. Y.) 86; Bissell *v.* Briggs, 9 Mass. 461, 468; Ocean Ins. Co. *v.* Portsmouth Marine R. Co., 44 Mass. (3 Metc.) 564.

**Transitory Action.**—An action to foreclose a mortgage in the absence of statute may be brought wherever jurisdiction of the parties can be acquired. Bates *v.* Reynolds, 7 Bosw. (N. Y.) 685; Porter *v.* Lord, 4 Duer (N. Y.), 682; Varian *v.* Stevens, 2 Duer (N. Y.), 635; Broome *v.* Beers, 6 Conn. 198; Finnegan *v.* Manchester, 12 Iowa, 521; Cole *v.* Connor, 10 Iowa, 299; Caufman *v.* Sayre, 2 B. Mon. (Ky.) 202; Newman *v.* Stuart, Cooke (Tenn.) 339; Kinney *v.* McLeod, 9 Tex. 78; Paget *v.* Ede, L. R. 18 Eq. 118; Toller *v.* Carteret, 2 Vern. 494.

1. Pomeroy Remedies & Remedial Rights (2d Ed.), § 68; also §§ 56, 64, 333; 2 Jones on Mortg. (2d Ed.) §§ 1443, 1451.

2. 2 Jones on Mortg. (2d Ed.) § 1443.

3. 2 Jones on Mortg. (2d Ed.) § 1394; Pomeroy Remedies & Remedial Rights (2d Ed.), § 333.

**Parties Plaintiff.**—All parties interested in obtaining the judgment demanded should be parties plaintiff; such as:

Sole mortgagee. Haskell *v.* Bailey, 22 Conn. 573; Newall *v.* Wright, 3 Mass. 138; Wendell *v.* New Hampshire Bank, 9 N. H. 404, 417; Sutton *v.* Stone, 2 Atk. 101; Hubbell *v.* Sibley, 5 Lans. (N. Y.) 51.

Assignee of mortgagee. Andrews *v.* Gillespie, 47 N. Y. 487; Christie *v.* Herrick, 1 Barb. Ch. (N. Y.) 254; Franklyn *v.* Hayward, 61 How. (N. Y.) Pr. 43; Whitney *v.* McKinney, 7 Johns. Ch. (N. Y.) 144; Meeker *v.* Claghorn, 44 N. Y. 349; Allen *v.* Brown, 44 N. Y. 228; Brown *v.* Snell, 6 Fla. 741; Strother *v.* Law, 54 Ill. 413; Crooker *v.* Jewell, 31 Me. 306; Hills *v.* Eliot, 12 Mass. 26; Gould *v.* Newman, 6 Mass. 239; Fisher *v.* Meister, 24 Mich. 447; McGuffey *v.* Finley, 20 Ohio, 474; Miller *v.* Bear, 3 Paige Ch. (N. Y.) 466; Kinna *v.* Smith, 3 N. J. Eq. (2 H. W. Gr.) 14; Dolman *v.* Cook, 14 N. J. Eq. (1 McCart.) 56; Horstman *v.* Gerker, 49 Pa. St. 282; Knox *v.* Galligan, 21 Wis. 470; Douglass *v.* Durin, 51 Me. 121; Casper *v.* Munger, 62 Ind. 481; Wood *v.* Williams, 4 Madd. 186; Fisher on Mortgages, § 355; Mansing *v.* Ainsworth, 58 Ill. 163; Heath *v.* Hall, 60 Ill. 344. *Compare* Wilson *v.* Spring, 64 Ill. 14; Dempster *v.* Webster, 69 Ill. 613.

**Parol Assignment** will give assignee interest that may be foreclosed in his own name. Slaughter *v.* Foust, 4 Blackf. (Ind.) 379; Clearwater *v.* Rose, 1 Blackf.

(Ind.) 137; Green *v.* Marble, 37 Iowa, 95; Pease *v.* Warren, 29 Mich. 9; Denton *v.* Cole, 30 N. J. Eq. (3 Stew.) 244; Andrews *v.* McDaniel, 68 N. C. 385.

**An Equitable Assignment** gives an interest that may be foreclosed. Johnson *v.* Leonards, 68 Me. 237; Dixfield *v.* Newton, 41 Me. 221; Dorkay *v.* Noble, 8 Me. (8 Greenl.) 278; Carll *v.* Butman, 7 Me. (7 Greenl.) 102; Bullard *v.* Hinckley, 5 Me. (5 Greenl.) 272; Stewart *v.* Thompson, 3 Vt. 255.

**The Assignee of One of Several Notes May Foreclose** in his own name. See Gower *v.* Howe, 20 Ind. 396; Hough *v.* Osborne, 7 Ind. 140; Stanley *v.* Beatty, 4 Ind. 134; Johnson *v.* Candage, 31 Me. 28; Swartz *v.* Leist, 13 Ohio St. 419; Grattan *v.* Wiggins, 23 Cal. 16; Andrews *v.* Fiske, 101 Mass. 422; Brown *v.* Delaney, 22 Minn. 349; Chappell *v.* Allen, 38 Mo. 213; Anderson *v.* Baumgartner, 27 Mo. 80; Page *v.* Pierce, 26 N. H. (6 Fost.) 317; Furbush *v.* Goodwin, 25 N. H. (5 Fost.) 425.

**Joint Mortgagees Should be Joined as Plaintiffs.**—Paton *v.* Murray, 6 Paige Ch. (N. Y.) 474; Sanford *v.* Bulkley, 30 Conn. 344; Baker *v.* Shepard, 30 Ga. 706; Hopkins *v.* Ward, 12 B. Mon. (Ky.) 185; Gleises *v.* Maignan, 3 La. 530; Brown *v.* Bates, 55 Me. 520; Shirkey *v.* Hanna, 3 Blackf. (Ind.) 403; Platt *v.* Squire, 53 Mass. (12 Metc.) 494, 501; Woodward *v.* Wood, 19 Ala. 213.

**Representatives of Deceased Mortgagee.**—Mutual Life Ins. Co. *v.* Sturges, 32 N. J. Eq. (5 Stew.) 678, 683; Freeman *v.* Schofield, 16 N. J. Eq. (1 C. E. Gr.) 28; Savings Bank *v.* Freese, 26 N. J. Eq. (11 C. E. Gr.) 453; Martin *v.* McReynolds, 6 Mich. 70.

**Owner of One of Several Notes May Foreclose.**—Hartwell *v.* Blocker, 6 Ala. 581; Wilson *v.* Hayward, 2 Fla. 27; Myers *v.* Wright, 33 Ill. 284; Pogue *v.* Clark, 25 Ill. 351; Ross *v.* Utter, 15 Ill. 402; Goodall *v.* Mopley, 45 Ind. 355; Merritt *v.* Wells, 18 Ind. 171; Stanley *v.* Beatty, 4 Ind. 134; Barrett *v.* Blackmar, 47 Iowa, 569; Lyster *v.* Brewer, 13 Iowa, 461; Sangster *v.* Love, 11 Iowa, 580; Rankin *v.* Major, 9 Iowa, 297; Swenson *v.* Moline Plow Co., 14 Kan. 387; Jenkins *v.* Smith, 4 Metc. (Ky.) 380; Bell *v.* Shrock, 2 B. Mon. (Ky.) 29; Jordon *v.* Cheney, 74 Me. 359; Moore *v.* Ware, 38 Me. 496; Johnson *v.* Candage, 31 Me. 28; Haynes *v.* Wellington, 25 Me. 458; Johnson *v.* Brown, 31 N. H. 405; Wiley *v.* Pinson, 23 Tex. 486; Pettibone *v.* Edwards, 15 Wis. 95; King *v.* Merchants' Exchange Co., 5 N. Y. 547, 556; Pugh *v.* Holt, 27 Miss. 461; Archer *v.* Jones, 26 Miss. 583.

**All Holders of Notes are Necessary Parties**, that the amounts and priorities of their several claims may be determined. Meyers *v.* Wright, 33 Ill. 284; Thayer *v.* Campbell, 9 Mo. 277; Mitchell *v.* Ladew, 36 Mo. 526; Hurck *v.* Erskine, 45 Mo. 484; Thompson *v.* Field, 38 Mo. 320; Mason *v.* Barnard, 36 Mo. 384; Bank of Mobile *v.* Planters' & Merchants' Bank, 9 Ala. 645; McVay *v.* Bloodgood, 9 Port. (Ala.) 547; Cullum *v.* Erwin, 4 Ala. 452; Cotton *v.* Blocker, 6 Fla. 1; Humphreys *v.* Morton, 100 Ill. 592; Koester *v.* Burke, 81 Ill. 436; Herrington *v.* McCullum, 73 Ill. 476; Flower *v.* Elwood, 66 Ill. 438; Preston *v.* Hodgen, 50 Ill. 56; Funk *v.* McReynolds, 33 Ill. 481; Gerber *v.* Sheep, 72 Ind. 553; Doss *v.* Ditmars, 70 Ind. 451; Evansville Peoples' Sav. Bank *v.* Finney, 63 Ind. 460; Sample *v.* Rowe, 24 Ind. 408; Murdock *v.* Ford, 17 Ind. 52; Hough *v.* Osborne, 7 Ind. 140; Harris *v.* Harlan, 14 Ind. 439; Stanley *v.* Beatty, 4 Ind. 134; State Bank *v.* Tweedy, 8 Blackf. (Ind.) 447; Walker *v.* Schreider, 47 Iowa, 529; Richardson *v.* McKim, 20 Kan. 346; Mitchell *v.* Ladew, 36 Mo. 536; Noyes *v.* Barnet, 57 N. H. 605; Johnson *v.* Brown, 31 N. H. 405; Hunt *v.* Stiles, 10 N. H. 466; Winters *v.* Bank, 33 Ohio St. 250; Bushfield *v.* Meyer, 10 Ohio St. 334; Bank of United States *v.* Covert, 13 Ohio, 240; Pierce *v.* Shaw, 51 Wis. 316; Marine Bank *v.* International Bank, 9 Wis. 57; Wood *v.* Trask, 7 Wis. 566; Smith *v.* Stevens, 49 Conn. 181; Sargent *v.* Howe, 21 Ill. 148; Vansant *v.* Allmon, 23 Ill. 30, 34; Humphreys *v.* Morton, 100 Ill. 592; Grattan *v.* Wiggins, 23 Cal. 16; Phelan *v.* Olney, 6 Cal. 478; Winters *v.* Bank, 33 Ohio St. 250.

**Notes Payable pro Rata** in many of the States. See Granger *v.* Crouch, 86 N. Y. 494, 499; Bridenbecker *v.* Lowell, 32 Barb. (N. Y.) 9; Collerd *v.* Huson, 34 N. J. Eq. (7 Stew.) 38; Perry's Appeal, 22 Pa. St. 43; Hodge's Appeal, 84 Pa. St. 359; Wilson *v.* Eigenbrodt, 30 Minn. 4; Wilcox *v.* Allen, 36 Mich. 160; McCurdy *v.* Clark, 27 Mich. 445; Trustees Jefferson College *v.* Prentiss, 29 Miss. 46; Bank of England *v.* Tarleton, 23 Miss. 173; Henderson *v.* Herrod, 18 Miss. (10 Smed. & M.) 631; Dick *v.* Mawry, 17 Miss. (9 Smed. & M.) 448; Terry *v.* Woods, 14 Miss. (6 Smed. & M.) 138; Cage *v.* Iler, 13 Miss. (5 Smed. & M.) 410; Parker *v.* Mercer, 7 Miss. (6 How.) 320; Campbell *v.* Johnston, 4 Dana (Ky.), 182; Belding *v.* Manly, 21 Vt. 550; Keyes *v.* Wood, 21 Vt. 331; Wright *v.* Parker, 2 Aik. (Vt.) 212.

**Owner of Pledged Mortgage May Foreclose.**—Norton *v.* Warner, 3 Edw. Ch.

(N. Y.) 106; Simson *v.* Satterlee, 64 N. Y. 657, aff'm s. c. 6 Hun (N. Y.), 305; Sinking Fund Comm'rs *v.* Northern Bank, 1 Metc. (Ky.) 174; McKinney *v.* Miller, 19 Mich. 142; George *v.* Woodward, 40 Vt. 672; Brunette *v.* Schettler, 21 Wis. 188. But the pledgee is a necessary party. Plowman *v.* Riddle, 14 Ala. 169; Hoyt *v.* Martense, 16 N. Y. 231. See Simson *v.* Satterlee, 64 N. Y. 657; Norton *v.* Warner, 3 Edw. Ch. (N. Y.) 106; N. Y. Code Civ. Proc. § 448; Carpenter *v.* O'Dougherty, 67 Barb. (N. Y.) 397; s. c., 2 T. & C. (N. Y.) 427, aff'd 58 N. Y. 681; O'Dougherty *v.* Remington Paper Co., 81 N. Y. 496; Remington Paper Co. *v.* O'Dougherty, 81 N. Y. 474; Kittle *v.* Van Dyck, 1 Sandf. Ch. (N. Y.) 76; Woodruff *v.* Depue, 14 N. J. Eq. (1 McCart.) 168, 176; Miller *v.* Henderson, 10 N. J. Eq. (2 Stockt.) 320; Overall *v.* Ellis, 32 Mo. 322; Brunette *v.* Shettler, 21 Wis. 188.

**A Person Holding a Mortgage as Collateral** security may foreclose. Bard *v.* Poole, 12 N. Y. 495, 507; Bloomer *v.* Sturges, 58 N. Y. 168; Carpenter *v.* O'Dougherty, 67 Barb. (N. Y.) 397; s. c., 2 T. & C. (N. Y.) 427, aff'd in 58 N. Y. 681; Dalton *v.* Smith, 86 N. Y. 176; Bush *v.* Lathrop, 22 N. Y. 535; Whitney *v.* McKinney, 7 Johns. Ch. (N. Y.) 144; Lehman *v.* McQueen, 65 Ala. 570; Hunter *v.* Levan, 11 Cal. 11; Beers *v.* Hawley, 3 Conn. 110; Wilson *v.* Fatout, 42 Ind. 52; St. John *v.* Freeman, 1 Ind. 84; Compton *v.* Jones, 65 Ind. 117; Rice *v.* Dillingham, 73 Me. 59; Cutts *v.* York Mfg. Co., 14 Me. 326; s. c., 18 Me. 190; Brown *v.* Tyler, 74 Mass. (8 Gray) 135; Graydon *v.* Church, 7 Mich. 36, 50, 68; Natchez *v.* Minor, 17 Miss. (9 Smed. & M.) 544; Paige *v.* Chapman, 58 N. H. 333; Chew *v.* Brumagen, 21 N. J. Eq. (6 C. E. Gr.) 520, 529; s. c., 80 U. S. (13 Wall.) 497; bk. 20 L. ed. 663; Wilson *v.* Giddings, 28 Ohio St. 554; Carpenter *v.* O'Dougherty, 67 Barb. (N. Y.) 397; Salmon *v.* Allen, 11 Hun (N. Y.), 29; McCrum *v.* Corby, 11 Kan. 464; Underhill *v.* Atwater, 22 N. J. Eq. (7 C. E. Gr.) 16; Ackerson *v.* Lodi Branch R., 28 N. J. Eq. (1 Stew.) 542; Van Deventer *v.* Stiger, 25 N. J. Eq. (10 C. E. Gr.) 224; Kamena *v.* Huelbig, 23 N. J. Eq. (8 C. E. Gr.) 78.

**Owner of Equitable Interest** of any kind is usually entitled to foreclose. Hill *v.* Meeker, 23 Conn. 594; Wooden *v.* Haviland, 18 Conn. 107; Irish *v.* Sharp, 89 Ill. 261; N. Y. Code Civ. Proc. § 448; Beebe *v.* Morris, 56 Ala. 525.

**Equitable Assignees.**—A purchaser at a defective foreclosure becomes an equitable assignee of the mortgage, and may maintain a second or strict forclosure to extinguish junior liens; and for this purpose is entitled to an action *de novo* on the mortgage. Bolles *v.* Duff, 43 N. Y. 469; Robinson *v.* Ryan, 25 N. Y. 320; Franklyn *v.* Hayward, 61 How. (N. Y.) Pr. 43; Stewart *v.* Hutchinson, 29 How. (N. Y.) Pr. 181; Taylor *v.* Agricultural & M. Assoc., 68 Ala. 229; Goodenow *v.* Ewer, 16 Cal. 461; Muir *v.* Berkshire, 52 Ind. 149; Shimer *v.* Hammond, 51 Iowa, 401; Johnson *v.* Robertson, 34 Md. 165; Shaw *v.* Heisey, 48 Iowa, 468; Wilcoxson *v.* Osburn, 77 Mo. 621; Jones *v.* Mack, 53 Mo. 147; Bank of Wis. *v.* Abbott, 20 Wis. 570; Moore *v.* Cord, 14 Wis. 213; Stark *v.* Brown, 12 Wis. 572; Rogers *v.* Holyoke, 14 Minn. 220.

**A Person Who Advances Money to Pay Off a Mortgage,** or loans money on a mortgage, thereby becomes an equitable assignee of such mortgage. Gilbert *v.* Gilbert, 39 Iowa, 657; Bank *v.* Campbell, 2 Rich. (S. C.) Eq. 179; Patterson *v.* Birdsall, 64 N. Y. 294, 298, affirming s. c., 6 Hun (N. Y.), 632; Miller *v.* Winchell, 70 N. Y. 437.

**An Equitable Owner by Subrogation** may foreclose. See Ayers *v.* Adams, 82 Ind. 109; Lovejoy *v.* Vose, 73 Me. 46; Cobb *v.* Dyer, 69 Me. 494; Youngman *v.* Elimra & W. R., 65 Pa. St. 278; Marshall *v.* Davis, 78 N. Y. 415, reversing 16 Hun (N. Y.), 606; Calvo *v.* Davis, 73 N. Y. 211, 215; Wadsworth *v.* Lyon, 93 N. Y. 201; Wood *v.* Smith, 51 Iowa, 156; Strause *v.* Josephthal, 77 N. Y. 622; Green *v.* Marble, 37 Iowa, 95; Andrews *v.* McDaniel, 68 N. C. 385.

**Surety May Foreclose Where He Has Guaranteed the Mortgage Debt.**—Norton *v.* Soule, 2 Me. (2 Greenl.) 341; Mims *v.* McDowell, 4 Ga. 182; Saylors *v.* Saylors, 3 Heisk. (Tenn.) 525; Darst *v.* Bates, 95 Ill. 493; Gerber *v.* Sharp, 72 Ind. 554; Walker *v.* King, 44 Vt. 601.

**Where He Has Assumed Mortgage.**—See McLean *v.* Towle, 3 Sandf. Ch. (N. Y.) 117; Risk *v.* Hoffman, 69 Ind. 137; Hoffman *v.* Risk, 58 Ind. 113; Josselyn *v.* Edwards, 57 Ind. 212; Wood *v.* Smith, 51 Iowa, 156; Hoysradt *v.* Holland, 50 N. H. 433; Baker *v.* Terrell, 8 Minn. 195; Johnson *v.* Zink, 51 N. Y. 333, affirming 52 Barb. (N. Y.) 396; Matteson *v.* Thomas, 41 Ill. 110; Averill *v.* Taylor, 8 N. Y. 44, 51; Marshall *v.* Davies, 78 N. Y. 414, 421; s. c., 58 How. (N. Y.) Pr. 231; Marsh *v.* Pike, 10 Paige Ch. (N. Y.) 595; Calvo *v.* Davies, 73 N. Y. 211, 215; Cherry *v.* Monro, 2 Barb. Ch. (N. Y.) 618; Stebbins *v.* Hall, 29 Barb. (N. Y.) 525; Cornell *v.* Prescott, 2 Barb. (N. Y.) 16; Ferris *v.* Crawford, 2 Den. (N. Y.) 595; Tice *v.* Annin, 2 Johns. Ch. (N. Y.) 125; Halsey *v.* Reed, 9 Paige Ch. (N. Y.) 446;

Cox *v.* Wheeler, 7 Paige Ch. (N. Y.) 248; Brewer *v.* Staples, 3 Sandf. Ch. (N. Y.) 579.

**A Subsequent Incumbrancer,** though not holding the relation of surety for the mortgage debt, is entitled to redeem and become thereby subject to the rights of the mortgagee. See, Ellsworth *v.* Lockwood, 42 N. Y. 89, 99; Dings *v.* Parshall, 7 Hun (N. Y.), 522; Averill *v.* Taylor, 8 N. Y. 44; Cornell *v.* Prescott, 2 Barb. (N. Y.) 20; Carpenter *v.* Brenham, 40 Cal. 221; Tyrrell *v.* Ward, 102 Ill. 29; Lowrey *v.* Byers, 80 Ind. 442; Benton *v.* Shreeve, 4 Ind. 66; Rardin *v.* Walpole, 38 Ind. 146; Shinn *v.* Shinn, 91 Ill. 477; White *v.* Fisher, 62 Ill. 258; Champlin *v.* Williams, 9 Pa. St. 341; Hamilton *v.* Dobbs, 19 N. J. Eq. (4 C. E. Gr.) 227; Conwell *v.* McCowan, 53 Ill. 363.

**Assignee of a Mortgage Without the Bond** cannot foreclose. Jackson *v.* Blodget, 5 Cow. (N. Y.) 206; Nagle *v.* Macy, 9 Cal. 426; Peters *v.* Jamestown Bridge Co., 5 Cal. 334; Hamilton *v.* Lebukee, 51 Ill. 415; Hubbard *v.* Harrison, 38 Ind. 323; Willis *v.* Valette, 4 Met. (Ky.), 195; Lunt *v.* Lunt, 71 Me. 377; Webb *v.* Flanders, 32 Me. 175; Bulkley *v.* Chapman, 9 Conn. 8; Belden *v.* Meeker, 2 Lans. (N. Y.) 471, s. c. aff'd 47 N. Y. 307; Merritt *v.* Bartholick, 36 N. Y. 44, 45, aff'g 47 Barb. (N. Y.) 253; Cooper *v.* Newland, 17 Abb. (N. Y.) Pr. 342; Langdon *v.* Buell, 9 Wend. (N. Y.) 80.

**An Assignee of the Note, Bond, or Debt,** it is said, may foreclose although the mortgage is not assigned. Center *v.* Planters' & Mechanics' Bank, 22 Ala. 743; Doe *v.* McLoskey, 1 Ala. 708; Willis *v.* Farley, 24 Cal. 490; Bennett *v.* Solomon, 6 Cal. 134; Ord *v.* McKee, 5 Cal. 515; Quinebaug Bank *v.* French, 17 Conn. 134; Huntington *v.* Smith, 4 Conn. 237; Austin *v.* Burbank, 2 Day (Conn.), 474; Hamilton *v.* Lubukee, 51 Ill. 415; Olds *v.* Cummings, 31 Ill. 188; Herring *v.* Woodhull, 29 Ill. 92; Ryan *v.* Dunlap, 17 Ill. 40; Holdridge *v.* Sweet, 23 Ind. 118; Gower *v.* Howe, 20 Ind. 396; Garrett *v.* Puckett, 15 Ind. 485; Walker *v.* Schreiber, 47 Iowa, 529; Preston *v.* Morris, 42 Iowa, 549; Bremer Co. Bank *v.* Eastman, 34 Iowa, 392; Bank of Indiana *v.* Anderson, 14 Iowa, 544; Sangster *v.* Love, 11 Iowa, 580; Blair *v.* Marsh, 8 Iowa, 144; Crow *v.* Vance, 4 Clarke (Iowa), 434; Kurtz *v.* Sponable, 6 Kan. 395; Burdette *v.* Clay, 8 B. Mon. (Ky.) 295; Vimont *v.* Stitt, 6 B. Mon. (Ky.) 478; Bank of United States *v.* Huth, 4 B. Mon. (Ky.) 450; Warren *v.* Homestead, 33 Me. 256; Byles *v.* Tome, 39 Md. 461; Ohio L. Ins. & T. Co. *v.* Winn, 4 Md. Ch. Dec. 253; Briggs *v.* Hannowald. 35 Mich. 474; Martin *v.* McReynolds, 6 Mich. 70; Holmes *v.* McGinty, 44 Miss. 94; Laberge *v.* Chauvin, 2 Mo. 145; Richards *v.* Kountze, 4 Neb. 208; Kyger *v.* Riley, 2 Neb. 28; Wheeler *v.* Emerson, 45 N. H. 527; Whittemore *v.* Gibbs, 24 N. H. 484; Lane *v.* Sleeper, 18 N. H. 209; Rigny *v.* Lovejoy, 13 N. H. 253; Southerin *v.* Mendum, 5 N. H. 420, 432; Hyman *v.* Devereux, 63 N. C. 624; Keyes *v.* Wood, 21 Vt. 331; Pratt *v.* Bank of Bennington, 10 Vt. 293; Body *v.* Jewsen, 33 Wis. 402; Martineau *v.* McCollum, 3 Pin. (Wis.) 455; Perkins *v.* Sterne, 23 Tex. 561; Carpenter *v.* Longan, 83 U. S. (16 Wall.) 271; bk. 21, L. ed. 313; Wayman *v.* Cochrane, 35 Ill. 152; Swartz *v.* Leist, 13 Ohio St. 419; Moore *v.* Cornell, 68 Pa. St. 320.

**Where Mortgagees Own Equal Contemporaneous Liens,** any one of them may foreclose. See Potter *v.* Crandall, Clarke Ch. (N. Y.) 119, 123; Green *v.* Warnick, 64 N. Y. 220, rev'g 4 Hun (N. Y.), 703; Decker *v.* Boice, 83 N. Y. 215; Cochran *v.* Goodell, 131 Mass. 464; Perry's Appeal, 22 Pa. St. 43; Dungan *v.* American Life Ins. Co., 52 Pa. St. 253; Cain *v.* Hanna, 63 Ind. 408; Granger *v.* Crouch, 86 N. Y. 494, 499.

**Assignee or Receiver in Bankruptcy May Foreclose.**—Upton *v.* National Bank of Reading, 120 Mass. 153; Ward *v.* Price, 12 N. J. Eq. (1 Beas.) 543; Towle *v.* Towle, 58 N. H. 394; Robinson *v.* Williams, 22 N. Y. 380; Iglehart *v.* Bierce, 36 Ill. 133; Attorney-General *v.* Guardian Mut. L. Ins. Co., 77 N. Y. 272, 275.

**An Assignee Pendente Lite** may continue the foreclosure. Mills *v.* Hoag, 7 Paige Ch. (N. Y.) 18; Field *v.* Maghee, 5 Paige Ch. (N. Y.) 539; Wallace *v.* Dunning, Walk. Ch. (Mich.) 416; Smith *v.* Bartholomew, 42 Vt. 356; Bigelow *v.* Booth, 39 Mich. 622; Ellis *v.* Sisson, 96 Ill. 105; Foster *v.* Deacon, 6 Madd. 59; Coles *v.* Forrest, 10 Beav. 522.

**Personal Representatives** of the owner of the mortgage may foreclose. See Kinna *v.* Smith, 3 N. J. Eq. (2 H. W. Gr.) 14; Grace *v.* Hunt, 1 Cooke (Tenn.), 344; Thornborough *v.* Baker, 3 Swan. 628; Tabor *v.* Tabor, 3 Swan. 636; Newton *v.* Stanley, 28 N. Y. 61; People *v.* Keyser, 28 N. Y. 226; Peck *v.* Mallams, 10 N. Y. 509; Renaud *v.* Conselyea, 7 Abb. (N. Y.) Pr. 280; Routh *v.* Smith, 5 Conn. 135, 139; Buck *v.* Fischer, 2 Colo. 182; Dixon *v.* Cuyler, 27 Ga. 248; Hunsucker *v.* Smith, 49 Ind. 114; Nolte *v.* Libbert, 34 Ind. 163; Cryst *v.* Cryst, Smith (Ind.), 370; Talbot *v.* Dennis, Smith (Ind.), 357; Mervin *v.* Lewis, 90 Ill. 505; White *v.* Rittemeyer, 30 Iowa, 272; Grimmell *v.* Warner, 21 Iowa, 13; Burton *v.* Hintrager, 18 Iowa, 348, 351; Riley's Adm'r *v.* McCord's Adm'r, 24 Mo. 265; Albright

*v.* Cobb, 30 Mich. 355; Webster *v.* Calden, 56 Me. 204, 211; Fay *v.* Cheney, 31 Mass. 399; Dewey *v.* Van Deusen, 21 Mass. (4 Pick.) 19; Smith *v.* Dyer, 16 Mass. 18; Scott *v.* McFarland, 13 Mass. 309; Baldwin *v.* Allison, 4 Minn. 25; Griffin *v.* Lovell, 42 Miss. 402; Mutual L. Ins. Co. *v.* Sturges, 32 N. J. Eq. (5 Stew.) 678; s. c., 33 N. J. Eq. (6 Stew.) 328; Gibson *v.* Bailey, 9 N. H. 168; Trimmier *v.* Thomson, 10 Rich. (S. C.) 164; Collamer *v.* Langdon, 29 Vt. 32; Pierce *v.* Brown, 24 Vt. 165; Weir *v.* Mosher, 19 Wis. 311; Cave *v.* Cork, 2 Y. & C C. C. 244; Wilton *v.* Jones, 2 Y. & C. C. C. 244; Hobart *v.* Abbott, 2 P. Wms. 642; Meeker *v.* Tanton, 2 Ch. Cas. 29; Gobe *v.* Carlisle, 2 Vern. 67; Clerkson *v.* Bowyer, 2 Vern. 67.

**The Heirs of a Deceased Mortgagee** in most of the States are not necessary parties (see Dayton *v.* Dayton, 7 Ill. App. 136; Griffin *v.* Lovell, 42 Miss. 402), while in a few they are indispensable. Huggins *v.* Hall, 10 Ala. 283; McIver *v.* Cherry, 8 Humph. (Tenn.) 713; Atchison *v.* Surguine, 1 Yerg. (Tenn.) 400; Dayton *v.* Dayton, 7 Ill. App. 136; Etheridge *v.* Verney, 71 N. C. 184; Scott *v.* Nicoll, 3 Russ. 476. Winne *v.* Littleton, 2 Ch. Cas. 51; Ellis *v.* Guavas, 2 Ch. Cas. 50; Freak *v.* Hearsey, 1 Ch. Cas. 51.

**Personal Representatives of a Vendor Under a Land Contract** may foreclose. Thomson *v.* Smith, 63 N. Y. 301; Moyer *v.* Hinman, 13 N. Y. 180; Lewis *v.* Smith, 9 N. Y. 502; Moore *v.* Burrows, 34 Barb. (N. Y.) 173; Adams *v.* Green, 34 Barb. (N. Y.) 176; Champion *v.* Brown, 6 Johns. Ch. (N. Y.) 398; Schroeppel *v.* Hopper, 40 Barb. (N. Y.) 425; Leaper *v.* Lyon, 68 Mo. 216; Anshutz's Appeal, 34 Pa. St. 375.

**Heirs, Devisees, and Legatees of a Mortgagor** cannot foreclose, nor make such an assignment of the mortgage as will entitle the assignee to foreclose. Anthony *v.* Peay, 18 Ark. 24; Roath *v.* Smith, 5 Conn. 135; Kinna *v.* Smith, 3 N. J. Eq. (1 H. W. Gr.) 14; Gobe *v.* Carlisle, 2 Vern. 67; Clerkson *v.* Bowyer, 2 Vern. 67; Babbitt *v.* Bowen, 32 Vt. 437; Douglass *v.* Durin, 51 Me. 121; Melver *v.* Cherry, 8 Humph. (Tenn.) 713; Atchison *v.* Surguine, 1 Yerg. (Tenn.) 400; Hill *v.* Boyland, 40 Miss. 618.

**A Specific Bequest** of a mortgage passes the title to the legatee, and he may foreclose. See White *v.* Secor, 58 Iowa, 533; Grimmel *v.* Warner, 21 Iowa, 13; Trenton Banking Co. *v.* Woodruff. 2 N. J. Eq. (1 H. W. Gr.) 117; Wood *v.* Williams, 4 Madd. 186; Wetherell *v.* Collins, 3 Madd. 255; Hichens *v.* Kelley, 2 Sm. & G. 264; How *v.* Vigures, 1 Rep. in Ch. 32; Skipp *v.* Wyatt, 1 Cox C. C. 353.

**An Executor or Administrator** to whom a mortgage has been executed or assigned as such may foreclose. See Flagg *v.* Johnson, 39 Ga. 26; Wood *v.* Harman, 5 Madd. 368; Locke *v.* Lomas, 5 De G. & S. 326; Peck *v.* Mallams, 10 N. Y. 509, 537; People *v.* Keyser, 28 N. Y. 226; Renaud *v.* Conselyea, 4 Abb. (N. Y.) Pr. 280; s. c., 5 Abb. (N. Y.) Pr. 346; Caulkins *v.* Bolton, 98 N. Y. 511.

**Successor in Office** of an administrator or a mortgagor may foreclose. Renaud *v.* Conselyea, 4 Abb. (N. Y.) Pr. 280; Brooks *v.* Smyser, 48 Pa. St. 86.

**As to When Foreign Executors and Administrators May Foreclose,** see Parsons *v.* Lyman, 20 N. Y. 103; Morrell *v.* Dickey, 1 Johns. Ch. (N. Y.) 153; Doolittle *v.* Lewis. 7 Johns. Ch. (N. Y.) 45; Vroom *v.* Van Horne, 10 Paige Ch. (N. Y.) 549; Peterson *v.* Chemical Bank, 32 N. Y. 21, 40, aff'g 29 How. (N. Y.) Pr. 240; Brown *v.* Brown, 1 Barb. Ch. (N. Y.) 189; Vermilya *v.* Beatty, 6 Barb. (N. Y.) 429; Lawrence *v.* Elmendorf 5 Barb. (N. Y.) 73; Smith *v.* Webb, 1 Barb. (N. Y.) 232; Williams *v.* Storrs, 6 Johns. Ch. (N. Y.) 353; Stone *v.* Scripture, 4 Lans. (N. Y.) 186; Woodruff *v.* Mutchler, 34 N. J. Eq. (8 Stew.) 33; Porter *v.* Trall, 30 N. J. Eq. (3 Stew.) 106; Trecothick *v.* Austin, 4 Mason C. C. 633; Alexander *v.* Rice, 52 Mich. 451; Heywood *v.* Hartshorn, 55 N. H. 476.

**Trustees May Maintain an Action for the Foreclosure of a Mortgage.**—Osbourn *v.* Fallows, Russ & M. 741; Adams *v.* Paynter, 1 Coll. 530; Smith *v.* Chichester, 2 Dru. & War. 404; Browne *v.* Lockhart, 10 Sim. 426; Wilton *v.* Jones, 2 Y. & C. C. C. 244; Allen *v.* Knight, 5 Hare, 280; Barkley *v.* Rey, 2 Hare, 306; Hayes *v.* Dorsey, 5 Md. 99; Hackensack Water Co. *v.* DeKay, 36 N. J. Eq. (10 Stew.) 548; Hays *v.* Galion G. L. & C. Co., 29 Ohio St. 330; Holmes *v.* Boyd. 90 Ind. 332. But where the trust is merely nominal, it is usual to join the *cestui que trust* with the trustee, as some courts have held that the beneficiaries are necessary parties plaintiffs. Hitchcock's Heirs *v.* United States Bank of Pa., 7 Ala. 386; Freeman *v.* Schofield, 16 N. J. Eq. (1 C. E. Gr.) 28; Large *v.* Van Doren, 14 N. J. Eq. (1 McCart.) 208; Woodruff *v.* Depue, 14 N. J. Eq. (1 McCart.) 168; Stillwell *v.* McNeely, 2 N. J. Eq. (1 H. W. Gr.) 305; Davis *v.* Hemingway, 29 Vt. 438; Fleming *v.* Holt, 12 W. Va. 143; Cassidy *v.* Bigelow, 25 N. J. Eq. (10 C. E. Gr.) 112; Wright *v.* Bundy, 11 Ind. 398; Goldsmid *v.* Stonehewer, 9 Hare App. 39; s. c., 17 Jur. 199; Wood *v.* Harman, 5 Madd. 368; Locke *v.* Lomas, 5 De G. & S. 326; s. c., 16 Jur. 814;

Stansfield *v.* Hobson, 16 Beav. 189. If a beneficiary refuses to become a coplaintiff, he can be made a defendant. Large *v.* Van Doren, 14 N. J. Eq. (1 McCart.) 208; Davis *v.* Hemingway, 29 Vt. 438; Minn *v.* Stant, 12 Beav. 190; s. c., 15 Beav. 49; Browne *v.* Lockhart, 10 Sim. 426.

**Beneficiaries, Cestuis que Trust, May Sometimes Foreclose.** See Alabama L. Ins. & T. Co. *v.* Pettway, 24 Ala. 544; Carradine *v.* O'Connor, 21 Ala. 573; Marriott *v.* Givens, 8 Ala. 694; McGowan *v.* Branch Bank Mobile, 7 Ala. 823; Somes *v.* Skinner, 16 Mass. 348; Martin *v.* McReynolds, 6 Mich. 70; Hackensack Water Co. *v.* DeKay, 36 N. J. Eq. (10 Stew.) 548; Mitchell *v.* McKinney, 6 Heisk. (Tenn.) 83; Wood *v.* Williams, 4 Madd. 186; Hickens *v.* Kelly, 2 Sm. & G. 264; Berry *v.* Bacon, 28 Miss. 318; Ashurst *v.* Montour Iron Co., 35 Pa. St. 30; Davis *v.* New York Concert Co., 41 Hun (N. Y.), 492; Winton's Appeal, 87 Pa. St. 77; Bank of Commerce *v.* Lanahan, 44 Md. 396; Dorsey *v.* Thompson, 37 Md. 25.

**Mortgages to Persons in Their Official Capacity** and to their successors in office may be foreclosed by such officers or their successors in office. Iglehart *v.* Bierce, 36 Ill. 133; Vanorsdall *v.* State, 65 Ind. 176; Hiatt *v.* State *ex rel.* Kitsellman, 110 Ind. 472; Leavitt *v.* Pell, 27 Barb. (N. Y.) 322, aff'd 25 N. Y. 474; Lyon *v.* Lyon, 67 N. Y. 250; Walser *v.* Wala, 10 Neb. 123; Com. *v.* Watmough, 12 Pa. St. 316; Caulkins *v.* Bolton, 98 N. Y. 511; Norton *v.* Ohrens (Mich.), 12 West. Rep. 415; Miller *v.* Clark, 56 Mich. 337; Peabody *v.* Peabody, 59 Ind. 556.

**A Married Woman Owning a Mortgage** may either foreclose it or assign it to a person who may foreclose. See Bartlett *v.* Boyd, 34 Vt. 256; Kamena *v.* Huelbig, 23 N. J. Eq. (8 C. E. Gr.) 78; Shockley *v.* Shockley, 20 Ind. 108; McKinney *v.* Haminton, 51 Pa. St. 63; Power *v.* Lester, 17 How. (N. Y.) Pr. 413, s. c., aff'd 23 N. Y. 527; Mix *v.* Andes Ins. Co., 9 Hun (N. Y.), 397; Wochoska *v.* Wochoska, 45 Wis. 423; Putnam *v.* Bicknell, 18 Wis. 333; Terry *v.* Wilson, 63 Mo. 493; Bean *v.* Boothby, 57 Me. 295; Trenton Banking Co. *v.* Woodruff, 2 N. J. Eq. (1 H. W. Gr.) 117

**Parties Defendant.—All Persons Whose Interests are to Be Affected** by the foreclosure are necessary parties defendant. Thus:

**A Mortgagor** still owning the equity of redemption is a necessary party. Raynor *v.* Selmes, 52 N. Y. 579, rev'g 7 Lans. (N. Y.) 440; Kay *v.* Whittaker, 44 N. Y. 565, 572; Griswold *v.* Fowler, 6 Abb. (N. Y.) Pr. 113; Reed *v.* Marble, 10 Paige Ch. (N. Y.) 409; Lane *v.* Erskine, 13 Ill. 501, 503; Harvey's Adm'rs *v.* Thornton, 14 Ill. 217; Hughes *v.* Patterson, 23 La. An. 679; Fell *v.* Brown, 2 Bro. Ch. 276; Palk *v.* Clinton, 12 Ves. 48; Thomson & Baskerville Case, 3 Rep. in Ch. 215; Hunter *v.* Macklew, 5 Hare, 238. The reason for this is said to be that no title can be made that would not be defeasible by the person in whom the equity of redeeming the mortgage remain not barred or destroyed. Hall *v.* Nelson, 23 Barb. (N. Y.) 90; s. c., 14 How. (N. Y.) Pr. 32; Watson *v.* Spence, 20 Wend. (N. Y.) 260; Buckner *v.* Sessions, 27 Ark. 219; Cox *v.* Vickers, 35 Ind. 27; Lenox *v.* Reed, 12 Kan. 223; Champlin *v.* Foster, 7 B. Mon. (Ky.) 105; Lasere *v.* Rochereau, 21 La. An. 205.

**Where the Mortgagor Has Conveyed the Premises** by an unrecorded mortgage, he is a necessary party to a foreclosure. Hall *v.* Nelson, 23 Barb. (N. Y.) 88; Kipp *v.* Brandt, 49 How. (N. Y.) Pr. 858; Ostcom *v.* McCann, 21 How. (N. Y.) Pr. 431; Boice *v.* Mich. Mut. L. Ins. Co. (Mich.), 13 West. Rep. 377; Crooke *v.* O'Higgins, 14 How. (N. Y.) Pr. 154.

**Where Mortgagor Has no Interest** in the property, he is not a necessary party. See Daly *v.* Burchell, 13 Abb. (N. Y.) Pr. N. S. 268; Griswold *v.* Fowler, 6 Abb. (N. Y.) Pr. 113; Van Nest *v.* Latson, 19 Barb. (N. Y.) 604, 608; Cherry *v.* Monro, 2 Barb. Ch. (N. Y.) 627; Rhodes *v.* Evans, Clarke Ch. (N. Y.) 168; Trustees *v.* Yates, 1 Hoff. Ch. (N. Y.) 142; Drury *v.* Clark, 16 How. (N. Y.) Pr. 428; Crooke *v.* O'Higgins, 14 How. (N. Y.) Pr. 154; Bram *v.* Bram, 34 Hun (N. Y.), 487, 491; Root *v.* Wright, 21 Hun (N. Y.), 344, 348; Whitney *v.* McKinney, 7 Johns. Ch. (N. Y.) 144; Bigelow *v.* Bush, 6 Paige Ch. (N. Y.) 343; Horn *v.* Jones, 28 Cal. 194; Boggs *v.* Fowler, 16 Cal. 559; Swift *v.* Edson, 5 Conn. 534; Bennett *v.* Matsingly, 110 Ind. 197; Stevens *v.* Campbell, 21 Ind. 471; Burkham *v.* Beaver, 17 Ind. 367; Shaw *v.* Hoadley, 8 Blackf. (Ind.) 165; Johnson *v.* Monell, 13 Iowa, 300, 303; Jones *v.* Lapham, 15 Kan. 540; Bailey *v.* Myrick, 36 Me. 50; True *v.* Haley, 24 Me. 297; Osborne *v.* Crump, 57 Miss. 622; Andrews *v.* Stelle, 22 N. J. Eq. (7 C. E. Gr.) 478; Crenshaw *v.* Thackston, 14 S. C. 437; Wright *v.* Eaves, 10 Rich. (S. C.) Eq. 582; Buchanan *v.* Monroe, 22 Tex. 537; Miner *v.* Smith, 53 Vt. 551; Delaplaine *v.* Lewis, 19 Wis. 476; Brown *v.* Stead, 5 Sim. 535.

**Mortgagor Retaining a Divided or Undivided Part of the Premises or Being a Tenant in Common by Descent or Grant** is a necessary party defendant. See Tay-

lor *v.* Porter, 7 Mass. 355; Spiller *v.* Spiller, 1 Hayw. (N. C.) L. 482; Torrey *v.* Cook, 116 Mass. 163; Marks *v.* Sewall, 120 Mass. 174; Reid *v.* Gardner, 65 N. Y. 578; Hatch *v.* Kimball, 14 Me. 91; Rich *v.* Lord, 35 Mass. (18 Pick.) 322; Colton *v.* Smith, 28 Mass. (11 Pick.) 31; Stewart *v.* Allegheny Nat. Bank, 101 Pa. St. 342; Kline *v.* McGuckin, 24 N. J. Eq. (9 C. E. Gr.) 411; Hammond *v.* Perry, 33 Iowa, 217; Cornell *v.* Prescott, 2 Barb. (N. Y.) 16; Loomis *v.* Riley, 24 Ill. 307; Williams *v.* Perry, 20 Ind. 437; Frost *v.* Frost, 3 Sandf. Ch. (N. Y.) 188; Mims *v.* Mims, 35 Ala. 23; Douglass *v.* Bishop, 27 Iowa, 214, 216; Hull *v.* Lyon, 27 Mo. 270; Crenshaw *v.* Thackston, 14 S. C. 437; Cholmondeley *v.* Clinton, 2 Jac. & W. 134; Palk *v.* Clinton, 12 Ves. 48, 59.

**Mortgagor a Tenant in Common or by the Entirety** is a necessary party defendant. Stephen *v.* Beall, 89 U. S. (22 Wall.) 329; bk. 22, L. ed. 786; Frost *v.* Frost, 3 Sandf. Ch. (N. Y.) 188; Wiley *v.* Pinson, 23 Tex. 486; Peto *v.* Hammond, 29 Beav. 91; Ireson *v.* Denn, 2 Cox Ch. 425; Palk *v.* Clinton, 12 Ves. 58, 59.

**Mortgagor Holding Any Kind of an Equitable Contingent or Latent Interest** is a necessary party defendant. See Morgan *v.* Magoffin, 2 Bibb (Ky.), 395; Mims *v.* Mims, 35 Ala. 23; Hallock *v.* Smith, 4 Johns. Ch. (N. Y.) 649; Smith *v.* Moore, 73 Ind. 388; Byington *v.* Walsh, 11 Iowa, 27; Bennett *v.* Calhoun Association, 9 Rich. (S. C.) Eq. 163; Insurance Co. *v.* Bailey, 3 Edw. Ch. (N. Y.) 417; Woods *v.* Love, 27 Mich. 308.

**The Vendor and Vendee Under a Land Contract** are necessary parties defendant. Crooke *v.* O'Higgins, 14 How. (N. Y.) Pr. 154; Roddy *v.* Elam, 12 Rich. (S. C.) L. & Eq. 343; Equitable Life Assoc. Soc. *v.* Bostwick, 22 N. Y. Week. Dig. 360; Martin *v.* Morris, 62 Wis. 418; Greither *v.* Alexander, 15 Iowa, 470; Blair *v.* Marsh, 8 Iowa, 144; Griswold *v.* Fowler, 6 Abb. (N. Y.) Pr. 113.

**Parties to Deeds, Whether in Escrow or in Fraud,** are necessary parties defendant. Kipp *v.* Brandt, 49 How. (N. Y.) Pr. 358; Ostrom *v.* McCann, 21 How. (N. Y.) Pr. 431; Adams *v.* Bradley, 12 Mich. 346.

**A Party Who Purchases the Equity of Redemption From the Mortgagor, or Otherwise,** is a necessary party to the suit where he is still the owner thereof, whether such purchase be of the whole or a divided or undivided part of the mortgaged premises. See Raynor *v.* Selmes, 52 N. Y. 579; Miner *v.* Beekman, 50 N. Y. 337, 344; Winslow *v.* Clark, 47 N. Y. 261; Robinson *v.* Ryan, 25 N. Y. 320; St. John *v.* Bumpstead, 17 Barb. (N.Y.) 100; Van Slyke *v.* Shelden, 9 Barb. (N. Y.) 278; Hall *v.* Nelson, 14 How. (N. Y.) Pr. 32; Burnham *v.* De Bevorse, 8 How. (N. Y.) Pr. 159; Reed *v.* Marble, 10 Paige Ch. (N. Y.) 409; Watson *v.* Spence, 20 Wend. (N. Y.) 260; Williamson *v.* Field, 2 Sandf. Ch. (N. Y.) 533; Mickles *v.* Dillaye, 15 Hun (N. Y.), 296; Merritt *v.* Phenix, 48 Ala. 87; Hall *v.* Huggins, 19 Ala. 200; Parter *v.* Muller, 65 Cal. 512; Bludworth *v.* Lake, 33 Cal. 265; Skinner *v.* Buck, 29 Cal. 253; Horn *v.* Jones, 28 Cal. 194; Carpentier *v.* Wiliamson, 25 Cal. 154; Heyman *v.* Lowell, 23 Cal. 106; Boggs *v.* Fowler, 16 Cal. 559; Goodenow *v.* Ewer, 16 Cal. 461; De Leon *v.* Higuera, 15 Cal. 483; Luning *v.* Brady, 10 Cal. 265; Coker *v.* Smith, 63 Ga. 517; Jeneson *v.* Jeneson, 66 Ill. 260; Ohling *v.* Luitjens, 32 Ill. 23; Daugherty *v.* Deardorf, 107 Ind. 527; Petry *v.* Ambrosher, 100 Ind. 511; Searle *v.* Whipperman, 79 Ind. 424; Mark *v.* Murphy, 76 Ind. 534; Lenox *v.* Reed, 12 Kan. 223, 228; Reney *v.* Bell, 9 Dana (Ky.), 4; Cooper *v.* Martin, 1 Dana (Ky.), 25; Bailey *v.* Myrick, 36 Me. 50; Learned *v.* Foster, 117 Mass. 365; Roche *v.* Farnsworth, 106 Mass. 509; Campbell *v.* Bemis, 81 Mass. (16 Gray) 485; Putnam *v.* Putnam, 21 Mass. (4 Pick.) 139; Thayer *v.* Smith, 16 Mass. 426; Nichols *v.* Randall, 5 Minn. 304, 308; Wolf *v.* Banning, 3 Minn. 202, 204; Brundred *v.* Walker, 12 N. J. Eq. (1 Beas.) 140; Durand *v.* Isaacks, 4 McC. (S. C.) Eq. 221; Rodgers *v.* Jones, 1 McC. (S. C.) Eq. 221; Meng *v.* Houser, 13 Rich. (S. C.) Eq. 210, 220; Manufacturing Co. *v.* Price, 4 Rich. (S. C.) N. S. 338, 345; Norton *v.* Lewis, 3 Rich. (S. C.) N. S. 25; Morrow *v.* Morgan, 48 Tex. 304; Buchana *v.* Monroe, 22 Tex. 537; Cord *v.* Hirsch, 17 Wis. 403; Green *v.* Dixon, 9 Wis. 532; Hodgson *v.* Treat, 7 Wis. 263; Peto *v.* Hammond, 29 Beav. 91; Manly *v.* Beaufort, 1 Russ. 349; Brown *v.* Stead, 5 Sim. 535; Sumner *v.* Coleman, 20 Ind. 486; Cline *v.* Inlow, 14 Ind. 419; Semple *v.* Lee, 13 Iowa, 304; Adam *v.* Bradley, 12 Mich. 346; McDonald *v.* McDonald, 45 Mich. 44; Merrimam *v.* Hyde, 9 Neb. 113; Johnston *v.* Donvan, 106 N. Y. 269; Spiller *v.* Spiller, 1 Hayw. (N. C.) L. 482; Jefferson *v.* Coleman (Ind.), 9 West. Rep. 73; Day *v.* Patterson, 18 Ind. 114; Bates *v.* Ruddick, 2 Clarke (Iowa), 423; Curtis *v.* Gooding, 99 Ind. 45; Logan *v.* Smith, 70 Ind. 598; Williams *v.* Beard, 1 Rich. (S. C.) L. 309; Felder *v.* Murphy, 2 Rich. (S. C.) Eq. 58; Drinan *v.* Nichols, 115 Mass. 353; Chickering *v.* Failes, 26 Ill. 507; Rose *v.* Swann, 56 Ill. 37; Williams *v.* Terrell, 54 Ga. 462; Knowles *v.* Lawton, 18 Ga. 476; May *v.* Rawson,

21 Ga. 461; Mevey's Appeal, 4 Pa. St. 80.

**Where the Owner of Mortgaged Premises is Omitted as a Party Defendant** the sale operates only as an equitable assignment of the mortgage if such sale is not void. See Skinner *v.* Buck, 29 Cal. 253; Boggs *v.* Fowler, 16 Cal. 559; Nat. Fire Ins. Co. *v.* McKay, 1 Sheld. (N. Y.) 138; Reed *v.* Marble, 10 Paige Ch. (N. Y.) 414; Watson *v.* Spence, 20 Wend. (N. Y.) 260; Mickles *v.* Dillaye, 15 Hun (N. Y.), 296. The reason of this is that the equity of redemption is not affected by a decree rendered in an action to which he is not made a party; the court having no jurisdiction over him, so far as he is concerned the judgment is a nullity. Kelgour *v.* Wood, 64 Ill. 345; Cutter *v.* Jones, 52 Ill. 84; Dunlap *v.* Wilson, 32 Ill. 517; Hurd *v.* Case, 32 Ill. 45; Ohling *v.* Luitjens, 32 Ill. 23; Chickering *v.* Failes, 26 Ill. 517; Bradley *v.* Snyder, 14 Ill. 263; Porter *v.* Kilgore, 32 Iowa, 380; Street *v.* Beal, 16 Iowa, 68; Veach *v.* Schaup, 3 Clarke (Iowa), 194; Childs *v.* Childs, 10 Ohio St. 339; Miner *v.* Beekman, 50 N. Y. 337; Douglass *v.* Bishop, 27 Iowa, 214, 216; Barrett *v.* Blackmar, 47 Iowa, 565, 571.

**The Owner of the Equity of Redemption** must be made a party defendant whether he acquires his title by grant through a sheriff's sale, from an assignee in bankruptcy by descent, or devise, or otherwise, or a mere occupant under a contract to purchase. Coster *v.* Clark, 3 Edw. Ch. (N. Y.) 440; New York L. Ins. & T. Co. *v.* Bailey, 3 Edw. Ch. (N. Y.) 416; Hallock *v.* Smith, 4 Johns. Ch. (N. Y.) 649; Kepley *v.* Jansen, 107 Ill. 79; Smith *v.* Moore, 73 Ind. 388; Brooks *v.* Keister, 45 Iowa, 303; Buck *v.* Sanders, 1 Dana (Ky.), 189; Bollinger *v.* Chateau, 20 Mo. 89; Hemphill *v.* Ross, 66 N. C. 477; Thorpe *v.* Ricks, 1 Dev. & Bat. (N. C.) Eq. 619; Davis *v.* Evans, 5 Ired. (N. C.) L. 525; Winslow *v.* Clark, 47 N. Y. 261; Burnham *v.* DeBeborse, 8 How. (N. Y.) Pr. 159; Ohling *v.* Luitjens, 32 Ill. 23; Hall *v.* Huggins, 19 Ala. 200; Colehour *v.* State Sav. Inst., 90 Ill. 152; Martin *v.* Morris, 62 Wis. 418; Packe *v.* Rochester & S. R. Co., 17 N. Y. 283, 297; Stanton *v.* Kline, 11 N. Y. 199, rev'g 16 Barb. (N. Y.) 9; St. John *v.* Bumpstead, 17 Barb. (N. Y.) 100; Van Slyke *v.* Shelden, 9 Barb. (N. Y.) 278; Mickles *v.* Dillaye, 15 Hun (N. Y.), 296; Kipp *v.* Brandt, 49 How. (N. Y.) Pr. 358; Ostrom *v.* McCann, 21 How. (N. Y.) Pr. 431; Aldrich *v.* Stephens, 49 Cal. 676; Daniels *v.* Henderson, 49 Cal. 245; Tucker *v.* Leland, 75 N. Y. 186; Houghton *v.* Kneeland, 7 Wis. 244; Hall *v.* Nelson, 14 How. (N. Y.) Pr. 32; s. c., 25 Barb. (N. Y.) 88; Carpentier *v.* Williamson, 25 Cal. 154; Webb *v.* Maxan, 11 Tex. 678, 684.

**Where the Owner of Mortgaged Premises or of the Equity of Redemption is Omitted, Objection may be Taken** by demurrer where the defect appears upon the face of the complaint, and by answer if it does not; but if objection is not taken, it will be deemed to have been waived. Bard *v.* Poole, 12 N. Y. 508; Hall *v.* Nelson, 23 Barb. (N. Y.) 88; Reed *v.* Marble, 10 Paige Ch. (N. Y.) 410; Kittle *v.* VanDyck, 1 Sandf. Ch. (N. Y.) 76; Erickson *v.* Rafferty, 79 Ill. 210; Dunlap *v.* Wilson, 32 Ill. 517; Taylor *v.* Collins, 51 Wis. 123; Baker *v.* Hawkins, 29 Wis. 576; Cord *v.* Hirsch, 17 Wis. 403; Williams *v.* Meeker, 29 Iowa, 292; Davis *v.* Bechstein, 69 N. Y. 440.

**Mesne Owners of the Equity of Redemption Who are no Longer Owners** are not generally necessary parties defendant. Lockwood *v.* Benedict, 3 Edw. Ch. (N. Y.) 472; Merritt *v.* Phenix, 48 Ala. 87; Lewis *v.* Elrod, 38 Ala. 17; Haley *v.* Bennett, 5 Port. (Ala.) 452; Scarry *v.* Eldridge, 63 Ind. 44; Barton *v.* Kingsbury, 43 Vt. 640; Soule *v.* Albee, 31 Vt. 142; Vrooman *v.* Turner, 69 N. Y. 280.

**A Purchaser Pendente Lite** is not a necessary party in an action to foreclose. Fuller *v.* Scribner, 76 N. Y. 190; Lamont *v.* Cheshire, 65 N. Y. 30; Lenihan *v.* Hamann, 55 N. Y. 652; Cleveland *v.* Boerum, 23 Barb. (N. Y.) 201; s. c., 3 Abb. (N. Y.) Pr. 294; Zeiter *v.* Bowman, 6 Barb. (N. Y.) 133; Watt *v.* Watt, 2 Barb. Ch. (N. Y.) 371; Ostrom *v.* McCann, 21 How. (N. Y.) Pr. 431; Kindberg *v.* Freeman, 39 Hun (N. Y.), 466; Weeks *v.* Tomes, 16 Hun (N. Y.), 349; People's Bank *v.* Hamilton Co., 10 Paige Ch. (N. Y.) 481, 490; Curtis *v.* Hitchcock, 10 Paige Ch. (N. Y.) 399; Jackson *v.* Losee, 4 Sandf. Ch. (N. Y.) 381; Horn *v.* Jones, 28 Cal. 194; Taylor *v.* Adams, 115 Ill. 570; s. c., 2 West. Rep. 827; Chickering *v.* Fullerton, 90 Ill. 520; Addison *v.* Crow, 5 Dana (Ky.), 279; Osborne *v.* Crump, 57 Miss. 622; Loomis *v.* Riley, 24 Ill. 307; Rogers *v.* Holyoke, 14 Minn. 220; Chapman *v.* West, 17 N. Y. 125; Sedgwick *v.* Cleveland, 7 Paige Ch. (N. Y.) 290, 291; Smith *v.* Sanger, 3 Barb. Ch. (N. Y.) 360; Anon. *v.* Anon., 10 Paige Ch. (N. Y.) 20; Foster *v.* Deacon, 6 Madd. 59; Coles *v.* Forrest, 10 Beav. 552; Clow *v.* Derby Coal Co., 98 Pa. St. 432; Eyster *v.* Gaff, 91 U. S. (1 Otto) 521; bk. 23, L. ed. 403; Seward *v* Huntington, 94 N. Y. 114.

**A Married Woman Mortgagor Having a Separate Estate** is a necessary defendant.

See Conde *v.* Shepard, 4 How. (N. Y.) Pr. 75; Albany F. Ins. Co. *v.* Bay, 4 N. Y. 9, 38; affirming 4 Barb. (N. Y.) 407; Ellis *v.* Kenyon, 25 Ind. 134; Eaton *v.* Nason, 47 Me. 132; Galway *v.* Fullerton, 17 N. J. Eq. (2 C. E. Gr.) 389; Newhart *v.* Peters, 80 N. C. 166; McFerrin *v.* Menifee, 6 Coldw. (Tenn.) 499; Hill *v.* Edmonds, 5 De G. & S. 603; Weed Sewing-mach. Co. *v.* Emerson, 115 Mass. 554; Merchant *v.* Thomson, 34 N. J. Eq. (8 Stew.) 73; Armstrong *v.* Ross, 20 N. J. Eq. (5 C. E. Gr.) 109; Black *v.* Galway, 24 Pa. St. 18; Glass *v.* Warnick, 40 Pa. St. 140; Graham *v.* Long, 65 Pa. St. 383.

**Wife of Mortgagor or of the Owner of the Equity of Redemption** is a necessary party defendant. See Merchants' Bank *v.* Thomson, 55 N. Y. 7; Mills *v.* Van Voohies, 20 N. Y. 412; Denton *v.* Nanny, 8 Barb. (N. Y.) 618; Wheeler *v.* Morris, 2 Bosw. (N. Y.) 524, 529; Bell *v.* Mayor, 10 Paige Ch. (N. Y.) 49, 67; Kay *v.* Whittaker, 44 N. Y. 565, 572; Blydenburgh *v.* Northrop, 13 How. (N. Y.) Pr. 289; Hubbell *v.* Sibley, 5 Lans. (N. Y.) 56; Kittle *v.* Van Dyck, 1 Sandf. Ch. (N. Y.) 76, 79; Mabury *v.* Ruiz, 58 Cal. 11; Daniels *v.* Henderson, 5 Fla. 45; Kissel *v.* Eaton, 64 Ind. 248; Watt *v.* Alford, 25 Ind. 533; Verry *v.* Robinson, 25 Ind. 14; Richardson *v.* Skolfield, 45 Me. 386; Gage *v.* Ward, 25 Me. 101; Campbell *v.* Knight, 24 Me. 332; Smith *v.* Eustis, 7 Me. (7 Greenl.) 41; Lund *v.* Woods, 52 Mass. (11 Metc.) 566; Swan *v.* Wiswall, 32 Mass. (15 Pick.) 126; Snyder *v.* Snyder, 6 Mich. 470; Atkinson *v.* Stewart, 46 Mo. 510; Rands *v.* Kendell, 15 Ohio, 671, 675; Eldridge *v.* Eldridge, 14 N. J. Eq. (1 McCart.) 195; Chiswell *v.* Morris, 14 N. J. Eq. (1 McCart.) 101; Ketchum *v.* Shaw, 28 Ohio St. 503; State Bank of Ohio *v.* Hinton, 21 Ohio St. 509; McArthur *v.* Franklin, 15 Ohio St. 485; s. c., 16 Ohio St. 193; Conover *v.* Porter, 14 Ohio St. 450; Taylor *v.* Fowler, 18 Ohio, 567; Calmes *v.* McCrocker, 8 Rich. (S. C.) L. 87; James *v.* Fields, 5 Heisk. (Tenn.) 394; Greeg *v.* Jones, 5 Heisk. (Tenn.) 443; Verree *v.* Verree, 2 Brev. (S. C.) L. 211; Newhall *v.* Lynn Bank, 101 Mass. 428; Huston *v.* Neil, 41 Ind. 504; Miller *v.* Miller, 48 Mich. 311; Wood *v.* Chew, 13 How (N. Y.) Pr. 86; Earle *v.* Barnard, 22 How. (N. Y.) Pr. 437; Ethridge *v.* Vernoy, 71 N. C. 184; Thornton *v.* Pigg, 24 Mo. 249; Pitts *v.* Aldrich, 93 Mass. (11 Allen) 39; Hinchliffe *v.* Shea, 34 Hun (N. Y.), 365; Leonard *v.* Admr. of Villas, 23 Ill. 377; Chambers *v.* Nicholson, 30 Ind. 349; Hinchman *v.* Stiles, 9 N. J. Eq. (1 Stockt.) 361; Hartshorn *v.* Hartshorn, 2 N. J. Eq. (1 H. W. Gr.) 349; Campbell *v.* Campbell, 30 N. J. Eq. (3 Stew.) 415; Powell *v.* Ross, 4 Cal. 197; Cory *v.* Wheeler, 14 Wis. 281; Nimrock *v.* Scanlin, 87 N. C. 119; Pitts *v.* Aldrich, 93 Mass. (11 Allen) 39; Mims *v.* Mims, 1 Humph. (Tenn.) 425; McIver *v.* Cherry, 8 Humph. (Tenn.) 713; Wright *v.* Langley, 36 Ill. 381, 383; Smith *v.* Gardner, 42 Barb. (N. Y.) 356; Northrup *v.* Wheeler, 43 How. (N. Y.) Pr. 122; Gilbert *v.* Maggard, 2 Ill. (1 Scam.) 471; Eaton *v.* Simonds, 31 Mass. (14 Pick.) 98; Hildreth *v.* Jones, 13 Mass. 525; Bolton *v.* Ballard, 13 Mass. 227; Bird *v.* Gardner, 10 Mass. 364; Wilson *v.* Scott, 29 Ohio St. 636; Burton *v.* Lies, 21 Cal. 87; Bagley *v.* Muehe, 65 Cal. 345.

**A Wife Not Executing a Purchase-money Mortgage** is a necessary party defendant to an action to foreclose. Mills *v.* Van Voorhies, 20 (N. Y.) 412; s. c., 10 Abb. (N. Y.) Pr. 152, affirming 23 Barb. (N. Y.) 125; Stow *v.* Tifft, 15 Johns. (N. Y.) 458; Wheeler *v.* Morris, 2 Bosw. (N. Y.) 524; Blydenburgh *v.* Northrop, 13 How. (N. Y.) Pr. 289; Breckett *v.* Baum, 50 N. Y. 8; Young *v.* Tarbell, 37 Me. 509; Fox *v.* Pratt, 27 Ohio St. 512; Culver *v.* Harper, 27 Ohio St. 464; Welch *v.* Buckins, 9 Ohio St. 331; Carter *v.* Goodwin, 3 Ohio St. 75; Thompson *v.* Lyman, 28 Wis. 266; Foster *v.* Hichox, 38 Wis. 408; Holdane *v.* Sweet, 55 Mich. 196. *Compare* Short *v.* Raub, 81 Ill. 509; Stephens *v.* Bichnell, 27 Ill. 444; Fletcher *v.* Holmes, 32 Ind. 497, 506, 536; Walters *v.* Walters, 73 Ind. 425; Hoskins *v.* Hutchings, 37 Ind. 324; May *v.* Fletcher, 40 Ind. 575; Amphlett *v.* Hibbard, 29 Mich. 298.

Because it is said that, if the wife does not sign a mortgage executed by her husband, her right will not be affected even where she is made a party, without setting forth fully the facts in the complaint. Wiltsie on Mortgage Foreclosure, § 136. See also Baker *v.* Scott, 62 Ill. 86; Leary *v.* Shaffer, 79 Ind. 567; Sutton *v.* Jervis, 31 Ind. 265; Mooney *v.* Maas, 22 Iowa, 380, 383; Amphlett *v.* Hibbard, 29 Mich. 298; Parmenter *v.* Binkley, 28 Ohio St. 32; Sheldon *v.* Patterson, 55 Ill. 507; Westfall *v.* Lee, 7 Clarke (Iowa), 12, 14; Walch *v.* Wilson, 130 Mass. 124.

**The Remedy of a Wife or Widow** who has been omitted as a party defendant, in an action to foreclose, is to redeem; but this right to redeem does not accrue until the death of the husband. See Mills *v.* Van Voorhies, 20 N. Y. 412; Denton *v.* Nanny, 8 Barb. (N. Y.) 618; Ross *v.* Boardman, 22 Hun (N. Y.), 527; Bell *v.* Mayor of N. Y., 10 Paige Ch. (N. Y.) 49; Carll *v.* Butman, 7 Me. (7 Greenl.) 102; Van Vranker *v.* Eastman, 48 Mass. (7

Metc.) 157; Gibson *v.* Crehore, 22 Mass. (5 Pick.) 146; Sheldon *v.* Patterson, 55 Ill. 507; Opdyke *v.* Bartles, 11 N. J. Eq. (3 Stockt.) 133; White *v.* Coulter, 1 Hun (N. Y.), 357, 366; Morton *v.* Noble, 22 Ind. 160; Grable *v.* McCulloch, 27 Ind. 472.

**Wife of Mortgagor or Owner of Equity of Redemption** is not a necessary party defendant in those States where the common-law doctrine of dower has been changed by statute. See Powell *v.* Ross, 4 Cal. 197; Thornton *v.* Pigg, 24 Mo. 249; Miles *v.* Smith, 22 Mo. 502; Etheridge *v.* Vernoy, 71 N. C. 185; Stevens *v.* Campbell, 21 Ind. 471.

**The Husband of a Married Woman Who Has a Separate Estate and Mortgages it for Her Own Benefit** is not generally a necessary party where the foreclosure takes place during her lifetime. See Trustees of Jones' Fund *v.* Roth, 18 N. Y. Week. Dig. 459; Hilton *v.* Lothrop, 46 Me. 297; Yager *v.* Merkle, 26 Minn. 429; Wolf *v.* Banning, 3 Minn. 202; Landon *v.* Burke, 36 Wis. 378; Mayrich *v.* Grier, 3 Nev. 32; Andrews *v.* Swanton, 81 Ind. 474; Weed Sewing-mach. Co. *v.* Emerson, 115 Mass. 554; Camden *v.* Vail, 23 Cal. 633; Harrison *v.* Brown, 16 Cal. 287; Black *v.* Galway, 24 Pa. St. 18; Fogal *v.* Pirro, 10 Bosw. (N. Y.) 100; Leggett *v.* McClelland, 39 Ohio St. 624; Thornton *v.* Pigg, 24 Mo. 249; Riddick *v.* Walsh, 15 Mo. 519, 538; Building, Loan & Sav. Assoc. *v.* Camman, 11 N. J. Eq. (3 Stockt.) 382

**Heirs of Mortgagor or Owner of the Equity of Redemption**, necessary parties defendant to a foreclosure. See Wood *v.* Morehouse, 1 Lans. (N. Y.) 405; Leonard *v.* Morris, 9 Paige Ch. (N. Y.) 90; Bigelow *v.* Bush, 6 Paige Ch. (N. Y.) 345; Williamson *v.* Field, 2 Sandf. Ch. (N. Y.) 533; Pillow *v.* Sentelle, 39 Ark. 61; Kiernan *v.* Blackwell, 27 Ark. 235; Brown *v.* Orr, 29 Cal. 120; Burton *v.* Lies, 21 Cal. 87, 91; Pritchard *v.* Elton, 38 Conn. 434; Britton *v.* Hunt, 9 Kan. 228; Brenner *v.* Bigelo, 8 Kan. 496, 504; Abbott *v.* Godfrey's Heirs, 1 Mich. 178; Bill *v.* Hall, 76 Ala. 546; Hunt *v.* Acre, 28 Ala. 580: Erwin *v.* Ferguson, 5 Ala. 158; Duval *v.* McCloskey, 1 Ala. 708; Lane *v.* Erskine, 13 Ill. 501; Harvey *v.* Pius, 14 Ill. 217; McKay *v.* Wakefield, 63 Ind. 27; Daugherty *v.* Deardorf, 107 Ind. 527; s. c., 5 West. Rep. 850; Newkirk *v.* Burson, 21 Ind. 129; Shaw *v.* Hoadley, 4 Blackf. (Ind.) 165; Slaughter *v.* Fourst, 4 Blackf. (Ind.) 379; White *v.* Rittmeyer, 30 Iowa, 268; Smith *v.* Manning, 9 Mass. 422; Barrett *v.* Cochran, 8 Rich. (S. C.) L. 48; Williams *v.* Beard, 1 Rich. (S. C.) L. 309; George *v.* Cooper, 15 W. Va. 666; Stark *v.* Brown, 12 Wis. 572; Houghton *v.* Mariner, 7 Wis. 244; Zeagel *v.* Kuster, 51 Wis. 31; Averett *v.* Ward, 1 Busb. (N. C.) Eq. 192; Denison *v.* League, 16 Tex. 399, 409; Fletcher *v.* Holmes, 32 Ind. 497, 510; Shiveley's Adm's *v.* Jones, 6 B. Mon. (Ky.) 274; Kenshaw *v.* Taylor, 7 Oreg. 315; Shelton *v.* Atkins, 39 Mass. (22 Pick.) 71; Batre *v.* Auze's Heirs, 5 Ala. 173; Bailey *v.* Muehe, 65 Cal. 345. It is not sufficient in such cases merely to make the personal representatives of the deceased owner parties defendant, except in those cases where the foreclosure is by advertisement. Stark *v.* Brown, 12 Wis. 572; Zaegel *v.* Kuster, 51 Wis. 31; Perkins *v.* Wood, 27 Mo. 547; Dixon's Adm'r *v.* Cuyler's Adm's, 27 Ga. 248; Mackenzie *v.* Alster, 64 How. (N. Y.) Pr. 388; Low *v.* Purdy, 2 Lans. (N. Y.) 424; Rockwell *v.* Jones, 21 Ill. 279; John *v.* Hunt, 1 Blackf. (Ind.) 324.

**An Infant Heir** is a necessary party defendant, but his guardian is not. See Alexander *v.* Frary, 9 Ind. 481; Moore *v.* Starks, 1 Ohio St. 369; Dodd *v.* Neilson, 90 N. Y. 243; Given's Adm's *v.* Davenport, 8 Tex. 451.

**Heirs of the Mortgagor or Owner of the Equity of Redemption** are not necessary parties where the decedent parted with all his interest before his demise. See Daly *v.* Burchall, 13 Abb. (N. Y.) Pr. N. S. 264, 268; Wilkins *v.* Wilkins, 4 Port. (Ala.) 245; Hibernia Sav. Soc. *v.* Herbert, 53 Cal. 375; Medley *v.* Elliott, 62 Ill. 532.

**Devisees of Mortgaged Premises** are necessary parties defendant. See Leggett *v.* Mutual L. Ins. Co., 64 Barb. (N. Y.) 36; Robinson *v.* Robinson, 1 Lans. (N. Y.) 117; Nodine *v.* Greenfield, 7 Paige Ch. (N. Y.) 547; Savings & L. Soc. *v.* Gibbs, 21 Cal. 595; Sanderson *v.* Edwards, 111 Mass. 335; Mayo *v.* Tomkies, 6 Munf. (Va.) 520; Graham's Exr's *v* Carter, 2 Hen. & M. (Va.) 6; Coles *v.* Forrest, 10 Beav. 552; Simons *v.* Bryce, 10 Rich. (S. C.) L. 354; Macclesfield *v.* Fitton, 1 Vern. 168; Lewis *v.* Nangle, 2 Ves. Sr. 431; s. c., Ambl. 150; Hunt *v.* Acre, 28 Ala. 580.

**Legatees and Annuitants** are necessary party defendants. Hebron Society *v.* Schoen, 60 How. (N. Y.) Pr. 185; McGown *v.* Yerks, 6 Johns. Ch. (N. Y.) 450; Bachelor *v.* Middleton, 6 Hare, 75.

**Executors and Administrators** are generally not necessary parties defendant in New York and many other States. Dodd *v.* Neilson, 90 N. Y. 243; Erwin *v.* Ferguson, 5 Ala. 158; Judge *v.* Boardman, 2 Ala. 331; Wilkins *v.* Wilkins, 4 Port. (Ala.) 245; Dooley *v.* Villalonga, 61 Ala. 129; Bis-

sell *v.* Marine Co. of Chicago, 55 Ill. 165; Rockwell *v.* Jones, 21 Ill. 279; Trapier *v.* Waldo, 16 S. C. 276; Stark *v.* Brown, 12 Wis. 572; Houghton *v.* Mariner, 7 Wis. 244; Wiley *v.* Pinson, 23 Tex. 486; Martin *v.* Harrison, 2 Tex. 456; Willard *v.* Nason, 5 Mass. 240; Perkins *v.* Wood, 27 Mo. 547; Cadwallader *v.* Cadwallader, 26 Mo. 76; Miles *v.* Smith, 22 Mo. 502; Riley's Adm'rs *v.* McCord's Adm'rs, 21 Mo. 285; s. c., 24 Mo. 265; Randolph *v.* Widow, etc., of Chapman, 21 La. An. 486; Dixon *v.* Cuyler, 27 Ga. 248; Hall *v.* Musler, 1 Disney (Ohio), 36; Biggerstoff *v.* Loveland, 8 Ohio, 44; Heighway *v.* Pendelton, 15 Ohio, 735, 749, 758; Massie's Heirs *v.* Donaldson, 8 Ohio, 377; Wallace *v.* Holmes, 40 Pa. St. 427; Hunsecker *v.* Thomas, 89 Pa. St. 154; Mebane *v.* Mebane, 80 N. C. 34, 38; Averett *v.* Ward, 1 Busb. (N. C.) Eq. 192; Bryce *v.* Bowers, 11 Rich. (S. C.) Eq. 41; Wright *v.* Eaves, 10 Rich. (S. C.) Eq. 582; Gibbes *v.* Holmes, 10 Rich. (S. C.) Eq. 484, 493; Trapier *v.* Waldo, 16 S. C. 276; Graham *v.* Vinning, 1 Tex. 639; Cole *v.* Robertson, 6 Tex. 356; Bayly *v.* Muehe, 65 Cal. 345; Savings & L. Soc. *v.* Gibbs, 21 Cal. 595; Burton *v.* Lies, 21 Cal. 87; Fahlon *v.* Butler, 21 Cal. 24; Darlington *v.* Effey, 13 Iowa, 177; Hodgdon *v.* Heidman, 66 Iowa, 645; Brenner *v.* Bigelow, 8 Kan. 498, 504; Anderson *v.* Austin, 34 Barb. (N. Y.) 319; Cole *v.* Moffit, 20 Barb. (N. Y.) 18; Hornby *v.* Cramer, 12 How. (N. Y.) Pr. 490; Low *v.* Purdy, 2 Lans. (N. Y.) 424; Mackenzie *v.* Alster, 64 How. (N. Y.) Pr. 388; s. c., 12 Abb. (N. Y.) N. C. 110; Van Schaack *v.* Sanders, 32 Hun (N. Y.), 515; s. c., 19 N. Y. Week. Dig. 170.

**Trustees Holding an Interest for Beneficiaries** are necessary parties defendant, no matter what the character or purpose of the trust. See Bard *v.* Poole, 12 N. Y. 495; Case *v.* Price, 9 Abb. (N. Y.) Pr. 111; Christie *v.* Herrick, 1 Barb. Ch. (N. Y.) 254; Leggett *v.* Mutual Ins. Co., 64 Barb. (N. Y.) 38; Toole *v.* McKiernan, 48 N. Y. Super. Ct. (J. & S.) 163; Grant *v.* Duane, 9 Johns. (N. Y.) 591; Nodine *v.* Greenfield, 7 Paige Ch. (N. Y.) 547; Paton *v.* Murray, 6 Paige Ch. (N. Y.) 474; King *v.* McVicker, 3 Sandf. Ch. (N. Y.) 193; Williamson *v.* Field's Ex'rs, 2 Sandf. Ch. (N. Y.) 533, 563; Wilson *v.* Russ, 17 Fla. 691; C. & G. W. R. Land Co. *v.* Peck, 112 Ill. 408, 435; Walsh *v.* Truesdale, 1 Ill. App. 126; Clark *v.* Reyburn, 75 U. S. (8 Wall.) 318; bk. 19, L. ed. 354; Walton *v.* Jones, 2 Y. & Ch. Cas. 244; N. & C. Bridge Co. *v.* Douglass, 12 Bush (Ky.), 719; Gardner *v.* Brown, 88 U. S. (21 Wall.) 36; bk. 22, L. ed. 527; Rathbone *v.* Hooney, 58 N. Y. 463.

**Cestuis que Trust and Beneficiaries** are necessary defendants in order to cut off the entire equity of redemption. See Leggett *v.* Mutual L. Ins. Co., 64 Barb. (N. Y.) 23, 36; Case *v.* Price, 17 How. (N. Y.) Pr. 348; Terrett *v.* Crombie, 6 Lans. (N. Y.) 82; Nodine *v.* Greenfield, 7 Paige Ch. (N. Y.) 544; King *v.* McVickar, 3 Sandf. Ch. (N. Y.) 192; Williamson *v.* Field, 2 Sandf. Ch. (N. Y.) 562; Dodd *v.* Neilson, 90 N. Y. 243, 247; Lockman *v.* Reilley, 10 Abb. (N. Y.) N. C. 351; Woolner *v.* Wilson, 5 Ill. App. 439; Day *v.* Wetherby, 29 Wis. 363; Clark *v.* Reyburn, 75 U. S. (8 Wall.) 318; bk. 19, L. ed. 354; Broward *v.* Hoeg, 15 Fla. 370; Johnson *v.* Robertson, 31 Md. 476; Wood *v.* Nisbit, 20 Ga. 72; Hanman *v.* Riley, 9 Hare Append. 40; Goldsmid *v.* Stonehewer, 9 Hare Append. 39; s. c., 17 Jur. 199; Sale *v.* Kitson, 17 Jur. 171; s. c., 3 DeG. M. & G. 119; Tuder *v.* Morris, 1 Sm. &. Gif. 503; Cropper *v.* Mellersh, 1 Jur. N. S. 299; Coler *v.* Forrest, 10 Beav. 557; Williamson *v.* Field, 2 Sandf. Ch. (N. Y.) 562; Gore *v.* Stacpoole, 1 Dow's P. C. 18, 31; Calverley *v.* Phelp, 6 Madd. 229; Johnston *v.* Donvan, 106 N. Y. 269; Brown *v.* Cherry, 38 How. (N. Y.) Pr. 352; s. c., 56 Barb. (N. Y.) 633; Young *v.* Whitney, 18 Fla. 54; Story's Eq. Pl. §§ 193, 197.

**Cestuis que Trust Are Not Necessary Parties Defendant** to a mortgage foreclosure, either in cases of remote limitation of the equity of redemption, in which, on account of the impossibility of bringing in parties not *in esse*, or not ascertained, but who may ultimately become entitled,—see Williamson *v.* Field, 2 Sandf. Ch. (N. Y.) 562; Anderson *v.* Stather, 16 L. J. Eq. (N. S.) 152;—or in those cases where the beneficiaries are so numerous that it would be intolerably oppressive to compel the plaintiff to bring them all into the action,—Wiltsie on Mortgage Foreclosure, § 148. See also Christie *v.* Herrick, 1 Barb. Ch. (N. Y.) 254; Van Vechten *v.* Terry, 2 Johns. Ch. (N. Y.) 197; Paton *v.* Murray, 6 Paige Ch. (N. Y.) 474; C. & G. W. R. Land Co. *v.* Peck, 112 Ill. 408, 435; Swift *v.* Stebbins, 4 Stew. & Port. (Ala.) 447; Willis *v.* Henderson, 5 Ill. (4 Scam.) 13; New York Franklinite Co. *v.* Ames, 12 N. J. Eq. (1 Beas.) 507; Grant *v.* Duane, 9 Johns. (N. Y.) 591; Thomas *v.* Dunning, 5 DeG. & S. 618; Newton *v.* Earl of Egmont, 4 Sim. 574; Throughton *v.* Binkes, 6 Ves. 573; Holland *v.* Baker, 3 Hare, 68; Smart *v.* Bradstock, 7 Beav.

500; Powell *v.* Wright, 7 Beav. 444; Law *v.* Bagwell, 4 Dru. & Wal. 406; Doody *v.* Higgins, 9 Hare Append. 32; Gore *v.* Harris, 15 Jur. 761; Wallwyn *v.* Coutts, 3 Mer. 707; Garrard *v.* Lord Louderdale, 3 Sim. 1; Union Bank *v.* Bell, 14 Ohio St. 200.

**Remaindermen and Reversioners** necessary parties defendant in mortgage foreclosures. Brevoort *v.* Brevoort, 70 N. Y. 136; Rathbone *v.* Hooney, 58 N. Y. 463; Leggett *v.* Mutual L. Ins. Co., 64 Barb. (N. Y.) 23; Eagle F. Ins. Co. *v.* Cammet, 2 Edw. Ch. (N. Y.) 127; Nodine *v.* Greenfield, 7 Paige Ch. (N. Y.) 544; Williamson *v.* Field, 2 Sandf. Ch. (N. Y.) 533, 563; Lockman *v.* Reilley, 95 N. Y. 64; s. c., 10 Abb. (N. Y.) N. C. 351; Iowa Loan & T. Co. *v.* King, 58 Iowa, 598; Breit *v.* Yeaton, 101 Ill. 242; Lloyd *v.* Johnson, 9 Ves. 37; Gifford *v.* Hort, 1 Sch. & Lef. 386, 408; Yaths *v.* Hambly, 2 Atk. 237; Sutton *v.* Stone, 2 Atk. 101; Hopkins *v.* Hopkins, 1 Atk. 581, 590; Roscarrick *v.* Barton, 1 Ch. Cas. 218; Fishwick *v.* Lowe, 1 Cox Ch. 411; Chappell *v.* Rees, 1 DeG. M. & G. 393; Gore *v.* Stockpoole, 1 Dow's P. C. 18, 31; Cholmondeley *v.* Clinton, 2 Jac. & W. 133.

**Only Persons in Esse can be Made Parties Defendant**. Clark *v.* Reyburn, 75 U. S. (8 Wall.) 318; bk. 19 L. ed. 354; Reynoldson *v.* Perkins, Ambl. 564; Handcock *v.* Shaen, Coll. P. C. 122; Chappell *v.* Rees, 1 DeG. M. & G. 393; Gove *v.* Stackpoole, 1 Dow's P. C. 31; Eagle F. Ins. Co, *v.* Commet, 2 Edw. Ch. (N. Y.) 128.

**A Receiver or Voluntary Assignee in Bankruptcy** is a necessary party defendant in an action to foreclose a mortgage. See Lenihan *v.* Hamann, 55 N. Y. 652; Bard *v.* Poole, 12 N. Y. 507; Cleveland *v.* Boerum, 23 Barb. (N. Y.) 205, aff'd 24 N. Y. 613; Eyster *v.* Gaff, 91 U. S. (1 Otto) 521; bk. 23, L. ed. 403; Wagner *v.* Hodge, 34 Hun (N. Y.), 524; Landon *v.* Townshend, 44 Hun (N. Y.), 561; Spring *v.* Short, 90 N. Y. 538; Winslow *v* Clark, 47 N. Y. 261; Burnham *v.* DeBevorse, 8 How. (N. Y.) Pr. 477; Harris *v.* Cornell, 80 Ill. 54; Stimpson *v.* Pease, 53 Iowa, 572; Gardner *v.* Brown, 88 U. S. (21 Wall.) 36; bk. 22, L. ed. 527; Chickering *v.* Failes, 26 Ill. 507; King *v.* Bowman, 24 La. An. 506; Moors *v.* Albro, 129 Mass. 9; Freeland *v.* Freeland, 102 Mass. 475; Thorpe *v.* Ricks, 1 Dev. & B. (N. C.) Eq. 619, 620; Dwyer *v.* Garlough, 31 Ohio St. 158; Stafford *v.* Adair, 57 Vt. 63; Raynor *v.* Selmes, 52 N. Y. 579; rev'g 7 Lans. (N. Y.) 440; Herring *v.* New York, L. E. & W. R. Co., 105 N. Y. 341, 371; Rochfort *v.* Battersby, 14 Jur. 229; Lloyd *v.* Lander, 5 Madd. 282; Collins *v.* Shirley, 1 R. & M. 638; Kerrick *v.* Saffery, 7 Sim. 317; Franklyn *v.* Fern, Barn. Ch. (folio) 30, 32; Cashell *v.* Kelly, 2 Dru. & War. 181; Singleton *v.* Cox, 4 Hare, 326; Rafferty *v.* King, 1 Keen, 619; Collins *v.* Shirley, 1 Russ. & M. 638; s. c., 9 Sim. 399; Eades *v.* Harris, 1 Y. & C. 234.

**An Assignee in Bankruptcy During the Pendency of Suit to Foreclose** is not a necessary party. Eyster *v.* Gaff, 91 U. S. (1 Otto), 521; bk. 23, L. ed. 403; Lenihan *v.* Hamann, 55 N. Y. 652; Cleveland *v.* Boerum, 23 Barb. (N. Y.) 205, aff'd 24 N. Y. 613. A different rule, it seems, formerly prevailed in New York. Johnson *v.* Fitzhugh, 3 Barb. Ch. (N. Y.) 360; Burr *v.* Burr, 10 Paige Ch. (N. Y. 20; Sedgwick *v.* Cleveland, 7 Paige Ch. (N. Y.) 290, 291.

**Infants, Idiots, Lunatics, and Habitual Drunkards** are necessary parties defendant. See Prentiss *v.* Cornell, 31 Hun (N. Y.), 167; Agricultural Ins. Co. *v.* Barnard, 96 N. Y. 525; Lyon *v.* Lyon, 67 N. Y. 250; McManis *v.* Rice, 48 Iowa, 361; Eslava *v.* Le Petre, 21 Ala. 504; Parker *v.* Lincoln, 12 Mass. 16; Campbell *v.* Harmon, 43 Ill. 18; Merritt *v.* Simpson, 41 Ill. 391; Boston Bank *v.* Chamberlain, 15 Mass. 220; Valentine *v.* Haff, 72 N. Y. 184; Matter of Price, 67 N. Y. 231; Cole *v.* Gourlay, 9 Hun (N. Y.), 593; Aldrich *v.* Lapham, 6 How. (N. Y.) Pr. 129; Ingersoll *v.* Mangan, 84 N. Y. 622; McMurray *v.* McMurray, 66 N. Y. 175.

**Corporations are Necessary Parties Defendant** by their corporate names in mortgage foreclosures. See Aurora Agricultural & H. Soc. *v.* Paddock, 80 Ill. 263; Rochester Sav. Bank *v.* Averell, 96 N. Y. 467; Greenpoint Sugar Co. *v.* Whitin, 69 N. Y. 328; Reed *v.* Bradley, 17 Ill. 321; Ottawa Northern Plank Road Co. *v.* Murray, 15 Ill. 336; Donnelly *v.* Rusch, 15 Iowa, 99; People's Bank *v.* Hamilton Mfg. Co., 10 Paige Ch. (N. Y.) 481; Smith *v.* The Smith Moquette Loan Co., 20 N. Y. Week. Dig. 342; Chouteau *v.* Allen, 70 Mo. 292.

**Tenants and Occupants of Premises** are necessary parties defendant. See Globe Marble-mills Co. *v.* Quinn, 76 N. Y. 23; Clarkson *v*, Skidmore, 46 N. Y. 297; Whalen *v.* White, 25 N. Y. 462; Hirsch *v.* Livingston, 3 Hun (N. Y.), 9; s. c., 48 How. (N. Y.) Pr. 243; Zeiter *v.* Bowman, 6 Barb. (N. Y.) 133; Simers *v.* Saltus, 3 Den. (N. Y.) 214; Fuller *v.* Van Geesen, 4 Hill (N. Y.), 171; Ostrom *v.* McCann, 21 How. (N. Y.) Pr. 432; Peck *v* Knickerbocker Ice Co., 18 Hun (N. Y.), 183; Clason *v.* Corley, 5 Sandf. (N. Y.) 447;

Campbell *v.* Savage, 33 Ark. 678; Gortside *v.* Outley, 58 Ill. 210, 215; Tuttle *v.* Lane, 17 Me. 437; Fletcher *v.* Cary, 103 Mass. 475; Hemphill *v.* Ross, 66 N. C. 477, 480; Coe *v.* Manseau, 62 Wis. 81; Buckner *v.* Sessions, 27 Ark. 219; McLain *v.* Badgett, 4 Ark. 244; Cox *v.* Vickers, 35 Ind. 27; Sproule *v.* Samuel, 5 Ill. (4 Scam.) 135, 139; Downard *v.* Groff, 40 Iowa, 597, 598; Suiter *v.* Turner, 10 Iowa, 517, 527; McDermott *v.* Burke, 16 Cal. 580; Richardson *v.* Hadsall, 106 Ill. 476, 479; Delespine *v.* Campbell, 45 Tex. 268; Cassilly *v.* Rhodes, 12 Ohio, 88; Johnson *v.* Camp, 51 Ill. 219; Clarkson *v.* Skidmore, 46 N. Y. 297; Keershaw *v.* Thompson, 4 Johns. Ch. (N. Y.) 609; Astor *v.* Turner, 11 Paige Ch. (N. Y.) 436; Jones *v.* Clark, 20 Johns. (N. Y.) 51; Magill *v.* Hinsdale, 6 Conn. 464, 469; s.c., 16 Am. Dec. 70; Wakeman *v.* Banks, 2 Conn. 445; Rockwell *v.* Bradley, 2 Conn. 1.

**Subsequent Incumbrancers Still Owning Their Liens** are necessary parties defendant. See Gage *v.* Brewster, 31 N. Y. 218; Brainard *v.* Copper, 10 N. Y. 356; Peabody *v.* Roberts, 47 Barb. (N. Y.) 91; Arnot *v.* Post, 6 Hill (N. Y.), 65; Franklyn *v.* Hayward, 61 How. (N. Y.) Pr. 43; Vanderkemp *v.* Shelton, 11 Paige Ch. (N. Y.) 28; Waller *v.* Harris, 7 Paige Ch. (N. Y.) 167; Vroom *v.* Ditmas, 4 Paige Ch. (N. Y.) 526; Benedict *v.* Gilman, 4 Paige Ch. (N. Y.) 58; Carpenter *v.* Brenham, 40 Cal. 221; Shores *v.* Scott River Co., 21 Cal. 135; Montgomery *v.* Tutt, 11 Cal. 307; Whitney *v.* Higgins, 10 Cal. 347, 551; Goodman *v.* White, 26 Conn. 320; Broome *v.* Beers, 6 Conn. 207; Swift *v.* Edson, 5 Conn. 534; Smith *v.* Chapman, 4 Conn. 346; Hodgen *v.* Guttery, 58 Ill. 431; Strang *v.* Allen, 44 Ill. 428; Shinn *v.* Shinn, 91 Ill. 477; Kenyon *v.* Shreck, 52 Ill. 382; Catterlin *v.* Armstrong, 79 Ind. 514; Hosford *v.* Johnson, 74 Ind. 479; Hasselman *v.* McKernan, 50 Ind. 441; McKernan *v.* Neff, 43 Ind. 503; Holmes *v.* Bybee, 34 Ind. 262; Murdock *v.* Ford, 17 Ind. 52; Proctor *v.* Baker, 15 Ind. 178; Mack *v.* Graver, 12 Ind. 254; Pattison *v.* Shaw, 6 Ind. 377; Meredith *v.* Lackay, 14 Ind. 529; s. c., 16 Ind. 1; Waller *v.* Schreiber, 47 Iowa, 529; Newcomb *v.* Dewy, 27 Iowa, 381; Knoles *v.* Rablin, 20 Iowa, 103; Anson *v.* Anson, 20 Iowa 58; Johnson *v.* Harmon, 19 Iowa, 56; Macey *v.* Fenwick, 4 B. Mon. (Ky.) 309; Rogers *v.* Holyoke, 14 Minn. 220; Brown *v.* Nevitt, 27 Miss. 801; White *v.* Bartlett, 14 Neb. 320; Hinson *v.* Adrian, 86 N. C. 61; Mills *v.* Traylor, 30 Tex. 7; Weed *v.* Beebe, 21 Vt. 495; Deuster *v.* McCamus, 14 Wis. 307; Moore *v.* Cord, 14 Wis. 213; Murphy *v.* Farwell, 9 Wis. 102; Farwell *v.* Murphy, 2 Wis. 533; Burgess *v.* Sturgess, 14 Beav. 440; Tulee *v.* Webb, 6 Beav. 552; Adams *v.* Paynter, 1 Coll. 530; Johnson *v.* Holdsworth, 1 Sim. N. S. 106; Delabere *v.* Norwood, 3 Swanst. 144; Payne *v.* Compton, 2 Y. & C. 457; Rowan *v.* Mercer, 10 Humph. (Tenn.) 359; Collum *v.* Batre, 2 Ala. 415; Judson *v.* Emanuel, 1 Ala. 598; Hess *v.* Feldkamp, 2 Disney (Ohio), 332; Hayward *v.* Stearns, 39 Cal. 58; Valentine *v.* Havener, 20 Mo. 133; Russell *v.* Mullanhy, 4 Mo. 319; McCall *v.* Yard, 9 N. J. Eq. (1 Stockt.) 358; s. c., 11 N. J. Eq. (3 Stockt.) 58; Gould *v.* Wheeler, 28 N. J. Eq. (1 Stew.) 541; Willink *v.* Morris Canal & Banking Co., 4 N. J. Eq. (3 H. W. Gr.) 377; Winslow *v.* McCall, 32 Barb. (N. Y.) 241; McElrath *v.* Pittsburgh & S. R. Co., 68 Pa. St. 47; Supervisors of Iowa County *v.* Mineral Point R. R., 24 Wis. 93; Delaplaine *v.* Lewis, 19 Wis. 476.

**The Remedy of Omitted Junior Encumbrancers is to Redeem** from the sale. See Wiley *v.* Ewing, 47 Ala. 418; Carpentier *v.* Brenhan, 40 Cal. 221; Hodgen *v.* Guttery, 58 Ill. 431; Gower *v.* Winchester, 33 Iowa, 303; Newcomb *v.* Dewey, 27 Iowa, 381; Roney *v.* Bell, 9 Dana (Ky.), 4; Cooper *v.* Martin, 1 Dana (Ky.), 25; Clary *v.* Marshall, 5 B. Mon. (Ky.) 274; Bank of U. S. *v.* Carroll, 4 B. Mon. (Ky.) 50; Avery *v.* Ryerson, 34 Mich. 362; Baker *v.* Pierson, 6 Mich. 522; Renaud *v.* Brown, 7 Neb. 449; Holliger *v.* Bates, 43 Ohio St. 437; s. c., 1 West. Rep. 516; Gage *v.* Brewster, 31 N. Y. 218; Peabody *v.* Roberts, 47 Barb. (N. Y.) 91; County of Floyd *v.* Cheney, 57 Iowa, 160, 163; Crawford *v.* Taylor, 42 Iowa, 260; Gower *v.* Winchester, 33 Iowa, 303; Ewing *v.* Ainsworth, 53 Ill. 464; Ten Eyck *v.* Casad, 15 Iowa, 524; Vanderkap *v.* Shelton, 11 Paige Ch. (N. Y.) 28; Brainard *v.* Cooper, 10 N. Y. 356; Vroom *v.* Ditmas, 4 Paige Ch. (N.Y.) 526; Benedict *v.* Gilman, 4 Paige Ch. (N. Y.) 58; Belden *v.* Slade, 26 Hun (N. Y.), 635; Johnson *v.* Harmon, 19 Iowa, 56; American Buttonhole Co. *v.* Burlington M. L. Assoc., 61 Iowa, 464; McHenry *v.* Cooper, 27 Iowa 137, 141; Peabody *v.* Roberts, 47 Barb. (N.Y.) 91; Walsh *v.* Rutgers F. Ins. Co., 13 Abb. (N. Y.) Pr. 33; Coleman *v.* Witherspoon, 76 Ind. 285; McKernan *v.* Neff, 43 Ind. 503; Atwater *v.* West, 28 N. J. Eq. (1 Stew.) 361; Chilver *v.* Weston, 27 N. J. Eq. (12 C. E. Gr.) 435; Stewart *v.* Johnson, 30 Ohio St. 24; Besser *v.* Hawthorn, 3 Oreg. 129; Bache *v.* Purcell, 6 Hun (N. Y.), 518; Fliess *v.* Buckley, 90 N. Y. 286; Murphy *v.* Farwell, 9 Wis. 102; Peabody *v.* Roberts, 47 Barb.

(N. Y.) 91, 102; Brainard *v.* Cooper, 10 N. Y. 359; Franklyn *v.* Hayward, 61 How. (N. Y.) Pr. 43.

**Subsequent Judgment Creditors Who Still Retain Their Judgment Lien** are necessary parties defendant. See Virdin *v.* Slocum, 71 N.Y. 345; Morris *v.* Wheeler, 45 N. Y. 708; Brainard *v.* Cooper, 10 N. Y. 356; Winebrener *v.* Johnson, 7 Abb. (N. Y.) Pr. N. S. 202; Shaw *v.* McNish, 1 Barb. Ch. (N. Y.) 328; Niagara Bank *v.* Roosevelt, 9 Cow. (N. Y.) 409; Arnot *v.* Post, 6 Hill (N. Y.), 65; Haines *v.* Beach, 3 Johns. Ch. (N. Y.) 466; Hubbell *v.* Sibly, 5 Lans. (N. Y.) 56; People's Bank *v.* Hamilton Mfg. Co., 10 Paige Ch. (N. Y.) 481; Vroom *v.* Ditmas, 4 Paige Ch. (N. Y.) 531; Benedict *v.* Gilman, 4 Paige Ch. (N. Y.) 58; Alexander *v.* Greenwood, 24 Cal. 505; Ritch *v.* Eichelberger, 13 Fla. 169; Kelgour *v.* Wood, 64 Ill. 345; Strang *v.* Allen, 44 Ill. 428; Ducker *v.* Belt, 3 Md. Ch. Dec. 13; Wylie *v.* McMakin, 2 Md. Ch. Dec. 413; Hinson *v.* Adrian, 86 N. C. 61; Felder *v.* Murphy, 2 Rich. (S. C.) Eq. 58; Person *v.* Merrick, 5 Wis. 231; Leonard *v.* Groome, 47 Md. 499; Harris *v.* Hooper, 50 Md. 537; Gaines *v.* Walker, 16 Ind. 361; Heuisler *v.* Nickum, 38 Md. 270; Tome *v.* Mer. Mec. B. & L. Co., 34 Md. 12; Root *v.* Wheeler, 12 Abb. (N. Y.) Pr. 294; Groff *v.* Morehouse, 51 N. Y. 503; Lyon *v.* Lyon, 67 N. Y. 250; Waldo *v.* Williams, 3 Ill. (2 Scam.) 471; Verdin *v.* Slocum, 71 N. Y. 345; revs'g 9 Hun (N. Y.), 150; Winebrener *v.* Johnson, 7 Abb. (N. Y.) Pr. N. S. 202; De Saussure *v.* Bollmann, 7 Rich. (S. C.) L. 329, 339.

**Judgment Creditors and Creditors Without a Specific Lien** are not necessary parties defendant. Allen *v.* Case, 13 Wis. 621; Jones *v.* Winans. 20 N. J. Eq. (5 C. E. Gr.) 96; Spring *v.* Short, 90 N. Y. 538; Herring *v.* New York, L. E. & W. R. Co., 105 N. Y. 340; People *v.* Erie R. Co., 56 How. (N. Y.) Pr. 122; Gardner *v.* Lansing, 28 Hun (N. Y.), 413; Bullard *v.* Leach, 27 Vt. 491; Woods *v.* Love, 27 Mich. 308; Smith *v.* Moore, 73 Ind. 388; Short *v.* Bacon, 99 N. Y. 275; Bramhall *v.* Flood, 41 Conn. 68; Lyon *v.* Sandford, 5 Conn. 547; Campion *v.* Kille, 14 N. J. Eq. (1 McCart.) 229; s. c., 15 N. J. Eq. (2 McCart.) 476; Chandler *v.* Dyer, 37 Vt. 345; Nichols *v.* Holgate, 2 Aik. (Vt.) 138; Downer *v.* Fox, 20 Vt. 388; People's Bank *v.* Hamilton Mfg. Co., 10 Paige Ch. (N. Y.) 482; Leveridge *v.* Marsh, 30 N. J. Eq. (3 Stew.) 59; Ballard *v.* Anderson. 18 Tex. 377.

**The Remedy of a Judgment Creditor Who has been Omitted as a Party Defendant** is to redeem. See Gage *v.* Brewster, 31 N. Y. 218; Brainard *v.* Cooper, 10 N. Y. 356; Winebrener *v.* Johnson, 7 Abb. (N. Y.) Pr. N. S. 202; Belden *v.* Slade, 26 Hun (N. Y.), 636; American Buttonhole Co. *v.* Burlington M. L. Assoc., 61 Iowa, 464; Anson *v.* Anson, 20 Iowa, 55; Jones *v.* Harstock, 42 Iowa, 147; Newcomb *v.* Dewey, 27 Iowa 381; Rice *v.* Kelso, 57 Iowa, 115; Wright *v.* Howell, 35 Iowa, 288, 292; Stuart *v.* Scott, 22 Kan. 585; Martin *v.* Friedley, 23 Minn. 13; Pratt *v.* Frear, 13 Wis. 462; Iowa Co. *v.* Beeson, 55 Iowa, 262; Ewing *v.* Ainsworth, 53 Ill. 464; Miller *v.* Finn, 1 Neb. 254.

**Owner of Mechanic's Lien** is necessary party defendant in a mortgage foreclosure. See Emigrant Industrial S. Bank *v.* Goldman, 76 N. Y. 127, 129; Payne *v.* Wilson, 74 N. Y. 348; Jones *v.* Harstock, 42 Iowa, 147.

**Subsequent Lienors or Assignors No Longer Holding the Lien** are not necessary parties defendant. See Whitney *v.* McKinney, 7 Johns. Ch. (N. Y.) 147; McHenry *v.* Cooper, 27 Iowa, 137; McKee *v.* Murphy, 34 N. Y. Super. Ct. (2 J. & S.) 261.

**Subsequent Lienors with an Equitable or Contingent Interest** in the lien are generally necessary parties defendant. See Blair *v.* Marsh, 8 Iowa, 144; Manning *v.* Markel, 19 Iowa, 103; Patton *v.* Smith, 113 Ill. 499; Bloomer *v.* Sturges, 58 N.Y. 168; Andrews *v.* Gillespie, 47 N. Y. 487; Christie *v.* Herrick, 1 Barb. Ch. (N. Y.) 254; Slee *v.* Manhattan Co., 1 Paige Ch. (N. Y.) 48; Kittle *v.* Van Dyck, 1 Sandf. Ch. (N. Y.) 76.

**Assignee of Subsequent Lien** is a necessary party defendant. Winslow *v.* McCall, 32 Barb. (N. Y.) 241; Wetmore *v.* Roberts, 10 How. (N. Y.) Pr. 51; Augustine *v.* Doud, 1 Ill. App. 588; White *v.* Bartlett, 14 Neb. 320; Ward *v.* Van Bokkelen, 2 Paige Ch. (N. Y.) 289. 295; Western Reserve Bank *v.* Potter, Clarke Ch. (N. Y.) 437. But where the assignment is made *pendente lite*, it is otherwise. Case *v.* Bartholow, 21 Kan. 300; Koch *v.* Purcell, 45 N. Y. Super. Ct. (13 J. & S.) 162.

**Incumbrancer Pendente Lite** is not a necessary party defendant. See Lamont *v.* Cheshire, 6 N. Y. 39; Hovey *v.* Hill, 3 Lans. (N. Y.) 167; Montgomery *v.* Birge, 31 Ark. 491; Linn *v.* Patton, 10 W. Va. 187; Lyon *v.* Sandford, 5 Conn. 548; Fuller *v.* Scribner, 16 Hun (N. Y.), 130; aff'd 76 N. Y. 190; Bank of U. S. *v.* Carroll, 4 B. Mon. (Ky.) 50.

**Where Subsequent Incumbrancer is a Marrid Woman** she is a necessary party defendant. Mutual L. Ins. Co. *v.* Dake,

1 Abb. (N. Y.) N. C. 380; aff'd 87 N. Y. 257; Kay *v.* Whittaker, 44 N. Y. 565.

**Heirs, Devisees, Legatees, and Annuitants of a Subsequent Lienor** are usually not necessary parties defendant. Shaw *v.* McNish, 1 Barb. Ch. (N. Y.) 328; Jeneson *v.* Jeneson, 66 Ill. 260.

**Executors and Administrators of a Deceased Subsequent Lienor** are necessary parties to an action to foreclose. See Lockman *v.* Reilly, 95 N. Y. 64; Shaw *v.* McNish, 1 Barb. Ch. (N. Y.) 326; German Sav. Bank *v.* Muller, 10 N. Y. Week. Dig. 67; White *v.* Rittemeyer, 30 Iowa, 268, 272; Shields *v.* Keys, 24 Iowa, 298, 307; Baldwin *v.* Thompson, 15 Iowa, 504; Barton *v.* Hintrager, 18 Iowa, 348; Lothrop's Case, 33 N. J. Eq. (6 Stew.) 246; Whittla *v.* Halliday, 4 Dru. & War. 267; Roger *v.* Weakly, 2 Port. (Ala.) 516; Courser's Will, 4 N. J. Eq. (3 H. W. Gr.) 408; Long *v.* Storie, 23 L. J. Ch. N. S. 200.

**Voluntary Assignee and Assignee in Bankruptcy of a Subsequent Lienor** are necessary parties in an action to foreclose a mortgage. Bard *v.* Poole, 12 N. Y. 495, 507; Avery *v.* Ryerson, 34 Mich. 362.

**Guardians of Infants, Committees of Lunatics, Idiots, or Habitual Drunkards,** trustees and beneficiaries holding subsequent liens or mortgages, are necessary parties. Willink *v.* Morris Canal Banking Co., 4 N. J. Eq. (3 H. W. Gr.) 377; Iowa County *v.* Mineral Point R., 24 Wis. 93; Loehr *v.* Colborn, 92 Ind. 24; Shinn *v.* Shinn, 91 Ill. 477; Wehterelly *v.* Collins, 3 Madd. 255; Osbourn *v.* Fallows, 1 Russ. & M. 741.

**Municipal Corporations,** boards of supervisors, State comptrollers, and purchasers at tax sales are necessary parties defendant in foreclosure. Roosevelt Hospital *v.* Dowley, 57 How. (N. Y.) Pr. 489; Becker *v.* Howard, 66 N. Y. 5, 8; Adair *v.* Morgenthein (Ind.), 13 West. Rep. 852; Ayres *v.* Adair County, 61 Iowa, 728; Crum *v.* Cotting, 22 Iowa, 411; Strake *v.* Lander, 60 Wis. 115.

**An Assignor Who Has Made an Absolute Assignment of a Mortgage** is not a necessary party defendant to its foreclosure. Clark *v.* Mackin, 95 N. Y. 346; Andrews *v.* Gillespie, 47 N. Y. 487; Christie *v.* Herrick, 1 Barb. Ch. (N. Y.) 254; Western Reserve Bank *v.* Potter, Clarke Ch. (N. Y.) 437; Whitney *v.* McKinney, 7 Johns. Ch. (N. Y.) 147; Ward *v.* Van Bokkelen, 2 Paige Ch. (N. Y.) 295; Prout *v.* Hoge, 57 Ala. 28; Walker *v.* Bank of Mobile, 6 Ala. 452; Barraque *v.* Manuel, 7 Ark. 516; Markel *v.* Evans, 47 Ind. 326; Gower *v.* Howe, 20 Ind. 396; Strong *v.* Downing, 34 Ind. 300; Wilson *v.* Spring, 64 Ill. 14; Williams *v.* Smith, 49 Me. 564; Miller *v.* Henderson, 10 N. J. Eq. (2 Stockt.) 320; Larimer *v.* Clemer, 31 Ohio St. 499; Omohundro *v.* Henson, 26 Gratt. (Va.) 511; Scott *v.* Ludington, 14 W. Va. 387; Wright *v.* Sperry, 21 Wis. 331; Etheridge *v.* Vernoy, 71 N. C. 184; s. c., 70 N. C. 713; Kerchner *v.* Fairley, 80 N. C. 25; Pullen *v.* Heron Mining Co., 71 N. C. 567; Westerfield *v.* Spencer, 61 Ind. 339; Whitney *v.* McKinney, 7 Johns. Ch. (N. Y.) 147; Fenton *v.* Hughes, 7 Ves. 287; McGuffey *v.* Finley, 20 Ohio, 474.

**An Assignor is a Necessary Party Defendant Where He Has Guaranteed the Payment or Collection of the Mortgage Debt.** See Ward *v.* Sharp, 15 Vt. 115; Holdridge *v.* Sweet, 23 Ind. 118; Denby *v.* Mellgrew, 58 Ala. 147; Bibb *v.* Hawley, 59 Ala. 403; Strong *v.* Downing, 34 Ind. 300; Littauer *v.* Goldman, 72 N. Y. 506; Andrews *v.* Gillespie, 47 N. Y. 487; Delaware Bank *v.* Jarvis, 20 N. Y. 226; Ross *v.* Terry, 63 N. Y. 613.

**The Assignee of a Mortgage Absolutely Assigned** is a necessary party defendant in an action to foreclose. See Lennon *v.* Porter, 68 Mass. (2 Gray) 473; Burton *v.* Baxter, 7 Blackf. (Ind.) 297; Whitney *v.* McKinney, 7 Johns. Ch. (N. Y.) 147.

**The Assignor of a Mortgage Assigned as Collateral Security or Conditionally** is a necessary party defendant to a foreclosure. See *In re* Estate of Gilbert, 25 N. Y. Week. Dig. 470; Dalton *v.* Smith, 86 N. Y. 176; Union College *v.* Wheeler, 61 N. Y. 88; Bloomer *v.* Sturges, 58 N. Y. 175; Bard *v.* Poole, 12 N. Y. 495; Western Res. Bank *v.* Potter, Clarke Ch. (N. Y.) 432; Johnson *v.* Hart, 3 Johns. Cas. (N. Y.) 322; Slee *v.* Manhattan Co., 1 Paige Ch. (N. Y.) 48; Kittle *v.* Van Dyck, 1 Sandf. Ch. (N. Y.) 76; Hughes *v* Johnson, 38 Ark. 285; St. John *v.* Freeman, 1 Ind. 84; Brown *v.* Johnson, 53 Me. 246; Cutts *v.* York Manufacturing Co., 14 Me. 326; s. c., 18 Me. 190; Stevens *v.* Reeves, 33 N. J. Eq. (6 Stew.) 427; Ackerson *v.* Lodi Br. R., 28 N. J. Eq. (1 Stew.) 542; Woodruff *v.* Depue, 14 N. J. Eq. (1 McCart.) 168; Miller *v.* Henderson, 10 N. J. Eq. (2 Stockt.) 320; Fithian *v.* Corwin, 17 Ohio St. 118; Wright *v.* Sperry, 21 Wis. 331; Chew *v.* Brumagen, 21 N. J. Eq. (6 C. E. Gr.) 520; s. c., 80 U. S. (13 Wall.) 497; bk. 20, L. ed. 663; Salmon *v.* Allen, 11 Hun (N. Y.), 29; Graydon *v.* Church, 4 Mich. 646; Norrish *v.* Marshall, 5 Madd. 475, 643; Bard *v.* Poole, 12 N. Y. 495; Johnson *v.* Hart, 3 Johns. Cas. (N. Y.) 322.

**Where a Mortgage is Assigned Collaterally,** the assignee is a necessary defendant.

in an action brought by the assignor to foreclose. Hoyt *v.* Martense, 16 N. Y. 231; Brown *v.* Johnson, 53 Me. 246; Norton *v.* Warner, 3 Edw. Ch. (N. Y.) 106; Simson *v.* Satterlee, 6 Hun (N. Y.), 305; McMillan *v.* Gordon, 4 Ala. 716; Pine *v.* Shannon, 30 N. J. Eq. (3 Stew.) 404; Anthony *v.* Wood, 19 N. Y. Week. Dig. 177; Carpenter *v.* O'Dougherty, 2 T. & C. (N. Y.) 427.

**Where One of Several Joint Mortgagees Commences an Action to Foreclose,** the other mortagees are necessary parties defendant. See Denison *v.* League, 16 Tex. 399; Porter *v.* Clements, 3 Ark. 364; Vickers *v.* Cowell, 1 Beav. 529; Lovell *v.* Farrington, 50 Me. 239; Howe *v.* Dibble, 45 Ind. 120; Tyler *v.* Yreka Water Co., 14 Cal. 212; Nashville & D. R. R. Co. *v.* Orr, 85 U. S. (18 Wall.) 471; bk. 22, L. ed. 810; Chrisman *v.* Chenoweth, 81 Ind. 401; Dedrick *v.* Barber, 44 Mich. 19; Fond du Lac Harrow Co. *v.* Haskins, 51 Wis. 135; Pettibone *v.* Edwards, 15 Wis. 95; Gratton *v.* Wiggins, 23 Cal. 16; Lietze *v.* Claybaugh, 59 Ill. 136; Preston *v.* Hodgen, 50 Ill. 56; Myers *v.* Wright, 33 Ill. 284; Murdock *v.* Ford, 17 Ind. 52; Rankin *v.* Major, 9 Iowa, 297, 300; Harris *v.* Harlin, 14 Ind. 439; Hensley *v.* Whiffin, 54 Iowa, 555; Thayer *v.* Campbell, 9 Mo. 277; Kemerer *v.* Bourne, 53 Iowa, 172; Bell *v.* Shrock, 2 B. Mon. (Ky.) 29; Pugh *v.* Holt, 27 Miss. 461; Archer *v.* Jones, 26 Miss. 583; Lannay *v.* Wilson, 30 Md. 536; Savings Bank *v.* Freese, 26 N. J. Eq. (11 C. E. Gr.) 453.

**On Foreclosure by One of Several Contemporary and Equal Mortgagees,** the others are necessary parties defendants. See Decker *v.* Boice, 83 N. Y. 215; Cain *v.* Hanna, 63 Ind. 408; Cochran *v.* Goodell, 131 Mass. 464; Eleventh Ward Sav. Bank *v.* Hay, 55 How. (N. Y.) Pr. 444; Greene *v.* Warnick, 64 N. Y. 220.

**Where Two or More Persons Claim the Ownership of a Mortgage,** and one of them commences an action to foreclose, the other claimants are advisable party defendants. See Kellogg *v.* Smith, 26 N. Y. 18; Hancock *v.* Hancock, 22 N. Y. 568; Peck *v.* Mallams, 10 N. Y. 509; Lawrence *v.* Lawrence, 3 Barb. Ch. (N. Y.) 71; Slee *v.* Manhattan Ins. Co., 1 Paige Ch. (N. Y.) 48; Burrows *v.* Stryker, 47 Iowa. 477.

**Prior Mortgagors and Lienholders** are not necessary parties defendant to foreclose the mortgage. See Adams *v.* McPartlin, 11 Abb. (N. Y.) N. C. 369; Hamlin *v.* McCahill, Clarke Ch. (N. Y.) 249; Emigrant Industrial Sav. Bk. *v.* Goldman, 75 N. Y. 127, 131; Brown *v.* Volkening, 64 N. Y. 76, 84; Frot *v.* Koon, 30 N. Y. 428; Hancock *v.* Hancock, 22 N. Y. 568; Eagle F. Ins. Co. *v.* Lent, 6 Paige Ch. (N. Y.) 635; Chapman *v.* West, 17 N. Y. 125; Lewis *v.* Smith, 9 N. Y. 502, aff'g 11 Barb. (N. Y.) 152; Bank of Orleans *v.* Flagg, 3 Barb. Ch. (N. Y.) 316; Holcomb *v.* Holcomb, 2 Barb. (N. Y.) 20; Smith *v.* Roberts, 62 How. (N .Y.) Pr. 196, 200, aff'd in 91 N. Y. 470, 477; Payne *v.* Grant, 23 Hun (N. Y.), 134; Vanderkemp *v.* Shelton, 11 Paige Ch. (N.Y.) 28; Western Ins. Co. *v.* Eagle F. Ins. Co., 1 Paige Ch. (N. Y.) 284; Koch *v.* Purcell, 45 N. Y. Super. Ct. (13 J. & S.) 162, 173; Hotchkiss *v.* Clifton Air Cure, 4 Keyes (N. Y.), 170; White *v.* Holman, 32 Ark. 753; Broward *v.* Hoeg, 15 Fla. 370; Pattison *v.* Shaw, 6 Ind. 377; Tome *v.* Merchants Loan Co., 34 Md. 12; Dawson *v.* Danbury Bank, 15 Mich. 489; Hudnit *v.* Nash, 16 N. J. Eq. (1 C. E. Gr.) 550; Williamson *v.* Probasco, 5 N. J. Eq. (4 Halst.) 571; Forrer *v.* Kloke, 10 Neb. 373, 377; Warren *v.* Burton, 9 S. C. 197; Weed *v.* Beebe, 21 Vt. 495; Jerome *v.* McCarter, 94 U. S. (4 Otto) 734; bk. 24, L. ed. 136; Hagan *v.* Walker, 55 U. S. (14 How.) 29; bk. 14, L. ed. 312; Case *v.* Bartholow, 21 Kan. 300.

**Prior Lienors or Incumbrancers May be Made Defendants** in action to foreclose junior mortgage, for the purpose of having the amount of their claims ascertained and paid out of the proceeds of the sale; but it is thought that such proceedings will not be valid unless the prior lienor has appeared and consented to the decree. See Smith *v.* Davis, 4 N. Y. Civ. Proc. 158; Smith *v.* Roberts, 91 N. Y. 470; Emigrant Industrial Savings Bank *v.* Goldman, 75 N. Y. 127, 132; Metropolitan Trust Co., *v.* Tonawanda R. Co., 18 Abb. (N. Y.) N. C. 368; Holcomb *v.* Holcomb, 2 Barb. (N. Y.) 20; Vanderkemp *v.* Shelton, 11 Paige Ch. (N. Y.) 28; Frost *v.* Yonkers Sav. Bank, 70 N. Y. 553, 557; Hamlin *v.* McCahill, Clarke Ch. (N. Y.) 249; Western Res. Bank *v.* Potter, Clarke Ch. (N. Y.) 439; Western Ins. Co. *v.* Eagle Fire Ins. Co., 1 Paige Ch. (N. Y.) 284; White *v.* Holman, 32 Ark. 753; Norton *v.* Joy, 6 Ill. App. 406; Warner *v.* Dewitt Co. Bank, 4 Ill. App. 305; Persons *v.* Alsip, 2 Ind. 67; Troth *v.* Hunt, 8 Blackf. (Ind.) 580; Clarke *v.* Prentice, 3 Dana (Ky.), 469; Chamolin *v.* Foster, 7 B. Mon. (Ky.) 104; Water *v.* Bossel, 58 Miss. 602; Hudnit *v.* Nash, 16 N. J. Eq. (1 C. E. Gr.) 550; Roll *v.* Malley, 6 N. J. Eq. (2 Halst.) 464; Evans *v.* McLucas, 12 S. C. 56; Raymond *v.* Holborn, 23 Wis. 57; Jerome *v.* McCarter, 94 U. S. (4 Otto) 734; bk. 24, L. ed. 136; Hagan *v.* Walker, 55 U. S. (14 How.) 29, 37;

brancers, and others subsequently acquiring an interest in the mortgaged premises, are necessary parties, depends upon the character of the title it is proposed to invest the purchaser with at the foreclosure sale. If his title is to be absolute, then not only all subsequent mortgagors and lienors, but every other person having an interest, however remote, in the mortgaged premises, must be made parties to the proceeding; otherwise the rights and interests of the omitted person in the equity of redemption will remain unaffected, and the purchaser will take the title burdened with such interest.[1]

bk. 14, L. ed. 312; Finley *v.* Bank of United States, 24 U. S. (11 Wheat.) 304; bk. 6, L. ed. 480; Dunn *v.* Raley, 58 Mo. 134; Gargan *v.* Grimes, 47 Iowa, 180; Anonymous, 8 N. J. Eq. (4 Halst.) 174; Tootle *v.* White, 4 Neb. 401; Rowley *v.* Williams, 5 Wis. 151.

**Parties Having Paramount Title to the Mortgage** are neither proper nor necessary parties; and, where they are made p rties to the action, their rights will not in any way be affected. See Lewis *v.* Smith, 9 N. Y. 502; Walsh *v.* Rutgers, 13 Abb. (N. Y.) Pr. 33; Rathbone *v.* Hooney, 58 N. Y. 463; Merchants Bank *v.* Thompson, 55 N. Y. 711; Lee *v.* Parker, 43 Barb. (N. Y.) 611, 614; Hamlin *v.* McCahill, Clarke Ch. (N. Y.) 249; Bram *v.* Bram, 34 Hun (N. Y.), 487; Gage *v.* Perry, 93 Ill. 176; McAlpin *v.* Zitzer, 119 Ill. 273; s. c., 8 West. Rep. 545; Wilkinson *v.* Green, 34 Mich. 221; Comstock *v.* Comstock, 24 Mich. 39; Horton *v.* Ingersoll, 13 Mich. 409; Wurcherer *v.* Hewitt, 10 Mich. 453; McClure *v.* Holbrook, 39 Mich. 42; Price's Exr's *v.* Lawton, 27 N. J. Eq. (12 C. E. Gr.) 325; Hekla Fire Ins. Co. *v.* Morrison, 56 Wis. 133; Macloon *v.* Smith, 49 Wis. 200; Palmer *v.* Yager, 20 Wis. 91; Pelton *v.* Farmin, 18 Wis. 222; Lewis *v.* Smith, 9 N. Y. 502, aff'd in 11 Barb. (N. Y.) 153; Merchants' Bank *v.* Thomson, 55 N. Y. 7, 11; Lanier *v.* Smith, 37 Hun (N. Y.), 529; Payn *v.* Grant, 23 Hun (N. Y.), 134; Bradley *v.* Parkhurst, 20 Kan. 462; Lounsbury *v.* Catron, 8 Neb. 469; Shellenbarger *v.* Biser, 5 Neb. 195; Wicke *v.* Lake, 21 Wis. 410; Roche *v.* Knight, 21 Wis. 324; Pool *v.* Horton, 45 Mich. 404; Standish *v.* Dow, 21 Iowa, 363.

**Adverse Claimants are Neither Proper nor Necessary Parties** in a mortgage foreclosure, for the reason that such suit is not a proper action in which to litigate the rights of persons who claim title to the mortgage premises. Lewis *v.* Smith, 9 N. Y. 502, aff'd in 11 Barb. (N. Y.) 153; Frost *v.* Koon, 30 N. Y. 428, 444; Corning *v.* Smith, 6 N. Y. 82; Bank of Orleans *v.* Flagg, 3 Barb. Ch. (N. Y.) 316; Meiggs *v.* Thomson, 66 How. (N. Y.) Pr. 466; Payn *v.* Grant, 23 Hun (N. Y.), 134; Eagle F. Ins. Co. *v.* Lent, 6 Paige Ch. (N. Y.) 635, 638; Brown *v.* Volkening, 64 N. Y. 75, 84; Marlow *v.* Barlew, 53 Cal. 456; Crogan *v.* Minor, 53 Cal. 15; San Francisco *v.* Lawton, 18 Cal. 465; Gage *v.* Perry, 93 Ill. 176; Gage *v.* Bd. of Directors, 5 Ill. App. 110; Carbine *v.* Sebastian, 6 Ill. App. 564; Pancost *v.* Travelers Ins. Co., 79 Ind. 172; Pattison *v.* Shaw, 6 Ind. 377; Comly *v.* Hendricks, 8 Blackf. (Ind.) 189; Wilkinson *v.* Green, 34 Mich. 321; Summers *v.* Bromley, 28 Mich. 125; Comstock *v.* Comstock, 24 Mich. 39; Wurcherer *v.* Hewitt, 10 Mich. 453; Chamberlain *v.* Lyell, 3 Mich. 448; Banning *v.* Bradford, 21 Minn. 308; Newman *v.* Home Ins. Co., 20 Minn. 422; Bogey *v.* Shute, 4 Jones (N. C.), Eq. 174; Lyman *v.* Little, 15 Vt. 576; Lange *v.* Jones, 5 Leigh (Va.), 192; Peters *v.* Bowman, 98 U. S. (8 Otto) 56; bk. 25, L. ed. 91; Dial *v.* Reynolds, 96 U. S. (6 Otto) 340; bk. 24, L. ed. 644; Chicago Theological Seminary *v.* Gage, 103 Ill. 175; Shellenbarger *v.* Biser, 5 Neb. 195; Coe *v.* N. J. Midland R., 31 N. J. Eq. (4 Stew.) 105.

**Where Senior Mortgagees or Incumbrancers Claim to be Junior** lienors, they are properly parties defendant for the purpose of litigating the question of priority. See Brown *v.* Volkening, 64 N. Y. 76, 84; Bank of Orleans *v.* Flagg, 3 Barb. Ch. (N. Y.) 316; Payn *v.* Grant, 23 Hun (N. Y.), 134; Krutsinger *v.* Brown, 72 Ind. 466; Cochran *v.* Goodell, 131 Mass. 464; Dawson *v.* Danbury Bank, 15 Mich. 495; Hoppock *v.* Ramsey, 28 N. J. Eq. (1 Stew.) 414; Board of Supervisors *v.* Mineral Point R., 24 Wis. 93.

1. Smith *v.* Chapman, 4 Conn. 344; Swift *v.* Edson, 5 Conn. 531; Goodman *v.* White, 26 Conn. 322; McGown *v.* Yerks, 6 Johns. (N. Y.) Ch. 450; Ensworth *v.* Lambert, 4 Johns. (N. Y.) Ch. 605; Vanderkemp *v.* Shelton, 11 Paige

The distinctions between necessary and proper parties are, however, not of much practical importance, inasmuch as the efficiency of foreclosure sales in enabling the mortgagee bringing the suit to collect his claim mainly depends upon the ability to pass a perfect title to the purchaser at the sale; and hence the only safe course is to bring all persons, whatever their interest may be, into the proceeding, so as to effectually conclude their rights.[1]

(N. Y.), 28; Haines *v.* Beach, 3 Johns. (N. Y.) Ch. 459; Kay *v.* Whittaker, 44 N. Y. 565; Bloomer *v.* Sturges, 58 N. Y. 168; Chase *v.* Abbott, 20 Iowa, 154; Wright *v.* Howell, 35 Iowa, 288; Gaines *v.* Walker, 16 Ind. 361; Proctor *v.* Baker, 15 Ind. 178; Martin *v.* Noble, 29 Ind. 216; Holmes *v.* Byber, 34 Ind. 262; Hasselman *v.* McKernan, 50 Ind. 441; Combs *v.* Carr, 55 Ind. 303; Armstrong *v.* Pratt, 2 Wis. 299; Rowley *v.* Williams, 5 Wis. 151; Stack *v.* Brown, 12 Wis. 572; Moore *v.* Cord, 14 Wis. 213; McCall *v.* Yard, 3 Stockt. (N. J.) 58; Hayward *v.* Stearns, 39 Cal. 58; Besser *v.* Hawthorne, 3 Oreg. 129; Hunt *v.* Acre, 28 Ala. 580; Boykin *v.* Rain, 28 Ala. 332; Doe *v.* McLocky, 1 Ala. 708; Caldwell *v.* Taggart, 4 Pet. (U. S.) 190; Pomeroy Remedies & Remedial Rights (2d Ed.), § 334.

1. **Necessary Parties.**—The mortgagor, unless he has ceased to be the owner of the equity of redemption, is a necessary party. Hallock *v.* Smith, 4 Johns. Ch. (N. Y.) 449; Worthington *v.* Lee, 2 Bland (Md.), 678; Farmer *v.* Curtis, 2 Sim. 466; Kunkel *v.* Markell, 26 Md. 407; Parker *v.* Small, 58 Ind. 349; Curtis *et al. v.* Gooding, 99 Ind. 45; Williams *v.* Smith, 49 Me. 564; Watson *v.* Spence, 20 Wend. (N. Y.) 260; Champlin *v.* Foster, 7 B. Mon. (Ky.) 105; Kay *v.* Whittaker, 44 N. Y. 565; Caddock *v.* Cook, 32 Beav. 70; Crenshaw *v.* Thackston, 14 S. Car. 437. And it has been held that even where he has conveyed, if the deed has not been recorded, he should still be made a party, as the title in the recorder's office appears to be still in him. Hall *v.* Nelson, 23 Barb. (N. Y.) 88. But in such case he would seem to be a proper rather than a necessary party. If he has not in fact conveyed, but only contracted to convey, he is, of course, a necessary party, as the title is still in him. Crooke *v.* O'Higgins, 14 How. Pr. (N. Y.) 154. But if the mortgagor has conveyed all his interest he is not a necessary party, nor indeed a proper party, unless a personal judgment is sought against him in case of deficiency. Andrews *v.* Stith, 22 N. J. Eq. 478; Jas. Miner *v.* Alma R. Smith, 53 Vt. 551.

The purchaser of the mortgaged lands, if in possession, is a necessary party. Noyes *v.* Hall, 97 U. S. 34. And if not made such, the decree will operate merely as an assignment of the mortgage to the purchaser at the sale. Martin *v.* Morris, 62 Wis. 418.

If the mortgagor's equity of redemption has been sold *in invitum*, he is not a necessary party; but when made such he was allowed to plead usury. Andrews *v.* Stith, 7 C. E. Greene (N. J.), 478.

A purchaser of the land sold for unpaid taxes is a proper party. Lyon *v.* Powell, 78 Ala. 351.

If the mortgagor's vendee has not been made a party, the foreclosure suit will not affect his rights. Mulvey *v.* Gibbons, 87 Ill. 367; Patton *v.* Smith, 113 Ill. 499; Childs *v.* Childs, 10 Ohio State, 339; s. c., 75 Am. Dec. 512.

In Dougherty *v.* Deardorf, 107 Ind. 527, it was held that the owner of the equity of redemption from the mortgagor or a mesne purchaser, was as necessary party to the foreclosure suit, as a mortgagor still owning the land; and if not made a party, the decree is of no validity as to him.

**Prior and Subsequent Encumbrancers.**—In Findley *v.* Bank of U. S., 11 Wheat. (U. S.) 306, it is said: "We consider the true rule to be, that where it is the object of the bill to procure a sale of the land, and the prior encumbrancer holds the legal title, and his debt is payable, it is proper to make him a party in order that a sale may be made of the whole title. In this sense, and for this purpose, he may correctly be said to be a necessary party; that is, necessary to such a decree. But it is in the power of the court to order a sale subject to the prior encumbrances."

The doctrine of the English cases and of many of the American courts is that neither prior nor subsequent encumbrancers, nor creditors of the mortgagor, nor purchasers from him, are indispensable parties to the foreclosure suit. Draper *v.* Jennings, 2 Vern. 518; Godfrey *v.* Chadwell, 2 Vern. 601; Merret *v.* Western, 2 Vern. 663; Lomax *v.* Hyde, 2 Vern. 185; Parker *v.* Fuller, 1 R. & M. 656; Rosecarrick *v.* Barton, 1 Ch. Cas. 217; Needler *v.* Deeble, 1 Ch. Cas. 199; Gres-

hold *v.* Marsham, 2 Ch. Cas. 171; Carroll *v.* Kershner, 47 Md. 262; Rowan *v.* Mercer, 10 Humph. (Tenn.) 359, 363; Fletcher *v.* Coleman, 2 Head (Tenn.), 384; Wilkes *v.* Smith, 4 Heisk. (Tenn.) 86; Mims *v.* Mims, 1 Humph. (Tenn.) 425; Young *v.* Montgomery, etc., R. Co., 2 Woods (U. S.), 606.

In Rowan *v.* Mercer, 10 Humph. (Tenn.) 359, Green, J., says: "It is certainly true that in a bill to foreclose a mortgage subsequent mortgagees are proper parties; but we do not think they are necessary parties. The English cases are by no means satisfactory on this question. In several of them the court has required subsequent encumbrancers to be made parties; but in several other cases mortgagees have been allowed to foreclose in the absence of subsequent encumbrancers." Mr. Calvert, in his treatise on Parties, pp. 123 to 133, cites all the cases on this subject, and from his review remarks: "First, that mortgagees have been allowed to foreclose in the absence of subsequent encumbrances. This has taken place in Needler *v.* Deeble, 1 Ch. Cas. 199; Rosecarrick *v.* Barton, 1 Ch. Cas. 217; Greshold *v.* Marsham, 2 Ch. Cas. 117; Lomax *v.* Hyde, 2 Vern. 185; Godfrey *v.* Chadwell, 2 Vern. 60, and Merret *v.* Western, 2 Vern. 663. Secondly, that the decree of foreclosure was not conclusive against subsequent mortgagors, who were absent; and that on proof of collusion they have been allowed to open the account." Needler *v.* Deeble, 1 Ch. Cas. 199; Lomax *v.* Hyde, 2 Vern. 185.

In the case of Haines *v.* Beach, 3 Johns. Ch. (N. Y.) 459, Chancellor Kent reviewed some of the English cases, and came to the conclusion that subsequent encumbrancers ought to be made parties. In that case it was proved that Field, the purchaser, had notice of the mortgage to Brazier before he bid at the master's sale, and that the master, before the sale, gave public notice of the existence and amount of the junior mortgage, and that the sale would be subject to the same. Field gave only one thousand five hundred and eight dollars for the lot, and it was worth seven thousand dollars. The chancellor set aside the sale, and ordered the property to be resold, and that Field should be reimbursed the money he had given, and also the sum expended by him in improvements.

The facts in the case of Haines *v.* Beach, 3 Johns. Ch. (N. Y.) 459, presented a clear case for a resale of the property. The master gave notice that the sale would be subject to the junior mortgage, and Field gave but little more than one-fifth part of the value of the property. So that the review of the cases, and the reasoning of Chancellor Kent, were wholly unnecessary for the decision of the case before him. The supreme court of Tennessee in the case of Mims *v.* Mims, 1 Humph. 425, decided that in a bill to foreclose a mortgage neither prior nor subsequent encumbrancers were necessary parties. It is certainly true that it may sometimes be important that subsequent encumbrancers should be parties to such a bill, especially where the property is to be sold, and where there may be a surplus. But, on the other hand, it will be a great increase of trouble, and a serious obstacle to him in his suit for the satisfaction of his debt, if the mortgagee is compelled to bring into court as many encumbrancers as his debtor may choose to make. The estate may be more than sufficient to cover his debt; and as the suit is not instituted for the benefit of the subsequent encumbrancers, they ought not to pay costs; and if the mortgagor is unable to pay them, the whole cost must come out of the fund, and thus greatly diminish the security. Calvert on Parties, 136. In addition to this, why should a mortgagee be entangled with all the questions that may arise amongst subsequent mortgagors? These inconveniences are greater than can exist by failure to bring subsequent encumbrancers before the court, especially as the decree is not conclusive against them, and on proof of collusion they may be allowed to open the account, or insist upon a resale of the property.

In a bill of foreclosure by a second mortgagee against the mortgagor and a third mortgagee, the first mortgagee is not a necessary party; the proceeding will not affect his *status*. Wright *v.* Bundy, 11 Ind. 398; Richards *v.* Cooper, 5 Beav. 304; Person *v.* Merrick, 5 Wis. 231; Strobe *v.* Downer, 13 Wis. 10; s. c., 80 Am. Dec. 709.

Prior mortgagees are not necessary parties where the suit is at the instance of a junior mortgagee seeking only the foreclosure and sale of the equity of redemption. Jerome *v.* McCarthy, 94 U. S. 734.

In case of suit by assignee of mortgage, the mortgagee being vested with the legal title is a necessary party. Fulgham *v.* Morris, 75 Ala. 245.

The general rule is that all encumbrancers should be made parties; although they may not be necessary parties, they are unquestionably proper parties. Noyes *v.* Sawyer, 3 Vt. 160; Catterlin *v.* Armstrong, 101 Ind. 258; Nodine *v.* Greenfield, 7 Paige (N. Y.), 544; Poston *v.* Eubank, 3 J. J. Marsh. (Ky.) 47; Judson *v.*

Emanuel, 1 Ala. Sel. Cas. 598; Findlay *v.* Bank of U. S., 11 Wheat. (U. S.) 304; Bishop of Winchester *v.* Beavan, 3 Vesey (Sumner's Ed.), 314, note *a*; Miller *v.* Kershaw, 1 Bailey Eq. (S. Car.) 479; Platt *v.* Squire, 12 Metc. (Mass.) 494; Davis *v.* Cook, 65 Ala. 617; Douthit *v.* Hipp, 23 S. Car. 205; Barclay White *v.* W. R. Bartlett, 14 Neb. 320. And the prior mortgagee is unquestionably a proper party where there is doubt as to the amount of the prior mortgage debt, or where there should be an account of rents, he being in possession of the premises. Jerome *v.* McCarter, 94 U. S. 734; Trulock *v.* Robey, 15 Sim. 265; Cochran *et al. v.* Goodall *et al.*, 131 Mass. 464.

A junior mortgagee is not estopped by the fact that he is a party to the foreclosure suit of the senior mortgagee from afterwards proceeding as to his own mortgage; nor will the fact, that the decree in the first foreclosure suit bars his equity of redemption, preclude his foreclosure suit. Coleman *v.* Witherspoon, 76 Ind. 285.

Nor does the fact that one of several mortgagees, under a mortgage given to several to secure the several claims of each all of even dates and maturing at the same time, has foreclosed the mortgage as to his particular claim preclude another of the mortgagees from a separate decree of foreclosure as to his claim; such mortgage is equivalent to a separate mortgage to each, without priority to any. There is no merger of remedies in such case; nor does it prejudice the mortgagor's right of redemption and of one year's undisturbed possession, as against each foreclosure. Moffit *v.* Roche, 96 Ind. 75.

A, a first mortgagee, whose mortgage is on several pieces of land, is not bound to make subsequent mortgagees parties defendant to his bill for foreclosure, where B, a second mortgagee of one of the tracts, has also in his mortgage other lands not covered by A's mortgage, and these are complicated with later mortgages on them to other parties, which later mortgages, by reason of their inadequacy, give these mortgagees a standing in equity for leave to redeem A's mortgage Anderson *v.* Hubbard, 50 Conn. 351.

Where the junior mortgagee, in his bill for foreclosure on account of his own and the prior mortgage debt, asks a sale of the property free from encumbrance of both his own and the senior mortgage, the senior mortgagee is a necessary party. Harwell *v.* Lehman, 72 Ala. 344.

Two sons purchased certain lands of their father, who made conveyances to each of one half of the same, each agreeing, as the consideration for the sale to him, to assume and pay one half of the mortgage debt, evidenced by two notes executed by the father, and secured by mortgage on other lands. The note upon which the larger sum was due ran to one of the sons, who subsequently paid the other note, but failed to have satisfaction of the mortgage entered of record, and afterwards transferred both notes and the mortgages to a person who had actual notice of the facts. This person instituted his suit to foreclose both mortgages, and the court held that he could recover, upon the note and mortgage which ran to the son who had assigned the mortgage to him, an amount equal to one half of the whole amount due upon both notes at the time the father had made the conveyances to his sons. Herzog *v.* Boll, 62 Wis. 21.

**Remaindermen.**—When the fee is in remainder the remainderman should be made a party Leggett *v.* Mut. Life Ins. Co., 64 Barb. (N. Y.) 23; Nodine *v.* Greenfield, 7 Paige (N. Y.), 544.

It suffices to make the person having the first estate of inheritance, the intermediate remaindermen, and claimants of estate in premises prior to vested estates parties. Eagle Fire Ins. Co. *v.* Cammet, 2 Edw. Ch. (N. Y.) 127; Iowa Loan & Trust Co. *v.* King, 58 Iowa, 598; Loyd *v.* Johnson, 9 Vesey, 37; Chappel *v.* Reed, 1 De G., M. & G. 393; Kerrick *v.* Gaffney, 7 Sim. 317.

A foreclosure bill should be dismissed as to the owner of a life estate where the mortgage has been given subject to the life estate; and so also as to a third person, who had an undivided interest in the property before the mortgage was given. Pool *v.* Horton *et al.*, 45 Mich. 404.

**Tenants in Common.**—Tenants in common, and others claiming a present estate in the property. must be made parties. Wiltse on Mort. Foreclosure, § 36; Jones on Mort. (2d Ed.) § 1409; Mims *v.* Mims, 35 Ala. 23. And all persons who were in possession at the commencement of the suit. McLain *v.* Smith, 4 Ark. 244; Cox *v.* Vickers, 35 Ind. 27; Ostrom *v.* McCann, 21 How. Pr. (N. Y.) 431; Wiltse on Mort. Foreclosure, 59.

A mortgage executed by a tenant in common, to one of his co-tenants, of his undivided interest in land, may be foreclosed against the portion of the land which in the intermediate time has been set apart to him in a partition suit between all the tenants in common, in which no mention of the mortgage has been made.

They may join as complainants when they are the mortgagees. Cochran *et al. v.* Goodell *et al.*, 131 Mass 464.

**Claimants by Subrogation.** — Persons having an interest in the premises under the doctrine of equitable subrogation should be made parties. Curtis *v.* Tyler, 9 Paige (N. Y.), 432; Leonard *v.* Morris, 9 Paige (N. Y.), 90; Bristol *v.* Morgan, 3 Edw. Ch. (N. Y.) 142; Jarmon *v.* Wiswall, 24 N. J. Eq. 68; Eastman *v.* Turman, 24 Cal. 379.

**Guarantors.**—Where a mortgage is executed by only one of the guarantors to secure a joint and several guaranty, all of them are proper parties defendant to a suit to foreclose the mortgage, and for personal judgment against them for deficiency, under section 3156 R. S. Fond du Lac Harrow Co. *v.* Haskins, 51 Wis. 135.

**Joint Makers of Note.**—Where a mortgage had been given by one of the joint makers of a joint and several note to secure its payment, the other joint maker is a necessary party to a bill to foreclose the mortgage; especially so if the mortgage has been assigned, and a joint cross-action for damages would be necessary to a defence against the note. Deaderick *v.* Barber, 44 Mich. 19.

**Infants and Lunatics.**—Where infants have any interest in the mortgaged premises or in the debt, they must be made parties, and must be made defendants and personally served with process (but, in *Illinois*, this personal service is held to be unnecessary if there is a guardian. Campbell *v.* Harmon, 43 Ill. 18); as, where the guardian of an infant has executed a mortgage of the infant's lands. Agricultural Ins. Co. *v.* Barnard, 96 N. Y. 525. And so of a lunatic. Eslava *v.* Lapretre, 21 Ala. 504; s. c., 56 Am. Dec. 266. So where the mortgage is executed to the infant,—Parker *v.* Lincoln, 12 Mass. 16;—or to secure him and another,—Robinson *v.* Collier, 11 B. Mon. (Ky.) 332; 52 Am. Dec. 572. If the infant has not been properly brought into the suit, he can maintain a bill to set aside the foreclosure after majority. McMurray *v.* McMurray, 66 N. Y. 175. In Mills *v.* Dennis, 3 Johns. Ch. (N. Y.) 367, Chancellor Kent observes: "The practice with us has been to sell, and not to foreclose, as well where infants as where adults are concerned. I think this course must generally be most beneficial to the infant, as well as to the creditors; and there can be no doubt of the authority of the court to pursue it." It is not necessary, to the validity of the sale as against the infant, that it should be made to appear that it is for the benefit of the infant that a sale should be made. Goodier *v.* Ashton, 18 Vesey, 84; Pace *v.* Mardon, (1st Ed.) Seton, 275. By 15 and 16 Vict. c. 86, § 48, the court is empowered, if it sees fit, to direct a sale instead of a foreclosure; and it does so where it appears to be for the benefit of the infant. Powell *v.* Robbins, 7 Vesey, (Sumner's Ed.), 211, note 1; Mean *v.* Best, 10 Hare, 51.

As to giving infant a day in court after coming of age, to show cause against decree of foreclosure, see 1 Danl. Ch. Pl. & Pr. (5th Ed.), *168, note 3.

**Femes Covert.**—If the wife has not joined in the execution of the mortgage, she need not be made a party, as no decree in the case can affect her rights of dower, for it is paramount to the mortgage,—Lewis *v.* Smith, 9 N. Y. 502;—unless in case of mortgage or lien to secure purchase-money, for this is paramount to dower,—Foster *v.* Hickox, 38 Wis. 408; Short *v.* Rauld, 81 Ill. 509; Amphlett *v.* Hibbard, 29 Mich. 298; Fletcher *v.* Holmes, 32 Ind. 497; (Frazer, J., dissented in this case). Where she has joined in the mortgage, she should be made a party. Byrne *v.* Taylor, 46 Wis. 95; Wisner *v.* Farnham, 2 Mich. 472; Johns *v.* Reardon, 3 Md. Ch. 57. But, in a foreclosure proceeding by advertisement in *New York*, she is not a necessary party. Brackett *v.* Baum, 50 N. Y. 8.

The wife is not a necessary party to a bill to foreclose a mortgage, in the execution of which she had joined, the legal title being in her husband, even if she claims an equity in the premises on the ground that her funds were used towards its purchase. Not being a party, her rights are unaffected by the decreee she would, however, be a proper party in order to conclude her rights. Flowers *v.* Barker, 79 Ala. 445. *Compare* Nimrock *v.* Scanlang, 87 N. Car. 119. The husband is a proper party defendant to a foreclosure suit of a mortgage upon lands purchased by a married woman subsequent to the mortgage; nor is it necessary to aver that he had notice of the mortgage. Andrews *v.* Swanton, 81 Ind. 474. When the husband has executed a mortgage purporting to be on the homestead, the wife is a necessary party in an action to foreclose it; and, if not made a party, she may intervene, and the question as to the existence of the homestead may then be litigated. Maury *v.* Ruiz *et al.*, 58 Cal. 11. If not made a party to the proceeding to foreclose mortgage on the homestead, the sale under it is void. Thompson *v.* Jones, 60 Tex. 94. Otherwise if the homestead interest attached only to an undivid-

ed half-interest in the land, and the owner of the other undivided half, having united with the husband in the mortgage, and subsequently conveyed his half-interest to the wife. In such case the foreclosure sale as to such half-interest would be valid. Thompson *v.* Jones, 60 Tex. 94.

**Devisees and Legatees.** — Devisees should of course be made parties where they claim an estate in the equity of redemption under the will of the mortgagor. So, also, where the equity of redemption is charged by the will with the payment of an annuity, the annuitants should be made parties. Hunt *v.* Fownes, 9 Vesey, 70. And, where legacies are made a special charge on the estate, the legatees should be made parties. McGowan *v.* Yerks, 6 Johns. Ch. (N. Y.) 450; Bacheler *v.* Middleton, 6 Hare, 75.

**Heirs and Personal Representatives.**— The heirs of the deceased mortgagor, or other owner of the equity of redemption, are necessary parties. 2 Jones on Mort. (2d Ed.), § 1414; Pillow *v.* Sentelle, 39 Ark. 61; Dodd *v.* Neilson, 90 N. Y. 243.

In some of the States the personal representative of the mortgagor is held to be a proper party. Darlington *v.* Effey, 13 Iowa, 177; Brenner *v.* Bigelow, 8 Kan. 498; Fallow *v.* Butler, 21 Cal. 24. He is of course a necessary party where personal judgment is sought for deficiency in the foreclosure proceeding.

In Dixon *v.* Cuyler, 27 Ga. 248, it was held that the heirs of the mortgagee are not necessary parties. So also, by statute in *Missouri*. Perkins *v.* Wood, 27 Mo. 547. So in *Ohio*,—Biggerstaff *v.* Loveland, 8 Ohio, 44,—the language of the statute being, "heirs, executors, or representatives." The statute of this State makes the equity of redemption a chattel passing to the personal representatives. Heighway *v.* Pendleton, 15 Ohio, 735.

The personal representative, and not the heir, of the deceased mortgagee is the proper person to institute the foreclosure suit, as the mortgage partakes of the nature of personal assets. Ratliff *v.* Davis, 38 Miss. 107; Notte *v.* Libbert, 34 Ind. 163; Roath *v.* Smith, 5 Conn. 133; People *v.* Keyser, 28 N. Y. 226; Gibson *v.* Bailey, 9 N. H. 168; Hobart *v.* Abbot, 2 P. Wms. 642; Hodgdon *v.* Heidman, 66 Iowa, 645. In some of the States it is held that the heirs of the mortgagee should also be made parties. McIver *v.* Cherry, 8 Humph. (Tenn.) 713; Huggins *v.* Hall, 10 Ala. 283; Zoegel *v.* Kuster, 51 Wis. 31. But the general rule is otherwise. Wiltsie on Mort. Foreclosure, § 24; Citizens' Bank *v.* Dayton, 116 Ill. 257.

**Judgment and Attachment Creditors.**— Judgment creditors, having a lien upon the property, should be made parties,— Hinson *v.* Adrian, 86 N. Car. 61; Strang *v.* Allen, 44 Ill. 428; De Sanssure *v.* Bollman, 7 S. Car. 329;—otherwise their rights remain unaffected by the forelcosure sale,—Person *v.* Merrick, 5 Wis. 231. They may redeem after the sale if not made parties. Proctor *v.* Baker, 15 Ind. 178. In Hendry *v.* Quinan, 4 Hals. (N. J.) 534, the judgment creditor was held not a proper party where the judgment had been rendered prior to the mortgage. See also Rundell *v.* Marquis of Donegal, 1 Hogan, 308; Wakeman *v.* Grover, 4 Paige (N. Y.), 23; Post *v.* Mackall, 3 Bland (Md.), 486. And even if made a party, his rights remain unaffected unless an attack is made upon the validity of the lien. Frost *v.* Koon, 30 N. Y. 428.

A subsequent judgment creditor of the mortgagor, who has had execution issued on his judgment, and thus acquired a lien on the equity of redemption, may redeem from mortgagee or his assignee, and thereupon proceed to foreclose, not only for the payment of the mortgage debt, but shall have the surplus applied to the payment of his judgment; but, in order to this, he must have redeemed. Kelly *v.* Longshore, 78 Ala. 203.

Where a decree had been rendered, and sale thereunder to a *bona fide* purchaser, in a foreclosure proceeding to which a judgment creditor of the mortgagor had been made a party, an assignee of the judgment, the assignment having been made prior to the foreclosure proceeding, who gave no notice, either actual or constructive, of the assignment, cannot, as against such purchaser, assert his lien as paramount to the title acquired at the sale. White *v.* Bartlett, 14 Neb. 320.

The judgment creditors, as also all mortgagees, and the mortgagor should be made parties to the foreclosure suit to the end that the rights and interests of all persons interested in the mortgage premises may be adjusted. Hinson & Cumming *v.* Adrian & Vallers, 86 N. Car. 61. An attaching creditor has been held a necessary party. If not made such, his rights remain unaffected. Lyon *v.* Sanford, 5 Conn. 544.

**Beneficiaries, when Numerous.**—Where the beneficiaries in the mortgage are numerous, and are represented by a trustee, it is not necessary to make them parties; it suffices to make the trustee, in his representative capacity, such. Board of Supervisors *v.* Mineral Point R., 24 Wis. 93; Willis *v.* Henderson, 5 Ill. 13; Chicago, etc., Co. *v.* Peck, 112 Ill. 408; Grant *v.*

Duane, 9 Johns. (N. Y.) 591. But in Osborne *v.* Fallows, 1 Russ. & M. 741, it was held that the beneficiaries—there were thirteen in that case—must be made parties. In foreclosure of railroad mortgage by trustees, the bondholders, the real beneficiaries, may be permitted to become parties where they claim that there has been improper conduct on the part of the trustees in the management of the foreclosure suit. *Ex parte* De Betz, 9 Abb. N. Cas. (N. Y.) 246. See Forbes *v.* Memphis, etc., R. Co., 2 Woods (U. S.), 323. Beneficiaries, *held*, not necessary parties, in Applegate *v.* Tyson, 39 N. J. Eq. 365.

In a bill of strict foreclosure against a township, which claimed the premises under a sale which had been made for taxes, filed by the complainant as trustee for a partnership composed of himself and two others, whom he made defendants, it was held that they should have been made complainants. Jewell *v.* Inhabs. of West Orange *et al.*, 36 N. J. Eq. 403.

Where a *cestui que trust* instituted a foreclosure suit under twenty-six deeds of trust, executed to five different sets of trustees, in which some of the deeds covered only part of the land, and one of them covered the whole, and all of the trustees were made defendants, the bill alleging that they had declined to execute the trusts, and also the insolvency of the trustor, and the inadequacy of the lands to pay liens of judgments and mechanic's liens against trustor, it was held that the suit was properly brought. Grant *v.* Phœnix Life Ins. Co., 121 U. S. 105.

**Claimants by Adverse Title** are not necessary, nor indeed proper, parties; for in foreclosure suits the court will not permit the mortgagor's title to be contested. Smith *v.* Edminston, 13 N. H. 410; Summers *v.* Bromley, 28 Mich. 125; Grace *v.* Hunt, Cook (Tenn.), 341; Owings *v.* Beall, 3 Litt. (Ky.) 103; Broome *v.* Beers, 6 Conn. 198; Merchants' Bank *v.* Thomson, 55 N. Y. 7; Pelton *v.* Farmin, 18 Wis. 222; Finnagan *v.* Manchester, 12 Iowa, 521; Kelsey *v.* Abbott, 13 Cal. 609; Lewis *v.* Smith, 9 N. Y. 502; Corning *v.* Smith, 6 N. Y. 82; Banks *v.* Walker, 2 Sandf. Ch. (N. Y.) 344; Wilkins *v.* Kirkbridge, 12 C. E. Greene (N. J.), 93; Lange *v.* Jones, 5 Leigh (Va.), 192; Dial *v.* Reynolds, 96 U. S. 340; Banning *v.* Bradford, 21 Minn. 308; Gage *v.* Perry, 93 Ill. 176; Payn *v.* Grant, 23 Hun (N. Y.), 134; Wicke *v.* Lake, 21 Wis. 410; Odell *v.* Wilson, 63 Cal. 159; Rathbone *v.* Hooney, 58 N. Y. 463; Standish *v.* Dow, 21 Iowa, 363; Eagle Fire Ins. Co. *v.* Lent, 6 Paige (N. Y.), 635; Bell *v.* Pate, *et al.*, 47 Mich. 468; Bozarth *v.* Landers, 113 Ill. 181. But of course questions of priorty of liens as between two mortgages made by the same mortgagor,—Board of Supervisors *v.* Mineral Point R. Co., 24 Wis. 93;—or of priority between owners of several pieces of land all embraced in the same mortgage,—N. Y. Life Ins. & Trust Co. *v.* Milner, 1 Barb. Ch. (N. Y.) 353;—may be determined, in order to properly adjust the equities of the parties in the mortgaged premises.

In *Indiana* and *Kansas*, adverse claims may be litigated in the foreclosure proceeding,—Masters *v.* Templeton, 92 Ind. 447; Nooner *v.* Short, 20 Kan. 624; Pattie *v.* Wilson, 25 Kan. 326;—Also in *Iowa*, Code 187, 3 §§ 2683-2685;—and *California*, Code 1872, § 387.

Under the *Vermont* statute for foreclosure, a deed executed by a debtor, to keep it from attachment, cannot be attached under a petition to foreclose a mortgage subsequently executed by the debtor. The titles of adverse claimants cannot be litigated in that proceeding. Kinsley *v.* Scott *et al.*, 58 Vt. 470.

In *North Carolina*, it has, in a recent case, been held that mortgagors will not be estopped, by the decree of foreclosure, from setting up a title acquired by them from the purchaser at the execution sale, when sued for possession of the land by a purchaser at the foreclosure sale. Wiel & Bro. *v.* Uzzell *et ux.*, 92 N. Car. 515.

In a suit to foreclose mortgage of leasehold, plaintiff may have relief against the fraudulent forfeiture of the leasehold estate; this is not the litigating of a paramount adverse title. Churchhill *v.* Proctor *et al.*, 31 Minn. 129.

In a suit to foreclose a mortgage given to secure purchase-money of land sold at sale by administrator of an insolvent estate, the court refused to allow the child of the decedent to assert a claim, by way of cross-complaint, to an interest as heir in the land, and for the quieting of the title; *held*, also, that, as the widow's interest in the land did not pass under the administrator's sale, it could not be subjected in the foreclosure proceeding. Weinberg *v.* Schwegeman, 97 Ind. 528.

The *English* courts refuse to allow the title to be litigated in the foreclosure suit. Goodtitle *v.* Bailey, Cowp. 597.

The mortgagor is estopped to deny his title in the foreclosure suit. Boone *et al.* *v.* Armstrong, 87 Ind. 168; Tefft *v.* Munson, 57 N. Y. 97; Macloon *v.* Smith, 49 Wis. 200. But it has been held that a mortgage for purchase-money is conditioned upon the title; and that want of title in the vendor may be set up in defence, as it involves a failure of consideration of

3. *Pleadings.*—The proper pleadings will be determined by the tribunal, law or equity, in which the foreclosure suit is to be instituted.

In most of the States, which have not adopted the code system, the suit is in equity, and the rules governing equity pleadings should be observed.

Where the code system obtains, there is but one form of pleadings in all cases; and the pleadings are regulated entirely by statute,[1]

the mortgage debt. Smith *v.* Newton, 38 Ill. 230. But, where the assignee of a mortgage is a purchaser before due, and without notice, the defect of title cannot be set up as against him. So held as to defect of title to part of the premises. Silwell *v.* Kellogg, 14 Wis. 461.

The general doctrine is that, unless the mortgagor has been evicted, he cannot set up defect of title unless it amounts to a total failure of consideration, in case of mortgage for purchase-money; but is remitted to his action at law upon the covenants in his vendor's deed. 2 Jones on Mort. (2d Ed.), §1500, and authorities cited in notes 1 and 2.

1. Where a court of equity has taken jurisdiction to correct a mistake in the description of the lands embraced in the mortgage, it may proceed to decree a foreclosure; or, if the lands have been sold under the power of sale contained in the instrument, and brought in by mortgagee, and no objection is made to the fairness of the sale, and mortgagor does not seek to have it set aside, it may be confirmed. Such confirmation relates to day of sale, and mortgagor cannot claim the intermediate rents. McGahee *v.* Lehman, Durr & Co., 65 Ala. 316.

As to pleadings and practice in foreclosure suits, see Dickerson *v.* Wenman *et ux.*, 35 N. J. Eq. 368; Rebecca Noar *v.* Union & Essex Land Co., 34 N. J. Eq. 111; Hopgood & Co. *v.* Ellis, *et al.*, 11 Neb. 131; Erkens *v.* Ayer, 58 Cal. 310; Davis *v.* Flagg, 35 N. J. Eq. 491; Daggett *v.* Flannagan, 78 Ind. 253; Lovering *v.* King, 97 Ind. 130; Martens *v.* Rawdon, 78 Ind. 85; Hughes *v.* Hodges, 94 N. Car. 56; Spencer *v.* Almoney, 56 Md. 551; Haldane *v.* Sweet, 58 Mich. 429; Osborn *v.* Eliason, 77 Ind. 393; Zwickey *v.* Haney, 63 Wis. 464; Bolling *v.* Munchus, 65 Ala. 558; Prissly *v.* McLean, 80 Ala. 309: Scott *v.* Russ *et al.*, 21 Fla. 260.

Cumulative and collateral securities may be proceeded against simultaneously, but the plaintiff can have but one satisfaction. Ford *v.* Burke, 37 Ark. 90.

As to foreclosure under *Michigan* statute, see Reading *v.* Waterman, 46 Mich. 107; Gibson *v.* Lyon *et al.*, 115 U. S. 439; Cochran *v.* Folger, 116 Ill. 194. See, generally, Savings & Loan Society *v.* Horton & Chase, 63 Cal. 105; Markson *v.* Ide, 29 Kan. 649; Millard *v.* Traux, 47 Mich. 251; Traper *v.* Waldo, 16 S. Car. 276; Marshall Jewell *v.* The Inhabs. of West Orange *et al*, 36 N. J. Eq. 403; Miner *v.* Smith, 53 Vt. 551; Havens *v.* Jones and Jones, 45 Mich. 253; McDonald *v.* McDonald *et al*, 45 Mich. 44; Tutwiler *v* Dunlap, 71 Ala. 126; Richardson *v.* Hadsall, 106 Ill. 477; Buchanan *v.* Berkshire Life Ins. Co., 96 Ind. 510; Macomb *v.* Prentiss, 57 Mich. 225; Craighead *v.* Dalton *et ux.*, 105 Ind. 72; Ransom *v.* Sutherland, 46 Mich. 489; Denver Brick, etc., Co *v.* McAllister, 6 Col. 261; Dobson *et al. v.* Markle, 77 Ind. 53; Morrill & Dawes *v.* Wheeler, 45 N. J. L. 67; Harris *v.* McCrossin, 31 Kan. 402; James *v.* Seep, 26 Kan. 148; Sorile *v.* Hough, 45 Mich. 418; McKernan *v.* Robinson *et al.*, 84 N. Y. 105; Nolan *et ux. v.* Woods, 12 Lea (Tenn.), 615; Mitchell *v.* Rollson, 52 Wis. 155; Carmichael *v.* McGillway, 57 Cal. 8; Sidwell *v.* Schumacher, 99 Ill. 427; Morris *v.* Brauchaud *et al.*, 52 Wis. 187; Glacius *v.* Fogel, 88 N. Y. 435; Stiles Adm'r, *v.* Elliot, Ex'r, 68 Ga. 83; Brown *v.* Shirk, 75 Ind. 266; Palmer *v.* Wendrom, 12 Neb. 494; Dobson *v.* Markle, 77 Ind. 53; Grant *v.* Phœnix Life Ins. Co., 121 U. S. 105; Bax *et ux. v.* Hoogland *et al.*, 13 Neb. 571; Helck, Adm'r, *v.* Reinheimer, 105 N. Y. 870; Wyckoff *v.* Scofield, 103 N. Y. 630; Bass *v.* Berker, 6 Mont. 442; Clay *v.* Hilderbrand, 34 Kan. 694; Allen *v.* Shannon, 74 Ind. 164; Grant *et al. v.* Phœnix Life Ins. Co., 121 U. S. 118; Torne & Hambleton *v.* King & Sterling, 64 Md. 166; Stoddard *v.* Gailor, 90 N. Y. 575; Malone *v.* Mariott, 64 Ala. 486; Citizens' Bank *v.* Dayton, 116 Ill. 257; Boyton *v.* Sisson, 56 Wis. 401; Bird *v.* Belz, 33 Kan. 381; Newell *v.* City of Camden, 40 N. J. Eq. 499; Id. 728; Burt *v.* Thomas *et al.*, 49 Mich. 462; Trilling *v.* Schumitsch, 67 Wis. 186; Lyon *v.* Powell, 78 Ala. 351; Barton *v.* Anderson, 104 Ind. 578; Connally *v.* Dickson, 76 Ind. 441; Wright *v.* Houghtalling, 91 N. Car. 246; Bozartte *v.* Landers, 113 Ill. 181; McCrickety *v.* Wilson, 50 Mich. 513; Land Co. *v.* Peck, 112 Ill. 408; Hallenbeck *v.* Donnell, 94 N. Y.

4. *Defences.*—It may be stated generally, that whatever will serve to show that the plaintiff has no right to enforce the foreclosure either because of lack of title or interest in himself, or because of non-liability of the defendant on the mortgage debt, or of the property for its payment, may be set up as a defence. Among the various defences to be interposed may be mentioned want,[1] or failure,[2] or illegality,[3] of consideration for the mortgage debt; fraud,[4] duress,[5] usury,[6]

342; Smith *v.* Smith, *et al.*, 46 Mich. 301; Rucker *v.* Steelman, 73 Ind. 396; Sisson *v.* Tubbs, 50 Conn. 292; Coulston *v.* Coulston, 30 N. J. Eq. 396; Johnson *v.* Anderson *et al.*, 76 Va. 766; Davis *v.* Houston, 15 Neb. 28; Churchill *v.* Proctor, 31 Minn. 129; Perry, Adm'r. *v.* Robinson, 69 Ga. 650; Reinig *v.* Hetch *et al.*, 58 Wis. 212; Ayers *v.* Rivers, 64 Iowa, 543; Carrol *et al.*, Ex'rs, *v.* Dumel, 95 N. Y. 252; Bundy *v.* Cunningham, 107 Ind. 360; Foster *v.* Malone, 45 Mich. 255; Harral *v.* Leverty, 50 Conn. 46; Ætna Life Ins. Co. *v.* Finch *et al.*, 84 Ind. 301; Gunn *v.* Jones, 67 Ga. 398; Johnson *v.* Hambleton, 52 Md. 378; Lashbrook *v.* Hathaway, 52 Mich. 124; Iowa Loan & Trust Co. *v.* Day *et al*. 63 Iowa, 459; Jackson *v.* Centreville, Moravia & Alba R. Co., 64 Iowa, 292; Gies *v.* Green, 42 Mich. 107; Malone *v.* Mariott, 64 Ala. 486; Hurt *v.* Blunt, 63 Ala. 327; Coker *v.* Smith, 63 Ga. 517; Bayliss *v.* Glenn, 72 Ind. 5; Evansville Gas-Light Co. *v.* State *ex rel.* Reitz, 73 Ind. 219; s. c., 38 Am. Rep. 73 Ind. 243.

1. In Wearse *v.* Peirce, 24 Pick. (Mass.) 141, it is said that in foreclosure proceedings "the judgment is conditional, and becomes vacated if the condition of payment within 60 days is complied with. Of course, therefore, the court is bound to inquire how much is due; and, when it appears that there was no consideration, there is nothing to found a conditional judgment upon, and the action cannot be sustained." Conwell *v.* Clifford, 45 Ind. 392; Smith *v.* Newton, 38 Ill. 230. But this is no defence as against an innocent purchaser of the mortgage notes, for value, without notice. Fisher *v.* Meister, 24 Mich. 447; Stilwell *v.* Kellogg, 13 Wis. 461.

2. Fisher *v.* Meister, 24 Mich. 447.

3. Hyatt *v.* James, 2 Bush, (Ky.) 463; Stillman *v.* Looney, 3 Coldw. (Tenn.) 20; Gilbert *v.* Holmes, 64 Ill. 548. In Stillman *v.* Looney, 3 Coldw. (Tenn.) 20, the bill was filed to foreclose a mortgage given to secure certain notes; the defence was, and the proof established, that the consideration for which the notes were given was Confederate treasury notes. The defence was sustained; the court observing: "In the case under consideration the notes were issued by an unlawful confederation of States whose declared purpose was to overthrow the constitution. The enforcement of all such contracts is against public policy. The party seeking the aid of the court will be repelled. The defendant, not out of any favor to him, but because he is such, can allege and show the illegality of the contract." Atwood *v.* Fisk, 101 Mass. 363; Lantz *v.* Buckingham, 4 Lans. (N. Y.) 484.

A mortgage on real estate provided that in case of foreclosure the mortgagor should pay the attorney's or solicitor's fees of $100. *Held*, that this provision is illegal and void by the law of *Michigan*, as declared by the supreme court of that State; and consequently is not inforceable in the United States circuit court upon a bill in equity to foreclose the mortgage, made payable in that State, the land being in that State. Bendy and Wife *v.* Townsend *et al.*, 109 N. Y. 665.

4. Aikin *v.* Morris, 2 Barb. Ch. (N. Y.) 140; Allen *v.* Shackelton, 15 Ohio St. 145.

5. Lane *v.* Losee, 2 Barb. (N. Y.) 56; De Butts *v.* Bacon, 6 Cranch (U. S.), 252; Minot *v.* Sawyer, 8 Allen (Mass.), 78.

The weight of authority is that no one but the debtor himself can make this defence. Austin *v.* Chittenden, 33 Vt. 553; Campbell *v.* Johnson, 4 Dana (Ky.), 179; Adams *v.* Robertson, 37 Ill. 45; Ransom *v.* Hays, 39 Mo. 445; Cain *v.* Gimon, 36 Ala. 168; Powell *v.* Hunt, 11 Iowa, 430; Loomis *v.* Eaton, 32 Conn. 550; Pritchett *v.* Mitchell, 17 Kan. 355. *Contra*, Union Bank *v.* Bell, 14 Ohio St. 200; Gunnison *v.* Gregg. 20 N. H. 100; Post *v.* Dart, 8 Paige (N. Y.). 640; Green *v.* Tyler, 39 Pa. St. 361; Cummins *v.* Wire, 6 N. J. Eq. 73.

6. Central Bank *v.* Copeland, 18 Md. 305; Smith *v.* Myers, 41 Md. 425; Cowles *v.* Ragnet, 14 Ohio, 38; Eyster *v.* Hathaway, 50 Ill. 521.

If the party asking relief against a usurious contract is plaintiff in the suit in equity, the court, before granting him relief, will require him to pay the defendant the money with lawful interest which

set-off,[1] Statute of Limitations,[2] payment,[3] and release.[4] As a rule, these defences should be specially pleaded; but pleadings are now so largely regulated by statute that more particular reference will not be made to them in this article.

5. *Proceedings Before Sale.*—All contested matters under the pleadings should be determined; and it should be made to appear to the satisfaction of the court that the plaintiff has established his right to a decree of foreclosure and sale, before a sale is ordered.

is justly due. It is otherwise where the creditor comes into court seeking the enforcement of the usurious claim. Manning *v.* Elliott, 92 N. Car. 48.

In the absence of proof of an intent to charge a usurious rate of interest, a clause in the mortgage authorizing the mortgagee to retain from the proceeds of the sale of the property "costs and charges, including a commission of 5 per cent for making such sale, in addition to the principal and interest then due on the secured debt, is not usurious, but merely a provision for compensation for services performed. B. N. Howell *et al. v.* Wm. R. Pool, 92 N. Car. 450.

Mortgagor may set up usury by cross-bill. Davis *v.* Cook, 65 Ala. 61.

1. Ransom *v.* Copland, 3 Barb. Ch. (N. Y.) 166; Dolman *v.* Cook, 14 N. J. Eq. 56.; Holdon *v.* Gilbert, 7 Paige (N. Y.), 208; Hess *v.* Final, 32 Mich. 515; Hannon *et al. v.* Hilliard, 83 Ind. 362. But an independent claim of the mortgagor cannot be set off,—White *v.* Williams, 3 N. J. Eq. 376;—nor a claim for unliquidated damages,—Hattier *v.* Etinaud, 2 Desau. (S. Car.) 570.

Upon a writ of entry to foreclose a mortgage distinct debts cannot be set off. The question is: "How much is due to the plaintiff on the mortgage? not, What would be due between the parties upon a settlement of all mutual demands between them?" Bird *v.* Gill, 12 Gray (Mass.), 60.

In *New Jersey*, set off is not allowed. Nothing but payment will be recognized, unless there has been an agreement that the sum proposed to be set off shall be received and credited as payment. Dolman *v.* Cook, 1 McCarter (N. J.), 56; White *v.* Williams, 2 Green Ch. (N. J.) 376; Dudley *v.* Burger, 8 C. E. Greene (N. J.), 397.

In *New Hampshire*, set-off is allowed, and the mortgagor's right recognized to make any defence in the proceeding which he could make in defence of a suit at law upon the note; but the set-off must be against the party to whom the money secured by the mortgage is payable, and to enforce the payment of which the suit is brought. Northy *v.* Northy, 45 N. H. 141.

2. See *ante*, note 3, p. 197, and note 1, p. 204; 2 Jones on Mort. (2d Ed.) Ch. 26.

3. Deming *v* Comings, 11 N. H. 474; Burke *v.* Miller, 4 Gray (Mass.), 114; *ante*, note 3, p. 197.

Where the mortgagor has the privilege of paying the debt before maturity in certain bonds, he cannot pay in these bonds after maturity. City Council *v.* Caulfield, 19 S. Car. 294.

If the mortgagee insures his interest at his own expense, and recovers for a loss, he is not bound to account to the mortgagor for any part of the amount recovered, nor to apply it in payment of the mortgage debt. Ætna Ins. Co. *v.* Tyler, 16 Wend. (N. Y.) 385; King *v.* State Mut. Fire Ins. Co., 7 Cush. (Mass.) 1.

Where the principal note was secured by deed of trust with power of sale in case of default in payment of any instalment of interest, which instalments of interest were evidenced by ten interest notes, payable semi-annually, which themselves bore interest, it was contended that the giving of these interest notes operated as a payment of the interest, and hence no sale could be made under the power; but the court held that such effect could not be given to the execution of the interest notes. Hoodless *v.* Reid, 112 Ill. 105.

A mortgagee loses his lien when he evades a tender of payment. Ferguson *v.* Popp, 42 Mich. 115.

4. Sumner *v.* Batchelder, 30 Me. 35; Ford *v.* Burks, 37 Ark. 91; Burnet *v.* Denniston, 5 Johns. Ch. (N. Y.) 35; Brewer *v.* Staples, 3 Sandf. Ch. (N. Y.) 579.

A sale had been made under the power contained in the mortgage, and the property was bid in by the mortgagee. The sale was held to have been void. After the sale, the mortgagee conveyed the property to N., who conveyed portions of it to other persons, and subsequently the mortgagee assigned the mortgage to N. *Held*, that this state of facts furnished no grounds of objection to the mortgagor against N. foreclosing

The usual course is to order a reference to determine the amount of the debt.[1]

A reference may also be proper to determine whether or not the land should be sold in parcels;[2] and as to whether the sale should be made in a certain designated order, so as to best subserve the interests of the parties whose equities may conflict.[3]

under the power. Bottineau *v.* Ætna Life. Ins. Co. 31 Minn. 125.

1. Doody *v.* Pierce, 9 Allen (Mass.), 141; Jewet *v.* Guild, 42 Me. 246; Bellows *v.* Stone, 18 N. H. 465.

As to the extent to which a mortgagee who has been in possession of the mortgaged premises is liable for rents upon the taking of the account to ascertain the amount due him, see 2 Daniel Ch. Pl. & Pr. *1237 (5th Ed.) *et seq.*, and notes.

2. A reference to determine whether the land can be sold in parcels, usually arises under bills of foreclosure filed when only an instalment of the debt is due. The decree in such case should be for a sale of only so much as necessary to pay the amount already due. If the premises cannot be divided, the proceeds of the sale of the whole tract must be brought into court, and after paying the amount due the balance must be retained to meet the remainder of the debt as it matures. Beauchamp *v.* Leagan, 14 Ind. 401; Roe *v.* Nicholson, 13 Wis. 373; Hunt *v.* Dohrs, 39 Cal. 304.

If the premises can be divided, such subsequent sales will be ordered as may be necessary to meet the subsequently maturing instalments. McDougal *v.* Downey, 45 Cal. 165.

Where the mortgage secured both unmatured and matured claims, and the land was ordered to be sold as not divisible, plaintiff may bid whole amount of the debts, due or not due, and costs. Burton *v.* Ferguson, 69 Ind. 486. Where the beneficiaries were the purchasers at the foreclosure sale, and, after confirmation of the sale, the mortgagor satisfied the decree, the money so received will avoid the sale and confirmation. Applegate *v.* Kingman & Ballard, 17 Neb. 338.

3. As, where separate portions of the premises are held or claimed by different persons under subsequent mortgages or other conveyances made by the mortgagor. The decree may direct that in the first instance the master shall specify a time and place, where the parties in interest should attend before him to be heard as to the order in which the several parcels should be sold. The general order of sale is that the portion retained by the mortgagor, or other person who may be under obligation to pay the mortgage debt, shall be first sold, and the remainder in the inverse order of alienation. New York Life Ins. & Trust Co. *v.* Milner, 1 Barb. Ch. (N. Y.) 353; Warren *v.* Foreman, 19 Wis. 35; Rathbone *v.* Clark, 9 Paige (N. Y.), 648. See also N. Y. Life Ins. Co. *v.* Cutler, 3 Sandf. Ch. (N. Y.) 176; Bard *v.* Steele, 3 How. Pr. (N. Y.) 110.

Where, at the time of foreclosure, the original mortgagor owned any part of the mortgaged property, it must be first sold. Hahn *v.* Behrman, 73 Ind. 120.

**Sale in Parcels—Discretion of Court.**—The court is not bound to ascertain whether it will be to the advantage of the defendant to have the mortgaged premises sold in parcels. Jones *v.* Gardner, 57 Cal. 641. And the premises may be sold in parcels or in one piece, in the discretion of the court. McComb *v.* Prentiss, 57 Mich. 225. But where it is made to appear to the court that sale in parcels will be injurious to the defendant, a sale in one parcel will be decreed. Firestone *v.* Klick, 67 Ind. 309.

**Where the Whole Debt Not Due.**—In those cases where the whole debt is not due, and the mortgaged premises, although ample security for the debt, are indivisible, and it is made to appear that the whole of the mortgage will become due before a sale can be made under the judgment, a decree for the sale of the entire premises will be made. Screver *v.* Keery, 48 Wis. 208.

**Same — Where Mortgaged Property in Parcels.**—Where the mortgaged property is in separate parcels, although a sale of a single parcel would bring sufficient to pay the amount due, yet, if the sale of all the parcels together is necessary to protect the rights of subsequent incumbrancers, it will be ordered to be so sold,—Gregory *v.* Campbell, 16 How. (N. Y.) Pr. 417;—and a supplementary order directing the sale of all the parcels may be made after the sale of one,—Livingston *v.* Mildrum, 19 N. Y. 440; De Forest *v.* Farley, 4 Hun (N. Y.), 640. Where an order directs the sale of the whole premises for the payment of an instalment due, on sufficient showing, the court may afterwards direct the sale of one of the parcels only.

American Life Ins. & Trust Co. *v.* Ryerson, 6 N. J. Eq. (2 Halst.) 9.

**Same—Where Subdivided into Lots after Execution of Mortgage,** the mortgagor will have no right to insist that the premises be sold in lots instead of in an undivided tract. See Griswold *v.* Fowler, 24 Barb. (N. Y.) 135; s. c., 4 Abb. (N. Y.) Pr. 238; Lamerson *v.* Marvin, 8 Barb. (N. Y.) 9; Hubbell *v.* Sibley, 5 Lans. (N. Y.) 51, distinguishing Ellsworth *v.* Lockwood, 42 N. Y. 89; Lane *v.* Conger, 10 Hun (N. Y.), 1; Ellsworth *v.* Lockwood, 9 Hun (N. Y.), 548. The reason for this seems to be because the whole mortgaged premises are pledged for the debt and the mortgagor cannot, by laying it out into village lots, bounded upon and intersected by streets, withdraw from the mortgage the land covered by the streets. See Griswold *v.* Fowler, 24 Barb. (N. Y.) 135; s. c., 4 Barb. (N. Y.) 238; Hubbell *v.* Sibley, 5 Lans. (N. Y.) 51; Lane *v.* Conger, 10 Hun (N. Y.), 1; Ellsworth *v.* Lockwood, 5 Hun (N. Y.), 548.

**Order of Sales—Duty of Officer.**—Where the decree directs that the land be sold together or in parcels, it is the duty of the officer making the sale to comply strictly with such order, notwithstanding a stipulation of the parties to the suit providing for a different mode of sale (Babcock *v.* Parry, 8 Wis. 277); and subsequent lienors may insist upon a compliance with such order. Farmer's & Miller's Bank of Milwaukee *v.* Luther, 14 Wis. 96. The duties of the officer making the sale are purely ministerial, and for that reason cannot vary the judgment prescribing the parcels of sale. See People *v.* Bergen, 53 N. Y. 404; s. c., 15 Abb. (N. Y.) Pr. N. S. 97; O'Donnell *v.* Lindsay, 39 N. Y. Super. Ct. (7 J. & S.) 523, 529.

**Same—Under the Codes.**—Where codes of civil procedure provide for the method in which property shall be sold in mortgage foreclosure, they simply adopt the principles by which courts of equity, without statutory provisions, are governed in foreclosure suits. Cunningham *v.* Cassady, 17 N. Y. 276; s. c., 7 Abb. (N. Y.) Pr. 183; Livingston *v.* Mildrum, 19 N. Y. 440, 443; Campbell *v.* Macomb, 4 Johns. Ch. (N. Y.) 534; Magruder *v.* Leggston 40 Wis. 284; American Fire Ins. & Trust Co. *v.* Ryerson, 2 N. J. Eq. (2 Halst.) 9; Wilmer *v.* Atlanta & R. A. L. R. Co., 2 Woods C. C. 447. Statutes regulating such sales merely established by legislative enactments the principles which before prevailed. See Cunningham *v.* Cassady, 17 N. Y. 276; Campbell *v.* Macomb, 4 Johns. Ch. (N. Y.) 487; Brinckerhoff *v.* Thrallbeiner, 2 Johns. Ch. (N. Y.) 486; Wallace *v.* Feely, 1 N. Y. Civ. Proc. Rep. 126.

**Determining Amount to be Sold.**—In determining whether mortgaged premises should be sold together or in parcels, the court should take into consideration the interest of the parties having equities subject to the mortgage, and direct a sale so as not to prejudice their interests. Livingston *v.* Mildrum, 19 N. Y. 440; De Forest *v.* Farley, 62 N. Y. 628; Malcolm *v.* Allen, 49 N. Y. 448; Beetman *v.* Gibbs, 8 Paige Ch. (N. Y.) 111; Blazey *v.* Delins, 74 Ill. 299.

**When Sold in Parcels—Matter of Right.**—The plaintiff is entitled to a sale of sufficient of the land to pay the mortgage and costs, and no more. Ellsworth *v.* Lockwood, 42 N. Y. 89; Hughson *v.* Dygert, 8 Johns. (N. Y.) 333; Tiernan *v.* Wilson, 6 Johns. Ch. (N. Y.) 411; Jencks *v.* Alexander, 11 Paige Ch. (N. Y.) 619; Mohawk Bank *v.* Atwater, 2 Paige Ch. (N. Y.) 61; O'Donnell *v.* Lindsay, 39 N. Y. Super. Ct. (7 J. & S) 523, 530. See Griffith *v.* Hadley, 10 Bosw. (N. Y.) 587; Cunningham *v.* Cassady, 17 N. Y. 276; s. c., 7 Abb. (N. Y.) Pr. 183; Jackson *v.* Newton, 18 Johns. (N. Y.) 355; Tiernan *v.* Wilson, 6 Johns. Ch. (N. Y.) 411, 414; Wood *v.* Monell, 1 Johns. Ch. (N. Y.) 502. For this reason, the sale must be conducted in such a manner as not to inflict unnecessary loss or injury upon the debtor or subsequent lienors or incumbrancers. Woodhull *v.* Osborne, 2 Edw. Ch. (N. Y.) 614. And where the property mortgaged has been mortgaged in parcels, it should be sold in parcels. Walcott *v.* Schenck, 23 How. (N. Y.) Pr. 385; Hughson *v.* Dygert, 8 Johns. (N. Y.) 333; Wood *v.* Monell, 1 Johns. Ch. (N. Y.) 502; Mahone *v.* Williams, 39 Ala. 202; Rowley *v.* Brown, 1 Binn. (Pa.) 61; Steed's Exrs. *v.* Course, 8 U. S. (4 Cr.) 403; bk. 2, L. ed. 660; Gray *v.* Shaw, 14 Mo. 341; Stull *v.* McAlester, 9 Ohio, 19, 24; Ord *v.* Oneol, 5 Madd. 438.

**Sale in Parcels. —Where the Premises Described as One Piece,** the rule is the same as that it were described in parcels. Ellsworth *v.* Lockwood, 42 N. Y. 89; Hughson *v.* Dygert, 8 Johns. (N. Y.) 333; Tiernan *v.* Wilson, 6 Johns. Ch. (N. Y.) 411; Jencks *v.* Alexander, 11 Paige Ch. (N. Y.) 619; Mohawk Bank *v.* Atwater, 2 Paige Ch. (N. Y.) 54. However, it seems that where the premises are so described, the officer making the sale is not bound to sell in parcels. Sherman *v.* Willett, 42 N. Y. 146, 150; Griswold *v.* Fowler, 24 Barb. (N. Y.) 135; s. c., 4 Abb. (N. Y.) Pr. 238; Lamerson *v.* Marvin, 8 Barb. (N. Y.) 9. And where two tracts have

Upon the coming in of the report exceptions may be filed to it, which must be passed upon before the decree for sale is rendered; for the decree should be based upon the report.

6. *Receiver.*—A receiver will be appointed to collect the rents and profits of the mortgaged premises only when it is necessary to the protection of the mortgagee's interests by reason of the inadequacy of the security.[1] Particularly is this true where the party liable for any deficiency in the security is insolvent,[2] where the plaintiff has *prima facie* an equitable claim, or circumstances of fraud or bad faith on the part of the mortgagor,[3] or a denial of the relief inequitable or unjust,[4] or if the rents and profits have been expressly pledged for the payment of the debt.[5] As a rule, it should appear, not only that the mortgage is insufficient, but that the mortgagor is insolvent,[6] unless where the mortgage

been held, used, and conveyed together, their sale as one parcel is valid. See Andrews *v.* Austin, 34 Barb. (N. Y.) 319.

**Parties Dictating Manner of Sale.**—Where the security is doubtful, and the plaintiff acts in good faith, he may properly be allowed to designate the manner in which the sale shall be made. Griswold *v.* Fowler, 24 Barb. (N. Y.) 135; Brown *v.* Frost, Hoffm. Ch. (N. Y.) 41, 43. But where the land is ample security, the mortgagor or owner of the equity of redemption is entitled to have the property sold as he directs. See Walworth *v.* Farmer's Loan & Trust Co., 4 Sandf. Ch. (N. Y.) 51; Ellsworth *v.* Lockwood, 42 N. Y. 89; King *v.* Platt, 37 N. Y. 255; s. c., 3 Abb. (N. Y.) Pr. N. S. 434; 35 How. (N. Y.) Pr. 23.

**Discretion of Officer Making the Sale.**—Where the officer is called upon to exercise a judicial discretion (Schneider *v.* Stafford, 11 Paige Ch. (N. Y.) 71), its honest exercise will be final. O'Donnell *v.* Lindsay, 39 N. Y. Super. Ct. (7 J. & S.) 523, 529. In such cases the parties are entitled to whatever benefit may follow from a judicious exercise of such discretion. O'Donnell *v.* Lindsay, 39 N. Y. Super. Ct. (7 J. & S.) 523, 530; Russell *v.* Conn, 20 N. Y. 83. And where such officer relies upon another party for his information, the sale will be set aside. O'Donnell *v.* Lindsay, 39 N. Y. Super. Ct. (7 J. & S.) 523, 530; Whiteback *v.* Rowe, 25 How. (N. Y.) Pr. 403; Waldo *v.* Williams, 3 Ill. (2 Scam.) 470; Benton *v.* Wood, 17 Ind. 260; White *v.* Watts, 18 Iowa, 74; Lay *v.* Gibons, 14 Iowa, 377.

1. See Mackellar *v.* Rogers, 52 N. Y. Super. Ct. (20 J. & S.) 360; Hollenbeck *v.* Donell, 29 Hun (N. Y.), 94; Main *v.* Ginthert, 92 Ind. 180; Jacobs *v.* Gibson, 9 Neb. 380. See Barnett *v.* Nelson, 54 Iowa, 41; Myton *v.* Davenport, 51 Iowa, 583.

2. Main *v.* Ginthert, 92 Ind. 180; Mitchell *v.* Bartlett, 51 N. Y. 447; Astor *v.* Turner, 2 Barb. (N. Y.) 444; Hollenbeck *v.* Donell, 29 Hun (N. Y.), 94; Sea Ins. Co. *v.* Stebbins, 8 Paige Ch. (N. Y.) 568; Price *v.* Dowdy, 34 Ark. 285; White *v.* Griggs, 54 Iowa, 650; Myton *v.* Davenport, 51 Iowa, 583; Douglass *v.* Cline, 12 Bush (Ky.), 608; Chase's Case, 1 Bland Ch. (Md.) 206; Brown *v.* Chase, 1 Walk. (Mich.) 43; Phillips *v.* Eiland, 52 Miss. 721; Kerchner *v.* Farley, 80 N C. 24; Henshaw *v.* Wells, 9 Humph. (Tenn.) 568; Schreiber *v.* Carey, 48 Wis. 208.

3. Haas *v.* Chicago Building Society, 89 Ill. 498.

4. Haas *v.* Chicago Building Society, 89 Ill. 498; Bloodgood *v.* Clark, 4 Paige Ch. (N. Y.) 577. These facts may be made to appear by affidavit. See Vann *v.* Barnett, 2 Bro. C. C. 358; Metcalfe *v.* Pulvertoft, 1 Ves. & B. 180.

5. Shotwell *v.* Smith, 3 Edw. Ch. (N. Y.) 588; Verplank *v.* Caines, 1 Johns. Ch. (N. Y.) 58; Tysen *v.* Wabash R. Co., 8 Biss. C. C. 247; Morrison *v.* Buckner, Hempst. C. C. 442; Lloyd *v.* Passingham, 16 Ves. 59. See Warner *v.* Gouverneur's Ex'r, 1 Barb. (N. Y.) 36; Edw. on Rec. 356 *et seq.*

**Discretion of Court.**—The appointment of a receiver is in the sound discretion of the court. Jacobs *v.* Gibson, 9 Neb. 380.

6. See Bank of Ogdensburg *v.* Arnold, 5 Paige Ch. (N. Y.) 38; Haas *v.* Chicago Building Society, 89 Ill. 498; Newport & Cin. Bridge Co. *v.* Douglass, 12 Bush Ky.), 673; Plaskett *v.* Dillon, 1 Hog. 201; Hollenbeck *v.* Donell, 94 N. Y. 342; s. c., 29 Hun (N. Y.), 94; Warner *v.* Gouverneur's Ex'r, 1 Barb. (N. Y.) 36; Shotwell *v.* Smith, 3 Edw. Ch. (N. Y.) 588; Verplank *v.* Caines, 1 Johns. Ch.

deed provides that, upon default, the mortgagee shall have the rents and profits.[1] Ordinarily, the appointment will not be made

(N. Y.) 58; Astor *v.* Turner, 11 Paige Ch. (N.Y.) 436; s c., 3 Am. Dec. 766; Howell *v.* Ripley, 10 Paige Ch. (N. Y.) 45; Sea Ins. Co. *v.* Stebbins, 8 Paige Ch. (N. Y ) 565; Bank of Ogdensburg *v.* Arnold, 5 Paige Ch. (N. Y.) 38; Quincy *v.* Cheeseman, 4 Sandf. (N. Y.) Ch. 405; Price *v.* Dowdy, 34 Ark. 285; Hughes *v.* Hatchett, 55 Ala. 631; Jacobs *v.* Gibson, 9 Neb. 380; Tysen *v.* Wabash R. Co., 8 Biss. C. C. 247; Hunter *v.* Hays, 7 Biss. C. C. 362; Morrison *v.* Buckner, Hempst. C. C. 442; Lloyd *v.* Passingham, 16 Ves. 59; Burt *v.* Burt, 41 N. Y. 46; Syracuse Bank *v.* Tallman, 31 Barb (N. Y.) 201; Shotwell *v.* Smith, 3 Edw. Ch. (N. Y.) 588; Tyler *v.* Poppe, 4 Edw. Ch. (N. Y.) 430; Willis *v.* Corliss, 2 Edw. Ch. (N. Y.) 281, 287; Haggarty *v.* Pittman, 1 Paige Ch. (N. Y.) 298; s. c., 19 Am. Dec. 434; Wooding *v.* Malone, 30 Ga. 979; Edie *v.* Applegate, 14 Iowa. 273; Cofer *v.* Echerson, 6 Iowa, 502; Blondheim *v.* Moore, 11 Md. 365, 374; Langolf *v.* Ridgely, 1 Md. Ch. Dec. 70.

1. By the provisions of the English statute 23 & 24 Vict., c. 145, §§ 11–32, the right to have a receiver appointed is independent of a foreclosure suit. The mortgagee may obtain the appointment of a receiver of the rents and profits of the estate where the principal has been in arrear for twelve or the interest for six months, or omission to pay insurance premium which by the terms of the mortgage is to be kept paid. Before this statute, the mortgagee, having the legal estate, was not entitled to a receiver. He could enter for condition broken, or enforce his right of entry by action at law. Berney *v.* Sewell, 1 J. & W. 647; Sturch *v.* Young, 5 Beav. 557; Ackland *v.* Gravemen, 31 Beav. 482. The same view has been adopted in some of the American courts. Frizbie *v.* Bateman, 24 N. J. Eq. 28. But the prevailing doctrine in the courts of this country is otherwise, and in accordance with the rule stated in the text. Astor *v.* Turner, 11 Paige (N. Y.), 436; Syracuse Bank *v.* Tallman, 31 Barb. (N. Y.) 201; Myers *v.* Estell, 48 Miss. 373; Douglass *v.* Cline, 12 Bush (Ky.), 608; Williams *v.* Robinson, 16 Conn. 517; First Nat. Bank *v.* Gage, 79 Ill. 207; Hackett *v.* Snow, 10 Ired. Eq. (N. Car.) 220.

In Cortleyou *v.* Hathaway, 3 Stock. (N. J.) 39; s. c., 64 Am. Dec. 478, it was held that the mere inadequacy in value of the land, coupled with the insolvency of the mortgagor, was not sufficient to justify the appointment of a receiver; but that the appointment would be made where the improvements on the mortgaged premises had been burnt, and the property allowed to go to waste through the fault of the party in possession.

The power of appointing receivers has been very frequently exercised in recent years in the American courts, in respect to railroad corporations. In these cases the management and operation of the railroad has been intrusted to the receivers. See, generally, Kennedy *v.* St. Paul R. R. Co., 2 Dill. (U. S.) 488; Milwaukee R. Co. *v.* Souther, 2 Wall. (U. S.) 510; Delaware R. Co. *v.* Erie R. Co., 21 N. J. Eq. 298; Stevens *v.* Davison, 18 Gratt. (Va.) 819; Jerome *v.* McCarter, 94 U. S. 734; Wallace *v.* Loomis, 97 U. S. 146; Fosdick *v.* Schall, 99 U. S. 235; Cowdrey *v.* Galveston R. Co., 93 U. S. 352; Wilmer *v.* Atlanta R. Co., 2 Woods. (U. S.), 409; Meyer *v.* Johnson, 53 Ala. 237.

In Wallace *v.* Loomis, 97 U. S. 146, Bradley, J., speaking for the court, says: "The power of a court of equity to appoint managing receivers of such property as a railroad when taken under its charge as a trust fund for the payment of encumberances, and to authorize such receivers to raise money for the preservation and management of the property, and make the same chargeable as a lien thereon for its repayment, cannot at this day be seriously disputed. It is a part of the jurisdiction always exercised by the court, by which it is its duty to protect and preserve the trust fund in its hands. It is undoubtedly a power to be exercised with great caution; and, if possible, with the consent and acquiescence of the parties intrusted in the fund."

The receiver may be ordered to pay outstanding debts incurred for labor and supplies before the bringing of the foreclosure suit but during the period of default; the mortgagees having during this period presumably profited by the labor and supplies; and may be so ordered to pay from the proceeds of the sale of the road, although such payment may have the effect of rendering the proceeds insufficient to pay the mortgage debt; it appearing that the receiver had, with the consent of the mortgagee, applied current income to the permament improvement of the road. Union Trust Co. *v.* Souther, 107 U. S. 591. See also Fosdick *v.* Schall, 99 U. S. 235; Burnham *v.* Bowen, 111 U. S. 776; Heindkeper *v.* Hinckley

Locomotive Works, 99 U. S. 258; Hale *v.* Frost, 99 U. S. 389. Such payments from the *corpus* of the property are only permissible under special circumstances; Miltenberger *v.* Logansport, Crawfordsville & Southwestern R. Co., 106 U. S. 286. The receiver may be empowered by the court to complete unfinished portions of the road; and, in order to do so, to borrow money and issue bonds which may be made a first lien upon the property. Kennedy *v.* St. Paul & P. R. Co., 2 Dill. (U. S.) 448.

As to power of receiver to lessen funds in his hands for repairs in case of mortgage between private persons, see Wyckoff *v.* Scofield, 103 N. Y. 630.

Where a prior encumbrancer is in actual possession, a receiver will not be appointed at the instance of a mortgagee who has filed a bill for foreclosure, when such appointment will operate to the prejudice of such prior encumbrancer. Hiles *v.* Moore, 15 Beav. 175; Norway *v.* Roe, 19 Vesey, 153; Quinn *v.* Brittain, 3 Edw. Ch. (N. Y.) 314. However, if he is not in possession, the appointment will be made. Silver *v.* Bishop of Norwich, 2 Swans. 112, note.

A mortgagee filed his bill for foreclosure of a mortgage given by James Horner & Co. L., who had been appointed receiver of the firm after the death of Horner, was made a party, but in his individual capacity. The devisees of Horner were also made parties. *Held*, that while L. should have been made a party in his capacity of receiver, yet neither he nor the devisees whom he represented could stand by without objection, and, after the sale, be heard against the proceedings upon the ground that he had not been made a party as receiver. Andrew Kirkpatrick, Receiver, *v.* Erastus Corning *et al.*, 38 N. J. Eq. 234.

Where there was nothing to show that the party personally liable for a large portion of the indebtedness was not fully responsible for any probable deficiency, and where the debt had been diminished to less than one half, including a small amount of interest, since the securities were taken, and no waste, or failure to pay taxes, or diminution of the value of the security was shown, and the property consisted of city lots presumptively salable in parcels, it was error to appoint a receiver. Morris, Trustee, *v.* Brauchaud *et al.*, 52 Wis. 187.

As to compensation to receivers, see Tome & Hambleton *v.* King & Sterling, 64 Md. 166.

As to circumstances justifying appointment of receiver. Buchanan *v.* Berkshire Life Ins. Co., 96 Ind. 510; Sales *v.* Lusk, 60 Wis. 490; Wyckoff *v.* Scofield, 98 N. Y. 475; Brinkman *v.* Ritzinger Adm'r, 82 Ind. 358; Rapier *v.* Gulf City Paper Co., 64 Ala. 330; Cook *v.* Citizens Nat. Bank, 73 Ind. 256; Holenbeck *v.* Donnell, 94 N. Y. 342; Sleeper *v.* Iselin, & Co., 59 Iowa, 379; Ogdham *v.* First Nat. Bank of Wilmington, 84 N. Car. 304; Hursh *v.* Hursh, 99 Ind. 500; Sheeks *et al. v.* Klotz, 84 Ind. 471; Maich *v.* Bird, 59 Iowa, 307; Hazeltene *v.* Granger, 44 Mich. 503.

Law partner of solicitor of complaint not permitted to be receiver even by consent. Manufacturer's Bank *v.* Kent Circuit Judge, 43 Mich. 292.

As to disposition of funds in hands of receiver, see Union Trust Co. *v.* Souther, 107 U. S. 591; Union Trust Co. *v.* Walker, 107 U. S. 596; Lehman *v.* Tallasse Mfg. Co., 64 Ala. 567; Ranney *v.* Peyser *et al.*, 83 N. Y. 1. See also Jacobs *v.* Gibson, 9 Neb. 380; Hunter *v.* Hays, 7 Biss. C. C. 362; American Bridge Co. *v.* Heidelbach, 94 U. S. (4 Otto) 798; bk. 24, L. ed. 322; s. c., 15 Alb. L. J. 294; Chinney *v.* Black, 3 Doug. 391; Hollenbeck *v.* Donnell, 94 N. Y. 342, reversing 29 Hun (N. Y.), 94; Post *v.* Dorr, 4 Edw. Ch. (N. Y.) 412; Howell *v.* Ripey, 10 Paige Ch. (N. Y.) 43; Thomas *v.* Brigestocke, 4 Russ. 64.

**Administrators and Executors of Deceased Mortgagors** are not entitled to exceptions in their favor. See Jacobs *v.* Gibson, 9 Neb. 380. Kerchner *v.* Fairley, 80 N. C. 24; Middletown *v.* Dodswell, 13 Ves. 266; Chautauqua County Bank *v.* White, 6 N. Y. 236; McElwain *v.* Willis, 9 Wend. (N. Y.) 548, 561; Stileman *v.* Ashdown, 2 Atk. 477; Edgell *v.* Haywood, 3 Atk. 357; Anon., 12 Ves. 4; Middleton *v.* Dodwell, 13 Ves. 266.

**Imminent Danger of Loss or Injury** is a sufficient cause for the appointment of a receiver. Newport & Cin. Bridge Co. *v.* Douglass, 12 Bush (Ky.), 673; Shotwell *v.* Smith, 3 Edw. Ch. (N. Y.) 588; Verplank *v.* Caines, 1 Johns. Cas. (N. Y.) 58; Morrison *v.* Buckner, Hempst. C. C. 442; Tysen *v.* Wabash R. Co., 8 Biss. C. C. 247; Parkhurst *v.* Kinsman, 2 Blatchf. C. C. 78; Lloyd *v.* Passingham, 16 Ves. 59; N. Y. Code Civ. Proc. § 713; Chase's Case, 1 Bland Ch. (Md.) 266; s. c., 17 Am. Dec. 277; Pritchard *v.* Fleetwood, 1 Meriv. 54; Shee *v.* Harris, 1 J. & La T. 92; s. c., 6 Ir. Eq. 543; Thomas *v.* Davies, 11 Beav. 29; Metcalf *v.* Pulvertoft, 1 Ves. & B. 180; Aberdeen *v.* Chitty, 3 Y. & C. 382; Kelly *v.* Stanton, 1 Hog. 393; Bloodgood *v.* Clark, 4 Paige Ch. (N. Y.) 577; Evans *v.* Coventry, 5 De G. M.

& G. 918; Williamson *v.* Wilson, 1 Bland Ch. (Md.) 421; Levenson *v.* Elson, 88 N. C. 182; Oldfield *v.* Cobbett, 4 L. J. Ch. N. S. 272; Middleton *v.* Dodswell, 13 Ves. 266; Sleeper *v.* Iselin, 59 Iowa, 379; Rollins *v.* Henry, 77 N. C. 467; Smith *v.* Kelley, 31 Hun (N. Y.), 38.

**Accumulation of Taxes and Interest, Ground for Appointing Receiver** in mortgage foreclosure. See Mahon *v.* Crothers, 28 N. J. Eq. (1 Stew.) 567; Finch *v.* Houghton, 19 Wis. 149; Sidenberg *v.* Ely, 90 N. Y. 257; Wall Street Ins. Co. *v.* Loud, 20 How. (N. Y.) Pr. 95; McLane *v.* Placerville & S. V. R. Co., 66 Cal. 606; Simpson *v.* Robert, 35 Ga. 180; Buchanan *v.* Berkshire L. Ins. Co., 96 Ind. 510; Callanan *v.* Shaw, 19 Iowa, 183; Clagett *v.* Salmon, 5 Gill & J. (Md.) 314; Brown *v.* Chase, Walk. Ch. (Mich.) 43; Stockman *v.* Wallis, 30 N. J. Eq. (3 Stew.) 449; Johnson *v.* Tucker, 2 Tenn. Ch. 398. See also Haas *v.* Chicago Building Society, 89 Ill. 498; Brasted *v.* Sutton, 30 N. J. Eq. (3 Stew.) 462; Green *v.* Green, 30 N. J. Eq. (3 Stew.) 451; Oliver *v.* Decatur, 4 Cr. C. C. 458; Chetwood *v.* Brittan, 4 N. J. Eq. (2 H.W Gr.) 334; Darnsmont *v.* Patton, 4 Lea (Tenn.), 597.

**Waste Committed by a Person in Possession** is a sufficient cause for a receiver. Wall St. Fire Ins. Co. *v.* Loud, 20 How. (N. Y.) Pr. 95; Worrill *v.* Coker, 56 Ga. 666; Haas *v.* Chicago Building Soc., 89 Ill. 498; Brasted *v.* Sutton, 30 N. J. Eq. (3 Stew.) 462; Green *v.* Green, 30 N. J. Eq. (3 Stew.) 451; Stockman *v.* Wallis, 30 N. J. Eq. (3 Stew.) 450; Mahon *v.* Crothers, 28 N. J. Eq. (1 Stew.) 567; Johnson *v.* Tucker, 2 Tenn. Ch. 398; Finch *v.* Houghton, 19 Wis. 149; Oliver *v.* Decatur, 4 Cr. C. C. 458. See Chappell *v.* Boyd. 56 Ga. 578; Tafts *v.* Little, 56 Ga. 139; Ensign *v.* Colburn, 11 Paige Ch. (N. Y.) 503. Thus, although the mortgagor has a right to cut timber, yet where he has become bankrupt, and exercises this right in bad faith, a receiver will be appointed to take charge of the premises. Or, he may be restrained by an action. Hutchins *v.* King, 66 U. S. (1 Wall.) 53; bk. 17, L. ed. 693; Johnson *v.* White, 11 Barb. (N.Y.) 194; Van Wyck *v.* Alliger, 6 Barb. (N. Y.) 507; Watson *v.* Hunter, 5 Johns. Ch. (N. Y.) 169; Winship *v.* Pitts, 3 Paige Ch. (N. Y.) 259; People *v.* Alberty, 11 Wend. (N. Y.) 160; Morgan *v.* Gilbert, 2 Flip. C. C. 645; s. c., 2 Fed. Rep. 835; Willard's Eq. Jur. 371, 379; Watson *v.* McClay, 5 Johns. Ch. (N. Y.) 169; Hawley *v.* Clowes, 2 Johns. Ch. (N. Y.) 122; Ensign *v.* Colburn, 11 Paige Ch. (N. Y.) 503; Winship *v.* Pitts, 3 Paige Ch. (N. Y.) 259; Weatherby *v.* Wood, 29 How. (N. Y.) Pr. 406; Spear *v.* Cutter, 5 Barb. (N.Y.) 486; s.c., 2 N.Y. Code Rep. 100; Pratt *v.* Potter, 21 Barb. (N. Y.) 589.

Fraud is a ground for the appointment of a receiver. See Orphan Asylum *v.* McCartree, Hopk. Ch. (N. Y.) 429; Tomlinson *v.* Ward, 2 Conn. 396; Powell *v.* Quinn, 49 Ga. 523; Crawford *v.* Ross, 39 Ga. 44; Jones *v.* Dougherty, 10 Ga. 281; Voshell *v.* Hynson, 26 Md. 83; Haight *v.* Burr, 19 Md. 134; State *v.* Northern Cent. R. Co., 18 Md. 193; Blondheim *v.* Moore, 11 Md. 365; Furlong *v.* Edwards, 3 Md. 99; Thompson *v.* Diffenderfer, 1 Md. Ch. Dec. 489; Mays *v.* Rose, 1 Freem. Ch. (Miss.) 703; Maynard *v.* Railey, 2 Nev. 313; Ladd *v.* Harvey, 21 N. H. (1 Fost.) 514; Mordaunt *v.* Hooper, 1 Amb. 311; Montgomery *v.* Clark, 2 Atk. 378; Lloyd *v.* Passingham, 16 Ves. 59; Middleton *v.* Dodswell, 13 Ves. 266; Hugonin *v.* Basley, 13 Ves. 105; Anon., 12 Ves. 4; Jervis *v.* White, 6 Ves. 738.

**When the Property is of Sufficient Value to Pay the Mortgage Debt** with costs a receiver will not be appointed. See Worrill *v.* Coker, 56 Ga. 666; Williams *v.* Noland, 2 Tenn. Ch. 151; Pullan *v.* Cincinnati & C. O. R. Co., 4 Biss. C. C. 35; Silverman *v.* Northwestern Mut. L. Ins. Co., 5 Ill. App. 124; Shotwell *v.* Smith, 3 Edw. Ch. (N. Y.) 588; Bank of Ogdensburgh *v.* Arnold, 5 Paige Ch. (N. Y.) 38; Quincy *v.* Cheeseman, 4 Sandf. Ch. (N. Y.) 405; Eslava *v.* Crampton, 61 Ala. 50; Sales *v.* Lusk, 60 Wis. 490; s. c., 18 Rep. 382; Morris *v.* Branchaud, 52 Wis. 187; Robinson *v.* Hadley, 11 Beav. 614.

Receiver will not be appointed where additional security is given. Myton *v.* Davenport, 51 Iowa, 583. See Cortelyeu *v.* Hathaway, 11 N. J. Eq. (3 Stockt.) 39; s. c., 64 Am. Dec. 478; Sea Ins. Co. *v.* Stebbins, 8 Paige Ch. (N. Y.) 565; Harper *v.* Grambling, 66 Ga. 236; Rich *v.* Colquitt, 65 Ga. 113; Overton *v.* Bigelow, 10 Yerg. (Tenn.) 54; Granthaim *v.* Lucas, 15 W. Va. 425; Palmer *v.* Vaughan, 3 Sawy. C. C. 173; Prebble *v.* Boghurst, 1 Sawy. C. C. 313; Talbot *v.* Hope Scott, 4 Kay & J. 141; Pritchard *v.* Fleetwood, 1 Meriv. 54; Curling *v.* Townshend, 19 Ves. 633. *Compare* Clark *v.* Johnston, 15 W. Va. 804.

**Where the Debt is Not all Due** (Astor *v.* Turner, 11 Paige Ch. (N.Y.) 436; s. c., 43 Am. Dec. 766; Howell *v.* Ripley, 10 Paige Ch. (N. Y.) 45; Bank of Ogdensburgh *v.* Arnold, 5 Paige Ch. (N. Y.) 38, Burrows *v.* Malloy, 2 Jo. & Lat. 521), or the premises can be sold in parcels, a re-

ceiver will not be appointed. See Wyckoff *v.* Schofield, 93 N. Y. 475, 477; Hollenback *v.* Barnard, 94 N. Y. 342; Bank of Ogdensburgh *v.* Arnold, 5 Paige Ch. (N. Y.) 38, 40; Quincy *v.* Cheeseman, 4 Sandf. Ch. (N. Y.) 405; Morris *v.* Branchaud, 52 Wis. 187.

**Laches on the Part of the Mortgagee** will prevent the appointment of a receiver. See Cone *v.* Combs, 18 Fed. Rep. 576; Shepherd *v.* Murdock, 2 Molloy, 531; Darcy *v.* Blake, 1 Molloy, 247.

**Where Mortgage Impeached,** a receiver will not be appointed. Leahy *v.* Arthur, 1 Hog. 92; Shepherd *v.* Murdock, 2 Molloy, 231, 531; Darcy *v.* Blake, 1 Molloy, 247.

**Where the Property is in the Possession of a Stranger,** a receiver will not be appointed. Searles *v.* Jacksonville, P. & M. R. R. Co., 2 Woods C. C. 621; Sea Ins. Co. *v.* Stebbins, 8 Paige Ch. (N. Y.) 585; Whorton *v.* Webster, 56 Wis. 356; Bank of Ogdensburgh *v.* Arnold, 5 Paige Ch. (N. Y.) 38; Zeiter *v.* Bowman, 6 Barb. (N. Y.) 133.

Where rents and profits cannot be applied under receiver, there will generally be no appointment. See Phœnix Mut. Life Ins. Co. *v* Grant, McAr. C. C. 320; Wyckoff *v.* Schofield, 98 N. Y. 475; Argall *v.* Pitts, 78 N. Y. 239; Zeiter *v.* Bowman, 6 Barb. (N.Y.) 133; Bank of Ogdensburgh *v.* Arnold, 5 Paige Ch. (N. Y.) 38; Syracuse Bank *v.* Tallman, 31 Barb. (N. Y.) 201; Shotwell *v.* Smith, 3 Edw. Ch. (N. Y.) 588; Hughes *v.* Hatchett, 55 Ala. 631.

During the time allowed for redemption, a receiver will not be appointed. See White *v.* Griggs, 54 Iowa, 650; Lapham *v.* Ives, 8 Rep. 6; s. c., 13 West. Jur. 357; 25 Int. Rev. Rec. 186; Sheek *v.* Klotz, 84 Ind. 471; Edwards *v.* Woodbury, 1 McCr. C. C. 429; s. c., 3 Fed Rep. 14; Beecher *v.* Marquette & P. R. Mill Co., 40 Mich. 307; Teal *v.* Walker, 111 U. S. 242; bk. 28, L. ed. 415; Semple *v.* Bank of British Columbia, 5 Sawy. C. C. 394.

A receiver will not be appointed where the legal title of the premises is in the mortgagee. See Williams *v.* Robinson, 16 Conn. 524; Mahon *v.* Crothers, 28 N. J. Eq. (1 Stew.) 568; Beverley *v.* Brooke, 4 Gratt. (Va.) 209; Williamson *v.* New Albany R. Co., 1 Biss. C. C. 201; Ackland, *v.* Gravener, 31 Beav. 482; Sturch *v.* Young, 5 Beav. 557; Berney *v.* Sewell, 1 Jac. & W. 628; Silver *v.* Bishop of Norwich, 3 Sw. 115 n.; White *v.* Bishop of Peterborough, 3 Sw. 109.

**When Mortgagee is in Possession,** no receiver will be appointed until after his claim has been fully paid. See Patten *v.* The Accessory Transit Co., 4 Abb. (N.Y.) 235; s.c., 13 How. (N. Y.) Pr. 502; Quinn *v.* Brittain, 3 Edw. Ch. (N. Y.) 314; Bolles *v.* Duff, 35 How. (N. Y.) Pr. 481; Rapier *v.* Gulf City Paper Co., 64 Ala. 330; Callanan *v.* Shaw, 19 Iowa, 183; Trenton Banking Co. *v.* Woodruff, 3 N. J. Eq. (2 H. W. Gr.) 210; Rowe *v.* Wood, 2 Jac. & W. 553; Berney *v.* Sewell, 1 Jac. & W. 649; Hiles *v.* Moore, 15 Beav. 180; Mahon *v.* Crothers, 28 N. J. Eq. (1 Stew.) 567; Cortelyeu *v.* Hathaway, 11 N. J. Eq. (3 Stockt.) 39; s.c., 64 Am. Dec. 478; Trenton Banking Co. *v.* Woodruff, 3 N. J. Eq. (2 H. W. Gr.) 210; Schreiber *v.* Carey, 48 Wis. 213; Hiles *v.* Moore, 15 Beav. 175; Rowe *v.* Wood, 2 Jac. & W. 553; Bates *v.* Brothers, 17 Jur. 1174; s. c., 2 Sm. & G. 509; Quinn *v.* Brittain, 3 Edw. Ch. (N. Y.) 314; Berney *v.* Sewell, 1 Jac. & W. 648–9; Phipps *v.* Bishop of Bath & Wells, 2 Dick. 608; Bryan *v.* Cormick, 1 Cox Ch. 423; Dalmer *v.* Darshwood, 2 Cox Ch. 382–3; Chambers *v.* Goldwin, cited 13 Ves. 378; Quarrell *v.* Beckford, 13 Ves. 378; Bayand *v.* Fellows, 28 Barb. (N. Y.) 451.

Except in those cases where the mortgagee is unable to state how much is yet due him,—Chambers *v.* Goldwin, cited in 13 Ves. 378; Quarrell *v.* Beckford, 13 Ves. 378; Rowe *v.* Wood, 2 Jac. & W. 558;—or that the rents and profits will be lost, or are in danger of being lost, or that he is committing waste upon or a material injury to the premises, an exception will be made and a receiver will be appointed,—Bolles *v.* Duff, 35 How. (N. Y.) Pr. 481; Williams *v.* Robinson, 16 Conn. 517; Beverley *v.* Brooke, 4 Gratt. (Va.) 209; Hiles *v.* Moore, 17 L. J. Ch. (N. S.) 385; s. c., 15 Eng. L. & Eq. 130; Meaden *v.* Sealey, 6 Hare. 620; Hugonin *v.* Barely, 13 Ves. 105; Lloyd *v.* Passingham, 16 Ves. 58; Codrington *v.* Parker, 16 Ves. 464; Corcoran *v.* Doll, 35 Cal. 476; Kipp *v.* Hanna, 2 Bland. Ch. (Md.) 26.

**Where the First Mortgagee is Out of Possession,** a receiver will be appointed at the instance of subsequent incumbrancers, without prejudice to the right of the first mortgagee to take possession should he see fit. See Berney *v.* Sewell, 1 Jac. & W. 647–649; Phipps *v.* Bishop of Bath and Wells, 2 Dick. 608; Bryan *v.* Cormick, 1 Cox Ch. 423; Dalmer *v.* Dashwood, 2 Cox Ch. 378–383; Tanfield *v.* Irvine, 2 Russ. 151, 152. But see Holmes *v.* Bell, 2 Beav. 290; Browne *v.* Blounte, 2 Russ. & M. 83.; Anderson *v.* Stather, 2 Coll. 209; Lowry *v.* Fulton, 9 Sim. 114; Dows *v.* Duke of Marlborough, 2 Sw.

113; Rhedes *v.* Mortyn, 17 Jur. 1007; Coope *v.* Creswell, 12 W. R. 299; Phipps *v.* Bishop of Bath and Wells, 2 Dick. 608; Longton *v.* Longton, 7 D. M. & G. 30; Cortelyeu *v.* Hathaway, 11 N. J. Eq. (3 Stockt.) 39–42; s. c., 64 Am. Dec. 478; Rhoes *v.* Martyn, 17 Jur. 1007; Wiswall *v.* Sampson, 55 U. S. (14 How.) 52, 65; bk. 14. L. ed. 322; Silver *v.* Bishop of Norwich, 3 Sw. 112.

As to appointment on application of junior mortgagee, see Burrows *v.* Molloy, 2 Jac. & Lat. 521; Taylor *v.* Emerson, 4 D & War. 117, 122; Bord *v.* Tollemoche, 1 N. R. 117; Cortelyeu *v.* Hathaway, 11 N. J. Eq. (3 Stockt.) 42; s. c., 64 Am. Dec. 478; White *v.* Bishop of Peterborough, 3 Sw. 109; Plaskett *v.* Dillon, 1 Hog. 201; Tanfield *v.* Irvine, 2 Russ. 151; Wilson *v.* Wilson, 2 Keen, 249; Hopkins *v.* Worcester & Birmingham Canal Co., L. R. 6 Eq. 447; Bates *v.* Brothers, 17 Jur. 1174; Wash. Life Ins. Co. *v.* Fleischener, 10 Hun (N. Y.), 117; Post *v.* Dorr, 4 Edw. Ch. (N. Y.) 412; Warner *v.* Gonverneur, 1 Barb. (N. Y.) 36; Astor *v.* Turner, 11 Paige Ch. (N. Y.) 436; s. c., 43 Am. Dec. 766; Howell *v.* Ripley, 10 Paige Ch. (N. Y.) 43; Thomas *v.* Brigstocke, 4 Russ. 60; Miltenberger *v.* Logansport R. Co., 106 U. S. 286; bk. 27, L. ed. 117; s. c. 1 Sup. Ct. Rep. 140.

**Where a Puisne Mortgagee is in Possession** a receiver will be appointed on the application of a senior mortgagee. See Silver *v.* Bishop of Norwich, 3 Sw. 116, n.; New York Life Ins. Co. *v.* Glass, 50 How. (N. Y.) Pr. 88; Hites *v.* Moore, 15 Beav. 175, 181; Ramsey *v.* Peyser, 83 N. Y. 1, reversing s. c. 29 Hun (N. Y.), 11.

**Time of Appointing Receiver.**—Where sufficient cause is shown therefor, a receiver will be appointed during the progress of the cause, either before or after the hearing,—Lofsky *v.* Maujer. 3 Sandf, Ch. (N. Y.) 69; Hardy *v.* McClellan, 53 Miss. 507; Whitehead *v.* Wooten, 43 Miss. 523; Brown *v.* Chase, Walk. Ch. 43; Frelinghuysen *v.* Colden. 4 Paige Ch. 204; Brinkham *v.* Ritzinger. 82 Ind. 364; Caslin *v.* State, 44 Ind. 151;—unless the party personally liable for the payment of the deficiency gives a sufficient undertaking to account for the rents and profits in case of a deficiency. Syracuse Bank *v.* Tallman, 31 Barb. (N. Y.) 201; Warner *v.* Gouverneur, 1 Barb. (N. Y.) 36; Shotwell *v.* Smith, 3 Edw. Ch. (N. Y.) 588; Clark *v.* Binninger, 39 How. (N. Y.) Pr. 363; Smith *v.* Tiffany, 13 Hun (N. Y.), 671; Astor *v.* Turner, 11 Paige Ch. (N. Y.) 436; Howell *v.* Ripley, 10 Paige Ch. (N. Y.) 43; Sea Ins. Co. *v.* Stebbins, 8 Paige Ch. (N. Y.) 565; Frelinghuysen *v.* Colden, 4 Paige Ch. (N. Y.) 204; Miller *v.* Bowles, 2 T. & C. (N. Y.) 568; Main *v.* Ginthert, 92 Ind. 180; Connelly *v.* Dickson, 76 Ind. 440; Myers *v.* Estell, 48 Miss. 372.

The court may appoint a receiver prior to the filing of a bill and the commencement of an action. See Crowder *v.* Moore, 52 Ala. 220; Jones *v.* Schall, 45 Mich. 379; Dusenbury *v.* Dusenbury, 11 Daly (N. Y.), 112; Kattenstorth *v.* Astor Bank, 2 Duer (N. Y.), 632; Stratton *v.* Danielson, 1 Russ. & M. 484; Tanfield *v.* Irvine, 2 Russ. 151; Quinn *v.* Gunn, 1 Hog. 75; Malcolm *v.* Montgomery, 1 Hog. 93; Maguire *v.* Allen, 1 Ball & Beat. 75; Coward *v.* Chadwick, 2 Russ. 150, n-; 1 Van Sant Eq. Pr. 402.

Before answer, a receiver will not usually be appointed. See People *v.* Mayor of N. Y., 8 Abb. (N. Y.) Pr. 7; West *v.* Swan, 3 Edw. Ch. (N. Y.) 420; Hamilton *v.* Austin, 36 Hun (N. Y.) 138; Phœnix Mut. L. Ins. Co. *v.* Grant, 3 McAr. C. C. 220; Lloyd *v.* Passingham. 3 Meriv. 697; Attorney-gen. *v.* Mayor of Galway, 1 Moll. 95; Cook *v.* Gwyn, 3 Atk. 689; Meredith *v.* Wyse, 1 Moll. 22.

**After Decree, the Court May Appoint a Receiver,** although not asked for in the complaint, when such appointment becomes necessary to protect the interests of the mortgagee. See Wilson *v.* Russ, 17 Fla. 691; Buchanan *v.* Berkshire L. Ins. Co., 96 Ind. 510; Haas *v.* Chicago Building Soc., 89 Ill. 498; Schreiber *v.* Carey, 48 Wis. 208; Cooke *v.* Gwyn, 3 Atk. 689; Meredith *v.* Wyse, 1 Moll. 2.

**Appointment of Receiver after Sale** will be made where the propriety of such appointment does not appear until after the sale is made. See Smith *v.* Tiffany, 13 Hun (N. Y.), 671; Astor *v.* Turner, 11 Paige Ch. (N. Y.) 436; s. c., 43 Am. Dec. 766; Haas *v.* Chicago Building Soc., 182 Ill. 498; Connelly *v.* Dickson, 76 Ind. 440; Adair *v.* Wright, 16 Iowa, 385; Schreiber *v.* Carey, 48 Wis. 208; Thomas *v.* Davies, 11 Beav. 29; Foster *v.* Rhodes, 10 Bankr. Reg. 523.

**The Receiver's Possession Will Not be Disturbed** without leave of the court appointing him. See Foster *v.* Townshend, 2 Abb. (N. Y.) N. C. 29, 36; Sea Ins. Co. *v.* Stebbins, 8 Paige Ch. (N. Y.) 565; Angel *v.* Smith, 9 Ves. 336, 338; Brooks *v.* Greathed, 1 Jac. & W. 176, 178; Pelham *v.* Dutchess of Newcastle, 3 Swan. 289, 293 n.; O'Mahoney *v.* Belmont, 62 N. Y. 133, 149; Milwaukee & St. P. R. Co. *v.* Milwaukee & M. R. Co., 20 Wis. 165; Peale *v.* Phipps, 55 U. S. (14 How.) 368, 374; bk. 14, L. ed. 459.

Tyson *v.* Fairclough, 2 Sim. & S. 142;

until after the answers have been filed and the merits disclosed. But this rests largely in the discretion of the court; and the appointment may be made at any time, even before the defendants have entered their appearance, if the proper protection of the property makes such a course, in the opinion of the court, necessary. The receiver is an officer of the court, and should ask direction of the court in all matters pertaining to the management of the property. Such directions are generally embodied in a decree of a general character, defining his powers and duties.

**VI. Decree for Foreclosure and Sale.**—The decree of foreclosure and for sale is properly rendered at the hearing upon the merits, and after the respective rights and equities of the parties have been adjudicated and adjusted, and after the exceptions to the master's report upon the matters of preliminary inquiry, if exceptions have been filed, have been disposed of. The decree should contain a description of the premises; a statement of the amount of the debt; a direction as to how the property is to be sold, whether in parcels or otherwise; the order in which the sale is to be made, as, e.g., that the portion retained by the mortgagor be first sold when alienations have been made, and the remainder in the inverse order of alienation;[1] the time,

Dixon *v.* Smith, 1 Swan, 457; Attorney-general *v.* Coventry, 1 P. Wms. 306; Empringham *v.* Short, 3 Hare, 461; Gilb. For. Roman. 8.

**Respecting the Continuing of a Receiver Pending an Appeal,** see Rider *v.* Bagley, 84 N. Y. 461; McMahon *v.* Allen, 14 Abb. (N. Y.) Pr. 220.

**Respecting the Accounting of Receivers:** Pendola *v.* Alexanderson, 67 Cal. 337; Radford *v.* Folsom, 55 Iowa, 276; Washington L. Ins. Co. *v.* Fleischauer, 10 Hun (N. Y.), 117; Howell *v.* Ripley, 10 Paige Ch. (N. Y.) 43; Post *v.* Dorr, 4 Edw. Ch. (N. Y.) 412; Brower *v.* Brower, 3 Edw. Ch. (N. Y.) 621; Misgroove *v.* Nash, 3 Edw. Ch. (N. Y.) 172; Keogh *v.* McManus, 34 Hun (N. Y.), 521; Mabray *v.* Harrison, 44 Tex. 286; Conkling *v.* Butler, 4 Biss. C. C. 22.

**The Compensation of a Receiver** should be such a sum as would be reasonable for a service rendered by a person competent to perform the duties of such receiver. See McLane *v.* Placerville & S. V. R. Co., 66 Cal. 606; United States T. Co. *v.* New York, W. S. & B. R. Co., 101 N. Y. 478; Hopfensack *v.* Hopfensack, 61 How. (N. Y.) Pr. 498; Radford *v.* Folsom, 55 Iowa, 276; Hutchinson *v.* Hampton, 1 Mon. Ter. 39; Ranney *v.* Peyser, 20 Hun (N. Y.), 11; Gardiner *v.* Tyler, 4 Abb. (N. Y.) Pr. N. S. 463; s. c., 3 Keyes (N. Y.), 505; 3 Travs. App. 161; Howes *v.* Davis, 4 Abb. (N. Y.) Pr. 71; Jones *v.* Keen, 115 Mass. 170; Stretch *v.* Gowdey, 3 Tenn. Ch. 565.

**A Receiver May be Removed for Misconduct,** by the court appointing him only. *Re* Louisiana Savings Bank, etc., Co., 35 La. An. 196; Altrill *v.* Rockaway Beach Imp., 25 Hun (N. Y.), 509; Bruce *v.* Manchester & K. R. Co., 19 Fed. Rep. 342; Young *v.* Montgomery & E. R. Co., 2 Woods C. C. 606; Kennedy *v.* Indianapolis, C. & L. R. Co., 2 Flipp. C. C. 704; s. c., 3 Fed. Rep. 97; 11 Cent. L. J. 89; 26 Int. Rev. Rec. 30, 90; 10 Rep. 359.

**The Discharge of a Receiver** after his duties have been performed should not be made on his own application, unless he shows good cause. Coburn *v.* Ames, 57 Cal. 201; s. c., 28 Am. Dec. 634; Whiteside *v.* Prendergast, 2 Barb. Ch. (N. Y.) 471. See Murrough *v.* French, 2 Mall. Rep. 497; Largan *v.* Bowen, 1 Sch. & Lef. 296; Beers *v.* Chelsea Bank, 4 Edw. Ch. (N. Y.) 277; Crook *v.* Findley, 60 How. (N. Y.) Pr. 375; Weems *v.* Lathrop, 42 Tex. 207.

1. **Sale in Inverse Order of Alienation.**—Where a mortgagor, subsequent to the execution of a mortgage, conveys a portion of the mortgaged premises at different times and by different conveyances, the portion still remaining in his hands must first be applied to the discharge of the mortgage debt, and then the parcels alienated in the inverse order of their alienation. See Wiltsie on Mortgage

Foreclosure, 603, § 499. See also Lock *v.* Fulford, 52 Ill. 166; Hoy *v.* Bramhall, 19 N. J. Eq. (4 C. E. Gr.) 563; Gaskill *v.* Sine, 13 N. J. Eq. (2 Beas.) 400; s. c., 78 Am. Dec. 105; Messervey *v.* Barelli, 2 Hill (S. C.) Eq. 567; Dickey *v.* Thompson, 8 B. Mon.(Ky.) 314; Blight *v.* Banks, 6 T. B. Mon. (Ky.) 197; s. c., 17 Am. Dec. 136; Blackledge *v.* Nelson, 2 Dev. (N. C.) Eq. 166; Mervey's Appeal, 4 Pa. St. 80; Niles *v.* Harmon, 80 Ill. 396.

**Subsequent Incumbrances.**—The same is true where there are subsequent incumbrances, either by mortgage or judgment, upon different portions of the premises,—see Brenhart *v.* Limburner, 85 N. Y. 172; Stuyvesant *v.* Hall, 2 Barb. Ch. (N. Y.) 151, 155; New York Life Ins. & Trust Co. *v.* Milner, 1 Barb. Ch. (N. Y.) 353; Steere *v.* Child, 15 Hun (N.Y.), 511; Snyder *v.* Stafford, 11 Paige Ch. (N. Y.) 71; Fassett *v.* Mulock, 5 Colo. 466; Conrad *v.* Harrison, 3 Leigh (Va.), 532; Dodds *v.* Snyder, 44 Ill. 153;—for subsequent incumbrances are to be deemed sales within the rule,—Milligan's Appeal, 104 Pa. St. St. 503. See Fassett *v.* Mulock, 5 Colo. 466; Bernhardt *v.* Lymburner, 85 N. Y. 172; Stuyvesant *v.* Hall, 2 Barb. Ch. (N. Y.) 151, 155; New York Life Insurance & Trust Co. *v.* Milnor, 1 Barb. Ch. (N. Y.) 353; Snyder *v.* Stafford, 11 Paige Ch. (N. Y.) 71; Conrad *v.* Harrison, 3 Leigh (Va.), 532; Steere *v.* Childs, 15 Hun (N. Y.), 511; Dodds *v.* Snyder, 44 Ill. 53; Hopkins *v.* Wooley, 81 N. Y. 77; Barnes *v.* Mott, 64 N. Y. 397, 402; Chapman *v.* West, 17 N. Y. 125; Ingalls *v.* Morgan, 10 N. Y. 178; Howard Ins. Co. *v.* Halsey, 8 N. Y. 271; s. c., 59 Am. Dec. 478; Crafts *v.* Aspinwall, 2 N. Y. 289; McDonald *v.* Whitney, 2 N.Y. Week. Dig. 529; Woods *v.* Spaulding, 45 Barb. (N. Y.) 608; Lefarge F. Ins. Co. *v.* Bell, 22 Barb. (N. Y.) 54; St. John *v.* Bumstead, 17 Barb. (N. Y.) 102; Weaver *v.* Toogood, 1 Barb. (N. Y.) 238; Ferguson *v.* Kimball, 3 Barb. Ch. (N. Y.) 616; *Ex parte* Merriam, 4 Den. (N. Y.) 254; Van Slycke *v.* Van Loan, 26 Hun (N. Y.), 344; Coles *v.* Appleby, 22 Hun (N.Y.), 72; Clowes *v.* Dickinson, 5 Johns. Ch. (N. Y.) 235; s. c., 9 Cow. (N. Y.) 403; Gill *v.* Lyon, 1 Johns. Ch. 447; Kellogg *v.* Rand, 11 Paige Ch. (N. Y.) 59; Rathbone *v.* Clark, 9 Paige Ch. (N. Y.) 648; Schryver *v.* Teller, 9 Paige Ch. 173; Farmers' Loan & Trust Co. *v.* Maltby, 8 Paige Ch. (N. Y.) 361; Patty *v.* Pease, 8 Paige Ch. (N. Y.) 277; s. c., 35 Am. Dec. 63; Skeel *v.* Spraker, 8 Paige Ch. (N. Y.) 182; Guion *v.* Knapp, 6 Paige Ch. (N. Y.) 35; s. c., 29 Am. Dec. 741; Jenkins *v.* Freyer, 4 Paige Ch. (N. Y.) 47; Gouverneur *v.* Lynch, 2 Paige Ch. (N. Y.) 300; James *v.* Hubbard, 1 Paige Ch. (N. Y.) 228; New York Life Ins. & Trust Co. *v.* Cutler, 3 Sandf. Ch. (N. Y.) 176; Mobile, M. D. & M. Ins. Co. *v.* Huder, 35 Ala. 713; Ritch *v.* Eichelberger, 13 Fla. 169; Moore *v.* Chandler, 59 Ill. 466; Summer *v.* Waugh, 56 Ill. 531; Tomkin *v.* Willberger, 56 Ill. 385; Lock *v.* Fulford, 52 Ill. 166; Iglehart *v.* Crain, 42 Ill. 261; Mattson *v.* Thomas, 41 Ill. 110; McLaurie *v.* Thomas, 39 Ill. 291; Marshall *v.* Moore, 36 Ill. 321; Evansville Gas-light Co. *v.* State, 73 Ind. 219; Medsker *v.* Parker, 70 Ind. 509; McCullum *v.* Turpie, 32 Ind. 146; Aiken *v.* Bruen, 21 Ind. 137; Williams *v.* Perry, 20 Ind. 437; Cissna *v.* Haynes, 18 Ind. 496; Day *v.* Patterson, 18 Ind. 114; Shepperd *v.* Adams, 32 Me. 63; Holden *v.* Pike, 24 Me. 427; Beard *v.* Fitzgerald, 105 Mass. 134; Pike *v.* Goodnow, 94 Mass. (12 Allen) 474; George *v.* Wood, 91 Mass. (9 Allen) 80; Kilborn *v.* Robbins, 90 Mass. (8 Allen) 466; George *v.* Kent, 89 Mass. (7 Allen) 16; Chase *v.* Woodbury, 60 Mass. (6 Cush.) 143; Allen *v.* Clark, 34 Mass. (17 Pick.) 47; Parkman *v.* Welch, 36 Mass. (19 Pick.) 231; McVeigh *v.* Sherwood, 47 Mich. 545; Sager *v.* Tupper. 35 Mich. 134; McKinney *v.* Miller, 19 Mich. 142; Ireland *v.* Woolman, 15 Mich. 253; Cooper *v.* Bigley, 13 Mich. 463; Briggs *v.* Coffman, 2 Mich. N. P. 160; Mason *v.* Payne, Walk. Ch. (Mich.) 459; Johnson *v.* Williams, 4 Minn. 260, 268; Mahagan *v.* Mead, 63 N. H. 570; Brown *v.* Simons, 44 N. H. 475; Hill *v.* McCarter, 27 N. J. Eq. (12 C. E. Gr.) 41; Mutual Life Ins. Co. of N. Y. *v.* Boughrum, 24 N. J. Eq. (9 C. E. Gr.) 44; Mount *v.* Potts, 23 N. J. Eq. (8 C. E. Gr.) 188; Wetherby *v.* Slack, 16 N. J. Eq. (1 C. E. Gr.) 491; Keene *v.* Munn, 16 N. J. Eq. (1 C. E. Gr.) 398; Gaskill *v.* Sine, 13 N. J. Eq. (2 Beas.) 400; s. c., 78 Am. Dec. 105; Winters *v.* Henderson, 6 N. J. Eq. (2 Halst.) 31; Wyckoff *v.* Davis, 4 N. J. Eq. (3 H. W. Gr.) 224; Britton *v.* Updyke, 3 N. J. Eq. (2 H. W. Gr.) 125; Shannon *v.* Marselis, 1 N. J. Eq. (Saxt.) 413; Sternberger *v.* Hanna, 32 Ohio St. 503; Nellons *v.* Truax, 6 Ohio St. 97; Cary *v.* Folsom, 14 Ohio, 365; Commercial Bank of Lake Erie *v.* Western Reserve Bank, 11 Ohio, 444; s. c., 38 Am. Dec. 739; Green *v.* Ramage, 18 Ohio, 428; s. c., 51 Am. Dec. 458; Carpenter *v.* Koons, 20 Pa. St. 222; Warren *v.* Sennett, 4 Pa. St. 114; Cowden's Estate, 1 Pa. St. 267; Presbyterian Corporations *v.* Wallace, 3 Rawle (Pa.), 109; Donnelly *v.* Hays, 17 Serg. & R. (Pa.) 400; Nailer *v.* Stanley, 10 Serg. & R. (Pa.) 450; s. c., 13 Am. Dec. 691; Norton *v.* Lewis, 3 S. C. 25; Stoney *v.* Shultz, 1 Hill (S. C.) Eq. 465; s. c., 27 Am. Dec.

429; Meng *v.* Houser, 13 Rich. (S. C.) Eq. 210; Rippetoe *v.* Dwyer, 49 Tex. 498; Miller *v.* Rogers, 49 Tex. 398; Root *v.* Collins, 34 Vt. 173; Lyman *v.* Lyman, 32 Vt. 79; Jones *v.* Myrick, 8 Gratt. (Va.) 179; Henkle *v.* Allstadt, 4 Gratt. (Va.) 284; Aiken *v.* Milwaukee & St. P. R. Co., 37 Wis. 469; State *v.* Titus, 17 Wis. 241; Worth *v.* Hill, 14 Wis. 559; Ogden *v.* Glidden, 9 Wis. 46; Hartley *v.* O'Flaherty, Lloyd & Goold Cas. *temp.* Plunkett, 208; Averall *v.* Wade, Lloyd & Goold Cas. *temp.* Suyden, 252; Hamilton *v.* Royse, 2 Sch. & Lef. 315; Barnes *v.* Raester, 1 Young & C. 401. *Compare* Huff *v.* Farwell, 67 Iowa, 298; Barney *v.* Myers, 28 Iowa, 472; Griffith *v.* Lovell, 26 Iowa, 226; Massie *v.* Wilson, 16 Iowa, 391; Bates *v.* Ruddick, 2 Iowa, 423; s. c., 65 Am. Dec. 174; Campbell *v.* Johnson, 4 Dana (Ky.), 182; Hughes *v.* Graves, 1 Litt. (Ky.) 317; Poston *v.* Eubanks, 3 J. J. Marsh. (Ky.) 44; Dickey *v.* Thompson, 8 B. Mon. (Ky.) 312; Burk *v.* Chrisman, 3 B. Mon. (Ky.) 50; Hunt *v.* McConnell, 1 T. B. Mon. (Ky.) 219; Stanley *v.* Stocks, 1 Dev. (N. C.) Eq. 314; Borden *v.* Grady, 37 Ga. 660; Cumming *v.* Cumming, 3 Ga. 460; Knowles *v.* Lawton, 18 Ga. 476; Hammond *v.* Myrick, 14 Ga. 77.

**Same—Conveyance by Grantees of Mortgagor.**—The same rule prevails where there have been successive conveyances, with warranty, by the grantees of the mortgagor. Mahagan *v.* Mead, 63 N. H. 570; Hiles *v.* Coult, 30 N. J. Eq. (3 Stew.) 40; Guion *v.* Knapp, 6 Paige Ch. (N. Y.) 35. Also where subsequent and distinct portions of the mortgaged premises are subsequently encumbered. See Schryver *v.* Teller, 9 Paige Ch. (N. Y.) 173; Stuyvesant *v.* Hall, 2 Barb. Ch. (N. Y.) 151; Hill *v.* McCarter, 27 N. J. Eq. (12 C. E. Gr.) 141.

**Same — Determining Order of Sale—Equities of Grantees.**—Where the mortgagor has sold different parcels of the mortgaged land at different times, that part still retained by him will be first liable under the decree, and the parcels in the inverse order of their alienation. Iglehart *v.* Crane, 42 Ill. 261; Ingall *v.* Morgan, 10 N. Y. 178; Thompkins *v.* Wilkburger, 56 Ill. 385; Matteson *v.* Thomas, 41 Ill. 110; Weatherby *v.* Slack, 16 N. J. Eq. (1 C. E. Gr.) 491; Wikoff *v.* Davis, 4 N. J. Eq. (3 H. W. Gr.) 224; Orvis *v.* Powell, 98 U. S. (8 Otto) 176; bk. 25, L. ed. 238; s. c., 8 Cent. L. J. 74. See also Hart *v.* Wandle, 50 N. Y. 381; Erie Co. Savings Bank *v.* Roop, 48 N. Y. 292; New York Life Ins. & Trust Co. *v.* Milnor, 1 Barb. Ch. (N. Y.) 353; National State Bank *v.* Hibbard, 45 How. (N. Y.) Pr. 280; Evansville Gas-light Co. *v.* State, 73 Ind. 219; Ferguson *v.* Kimball, 3 Barb. Ch. (N. Y.) 616; Rathbone *v.* Clark, 9 Paige Ch. (N. Y.) 648; Jumel *v.* Jumel, 7 Paige Ch. (N. Y.) 591.

**Direction as to Order of Sale—Application to Court for.**—A party wishing parcels of premises sold in a particular order, should apply to the court for that purpose, and have a clause directing such order inserted in the decree of sale. Vandercook *v.* Cohoes Savings Inst., 5 Hun (N. Y.), 641; Bergen *v.* Backhouse, 7 N. Y. Week. Dig. 113. See Rathbone *v.* Clark, 9 Paige Ch. (N. Y.) 641. However, where a person neglects to apply to the court, it seems he may apply to the officer making the sale. Vandercook *v.* Cohoes Savings Inst., 5 Hun (N. Y.), 641.

**Equities by Subsequent Grantees** will be protected and preserved by the court. See Snyder *v.* Stafford, 11 Paige Ch. (N. Y.) 71; Oppenheimer *v.* Walker, 3 Hun (N. Y.), 30; Kellogg *v.* Rand, 11 Paige Ch. (N. Y.) 59; Guion *v.* Knapp, 6 Paige Ch. (N. Y.) 35, 42; Bernhardt *v.* Lymburner, 85 N. Y. 172, 175; Colgrove *v.* Tallman, 67 N. Y. 93, 95; Howard Ins. Co. *v.* Halsey, 8 N. Y. 271, 273; Kendall *v.* Niebuhr, 45 N. Y. Super. Ct. (13 J. & S.) 542, 551; s. c., 58 How. (N. Y.) Pr. 156, 163; Stuyvesant *v.* Hall, 2 Barb. Ch. (N. Y.) 151; Patty *v.* Pease, 8 Paige Ch. (N. Y.) 277, 285; s. c., 35 Am. Dec. 683; Stuyvesant *v.* Hone, 1 Sandf. Ch. (N. Y.) 419, 425.

**Same — Time of Acquiring.**—Equities attach in the order of the execution of the conveyances. Ellison *v.* Pecare, 29 Barb. (N. Y.) 333; Van Slyke *v.* Van Loan, 26 Hun (N. Y.), 344; Meacham *v.* Steele, 93 Ill. 135; Lausman *v.* Drahos, 8 Neb. 457. But see Foster *v.* Union Nat. Bank of Rahway, 34 N. J. Eq. (7 Stew.) 48.

As to the rights of successive mortgagees, see Pancoast *v.* Duval, 26 N. J. Eq. (11 C. E. Gr.) 445; Kellogg *v.* Rand, 11 Paige Ch. (N. Y.) 59; Sager *v.* Tupper, 35 Mich. 134; Ely *v.* Perrine, 2 N. J. Eq. (1 H. W. Gr.) 396.

As to rights of purchaser of part of mortgaged premises, subject to the mortgage, see Jumel *v.* Jumel, 7 Paige Ch. (N. Y.) 591; Krueger *v.* Ferry, 41 N. J. Eq. (14 Stew.) 432.

Respecting the order of sale in parcels where the subsequent grantee of a part has assumed the payment of the mortgage, see Wilcox *v.* Campbell, 106 N. Y. 325; Michigan State Ins. Co. *v.* Soule, 51 Mich. 312; Halsey *v.* Reed, 9 Paige Ch. (N. Y.) 446; Bowne *v.* Lynde, 91 N. Y. 92.

**The Rule of Sale in the Inverse Order Does Not Apply** where the conveyance

place,[1] and manner of sale; the officer by whom to be made;[2] whether or not to be sold subject to redemption; the terms of sale;[3] whether for cash or on credit;[4] and that, out of the proceeds of sale, the debt as found due the plaintiff, together with costs of suit and expenses of sale, be paid.

In those States where personal judgment in case of deficiency is authorized, the decree may also contain provisions for judgment against the defendants liable therefor, in case there should be a deficiency.

The decree sometimes provides also that the plaintiff may bid at the sale,[5] and also for placing the purchaser in possession.[6]

Under the practice in some of the States the decree provides for a time before the sale within which the defendant may pay the debt; in default of which, the sale to be proceeded with.[7]

stipulates that the property was taken subject to the payment of the existing liens. See Warren *v.* Boynton, 2 Barb. (N. Y.) 13; Torrey *v.* Bank of Orleans, 9 Paige Ch. (N. Y.) 649; Halsey *v.* Reed, 9 Paige Ch. (N. Y.) 446; Ross *v.* Haines, 5 N. J. Eq. (1 Halst.) 632; Engle *v.* Haines, 5 N. J. Eq. (1 Halst.) 186; s. c., 43 Am. Dec. 624; Brisco *v.* Power, 47 Ill. 447; Hoy *v.* Bramhall, 19 N. J. Eq. (4 C. E. Gr.) 563; Ross *v.* Haines, 5 N. J. Eq. (1 Halst.) 632; Steere *v.* Childs, 15 Hun (N. Y.), 511; Warfield *v.* Crane, 4 Abb. Ct. App. Dec. (N. Y.) 525; Woods *v.* Spalding, 45 Barb. (N. Y.) 607; Stuyvesant *v.* Hall, 2 Barb. Ch. (N. Y.) 151.

1. **Time and Place of Sale.**—The sale must be made at the time fixed, and at the place named in the notice. Bicknell *v.* Burnes, 23 How. (N. Y.) Pr. 486; Sessions *v.* Peay, 23 Ark. 39.

2. **What Officer to Make Sale.**—The sale must be made by the sheriff of the county in which the property is situated, or the party designated by the court, if the foreclosure is had in a State court, and by the marshall of the district where the foreclosure is had in a federal court. See Lynde *v.* O'Donnell, 21 How. (N. Y.) Pr. 34; s. c., 12 Abb. (N. Y.) Pr 286; Center *v.* Billinghurst, 1 Cow. (N. Y.) 33; Cleve *v.* Veer, Cro. Car. 450; Knickerbacker *v.* Eggleston, 3 How. (N. Y.) Pr. 130; Jennings *v.* Jennings, 2 Abb. (N. Y.) Pr. 7, 17; Heyer *v.* Deaves, 2 Johns. Ch. (N. Y.) 154; Gould *v.* Garrison, 48 Ill. 258; Reynolds *v.* Wilson, 15 Ill. 394; s. c., 60 Am. Dec. 753; Blossom *v.* Milwaukee & C. R. Co., 70 U. S. (3 Wall.) 196, 205; bk. 19 L. ed. 43; Williamson *v.* Berry, 49 U. S. (8 How.) 495, 544; bk. 12 L. ed. 1170; Yates *v.* Woodruff, 4 Edw. Ch. (N. Y.) 700; Fuller *v.* Van Geeson, 4 Hill (N. Y.), 171, 176.

3. **Terms of Sale.**—The terms and conditions of the sale are generally made known before the bidding commences; it is the usual practice for the officer conducting the sale to read the published notice of sale in order that persons intending to bid may be made acquainted with the location and description of the property; and where the terms of sale are not contained in the published notice, they should be announced at the time of the sale. Bicknell *v.* Byrnes, 23 How. (N. Y.) Pr. 486.

**Deposit Required.**—To insure the completion of the sale a deposit at the time of the sale or of the payment of a portion of the bid is usually required. Maryland Permanent Loan and Building Soc. *v.* Smith, 41 Md. 516; Goldsmith *v.* Osbord, 1 Edw. Ch. (N. Y.) 560, 562. On refusal of the bidder to make the deposit, the sale will be resumed. See Lents *v.* Craig, 13 How. (N. Y.) Pr. 72; s. c., 2 Abb. (N. Y.) Pr. 294; Sherwood *v.* Reade, 8 Paige Ch. (N. Y.) 633.

4. **Where the Terms are Cash.**—The bidder is required to pay at once in cash the whole or a part of his bid. Pursley *v.* Forth, 82 Ill. 387; Sage *v.* Central R. Co. (Iowa), 13 West. Jur. 218. As to where the mortgagee becomes the purchaser, see Jacobs *v.* Turpin, 83 Ill. 424

5. See Ten Eyck *v.* Craig, 62 N. Y. 406, 421; Williams *v.* Townsend, 31 N. Y. 415; Cameron *v.* Irwin, 5 Hill (N. Y.), 280; Shaw *v.* Bunny, 2 De. G. J. & S. 468; s. c., 13 W. R. 374; Holcomb *v.* Holcomb, 11 N. J. Eq. (3 Stockt.) 281; Edwards *v.* Sanders, 6 S. C. 316.

6. Frisbie *v.* Fogarty, 34 Cal. 11; Montgomery *v.* Middlemiss, 21 Cal. 103; Belloe *v.* Rogers, 9 Cal. 125.

7. For the practice in the English courts in decree of sale, see 2 Daniels Chanc. Pl. & Pr. (5th Ed.) § 1264 *et seq.*

The *New York* Code requires provision

to be made for the payment of taxes, assessment of water rates; and they are made liens upon the property. And, in ascertaining the amount of the deficiency, these are to be deducted as if they were a part of the principal debt. New York Code, §§ 1626, 1627. Attorney's fees not allowed as part of debt, unless so stipulated in mortgage. Wylie *v.* Karnes, 54 Wis. 591.

It is not necessary that the decree should describe the premises by setting them forth by specific description; it will suffice if they are designated by reference to the description in the bill. McGee *v.* Smith. 1 C.E.Greene (N. J.), 462. Or to the mortgage deed when it is made a part of the record. Sims *v.* Cross, 10 Yerg. (Tenn.) 460.

The mortgagee is not entitled to an inquiry as to repairs or lasting improvements, unless he has established a case for such inquiry before the hearing. Norton *v.* Cooper, 25 L. J. 121; Landor *v.* Hooper, 6 Beav. 246; Clark *v.* Reyburn, 8 Wall. (U. S.) 318.

Only the estate of the mortgagor in the mortgaged premises, as it existed at the date of the mortgage, can be sold. The estate and interest of prior incumbrances cannot be affected by the decree of sale. McReynolds *v.* Mumes, 2 Keyes. (N. Y.), 214. The sale should be directed to be made subject to such incumbrances when they are known. Bache *v.* Doscher, 67 N. Y. 429. The fact that the prior encumbrance has been made a party to the junior mortgagee's suit of foreclosure can have no effect on his interest, nor preclude him from instituting an independent suit to foreclose under his own mortgage. Adams *v.* McPattlin, 11 Abb. N. Cas. (N. Y.) 369.

The *English* practice seems to be for the decree to be made at the hearing directing a sale, in case of default in payment of the amount ascertained to be due, within a specified time, usually six months. Boydell *v.* Mauby, 9 Hare 53; Belamy *v.* Cockle, 18 Jur. 465; Loyd *v.* Whitte, 17 Jur. 754; Smith *v.* Robinson, 1 Sm. & G. 140. And the court will, upon a bill for foreclosure, allow the defendant, upon application, to enlarge the time appointed for payment; and will so enlarge the time even although the final decree has been enrolled, upon the defendant consenting to a reference to compute the interest upon the whole sum reperted due for principal, interest, and costs. 2 Daniel Ch. Pl. & Pr. (5th Ed.) *999, 1000.

The same practice as to designating a particular time within which to pay exists in some of the American courts. Harkins *v.* Forsyth, 11 Leigh (Va.), 294; Stockton *v.* Dundee Mfg. Co., 12 N. J. Eq. 56; Durrett *v.* Whiting, 7 T. B. Mon. (Ky.) 547. In Eslava *v.* Lepretre, 21 Ala. 504; s. c., 56 Am. Dec., 266, *held*, to be discretionary with chancellor; while, in others, provision is made in the decree for redemption after sale, in which the commissioner making the sale will give the purchaser a certificate of purchase, a deed to be delivered only upon the expiration of the time for redemption without redemption having been made. Rhineheart *v.* Steveson, 23 Ill. 472; Jones *v.* Gilman, 14 Wis. 450; Walker *v.* Jarvis, 16 Wis. 28; Boester *v.* Byrne, 72 Ill. 466;—and in the mean time the mortgagor in possession is not liable for rents,—Whitney *v.* Allen, 21 Cal. 233. But this is not the general practice. As to decrees of sales in parcels, see Harris *v.* Makepeace, 13 Ind. 560; Roe *v.* Nicholson, 13 Wis. 373; James *v.* Fisk, 17 Miss. 144; Hunt *v.* Dohrs, 39 Cal. 304.

When the interest of parties subsequently interested, and who are before the court, make such a course advisable, it is within the discretion of the court to order the whole premises sold, although a portion thereof would suffice to pay off the mortgage debt, when such would better protect the interest of such subsequently interested parties. Livingston *v.* Mildrum, 19 N. Y. 440; Brevoort *v.* Jackson, 1 Edw. Ch. (N. Y.) 447.

The court cannot give a lien upon, or affect any other property, of the mortgagor than that included in the mortgage until that is exhausted, nor order a general execution except after the deficiency has been ascertained. Clapp *v.* Maxwell, 13 Neb. 542; Scott *v.* Russ, Ex'r, 21 Fla. 260.

In a case where five mortgages had been given on one tract, and subsequently a small strip was taken and condemned for a railroad tract, and the owner paid therefor, the bank holding the fourth and fifth mortgages subsequently foreclosed them, making the mortgagor the only party defendant, and bought the property at the sale. After this, the second mortgage was foreclosed, to which the R. R. Co., with others, was made a defendant, and the bank came in and proved its mortgages. *Held*, that the order of sale to be observed in the decree should be, first, the sale of all the land (except the condemned strip) to satisfy, in order, all five mortgages; and, in case of deficiency, the sale of the strip. Foster *v.* Union Bank, 34 N. J. Eq. 48.

1. *Conclusiveness of the Decree.*—The decree cannot be attacked collaterally. However erroneous it may be, the purchaser will get a good title according to the terms of the decree, as against all the parties to the proceeding who come within the proper scope of the foreclosure suit; and this is so even where the decree is subsequently reversed for error.[1]

2. *By Whom the Sale Should be Made.*—In those States which still retain the equity courts as separate tribunals, with a master in chancery, foreclosure sales are usually made by that officer, although a special commissioner may even there be appointed to make the sale. (See SPECIAL COMMISSIONERS.) Where the office of master in chancery does not exist, the sale will be made by a commissioner specially appointed by the court for that purpose. In the Federal courts, foreclosure sales are made by the marshal.[2]

1. If it appears that the court has jurisdiction of the subject-matter and of the person, the decree of sale and the sale under it cannot be collaterally attacked. Errors and mistakes in the proceedings will not affect its validity. Parker *v.* Kane, 22 How. (U. S.) 14; Thompson *v.* Tolmie, 2 Pet. (U. S.) 157; Rhode Island *v.* Massachusetts, 12 Pet. (U. S.) 657; Phil. & Trenton R. Co. *v.* Stimpson, 14 Pet. (U. S.) 448; Graham *v.* Bleakie, 2 Daly (N. Y.), 55; Dewey *v.* Brownell, 54 Vt. 441; s. c., 41 Am. Rep. 441; Florentine *v.* Barlow, 2 Wall. (U. S.) 210; Thomas *v.* Le Baron, 8 Metc. (Ky.) 355; Pursley *v.* Hays, 22 Iowa, 1; Iverson *v.* Loberg, 26 Ill. 179; Burford *v.* Rosenfield, 37 Tex. 42; Dill *et al. v.* Vincent, 78 Ind. 321; Davis *v.* Helbig, 27 Md. 452; Fithian *v.* Monks, 43 Mo. 502; Wallace *v.* Field, 56 Mich. 3; Woods *v.* Lee, 21 La. Ann. 505; Dequindre *v.* Williams, 31 Ind. 444; Goltra *v.* Green, 98 Ill. 317. A decree of foreclosure is in the nature of a proceeding *in rem*,—Trenholm *v.* Wilson, 13 S. Car., 174;—even although it be made to appear that some of the claims paid out of the proceeds were fraudulent, and to a greater amount than necessary,—Myer *v.* McDougal, 47 Ill. 278.

But a sale of land not included in the decree is, as to such land, void. Ryan *v.* Dox, 24 Barb. (N. Y.) 440; Shiver's lessee *v.* Lynn, 2 How. (U. S.) 43;—so if made on a different notice from that ordered in the decree, — Reynolds *v.* Wilson, 15 Ill. 394;—so where application was to sell one tract, and license to sell, notice of sale, and deed were of another tract,—Frazer *v.* Steenrod, 7 Clarke (Iowa), 339;—so where the mortgage was invalid, being given by persons claiming to be trustees of a corporation, but who had no authority to bind it,—Brindernagle *v.* German Reformed Church, 1 Barb. Ch. (N. Y.) 15;—so sales made after the time allowed by statute for decrees to remain in force,—Mason *v.* Ham, 36 Me. 573; Wellman *v.* Lawrence, 15 Mass. 326;—so of sale made under void decree.—Harshey *v.* Blackmore, 20 Iowa 161; Shelton *v.* Tiffin, 6 How. (U. S.) 163.

The decree and sale have no validity as against one who was interested in the premises and not made a party. Goodenow *v.* Ewer, 16 Cal. 461; Shores *v.* Scott River Co., 21 Cal. 135.

2. While the sale is usually made by the marshal, it may be made by a commissioner specially appointed by the court: Blossom *v.* R. Co., 3 Wall. (U. S.) 196.

For provisions of the statutes of the several States, see 2 Jones on Mort. (2d Ed.), §§ 1317–1366.

A foreclosure sale, irregular because not made at the proper time as required by law, does not operate to transfer the mortgage debt itself to the purchaser, so as to entitle him to hold the land and collect the residue of the mortgage debt. Wells's Adm'r *v.* Lincoln County, 80 Mo. 424.

For proceedings in foreclosure sales in the *English* courts, see 2 Daniels Ch. Pl. & Pr. (5th Ed.), 1264 *et seq.*

The decree for sale confers the power to make the sale, while the decree confirming the report of sale gives validity to such sale when made.

It is in the discretion of the chancellor, where there are no statutory requirements on the subject, to order a sale for cash or on credit. Cummins *v.* Little, 1 C. E. Green (N. J.), 48; Penn *v.* Tollison, 20 Ark. 652.

If the sale is made without notice, it will be set aside. Shier *v.* Prentis, 55

**VII. Conduct of the Sale.**—By whomsoever conducted, whether by an officer of the court, or by a special commissioner appointed for that purpose, or by some ministerial officer designated by statute, the sale is, in contemplation of law, the act of the court, and the person who makes it is the instrument of the court, deriving his authority from the decree ordering the sale; and the validity of his acts in the matter of the sale is dependent upon his obedience to the directions contained in the decree. The decree ordering the sale usually prescribes the duties of the person making it, as to terms of sale, time, place, and manner of sale; the notice[1] or sale to be given, and how given, except when regulated by statute.[2] The court may, however, leave the details of the sale

Mich. 175; Nugent *v.* Nugent, 54 Mich. 557. The advertisement of the time and place of sale should be specific as to the place where the sale is to be made; the day, and between what hours of the day the sale will be made. If these requirements are not observed and a fair price not bid, the sale will be set aside. Trustees of Schools *v.* Snell, 19 Ill. 156; s. c., 68 Am. Dec. 586. Where the sale was advertised for a particular day, between the hours of 12 and 5 o'clock in the afternoon, it was held that the sale would not be set aside, although it would have been better to have designated a particular hour between these two. Cone *v.* Halstead, 1 Green Ch. (N. J.) 311.

Where the order requires the notice to be published once a week for a certain number of weeks, it is not essential that the period between the first and last publication should be the designated number of weeks, but only that one publication a week be made. Sheldon *v.* Wright, 5 N. Y. 497; Davis *v.* Huston, 15 Neb. 28. The advertisement should also contain a description of the premises. The report should show that the advertisement has been made. Clark *v.* Bell, 4 Dana (Ky.), 15.

The officer publishing the notice of sale should do so in such way as to promote the interest of all parties in effecting a sale of the property; and failure so to do which results prejudicially to any of the parties in interest will induce the court to set the sale aside. Cummins *v.* Little, 1 C. E. Greene (N. J.), 48. In such sales a warrant cannot be implied. Mitchell *v.* Pinckney, 13 S. Car. 203.

If the sale has not been advertised in accordance with the requirements of the order, it will be set aside. Glenn *v.* Wootten, 3 Md. Ch. Dec. 514; Baily *v.* Baily, 9 Rich. Eq. (S. Car.) 392.

1. **The Notice** required to be given in most of the states is regulated by statute; and where so regulated, the statutory provision must be strictly followed. Shier *v.* Prentis, 55 Mich. 175; Miller *v.* Lefever, 10 Neb. 77. Where not regulated by statute, the notice of sale may be prescribed by the decree of foreclosure, or left to the discretion of the officer intrusted with the execution of the decree. Trustees of Schools *v.* Snell, 19 Ill. 156; s. c., 68 Am. Dec. 586. See Miller *v.* Lefever, 10 Neb. 77.

**Contents of Notice.**—As to contents of notice, see Ray *v.* Oliver, 6 Paige Ch. (N. Y.) 489; Marsh *v.* Ridgeway, 18 Abb. (N. Y.) Pr. 262; Laight *v.* Pell, 1 Edw. Ch. (N. Y.) 577; Veeder *v.* Fonda, 3 Paige Ch. (N. Y.) 94; Hoffman *v.* Burke, 21 Hun (N. Y.), 580.

**Publication of Notice** is regulated by statute in the various States. See Wilson *v.* Page, 76 Me. 279; Kopmeier *v.* O'Neil, 47 Wis. 593; Market Nat. Bank *v.* Pacific Nat. Bank, 89 N. Y. 397, 399; s. c., 11 Abb. (N. Y.) N. C. 104; Olcott *v.* Robinson, 21 N. Y. 150; Sheldon *v.* Wright, 5 N. Y. 497; Steinle *v.* Bell, 12 Abb. (N. Y.) Pr. N. S. 171, 177; Merritt *v.* Village of Rochester, 8 Hun (N. Y.), 40. 45; Wood *v.* Terry, 4 Lans. (N. Y.) 80, 85; Hackley *v.* Draper, 4 T. & C. (N. Y.) 614, 622; Valentine *v.* McCue, 26 Hun (N. Y.), 456.

The notice need not to be inserted in every edition of the paper issued on the day on which the notice is published. Everson *v.* Johnson, 22 Hun (N. Y.), 15.

**Change of Name of Paper During Publication of Notice** will not affect the validity of the sale. Sage *v.* Central R. R Co., 13 West. Jur. 218.

**Proof of Publication** may be made by affidavit of person having knowledge of the fact. Miller *v.* Lefever, 10 Neb. 177. In absence of evidence to the contrary, it will be presumed that publication of notice in a daily newspaper was first made on the day of its date. Kopmeier *v.* O'Neil. 47 Wis. 593.

2. **Notice of Sale.**—In most, if not all,

to the master, or other officer who is to make the sale. The sale should be made at public vendue, by auction, and the property should be struck off to the highest and last bidder.[1] The officer making the sale should be personally present[2] at the sale, as exigencies may arise requiring the exercise of judgment and discretion.[3] The officer or special commissioner making the sale must report his action in the premises to the court for confirmation.[4]

the States, notice of the time and place of sale is required by the statute; and the sale in such States without the prescribed notice is illegal. Chicago & Gt. Western R. Co. *v.* Peck, 112 Ill. 408; Shier *v.* Prentis, 55 Mich. 175; Miller *v.* Lefever, 10 Neb. 77; Trustees of Schools *v.* Snell, 19 Ill. 156; s.c., 68 Am. Dec. 586; Chamberlain *v.* Dempsey, 13 Abb. (N. Y.) Pr. 421; s. c., 22 How. (N. Y.) Pr. 356; Dalby *v.* Pullen, 1 Russ. & Myl. 296.

1. **Sale to Highest Bidder.**—The officer making a sale is not obliged to accept the highest bid in those cases where he has reason to believe that the bid is not made in good faith or that the bidder is not able to comply with the terms of the sale. Wiltsie on Mortgage Foreclosure, 578, § 480; see also Gray *v.* Viers, 3 Md. 18.

2. See Reynolds *v.* Wilson, 15 Ill. 394; Blakey *v.* Abert, 1 Dana (Ky.), 185; Meyer *v.* Bishop, 27 N. J. Eq. (12 C. E. Gr.) 145; Blossom *v.* Milwaukee & C. R. Co., 70 U. S. (3 Wall.) 205; bk. 18, L. ed. 43, 46; Williamson *v.* Berry, 49 U. S. (8 How.) 495, 544; bk. 12, L. ed. 1170, 1191; Connolly *v.* Belt, 5 Cr. C. C. 405. 408. See also Powell *v.* Tuttle, 3 N. Y. 396; Sebastian *v.* Johnson, 72 Ill. 283; s. c., 22 Am. Rep. 145; Berger *v.* Duff, 4 Johns. Ch. (N. Y.) 368; Taylor *v.* Hopkins, 40 Ill. 442.

3. **Discretion of Officer.**—The parties to the sale are entitled to the honest exercise of the discretion of the officer making the sale; and the exercise of such discretion is final. O'Donnell *v.* Lindsey, 39 N. Y. Super. Ct. (7 J. & S.) 523, 529, 530; Russell *v.* Conn., 20 N. Y. 81; Lichtfield *v.* Register, 76 U. S. (9 Wall.) 577; bk. 19, L. ed. 64; The Secretary *v.* McGarrahan, 76 U. S. (9 Wall.) 311; bk. 19, L. ed. 64; Gaines *v.* Thompson, 74 U. S. (7 Wall.) 349; bk. 19, L. ed. 62.

**Postponement of Sale** may be made from time to time or adjourned to another place, in the discretion of the officer making the sale, on reasonable cause. Richards *v.* Holmes, 59 U. S. (18 How.) 143; bk. 16, L. ed. 320; Tinkom *v.* Purdy, 5 Johns. (N. Y.) 345; Russell *v.* Richards, 11 Me. (2 Fairf.) 371; s. c., 25 Am. Dec. 354; Warren *v.* Leland, 9 Mass. 265; Strong *v.* Catton, 1 Wis. 471.

**Application for Postponement.** As to, see Tinkom *v.* Purdy, 5 Johns. (N. Y.) 345; Astor *v.* Romayne, 1 Johns. Ch. (N. Y.) 310; McGown *v.* Sandford, 9 Paige Ch. (N. Y.) 290; Ward *v.* James, 8 Hun (N. Y.), 526; Russell *v.* Richards, 11 Me. (2 Fairf.) 371; s. c., 26 Am. Dec. 532; Richards *v.* Holmes, 59 U. S. (18 How.) 143, 147; bk. 16, L. ed. 320.

**Notice of Postponement** is required to be published in the same place the notice of the sale was published. Le Farge *v.* Van Wagenen, 14 How. (N. Y.) Pr. 54.

Practice when advertised day falls on Sunday: Sayles *v.* Smith, 12 Wend. (N. Y.) 57; s. c., 27 Am. Dec. 117; Westgate *v.* Handlin, 7 How. (N. Y.) Pr. 372; Bunce *v.* Reed, 16 Barb. (N. Y.) 347, 349. Practice where day of sale subsequently made a holiday: White *v.* Zust, 23 N. J. Eq. (1 Stew.) 107.

Notice of postponement before day advertised for sale renders invalid a sale made on that day. Jackson *v.* Clark, 7 Johns. (N. Y.) 217; Frederick *v.* Wheelock, 3 T. & C. (N. Y.) 210; Miller *v.* Hull, 4 Den. (N. Y.) 104; La Farge *v.* Van Wagenen, 14 How. (N. Y.) Pr. 54.

**Holding Sale Open.** As to, see Isbell *v.* Kenyon, 33 Mich. 63; Baring *v.* Moore, 5 Paige Ch. (N. Y.) 48.

**Memorandum of Sale.**—Purchaser need not sign. Bicknell *v.* Byrnes, 23 How. (N. Y.) Pr. 486; Wadsworth *v.* Lyon, 93 N. Y. 201, 219; s. c., 45 Am. Rep. 109; Miller *v.* Collyer, 36 Barb. (N. Y.) 250; Willets *v.* Van Alst, 28 How. (N. Y.) Pr. 325; National Fire Ins. Co. *v.* Loomis, 11 Paige Ch. (N. Y.) 431.

The signature of the officer is sufficient under the Statute of Frauds. Bicknell *v.* Byrnes, 23 How. (N. Y.) Pr. 486. By signing memorandum, purchaser does not become liable to suit, but simply subjects himself to the jurisdiction and control of the court. Miller *v.* Collyer, 36 Barb. (N. Y.) 250; Willets *v.* Van Alst, 26 How. (N. Y.) Pr. 325, 346; *In re* Davis, 7 Daly (N. Y.), 1, 8; Graham *v.* Bleakie, 2 Daly (N. Y.), 171.

**Reporting Sale.**—The officer making the sale should report it to the court. Agricultural Ins. Co. *v.* Barnard, 96 N. Y. 525. As to errors in such report, see Ruggles *v.* First Nat. Bank of Centreville, 43 Mich. 192.

4. **Conduct of Sale.**—The sale must be

**VIII. The Sale Not Within the Statute of Frauds.**—It is the established doctrine, both in the English and American courts, that the sale is not within the Statute of Frauds;[1] at all events, is not within the statute after confirmation.[2]

**IX. Duty of Officer Conducting Sale.**—It is the duty of the officer empowered to make the sale to be personally present, and to see that the same is conducted with the utmost fairness and impartiality, so as to protect the rights and promote the interests of all parties concerned. In the exercise of a sound discretion he may adjourn the sale if necessary to prevent a sacrifice of the property; or, if the sale proceeds, he may reject bids which are manifestly not made in good faith, and where there is no ability to comply with the bid. He may also make short adjournments in order to allow the mortgagor to pay the debt, and thus prevent a sale, when such application is made at the time for the sale to begin, and ability to pay is shown. In short, exigencies may arise at the time of the sale calling for the exercise of judgment and discretion on the part of this officer; and these cannot be delegated.[3]

made by the officer appointed by the decree or designated by the statute,—Heyer *v.* Deaves, 2 Johns. Ch. (N. Y.) 254; May *v.* May, 11 Paige Ch. (N. Y.) 201; *compare* Connolly *v.* Belt, 5 Cr. C. C. 405, 408;—or under his immediate direction or personal supervision,—Blossom *v.* Milwaukee & C. R. Co., 70 U. S. (3 Wall.) 196, 205; bk. 18, L. ed. 43; Reynolds *v.* Wilson, 15 Ill. 394; Blakey *v.* Abert, 1 Dana (Ky.), 185; Meyer *v.* Bishop, 27 N. J. Eq. (12 C. E. Gr.) 145; Williamson *v.* Berry, 49 U. S. (8 How.) 495, 544; bk. 12, L. ed. 1170, 1191.

It seems that the reason requiring the personal supervision of the officer delegated to make the sale is because the statute imposes a duty and discretionary power which cannot be delegated. Meyer *v.* Patterson, 28 N. J. Eq. (1 Stew.) 239; Meyer *v.* Bishop, 27 N. J. Eq. (12 C. E. Gr.) 141; People *v.* Collins, 7 Johns. (N. Y.) 549; Potter *v.* Luther, 3 Johns. (N. Y.) 431; Wilcox *v.* Smith, 5 Wend. (N. Y.) 231; s. c., 21 Am. Dec. 213; State *v.* Carroll, 38 Conn. 449; s. c., 9 Am. Rep. 409; Powell *v.* Tuttle, 3 N. Y. 396, 400; Sherwood *v.* Reade, 7 Hill (N. Y.), 431; Sharpe *v.* Speir, 4 Hill (N. Y.), 76; Downing *v.* Rugar, 21 Wend. (N. Y.) 178; s. c., 34 Am. Dec. 223; York *v.* Allen, 30 N. Y. 104, 111; Pell *v.* Ulmar, 18 N. Y. 139, 144; s. c., 21 Barb. (N. Y.) 500; Olmstead *v.* Elder, 5 N. Y. 144, 147. And the parties have a right to the honest exercise thereof. O'Donnell *v.* Lindsey, 39 N. Y. Super. Ct. (7 J. & S.) 523, 529, 530; Russell *v.* Conn, 20 N. Y. 81.

1. 2 Daniell Ch. Pl. & Pr. (5th Ed.), *1283; 1 Sugd. V. & P. 65; Rorer on Judicial Sales, § 146. In Atty.-Genl. *v.* Day, 1 Ves. Sr. 218, Lord Hardwick, in declaring that judicial sales were not within the Statute of Frauds, held that after the confirmation of the master's report of sale the court would carry into execution a purchase made by oral bid; and such is the established doctrine, the bidding being in almost all cases oral. Hutton *v.* Williams, 35 Ala. 503; Stewart *v.* Garvin, 31 Mo. 36; Fulton *v.* Moore, 25 Pa. St. 468; Halleck *v.* Guy, 9 Cal. 181. If within the statute at all, the memorandum of the auctioneer is a sufficient compliance. Hageman *v.* Johnson, 35 Barb. (N. Y.) 200.

2. Hutton *v.* Williams, 55 Ala. 503.

3. "Where a sale by a public officer is conducted in violation of the spirit and policy of the law, and so as, in fact, to defeat the just claims, or greatly prejudice the rights, of parties interested, the sale will be set aside, though the formal requirements of the statute have been complied with." Cummins *v.* Little, 1 C. E. Greene (N. J.), 48.

**Sale at Auction.**—The sale, unless specially directed otherwise, should be made at auction; and the officer making the sale may, in his discretion, employ an auctioneer. Blossom *v.* Railroad Co. 3 Wall. (U. S.) 205. But the officer should himself be present at the sale, so as to meet exigencies as they may arise. Blossom *v.* Railroad Co., 3 Wall. (U. S.) 205.

**Bidding.**—Bids should be received as

**X. Rights, Relations, and Obligations of the Purchaser at the Sale.**—The highest and best bidder at the sale has the right to demand that the property be struck off to him; and, upon making the required deposit, where such is the regulation of the sale, to have the commissioner report the sale to the court for confirmation.[1]

long as offered, but an unreasonable time between bids should not be permitted. The property should be struck off to the highest bidder.

**Deposit by Bidder.**—There is no settled rule respecting judicial sales in the American courts as to requiring a deposit of a reasonable amount of the purchase-money by the purchaser when the property is struck off to him. It is in the discretion of the officer conducting the sale, when not required by the decree. Md. Perm. Land & Build. Soc. *v.* Smith, 41 Md. 516; Gray *v.* Veirs, 33 Md. 18.

Where at a sale by the master the right is reserved to consider the biddings open until the deposit is made, and the purchaser refuses to make the deposit, the master may disregard his bid and proceed with the sale. Hewlett *v.* Davis, 3 Edw Ch. (N. Y.), 338.

It is proper to keep the biddings open until the deposit is made, and if the purchaser refuses or fails to make it, to resume the sale; and the officer may even adjourn the sale to another day when the deposit is not made, if that course appears to be best. A requirement for *immediate* payment of the whole purchase-money at the time of the sale will be regarded as unreasonable and oppressive. Goldsmith *v.* Osborne, 1 Edw. Ch. (N. Y.) 560.

**Power to Adjourn Sale.**—The officer making the sale has the power to adjourn the sale to another day, and to make the sale at the adjourned time. His discretion in this regard must be exercised with the utmost good faith, and with a view to the best interests of all concerned. Kelly *v.* Creen, 63 Pa. St. 299: Tinkom *v.* Purdy, 5 John. (N. Y.) 345; Swortzell *v.* Martin, 16 Iowa, 519.

**1. Until Confirmation,** there is no judicial sale and no title passes. Mills *v.* Ralston, 10 Kan. 206; Young *v.* Keogh, 11 Ill. 642; Busey *v.* Hardin, 2 B. Mon. (Ky.) 407; Allen *v.* Poole, 54 Miss. 323; Gowan *v.* Jones, 18 Miss. (10 Smed. & M.) 164; Hay's Appeal, 51 Pa. St. 58; Thorn *v.* Ingran, 25 Ark. 52; Southern Bank *v.* Humphreys, 47 Ill. 227; Bozza *v.* Rowe, 30 Ill. 198; Penn *v.* Heisey, 19 Ill. 297; s. c., 68 Am. Dec. 587; Ayers *v.* Baumgarten, 15 Ill. 444; Forman *v.* Hunt, 3 Dana (Ky.), 614, 621; Hurt *v.* Stull, 4 Md. Ch. Dec. 391; Harrison *v.* Harrison, 1 Md. Ch. Dec. 331; Sewall *v.* Costigan, 1 Md. Ch. Dec. 208; Andrews *v.* Scotten, 2 Bland Ch. (Md.) 538; Iglehart *v.* Arminger, 1 Bland Ch. (Md.) 527; Wagner *v.* Cohen, 6 Gill (Md.). 97; Mason *v.* Osgood, 64 N. C. 467; Vandaver *v.* Baker, 13 Pa. St. 121, 126; Moore *v.* Shultz, 13 Pa. St. 102; s. c., 53 Am. Dec. 446; Yerby *v.* Hill, 16 Tex. 377, 381; Griffith *v.* Fowler, 18 Vt. 394; Blossom *v.* Milwaukee & C. R. Co., 70 U. S. (3 Wall.) 207; bk. 18 L. ed. 47; Minnesota R. Co. *v.* St. Paul R. Co., 69 U. S. (2 Wall.) 609; bk. 17. L. ed. 886; Williamson *v.* Berry, 49 U. S. (8 How.) 547; bk. 12, L. ed. 1170, 1192. The court can stay the sale, or confirm or reject the referee's report, as law and justice may require. Sessions *v.* Peay, 23 Ark. 39, 41. See Penn's Admr. *v.* Tolleson, 20 Ark. 652; Robertson *v.* Haun, Freem. Ch. (Miss.) 270; Tooley *v.* Kane, 1 Smed. & M. Ch. (Miss.) 518, 522; Deaderick *v.* Smith, 6 Humph. (Tenn.) 146; Wells *v.* Rice, 34 Ark. 346; Dills *v.* Jasper, 33 Ill. 262; Tooley *v.* Gridley, 11 Miss. (3 Smed. & M.) 514; s. c., 41 Am. Dec. 628; Allen *v.* Elderkin, 62 Wis. 627; Welp *v.* Gunther, 48 Wis. 543; Woehler *v.* Endter, 46 Wis. 301.

Where deed has been delivered without confirmation, possession may be valid. Gown *v.* Jones, 18 Miss. (10 Smed. & M.) 164.

**Referee's Report** should show amount of deficiency, if any. Moore *v.* Shaw, 15 Hun (N. Y.), 428; aff'd, 77 N. Y. 512; Springsteene *v.* Gillett, 30 Hun (N. Y.), 260.

**Notice of Application for Confirmation** should be given. Branch Bank *v.* Hunt, 8 Ala. 776.

**Order of Confirmation,** the usual order *nisi* in the absence of objection. New England Security Co. *v.* Smith, 25 Kan. 622, 624; Moore *v.* Pye, 10 Kan. 246; White-crow *v.* White-wing, 3 Kan. 276; Challiss *v.* Wise, 2 Kan. 193; Koehler *v.* Ball, 2 Kan. 160.

**Exceptions to Report**—as to, see Ruggles *v.* National Bank of Centreville, 43 Mich. 192; Howard *v.* Bond, 42 Mich. 131.

**Effect of Confirmation** is to make the referee's act the act of the court. See Mc-

He is regarded as a *quasi* party to the suit, for he is under both the control and protection of the court.[1]

Until confirmation of the sale by the court, he is not, properly speaking, a purchaser.[2] He is rather a preferred bidder, whose right to be invested with the title to the property only becomes perfect upon confirmation of the report of sale by the court.[3] Until such time his rights are in abeyance. Any loss happening to the property between the date of the sale and confirmation of the report will not fall upon him. As yet he is not the owner.[4] The general rule is, that before confirmation he has the right to have a reference as to title; he may examine the abstract and muniments of title before the referee; and file objection if the report is favorable to the title. He has no right to demand

Gown *v.* Newcomb, 4 Abb. (N. Y.) N. C. 80; Dills *v.* Jasper, 33 Ill. 262.

**Setting Aside Confirmation** is in the discretion of the court. See Goodell *v.* Harrington, 76 N. Y. 547; Hale *v.* Clawson, 60 N. Y. 339; Crane *v.* Stiger, 58 N. Y. 625; Buffalo Savings Bank *v.* Newton, 23 N. Y. 160; Moore *v.* Titman, 33 Ill. 358, 366; Perrien *v.* Fetters, 35 Mich. 233; Branch Bank *v.* Hunt, 8 Ala. 876; Williamson *v.* Berry, 49 U. S. (8 How.) 495. 546; bk. 12, L. ed. 1170.

**In Kansas**, where the proceedings are regular and in conformity with the decree, in the absence of extrinsic circumstances of an equitable character, sale will be confirmed. New England Mortgage Security Co. *v.* Smith, 25 Kan. 622; Moore *v.* Pye, 10 Kan. 246, 250; Challiss *v.* Wise, 2 Kan. 193.

1. Cazet *v.* Hubbell, 36 N. Y. 677; Miller *v.* Collyer, 36 Barb. (N. Y.) 250: Graham *v.* Bleakie, 2 Daly (N. Y.), 55; Brasher *v.* Cortlandt, 2 Johns. Ch. (N. Y.) 505; Requa *v.* Rea, 2 Paige Ch. (N. Y.) 339; Coulter *v.* Henderson, 27 Miss. 685, 689; Ogilvie *v.* Richardson, 14 Wis. 157; Wood *v.* Mann, 3 Sumn. C. C. 318; Casamajor *v.* Strole, 1 Sim. & S. 381; Landsdown *v.* Elderton, 14 Ves. 512.

**As to Proceedings Where Purchaser Refuses or Neglects to Complete the Purchase** —Riggs *v.* Pursell, 74 N. Y. 370; Miller *v.* Collyer, 36 Barb. (N. Y.) 250; Graham *v.* Bleakie, 2 Daly (N. Y.), 55; Wood *v.* Mann, 3 Sumn. C. C. 318; Knight *v.* Maloney, 4 Hun (N. Y.), 33; Ruhe *v.* Law, 8 Hun (N. Y.), 251; Chase *v.* Chase, 15 Abb. (N. Y.) N. C. 91.

**Enforcing Sale by Attachment.**—See Merchants Bank *v.* Thomson, 55 N. Y. 7; Cazet *v.* Hubbell, 36 N. Y. 677; Miller *v.* Collyer, 36 Barb. (N. Y.) 250; Graham *v.* Bleakie, 2 Daly (N. Y.), 55; Brasher *v.* Cortlandt, 2 Johns. Ch. (N. Y.) 505; Requa *v.* Rea, 2 Paige Ch. (N. Y.) 339; Anderson *v.* Foulke, 2 Har. & G. (Md.) 346; Richardson *v.* Jones, 3 Gill & J. (Md.) 163; s.c., 22 Am. Dec. 393; Wood *v.* Mann, 3 Sumn. C. C. 318; Lansdown *v.* Elderton, 14 Ves. 512; Savile *v.* Savile, 1 P. Wms. 745.

2. **Confirmation of Sale.**—See Wells *v.* Rice, 34 Ark. 346; Dills *v.* Jasper, 33 Ill. 262; Allen *v.* Poole, 54 Miss. 323; Gowan *v.* Jones, 18 Miss. (10 Smed. & M.) 168; Tooley *v.* Gridley, 11 Miss. (3 Smed. & M.) 515; s. c., 41 Am. Dec. 628; Hay's Appeal, 51 Pa. St. 61; Allen *v.* Elderkin, 62 Wis. 627; Welp *v.* Gunther, 48 Wis. 543; Woehler *v.* Endter, 46 Wis. 301; Twigg *v.* Fifield, 13 Ves. 517; *In re* Minor, 11 Ves. 559.

3. Dills *v.* Jasper, 33 Ill. 272; Blossom *v.* Milwaukee & C. R. Co., 70 U. S. (3 Wall.) 196; bk. 18, L. ed. 43; Martin *v.* Kelly, 59 Miss. 652.

4. See Wells *v.* Rice, 34 Ark. 346; Dills *v.* Jasper, 33 Ill. 262; Young *v.* Keogh, 11 Ill. 642; Mills *v.* Ralston, 10 Kan. 206; Busey *v.* Hardin, 2 B. Mon. (Ky.) 407; Allen *v.* Poole, 54 Miss. 323; Gowan *v.* Jones, 18 Miss. (10 Smed. & M.) 164; Tooley *v.* Gridley, 11 Miss. (3 Smed. & M.) 493; s. c., 41 Am. Dec. 628; Blossom *v.* Milwaukee & C. R. Co., 70 U. S. (3 Wall.) 196; bk. 18, L. ed. 43. *Compare* Jackson *v.* Warner, 32 Ill. 331.

**As to the Rule in New York** regarding the confirmation of mortgage foreclosure sales, see Stimson *v.* Arnold, 5 Abb. (N. Y.) N. C. 377; Fort *v.* Burch, 6 Barb. (N. Y.) 60; Fuller *v.* Van Geesen, 4 Hill (N. Y.), 171; aff'd, 1 How. (N. Y.) App. Cas. 240; Terpenning *v.* Agricultural Ins. Co., 14 Hun (N. Y.), 299; Mitchell *v.* Bartlett, 51 N. Y. 447; N. Y. Supreme Court Rule 61; Brown *v.* Marzyck, 19 Fla. 840; Petty *v.* Mays, 19 Fla. 652; Loomis *v.* Wheeler, 18 Wis. 524; Moore *v.* Shaw, 15 Hun (N. Y.), 428.

any other title than the mortgagor had at the date of the mortgage.[1] If the title is defective the court will not ordinarily compel him to take the deed, and complete the purchase, if such defect was unknown to him.[2] If he is relieved from his bid he should

**1. The Purchaser Takes the Risk** as to all claims affecting the title to property which existed prior to the mortgage. See Riggs *v.* Pursell, 66 N. Y. 193; Fryer *v.* Rockefeller, 63 N. Y. 268, aff'g 4 Hun (N. Y.), 800; Holden *v.* Sackett, 12 Abb. (N. Y.) Pr. 473; Strong *v.* Waddell, 56 Ala. 471; Boggs *v.* Fowler, 16 Cal. 559; s. c., 76 Am. Dec. 561; Osterberg *v.* Union T. Co., 93 U. S. (3 Otto) 424; bk. 23, L. ed. 964. See N. Y. Code Civ. Proc. § 1632.

Where mortgage purports to cover an estate in fee, but in fact covers only a leasehold, the purchaser will be bound. Graham *v.* Blake, 2 Bail. (S. C.) 55.

**Purchaser Chargeable with Notice** of the defects and irregularities of record in the foreclosure proceedings. McKernan *v.* Neff, 43 Ind. 503; Piel *v.* Baryer, 30 Ind. 333; Alexander *v.* Greenwood, 24 Cal. 505.

**Irregularity Prior to Judgment** does not excuse purchaser where all the parties in interest are before the court. De Forest *v.* Farley, 62 N. Y. 628; Blakeley *v.* Calder, 15 N. Y. 617; Gaskin *v.* Anderson, 55 Barb. (N.Y.) 259; s. c , 7 Abb. (N. Y.) Pr. N. S. 1; Graham *v.* Bleakie, 2 Daly (N. Y.), 55; Ogden *v.* Walters, 12 Kan. 282; Mills *v.* Ralston, 10 Kan. 206.

Where the purchaser is himself a party to the action, he cannot question the regularity of the decree. Concklin *v.* Hall, 2 Barb. Ch. (N. Y.) 136.

**After Confirmation,** errors in the proceedings or the decree no ground of relief. Daniel *v* Lezcht, 13 Gratt. (Va.) 195; Worsham *v.* Hardaway's Adm'r, 5 Gratt. (Va.) 60; Threlkeld *v.* Campbell, 2 Gratt. (Va.) 198; s. c., 44 Am. Dec. 384. Otherwise where the court had no jurisdiction of the case. Boggs *v.* Hargrave, 16 Cal. 559; s c., 76 Am. Dec. 561.

**2. Bidder Excused from Completing Purchase when** title doubtful or a mere equitable estate. Beckenbaugh *v.* Nally, 32 Hun (N. Y.), 160; Piser *v.* Lockwood, 30 Hun (N. Y.), 6; Lockman *v.* Reilley, 29 Hun (N. Y.), 434; Morris *v.* Mowatt, 2 Paige Ch. (N. Y.) 586; s. c., 22 Am. Dec. 661; Turner *v.* Clay, 3 Bibb (Ky.), 52; Perkins *v.* Wright, 3 Harr. & McH. (Md.) 326; Butler *v.* O'Hear, 1 Desaus. (S. C.) Eq. 382; s. c., 1 Am. Dec. 671; Thompson *v.* Todd, 1 Pet. C. C. 380; Stapylton *v.* Scott, 16 Ves. 272; Shapland *v.* Smith, 1 Bro. C. C. 75; Cooper *v.* Denne, 1 Ves. Jr. 565; s. c., 4 Bro. C. C. 80; Lowes *v.* Lush, 14 Ves. 550; Abel *v.* Heathcote, 2 Ves. Jr. 98.

The court will not compel a purchaser to take a title so defective that it may expose him to a suit either at law or in equity. Morris *v.* Mowatt, 2 Paige Ch. (N. Y.) 585; s. c., 22 Am. Dec. 661; Cooper *v.* Denne, 1 Ves. Jr. 565; s. c., 4 Bro. C. C. 80, 86; Seymour *v.* De Lancey, Hopk. Ch. (N. Y.) 436; s. c., 16 Am. Dec. 552; Morris *v.* Mowatt, 2 Paige Ch. (N. Y.) 586; s. c., 22 Am. Dec. 661; Jackson *v.* Edwards, 22 Wend. (N. Y.) 498, 509; Graham *v.* Bleakie, 2 Daly (N. Y.), 55; Banister *v.* Way, Dick. 686; Harding *v.* Harding, 4 Myl. & C. 515; Tanner *v.* Radford, 4 Myl. & C. 518; Hodder *v.* Ruffin, 1 Ves. & B. 544.

However, if the purchaser is tendered a confirmatory deed which remedies the defects, he will be required to complete the purchase. Graham *v.* Bleakie, 2 Daly (N. Y.), 55.

**Where the Court Had no Jurisdiction,** or the proceedings are otherwise void, or the necessary defendant was not properly served, the purchaser will not be compelled to take the title. Verdin *v.* Slocum, 71 N. Y. 345, reversing 9 Hun (N. Y.), 150; Cook *v.* Farren, 34 Barb. (N. Y.) 95; s. c., 21 How. (N. Y.) Pr. 286; 12 Abb. (N. Y.) Pr. 359; Alexander *v.* Greenwood, 24 Cal. 505; McKernan *v.* Neff, 43 Ind. 503.

**Defects of Title Unknown to Purchaser** at time of sale, such as an outstanding inchoate right of dower or a prior mortgage, will excuse purchaser from completing sale. Simar *v.* Canaday, 53 N. Y. 298; s. c., 13 Am. Rep. 523; Mills *v.* Van Voorhies, 20 N. Y. 412; Shiveley's Admr's *v.* Jones, 6 B. Mon. (Ky.) 274; Fitts *v.* Hoitt, 17 N. H. 530; Hirsch *v.* Livingstone, 3 Hun (N. Y ), 9; s. c., 48 How. (N. Y.) Pr. 243; Seaman *v.* Hicks, 8 Paige Ch. (N. Y.) 655.

**Inchoate Right of Dower** outstanding, excuses purchaser from completing sale. Simar *v.* Canaday, 53 N. Y. 298; s. c., 13 Am. Rep. 523; Mills *v.* Van Voorhies, 20 N. Y. 412; Shiveley's Admr's *v.* Jones, 6 B. Mon. (Ky.) 274; Fitts *v.* Hoitt, 17 N. H. 530.

**Prior Mortgage** an excuse. Hirsch *v.* Livingstone, 3 Hun (N. Y.), 9; s. c., 48 How. (N. Y.) Pr. 243; Seaman *v.* Hicks, 8 Paige Ch. (N. Y.) 655.

have his deposit refunded to him, and be repaid out of the funds,[1]

**Where Purchaser Discharged from His Contract, He Will be Repaid His Proper Disbursements,** with interest, out of the funds in the case, or may recover them in a direct suit. Raynor *v.* Selmes, 52 N. Y. 579; Morris *v.* Mowatt, 2 Paige Ch. (N. Y) 586, 593; s. c., 22 Am. Dec. 661; Reynolds *v.* Blake, 2 Sim. & S. 117; Attorney-general *v.* Newark, 8 Sim. 71; Smith *v.* Nelson, 2 Sim. & S. 557; Berry *v.* Johnson, 2 Younge & C. 564.

**As to Defects of Title Existing Prior to the Mortgage** which the action is brought to foreclose, see Riggs *v.* Pursell, 66 N. Y. 193; King *v.* Bardeaux, 6 Johns. Ch. (N. Y.) 38; s. c., 10 Am. Dec. 312; Weems *v.* Brewer, 2 Harr. & G. (Md ) 390.

**The Purchaser Takes the Risk** as to all claims existing prior to the execution of the mortgage. Riggs *v.* Pursell, 66 N. Y. 193; Fryer *v.* Rockfeller, 63 N. Y. 268, aff'g 4 Hun (N. Y.), 800; Holden *v.* Sackett, 12 Abb. (N. Y.) Pr. 473; Strong *v.* Waddell, 56 Ala. 471; Boggs *v.* Fowler, 16 Cal. 559; s. c., 76 Am. Dec. 561; Osterberg *v.* Union Trust Co., 93 U. S. (3 Otto) 424; bk. 23, L. ed. 964. See Graham *v.* Bleakie, 2 Daly (N. Y.), 55; Jackson *v.* Littell, 56 N.Y. 108; McKernan *v.* Neff, 43 Ind. 503; Alexander *v.* Greenwood, 24 Cal. 505; McMurray *v.* Brassfield, 10 Heisk. (Tenn.) 529.

**After Confirmation** simple errors in a decree or in the proceedings are not grounds for a relief. Daniel *v.* Leitch, 13 Gratt. (Va.) 195; Worsham *v.* Hardaway's Adm'r, 5 Gratt. (Va.) 60; Threlkelds *v.* Campbell, 2 Gratt. (Va.) 198; s. c., 44 Am. Dec. 384. Otherwise, however, where the court had no jurisdiction. Boggs *v.* Hargrave, 16 Cal. 559; s. c., 76 Am. Dec. 561.

**As to Enforcement Where There are Lunatic Defendants,** see Sternberg *v.* Schoolcraft, 2 Barb. (N. Y.) 153; Robertson *v.* Lain, 19 Wend. (N. Y.) 649; Crippen *v.* Culver, 13 Barb (N. Y.) 424; Prentiss *v.* Cornell, 96 N. Y. 665, aff'g 31 Hun (N. Y.), 169; Sandford *v.* Sanford, 62 N. Y. 553; Mutual Life Ins. Co. *v.* Hunt, 14 Hun (N. Y.), 169, aff'g 79 N. Y. 541.

**Formal Irregularities** will not excuse. Knight *v.* Moloney, 4 Hun (N. Y.), 33; Trilling *v.* Schumitsch, 67 Wis. 186; Wells *v.* Lincoln County, 80 Mo. 424.

**Purchaser is Entitled to a Marketable Title** (Fleming *v.* Burnham, 100 N. Y. 1; Lowes *v.* Lush, 14 Ves. 547), and will not be compelled to accept any other. Jordan *v.* Tillon, 77 N. Y. 518.

**A Title Open to Objection** is not a marketable title; and the court will compel the bidder to accept it. Fleming *v.* Burnham, 100 N. Y. 1, 10; People *v.* Board of Stock-brokers, 92 N. Y. 98; Jordan *v.* Poillon, 77 N. Y. 518; Post *v.* Bernheimer, 31 Hun (N. Y.), 247; Shriver *v.* Shriver, 86 N. Y. 575; Lockman *v.* Reilley, 29 Hun (N. Y.), 434; Richmond *v.* Gray, 85 Mass. (3 Allen) 25; Garnett *v.* Macon, 6 Call (Va.), 368; Christian *v.* Cabell, 22 Gratt. (Va.) 82; Emery *v.* Grocock, 6 Madd. 54; Smith *v.* Death, 5 Madd. 371; Lowes *v.* Lush, 14 Ves. 547.

**Appointment of Referee to Investigate Title** may be made, and if the title is found to be marketable purchaser will be compelled to complete the purchase. Graham *v.* Bleakie, 2 Daly (N. Y.), 55, 58; Ormsby *v.* Terry, 6 Bush (Ry.), 553; Banister *v.* Way, Dick. 686; Saunders *v.* Gray, 4 Myl. & C. 515; Tanner *v.* Rapford, 4 Myl. & C. 518; Harding *v.* Harding, 4 Myl. & C. 514; Hodder *v.* Ruffin, 1 Ves. & B. 544. Otherwise where the proceedings are for any reason void. Cook *v.* Farren, 34 Barb. (N. Y.) 95; s. c., 12 Abb. (N. Y.) Pr. 359; 21 How. (N. Y.) Pr. 286; Verdin *v.* Slocum, 71 N. Y. 345, reversing 9 Hun (N. Y.), 150; Graham *v.* Bleakie, 2 Daly (N. Y.), 55; Coffin *v.* Cooper, 14 Ves. 205; Duvall *v.* Speed, 1 Md. Ch. Dec. 225, 235.

**Partial Failure of Title** will always excuse the bidder from completing the purchase. Riggs *v.* Pursell, 66 N. Y. 192; Beckenbaugh *v.* Nally, 32 Hun (N. Y.), 160; Parker *v.* Rodman, 84 Ind. 256.

**As to Right of Bidder to Have Sale Completed,** see Hotchkiss *v.* Clifton Air Cure, 4 Keyes (N. Y.), 170; Rhodes *v.* Dutcher, 6 Hun (N. Y.), 453; Merchants' Bank *v.* Thomson, 55 N. Y. 7; Taylor *v.* Longworth, 39 U. S. (14 Pet.) 172; bk. 10, L. ed. 405; Diar *v.* Glover, Hoff. Ch. (N. Y.) 71; Worrall *v.* Munn, 53 N. Y. 185; American Ins. Co. *v.* Oakley, 9 Paige Ch. (N. Y.) 496; s. c., 38 Am. Dec. 561; Barnard *v.* Wilson, 66 Cal. 251.

1. Reynolds *v.* Blake, 2 Sim. & S. 117; Attorney-general *v.* Newark, 8 Sim. 71.

**Where no Funds in Court,** the plaintiff will be required to pay the purchaser the amount of his disbursements (Smith *v.* Nelson, 2 Sim. & S. 557; Lechmere *v.* Brasier, 2 Jac. & W. 287; Crayno *v.* Selmes, 52 N. Y. 579), and he may maintain an action to recover the amount thereof on a resale. Berry *v.* Johnson, 2 Y. & C. 564.

Where the defect in the title is caused by the negligence of the plaintiff himself, he will not be entitled to receive the amount of the disbursements he has been compelled to pay, from the surplus moneys

under the control of the court, any proper expenses incurred in reference to the title.[1]

His rights and obligations, after confirmation, will be noticed under a subsequent head.

arising from the second sale. Raynor *v.* Selmes, 52 N. Y. 579, reversing s. c. 7 Lans. (N. Y.) 440.

**Defects of Title Existing Prior to the Mortgage** will not be relieved from. See Riggs *v.* Purcell, 66 N. Y. 193; s. c., 10 Am. Dec. 312; King *v.* Bardeau, 6 Johns. Ch. (N. Y.) 38; s. c., 10 Am. Dec. 312; Weems *v.* Brewer, 2 Har. & G. (Md.) 390.

1. When the purchaser fails to complete his purchase he forfeits his deposit, unless good cause for such failure is shown; and a resale of the property may be ordered, and the expenses of the resale be chargeable against him; and if, on the second sale, the property brings less than at the former sale, judgment may be rendered against him for the difference; and the deposit may be applied on such judgment. Graham *v.* Bleakie, 2 Daly (N. Y.), 55; Willets *v.* Van Ault, 26 How. Pr. (N. Y.) 325; Knight *v.* Maloney, 4 Hun (N. Y.), 33; Harding *v.* Yarborough, 6 Jones Eq. (N. Car.) 215 n.; Clarkson *v.* Read, 15 Gratt. (Va.) 288; Simmons *v.* Tongue, 3 Bland (Md.), 341; Vannerson *v.* Cord, 1 S. & M. (Miss.) ch. 345; Folings *v.* Martin, 16 Beav. 586. In order to hold a purchaser liable for such deficiency, the order of resale should, after notice to him, declare the sale to be at his risk. Sharp *v.* Hess, 1 Tenn. Leg. Rep. 23.

The purchaser will be held strictly to his bargain where the sale has been fairly conducted, and he has the ability to comply,—Jewett *v.* Miller, 10 N. Y. 402;—unless he has, by mistake, given an unreasonable price,—Morsehead *v.* Frederick, cited in 1 Sugd. V. & P. 72;—or where there has been a serious mistake in the representations as to the land,—Gordon *v.* Sims, 2 McCord Ch. (S. Car.) 151; Laight *v.* Pell, 1 Edw. Ch. (N. Y.) 577;—or surprise,—Williamson *v.* Dale, 3 John. Ch. (N. Y.) 290;—or misrepresentation by the person conducting the sale,—Lachlan *v.* Reynolds, Kay, 52;—or false representation by the solicitor making the sale that a good title could be made,—Bronge *v.* Davis, 4 Jur. N. S. 683.

Before confirmation, losses by fire, or otherwise, which the property has sustained since the sale, do not fall upon the purchaser, although his bid has been accepted, and report of sale made. *Ex parte* Minor, 11 Vesey, 559; Wagner *v.* Cohen, 6 Gill (Md.), 102; Eakin *v.* Herbert, 4 Coldw. (Tenn.) 116; Mu. L. Ins. Co. *v.* Balch, 4 Abb. N. Cas. (N. Y.) 200.

Until confirmation, he cannot be compelled to complete his purchase, as, until such time his rights are in abeyance. Anon., 2 Vesey Jr. 335; Wells *et al. v.* Rice *et al.*, 34 Ark. 346. Bids for property sold under decree of the court are mere propositions, which may be rejected by the court in the exercise of its reasonable discretion, if the sale has not been perfectly fair, or where the purchaser has obtained an unconscientious advantage. Vanbussum *v.* Maloney, 2 Met. (Ky.), 550.

The title which the purchaser can demand being only such as the mortgagee acquired by the execution of the mortgage, it is no objection to the sale that there is a title outstanding paramount to that of the mortgagor. Thomas *v.* De Baun, 1 McCarter (14 N. J. Eq.), 37; Rose *v.* Page, 2 Sim. 471; Jerome *v.* McCarter, 94 U. S. 734; Boggs *v.* Fowler, 16 Cal. 529, s. c., 76 Am. Dec. 561. It is only the parties in the foreclosure suit whose right and title the decree proposes to pass at the sale; and even if prior encumbrancers are made parties, their title cannot be passed to the purchaser through the sale made by the court, except by their consent. Vander Kemp *v.* Prentice, 3 Dana, 409; Rucks *v.* Taylor, 49 Miss. 552; authorities *supra*. If subsequent encumbrancers have not been made parties, the land remains subject to redemption by them. Wiley *v.* Ewing, 47 Ala. 418; Newcomb *v.* Dewery, 27 Iowa, 381; Baker *v.* Pierson, 6 Mich. 522; Roney *v.* Bell, 9 Dana (Ky.), 3. But he shall not be relieved of his purchase because of defects of which he had knowledge at the time of the sale. Riggs *v.* Pursell 66 N. Y. 193. And, moreover, if the defect can be corrected within a reasonable time, he will not be released from his bid, but the defect will be remedied, and he be held to his purchase. Graham *v.* Bleakie, 2 Daly (N. Y.), 55.

All the rights of the mortgagor pass to the purchaser at the sale, no matter what irregularities may exist in the sale, even although it be no bar to the equity of redemption. Brobst *v.* Brock, 10 Wall. (U. S.) 519. The purchaser is subrogated to the rights of the mortgagee. Childs *v.* Childs, 10 Ohio St. 339 s. c.,

**XI. Report of Sale, and Action Thereon.**—The master or commissioner making the sale should report his action to the court, to the end that the sale may be confirmed. A motion to confirm the sale, with notice to the parties adversely interested to the confirmation, should be made. Confirmation *nisi* will be ordered, to become absolute within a designated time, unless cause is shown against it. If cause is not shown, it stands confirmed.[1]

In some of the States the practice is to raise objections to the confirmation by filing exceptions to the report in the first instance.[2]

If the report is not confirmed, a resale will be ordered.

1 *Opening the Biddings.*—The court may, before confirmation, in the exercise of a sound discretion, open the biddings and order a resale of the property. In the *English* courts the sale is considered as continuing open for bids up to the period for the confirmation of the master's report; and an offer of a larger price than that bid at the master's sale, usually ten per cent advance, will be entertained up to the period of confirmation; and if an advance recognized by the court as sufficient to move its discretion to order a resale is offered, and a proportionate deposit paid in, the biddings will be opened and a resale ordered. There is no uniform practice on this subject in the courts of this country. In some of the States the English course of procedure is adopted, and the biddings opened upon such advance as the court considers reasonable; while in others an advance alone is not considered sufficient, and special circumstances, most usually great inadequacy of price, must be shown. When the biddings are opened, the purchaser is entirely discharged from his purchase; and if he has paid his deposit, or any part of the purchase-money, into court, he will be entitled to have it returned to him. The proceedings upon the resale are usually the same as upon the original sale.[3]

75 Am. Dec., 512. A purchaser at the sale will not be allowed to retain from his bid taxes which were a lien on the property at the date of the decree; the rule of *caveat emptor* applies. Osteberg *v.* Union Trust Co., 93 U. S. 424.

As to purchaser's right to have reference as to title, see Hoffman's Referees, 240, 241, and 242; Staypelton *v.* Scott, 16 Vesey, 272; Ormsby *v.* Terry, 6 Bush. (Ky.), 553; Graham *v.* Bleakie, 2 Daly (N. Y.), 55. Also Lawrence *v.* Cornell, 4 John. Ch. (N. Y.) 542, as to tax encumbrances.

Where the purchaser was innocently mistaken as to the character of title he was buying, as where the property was sold subject to redemption, and he supposed it was being sold so as to pass the absolute title, he was relieved from the purchase. Shively *v.* Jones, 6 B. Mon. (Ky.) 274. As to refunding deposit money where he is relieved from the purchase, see Morris *v.* Mowatt, 2 Paige (N. Y.), 586.

1. It is discretionary with the court whether or not the sale shall be confirmed. Sowards *v.* Pritchett, 37 Ill. 517; Williamson *v.* Berry, 8 How. Pr. (N. Y.) 495. But it should always be confirmed, unless good cause to the contrary be shown. Torrans *v.* Hicks, 32 Mich. 307; Koehler *v.* Ball, 2 Kan. 160; Detroit F. & M. Co. *v.* Renz. 33 Mich. 298. If the discretion is abused, however, an appeal will lie. Rorer on Jud. Sales, p. 13, § 25.

2. The practice in the English courts of requiring a confirmation by the court of the report of sale, "is not to enable the parties to bring the decision of the master under review, but to afford time between the service of the order *nisi*, and the absolute confirmation of the report, for others to come in and open the biddings, so as to secure the sale of the estate to the best possible advantage." 2 Daniel Ch. Pl. & Pr. (5th Ed.) *1305.

3. **Opening Biddings Under the English Practice.**—"Where estates are sold before the master, under the decree of a

court of equity, the court considers itself to have greater power over the contract than it would have were the contract made between party and party; and as the chief aim of the court is to obtain as great a price for the estate as can possibly be got, it is the habit, after the estate has been sold, of opening the biddings, that is, of allowing a person to offer a larger price than the estate was originally sold for; and upon such offer being made, and a proportionate deposit paid in, of directing a resale of the property." 2 Daniel Ch. Pl. & Pr. (5th Ed.) *1285. But the practice has been changed by statute 30 & 31 Vict. ch. 48, § 7.

Any person may open the biddings; and there seems to be no doubt that a person who is interested in theproduce of the estate, such as a residuary legatee,—Hooper *v.* Goodwin, G. Coop. 95; Chapman *v.* Fowler, 3 Hare, 377;—or a tenant for life, or a reversioner,—Williams *v.* Attenborough, T. & R. 70; McCullock *v.* Catbach, 3 Mad. 314; Preston *v.* Barker, 16 Vesey, 140; Thornhill *v.* Thornhill, 2 J. & W. 347,—may do so.

But the opinion of the court has fluctuated upon the question whether the court will entertain an application to open the biddings on behalf of a party who was present at the sale. McCullock *v.* Colbach, 3 Mad. 314; Thornhill *v.* Thornhill, 2 J. & W. 347; Tyndall *v.* Warre, Jac. 525; Lefroy *v.* Lefroy, 2 Russ. 606; Cockrane *v.* Cockrane, 2 R. & M. 684; Shellcrosse *v.* Hibberson, 1 C. P. Coop. t. Cott. 380; *Re* Jones, 1 Giff. 284; 5 Jur. N. S. 1243; Ware *v.* Watson, 7 DeG. M. & G. 739; 2 Jur. N. S. 129; Sommer *v.* Charlton, cited 5 Vesey, 655; Preston *v.* Barker, 16 Vesey, 140. See Bradford *v.* Hamilton, 3 Tenn. Ch. 334.

Mere advance of price, if the report of the purchaser being the best bidder is not absolutely confirmed, is sufficient to open the biddings; and they may be opened more than once. 2 Daniel Ch. Pl. & Pr. (5th Ed.) *1286. See further, upon the practice of the English courts in opening biddings, Scott *v.* Nesbitt, 3 Bro. C. C. (Perkins' Ed.) 475, notes (1), (*a*), and (*b*), and cases cited.

The expediency of the practice of opening the biddings was said by the lords to be very doubtful. Barlow *v.* Osborne, 6 H. of L. Cas. 556. And in White *v.* Wilson, 14 Vesey, 51, Lord Eldon, in expressing adherence to the view that great strictness should be observed in opening biddings, said that he could not do a thing more mischievous to the suitors than to relax further the binding nature of contracts in the master's office; half the estates in the kingdom being thrown away upon the speculation that there will be an opportunity of purchasing them afterwards by opening the biddings. While formerly £10 per cent advance was considered sufficient to open the biddings, there is now no fixed rule; each case will be governed by its special circumstances as to the per cent required; although usually £10 per cent is accepted, 2 Daniel Ch. Pl. & Pr. (5th Ed.) *1287. The same appears to be the rule in the Irish courts. Mayne *v.* McCartney, 2 Ir. Eq. 324; Digby *v.* Brown, 1 Ir. Eq. 377.

**Opening the Biddings Under the American Practice.**—In the American courts the practice on this subject is not uniform. Some of the States adhere to the English practice; as *Tennessee*,* where the biddings will be opened upon an advance of 10 per cent,—Click *v.* Burriss, 6 Heisk. (Tenn.) 539; Atkinson *v.* Murfree, 1 Tenn. Ch. 51. See also Mound City Life Ins. Co. *v.* Hamilton, 3 Tenn. Ch. 228; Mayo *v.* Harding, 5 Tenn. Ch. 237;—the party proposing to either execute notes for the advance in accordance with the terms of sale, or give security that he will comply. Childress *v.* Harrison, 1 Baxt. (Tenn.) 415.

In *Mississippi*, a resale may be granted upon the applicant stating the amount that he is ready to bid in advance of the bid already made. Wright *v.* Cantzon, 31 Miss. 514.

In *Alabama*, when the mortgagee is the purchaser at the sale, if an advance of 10 per cent is offered, and the money is deposited in court, a resale will be ordered. Littell *v.* Zunty, 2 Ala. 256.

The practice of opening the biddings upon an advance is not recognized in *New York*, *Maryland*, *New Jersey*, and *South Carolina*. Williamson *v.* Dale, 3 John. Ch. (N. Y.) 290; Lefevre *v.* Laraway, 22 Barb. (N. Y.) 167; Andrews *v.* Scotton, 9 Bland (Md.), 629; Conover *v.* Walling, 2 McCarter (N. J.), 173; Seamen *v.* Riggins, 1 Green Ch. (N. J.) 214; Young *v.* Teague, 1 Bailey Eq. (S. Car.) 14. See also Penn *v.* Tolleson, 20 Ark. 652.

In these States the biddings will not be opened except for special cause, and then only upon the purchaser, if he himself is free from fault, being fully indemnified for all damage, costs, and expenses which he has incurred. North River Ins. Co. *v.* Holmes, 1 Hoff. Ch. Pr. (N. Y.) 146; Requa *v.* Rea, 2 Paige (N. Y.), 339; Duncan *v.* Dodd, 2 Paige (N. Y.), 100; Frazier *v.* Hall, 2 McCord Ch. (S. Car.) 159, note (*b*); Anderson *v.*

Foulke, 2 Harr. & G. (Md.) 343. See Wood *v.* Hudson, 5 Munf. (Va.) 423; Campbell *v.* Gardner, 3 Stock. (N. J.) 423.

In *New Jersey*, it is held that the same requirements which are made in the English courts to open the biddings and direct a resale after confirmation are made in the courts of this State where the property has been sold under the orders of the court. Special grounds must exist; such as fraud or accident which has prevented a fair sale and worked injustice to some party in interest. Campbell *v.* Gardener, 3 Stockt. (N. J.) 425. A confirmation by the court, however, is not required in New Jersay, and the court say: "The same objection, therefore, which would exist to the opening of a sale by this court upon motion or petition, after the sheriff had delivered his deed, would operate with equal force against that practice after a confirmation of sale, if such a confirmation were necessary." Campbell *v.* Gardener, 3 Stockt. (N. J.) 425.

It is not necessary that any advance on the bid should be offered, or any sum whatever deposited in the court, when application is made to the court, by a party injured, to set aside the sale on the ground that the purchase was not *bona fide*. Penn *v.* Tolleson, 20 Ark. 652;

In Childress *v.* Hurt, 2 Swan (Tenn.), 485, the sale was attended with circumstances showing that the property had been purchased with a view to favor the debtor, and for a price greatly inadequate to its value. An application based upon these grounds, and with an offer to advance the bid, was made to open the biddings. McKinney, J., speaking for the court, says: "The exercise of the power of allowing the biddings to be opened and ordering the premises to be resold must necessarily, in some degree, depend upon the circumstances of each particular case in which the application is made; yet there are certain established principles by which the discretion of the court must be regulated. The course of decisions upon this subject in our courts has conformed rather to the English practice than to that of some of our American courts. In 4 Kent Com. 192, it is laid down that 'a sale at public auction by the master is ordinarily a valid and binding contract as soon as the hammer is down,' and that the purchaser, by force of such sale, becomes entitled to a conveyance, 'unless there be found mistake, or some special circumstances affording, as in other cases, a ground for equitable relief.' The *English* doctrine, on the other hand, seems to be that, although in ordinary sales by auction or by private agreement, the contract is complete when the agreement is concluded, a different rule prevails in chancery sales by a master. In such cases the purchaser is not considered as entitled to the benefit of his purchase till the master's report of the purchaser's bidding is absolutely confirmed by the court. Until confirmation of the report, the contract is not regarded as complete or binding. And this sale applies equally to cases in which it is sought to compel a purchaser to complete his purchase; as, where the latter seeks to enforce his contract. 2 Danl. Ch. Pr. 1454, 1460; 1 Sug. on Vend. 58. Until confirmation of the report, the purchaser is not compelled to complete his purchase; nor is he entitled to a conveyance, nor to be let into the possession of the estate; neither is he liable to any loss or injury by fire, or otherwise, which may happen to the estate in the interim. 2 Danl. Ch. Pr. 1455, and cases referred to in the notes. And so, until the confirmation of the report, the purchaser may be discharged from his purchase on the ground that a good title cannot be made; or of mistake or other sufficient cause. 2 Danl. Ch. Pl. 1452, 1463. The principle being admitted that a sale by the master is not complete, nor binding on the purchaser, till confirmationof the report,—and this principle has been repeatedly sanctioned and applied by this court,—see 11 Humph. (Tenn.) 278, and cases there cited;—the conclusion is easily arrived at that, as it is equally the object and duty of the court to see, not merely that the sale is properly conducted, but also that the property shall be sold for the best price that can be had. It is allowable to open the biddings alone upon the ground of the offer of a larger price, if the advance be so considerable as to furnish a sufficient inducement under all the circumstances, to a resale of the property. 10 Humph. (Tenn.) 275; 2 Danl. Ch. Pr. 1485. With respect to the advance, which ought to be deemed sufficient to require that the biddings should be opened, no very definite rule can be laid down. This must be left to depend, in some measure, on the circircumstances of the given case. In the *English* practice, 10 per cent was formerly considered to be sufficient on a large sum. Lord Elden thought that this was not a wise rule to establish. 7 Vesey, 420. The rule has fluctuated, and in some cases the biddings have been opened upon a less advance than 10 per cent. 5 Vesey, 655; 2 Ross, 606. With-

2. *Confirmation of the Sale* is the judicial sanction of the sale by the decree of court, based upon the report of the sale made by the master or special commissioner appointed to conduct the sale.

Until confirmation the right of the purchaser to the title is incomplete. The confirmation perfects the right thereto. It relates back to the date of the sale, and cures all defects and irregularities, not involving the jurisdiction of the court, which may have characterized the sale, or subsequent proceedings in reference to it.[1]

The confirmation of the sale rests in the sound discretion of the court, due regard being had to the rights and interests of all persons concerned, and to the stability of judicial sales. The court should be satisfied that the sale has been made in conformity to the terms and requirements of the decree ordering the sale; that it has been conducted fairly, and that substantial justice has been attained in behalf of all parties in interest. These elements existing, the refusal to confirm would be an abuse of judicial discretion. The decree confirming the sale should not be made, however, until notice has been given, in such mode as may be prescribed by the rules of practice of the court where the foreclosure proceeding is pending, to all the parties interested in opposing it, so that opportunity may be had of objecting to the confirmation. The commissioner is usually directed to make the deed passing the title to the purchaser upon the terms of the decree of sale;

out attempting to prescribe any uniform rule upon this subject, we think it sufficient to say, in the decision of the case under consideration, that, under the circstances, the advance offered, of 30 per cent, was sufficient to require the biddings to be opened. In coming to this conclusion, we are not left to rest our judgment alone upon the fact of an advanced bid. The circumstances of the case almost force the conclusion upon the mind that the purchase was not made by the defendant for his own individual use and benefit. The character of the property itself forbids such an idea. And, to allow him to hold the property, and that, too, at a price greatly inadequate to its fair value, would be unjust towards the creditors of the 'lodge;' while, on the other hand, in refusing him the benefit of a purchase not in reality made for himself, and from which, personally, he neither expected nor desired to derive benefit, and which, if permitted to stand, would enable him to aid the 'lodge' in defeating the rights of creditors of the latter, no injustice or injury of which he can justly complain will be done to him. It is no objection that the person seeking to open the biddings is a stranger to the proceeding in which the sale took place, or that he has no interest in the subject-matter of the sale. It is well settled in *England* that any person who is capable of becoming the purchaser may make his application to the court. 2 Smith Ch. Pr. 258; 2 Danl. Ch. Pr. 1465. This ought to be so, because it can be a matter of no consequence who the person may be, offering to take the estate at an advanced price; and, in this view, it is settled that the biddings may be opened on the application of a person who was actually present at the sale, and might have become the purchaser at such sale. The only difference in such case, according to some of the authorities, is that from a person who attended the sale, a larger advance might be required to induce the court to open the biddings at his instance."

1. Where parties in interest have had due notice, and no equities intervene, a purchaser at foreclosure sale, after confirmation, is entitled to the crops from date of sale. Ruggles *v.* Centreville Bank, 43 Mich. 192.

Under R. S. 3169, Wisconsin until confirmation the title does not vest in the purchaser; and previous to confirmation the mortgagor, or those claiming under him having right of possession, may cut and remove the crops. Allen *v.* Elderkin, 62 Wis. 627.

unless where the officer making the sale has made the deed before the confirmation, in which case, while the title passes by the conveyance, it only becomes indefeasible when the decree of confirmation has been rendered. In some of the States the title is divested and vested by the decree itself; and, of course, a deed is not then necessary. In a few of the States a confirmation of the sale is not requisite; the sale being made under special writ of execution.[1]

3. *Setting Aside Sale, and Resale.*—Very different considerations govern the court upon application to set aside the sale after confirmation from those which influence its action when the application is before confirmation. In the former case the policy of the court is to observe great strictness as to the grounds upon which such application will be entertained. There must be something more than irregularities in the conduct of the sale, or than mere inadequacy of price in the sale itself,—some element of fraud, or of accident, mistake, or surprise, beyond the control of the party complaining, and unmixed with negligence on his part.[2] As a

1. In Campbell *v.* Gardener, 3 Stock. (N. J.) 423, Williamson, Chancellor, in commenting upon the sales made under the orders of the court by the sheriff, says: "In *England* a sale confirmed is upon the same footing as a sale here, which has been confirmed (not by the court, for that is not required), but by the sheriff's completing all that is necessary to be done as sale upon his execution, and delivery of his deed to the purchaser. The same objection, therefore, which would exist to the opening of a sale by this court upon motion or petition, after the sheriff had delivered his deed, would operate with equal force against the practice after confirmation, if such confirmation were necessary."

The title passes upon the execution of the master's deed, although the sale has not been confirmed; it is *prima facie* a valid title. Mitchell *v.* Bartlett, 51 N. Y. 447; Fuller *v.* Van Geesen, 4 Hill (N. Y.), 171; Jones *v.* Burden, 20 Ala. 382; Jackson *v.* Warren, 32 Ill. 331.

2. Where a motion is made in a foreclosure suit after confirmation of the report of sale to put the purchaser in possession, the defendant cannot resist the motion upon grounds known to him at the time of the confirmation. He is concluded by the decree confirming the sale. Leconte *v.* Irwin, 23 S. Car. 106. Transfer of the bid at foreclosure sale furnishes no ground for setting aside the sale and ordering a resale. Culver *v.* McKeown *et al.*, 43 Mich. 322.

Where several sales had been made under the orders of the court, and the conduct of the mortgagor had been of an improper character in connection with the sales, in forbidding the sales, and repeatedly delaying the mortgagee in collecting his debt; by disparaging his own title, and offering to raise the bid, thereby succeeding in having the sales set aside; and where the last sale made, appeared to have been properly conducted and the property to have brought a fair price, this sale was properly confirmed. Gibson *v.* McLaurin, 90 N. Car. 256.

**Sale Will be Set Aside Where Improperly or Unlawfully Conducted.**—King *v.* Platt, 37 N. Y. 155; s. c., 35 How. (N. Y.) Pr. 23; 3 Abb. (N. Y.) Pr. N. S. 434; Marsh *v.* Ridgway, 18 Abb. (N. Y.) Pr. 266; Lefevre *v.* Laraway, 22 Barb. (N. Y.) 177; Griffith *v.* Hadley, 10 Bosw. (N. Y.) 587; Wolcott *v* Schenck, 23 How. (N. Y.) Pr. 385; Lents *v.* Craig, 13 How. (N. Y.) Pr. 72; s. c., 2 Abb. (N. Y.) Pr. 294. Or, if the property has been sacrificed by the officer making the sale, see Bron *v.* Frost, 11 Paige Ch. (N. Y.) 243; Lansing *v.* McPherson, 3 Johns. Ch. (N. Y.) 424; Billington *v.* Forbes, 10 Paige Ch. (N. Y.) 487; American Ins. Co. *v.* Oakley, 9 Paige Ch. (N. Y.) 259; Requa *v.* Rea, 2 Paige Ch. (N. Y.) 339; Tripp *v.* Cook, 26 Wend. (N. Y.) 146; Bixley *v.* Mead, 18 Wend. (N. Y.) 611; Groff *v.* Jones, 6 Wend. (N. Y.) 522.

**A Motion in the Original Suit** is the proper method of having a sale set aside. McCotter *v.* Jay, 30 N. Y. 80; Kellogg *v.* Howell, 62 Barb. (N. Y.) 280, 283; Gould *v.* Mortimer, 26 How. (N. Y.) Pr. 167; s. c., 16 Abb. (N. Y.) Pr. 448. An ori-

ginal action for that purpose cannot be commenced. Brown *v.* Frost, 10 Paige Ch. (N. Y.) 243; Cotter *v.* Jay, 30 N. Y. 80; Kellogg *v.* Howell, 62 Barb. (N. Y.) 280; Libby *v.* Rosekrans, 55 Barb. (N. Y.) 202, 219, 220; Smith *v.* American Ins. Co., Clarke Ch. (N. Y.) 307; Vandercook *v.* Cohoes Sav. Inst., 5 Hun (N. Y.), 641; American Ins. Co. *v.* Oakley, 9 Paige Ch. (N. Y.) 259; Nicholl *v.* Nicholl, 8 Paige Ch. (N. Y.) 349; Requa *v.* Rea, 2 Paige Ch. (N. Y.) 339; Collier *v.* Whipple, 13 Wend. (N. Y.) 224; Brown *v.* Frost, Hoff. Ch. (N. Y.) 41. *Compare* Hakley *v.* Draper, 60 N. Y. 88, 93.

**Application for Resale Must be Made Promptly,** or a good excuse shown for the delay. Nicholl *v.* Nicholl, 8 Paige Ch. (N. Y.) 349. The proper time for making an application for a resale is before the confirmation of the report of the officer who conducted the sale. Lockwood *v.* McGuire, 57 How. (N. Y.) Pr. 266; Nicholl *v.* Nicholl, 8 Paige Ch. (N. Y.), 349; Hoyt *v.* Pawtucket Inst. of Savings, 110 Ill. 390; McHany *v.* Schenck, 88 Ill. 357; Bush *v.* Sherman, 80 Ill. 150; Munn *v.* Burges, 70 Ill. 604; Dempster *v.* West, 69 Ill. 613; Burr *v.* Borden, 61 Ill. 389; Beach *v.* Shaw, 57 Ill. 17; Hamilton *v.* Lubukee, 51 Ill. 415; Cox *v.* Montgomery, 36 Ill. 396.

**Laches Will Defeat a Motion to Set Aside Sale.**—Lockwood *v.* McGuire, 57 How. (N. Y.) Pr. 266; Depew *v.* Dewey, 46 How. (N. Y.) Pr. 441; s. c., 2 T. & C. (N. Y.) 515; Salles *v.* Butler, 27 N. Y. 638; Wait *v.* Van Allen, 22 N. Y. 319; Fry *v.* Bennett, 16 How. (N. Y.) Pr. 385; Marshton *v.* Johnson, 13 How. (N. Y.) Pr. 93; Humphrey *v.* Chamberlain, 11 N. Y. 274.

**Setting Aside Sale Where a Mortgagee Purchaser**—as to, see Mott *v.* Walkley, 3 Edw. Ch. (N. Y.) 590; Kellogg *v.* Howell, 62 Barb. (N. Y.) 280; Tripp *v.* Cook, 26 Wend. (N. Y.) 143; Nugent *v.* Nugent, 54 Mich. 557; Campbell *v.* Gardner, 11 N. J. Eq. (3 Stockt.) 423; Littell *v.* Zuntz, 2 Ala. 256; s. c., 36 Am. Dec. 415; Woodhull *v.* Osborne, 2 Edw. Ch. (N. Y.) 614; Lansing *v.* McPherson, 3 Johns. Ch. (N. Y.) 424.

**As to What are Proper Grounds for Setting Aside a Sale,** see Golden *v.* Fowler, 26 Ga. 451, 463; Marsh *v.* Ridgway, 18 Abb. (N. Y.) Pr. 262; Lefevre *v.* Laraway, 22 Barb. (N. Y.) 167; Griffith *v.* Hadley, 10 Bosw. (N. Y.) 587; Wolcott *v.* Schenck, 23 How. (N. Y.) Pr. 385; Brown *v.* Frost, 10 Paige Ch. (N. Y.) 243; Campbell *v.* Swan, 48 Barb. (N. Y.) 109; Requa *v.* Rea, 2 Paige Ch. (N. Y.) 339; Forman *v.* Hunt, 3 Dana (Ky.), 614; Nugent *v.* Nugent, 54 Mich. 557; American Ins. Co. *v.* Oakley, 9 Paige Ch. (N. Y.) 259; s. c., 38 Am. Dec. 561; Henderson *v.* Lowry, 5 Yerg. (Tenn.) 240; Hill *v.* Hoover, 5 Wis. 354; s. c., 68 Am. Dec. 70; Strong *v.* Catton, 1 Wis. 471; West *v.* Davis, 4 McL. C. C. 241.

**Irregularity in Conduct of Sale** will be a ground for setting aside the sale. See Forman *v.* Hunt, 3 Dana (Ky.), 614; Hotchkiss *v.* Clifton Air Cure, 4 Keyes (N. Y.), 170; Goldsmith *v.* Osborne, 1 Edw. Ch. (N. Y.) 560, 562; Lents *v.* Craig, 13 How. (N. Y.) Pr. 72; s. c., 2 Abb. (N. Y.) Pr. 294; Cunningham *v.* Cassidy, 17 N. Y. 276; American Ins. Co. *v.* Oakley, 9 Paige Ch. (N. Y.) 259; s. c., 38 Am. Dec. 561; Merchants' Ins. Co. of N. Y. City *v.* Hinman, 3 Abb. (N. Y.) Pr. 45; Griffith *v.* Hadley, 10 Bosw. (N. Y.) 587; Wolcott *v.* Schenck, 23 How. (N. Y.) Pr. 385; Breese *v.* Busby, 13 How. (N. Y.) Pr. 485; Quaw *v.* Lameraux, 36 Wis. 626.

**Few Bidders** do not constitute an adequate cause for setting the sale aside. Fairfax *v.* Muse, 4 Munf. (Va.) 124; Roberts *v.* Roberts, 13 Gratt. (Va.) 639; Campbell *v.* Swan, 48 Barb. (N. Y.) 109.

**Accidents in Surprise,** grounds for setting aside sale. See Parkhurst *v.* Cory, 11 N. J. Eq. (3 Stockt.) 233; Francis *v.* Church, Clarke Ch. (N. Y.) 475, 478; Brown *v.* Frost, 10 Paige Ch. (N. Y.) 243; Gould *v.* Libby, 24 How. (N. Y.) Pr. 440; Gould *v.* Gager, 18 Abb. (N. Y.) Pr. 32; Thompson *v.* Mount, 1 Barb. Ch. (N. Y.) 607; Hoppock *v.* Conklin, 4 Sandf. Ch. (N. Y.) 582, 586.

**Fraud and Misconduct** are grounds for setting aside a sale where any party interest has been misled or surprised thereby. Gardiner *v.* Schermerhorn, Clarke Ch. (N. Y.) 101; Trotter *v.* White, 26 Miss. 88; King *v.* Platt, 37 N. Y. 155, 160; Slocum *v.* Slocum, 3 How. (N. Y.) Pr. 178.

**False Statements,** where made by the plaintiff or his agent, as well as by the officer making the sale, will be ground for setting the sale aside. Banta *v.* Maxwell, 12 How. (N. Y.) Pr. 479; Murdock *v.* Empie, 19 How. (N. Y.) Pr. 79; 9 Abb. (N. Y.) Pr. 283; Francis *v.* Church, Clarke Ch. (N. Y.) 475; Billington *v.* Forbes, 10 Paige Ch. (N. Y.) 487; May *v.* May, 11 Paige Ch. (N. Y.) 201; Woodruff *v.* Bush, 8 How. (N. Y.) Pr. 117; Collier *v.* Whipple, 13 Wend. (N. Y.) 324; Tripp *v.* Cook, 26 Wend. (N. Y.) 143; Kellogg *v.* Howell, 62 Barb. (N. Y.) 280; Lefevre *v.* Laraway, 22 Barb. (N. Y.) 167, 173; Gould *v.* Gager,

condition to granting the application the court may impose such terms[1] as in the exercise of a sound discretion may seem to be proper. There may, however, be such a palpable abuse of this discretion[2] as to amount to reversible error.

Where inadequacy of price[3] is one of the grounds, an offer to

18 Abb. (N. Y.) Pr. 32; Stahl *v.* Charles, 5 Abb. (N. Y.) Pr. 348; Lansing *v.* McPherson, 3 Johns. Ch. (N. Y.) 424; Brown *v.* Frost, 10 Paige Ch. (N. Y.) 243; Requa *v.* Rea, 2 Paige Ch. (N. Y.) 339; Gardiner *v.* Schermerhorn, Clarke Ch. (N. Y.) 101, 104.

**Excusable Mistake** is a ground for setting aside sale if such mistake cause the property to bring a less price than it would otherwise have brought. Williamson *v.* Dale, 3 Johns. Ch. (N. Y.) 290; Parfit *v.* Warner, 13 Abb. (N. Y.) Pr. 471; King *v.* Morris, 2 Abb. (N. Y.) Pr. 296; Gould *v.* Gager, 24 How. (N. Y.) Pr. 440; Smith *v.* Heermance, 18 How. (N. Y.) 261; Gould *v.* Libby, 24 How. (N. Y.) Pr. 440; s. c. *sub. nom.* Gould *v.* Gager, 18 Abb. (N. Y.) Pr. 32.

**Setting Aside Sale for Benefit of Infants** where property has been sacrificed through the negligence or misapprehension of the statutory or natural guardian. Lefevre *v.* Laraway, 22 Barb. (N. Y.) 167; Gardiner *v.* Schermerhorn, Clarke Ch. (N. Y.) 101. See Duncan *v.* Dodd, 2 Paige Ch. (N. Y.) 99; Howell *v.* Mills, 53 N. Y. 322; Stryker *v.* Storm, 1 Abb. (N. Y.) Pr. N. S. 424.

**Objections to a Sale are Presumed to be Waived by Delay.** See Depew *v.* Dewey, 46 How. (N. Y.) 441; Rigney *v.* Small, 60 Ill. 416; Roberts *v.* Fleming, 53 Ill. 196; Hamilton *v.* Lubukee, 51 Ill. 415; Salles *v.* Butler, 27 N. Y. 638; Wait *v.* Van Allen, 22 N. Y. 319; Humphrey *v.* Chamberlain, 11 N. Y. 274; Fry *v.* Bennett, 16 How. (N. Y.) Pr. 385; Marston *v.* Johnson, 13 How. (N. Y.) Pr. 93; McMurray *v.* McMurray, 66 N. Y. 175; Garrett *v.* Moss, 20 Ill. 549; Curyea *v.* Berry, 84 Ill. 600.

**1. The Terms Imposed on Setting Aside a Sale** will be such as to the court may seem proper under the circumstances. Francis *v.* Church, Clarke Ch. (N. Y.) 475; Duncan *v.* Dodd, 2 Paige Ch. (N. Y.) 99; May *v.* May, 11 Paige Ch. (N. Y.) 201, 204.

**2. Discretion of Court** to set aside a sale, in the absence of fraud or abuse of discretion, will not be interfered with. See Young *v.* Bloomer, 22 How. (N. Y.) Pr. 383; Bullard *v.* Green, 10 Mich. 268; McCotter *v.* Jay, 30 N. Y. 80; Goodell *v.* Harrington, 76 N. Y. 547; Kellogg *v.* Howell, 62 Barb. (N. Y.) 280; Gould *v.* Mortimer, 26 How. (N. Y.) Pr. 167; Hale *v.* Clauson, 60 N. Y. 339, 341; Crane *v.* Stiger, 58 N. Y. 625; Buffalo Sav. Bank *v.* Newton, 23 N. Y. 160; Wakeman *v.* Price, 3 N. Y. 334; Bergen *v.* Snedeker, 8 Abb. (N. Y.) N. C. 50; Nugent *v.* Nugent, 54 Mich. 557; Adams *v.* Haskell, 10 Wis. 123; Schaefer *v.* O'Brien, 49 Md. 253.

**3. Mere Inadequacy of Price** is not a ground for setting aside a sale unless the inadequacy is so great as to be evidence of unfairness or fraud. See O'Donnell *v.* Lindsay, 39 N. Y. Super. Ct. (7 J. & S.) 523, 532; Howell *v.* Mills, 53 N. Y. 322; King Morris, 2 Abb. (N. Y.) Pr. 296, 298; Kellogg *v.* Howell, 62 Barb. (N. Y.) 280; Lefevre *v.* Laraway, 22 Barb. (N. Y.) 167; Francis *v.* Church, Clarke Ch. (N. Y.) 475; Gardiner *v.* Schermerhorn, Clarke Ch. (N. Y.) 101; Mott *v.* Walkley, 3 Edw. Ch. (N. Y.) 590; Woodhull *v.* Osborne, 2 Edw. Ch. (N. Y.) 614; Gould *v.* Gager, 24 How. (N. Y.) Pr. 440; s. c., 18 Abb. (N. Y.) Pr. 32; Murdock *v.* Empie, 19 How. (N. Y.) Pr. 79; s. c., 9 Abb. (N. Y.) Pr. 283; *In re* Rider, 23 Hun (N. Y.), 91; Livingston *v.* Byrne, 11 Johns. (N. Y.) 555; American Ins. Co. *v.* Oakley, 9 Paige Ch. (N. Y.) 259; s. c., 38 Am. Dec. 561; Duncan *v.* Dodd, 2 Paige Ch. (N. Y.) 99; March *v.* Ludlum, 3 Sandf. Ch. (N. Y.) 35; Tripp *v.* Cook, 26 Wend. (N. Y.) 143; Collier *v.* Whipple, 13 Wend. (N. Y.) 224; Central Pac. R. R. Co. *v.* Creed, 70 Cal. 497; Garrett *v.* Moss, 20 Ill. 549; Wing *v.* Hayford, 124 Mass. 249; King *v.* Bronson, 122 Mass. 122; Lalor *v.* McCarthy, 24 Minn. 417; Kline *v.* Vogel, 11 Mo. App. 211; Wetzler *v.* Schaumann, 24 N. J. Eq. (9 C. E. Gr.) 60; Henderson *v.* Lowry, 5 Yerg. (Tenn.) 240; Klein *v.* Glass, 53 Tex. 37; Hill *v.* Hoover, 5 Wis. 354; Strong *v.* Catton, 1 Wis. 471; Dryden *v.* Stephens, 19 W. Va. 1; West *v.* Davis, 4 McL. C. C. 241; Cleaver *v.* Green, 107 Ill. 67; King *v.* Platt, 37 N. Y. 155; McCotter *v.* Jay, 30 N. Y. 80; Dwight's Case, 15 Abb. (N. Y.) Pr. 259; King *v.* Morris, 2 Abb. (N. Y.) Pr. 296; Griffith *v.* Hadley, 10 Bosw. (N. Y.) 588; Francis *v.* Church, Clarke Ch. (N. Y.) 475; Whitbeck *v.* Rowe, 25 How. (N. Y.) Pr. 403; Soule *v.* Ludlow, 3 Hun (N. Y.), 503; Howell *v.* Baker, 4 Johns. Ch. (N. Y.) 118; Lansing *v.* Mc-

advance[1] the bid should properly accompany the application, except when the sale appears not to have been *bona fide;* in such case no offer to advance the bid will be required.

It is not necessary that the applicant should be a party to the foreclosure proceeding: any one injured by the sale may be heard upon the application to set it aside; but it must be made, in all cases, by some one interested in the mortgaged premises, or who is liable for a deficiency. Generally the application should be made in the foreclosure proceeding, but there are exceptional cases where it has been entertained on original bill.[2]

Pherson, 3 Johns. Ch. (N. Y.) 426; Williamson *v.* Dale, 3 Johns. (N. Y.) 292; Osgood *v.* Franklin, 2 Johns. Ch. (N. Y.) 23; Jencks *v.* Alexander, 11 Paige Ch. (N.Y.) 619; May *v.* May, 11 Paige Ch. (N. Y.) 201; Brown *v.* Frost, 10 Paige Ch. (N. Y.) 244; Duncan *v.* Dodd, 2 Paige Ch. (N.Y.), 99; Hoppock *v.* Conklin, 4 Sandf. Ch. (N. Y.) 582; White *v.* Coulter, 3 T. & C. (N. Y.) 608; Mulks *v.* Allen, 12 Wend. (N. Y.) 253; Ontario Bank *v.* Lansing, 2 Wend. (N. Y.) 261; Littell *v.* Grady, 38 Ark. 584; Webber *v.* Curtiss, 104 Ill. 309; Montague *v.* Dawes, 96 Mass. (14 Allen) 369; Vail *v.* Jacobs, 62 Mo. 130; Delaware, L. & W. R. Co. *v.* Scranton, 34 N. J. Eq. (8 Stew.) 429, 432; Kloepping *v.* Stellmacher, 21 N. J. Eq. (6 C. E. Gr.) 328; Marlatt *v.* Warwick, 18 N. J. Eq. (3 C. E. Gr.) 108; Smith *v.* Duncan, 16 N. J. Eq. (1 C. E. Gr.) 240; Eberhart *v.* Gilchrist, 11 N. J. Eq. (3 Stockt.) 167; Howell *v.* Hester, 4 N. J. Eq. (3 H. W. Gr.) 266; Mercereau *v.* Prest, 3 N. J. Eq. (2 H. W. Gr.) 460; Seaman *v.* Riggins, 2 N. J. Eq. (1 H. W. Gr.) 214; Crane *v.* Conklin, 1 N. J. Eq. (1 Saxt.) 346; Simmons' Ex'rs *v.* Vandergift, 1 N. J. Eq. (Saxt.) 55; Bank of New Brunswick *v.* Hassert, 1 N. J. Eq. (Saxt.) 1; Peacock *v.* Evans, 16 Ves. 512; How *v.* Weldon, 2 Ves. Sr. 516.

**1. What Advance in Price Must be Made on Resale.**—The court may open the biddings and order a resale on application of any one liable for the deficiency, on his offering a sufficient advance to pay costs of former sale. See Lansing *v.* McPherson, 3 Johns. Ch. (N. Y.) 424; Farlow *v.* Weildon, 4 Madd. 460. In England, 10 per centum of an advance is required. Garston *v.* Edwards, 1 Sm. & S. 20; Brooks *v.* Snaith, 3 Ves. & B. 144; White *v.* Wilson, 14 Ves. 151; *Ex parte* Partington, 1 Ball. & B. 209. But this practice has never been adopted in this country. Woodhull *v.* Osborne, 2 Edw. Ch. (N.Y.) 614; Lefevre *v.* Laraway, 22 Barb. (N.Y.) 167, 173; Lansing *v.* McPherson, 3 Johns. Ch. (N. Y.) 424; Williamson *v.* Dale, 3 Johns. Ch. (N. Y.) 290; Collier *v.* Whipple, 13 Wend. (N. Y.) 224; Jackson *v.* Warren, 32 Ill. 331; Forman *v.* Hunt, 3 Dana (Ky.), 614; Delaware, L. & W. R. Co. *v.* Scranton, 34 N. J. Eq. (7 Stew.) 429, 432; Adams v. Haskell, 10 Wis. 123. The reason in such proceedings is considered prejudicial to the fair conduct of sales; and for that reason neither before nor after confirmation will a resale be ordered simply on an offer of increased price. Delaware, L. & W. R. Co. *v.* Scranton, 34 N. J. Eq. (7 Stew.) 429; Conover *v.* Walling, 15 N. J. Eq. (2 McCart.) 173, 178; Lefevre *v.* Laraway, 22 Barb. (N. Y.) 167, 173; Brown *v.* Frost, 10 Paige Ch. (N. Y.) 259; Tripp *v.* Cook, 26 Wend. (N. Y.) 143; Collier *v.* Whipple, 13 Wend. (N. Y.) 224; Adams *v.* Haskell, 10 Wis. 123.

2. Boggs *v.* Fowler, 16 Cal. 559; s. c., 76 Am. Dec. 561.

In granting the application for a resale the court will see that the respective equities of the parties are not prejudiced. Wiley *v.* Angel, Clarke (N.Y.), 217. And if the purchaser at the sale has acquired the title by the execution of a deed by the officer conducting the sale, the court will require him to release this title to the purchaser on the resale. Campbell *v.* Gardener, 3 Stock. (N. J.) 423. Or the court may, and most generally does, in the first instance, upon setting aside the first sale, annul the title of the first purchaser, and place the title to the property in the same position it occupied before the sale. Freeman *v.* Munns, 15 Abb. Pr. (N. Y.) 468. And the purchaser also should be placed in the same position he occupied before the sale. Trotter *v.* White, 26 Miss. 88.

The proceedings upon the resale, while usually upon the same terms as the original sale, may be varied—as by directing that the property be allotted in a different manner. Watts *v.* Martin, 9 Bro. C. C. (Eng.) 113; Ward *v.* Cooke, 4

Sim. 87; Humphreys *v.* Roberts, 6 Jur. 680.

The person at whose instance the sale has been set aside, and who has made a deposit of his advance bid, will be discharged, and have his deposit returned to him, if he is outbid at the second sale. Williams *v.* Attenborough, T. & R. 7; Seton, 1206. Where there is no bidding at the second sale, a second resale will be ordered. Ewings *v.* Waite, L. R. 1 Eq. 440.

Amongst the numerous grounds for setting aside the sale and ordering a resale may be mentioned:

**Fraud**, which will of course in all cases furnish a sufficient ground for opening the biddings after confirmation,—Stahl *v.* Charles. 5 Abb. Pr. (N. Y.) 348; Laight *v.* Pell, 1 Edw. Ch. (N. Y.) 577; Anderson *v.* Foulke, 2 Harr. & G. (Md.) 346; Lefevre *v.* Larraway, 22 Barb. (N. Y.) 167; White *v.* Wilson, 14 Vesey, 151; Morice *v.* Bishop of Durham, 11 Vesey, 67;—as where the purchaser is a partner with a solicitor in the cause, and is in possession of information which he ought to have disclosed, and which he concealed,—Ryder *v.* Gower, 6 Bro. P. C. 306; Brinkerhoff *v.* Brown, 4 John. Ch. (N. Y.) 674;—or fraudulent misconduct on the part of the officer conducting the sale, or on the part of any other person connected with the sale,—National Bank *v.* Sprague, 21 N. J. Eq. 458; Lefevre *v.* Laraway, 22 Barb. (N. Y.) 167;—or where the parties agree not to bid against each other,—Watson *v.* Birch, 2 Ves. Jr. 52;—or in surveying the premises there has been collusion by which the quantity and value of the estate is misrepresented; known to some of the bidders, and unknown to others of them,—Ryder *v.* Gower, 6 Bro. P. C. 306;—or fraud in preventing a person interested in the property from attending the sale and bidding, and where the property was struck off much below its value,—Murdock *v.* Empie, 9 Abb. Pr. (N. Y.) 283. But it has been held that the fact that there were but two persons at the sale, where there is nothing to show that any attempt was made to keep others away, is not a circumstance of fraud, and the sale will not be set aside. Mitchell *v.* Berry, 1 Metc. (Ky.) 602. See further, as to circumstances which will cause sale to be set aside, Gilbert *v.* Haire, 43 Mich. 283; Fix *v.* Loranger, 30 Mich. 199. To authorize the setting aside of the sale upon the ground of inadequacy of price, it should be so gross as to justify the inference of fraud. Eberhart *v.* Gilchrist, 3 Stock. (N. J.) 167. See Twining *v.* Neil, 38 N. J. Eq. 470.

In McMinn *v.* Phipps, 3 Sneed (Tenn.), 196, where the application was made after confirmation to set aside the sale on the ground of fraudulent combination to suppress competition, the application was denied; the court holding that it should be by original bill, and not by motion in the pending suit. See also Spence *v.* Armour, 9 Heisk. (Tenn.) 167. *Compare* Brown *v.* Frost, 10 Paige (N. Y.), 243.

Where the sale had been set aside because of the fraudulent conduct on the part of the complainant, who became the purchaser of a part of the premises, and the mortgagor sought to charge him with the value of the use and occupation of the land while in his possession under his purchase, and with damages for waste, it was held that the setting aside of the sale vacated the satisfaction of the decree caused by the sale; and that judgment should be rendered against the complainant for only so much of the sum found to be due for such value and damages as was in excess of the amount necessary to satisfy the decree. Fort *v.* Roush, 104 U. S. 142.

**Surprize, accident, or mistake**, to constitute a ground for setting aside the sale, must be unattended with negligence on the part of the person making the application. If it might have been avoided by ordinary prudence on his part, the application will be denied. Parkhurst *v.* Cory, 3 Stock. (N. J.) 233. Nor will the sale be opened on any ground which the party might have interposed as a defence, unless he was prevented by fraud or mistake from so doing. Hall *v.* Urquart, 3 Stock. (N. J.) 318.

Where the party making the application, and who was the principal defendant in the case, was prevented by unavoidable accident from reaching the place of sale until after it was over, and proposed to advance the bid, the sale was set aside and the biddings opened upon his paying the expenses of the former sale and depositing the advance. Adams *v.* Haskell, 10 Wis. 123. See Hill *v.* Hoover, 5 Wis. 354; Hunt *v.* Ellison, 32 Ala. 173, cases where the court refused to set aside the sale on the ground of surprise.

A sale was set aside at the instance of a purchaser on account of a serious mistake in the representations as to the lands,—Gordon *v.* Sims, 2 McCord Ch. (S. Car.) 151;—and because it was knocked off to the purchaser prematurely, a higher bid having been offered, which the auctioneer failed to hear,—Gordon *v.* Sims, 2 McCord Ch. (S. Car.) 151. See also Williamson *v.* Dale, 3 John. Ch. (N. Y.)

290; Anderson *v.* Foulke, 2 Harr. & G. (Md.) 346; Mutual Life Ins. Co. *v.* Goddard, 33 N. J. Eq. 483.

In all cases of setting aside the sale on the ground of accident, mistake, or surprise, it should appear either that the sale was for a price greatly inadequate, or the party making the application should propose an advance. Usually both of these should exist. Where the mortgagee is the purchaser, the court will regard the application to set aside the sale with more indulgence than where a stranger is the purchaser. Campbell *v.* Gardener, 3 Stockt. (N. J.) 423.

Where a foreclosure sale had been made, and fairly and regularly conducted, and bought by a *bona fide* purchaser, who was a stranger to the proceedings, for $180, the property being worth about $550, the court refused to set aside the sale upon the application of the mortgagee, in which the mortgagor did not join, upon the following state of facts: Two days before the sale, the mortgager had written to one of his attorneys, who resided about 300 miles distant from the place of sale, requesting him to attend the sale and bid in the property at $200, and, if necessary, bid up to $450—the amount of the judgment in trust, and costs. The attorney not being able to arrange his business to attend the sale, requested another to attend and carry out these directions; this the other promised to do, but failed. It did not appear that this person was capable and reliable; nor was any reason shown why he did not comply with the request. The property had been sold by the sheriff, a few months previous to the sale, for $200. Babcock *v.* Canfield, 36 Kan. 437.

Where gross inadequacy, coupled with accident, mistake, or misapprehension, caused by the purchaser, or others interested, or by the officer conducting the sale, it will be set aside. Cole County *v.* Madden, 91 Mo. 585; Nugent *v.* Nugent, 54 Mich. 557.

Where the sale was of a tract "containing 900 acres, more or less," a deficiency of 40 acres will not justify the setting aside of the sale. Douthit *v.* Hipp, 23 S. Car. 205.

Under a statute requiring the court to be satisfied that the sale had realized the highest and best price the property would bring in cash, it appeared that the several lots and improvements had cost the defendant over $18,000; they sold for $8500. There was a good deal of testimony that, at a forced cash sale, the property was worth $9500. The taxes and costs, which are liens, were over $1000. *Held*, that the statute had been complied with. Guarantee Trust & Safe Deposit Co. *v.* Jenkins, 40 N. J. Eq. 451.

Where one claiming an interest in the premises was deprived of an opportunity to protect her interests by neglect of her attorney, and the property seems not to have brought the "highest and best price it would bring in cash at the time of the sale" (P. L. of 1880, p. 255), the sale will be set aside, and a resale ordered. Mut. Benefit Life Ins. Co. *v.* Gould, 634 N. J. Eq. 417. The object of this statute was merely to prevent the sacrifice of property at foreclosure sales, so far as this can be accomplished, by requiring proof that the property brought the best price obtainable at time of sale for cash; and the legislature did not intend that the court should set aside sales until an adequate price should be obtained. Delaware, Lackawanna & Western R. Co. *v.* Scranton, 34 N. J. Eq. 429.

Where a principal seeks to have a sale set aside, at which his agent was the purchaser, he will be required to refund the purchase-money paid, with interest, as also moneys expended in payment of taxes, for repairs, and improvements, and other lawful charges, with interest thereon; and the agent will be required to account for rents and profits, or, if he has had possession, for use and occupation, estimating the property at its value when he took possession, but not its value as enhanced by the improvements he placed upon it. Adams *v.* Sayre, 76 Ala. 509.

For cases of application to set aside sale on ground of fraud, accident, and mistake, see Gordon *v.* Sims, 2 McCord Ch. (S. Car.) 151; Laight *v.* Pell, 1 Edw. Ch. (N. Y.) 577; Anderson *v.* Foulke, 2 Harr. & G. 346; Campbell *v.* Gardner, 3 Stockt. (N. J.) 423; Lachlan *v.* Reynolds, Kay, 52; Williamson *v.* Dale, 3 Johns. Ch. (N. Y.) 290; Francis *v.* Church, Clarke Ch. (N.Y.) 475; Billington *v.* Forbes, 10 Paige (N.Y.), 587; May *v* May, 11 Paige (N.Y.), 201; Gould *v.* Libby, 24 How. Pr. (N. Y.) 440; Howell *v.* Hester, 4 N. J. Eq. 266; Thompson *v.* Mount, 1 Barb. Ch. (N. Y.) 607; Culvert *v.* Godfrey, 6 Beav. 97; Grissell *v.* Peto, 2 Sm. & G. 39; Griffith *v.* Hadley, 10 Bosw. (N. Y.) 587.

**Misconduct of the Officer Conducting the Sale** is a good ground for setting it aside. As, where there was a failure to advertise in the manner required, and the land sold for an inadequate price,—Williams *v.* Woodruff, 1 Duv. (Ky.) 257;—or where there was but one bidder present, a person living at the place, others being

**XII. Judgment for Deficiency.**—There is no power in the court, except as conferred by statute,[1] to render a personal judgment in the foreclosure proceeding against the mortgagor, or other person liable for the mortgage debt, for the balance of the debt which the

prevented from attending by the severity of the weather,—Roberts *v.* Roberts, 13 Gratt. (Va.) 639;—or by selling the whole premises together, where ordered to sell in parcels, and at an inadequate price,—Am. Ins. Co. *v.* Oakley, 9 Paige (N. Y.), 259;—or has violated the orders of the court as to price, of which the purchaser had notice,—Reqna *v.* Rea, 2 Paige (N. Y.), 339;—or holds out, to the parties in interest, that the sale will not take place, in consequence of which they fail to attend, and then makes the sale,—Collier *v.* Whipple, 12 Wend. (N. Y.) 224; Cole County *v.* Madden, 91 Mo. 585;—see Hubbard *v.* Taylor *et al.*, 49 Wis, 68;—or does not advertise and sell according to tho instructions for the sale, —Vanbussum *v.* Maloney, 2 Metc. (Ky.) 550,—the sale will be set aside. See State Bank of Nebraska *v.* Green *et al.*, 11 Neb. 303, a case showing an insufficient state of facts for setting sale aside.

The officer, in making the sale under the order of the court, is under no obligation to attempt to describe the improvements on the property. Guarantee Trust & Safe Deposit Co. *v.* Jenkins, 40 N. J. Eq. 451.

Where the incorrect description in the notice and sheriff's deed is also in the judgment and order of sale and in the mortgage, the proceedings cannot be corrected either at instance of purchaser at sale or mortgagee, but only by the re-forming of the mortgage, and having it foreclosed as re-formed. Conyers *v.* Merides, 75 Ind. 443.

The owner of the equity of redemption having disputed the validity of a foreclosure proceeding instituted by the owner of the mortgage, filed a bill attacking it and seeking to have it annulled; pending which the owner of the mortgage foreclosed under his suit. Whereupon the owner of the equity of redemption filed his supplemental bill, setting up a tender in full to the mortgagor. The court found in favor of the tender, and held the case was a proper one for setting the sale aside and held, further, that, even if there had been no tender, the court had full jurisdiction to dispose of the whole controversy; and that, if the owner of the mortgage proceeded to a sale regardless of the equities set up by the suit of the owner of the equity of redemption, the sale would be subject to the final decree of the court. Londer *v.* Burch, 47 Mich. 109.

Where a party has had full notice of the time and place of sale, in order to avail himself of alleged equities, he should have attended the sale, and notified the bidders of the same. Pender *v.* Pitman, 84 N. Car. 372.

Misdescription of the property sold will not be a ground for refusing confirmation, unless it appears that the party objecting has been prejudiced thereby. Cooper *v.* Foss, 15 Neb. 515.

1. See McCrickett *v.* Wilson, 50 Mich. 513; Stark *v.* Mercer, 4 Miss. (3 How.) 377; Fleming *v.* Sitton, 1 Dev. & B. (N. C.) Eq. 621; Waddell *v.* Hewitt, 2 Ired. (N. C.) Eq. 252; Orchard *v.* Hughes, 68 U. S. (1 Wall.) 73; bk. 17, L. ed. 560; Wightman *v.* Gray, 10 Rich. (S. C.) Eq. 518. It has been said that these statutes are "enacted to avoid the necessity of a separate action at law, and to enable one court to dispose of the whole case." Wiltsie on Mortgage Foreclosure, § 601. Seo also Schofield *v.* Doscher, 72 N. Y. 491; Equitable Life Ins. Co. *v.* Stevens, 63 N. Y. 341; Thorne *v.* Newby, 59 How. (N. Y.) Pr. 120.

In the absence of statutory provisions conferring authority, it is said that a court of equity possesses no power to give alien upon or to sequestrate any other property of the mortgagor as an additional security for the mortgage debt until after the mortgage property has been exhausted; and that for that reason such court cannot decree the payment of any deficiency remaining after the proceeds of the sale of the mortgaged premises have been applied to the payment of the debt, unless the court would have had jurisdiction to enforce the debt without the mortgage. Wiltsie on Mortgage Foreclosure, § 604. See Dunkley *v.* Van Buren, 3 Johns. Ch. (N. Y.) 330; Hunt *v.* Lewin, 4 Stew. & P. (Ala.) 138; Morgan *v.* Wilkins, 6 J J. Marsh. (Ky.) 28; McGee *v.* Davie, 4 J. J. Marsh. (Ky.) 70; Downing *v.* Palmateer, 1 T. B. Mon. (Ky.) 64; Stark *v.* Mercer, 4 Miss. (3 How.) 377; Fleming *v.* Sitton, 1 Dev. & B. (N. C.) Eq. 621; Orchard *v.* Hughes, 68 U. S. (1 Wall.) 73; bk. 17, L. ed. 560; Noonan *v.* Lee, 67 U. S. (2 Black) 499; bk. 17, L. ed. 278; Crutchfield *v.* Coke, 6 J. J. Marsh. (Ky.) 89; Waddell *v.* Hewitt, 2 Ired. (N. C.) Eq. 252.

proceeds of the sale fails to satisfy (except in the United States courts, where it is authorized by a rule of court). Where the foreclosure proceeding is not regulated by statute, it is based upon the inherent jurisdiction of equity over trusts; and the mortgagee would have to resort to the courts of law for his right to personal judgment.[1]

**1. Contingent Decree for Deficiency** cannot be rendered prior to the final decree of foreclosure and sale. Cobb *v.* Thornton, 8 How. (N. Y.) Pr. 66. It is said that the correct practice is to make a contingent judgment in the decree of foreclosure and sale for the payment of any deficiency which may appear upon the coming-in consummation of the report of sale, and that the plaintiff have execution therefor. Wiltsie on Mortgage Foreclosure, § 603. See Cobb *v.* Thornton, 8 How. (N. Y.) Pr. 66; McCarthy *v.* Graham, 8 Paige Ch. (N. Y.) 480. However, an execution cannot issue until the deficiency has been ascertained from the report of the sale. Bank of Rochester *v.* Emerson, 10 Paige Ch. (N. Y.) 115; Howe *v.* Lemon, 37 Mich. 164.

**The Deficiency is Ascertained** by deducting the proceeds of the sale from the amount due on the mortgage, the costs, and all taxes and assessments. Marshall *v.* Davies, 78 N. Y. 414, revs'g 16 Hun (N. Y.), 606; Mitchell *v.* Browne, 63 How. (N. Y.) Pr. 1; s. c., 14 N. Y. Week. Dig. 423.

**The Deficiency Contemplated** is thought to be the actual deficiency arising upon sale, and not the deficiency caused to a second mortgagee by a sale under a prior mortgage. See Loeb *v.* Willis, 22 Hun (N. Y.), 508; Siewert *v.* Hamel, 33 Hun (N. Y.), 44.

**Judgment for Deficiency Against Mortgagor**—as to, see Marshall *v.* Davies, 78 N. Y. 414; Bache *v.* Doscher, 41 N. Y. Super Ct. (9 J. & S.) 150; Bank of Rochester *v.* Emerson, 10 Paige Ch. (N. Y.) 359; Tormey *v.* Gerhart, 41 Wis. 54; Baird *v.* McConkey, 20 Wis. 297; Siewert *v.* Hamel, 33 Hun (N. Y.), 44; Moore *v.* Shaw, 15 Hun (N. Y.), 428.

**Judgment for Deficiency Against Third Person** cannot be rendered in the absence of a special statute conferring such authority. Doan *v.* Holly, 25 Mo. 357; s. c., 26 Mo. 186; Faesi *v.* Goetz, 15 Wis. 231; Borden *v.* Gilberty, 13 Wis. 670; McCarthy *v.* Gerraghty, 10 Ohio St. 438; Baird *v.* McConkey, 20 Wis. 297; Cary *v.* Wheeler, 14 Wis. 281; Jessop *v.* City Bank of Racine, 14 Wis. 331; Stillwell *v.* Kellogg, 14 Wis. 461; Gage *v.* Jenkinson, 58 Mich. 169.

**Deficiency Against an Assignor Guaranteeing Payment** will be granted. Vanderbilt *v.* Schreyer, 91 N. Y. 392; Officer *v.* Burchell, 44 N. Y. Super. Ct. (12 J. & S.) 575; Rushmore *v.* Gracie, 4 Edw. Ch. (N. Y.) 84; Bristol *v.* Morgan, 3 Edw. Ch. (N. Y.) 142; Jarman *v.* Wiswall, 24 N. J. Eq. (9 C. E. Gr.) 267. While such a person is a proper party defendant to a foreclosure, yet in such case no execution should issue against him until after the property of the person primarily liable is exhausted. See Harlem Sav. Bank *v.* Micklesburgh, 57 How. (N. Y.) Pr. 106; Leonard *v.* Morris, 9 Paige Ch. (N. Y.) 90; Curtis *v.* Tyler, 9 Paige Ch. (N. Y.) 432.

**Judgment for Deficiency Against Party Assuming a Mortgage** may be granted in most of the States, as well as against one who has become a guarantor or surety of it, or one who has given a collateral undertaking for its payment. Marshall *v.* Davies, 78 N. Y. 414; Gifford *v.* McCloskey, 38 Hun (N. Y.), 350; Douglass *v.* Wells, 18 Hun (N. Y.), 88; Tuttle *v.* Armstead, 53 Conn. 175; Bassett *v.* Bradley, 48 Conn. 224; Bay *v.* Williams, 112 Ill. 91; s. c., 54 Am. Rep. 209; Birke *v.* Abbott, 103 Ind. 1; Wright *v.* Briggs, 99 Ind. 563; Ellis *v.* Johnson, 96 Ind. 377; Logan *v.* Smith, 70 Ind. 597; Gage *v.* Jenkinson, 58 Mich. 169; Unger *v.* Smith, 44 Mich. 22; Fitzgerald *v.* Barker, 70 Mo. 685; Heim *v.* Vogel, 69 Mo. 529; Bond *v.* Dolby, 17 Neb. 491; Cubberly *v.* Yager, 42 N. J. Eq. (15 Stew.) 289; Vreeland *v.* Van Blarcom, 35 N. J. Eq. (8 Stew.) 530; Allen *v.* Allen, 34 N. J. Eq. (7 Stew.) 493; Trustees for Support of Public Schools *v.* Anderson, 30 N. J. Eq. (3 Stew.) 366; Brewer *v.* Maurer, 38 Ohio St. 543; s. c., 43 Am. Rep. 436; Davis *v.* Hulett, 58 Vt. 90; Palmater *v.* Carey, 63 Wis. 426; Meech *v.* Ensign, 49 Conn. 191; s. c., 44 Am. Rep. 225; Wallace *v.* Furber, 62 Ind. 103; Prentice *v.* Brimhall, 123 Mass. 291; Booth *v.* Conn. Mut. Life Ins. Co., 43 Mich. 299; Stuart *v.* Worden, 42 Mich. 154; Jones *v.* Steinbergh, 1 Barb. Ch. (N. Y.) 250; Bristol *v.* Morgan, 3 Edw. Ch. (N. Y.) 142; Halsey *v.* Reed, 9 Paige Ch. (N. Y.) 446.

In such cases the vendee becomes primarily liable for the payment of the debt.

But in nearly all of the American States the right to a personal judgment in the foreclosure suit, for the balance of the debt re-

See Comstock *v.* Drohan, 71 N. Y. 9; Hartley *v.* Harrison, 24 N. Y. 170; Russell *v.* Pistor, 7 N. Y. 171; s. c., 57 Am. Dec. 109; Cornell *v.* Prescott, 2 Barb. (N. Y.) 16; Ferris *v.* Crawford, 2 Den. (N. Y.) 595; Thayer *v.* Marsh, 11 Hun (N. Y.), 501; Marsh *v.* Pike, 10 Paige Ch. (N. Y) 595; Blyer *v.* Monholland, 2 Sandf. Ch. (N. Y.) 478. But where one takes lands subject to a mortgage, without expressly binding himself to the debt, a covenant to pay cannot be implied either from the debt or the mortgage, and no judgment for deficiency can be rendered against him. Ranney *v.* McMullen, 5 Abb. (N. Y.) N. C. 246; Wales *v.* Sherwood, 52 How. (N. Y.) Pr. 413; Equitable Life Ins. Co. *v.* Bostwick, 100 N. Y. 628; Gage *v.* Jenkinson, 58 Mich. 169.

**Where a Purchaser Has Assumed and Agreed to Pay a Mortgage,** the obligation inures to the benefit of the holder of the mortgage. Ricard *v.* Sanderson, 41 N. Y. 179; Ranney *v.* McMullen, 5 Abb. (N. Y.) N. C. 246; Thayer *v.* Marsh, 11 Hun (N. Y), 501; aff'd, 75 N. Y. 340; Comstock *v.* Drohan, 8 Hun (N. Y.), 373; aff'd, 71 N. Y. 9; Halsey *v.* Reed, 9 Paige Ch. (N. Y.) 446; Stiger *v.* Mahone, 24 N. J. Eq. (9 C. E. Gr.) 426; Hoy *v.* Bramhall, 19 N. J. Eq. (2 Beas.) 62; s. c., 78 Am. Dec. 68. And a grantee who assumes a payment of a mortgage will be deemed to have undertaken to pay the dept, althought he may not sign but merely accepts the deed. Smith *v.* Truslow, 84 N. Y. 660; Atlantic Dock Co. *v.* Leavitt, 54 N. Y. 35; s. c., 13 Am. Rep. 556; Richard *v.* Sanderson, 41 N. Y. 179; Belmont *v.* Coman, 22 N. Y. 438; Collins *v.* Rowe, 1 Abb. (N. Y.) N. C. 97; Marsh *v.* Pike, 10 Paige Ch. (N. Y.) 595; Furnas *v.* Durgin, 119 Mass. 500; s. c., 20 Am. Rep. 341; Miller *v.* Thompson, 34 Mich. 10; Taylor *v.* Preston, 79 Pa. St. 436.

**Where a Grantee Has Assumed the Payment of a Mortgage, He Will Not be Liable on a Judgment for Deficiency Unless His Grantor Was Liable.**—Cashman *v.* Henry, 75 N. Y. 103; Vrooman *v.* Turner, 69 N. Y. 280; Smith *v.* Cross, 16 Hun (N. Y.), 487; Norwood *v.* De Hart, 30 N. J. Eq. (3 Stew.) 412.

**Whether a Person Who Has Assumed the Payment of a Mortgage, and Thereby Incurred a Personal Liability to the Holder of the Mortgage, Can Subsequently be Released** by an agreement with his grantor is an unsettled question. See Judson *v.* Dada, 79 N. Y. 373; Hartley *v.* Harrison, 24 N. Y. 170; Douglass *v.* Wells, 18 Hun (N. Y.), 88; Stephens *v.* Casbacker, 8 Hun (N. Y.), 116; Bay *v.* Williams, 112 Ill. 91; s. c., 54 Am. Rep. 209; Berkshire Life Ins. Co. *v.* Hutchings, 100 Ind. 496; Young *v.* Trustees for the Support of Public Schools, 31 N. J. Eq. (4 Stew.) 290; Trustees for the Support of Public Schools *v.* Andersen, 30 N. J. Eq. (3 Stew.) 366; Brewer *v.* Maurer, 38 Ohio St. 543; s. c., 43 Am. Rep. 436. However, where a grantee who has assumed the payment of a mortgage subsequently reconveys the land in good faith to his grantor, who assumes the mortgage, the grantee will be thereby discharged from personal liability to the mortgagor. Lane *v.* Byrne, 34 N. J. Eq. (7 Stew.) 52.

**Acceptance of a Deed Subject to a Mortgage Creates no Personal Liability** on the grantee. Equitable Life Assurance Soc. *v.* Bostwick, 100 N. Y. 628; Smith *v.* Truslow, 84 N. Y. 660; Collins *v.* Rowe, 1 Abb. (N. Y.) N. C. 97; Johnson *v.* Monell, 13 Iowa, 300; Fiske *v.* Tolman, 124 Mass. 254; s. c., 26 Am. Rep. 659; Strong *v.* Converse, 90 Mass. (8 Allen) 557; s. c., 85 Am. Dec. 732; Hall *v.* Morgan, 79 Mo. 47; Lawrence *v.* Towle, 59 N. H. 28; Woodbury *v.* Swan, 58 N. H. 380; Walker *v.* Goldsmith, 7 Oreg. 161.

**Oral Contract of Assumption May be Enforced** and the grantee compelled to pay any deficiency. See Taintor *v.* Hemmingway, 18 Hun (N. Y.), 458.

**Judgments Against Non-residents Defendants for Deficiency** cannot be rendered where they have not appeared in the action or been personally served with the summons within the State. Schwinger *v.* Hickok, 53 N. Y. 280; Lawrence *v.* Fellows, Walk. Ch. (Mich.) 468; *In re* Empire State Bank, 18 N. Y. 199, 215; Bissell *v.* Briggs, 9 Mass. 462; s. c., 6 Am. Dec. 88; Boswell *v.* Otis, 50 U. S. (9 How.) 336; bk. 13, L. ed. 164; Thompson *v.* Emmert, 4 McL. C. C. 96.

**When Judgment for Deficiency May be Docketed.**—See Bache *v.* Doscher, 41 N. Y. Super. Ct. (9 J. & S.) 150; De Agreda *v.* Mantel, 1 Abb. (N. Y.) Pr. 130; Cobb *v.* Thornton, 8 How. (N. Y.) Pr. 66; Cormerais *v.* Genella, 22 Cal. 116; Mickle *v.* Maxfield, 42 Mich. 304; Howe *v.* Lemon, 37 Mich. 164; Clapp *v.* Maxwell, 13 Neb. 542, 547; Brown *v.* Willis, 67 Cal. 235; Siewert *v.* Hamel, 33 Hun (N. Y.), 44; Loeb *v.* Willis, 22 Hun (N. Y.), 508.

maining after the proceeds of the sale have been applied, has been conferred by statute.[1]

The judgment, when rendered and docketed, is a lien[2] on the general property of the judgment debtor as if rendered in a court of law, and may be enforced by execution[3] as at law.[4]

1. See Florida Code (Bush's Dig.) 849; N. Y. Code Civ. Proc. § 1627; North Carolina Code, § 190; Wisconsin Rev. Stat. § 3156. See Equitable Life Ins. Co. *v.* Stevens, 63 N. Y. 341; Thorne *v* Newby, 59 How. (N. Y.) Pr. 120; Jarman *v.* Wiswall, 24 N. J. Eq. (9 C. E. Gr.) 267.

2. McCarthy *v.* Graham, 8 Paige Ch. (N. Y.) 480; Cobb *v.* Thornton, 8 How. (N. Y.) Pr. 66; Mutual Life Ins. Co. *v.* Southard, 25 N. J. Eq. (10 C. E. Gr ) 337; Bell *v.* Gilmore, 25 N. J. Eq. (10 C. E. Gr.) 104; De Agreda *v.* Mantel, 1 Abb. (N. Y.) Pr. 130; Englund *v.* Lewis, 25 Cal. 337; Chapin *v.* Broder, 16 Cal. 403; Fletcher *v.* Holmes, 25 Ind. 458; Cormerais *v.* Genella, 22 Cal. 116; Rowe *v.* Table Mountain Water Co., 10 Cal 441; Rollins *v.* Forbes, 10 Cal. 299.

3. See Bank of Rochester *v.* Emerson, 10 Paige Ch. (N. Y.) 115; s. c., 10 Paige Ch. (N. Y.) 359; Bache *v.* Doscher, 41 N. Y. Super. Ct. (9 J. & S.) 150; Cobb *v.* Thornton, 8 How. (N. Y.) Pr. 66; Hanover Fire Ins. Co. *v.* Tomlinson, 3 Hun (N. Y.), 630; Tormey *v.* Gerhart, 41 Wis. 54; Baird *v.* McConkey, 20 Wis. 297; Bicknell *v.* Byrnes, 23 How. (N. Y.) Pr. 486, 490; Moore *v.* Shaw, 15 Hun (N. Y.), 428; McCrickett *v.* Wilson, 50 Mich. 513; Gies *v.* Green, 42 Mich. 107; Clapp *v.* Maxwell, 13 Neb. 542; Rannos *v.* Sutherland, 46 Mich. 489.

4. While the rule undoubtedly is that, without statutory authority, the court, in the exercise of its equitable jurisdiction, has no power to render a personal judgment in the foreclosure suit, yet when there are circumstances which would give equitable jurisdiction as respects the demand itself, independent of the mortgage, the court, in the exercise of its recognised equity powers, may render personal judgment on the debt,—Halsey *v.* Reed, 9 Paige (N. Y.), 446; Crutchfield *v.* Coke, 6 J. J. Marsh. (Ky.) 89; Waddell *v.* Hewett, 2 Ired. Eq. (N. Car.) 252; Klapworth *v.* Dressler, 13 N. J. Eq. 62; s. c., 78 Am. Dec. 69;—as, where the purchaser of the mortgaged premises has assumed to pay the mortgage debt, this inures to the benefit of the mortgagee or his assignee, and he may have judgment for the deficiency in the foreclosure suit. Halsey *v.* Reid, 9 Paige (N. Y.), 446. See, generally, Orchard *v.* Hughes, 1 Wall. (U. S.) 73; Dunkley *v.* Van Buren, 3 Johns. Ch. (N. Y.) 330; Starke *v.* Mercer, 4 Miss. (3 How.) 377; McGee *v.* Davie, 4 J. J. Marsh. (Ky.) 70; Fleming *v.* Sitton, 1 Dev. & B. (N. Car.) 621.

By the 8th Equity Rule of the U. S. courts, it is provided that "Final process to execute any decree may, if the decree be solely for the payment of money, be by writ of execution in the form used in the circuit court in suits at common law in actions of *assumpsit*." By an additional rule, made April 18, 1864, it is provided that, in suits in equity for foreclosure of mortgages in the circuit courts of the United States, or courts of the territories having jurisdiction of the same, a decree may be rendered for any balance that may be found due to the plaintiff over and above the proceeds of the sale or sales, and execution may issue for the collection of the same as is provided in the 8th Rule, above, where the decree is solely for the payment of money. But, without such rule of court, the Federal courts will not give personal judgment nor issue execution in such cases. Orchard *v.* Hughes, 1 Wall. U. S. 73; Noonan *v.* Lee, 2 Black (U. S.), 499.

Some of the courts hold that, when the statute of the State does not expressly authorize it, either by specific provision or under general enactments, judgment cannot be rendered against a third party who has made himself liable for the debt; that there would be misjoinder of causes of action. Doan *v.* Holly, 26 Mo. 186; Cary *v.* Wheeler, 14 Wis. 281; Stilwell *v.* Kellogg, 14 Wis. 461. There should be a prayer for personal judgment in the bill or petition. French *v.* New, 20 Barb. (N. Y.) 481; Simonson *v.* Blake, 12 Abb. Pr. (N.Y.) 331; Foote *v.* Sprague, 13 Kan. 155.

In order that a purchaser from the mortgagor may be subjected to a personal judgment, he must have assured the mortgage debt; and, whether he has done so or not must be gathered from the language of the entire instrument where there is no express undertaking to do so. Stebbins *v.* Hall, 29 Barb. (N. Y.) 524; Belmont *v.* Coman, 22 N. Y. 438; Weed Sewing-M. Co .*v.* Emerson, 115 Mass. 554; Gifford *v.* Corrigan, 105 N. Y. 223.

It has been held that the recital in the conveyance that the land is subject to the mortgage, even with the additional words "which has been estimated, as a part of the consideration-money of this conveyance, and has been deducted therefrom," does not amount to an assumption of the mortgage debt. Belmont *v.* Coman, 22 N. Y. 438.

Where there is no covenant in the mortgage for the payment of the debt, nor any note or other agreement for its payment, there cannot be a personal judgment for the deficiency. Van Brunt *v.* Mismer, 8 Minn. 232; Hunt *v.* Lewin, 4 Stew. & P. (Ala.) 138, and is so provided by statute in several of the States.

The judgment becomes a lien upon the general lands of the judgment debtor upon the docketing of the judgment, or such other time as may be prescribed by statute. Rollins *v.* Forbes, 10 Cal. 299.

When parts of the debt are not due, the court may direct that subsequent judgments may be entered, in case of default, upon the maturing of respective instalments. Sketon *v.* Ward, 51 Ind. 46.

A personal judgment for deficiency in the foreclosure suit, with appropriate process for its enforcement, is now authorized by statute in most of the American States, not only against the mortgage, but against all persons who may have become liable for the mortgage debt. For citation of the statutes of the various States, and cases thereon, see Wiltsie on Mort. Foreclosure, § 87, and note 2. The same rule has been adopted in the Federal courts. Cross *v.* Devalle, 1 Wal. 5; Orchard *v.* Hughes, 1 Wall. (U. S.), 73; Noonan *v.* Lee, 2 Black (U. S.) 599.

The *scire facias* proceeding in *Illinois* is confined to a judgment *in rem*. Osgood *v.* Stevens, 25 Ill. 89. And so, also, the proceeding by advertisement, in *New York*.

In the absence of statute allowing such personal judgment, a court of equity in a foreclosure proceeding will not exercise its jurisdiction to give such judgment unless there be some feature of the debt itself conferring equity jurisdiction independent of the mortgage. But in Birnie *v.* Main, 29 Ark. 591, it was held that, although the debt was barred by the Statute of Limitations, the court would nevertheless, give judgment for the deficiency; that, having taken jurisdiction to enforce the mortgage, it would retain it for all purposes, so as to give complete relief; that the judgment for the deficiency was but incidental to the decree of foreclosure. The soundness of this view may well be doubted.

Section 808, Rev. Stat. Dist. Columbia, authorizes a decree *in personam* for deficiency. Dodge *v.* Freedman's Spring & Trust Trust Co., 106 U. S. 445

Special application to the court should be made by execution on a judgment for deficiency. Ges *v.* Green, 42 Mich. 107.

The amount for which the mortgaged premises were sold is, as between the parties to the suit, the conclusive value of the premises upon the question of the amount, for which judgment for the deficiency should be rendered. Snyder *v.* Blain, 33 N. J. Eq. 208.

Where, in the bill for foreclosure, there was a prayer "That the plaintiff may have execution for any balance remaining unpaid," this was held sufficient to authorize a judgment for deficiency under a statute which provided for the entry of such judgment only where the complaint contains a demand therefor. Olinger *v.* Liddle, 55 Wis. 621.

A personal judgment may be taken against the husband, in a proceeding to foreclose a mortgage upon the wife's property given to secure a note executed by the husband, even although the note was given for the wife's debt. Ogborn *v.* Eliason, 77 Ind. 373.

Certain mortgages had been given at a sale made by commissioner in a partition proceeding in the orphans' court, for 70 per cent of the purchase-money, the mortgages being given by one Beam, in his own name, to the commissioners, who assigned part of them to the guardian of a minor, who was one of the complainants in the partition suit. They were so given by Beam under an arrangement with several persons,—the defendants in the proceeding thereinafter mentioned. And Beam also executed a declaration of trust, stating that he held the title in trust for himself and defendants; and they paid their proportion of the 30 per cent required at the time of the sale, as well as the interest subsequently accruing on the mortgages. When the minor attained his majority, the guardians assigned the mortgages to him. At the foreclosure sale, in a suit to foreclose the mortgages brought by the assignee, the premises failed to realize an amount sufficient to satisfy the mortgages. *Held*, that the defendants were not personally liable for the deficiency. Burhans *v.* Beam, 36 N. J. Eq. 497.

A mortgage executed under unrecorded power of attorney is, as between the parties, good; and, in a foreclosure suit in equity, the court can render a personal

**XIII. Disposition of the Proceeds of Sale.**—The surplus proceeds of the sale stand in place of the equity of redemption in the land for those who have a lien upon or an estate or interest in this equity of redemption. The general course of practice is for the surplus proceeds to be paid into court to await the distribution. The distribution will be made, under the orders and direction of the court, amongst those entitled according to their respective equities and in the order of priorities. A reference should be ordered directing the master or special referee to ascertain and report the amounts due, respectively, to the various claimants, as well as all facts necessary to determining priorities, adjusting conflicting equities, and to the apportionment of the fund between the claimants.

This report is open to exceptions, and may be confirmed or set aside and a new reference ordered, as the court shall determine.

Where the rights of the various claimants have been ascertained and adjusted, the distribution will be made in accordance with such adjustment.[1]

judgment against the mortgagor for debt, although no decree *in rem.* can be rendered because of the sale of the mortgagor's interest in the premises under an execution, for the reason that the power of attorney had not been recorded with the mortgage. Du Val, Adm'r, *v.* Johnson *et al.*, 39 Ark. 182.

A personal judgment rendered on the mortgage debt at the suit of the mortgagee, who had taken out execution upon the judgment, and had the mortgaged premises sold under it, and bid off the property at the sale, is void, and may be so declared at the suit of the mortgagee. So held in Boone *et al. v.* Armstrong, 87 Ind. 168.

The mortgagee is not bound by the relation of principal and surety, created between the mortgagor and his vendee, where the vendee, on a sale to him of the mortgaged premises, has assumed the payment of the mortgage debt. And where, after foreclosure, the mortgagor is sued for the balance unsatisfied of the mortgage debt, it is no defence to the suit. that his vendee had, with the permission of the mortgagee, removed certain personalty embraced in the mortgage.

Where vendees of the mortgagor assumed to pay the mortgaged debt in specified proportions, which were recited to be part of the consideration of their purchase, it was held, in an action against them by the mortgagee, to recover a deficiency arising from a foreclosure sale of the mortgaged premises, that there was a sufficient consideration to sustain the covenaut of the vendees, and that mortgagee could recover. Hand *v.* Kennedy, 83 N. Y. 149.

1. The court, when by proper service it has obtained jurisdiction, has equitable powers sufficiently broad to reach all the equities, and to adjust all the rights and liabilities, of the various parties; and it will settle, and dispose of, and enforce the whole in one suit. Chapworth *v.* Dressler, 2 Beasley Ch. (N. J.) 62. Fithian *v.* Monks, 43 Mo. 502.

The report of the referee upon the reference to ascertain the amount of claims upon the surplus, and the liens and priorities of the respective claimants, etc., should show that notice of the application for the distribution of the surplus had been given to all the parties in interest in the foreclosure suit; and, if the notice has not been given, the order directing the distribution of the fund will be set aside. Smith *v.* Smith, 13 Mich. 258. If there is no one interested in the surplus but the mortgagor, and he dies pending the suit, the surplus goes to his heirs. Shaw *v.* Hoadley, 8 Blackf. (Ind.) 165. Although it has been held that the surplus is personalty going to the personal representative. Smith *v.* Smith, 13 Mich. 258. *Compare* Dunning *v.* Ocean Nat. Bank, 61 N. Y. 497; Wright *v.* Rose, 2 Sim. & Stu. 323.

The surplus, under foreclosure of real estate mortgage, stands in the place of the equity of redemption, possesses all the properties of realty, and goes to the heir; and when paid to the administrator of the mortgagor, his widow cannot claim it as personalty exempt under the statute. Beard, Adm'r, *v.* Smith, 71 Ala. 568.

A junior judgment creditor of the mortgagor is entitled to be paid out of the surplus, notwithstanding an agreement

which was carried into effect between the mortgagor, the last mortgagee, and one A, made at the time the tract of land was to be sold under several mortgages, that A should bid off the land at $3000 (which amount was insufficient to pay all the mortgages) but that he should actually pay $3939.85, a sum more than sufficient to pay them all, and the surplus should be paid to the last mortgagee to indemnify him against a liability he had assumed for the mortgagor. *Held*, also, that this surplus could be reached by garnishment against the last mortgagee. McGuire *v.* Wilkinson, 72 Mo. 199.

Where the sheriff had embezzled a part of the money upon the sale of mortgaged lands made by him, it was held that the amount so embezzled should not be credited on the mortgage; that the sheriff was not the agent of the mortgagee. Chalmers *v.* Turnipseed, 21 S. Car. 126.

Where a mortgage had been given to secure both an individual note and a joint note, and was insufficient to pay both, the holder is under no obligation to apply proceeds *pro rata;* but may apply entire proceeds on individual note. Small *v.* Older, 57 Iowa, 326.

An independent action will not lie, by a junior mortgagee, to reach surplus under a foreclosure by the senior mortgagee. He must come into that proceeding. Fliess *v.* Buckley, Adm'r, 90 N. Y. 286.

The surplus money remaining under a foreclosure sale by a junior mortgagee cannot be claimed by a senior mortgagee, or one having his rights by subrogation. He must foreclose his own mortgage. Firestone *v.* State, *ex rel.*, 100 Ind. 226.

A second mortgagee instituted his suit to foreclose his mortgage and made all lienholders, prior and subsequent, parties, and moved for a receiver to collect the rents pending the suit, which application was refused. Subsequently a junior mortgagee instituted his action to foreclose, making all lienholders parties, and a receiver was appointed. The court held that the funds collected by the receiver should be applied to the liens in the order of their priority. Williamson *v.* Gerlach, 71 Ga. 682.

On foreclosure sale of a homestead exceeding $1500, the surplus must be applied on the mortgage of the homestead before making any application thereof on antecedent levies. Vermont Savings Bank *v.* Elliott *at al.*, 53 Mich. 257.

The vendee, to whom his mother had conveyed the land, taking his bond, payable to her daughter (who was a person of week mind) for the purpose of providing for her, gave a mortgage on the land to another one of her sons to secure the bond, and subsequently sold the equity of redemption in the land to another one of the sons. The holder of the mortgage filed his bill for foreclosure, making the mortgagor and his vendee parties. *Held*, that the transaction constituted the complainant trustee for the daughter, and that, in this proceeding, the holder of the equity of redemption could not be heard to claim that the fund should be secured for the benefit of the daughter, or enjoined from passing into complainant's hands. Nugent *v.* Nugent, 50 Mich. 377.

As to distribution of surplus under complicated state of facts, see Erie County Savings Bank *v.* Roof *et al.*, 80 N. Y. 591.

The order of priority of liens should be observed in the distribution of the surplus. Averill *v.* Lorcks, 6 Barb. (N. Y.) 470; Baker & Hall *v.* Gladden, 72 Ga. 469.

The mortgagee himself may be a claimant on the surplus by reason of an independent claim,—Beekman Fire Ins. Co *v.* First M. E. Church, 29 Barb. (N. Y.) 658;—so a junior mortgagee; —Kenton *v* Spencer, 6 Ind. 321. Mortgages are entitled to priority in the distribution, over subsequent judgments, even although unrecorded. Knell *v.* Green St. Building Asso., 34 Md. 77. The creditor has in such case the same rights, and no greater, that his debtor had. Norton *v.* Williams, 9 Iowa, 529. Simultaneous mortgages, although held by different persons, are entitled to share equally out of the surplus. Dagget *v.* Rankin, 31 Cal. 321.

Where only a part of the mortgaged premises is foreclosed, upon which part there are other encumbrances, the proceeds can only be applied on a proportional part of the debt, and the balance towards such other encumbrances in their order. Mickle *v.* Rambs, 1 N. J. Eq. 501.

Mechanic's liens, although not ripened into judgment, are entitled to share. Livingston *v.* Mildrum, 19 N. Y. 440.

A dower interest is extinguished to the extent of the debt secured by the mortgage, but the remainder of the dower interest is a claim upon the surplus where the wife has joined in the mortgage, Jones on Mort., (2d Ed.) § 1693, and authorities cited. See also § 1694.

An attachment of the surplus is subordinate to the claims under mortgages or other encumbrances of record. West *v.* Shryer, 29 Ind. 624.

Where a partner executes a mortgage

upon his interest in the partnership property, the mortgagee's interest and rights are subject to all the equities of the partnership, and are limited to what remains after these equities are fully adjusted, and a full accounting of the partnership business is necessary to determine this; but this accounting may be had in the foreclosure suit, as it is essential to the ascertainment of the mortgagor's interest. Churchill *v.* Baron, Proctor *et al.*, 31 Minn. 129.

As to the disposition of costs in the foreclosure suits, see Scattergood *v.* Keeley, 40 N. J. Eq. 491

**Trustee's Commissions.**—Where trustee, on sale, received from purchaser only part of the purchase-money, and obtained an order for resale, and resold it, he is entitled to commission only on amount actually received on first sale, and on whole amount of resale. McCullough *v.* Pierce, 55 Md. 540.

**Attorney's Fees.**—No greater amount for attorneys' fees than the sum stipulated for in the mortgage can be allowed. Palmeter *v.* Carey, 63 Wis. 426.

A provision in a mortgage, to pay a reasonable sum for fee of complainant's solicitor in foreclosure suit, to be included in the decree, if the intention was to indemnify the mortgagee against the expense of foreclosing is allowable, but will not embrace unnecessary and useless services of a solicitor, however laborious or extensive. Soles *v.* Sheppard, 99 Ill. 615.

The circuit court has no power to adopt a rule allowing a fee of $30 to complainant's solicitor, under an order of sale. McCullough *v.* Pierce, 55 Md. 540.

Where the mortgage stipulates for a certain amount for attorney's fees, it is in the sound discretion of the court to determine whether the whole or any part thereof shall be embraced in the foreclosure decree; and, if the mortgagee himself conducts the foreclosure suit, nothing should be allowed him under this stipulation. But where the full amount was allowed without objection in the court below, it is not reversible error. Reed *v.* Catlin, 49 Wis. 686.

Attorney's fees stipulated for in the mortgage may be allowed although the complaint contained no allegations respecting them further than that the mortgage was executed, a copy being attached to the complaint. Kern Valley Bank *v.* Chester, 55 Cal. 49.

When the answer alleged that the plaintiff's attorney received a regular salary in compensation for all his services, and that plaintiff had not agreed or become liable to pay anything for services in this action (in an action to foreclose a mortgage stipulating for an attorney's fee), but the court failed to find upon the issue, and allowed the attorney's fee stipulated for in the mortgage, *held*, error, and cause reversed. Bank of Woodland *v.* Treadwell, 55 Cal. 379.

In a case where the mortgage provided for an attorney's fee of $50, at the foreclosure sale the mortgagee bid off the premises for a sum exceeding by about $40 the debt, costs, taxes, and insurance. It was held that this $40 must be paid over to the owner of the equity of redemption. In such case the mortgagee is estopped, at least in the absence of evidence from insisting that he did not have to bid this surplus sum to obtain the land, and cannot be heard to say that this part of his bid was fictitious. Kennedy *v.* Brown, 50 Mich. 336, 343.

Stipulations in mortgages for attorney's fees are subject to the equitable control of the court, and will be enforced only to extent of reasonable compensation, and the court may refuse any allowance where the debtor has been misled by the creditor; but, to justify such an exercise of discretion, the debtor should attest his sincerity and good faith by promptly paying or tendering the amount of debt and interest, exclusive of commissions. Lewis *v.* Germania Savings Bank, 96 Pa. St. 86.

Where the mortgage provides that, in case of foreclosure, the mortgagor will pay "a reasonable and customary sum for attorney's or solicitor's fees," the amount must be ascertained by evidence. Voechting *v.* Grau, 55 Wis. 312.

The mortgage contained a stipulation that, in case of foreclosure, or suit on the notes, the mortgagor would pay all attorney's fees and commissions, not less than 10 per cent on the amount for which the foreclosure might be had, and all costs and expenses incurred, and that such fees and expenses should be considered as part of the mortgage debt, and as amply secured by the mortgage as the debt itself. The court allowed 10 per cent to plaintiff's attorneys in the foreclosure suit. *Held*, that this was proper; that the fees, by the terms of the contract, were as much a part of the debt secured as the notes themselves. The case was distinguished from 49 Ga. 604, a case of factor's lien, which was governed by the statute. McCall *v.* Walter, 71 Go. 287.

Where a mortgage which contained a

**XIV. Remedies against the Purchaser.**—The person who purchases at the sale in the foreclosure proceeding becomes a *quasi* party to the suit, and thereby submits himself to the jurisdiction of the court so as to be liable to its orders and decrees against him in all matters connected with the sale or relating to him as purchaser; and the orders and decrees or judgments against him may be enforced by the ordinary process of the court, and, if necessary to enforce compliance, by its extraordinary compulsory process.[1]

power of sale authorized a sale on default, and payment, out of proceeds, of "all costs of foreclosure, including attorney's fee," this only confers authority to so pay in case of a sale under the power, and does not authorize the allowance of attorney's fee for filing a bill for foreclosure. So held in Bynum *v.* Frederick, 81 Ala. 489.

Where a personal judgment had been rendered against a husband in a decree to foreclose a mortgage upon wife's property, and in said judgment was included an amount allowed for attorney's fees, a motion by the husband to strike out of this judgment the amount so allowed was properly overruled, as, if the land failed to bring enough to satisfy the residue of the judgment, the amount for attorney's fees was proper. Ogborn *v.* Eliason, 77 Ind. 393.

1. By the English practice, as it now exists, the court may, upon failure of the purchaser to comply with the terms of sale, make an order upon him to pay the money into court, and, ordinarily, will do so where he appears to be responsible, and may enforce such order by attachment against his person; or may, instead, order a resale of the property, and charge the purchaser with the expenses of such resale, and may enter judgment against him for any deficiency in the price at the second sale as respects the price at the first sale. 2 Daniel Ch. Pl. & Pr. (5th Ed.), *1282. [By the former practice, forfeiture of the deposit was the only remedy. Saville *v.* Saville. 1 P. Wms. 745.] The same course of practice is adopted in the American courts. Richardson *v.* Jones, 3 Gill. & J. (Md.) 163; Brasher's Ex'rs *v.* Cortlandt, 2 John. Ch. (N. Y.) 505; Clarkson *v.* Read, 15 Gratt. (Va.) 288; Simmons *v.* Tongue, 5 Bland (Md.). 341; Harding *v.* Yarbrough, 6 Jones Eq. (N. Car.) 215, n. Vannerson *v.* Cord, 1 S. & M. Ch. (Miss.) 355; Townshend *v.* Simon, 9 Vroom (N. J.) 239; Haralson *v.* George, 56 Ala. 295; Gordon *v.* Sims, 2 McCord Ch. (S. Car.) 151; Cowell *v.* Lippitt, 3 R. I. 92; Wood *v.* Mann, 3 Sumn. (U. S.) 318.

By becoming a purchaser, he submits himself to the jurisdiction of the court,—Regna *v.* Rea, 2 Paige (N. Y.), 339;—he becomes a *quasi* party to the suit,—Eagan *v.* Phieter, 5 Sneed (Tenn.) 296;—and the court may give judgment against him and his sureties,—Deadirick *v.* Smith, 6 Humph. (Tenn.) 138;—and may, by attachment against his person, be compelled to complete his purchase,—Wood *v.* Mann, 3 Sumner 318; Graham *v.* Bleakie, 2 Daly (N. Y.), 55; Gordon *v.* Sims, 2 McCord Ch. (S. Car.) 157;—and his surity also,—Wood *v.* Mann, 3 Sumn. (U. S.) 151;—but there must be an order passed for the payment by him of the purchase-money before an attachment can issue against him,—Cowell *v.* Lippitt, 3 R. I. 92.

It is not for the purchaser to say what remedies shall be pursued against him for non-compliance; nor whether or not there shall be a resale of the property. Wood *v.* Mann, 5 Sumn. (U. S.) 318. The parties interested in enforcing compliance may, if they see proper, file a bill against him for specific performance,—Bowne *v.* Ritter, 26 N. J. Eq. 456;—but proceedings in the suit itself to compel performances is the better course.

The person making an advance on the bid may likewise be held liable in the suit itself in the same way as the purchaser may be held liable. Allen *v.* East, 4 Baxt. (Tenn.) 308.

Payment cannot be resisted after confirmation and after the time for appeal has expired, upon the ground of irregularities in the sale. (Todd *v.* Dowd, 1 Metc. (Ky.) 281; see Spence *v.* Armour 9 Heisk. (Tenn.) 167), where the court rests its refusal to relieve the purchaser upon the ground that he had full knowledge of the defect in the title at the time of the sale.

When the purchaser has given his note for the purchase-money, the land may again be sold, for the payment of such note. Such order of sale should be based upon a rule on the purchaser to show cause why the land should not be sold. Clarkson *v.* Read, 15 Gratt. (Va.)

**XV. Rights of the Purchaser.**—Whilst the purchaser's right to the ownership and possession of the property does not exist until confirmation of the report (as, until confirmed, there is no sale), yet, upon the confirmation, his right to the title and to the possession is complete. Upon the confirmation, he is entitled to be vested with the title, either by the execution of a deed by the master or commissioner who made the sale, or by divestiture and vestiture in him of the title by the decree itself, when such mode is according to the practice of the court.[1]

If the deed has already been executed and delivered, the confirmation of the sale relates back to this delivery and makes the deed operative from its date. There is no uniform practice in the American courts as to the time at which the deed should be executed and delivered, whether before or after confirmation. The deed relates to the date of the mortgage, and invests the purchaser with such title as the mortgagor had at the execution of the mortgage, and passes the property as it then was. The purchaser is entitled to the crops growing at the time of the delivery of the deed;[2] but not to the rents between the time of the sale and delivery of the deed.[3]

He is entitled to possession from the date of demand, after the execution of his deed. The court, by orders in the foreclosure suit, usually by injunction or writ of assistance, will compel the person in possession of the property to surrender the possession to the purchaser whenever such person is a party to the suit, or has come into possession *pendente lite;* otherwise, the purchaser must enforce his right by independent suit. If the owner in possession has the right to redeem under a prior mortgage, his possession cannot be disturbed. If a party in possession relies upon his right to the possession under a title claimed to be paramount to the

288. *Compare* Richardson *v.* Jones, 3 Gill. & J. (Md.) 163.

The purchaser cannot escape the compulsory process of the court by a forfeiture of his deposit,—Brasher's Ex'rs *v.* Cortlandt, 2 Johns. Ch. (N. Y.) 505;—but this forfeiture may also be enforced,—Willets *v.* Van Alst, 26 How. Pr. (N. Y.) 325.

1. In *Connecticut*, courts of equity are authorized by statute to pass the title to real estate by decree, without any act on the part of the defendant, where in their judgment it shall be the proper mode to carry the decree into effect; and shall be as effectual to transfer the title as a deed. King *v.* Bill, 28 Conn. 593.

So in *Tennessee*—Code of 1884, § 5234;—or may require the execution of a deed,—§§ 5235;—5236, and may compel its execution by attachment and sequestration,—§ 5237.

So in *Ohio*,—Taylor *v.* Boyd, 3 Ohio, 337;—but, as between the parties, subject to revocation upon reversal of the decree,—Taylor *v.* Boyd, 3 Ohio, 337;—but the decree may still order the execution of a deed to be enforced by attachment, if necessary,—Randall *v.* Pryor, 4 Ohio, 424.

2. Lane *v.* King, 8 Wend. (N. Y.) 584; Parker *v.* Storts, 15 Ohio St. 351; Jones *v.* Thomas, 8 Blackf. (Ind.) 428.

3. Clason *v.* Corley, 5 Sandf. (N. Y.) 447; Astor *v.* Turner, 11 Paige (N. Y.), 436; s. c., 43 Am. Dec. 766, and note; Beckman *v.* Sikes, 35 Kan. 120. See Taliaferro, etc., *v.* J. P. Gay, 78 Ky. 496.

In *Tennessee* the purchaser is entitled to the rents only from the confirmation of the report of sale by the court. Armstrong *v.* McClure, 4 Heisk. (Tenn.) 80.

In Lathrop *v.* Nelson, 4 Dill. (U. S.) 194, the purchaser was held entitled to the rents between the sale and the confirmation. See Taylor *v.* Cooper, 10 Leigh (Va.), 317; Wagner *v.* Cohen, 6 Gill (Md.), 102.

mortgage which was the subject of the foreclosure suit, the court will not pass upon the title, but leave the purchaser to his remedy at law. In any case, the exercise of this power in the foreclosure suit rests in the sound discretion of the court; and, where the title is doubtful, it will leave the parties to litigate the question in the courts of law. Nor does the right to this summary proceeding preclude the remedy by independent suit.[1]

1. When the report has been confirmed the purchaser is entitled to a conveyance upon the payment of the purchase-money where the sale has been for cash, or upon his otherwise complying with the terms of sale. Clason *v.* Corley, 5 Sandf. (N. Y.) 447; Myers *v.* Manny, 63 Ill. 332. His rights as purchaser cannot be prejudiced by any dereliction in the officer whose duty it is to distribute the surplus. Sinclair *v.* Learned, 51 Mich. 335.

Where the mortgagee is the purchaser no conveyance is necessary, as he is already invested with the legal title; and the sale confirms him in the possession of the property. Lannay *v.* Wilson, 30 Md. 536. The court may order the party in possession to surrender possession to the purchaser. Gorton *v.* Paine, 18 Fla. 117. It is the business of the purchaser to see that all persons from whom it is necessary to have conveyances are before the court; for if he takes a title which a decree in an imperfect suit does not protect, he must abide the consequence. Daniels Ch. Pl. & Pr. (5th Ed.) *1276.

Where the court has complete jurisdiction of both subject-matter and person, a sale and conveyance in conformity with its decree is as effectual to convey the title as a sheriff's deed in pursuance of an execution at law. Miller *v.* Sherry, 2 Wall. (U. S.) 237.

Where real estate is sold by the master under the decree of a court of chancery, and as for a good title, the purchaser can only demand such title as a vendee at private sale would be bound to accept from his vendor. Spring *v.* Landford, 7 Paige (N. Y.), 556. See Matter of Browning, 2 Paige (N. Y.), 64; Weems *v.* Brewer, 2 Harr. & G. (Md.) 390; Jackson *v.* Edwards, 7 Paige (N. Y.), 386. But where the sale is made under the assurance by the master at the sale that the purchaser will receive a perfect title, he will be relieved from the purchase if the title is not such as represented. Morris *v.* Mowatt, 2 Paige (N. Y.), 586; Myers *v.* Raymond, 5 Fla. 516. See Seamen *v.* Hicks, 8 Paige (N. Y.), 655.

In *Maryland* the rule of *caveat emptor* applies to all judicial sales. Brown *v.* Wallace, 4 Gill & J. (Md.) 479. See also Osterberg *v.* Union Trust Co., 93 U. S. 424; Brown *v.* Wallace, 2 Bland (Md.), 585; Thomas *v.* De Baun, 1 McCarter (N. J.), 37.

The purchaser acquires title to only that which by the terms of the mortgage was subject to the payment of the debt. If the homestead be not properly released, he takes the surplus in value over the amount allowed for homestead; and if the homestead has not been set apart, he acquires no right to the possession. Frederick Parrot *v.* Adam Kumpf, 102 Ill. 423.

Where the mortgagor had, previously to the foreclosure suit, sold a part of the lands subsequently mortgaged, and this vendee was not made a party to the foreclosure suit, a purchaser of all the lands thereunder is entitled.

C was assignee of certificate of sale by sheriff of land on execution against A, issued upon a judgment rendered subsequently to the execution of a mortgage upon the land by A to B, which mortgage was duly recorded. After the year for redemption had expired the sheriff made a deed to C. Subsequently, in a suit to foreclose the mortgage in which C was made a party, a sale of the real estate was made, at which B became the purchaser for a nominal sum. Before the expiration of the time for redemption C redeemed the land by paying into the clerk's office the amount, with interest, for which it was sold. Shortly after this B sued out another order of sale on his judgment. On this state of facts C instituted his suit to enjoin this sale. *Held*, that such suit would not lie; and further, that C, by virtue of his sheriff's deed, acquired only the title and interest that A had in the land at date of the judgment; that it was subject to the mortgage; and that the redemption by C from the sale to B did not free the land from the unpaid balance of the mortgage debt; and that this might be enforced by a resale of the mortgaged premises under an *alias* order of sale, as often as there was a redemption, until the mortgage was satisfied. Smith *v.* Moore, 73 Ind. 388. See further, on rights of purchaser at foreclosure sale, Martin *v.* Kelley, 59 Miss. 652.

The purchaser at foreclosure sale of land dedicated to the city by the mortgagor subsequently to the mortgage, buys free from the dedication. Moore *v.* Little Rock, 42 Ark. 66.

Where, prior to the foreclosure suit by the mortgagee, he had purchased the premises at tax sale, and after foreclosure took a tax deed, and sought to compel the purchaser at the foreclosure sale to redeem, *held*, that he cannot do so; that the tax lien, if foreclosed at all, should have been foreclosed with the mortgage. Young *v.* Brand, 15 Neb. 601.

At a foreclosure sale the purchasers entered into a parol agreement with persons to whom the mortgagor had contracted to convey part of the land, that if the vendees would permit them to bid at the sale without opposition they would recognize and fulfil said land contracts. It was held that these purchasers held the land subject to the equitable rights of the vendees in the land contracts. Martin *v.* Morris, 62 Wis. 418.

A purchaser at foreclosure sale, made to enforce the collection of the original mortgage debt only, although he knew at the time he bid off the land that the holder of certain tax certificates as assignee of the mortgagee, and who was also assignee of the notes and mortgage, and plaintiff in the foreclosure suit, claimed a superior lien by virtue of these tax certificates (said mortgagee having acquired said tax certificates by virtue of his purchase at tax sale, and payment of subsequent taxes on the mortgaged premises, which he had so paid under a provision in the mortgage that he might pay the taxes in case mortgagor failed to do so, the amounts so paid to be added to the indebtedness secured by the mortgage, and to draw the same interest), was held to have acquired title by virtue of his purchase, which was unaffected by these tax certificates; that the lien of the mortgagee for the taxes so paid was created by contract, and was not superior to the other indebtedness secured by the mortgage. *Held*, further, that in an appropriate action by such purchaser these tax certificates were properly cancelled. Dickinson *v.* White, 64 Iowa, 708. *Compare* Poweshiek County *v.* Dennison, 36 Iowa, 244.

A purchaser of a railroad at foreclosure sale of first mortgage, under a decree which provided that the sale should be made subject to liens established, or to be established (on references previously made, or then pending, with right to bondholders to appear and oppose), as prior and superior liens to the lien of the bonds under the first mortgage, is bound by the liens thus established, and cannot be heard to allege fraud as having been discovered subsequently to the master's report fixing the amount of the liens. Whether bondholders may be heard to contest these liens was not decided. Swan *v.* Wright's Ex. *et al.*, 110 U. S. 590.

Where the successful bidder at the foreclosure sale takes back his offer immediately after acceptance, and while competing bidders are still present, subsequent purchasers cannot resist the reopening of the sale. Miller *v.* Miller, 48 Mich. 311.

To set aside sale, prompt action to that end must be taken upon the ascertainment of the facts upon which the application is based. Lyon *v.* Brunson, 48 Mich. 194. Nor will it be set aside because made in view of an unauthorized appraisement when it conforms to a prior and valid one as to the price realized. Hubbard *v.* Draper, 14 Neb. 500.

Where the purchaser at foreclosure sale is neither mortgagee nor heir or personal representative of the mortgagee, the estate of deceased mortgagor is not liable to him upon the covenants of warranty contained in the mortgage deed. Parker *et al.*, Admrs., *v.* Rodman, 84 Ind. 256.

The purchaser is entitled to the property in the condition it was in at the date of the mortgage, as his deed relates to and operates to vest him with the title from that time; all fixtures, therefore, subsequently annexed and permanently attached to the property pass to him. Jones on Mort., vol. 1., sec. 428 *et seq.*; Sands *v.* Pfeiffer, 10 Cal. 258; Gardner *v.* Finley, 19 Barb. (N. Y.) 317. So where, in a proceeding of strict foreclosure, a mortgagee comes into possession under its decree, a barn erected pending the suit on the premises by a stranger, with consent of mortgagor, will belong to the mortgagee. Preston *v.* Briggs, 16 Vt. 124.

A decree to foreclose a second mortgage was made where a policy of insurance for $2000 had been issued to the owner of the equity of redemption, and made payable to the mortgagees, and in fact delivered to the first mortgagee, whose mortgage was for $1000. On the day of the sale ordered under the decree, and before the sale, the house insured was destroyed by fire. The owner of the equity of redemption, about eight days thereafter, made proof of loss; and five months later the insurers paid first mortgagee his mortgage in full, and took an assignment thereof. At the foreclosure sale the premises were purchased, and sheriff's deed executed to the purchaser,

who sold the premises to the second mortgagee. On a bill filed to cancel first mortgage, on ground that the insurers ought to have paid the insurance money, the relief was granted, and the mortgage cancelled; the court holding that it was no defence that suit on the policy had not been brought within a year after the loss occurred. as the policy required, for the reason that by the assignment the insurers took the place of the first mortgagee, who might have sued on the policy; nor that, subsequently to the issuance of the policy, the premises were sold under the second mortgage; that an ordinary decree of foreclosure was not an alienation within the prohibitions of the policy, and that here the loss accrued before the sale under the decree; that inasmuch as the policy had been obtained by the owner of the equity of redemption, and premiums paid by her, the insurers were not subrogated, by virtue of the assignment, to the rights of the first mortgagee; the court holding that the claimant of the equity of redemption was the actual owner thereof, as a previous sale of her interest under a sheriff's sale had subsequently been annulled. Pearman *v.* Gould, 42 N. J. Eq. 4.

He is not entitled to possession upon the certificate of purchase where the property has been sold subject to redemption; his title only becomes absolute upon the execution of the deed, which should not be made until the time for redemption has expired. Bennett *v.* Matson, 41 Ill. 333.

If a tenant holds possession after the delivery of the deed by the commissioner who made the sale, he may be at once ejected, in case he has been made a party to the suit. Hirsch *v.* Livingston, 3 Hun (N. Y.), 9; N. Y. Code, sec. 2232. But foreclosure before expiration of the term will not prevent tenant from removing fixtures. Globe Marble Mills Co. *v.* Quinn, 76 N. Y. 23.

Where the tenant went into possession pending the foreclosure suit, and raised and cut the grain before the suit was concluded, he was allowed to remove the same. Johnson *v.* Camp, 51 Ill. 219.

The courts both of *England* and the *American* States compel the person in possession to surrender it to the purchaser, and enforce this requirement by an order, or by injunction, or by writ of assistance. Huguenin *v.* Baseley, 15 Vesey (Eng.), 180; Dove *v.* Dove, 1 Bro. Ch. 375; Kershaw *v.* Thompson, 4 Johns. Ch. (N. Y.) 609; Dorsey *v.* Campbell, 1 Bland (Md.), 357; Frelinghuysen *v.* Colden, 4 Paige (N. Y.), 204; Planters' Bank *v.* Fowlkes, 4 Sneed (Tenn.), 461; Applegarth *v.* Russell, 25 Md. 317; Creighton *v.* Payne, 2 Ala. 158; Buffum's Case, 13 N. H. 14; Montgomery *v.* Tutt, 11 Cal. 190; Aldrich *v.* Sharp, 4 Ill. 261; Ballinger *v.* Waller, 9 B. Mon. (Ky.) 67. Not only as against a party to the suit, but also against any one who has come into possession under him pending the suit. Bell *v.* Birdsall, 19 How. Pr. (N. Y.) 491.

Parties to the suit, and all others coming in under the decree, will be enjoined from disturbing the purchaser. Dorsey *v.* Campbell, 1 Bland (Md.), 357; Stackpole *v.* Curtis, 2 Moll. 504. *Compare* Huddleston *v.* Williams, 1 Heisk. (Tenn.) 579.

The writ of assistance is discretionary, and will only be granted in a clear case, —Vanmeter *v.* Borden, 10 C. E. Greene (N. J.), 414;—and will be refused where the purchaser has left it doubtful whether or not he has not given the person in possession the right to remain. Barton *v.* Beatty, 1 Stew. (N. J. Eq.) 412. In ordinary cases the writ of assistance is the first and only process for giving possession of land under judicial sales. Valentine *v.* Teller, 1 Hopk. (N. Y.) 422; Fackler *v.* Worth, 2 Beasley (N. J.), 395; Irvine *v.* McRee, 5 Humph. (Tenn.) 554; Beatty *v.* De Forrest, 12 C. E. Greene (N J.), 482. See Ketchum *v.* Robinson, 48 Mich. 618.

The purchaser was held entitled to possession in a case where the land was sold after death of mortgagor, but under a decree in the foreclosure suit rendered in his lifetime; the purchaser having, after the sale was confirmed, demanded possession of the mortgagor's widow, who refused to surrender the same, insisting that the sale was invalid, and that she was entitled to dower. Trenholm *v.* Wilson, 13 S. Car. 174.

A purchaser waives his right to be released from the purchase, when, after having been informed of the defect, viz., the deficiency in the quantity of the land, he nevertheless complies with the terms of sale by executing his bond and mortgage, and accepting the title-deeds; and this waiver is unaffected by his notification to the officer who made the sale, that an abatement would be claimed on account of the deficiency. Mitchell *v.* Pinckney, 13 S. Car. 203.

A personal decree for deficiency in foreclosure suit not allowable since statute of 1880, in *New Jersey*. Allen *v.* Allen, 34 N. J. Eq. 111, 493.

In *New York* (2 R. S. 191, § 152) the power to render judgment for deficiency exists, and may be rendered against the

**XVI. Appeal.**—Where the sale has been made before the appeal is taken, a reversal of the decree under which the sale was made, and the decree declared to be erroneous, will not affect the validity of the sale, even although the purchaser be a party to the suit. If there is a subsisting judgment or decree, and the court has jurisdiction, the purchaser need look no further. He will be protected in his purchase, although there be error in the record. Such is the general doctrine.[1] Its necessity is obvious; otherwise, purchasers at judicial sales can have no assurance that they are safe in bidding. The contrary doctrine would destroy or greatly impair the salable value of property under decrees of the court.

**XVII. Foreclosure in Power of Sale Mortgages.**—While mortgages with power of sale or in the form of trust deeds are now very generally adopted both in England and in the American States as furnishing, through the execution of the trust by the individual designated in the instrument for that purpose, a more convienient and expeditious mode of foreclosure than can be had through the courts, yet this method does not preclude resort to the courts for foreclosure under such instruments. Such species of foreclosure is regarded as cumulative merely. It enlarges, instead of diminishing, the rights of the beneficiaries in the mortgage. Such method of foreclosure as is in accordance with the practice of the courts of the State where the proceeding is to be instituted may be resorted to and a sale by judicial decree had; thus, either

personal representative of the mortgagor. Glacius *v.* Fogel *et al.*, 88 N. Y. 435.

1. Fergus *v.* Woodworth, 44 Ill. 374; Buckmaster *v.* Jackson, 4 Ill. 104; Blakeley *v.* Calder, 15 N. Y. 617; Holden *v.* Sackett, 12 Abb. Pr. (N. Y.) 473; Gray *v.* Brignardello, 1 Wall. (U. S.) 634; Gosson *v.* Donaldson, 18 B. Mon. (Ky.) 230; Irwin *v.* Jeffers, 3 Ohio St. 389. In Gray *v.* Brignardello, 1 Wall. (U. S.) 632, Mr. Justice Davis says: "Although the judgment or decree may be reversed, yet all the rights acquired at a judicial sale while the decree or judgment were in full force, and which they authorized, will be protected. It is sufficient for the buyer to know that the court had jurisdiction and exercised it, and that the order, on the faith of which he purchased, was made, and authorized the sale." See also Ward *v.* Hollins, 14 Md. 158; Clark *v.* Bell, 4 Dana (Ky.), 15; Goudy *v.* Hall, 36 Ill. 319; Iverson *v.* Loberg, 26 Ill. 179; Lewis *v.* Baker, 1 Head (Tenn.), 385.

In *England*, a purchaser under a decree, although not a party to the suit, may appeal from an order setting aside the bidding and ordering a resale. Ryder *v.* Earl Gower, 6 Bro. P. C. (Toml. Ed.) 306; Barlow *v.* Osborne, 6 H. L. Cas. 556.

A purchaser may appeal from a decree declaring him liable for a loss on a resale. Sharp *v.* Hess, 1 Tenn. Leg. Rep. 23.

In *England*, an appeal lies from an interlocutory decree. 2 Daniel Ch. Pl. & Pr. *1463, note 1 (5th Ed.). So in some of the American States, although, as a general rule, the appellate court will not revise the action of the lower court, except there has been a clear abuse of discretion. Dollard *v.* Taylor, 33 N. Y. Sup. Ct. 496; Journeay *v.* Brown, 2 Dutch. (N. J. L.) 111; Jones *v.* Halliday, 37 Ga. 569; Dale *v.* Kent, 58 Ind. 584; State *v.* Johnson, 13 Fla. 33; Wade *v.* Am. Col. Soc., 12 Mass. (4 Sm. & M.) 679; Callanan *v.* Shaw, 19 Iowa, 185.

Where, before the date of a decree of foreclosure, the mortgagor disposed of his equity of redemption, an appeal from the decree subsequently taken by him was dismissed upon the ground that he had no remaining interest in the mortgaged premises. McDonald *v.* Workingmen's Building Association, 60 Md. 589.

superseding the exercise of the power by the trustee, or donee of the power, or requiring its execution by him under the direction of the court.[1]

The option, however, to resort to a judicial foreclosure lies wholly with the mortgagee, or beneficiary in the trust deed,[2] although the trustee may, when the necessity exists, seek the direction of the court in the execution of the trust; and the mortgagor or his assignees may seek the protection and restraining process of the court against abuse of the trust on the part of the trustee.[3] But whenever a sale is made under the decrees of the court, it must be in the execution of the power contained in the instrument, and its provisions as to the terms and mode of sale must be followed.[4]

**XVIII. Foreclosure of Chattel Mortgages.**—The proceedings, and the rules and principles applicable thereto, for foreclosure of chattel mortgages are substantially the same as obtain in the foreclosure of land mortgages; and the jurisdiction of the court is as complete for the enforcement of the former as the latter.[5]

The concurrent remedies, and right of foreclosure in power of sale chattel mortgages, are as fully recognized as in case of land mortgages.[6] (See CHATTEL MORTGAGES.)

1. The power of sale in the mortgage does not preclude the exercise of the jurisdiction of the court to foreclose by such mode as is in accordance with the practice of the court. Marriott *v.* Givens, 8 Ala. 694; Cormerais *v.* Genella, 22 Cal. 116; Atwater *v.* Kinman, Harr. (Mich.) 255; Slade *v.* Riggs, 9 Hare, 35.

In McDonald *v.* Vinson, 56 Miss. 497, it is said that "a power of sale in a mortgage or deed of trust does not in any way affect the jurisdiction of a court of chancery to enforce the rights of the parties thereto, nor abridge in the slightest degree the right of a person secured by such instrument to resort to a court of chancery, as he might do if no such provision had been made for enforcing the security without the aid of a court. All the powers conferred by such an instrument are additional to what the law grants, and neither affects the jurisdiction of a court of chancery, nor the option the holder has to invoke its jurisdiction, as if the instrument contained no such provision. A power to sell, or appoint a trustee, enlarges the right of the person to whom it is given, but does not diminish it."

2. See authorities *supra*.

3. Youngman *v.* Elmira, etc., R. Co., 65 Pa. St. 278; Farmers' Loan & Trust Co. *v.* Hughes, 11 Hun (N. Y.), 130; Myers *v.* Estell, 48 Miss. 373.

4. Doolittle *v.* Lewis, 7 Johns. Ch. (N. Y.) 45; Beatie *v.* Butler, 21 Mo. 313; Rice *v.* Brown, 77 Ill. 549; Crenshaw *v.* Seigfried, 24 Gratt. (Va.) 272. Where a mortgagee holding under a mortgage containing a power of sale, has, by reason of the relief which he has sought in the court of equity, thrown persons claiming under the mortgage off their guard, it is proper that, before proceeding to sell by notice under the power, he should notify either the mortgagor or his assignee of his intention. Where, however, a specific demand of the amount due has been made, the person of whom such demand has been made cannot claim to have been lulled into security. If the mortgagee has no notice of the interest of one holding under the mortgagor, he is not bound to give such a one personal notice before selling under the power; nor to any one who has not been misled by his suit. Tartt *v.* Clayton, 109 Ill. 579. See Hairston *v.* Ward, 108 Ill. 87.

5. Blakemore *v.* Taber's Ex'r, 22 Ind. 595; Aldrich *v.* Goodell, 75 Ill. 452; Freeman *v.* Freeman, 17 N. J. Eq. 44; Packard *v.* Kingman, 11 Iowa, 219; Brown *v.* Greer, 13 Ga. 285; Charter *v.* Stevens, 3 Den. (N. Y.) 33.

6. Marx *v.* Davis, 56 Miss. 745; Briggs *v.* Oliver, 68 N. Y. 339. The suit, however, in the foreclosure of chattel mortgages is transitory, and not local, and the

jurisdiction exists wherever service can be had on the defendant, irrespective of the locality of the property. Brown *v.* Greer, 13 Ga. 285.

For a synopsis of the statutory provisions of the various States and Territories respecting the foreclosure of chattel mortgages see Jones on Chattel Mortgages (2d Ed.), chap. xvii.

The mortgagee is not bound to foreclose. He may assert his legal rights under the terms of the instrument, and take the custody of the chattels upon the default. The mortgagor would then be driven to the enforcement of his right to redeem. Freeman *v.* Freeman, 17 N. J. Eq. 44; Olcott *v.* Tioga R. Co., 40 Barb. (N. Y.) 179; Tannahill *v.* Tuttle, 3 Mich. 104; s. c., 61 Am. Dec. 480. But so taking possession would constitute payment of the mortgage debt. Stoddard *v.* Denison, 38 How. Pr. (N. Y.) 296; Freeman *v.* Freeman, 17 N. J. Eq. 44.

Even if the property is of greater value than the mortgage debt, the mortgagor has no redress, except to redeem. Olcott *v.* Tioga R. Co., 40 Barb. (N. Y.) 179; and see Landon *v.* Emmons, 97 Mass. 37.

Special grounds may exist for resorting to a judicial foreclosure; as, where there are many creditors whose interests are not accurately defined by the mortgage, —Norton *v.* Ladd, 22 Conn. 203;—or where there is a necessity for marshalling securities,—High *v.* Brown, 46 Iowa, 259;—or where there are other liens and encumbrances which may necessitate an equitable distribution, — Hammers *v.* Dole; 61 Ill. 307;—or where, for any cause, there is an impossibility of giving the requisite notice,—Sullivan *v.* Hadley, 16 Ark. 129. But resort to foreclosure in equity cannot be had in those States where a statutory mode is provided.

No demand by mortgagee is necessary before bringing bill to foreclose. Zehner *v.* Anetman, 74 Ind. 24.

All persons interested in the mortgaged chattels should be made parties to the foreclosure proceedings; and, of course, the trustee also where the mortgage is in the form of a deed of trust.

Purchasers of the mortgaged property junior encumbrancers, as well as all others having liens upon or interest in the property, or in the right of redemption of the same, should be made parties so that their respective equities may be adjusted. Chapman *v.* Hunt, 14 N. J. Eq. 149; Greither *v.* Alexander, 15 Iowa, 470; Parrott *v.* Hughes, 10 Iowa, 459; Trittipo *v.* Edwards, 35 Ind. 467; Bryan *v.* Robert, 1 Strobh. Eq. (S. Car.) 334.

If the mortgagee attaches the mortgaged chattels,—Buck *v.* Ingersol, 11 Metc. (Mass.) 226;—or causes them to be sold on execution,—Kimball *v.* Marshall, 8 N. H. 291.—he by so doing waives his claim under the mortgage. If, however, he himself becomes the purchaser at the sale, he will be considered as holding the property under the mortgage, and subject to redemption. Dabney *v.* Green, 4 Hen. & M. (Va.) 101.

The prevailing doctrine is that the mortgagee may sell the entire property upon default of any instalment, without special provision to that effect in the mortgage; the reason being that the mortgagee's right to the property thereupon becomes absolute. Jones on Chattel Mort. (2d Ed.), § 768. Bragelman *v.* Daue, 69 N. Y. 69; McConnell *v.* Scott, 67 Ill. 274. *Compare* Brink *v.* Freoff, 40 Mich. 610.

Where the entire debt was secured by mortgage of real estate, and $200 of it by chattel mortgage, and the real-estate mortgage was foreclosed, the decree, becoming absolute, operated as an extinguishment of the chattel mortgage debt. Calkins *v.* Clement, 54 Vt. 635. Where a part only of a debt was due, a chattel mortgage given to secure a portion, not specifying what, will be presumed to have been given to secure that which was due. Calkins *v.* Clement, 54 Vt. 635.

## FOREIGN.—See note 1.

**1. Foreign Assignments.** See CONFLICT OF LAWS.

**Foreign Bills.** (See BILLS AND NOTES.) —Notes of banks of other localities. They are not money; and a note payable in such is not negotiable. Jones *v.* Fales, 4 Mass. 245.

**Foreign Bonds.**—Where a testatrix, having about £7500 in foreign bonds and £500 in Australian bonds, her bequest of "the foreign bonds, amounting to about £8000, purchased with the economies of my own marriage settlement," does not pass the Australian bonds. Hill *v.* Hill, L. R. 4 Ch. D. 97.

A power under a will to invest "upon any of the stocks or funds of the government of the U. S. of America, or of the government of France or of any foreign government," authorizes an investment in stocks of New York and Ohio and bonds of Georgia. Said Jessel, M. R.: "Each of these States is ruled over by a government—an actual government in every sense of the word. Why then should they not be regarded as a foreign government, that is, a government not under the jurisdiction of this country; for that is the meaning of the word 'foreign'? That being so, the word 'foreign' is satisfied, and the word 'government' is also satisfied." Cadette *v.* Earle, L. R. 5 Ch. D. 710.

**Foreign Citizens.**—Indians are not "foreign citizens" or subjects within art. 3, sec. 2, of the constitution of the United States. Kanahoo *v.* Adams, 1 Dill. (C. C.) 344; Cherokee Nation *v.* State of Georgia, 5 Pet. (U. S.) 1.

**Foreign Dominion.**—A country which at some time formed part of the dominions of a foreign state or potentate, but which by conquest or cession has become a part of the dominion of the crown of England. An act which prohibits the writ of *habeas corpus* running into any foreign dominion of the crown, where there is a court established with authority to issue the writ, does not include in that expression the Isle of Man. *Ex parte* Brown, 5 B. & S. 280.

**Foreign Fishing.**—Oil is not the product of foreign fishing within the revenue laws if the fish from which it is obtained, wherever caught, are caught by the crew of an American vessel. United States *v.* Burdett, 2 Sumn. (C. C.) 336.

**Foreign Government.**—See *supra* this title, *Foreign Bonds.*

**Foreign Markets.**—This expression, taken in conjunction with "exportation out of the province," in a colonial act providing for inspection of exports, applies to the markets of other States. Shuster *v.* Ash, 11 S. & R. 90.

**Foreign Paupers** are "all those persons coming within the general provisions of the poor laws, as persons standing in need of relief, who are incapable of supplying themselves, who have no parents or other kindred liable for their support, and who have no legal settlement in any city, town, or district in the commonwealth." In an act charging the support of foreign paupers on the State and of prisoners on the county, the term includes those committed to the house of correction as rogues and vagabonds, but not those confined there for other offences. Opinion of the Judges, 1 Metc. (Mass.) 578.

**Foreign Plea.**—A plea to the jurisdiction. Burr. L. Dict. At common law there was a distinction between a plea to the jurisdiction and a foreign plea. The latter was where the action was carried out of the county or place where the venue was laid. 1 Ch. Pl. 443. Also, a plea in another case between the same parties, or the creditor and a third party bound to pay the debt. Mazyck *v.* Coil, 3 Rich. (S. Car.) 237.

**Foreign Port or Place.**—In the matters of average, hypothecation, maritime lien, and master's contracts, the term "foreign port" includes all maritime ports other than that where the vessel belongs. The ports of the several States of the Union are foreign as to each other. Lewis *v.* Williams, 1 Hall (N. Y.); Burk *v.* The M. P. Rich, 1 Cliff. (C.C.) 308; Negus *v.* Simpson, 99 Mass. 388; The Sarah J. Reed, 2 Low. (C. C.) 555; The Lulu, 1 Abb. (C. C.) 191; s. c. on appeal, 10 Wall. (U. S.) 192.

But in a settlement act, a foreign port or place is a port or place out of the United States. Overseers of Chatham *v.* Overseers of Middlefield, 19 Johns. (N. Y.) 56. So also in an act giving a court jurisdiction of certain assaults, etc., committed "in any foreign port or place." King *v.* Parks, 19 Johns. (N. Y.) 375. As used in a non-importation act, the phrase was held to mean a place exclusively within the sovereignty of a foreign nation. It is not applicable to a place on the high seas without the jurisdictional limits of the United States. The Boat Eliza, 2 Gall. (C. C.) 4.

A port of the United States in the possession of the public enemy is a foreign port. United States *v.* Hayward, 2 Gall (C. C.) 501. So far as the revenue laws

**FOREIGN ASSIGNMENTS.**—(See also ASSIGNMENTS; ASSIGNMENTS FOR BENEFIT OF CREDITORS; CONFLICT OF LAWS.)


I. Of Personal Property, 281.
  1 Form of Assignment, 281.
II. Transfer of Goods, etc., 282.
  1. Rule adopted, 282.
  2. Reasons for the Rule, 282.
  3. Exceptions Stated in Rule, 283.
    a. *Goods in Transit*, 283.
    b. *Goods with the Owner*, 283.
    c. *Marriage Transfer*, 283.
    d. *When Both Parties Reside in same Country*, 283.
    e. *When the Parties Select some other Law by Contract*, 283.
  4. Ship at Sea, 283.
III. Debts and Choses in Action, 284.
IV. Assignments for Benefit of Creditors, 284.
  1. Involuntary, 284.
    a. *Domestic Creditors*, 285.
    b. *Foreign Creditors*, 285.
    c. *English Rule*, 286.
  2. Voluntary, 286.
    a. *General Rule*, 286.
    b. *Exceptions as to Real Estate*, 287.
    c. *Where Assignment is Opposed to Public Policy, etc.*, 287.
  3. Where Possession has Changed, 288.


**I. OF PERSONAL PROPERTY.—1. Form of Assignment.**—In reference to the form of the conveyance or assignment of personal property, one well-known authority [1] inclines to the opinion that the *lex rei sitæ* should control, and his view is also maintained by other writers on international law.[2]

are concerned, this is true of any territory in the enemy's possession. United States *v.* Rice, 4 Wheat. (U. S.) 246.

**Foreign State**—An Indian nation is not within the meaning of the term as used in art. 3, sec. 2, of the constitution of the United States. Cherokee Nation *v.* Georgia, 5 Pet. (U. S.) 1.

**Foreign Subject.**—See FOREIGN CITIZEN.

**Foreign Trade** was held to include trade between the Atlantic and Pacific ports of the United States in United States *v.* Patton, 1 Holmes (C. C.), 421.

Under an act exempting from duty lumber to be used in the construction and equipment of "vessels built in the United States for *the* foreign trade," the terms "the foreign trade" limit the application of the act to vessels owned by Americans. It does not apply to those built for foreigners. Russel *v.* United States, 15 Blatchf. (C. C.) 26.

**Foreign Vessel.**—A vessel owned by residents in or sailing under the flag of a foreign nation. Rapalje & L. L. Dict. Whether a ship is foreign or domestic depends upon the residence of her owners, and not upon the place of her enrolment. The Albany, 4 Dill. (C. C.) 339. But see The Mary Merritt, 2 Biss. (C. C.) 381. The omission to register and enrol an American vessel does not make it foreign. It only deprives it of the privileges of an American. Fox *v.* The Lodemia, Crabbe (C. C.), 271.

**Foreign Voyage.**—A voyage to some port or place within the territory of a foreign nation. A whaling voyage is not such. Taber *v.* United States, 1 Story (C. C.), 1. Even if the vessel touch at a foreign port, if she do not trade there. The Ocean Spray, 4 Sawy. (C. C.) 105.

On the other hand, a foreign voyage is defined to be a voyage to some place without the territorial jurisdiction of the United States. The Sloop Lark, 1 Gall. (C. C.) 55. And see the Schooner Three Brothers, 1 Gall. (C. C.) 142.

1. Wharton on Confl. of Laws (1st Ed.), §§ 697, 76, 372, 334, 297, 273.

2. Bar. Priv. Inter. Law, § 64.

"The doctrine of certain cases in Louisiana, applying the *lex rei sitæ in situr* which required tradition in order to transfer of property in movables and rejecting the *lex loci contractus*, which was the law of the owner's domicile, has been strongly controverted by Story and others, but no authority is cited against it except the cases which establish the *lex domicilii* as the law regulating succession. On the contrary, the application of the *lex rei sitæ* appears to be assumed in all the numerous cases in which conflicts have arisen in regard to the transmission by sale of property in movables." Savigny, 138, n. 1 (Guthrie's Col.); Wharton on Conflict of Laws, § 338; 2 Von Wachter, 388; 4 Phillimore, 396.

"Of late years, however, the current has set very strongly, even in commer-

Another maintains that the owner's domicile should in all cases determine the validity of every transfer, alienation, or disposition made by the owner, whether it be *inter vivos* or *post mortem*.[1]

**II. TRANSFER OF GOODS, ETC.—1. Rule Adopted.**—Movables, when not massed for the purposes of succession or marriage transfer, and when not in transit or following the owner's person, are governed by the *lex situs*, except so far as the parties interested may select some other law.[2]

**2. Reasons for the Rule.**—The reasons as given for the rule stated in the text as laid down by Wharton are: 1. National preservation requires that no sovereignty should permit the intrusion on its soil of a foreign law.[3] 2. It is by the local, or the

cial countries, towards enforcing the *lex situs* on the title to chattels." Westlake Private Inter. Law, art. 267.

The same view is maintained by President Wolsey, vol. i., § 71, of his work on International Law.

"It is insisted that great embarrassment will occur if a transfer of movables must be made according to the law of the *situs*, as it is not expected that persons will know the laws of a foreign country. This difficulty is rather imaginary than real. The transfer is always held good for all general purposes. . . . There would seem to be no great injustice in holding that movables in one State, which probably have been a ground of their owner's obtaining credit there should not be transferred to another State to pay foreign debts, leaving local debts unpaid, unless it be done in accordance with the law of their locality." Peckham, J., in Guillaudet *v.* Howell, 35 N. Y. 657; s. c., 6 Am. Law Reg. 522, note (N. S.).

These results, however, are intended to apply to voluntary assignments for the benefit of creditors.

1. Story Conflict of Laws (Redfield's Ed.), § 383, citing Bell Com. (5th Ed.) 4; Bell Com. (4th Ed.) 65, 67, 68; 3 Burge Com. on Col. and For. pt. 2, chap. 20, 750, 752.

Tilghman, C. J., on one occasion said: "The proposition [that personal property has no locality, but is transferred according to the law of the country in which the owner is domiciled] is true in a general sense, but not to its utmost extent, nor without several exceptions. In one sense personal property has locality—that is to say, if tangible it has a place in which it is situated, and if invisible (consisting of debts) it may be said to be in the place where the debtor resides; and of these circumstances the more liberal nations have taken advantage by making such property subject to regulations which suit their own convenience. "Every country has a right of regulating the transfer of all personal property within its territory; but where no positive regulation exists the owner transfers at his pleasure.'" Milne *v.* Moreton, 6 Binn. (Pa.) 353, 361.

The reasoning of Lord Kenyon in a celebrated case, Hunter *v.* Potts, 4 T. R. 182–192, would certainly lead to the conclusion that an assignment of personal property, whether it were of goods or debts, according to the law of the owner's domicile would pass the title in whatever country it might be, unless there was some prohibitory law in the country. His language is: "Every person having property in a foreign country may dispose of it in this, though indeed if there be a law in that country directing a particular mode of conveyance, that ought to be adopted." Story Conflict of Laws (Redfield's Ed.), § 398.

The transfer of personal property by the assignment or sale made in accordance with the laws of the country if the domicile of the owner will be respected by the courts of the country where the property is located, although the mode of transfer may be different from that prescribed by the local law. But this is a mere principle of comity between the courts, which must give way when the statutes of the country where the property is situated or the established policy of its laws prescribe to its courts a different rule. Green *v.* Van Buskirk, 5 Wall. (U. S.) 307.

2. Wharton Conflict of Laws (1st Ed.), § 311. This is the rule laid down by Professor Wharton after an examination and criticism of some length of the contrary view held by some other leading authors. See also CONFLICT OF LAWS, 3 Am. & Eng. Encyc. of Law, 616.

3. Wharton Conflict of Laws, §§ 305–10.

municipal, or the corporate law alone that the registry title of stocks can be made out.[1] 3. If the doctrine of *lex rei sitæ* be not accepted, there is no available decisive law.[2] 4. Unless the *lex rei sitæ* be enforced, property loses its merchantable value.[3] 5. No absolute title can be given except by a proceeding *in rem*.[4]

**3. Exceptions Stated in the Rule.**—*a. Goods in Transit.*—The law seems to be pretty well settled that in the case of goods in transit the law of the owner's domicile should control,[5] and this applies as well to goods that have been forcibly or fraudulently withdrawn in a State other than that of the owner's domicile.[6]

Some authority, however, seems to incline to the view that the *lex loci contractus* should prevail.[7]

*b. Goods Following the Owner.*—Where goods are with and following the owner, then the same rule is to prevail as goods in transit.[8]

(*c*) *Marriage Transfer.*—It seems to be well settled, where property is transferred by marriage from wife to husband or *vice versa*, the law of the domicile of the husband at the marriage is to prevail,[9] unless a special contract is made to the contrary,[10] and when there is a change of domicile, the law of the actual and not the matrimonial domicile will prevail.[11]

(*d*) *When Both Parties Reside in the same State or County.*—When all the claimants to a movable are domiciled in the same country, and may therefore be viewed as consenting to the same municipal law, then so far as concerns their title to the movable the law of this common domicile prevails.[12]

(*e*) *When the Parties Select some other Law by Contract.*—When not illegal or immoral, the parties may specify by contract what law shall govern it, and such law will control the courts in their construction of such contract.[13]

**4. Ship at Sea.**—A ship in the open sea is regarded by the law of nations as a part of the territory whose flag such ship carries,[14] and in reference to the goods carried thereon, the law of the coun-

1. Wharton Conflict of Laws, §§ 307–10.

2. Wharton Conflict of Laws, §§ 308–10.

3. Wharton Conflict of Laws, §§ 309–10.

4. Wharton, Conflict of Laws, §§ 310–10

5. Wharton Conflict of Laws, § 355. See Abbott on Shipping (2d Ed.), pt. 1, ch. 1, § 6, ch. 9, § 3; 2 Kent Com. § 39; Story (Redfield's Ed.), § 401; Inglis *v.* Usherwood, 1 East, 515. Mr. Burge, however, declares that the *lex loci contractus* prevails. 3 Burge's Com. 770, 778. And to this latter view Judge Story seems to incline. Conflict of Laws (Redfield's Ed.), § 322, 401. Houston's Stoppage in Transitu, quotation from, in Wharton on Conflict of Laws, p. 306.

6. Paradise *v.* Farmers' Bank, 5 La. Ann. 710.

7. Story Conflict of Laws, §§ 322, 401.

8. Wharton Conflict of Laws, §§ 350, 306.

9. Wharton Conflict of Laws (1st Ed.), §§ 191–198; Story Conflict of Laws (Redfield's Ed.), §§ 186, 187, 202. There are a number of limitations to this doctrine.

10. Story Conflict of Laws, § 187.

11. Story, § 187.

12. Wharton Conflict of Laws, §§ 310, 369, 276.

13. Wharton Conflict of Laws, §§ 310, 369, 276.

14. Loyd *v.* Guibert, Law Rep. 1 Q. B. 115; Story Conflict of Laws, § 4239; Wharton Conflict of Laws, § 356.

try to which the ship belongs prevails.[1] As between the several States in the United States, a ship at sea is presumed to belong to the State in which she is registered.[2]

**III. Debts and Choses in Action.**—Sometimes it has been held that the legal seat of a debt is the domicile of the owner,[3] and sometimes the place of payment.[4] Upon these doctrines the leading American authorities on Conflict of Laws hold opposite opinions.[5]

**IV.—Foreign Assignment for Benefit of Creditors.—1. Involuntary Assignment.**—It is an elementary principle that a transfer of property *in invitum* is inoperative beyond the territorial limits of the government under and by whose laws the transfer is made.[6] Whenever such transfer is made or is recognized and given effect by the courts of a foreign government, the courts act upon the principles of international courtesy.[7] And where the rights of creditors are not concerned, the courts of the foreign jurisdiction should permit the assignee or receiver or other legal representative of the debtor to take possession of the debtor's property in that jurisdiction, or sue for it if it be necessary.[8] And this has been permitted to be done in a number of instances.[9] It has been

1. Wharton Conflict of Laws, § 356.

2. Kelley *v.* Crapo, 41 Barb. (N. Y.) 603; Moore *v.* Willett, 35 Barb. (N. Y.) 663. See Koster *v.* Merritt, 32 Conn. 246; Thuret *v.* Jenkins, 7 Martin (La.), 318.

3. Guillander *v.* Howell, 35 N. Y. 657. See Caskie *v.* Webster, 2 Wall. Jr. (U. S.) 131; Speed *v.* May, 17 Pa. St. 91; Clark *v.* Connecticut Peat., 35 Conn. 303.

4. Baylis *v.* Houghton, 15 Vt. 626; Emerson *v.* Partridge, 27 Vt. 8; Ward *v.* Morrison, 25 Vt. 593.

5. Wharton Conflict of Laws, §§ 359, 364; Story Conflict of Laws, §§ 399, 401. Professor Wharton says that with debts the law of the place of payment technically prevails, though the tendency in American courts is to hold that a domestic attaching creditor is, on general principles, entitled to prevail over the foreign assignee when the debtor resides in the domestic jurisdiction. Judge Story takes the view that in debts and choses in action the *lex domicilii* controls. A chose in action cannot be said to have any actual *situs* in the place where the debtor resides. As a general principle, it is payable at the residence of the creditor if not otherwise expressed, and a tender, to be good, must be made to the creditor. There would therefore seem to be no sound basis for the debtor's State to legislate exclusively as to the legality of the transfer of a debt made by a foreign creditor. In such cases, as in all others where the property transferred does not lie within the jurisdiction of another government, a sale or contract valid where made is valid everywhere. Guillander *v.* Howell, 35 N. Y. 657.

6. Hutcheson *v.* Perhine, 16 N. J. Eq. 167; Walters *v.* Whitlock, 9 Fla. 86; Osborn *v.* Adams, 18 Pick. (Mass.) 247; Dalton *v.* Currier, 40 N. H. 237; Edgerly *v.* Bush, 81 N. Y. 199, Harrison *v.* Sterry, 5 Cranch (N. S.), 289; Hibernian, etc., *v.* Lacombe, 21 Hun (N. Y.), 166; s. c., 38 Am. Rep. 518; s. c., 84 N. Y. 367; Kelly *v.* Crapo, 45 N. Y. 86; Crapo *v.* Kelly, 16 Wall. (U. S.) 610; Willetts *v.* Waite, 25 N. Y. 577; Story Conflict of Laws, 410–412.

7. Receiver of Bank *v.* First Nat. Bank, 34 N. J. Eq. 450; 2 Kent Com. 406. The question, then, is one of comity to be settled by the decisions of the courts of this State as determining how far they will recognize a foreign involuntary assignment. Willets *v.* Waite, 25 N. Y. 577.

8. Hibernia Nat. Bank *v.* Lacombe, 21 Hun (N. Y.), 166; s. c., 84 N. Y. 367; 38 Am. Rep. 518; Holmes *v.* Remsen, 20 Johns. (N. Y.) 259; Hoyt *v.* Thompson, 5 N. Y. 351; Hunt *v.* Jackson, 5 Blatch. (N. J.) 349; Upton *v.* Hubbard, 28 Conn. 274; Nilne *v.* Moreton, 6 Binn. (Pa.) 353; Story on Conflict of Laws, § 420; *In re* Waite, 99 N. Y. 433, where see a very interesting case, with a full citation of authorities.

9. Merchants' Nat. Bank *v.* McLeod, 38 Ohio St. 174; Wilmer *v.* Atlantic, etc.,

held that in all cases where the rights of domestic creditors are not concerned, the transfer should be given the same force and effect as in the State under whose statute it was made.[1]

(*a*) *Domestic Creditors.*—As to foreign involuntary assignments, there seems to be no question but that they are void as against creditors of the jurisdiction in which the property is situated.[2]

(*b*) *Foreign Creditors.*—As to foreign creditors as well as domestic, the rule seems to be well established that foreign involuntary assignments are void.[3]

2 Woods (C. C.) 409, 418; Iglehart *v.* Bierce, 36 Ill. 133; Graydon *v.* Church, 7 Mich. 36; Cagill *v.* Woolbridge, 8 Baxt. (Tenn.) 580; s. c., 35 Am. Rep. 716; Hurd *v.* City of Elizabeth, 41 N. J. L. 1.

1. Bagby *v.* Atlantic R., etc., 86 Pa. St. 291; Receiver, etc., *v.* First Nat. Bank, 34 N. J. Eq. 450.

"We shall not enter much into the discussion of the subject, and thus travel over ground so much marked by the footsteps of learned jurists. Our main endeavor will be to ascertain what, by the decisions of the courts of this State, has become the law here. . . . . From all these cases the following rules are to be deemed thoroughly recognized and established in this State: 1. The statutes of foreign States can in no case have any force or effect in this State *ex propria vigore*, and hence the statutory title of foreign assignees in bankruptcy can have no recognition here solely by virtue of the foreign statute. 2. But the comity of nations, says Judge Denio, in Peterson *v.* Chemical Bank, is a part of the common law, allows a certain effect here to titles derived under the powers created by the laws of other countries, and from such comity the titles of foreign statutory assignees are recognized and enforced here when they can be, without any injustice to our own citizens and without prejudice to the rights of creditors pursuing their remedies here under our statutes; provided also that such titles are not in conflict with the laws or public policy of our State. 3. Such foreign assignees can appear, and, subject to the condition above mentioned, maintain suits in our courts against debtors of the bankrupt whom they represent, and against others who have interfered with or withheld the property of the bankrupt." *In re* Waite, 99 N. Y. 433.

2. Burrill on Assign. (3d Ed.) 406.

The reason of the rule seems to be, that inasmuch as the conveyance is involuntary, and is without consideration, it is void as against the grantor, except by force of the insolvent law of the State where it is made; and to give force to such law would be to permit a foreign tribunal and a foreign law to regulate the trust property in another State. Hutcheson *v.* Peshing, 16 N. J. Eq. 167; Wharton Confl. of Laws, § 844.

3. Hoyt *v.* Thompson, 5 N. Y. 351; Rhawn *v.* Pearce, 110 Ill. 350; Upton *v.* Hubbard, 28 Conn. 274.

Hibernia Nat. Bank *v.* Lacombe, 84 N. Y. 367; s. c., 38 Am. Rep. 518, is an express authority. Plaintiff commenced in the State of New York an action against the Mechanics and Traders' Bank of New Orleans, a Louisiana corporation, on a draft and attached moneys of that corporation in deposit in New York. Plaintiff was a corporation organized under the laws of Louisiana. Before the attachment was levied the Mechanics and Traders' Bank went into liquidation under the laws of Louisiana, and commissioners were appointed to take possession of and administer the assets. They were made parties to the suit, and claimed that as to them the attachment was a nullity, on the ground that their appointment antedated the levying of the attachment, and that the plaintiffs could not claim that the laws of Louisiana, under which the property of the Traders' Bank was vested in them, were in operation in the State of New York, because it was itself a resident of the State of Louisiana. But the court of appeals refused to be governed by this argument, and decided that the foreign commissioners obtained no better title as against the foreign creditor than they would have obtained against a domestic creditor. The court said: "The remaining question relates to the claim made by Messrs. Lacombe and others, commissioners appointed by the court in Louisiana. Neither the law nor the adjudications under which they were appointed can have any operation here. They are strictly local, and affect nothing more than they can reach. For the rule, as we conceive it, is well settled that an assignment by virtue of and under

(*c*) *English Rule.*—It is well settled in Great Britain that an involuntary transfer under her bankrupt laws is operative in every jurisdiction, not only on foreign, but also as against domestic creditors of the bankrupt.[1] And an assignment in bankruptcy under foreign laws will be held to pass the title to the bankrupt's property in *England*, even as against a subsequent seizure of the property by an English creditor.[2] And the same rule has been established in *Scotland*.[3] But it has received this qualification in the English courts, that the title of the foreign assignee will be held paramount in only those cases in which it appears that in the domicile of the debtor there is a bankrupt law in form and substance.[4]

2. **Voluntary Assignments.**—(*a*) *General Rule.*—In voluntary assignments a different rule prevails than in involuntary assignments or bankrupt proceedings. A voluntary assignment, being by the owner, is the exercise of a personal right belonging to him to dispose of his effects.[5] And the general rule is, that if a voluntary assignment is valid where made, it is valid everywhere;[6] and in all

a foreign law does not operate upon a debt or right of action as against a person in the State. The plaintiff, as we have seen, although a foreign creditor, is rightfully in our courts, pursuing a remedy given by our statutes. It may enforce that remedy to the same extent and in the same manner and with the same priority as a citizen. Any other construction would make the permission of the statute a form without a benefit—a formality, and not a matter of substance; a mere delusion. Once properly in court and accepted as a suitor, neither the law nor the court administering the law will admit any distinction between a citizen of its own State and that of another, Before the law and its tribunals there can be no preference of one over another."

Again, in Johnson *v.* Hunt, 23 Wend. (N.Y.) 91, the court said, in referring to Abraham *v.* Plestero, 3 Wend. (N. Y.) 538: "The amount of the decision, as I understand it, is, that an assignment *in invitum* under the laws of one State or nation has no operation in another even with respect to its own citizens; that the bankrupt, the subject of the very country under whose laws he was proceeded against, may on crossing the territorial line dispose of the property which he has brought with him, may withhold it entirely from the creditors who are proceeding against him in the foreign jurisdiction; and it follows that other creditors coming into the same jurisdiction may either pursue him by attachment, by judgment and execution, or take a voluntary transfer of the property so brought by the debtor in satisfaction of his claim."

1. Story Confl. of Laws, § 409; Hunter *v.* Potts, T. R. 182; Sill *v.* Worswick, 1 H. Bl. 665.

2. Story Confl. of Laws, § 409; Jollet *v.* Deponthieu, 1 H. Bl. 132, note; Solomons *v.* Ross, 1 H. Bl. 131, note.

3. Stein's Case, 1 Rose Cas. on B. 462; Selkrig *v.* Davies, 2 Dowl. 230.

4. Story Confl. of Laws, § 415.

5. Rogers *v.* Allen, 3 Ohio, 488; Osborn *v.* Adams, 18 Pick. (Mass.) 247; Abraham *v.* Plestero, 3 Wend. (N. Y.) 538; Clark *v.* Booth, 17 How. (U. S.) 377; Burrill on Assign. (3d Ed.) 405. See *In re* Page & Sexsmith L. Co., 31 Minn. 136; Butler *v.* Wendell, 57 Mich. 62; Richardson *v.* Rogers, 45 Mich. 591.

6. May *v.* Wannemacher, 111 Mass. 202; Johnson *v.* Sharp, 31 Ohio St. 611; Hanford *v.* Paine, 32 Vt. 442; Ockerman *v.* Cross, 54 N. Y. 29; Sanderson *v.* Bradford, 10 N. H. 260; Atwood *v.* Protection Ins. Co., 14 Conn. 555; Daniels *v.* Willard, 16 Pick. (Mass.) 36; Miller *v.* Kernaghan, 56 Ga. 155; Walters *v.* Whitlock, 9 Fla. 87–103; Atherton *v.* Ives, 20 Fed. Rep. (Ky). 894; Speed *v.* May, 17 Pa. St. 91.

**What is a Voluntary Assignment.**—If it be an assignment under a compulsory statute, it exists alone by force of the law which cannot operate extra-territorially. The law is compulsory if it requires the assignment to be made even at the request of creditors, or if it provides for the discharge of the claims of creditors, without their consent, upon the voluntary surrender by the debtor, under the terms of the law, of all his property for the benefit of creditors. State insol-

such cases, if the assignment is prior in time, it will be prior in right, and will take precedence over an attachment, execution, or other process of a domestic or foreign creditor within the court's jurisdiction.

(*b*) *Exception as to Real Estate.*—The rule that an assignment valid where made is valid everywhere does not apply to real estate. Title to real estate can never be transferred except by the *lex rei sitæ.*[1]

(*c*) *Exception where the Assignment is Repugnant to the Policy of the lex rei sitæ.*—Where the assignment is opposed or repugnant to the policy of the laws of the State in which the goods are situated, and where it is sought to attach them, there the assignment will be held to be void,[2] so far as domestic creditors are concerned; but as to foreign creditors it has been held that if valid where made it will be valid everywhere.[3] But where the assignment was valid where made, and where the goods were situated, and the goods were afterwards removed to a State where it was invalid because it was opposed to a State law, the assignment will not be invalidated.[4]

vent laws which compel the insolvent debtor to surrender his property to an assignee, to be administered under the direction of a court for the benefit of creditors, and which compel the creditor to release the debtor on such full surrender, are instances of these classes. In *America*, such assignments are held inoperative upon property, real or personal, not situated within the territory over which the laws that make or compel the debtor to make them have dominion, as are discharges of the debtor, attempted to be made under them, inoperative as to persons not resident of the State under whose laws they are made. Weider *v.* Maddox, 66 Tex. 372, citing Wharton Confl. of Laws, 390, 390a; Story Confl. of Laws, 410–416; Burrill on Assign. (3d Ed.) 313; U. S. *v.* Banks, 8 Robinson (La.), 414; Hutcheson *v.* Peshine, 16 N. J. Eq. 170; Felch *v.* Bugbee, 48 Me. 9; Walters *v.* Whitlock, 9 Fla. 95; Ogden *v.* Saunders, 12 Wheat. (U. S.) 213; Harrison *v.* Sterry, 5 Cranch (U. S.), 239; Dalton *v.* Currier, 40 N. H. 237.

1. Burrill's Assignments (3d Ed.). p. 406; Story Confl. of Laws, §§ 428–444; Wharton Confl. of Laws, § 273.

It cannot be doubted that a deed of assignment for the benefit of creditors may be made in a sister State by a non-resident of the State, and that if its execution and acknowledgment accord with our statute, it is valid. King *v.* Glass (Iowa, 1887), 34 N. W. Rep. 830; Moore *v.* Church, 70 Iowa, 208.

2. Green *v.* Van Buskirk, 7 Wall. (U.S.) 139; Hervey *v.* R. I. Locomotive Works, 83 U. S. 664; Varnum *v.* Camp, 1 Green (N. J.), 326; Bentley *v.* Whittemore, 19 N. J. Eq. 462; Bryan *v.* Brisbin, 26 Mo. 423; Philson *v.* Barnes, 50 Pa. St. 230; Guildander *v.* Howell, 35 N. Y. 657; s. c., 6 Am. L. Reg. (N. S.) 531, note; Mumford *v.* Canty, 50 Ill. 370; Zipcey *v.* Thompson, 1 Gray (Mass.), 243; Boyd *v.* Rockport Mills, 7 Gray (Mass.), 406; Stricker *v.* Tinkham, 35 Ga. 177; Fuller *v.* Steidlitz, 27 Ohio St. 355; Edgerly *v.* Bush, 81 N. Y. 199–206. See ASSIGNMENTS FOR BENEFIT OF CREDITORS, n. 1, p. 873, Vol. I. Am. & Eng. Encycl. of Law.

3. May *v.* First Natl. Bank, 122 Ill. 551; Bentley *v.* Whittemore, 19 N. J. Eq. 462; Halstead *v.* Straus (1887), 32 Fed. Rep. (N. J.) 27.

The execution of foreign assignments in *New Jersey* will be enforced by its courts as a matter of comity, except when it would injure one of its own citizens; then it will not. Justice Bradley in Halstead *v.* Straus, 32 Fed. Rep. (N. J.) 280; Thurston *v.* Rosenfeld, 42 Mo. 474; Whipple *v.* Thayer, 16 Pick. (Mass.) 25; Chafee *v.* Natl. Bank, 71 Me. 514; s. c., 36 Am. Rep. 345.

4. In Bentley *v.* Whittemore, 19 N. J. Eq. 462, the assignment was made in New York by a citizen of that State. A portion of the property was in New Jersey. A creditor who was not a resident of New Jersey sought to assail the assignment on the ground that it was repugnant to laws of that State. The court said: "Upon

**3. Where Possession has Changed.**—Where there has been an actual transfer of possession, the transfer will be upheld everywhere.[1]

**FOREIGN ATTACHMENT.**—(See also ATTACHMENT; GARNISHMENT.)


I. Definition, 288.
II. Character of the Remedy, 289.
1. *Distinction*, 289.
2. *Modification of the Remedy*, 289.
3. *In Rem*, 291.
III. Who Liable to have their Property Attached, 291.
1. *Non-resident Debtors*, 291.
2. *Non-resident Present*, 292.
3. *Facts Showing Residence*, 293.
4. *Absence*, 294.
5. *Protracted Absence — Removal*, 295.
6. *Public Corporations*, 296.
7. *Cities*, 297.
8. *Private Corporations*, 298.
9. *General Rule as to Both Persons and Corporations when Non-resident*, 302.
10. *When Foreign Corporations Held Not Liable*, 302.
IV. Cause of Action which this Remedy May Aid, 303.
1. *Debts Due*, 303.
V. What May be Attached, and what May Not, 305.
1. *In General*, 305.
2. *Debts Due Defendant*, 306.
3. *Promissory Notes*, 308.
4. *Stocks*, 310.
(*a*) *Shares Owned Out of the State—Certificates Not Attachable*, 311.
5. *Partnership Property*, 311.
6. *Money*, 313.
7. *Legacies*, 314.
8. *Real Estate*, 315.
VI. Attaching in the Hands of Third Persons, 316.
1. *Right to Retain*, 317.
2. *Jurisdiction*, 317.
3. *Rights of Garnishee*, 318.
VII. The Writ, 319.
VIII. Publication, 321.
IX. Return of the Writ, 323.
X. Appearance of the Debtor, 323.
XI. Judgment and Execution, 326.


**I. Definition.**—Foreign attachment is a remedy against a non-resident debtor, by which property of his, or a credit due him, is secured for the eventual satisfaction of the debt, unless he appear meanwhile and give security for the payment in case of judgment against him, or bond the property attached or subjected to garnishment.[1]

what principle can a citizen of another State ask us to refuse to recognize the validity of an assignment made in New York, and in conformity to her laws. Upon what pleas consistent with comity under such circumstances are the authorities of this government to repudiate a transaction valid by the laws of a sister State? If the question touched one of our citizens we could vindicate our rejection of such transaction on the ground of our own statute, passed legitimately for the regulation of the affairs of such citizens. But if such rejection relates to the citizens of another State, how is such a line of conduct to be justified? We might indeed urge as a sort of excuse that the laws of New York regulating assignments were not similar to the laws of this State, and that we preferred the regulation of our law. . . . But I cannot think we have a right to endeavor to arbitrate in such a concern. . . . The true rule of law and public policy is this: That a voluntary assignment made abroad, inconsistent in substantial respects with our statutes, should not be put in execution here to the detriment of our own citizens, but for all other purposes, if valid by the *lex loci*, it should be carried fully into effect."

1. Hanford *v.* Paine, 32 Vt. 442; Rice *v.* Curtis, 32 Vt. 460; Mead *v.* Dayton, 28 Conn. 33.

**Authorities.** — Wharton's Conflict of Laws (1st Ed.); Story's Conflict of Laws (Redfield's Ed.); Burrill on Assignments (3d Ed.); valuable note in 55 Am. Rep. 129; article 2 Western Law Monthly, 178; valuable note in 6 Am. Law Reg. 527; 2 Kent's Com. (Holmes' Ed.)

**1. Definition.**—Abbott's L. Dict.; Law and Equity Dict.; Bouvier's L. Dict.; Barnet's Case, 1 Dall. (Pa.) 152.

"Foreign attachment is a remedy against debtors that are absent and non-resident, while domestic attachment is a remedy against resident debtors absenting or concealing themselves." Fuller

**II. Character of the Remedy.**—1. *Distinction.*—The principal distinction between foreign and domestic attachment is found in the situation of the attachment debtor as within the reach of ordinary process or beyond it. The remedy has grown in this country from a mere process to compel the appearance of an absent and non-resident debtor to a proceeding to create and enforce a lien; and the two forms of attachment now prevalent have become so much alike that little distinction is made between them in most of the States—non-residence being simply one of the grounds for attaching.[1] Foreign attachment is not now merely to compel appearance.[2] The purpose has undergone a change.[3]

*v.* Bryan, 20 Pa. St. 144, 147; Albany Ins. Co. *v.* Whitney, 70 Pa. St. 248.

Garnishment, trustee, or factorizing process, as it is variously called (applicable to both forms of attachment), "is a species of compulsory statute assignment by which a creditor may obtain that by operation of law which his debtor might voluntarily assign to him in payment of his debt." Strong *v.* Smith, 1 Metc. (Mass.) 476. "By the aid of this process, the attaching creditor is subrogated to all the rights of the debtor against third parties." Kneeland on Attachment, p. 17. It is a suit virtually by the attachment defendant, though in the plaintiff's name. Moore *v.* Stourton, 22 Ala. 831; Travis *v.* Tartt, 8 Ala. 574; Malley *v.* Altman, 14 Wis. 22.

**1. The Nature of the Process.**—Judge Sharswood thus describes it: "If a non-resident has property, real or personal, within the jurisdiction, an action may be commenced against him by a writ of foreign attachment, commanding the sheriff to attach the defendant by all and singular his goods and chattels, lands and tenements, in whose hands or possession soever they may be, so that he be and appear, etc. And in every such writ there must be contained a clause commanding him to summon all persons in whose hands or possession the said goods or chattels may be found, so that they appear, etc. The property itself, if susceptible of manual seizure, is taken possession of by the sheriff, and, if not, the summons of the garnishee fixes upon him a liability to the plaintiff for whatever he may hold belonging or owing to the defendant at that time. . . . He is allowed to controvert the fact of his indebtedness to the defendant, or that the property attached was his. The non-resident defendant may have the attachment dissolved by entering security for the plaintiff's claim, or, without such dissolution, he may appear voluntarily and take defence against the demand. By such appearance, the proceeding against him may end in a judgment which will bind him personally. . . . But, without such voluntary submission to the jurisdiction of the court, the judgment in the proceeding by foreign attachment can be enforced only against the property attached, or against the garnishee *in personam* to the extent of the property admitted, or found by the verdict of the jury, to be in his hands. It is allowed to have no extra-territorial operation." Coleman's Appeal, 75 Pa. St. 441, 455.

**2. Attachment as Distraint to Compel Appearance.**—When the object of attaching was to force the defendant into court, to give security for the debt or enter bail for his personal appearance,—not to create and enforce a lien for ordinary debt, as now,—it was thought that he was in court by his property. Beech *v.* Abbott, 6 Vt. 605. *Compare* Williams *v.* Stewart, 3 Wis. 773, and Matter of Clark, 3 Denis (N. Y.), 167.

"Nominal attachment" insufficient. Carleton *v.* Washington Ins. Co., 35 N. H. 168.

The defendant was twice reported *non est* before the court proceeded against his property. Barney *v.* Patterson, 6 Har. & J. (Md.) 182. On failure to appear, his attached property was applied to the payment of his debts. Barr *v.* Perry, 3 Gill (Md.), 326. All the *Maryland* attachment laws grew out of the London custom,—Turner *v.* Lytle, 59 Md. 199, 203; Campbell *v.* Morris, 3 Har. & McH. (Md.) 535;—which was a means of relief against a foreign debtor,—Hepburn's Case, 3 Bland Ch. (Md.) 118. In the earlier decisions, the process was merely to compel appearance. Risewick *v.* Davis, 19 Md. 91.

**3. Change in the Object.**—"It is said that a foreign attachment is a process to *compel the appearance* of a non-resident defendant, and that the appearance is supposed to be made only when he enters

2. *Modification of the Remedy.*—The property of a foreign debtor is not now taken only in case he cannot be personally attached, nor is it limited to chattels in the hands of third persons, and to debts due by them to him. It may be taken directly from the non-resident, if he be found with it, within the jurisdiction; and both realty and personalty are liable to be levied upon. On the other hand, garnishment, or trustee process, is applicable in a case of domestic attachment, as well as in one of foreign, if there are goods or realty in third hands belonging to the defendant, or credits due him.[1]

Starting from the same point, the several States of the Union have travelled in different paths, and some have gone much farther than others from the original methods of the Custom of London.[2] Some preserve the distinction between the two species of attachment on their statute-books, while others do not. All, however, observe the real difference between the two, in their practice and decisions. When a debtor has absconded, or secreted his property or himself, to avoid the payment of his debts, or disposed of his property, by assignment or otherwise, for this purpose, and by simulated acts, his conduct is fraudulent; and the reason underlying the authorization of attachment under those circumstances is very different from that for attaching the property of a non-resident. For this and other reasons, some states, which do not sharply draw the line between the two forms, require no bond from the plaintiff before attaching on the ground of non-residence, and make other differences in the conditions of the statutory authorization. Notwithstanding the variety of modifications in the several States, foreign and domestic attachment may now be described together: "A proceeding to create and enforce a lien; a remedy for the collection of ordinary debt by preliminary levy

special bail upon which he may be surrendered; and thus, in effect, a virtual *arrest* of an insolvent debtor for a debt due before his discharge would [might] occur, in violation of the provisions of the insolvent laws. However this might have been prior to the act of 13th June, 1836, the latter excludes the difficulty." It "provides that foreign attachment may issue against any person not residing, etc. And a defendant may enter an appearance and take defence without entering bail to dissolve the attachment." By the court in Brolaskey *v.* Landers, 2 Miles (Pa.), 371; Manuel *v.* Miss. etc., R. Co., 2 Miles (Pa.), 398.

1. Authorities under the head, WHAT MAY BE ATTACHED, AND WHAT MAY NOT, *post.*

2. **Custom of London.**—"This is a very ancient proceeding, taking its origin from the Roman law. . . . The object is to enable the creditor to attach the money, debts, or goods of his debtor in the hands of a third person, and so to deprive the owner of all control over the subject of the attachment until he appears to answer the claim of his creditor, or until the debt is satisfied." Complaint against the absent debtor was made, and, when he was returned *nihil* garnishment was issued against any person indebted to the defendant, by which that person was warned not to pay to his creditor, but to answer in court and abide judicial order, in case he do not deny his indebtedness. Four defaults of the defendant, upon successive proclamations, were followed by judgment against the garnishee (who had acknowledged or not denied the debt), in favor of the plaintiff, who gave pledges to restore in case the defendant should appear within a year and a day, give security, and defend the cause, etc. Locke on Foreign Attachment (Law Lib. Ed.), pp. 1, 2, *3, *19; Thayer *v.* Willet, 9 Abb. Pr. (N. Y.) 325.

upon property of the debtor, to conserve it for eventual execution after the lien shall have been perfected by judgment." [1]

There may be clashing between the two methods when one is in equity and the other at law.[2]

3. *In Rem.*—Under the prevalent system of foreign attachment there is no judgment *nisi* against the attachment defendant who is beyond the jurisdiction and merely invited to court, but a final judgment against the property attached, if the plaintiff has given bond and complied with all statutory requirements, and made out his case. In other words, the proceeding, under such circumstances, is *in rem.* It is so almost everywhere in the Union, except where bond is not required of the plaintiff till the time of sale when he obligates himself to make restoration in case the defendant should appear within a given time and defend, the judgment there being merely interlocutory.

This proceeding *in rem* is limited in effect to the defendant's interest and that of his privies, and is not *res adjudicata quo ad omnes*, like a general proceeding against property.

It is now quite generally held that, though the attachment suit, without a personal defendant in court, is still *in personam* in form, in effect it is *in rem.*[3]

**III. Who Liable to have their Property Attached.**—1. *Non-resident Debtors.*—The attachment of the property of non-resident debtors is authorized by statute in every State of the Union. It is not everywhere called foreign attachment, but it is such in all the States. The property of those debtors is universally held amenable to the remedy, though the owners cannot be summoned, but merely notified by publication.

Most of the statutes use the term "non-resident debtors" instead of "foreign debtors," because the condition upon which the remedy is to be employed is not that the debtor be a resident of another State or country, but that he do not have a place within the State

1. Waples on Attach. & Garn.

2. **Conflict Between Foreign and Domestic Attachment.**—Process in a foreign attachment is served upon a garnishee having property of the absent debtor in his hands, and afterwards other creditors sue out attachments at law against the same party as an absconding debtor, which are served upon the same garnishee; and, before the foreign attachment is ready for a hearing, they obtain judgments and an order of sale of the property in the hands of the garnishee. The plaintiff in the foreign attachment may amend his bill and enjoin the sale. Moore *v.* Holt. 10 Gratt. (Va.) 284.

3. **In Rem.**—Cooper *v.* Reynolds, 10 Wall. (U. S.) 308; St. Clair *v.* Cox, 106 U. S. 350; Fitzpatrick *v.* Flannagan, 106 U. S. 648; Harris *v.* Hardeman, 14 How. (U. S.) 334, 340; McKinney *v.* Collins, 88 N. Y. 216; Robinson *v.* Nat. Bank, 81 N. Y. 385; Force *v.* Gower, 23 How. Pr. (N. Y.) 294; Matter of Faulkner, 4 Hill (N. Y.), 598; Jackson *v.* Bank of U. S., 10 Pa. St. 61; Phelps *v.* Holker, 1 Dall. (Pa.) 261; Fitch *v.* Ross, 4 S. & R. (Pa.) 557; Miller *v.* Dungan, 30 N. J. L. 21; Myers *v.* Smith, 29 Ohio St. 125; Clymore *v.* Williams, 77 Ill. 618; Banta *v.* Wood, 32 Iowa, 469; Mayfield *v.* Bennett, 48 Iowa, 194; Woolkins *v.* Haid, 49 Mich. 299; Massey *v.* Scot, 49 Mo. 278; Bates *v.* Crow, 57 Miss. 676, 678; Field *v.* Dortch, 34 Ark. 399; Shirley *v.* Byrnes, 34 Tex. 625; Atchison *v.* Rosalip, 4 Chand. (Wis.) 12; American Bank *v.* Rollins, 99 Mass. 313. *Compare* Magee *v.* Beirne, 39 Pa. St. 50, 62.

Attachment is sometimes said to be "in the nature of" a proceeding *in rem.* Wade on Attach. 7.

of the process at which he can be reached. His property and credits may be attached if he is not personally and continuously subject to the jurisdiction of the court upon ordinary summons.[1]

Whether the debtor be a subject of a foreign government, and living abroad, or an inhabitant of any State or Territory of the Union other than that in which the process is issued, he is amenable to the process; but whatever his citizenship, whether he be voter or not, if he has a residence at which process may be served within the State, he is not thus amenable.

2. *Non-resident Present.*—He may, however, be served with process within the State of the court's jurisdiction when found temporarily therein, and yet be proceeded against as a non-resident. The mere accident by which ordinary process is enabled to reach him does not cut off the creditor from his right to resort to the extraordinary. The foreign debtor not being usually within the jurisdiction and liable to summons, cannot defend against foreign attachment on the plea of having been actually served with process.[2]

**1. Defendant not where Ordinary Process can reach him.**—The rule is that he must have a place within the State where process can always reach him in order to relieve him from the operation of the attachment remedy. Burcalow *v.* Trump, 1 Houst. (Del.) 363; Malone *v.* Lindley, 1 Phila. (Pa.) 192; Rayne *v.* Taylor, 10 La. Ann. 726; Bryan *v.* Dunseth, 1 Mart. N. S. (La.) 412; Green *v.* Beckwith, 38 Mo. 384; Murphy *v.* Baldwin, 41 How. Pr. (N. Y.) 270; Chaine *v.* Wilson, 16 How. Pr. (N. Y.) 552; Houghton *v.* Ault, 16 How. Pr. (N. Y.) 77; Lee *v.* Stanley, 9 How. Pr. (N. Y.) 272; Stout *v.* Leonard, 37 N. J. L. 492; Chase *v.* Ninth Nat. Bank, 56 Pa. St. 355. One recently arrived who designs to remain, and who has a place where he may be cited, is exempt from the process of foreign attachment. People *v.* McClay, 2 Neb. 7; Swaney *v.* Hutchens, 13 Neb. 266; Heidenback *v.* Schland, 10 How. Pr. (N. Y.) 477. But mere design without the act of coming will not avail him. Adams *v.* Evans, 19 Kan. 174.

If the debtor has not a place within the State where summons may be lawfully served upon him, "he is a non-resident within the statute, and may be proceeded against by attachment. . . . The use of this writ when the defendant is within reach of ordinary process is wholly inconsistent with the spirit and design of the statute." Baldwin *v.* Flagg, 43 N. J. L. 495; Perrine *v.* Evans, 35 N. J. L. 221; Brundred *v.* Del Hoys, 20 N. J. L. 328; City Bank of N. Y. *v.* Merrit, 1 Green (N. J.), 131; Branson *v.* Shinn, 1 Green (N. J.). 250; Clark *v.* Likens, 2 Dutch. (N. J.) 207; Phillipsburg Bank *v.* Lackawanna R. Co., 3 Dutch. (N. J.) 206; Kugler *v.* Shreve, 4 Dutch. (N. J.) 129; *In re* Thompson, 1 Wend. (N. Y.) 43; Haggart *v.* Morgan, 5 N. Y. 422; Wallace *v.* Castle, 68 N. Y. 370; Murphy *v.* Baldwin, 41 How. Pr. (N. Y.) 270; Ellington *v.* Moore, 17 Mo. 424.

**2. Absence and Non-residence.**—When absence and non-residence are conjoined as one statute ground, the debtor must not only be a non-resident, but also absent from the State when the writ is issued. Fuller *v.* Bryan, 20 Pa. St. 144; Bainbridge *v.* Alderson, 2 Browne (Pa.), 51; Haggett *v.* Emerson, 8 Kan. 262. Without such coupling of grounds in the statute, the present absence of the non-resident need not be averred or proved. Clark *v.* Arnold, 9 Dana (Ky.), 305.

"Service of process on a non-resident, while transiently within the State, will not suffice to hold him as garnishee." Green *v.* Farmers & Citizens' Bank, 25 Conn. 454.

**One of Several Non-residents Personally Served.**—"Where there are several non-resident debtors liable for the same demand, and they own property in this State, it may be attached; and though one of them was casually here and served with process, there is no reason why the property may not be sold for the debt." Jackson *v.* Perry, 13 B. Mon. (Ky.) 232.

"Absence from the State of one member of a firm or one of several joint debtors, gives the chancellor jurisdiction to subject their effects by attachment." Wilcox *v.* Carey, 9 Dana (Ky.), 298.

3. *Facts Showing Residence.*—Transient abode at a hotel, where summons may be served, will not defeat foreign attachment. It must be such an abode as will render the debtor ordinarily liable to be reached there; such as will place him upon an equal footing with resident citizens with respect to process.

As a question of fact, it is sometimes difficult to decide, under given circumstances, whether the debtor is a resident or not. A home very recently acquired is as good as one of long standing, but the question of its permanency and honesty is often difficult. A home very recently abandoned is equivalent to the want of one for years, but the fact of its abandonment and of change of residence to another State or country is sometimes inferred from circumstances, after much uncertainty. It is not necessary that the debtor should have acquired residence in any particular place out of the State; it suffices the purpose of the attaching creditor if the debtor has ceased to have residence within the State.

The keeping of a business establishment within the State will not render him a resident for attachment purposes. When there is a question whether he lives within the jurisdiction so as to be subject to ordinary process, the circumstance that he does his principal business therein may throw light upon the problem; but it is not sufficient, in itself, to relieve him from liability to have his property attached as that of a non-resident. If it be admitted or proven that he resides in a State other than that of the business place, and of the court issuing the process, the fact of the business establishment being within the State is entitled to no weight. He may have clerks there, on whom he has authorized service to be served as upon his agents, and yet this will not relieve him.[1] He may be liable at his business place within the State, though his domicil be foreign.[2] Non-residence should be proved,[3] but may

**1. Residence—Facts Showing—Presumption.**—A residence once shown to have been established is presumed to continue until it is clearly shown to have been abandoned. The residence of a man having a family, which he maintains, is *prima facie* where the family dwells. A man's acts and conduct are more to be considered, in determining the question of a change of residence, than any mere declarations of intent; and, when the question is doubtful, it should be so determined as will best secure the rights of creditors and others having dealings with such party. Keith *v.* Stetter, 25 Kan. 100.

Proof that the defendant declared his intention of removing out of the State, and invited another to go also and become his neighbor, and that he did leave the State, was held sufficient to warrant the attachment of his property as that of a non-resident, though he returned to the State a month after the bill had been filed. Farrow *v.* Barker, 3 B. Mon. (Ky.) 217.

**2. Place of Business.**—One may have a place of business within a State, yet no residence at which process can be served; and he may therefore be subject to the law of foreign attachment. Perrine *v.* Evans, 35 N. J. L. 221; Wallace *v.* Castle, 68 N. Y. 370; Murphy *v.* Baldwin, 41 How. Pr. (N. Y.) 270.

And he may have a place of business in the State, while his domicil is foreign, yet not be liable to the attachment of his property as that of a non-resident, for he may be amenable to ordinary process. Krone *v.* Cooper, 43 Ark. 547. *Compare* McKenzie *v.* Murphy, 24 Ark. 155. Domicil may be in one State, yet actual residence in another. Savage *v.* Scott, 45 Iowa, 130; Board *v.* Davenport, 40 Ill. 197. *Compare* Chariton Co. *v.* Moberly, 59 Mo. 238.

**3. Proof of Non-residence—Practice in New York.**—In New York, non-residence must be distinctly proved, and cannot be inferred from mere addition or description, to support foreign attachment.

be inferred from facts established.[1]

4. *Absence.*—Generally speaking, the statutes make no difference between a non-resident who is absent and one who is temporarily present; but, when "absence and non-residence" must be alleged, and must be stated in the affidavit, the statute requiring it must be followed, under penalty of having the attachment refused, or, if first granted, that of having it dissolved for non-compliance with the conditions of its authorization. Ordinarily, however, the present whereabouts of the non-resident debtor need not be averred. The test question usually is, whether the debtor is a resident or a non-resident; not whether he is present or absent at the time the process is issued. Where a certain period of absence—three months, for instance—must be alleged in the affidavit to conform to statute, that averment becomes as important as the allegation of non-residence.[2]

Protracted absence rendering the service of ordinary process impossible is equivalent to non-residence, if there is no place within the jurisdiction at which a summons may be legally left. The creditor is justifiable in suing out foreign attachment against a debtor absent without such a place within the jurisdiction, believing the debtor's stay abroad will be protracted, even though mistaken in that belief.

What length of absence amounts to non-residence within the meaning of the attachment laws, is a question that turns much on the debtor's design. And this design may be gathered from his

Payne *v.* Young, 8 N. Y. 158. Service is on the trustee. Wright *v.* Douglass, 7 N. Y. 564. The process may be issued in favor of a firm, some of the members of which are non-resident. Renard *v.* Hargous, 13 N. Y. 259. When against one partner, the levy may be on partnership property. Smith *v.* Orser, 42 N. Y. 132. When against a foreign corporation, the sheriff or plaintiff may assume prosecution of actions brought by the corporation on stock subscriptions—effect on other attaching creditors, etc. O'Brien *v.* Glenville Woollen Co., 50 N. Y. 128. The process of foreign attachment may be issued against a national bank located in another State. Robinson *v.* Nat. Bank of Newberne, 81 N. Y. 385; s. c., 37 Am. Rep. 508.

The sureties on the bond are estopped from denying the defendant's non-residence. Haggart *v.* Morgan, 5 N. Y. 422.

**1. Non-residence Inferred from Absconding.**—Where the affidavit states, in effect, that the defendant had been convicted of fraudulently obtaining money; that, while awaiting sentence, he had escaped; and that most strenuous efforts have failed to discover him: and that the plaintiff claims the money so embezzled; *held*, sufficient to authorize the issuing of a warrant of attachment, and that the warrant could be sustained on the ground that, from the facts stated, it sufficiently appeared that the defendant had left the State and was a non-resident. Mayor, etc., of New York *v.* Genet, 63 N. Y. 646.

**2. Absence and Intent.**—Wells *v.* People, 44 Ill. 40; Morgan *v.* Avery, 7 Barb. (N. Y.) 656; Swaney *v.* Hutchins, 13 Neb. 266.

Intent to stay away permanently was inferred from a citizen's absence of ten years, without communicating with regard to his property, and attachment of his property as that of a non-resident was sustained. Walker *v.* Barrelli, 32 La. Ann. 467.

Acts indicating a design to become a non-resident outweigh declarations of the defendant to the contrary. Wolf *v.* McGavock, 23 Wis. 516. Temporary absence, without other indications, affords no ground for concluding that the debtor has left his State permanently, and no cause for attachment. Alston *v.* Newcomer, 42 Miss. 186; Long *v.* Ryan, 30 Gratt. (Va.) 718; Morgan *v.* Nunes, 54 Miss. 308.

own declarations, from circumstances attending his departure, from the condition of his business affairs, from the whereabouts of his family, from his silence about business matters connected with his absence of which interested men usually speak, and from any suspicious circumstance which he himself could readily explain but which he leaves in doubt.[1]

5. *Protracted Absence—Removal.*—One who is domiciled within the State, and may be served by the leaving of process there with proper persons of his family living there, may be abroad many years without subjecting himself to liability to foreign attachment; for no length of time will create the presumption of non-residence under such circumstances. Why should the extraordinary process be invoked against him when the ordinary is available? But if the latter is unavailable, the creditor is entitled to the former, even though the indebted absentee is not acquiring residence abroad, not intending to acquire it, and is merely travelling, with the expectation of returning. He must have a place where he can be reached by process at the precise time when it is issued, if he would avoid liability to procedure against him as a non-resident. His becoming a resident soon after would have no effect. His being such at the time of the trial could not help him to defeat the remedy.[2]

1. A brief absence is sufficient to justify the allegation of non-residence if there are facts to indicate that there is no intention of returning,—Morgan *v.* Nunes, 34 Miss. 307; Wheeler *v.* Cobb, 75 N. Car. 21; McCollem *v.* White, 23 Ind. 43; Farrow *v.* Barker, 3 B. Mon. (Ky.) 217;—while, without such indications, one may be absent for years without becoming a non-resident, unless the statute of the State fixes a period,—Egan *v.* Lumsden, 2 Disney (Ohio), 168.

**Statutory Limit.**—In *Kentucky*, *Arkansas*, and *Colorado*, an absence of four months renders one a non-resident for attachment purposes; in *Michigan*, three months' absence, coupled with non-residence.

Absence for months, with such other circumstances as partial assignment, entry into business abroad, and failure to express an intention of returning, has been held sufficient to justify foreign attachment in a suit against him. Nailor *v.* French, 4 Yeates (Pa.), 241. It does not avail a non-resident to have an agent within the State: he is none the less liable to the foreign attachment of his property. Chase *v.* Ninth Nat. Bank of New York, 56 Pa. St. 355. The remedy is inapplicable to the estate of a person who is a resident, but leaves stating that he is going out of the State, yet returns in a few days. Shipman *v.* Woodbury, 2 Miles (Pa.), 67.

The expression, in a statute, "not in this State" was held to mean "residing out of the State," and not to include an inhabitant of the State temporarily absent, with reference to foreign attachment. Potter *v.* Sanborn, 49 Conn. 452.

Actual cessation to dwell within the State, with general intention to return but no fixed time therefor, constitutes non-residence and warrants an attachment under *New York* Code, §§ 635, 636. Weitkamp *v.* Lœhr, 53 N. Y. Super. Ct. 79. Where a defendant sold nearly all his personalty, placed his farm in the hands of an agent for sale, and left the State, and did not return until after attachment had been levied upon his farm, when he admitted that when he left he did not intend to make *Kansas* his home again, he was held to have been a non-resident at the time of the attachment. Ritter *v.* Phœnix Mut. Life Ins. Co., 32 Kan. 504.

2. **Removal.**—One "does not become a new resident so as to subject him to foreign attachment by leaving his residence and going into another State to seek a new one," until he has found another, with intent to remain there. Reed's App., 71 Pa. St. 378.

A debtor who had a place of business in the city of New York, but who resided in Paris part of his time for the purpose of purchasing goods for his New York house, and who had given up his apartments in Paris, taken rooms in

One who is absent on behalf of the government does not lose his residence.[1]

The question of non-residence being vital to the remedy of foreign attachment, an intervening creditor may raise it, and introduce evidence to disprove it.[2]

In *Virginia*, and some other States, it is necessary that the defendant shall have been formerly a resident.[3]

6. *Public Corporations.*—State and Federal governments, and their officers, cannot be subject to foreign attachment and garnishment: Governments cannot, for the general reason that they cannot be sued; and their officers cannot be, for property and money are held in such cases to be in the custody of the law. The funds of government, being devoted to governmental purposes, cannot be diverted to other objects by means of a process issued in the interest of another. Could that be done, the functions of the government might be suspended, officers would be hindered in the discharge of their duties, and payments could not be made without confusion, prior to the adjustment of official accounts.[4]

New York for himself and family, and announced his intention of remaining in the latter city, was held not a non-resident, and his goods not liable to foreign attachment. Knapp *v.* Gerson, (N. Y.), 25 Fed. Rep. 197.

Inferences of witnesses, drawn from the defendant's declarations as to his intentions with respect to residence and non-residence, *held*, not proper evidence. Charles *v.* Amos, 10 Colo. 272.

An emigrant from a State has been deemed a non-resident before crossing its border-line in making his exit. Clark *v.* Ward, 12 Gratt. (Va.) 440. *Compare* Ballinger *v.* Lantier, 15 Kan. 608. But, with full intent to change his residence to another State, he cannot be treated as having changed it before actually leaving home to execute his purposes. Kugler *v.* Shreve, 4 Dutch. (N. J.) 129; Hale *v.* Richardson, 89 N. Car. 62.

Absence preparatory to permanent removal affords no ground while there is yet a place within the State where ordinary process may reach the debtor. Pfoutz *v.* Comford, 36 Pa. St. 420. But it was held, in *New York*, that one domiciliated therein, but residing in another State part of his time, doing business in both States, may have his property attached in New York. McKinley *v.* Fowler, 67 How. Pr. (N. Y.) 388.

Actual cessation to dwell within the State for an uncertain period, though a general intention to return at some future time may exist, constitutes non-residence and warrants attachment under the *New York* Code, §§ 635, 636. Weitkamp *v.* Loehr, 53 N. Y. Super. Ct. 78.

See the leading cases of Frost *v.* Brisbin, 19 Wend. (N. Y.) 11; s. c., Am. Dec. 423, note;—also, the leading case of Haggart *v.* Morgan, 5 N. Y. 422; s. c., 55 Am. Dec. 550, note.

1. **Absent in the Army.**—Residence is not lost by absence when the absentee is in the Federal army,—Fibbits *v.* Townsend, 15 Abb. Pr. (N. Y.) 221; Thompson's Case, 1 Wend. (N. Y.) 43;—but otherwise if in the Confederate army,—Ludlow *v.* Ramsey, 11 Wall. (U. S.) 581.

2. **Judgment Creditor Intervening.**—A judgment creditor, subject to a foreign attachment laid, has a standing to contest the facts of the non-residence of the defendant and that the plaintiff gained a lien by his writ. Reed's App., 71 Pa. St. 378.

3. **Former Residence.**—In *Virginia*, under Code 1873, ch. 148, § 3, an attachment cannot create a lien on the property of a non-resident defendant who has never been a resident of that State. Starke *v.* Scott, 78 Va. 180.

4. **States, etc.**—Averill *v.* Tucker, 2 Cr. (C. C.) 544; Buchanan *v.* Alexander, 4 How. (U. S.) 20; Derr *v.* Luby, 1 McArth. (D. C.) 187; Pottier & Stymus Mfg. Co. *v.* Taylor, 3 McArth. (D. C.) 4; Brown *v.* Finley, 3 McArth. (D. C.) 77; Dewey *v.* Garvey, 130 Mass. 86; Pennebaker *v.* Tomlinson, (State Comptroller, Garnishee,) 1 Tenn. Ch. 598; Rollo *v.* Andes Ins. Co., (State Treasurer, Garnishee.) 23 Gratt. (Va.) 509; Wild *v.* Ferguson, 23 La. Ann. 752; (State officer, Garnishee;) Wilson *v.* Bank of La., 55 Ga. 98; Divine *v.* Harvie, 7 T. B. Mon. (Ky.) 439. (State officer, Garnishee.

The general rule that governments and their officers are not subject to attachment and garnishment is applicable to subordinate public corporations, such as counties, townships, school districts, and cities, though the rule is not universal, as will be shown.

If, however, the law provides that subordinate public corporations may "sue and be sued," this general authorization would render them liable to foreign as well as domestic attachment, and to the process of garnishment. Though these remedies be not mentioned in the statute, they would be understood as included with all legal remedies under the general authorization. These *quasi* corporations do not include counties, but the latter may be rendered liable by State statute.

Whether foreign attachment and garnishment are applicable to counties, etc., depends upon the statute of each State with reference to the process therein. But it has been held that there may be waiver of objection, though the attaching creditor have no express statutory right to employ the remedy; provided, however, that there must be assent on the part of the attachment debtor before garnishment can be resorted to under such circumstances.[2]

7. *Cities.*—The liability of cities depends upon statute; and, in the absence of express authorization, the creditor cannot employ

**1. Counties, Cities, etc.** — Cheally *v.* Brewer, 7 Mass. 259; Williams *v.* Boardman, 9 Allen (Mass.), 570; Wilchell *v.* Allen, 1 Conn. 585; Stillman *v.* Isham, 11 Conn. 124; Ward *v.* County of Hartford. 12 Conn. 404; Bray *v.* Wallingford, 20 Conn. 416; Webb *v.* McCauley, 4 Bush (Ky.), 8; Boone County *v.* Keck, 31 Ark. 387; McDougal *v.* Hennepin County, 4 Minn. 156; Wallace *v.* Lawyer, 54 Ind. 501; Merrill *v.* Campbell, 49 Wis. 535; Bromham *v.* Fond du Lac, 15 Wis. 193; Buffham *v.* Racine, 26 Wis. 449; Hill *v.* Lacrosse R. Co., 14 Wis. 291.

**2. Public Corporations, When Liable.**— Counties have been held liable to conservative writs under general provision that they may sue and be sued. Ward *v.* County of Hartford, 12 Conn. 404; McLoud *v.* Selby, 10 Conn. 390; Tilden *v.* Metcalf, 2 Day (Conn.), 259.

Counties may be garnisheed for debts due on their own contracts, in *Massachusetts*. and so may cities. Adams *v.* Taylor, 121 Mass. 380. But a juror's fees, due and unpaid by a county, ordinarily cannot be reached by trustee process against the county; though that has been done in *New Hampshire*. Wardwell *v.* Jones, 58 N. H. 305. Whenever a county may be sued, and judgment obtained against it, debts due it may be reached by garnishment. George *v.* Ralls County, 3 McCrary (C. C.), 181.

Townships are not ordinarily liable to the process;—Bradley *v.* Town of Richmond, 6 Vt. 121; Jenks *v.* Osceola Township, 45 Iowa, 554;—nor school districts, —Spencer *v.* School District, 11 R. I. 537. But the rule with respect to townships, etc., is not everywhere applicable. Hibbard *v.* Clark, 56 N. H. 135; Walker *v.* Cook, 129 Mass. 577.

**Waiver.**—Las Animas County Commissioners *v.* Bond, 3 Colo. 441; Clapp *v.* Walker, 25 Iowa, 315.

**Assent of Debtor.** — Johnson *v.* Dexter, 38 Mich. 695; School District *v.* Gage, 39 Mich. 484.

**School Funds in Custodia Legis.** — School districts and school commissioners and other officers cannot be garnisheed with respect to the funds they hold for distribution for public purposes. School Directors *v.* Harper, 59 Ill. 21; Millison *v.* Fisk, 43 Ill. 112; Bulkly *v.* Eckert, 3 Pa. St. 368; Colby *v.* Coates, 6 Cush. (Mass.) 559; School District *v.* Wood, 13 Mass. 193; Thayer *v.* Tyler, 5 5 Allen (Mass.), 95; Hadley *v.* Peabody, 13 Gray (Mass.), 200; Hightower *v.* Slaton, 54 Ga. 108; McLellan *v.* Young, 54 Ga. 399; s. c., 21 Am. Rep. 276; Clark *v.* School Coms., 36 Ala. 261; Tracy *v.* Hornbuckle, 8 Bush (Ky.), 336.

**School Districts as Municipal Corporations.**—Seely *v.* Board of Education, 39 Mich. 486; School District *v.* Gage, 39 Mich. 484; Trustees of Schools *v.* Tatman, 13 Ill. 27.

the remedy against them, nor garnishee them.[1] In cases of contract, however, they have been held liable as trustees; that is, when they are indebted upon contract to the attachment debtor.[2] There has been apparent conflict on the subject of their liability, but the differences are mostly attributable to the variations in the statutes of the several States, and the construction of them. As a general principle, it may be considered settled that municipal corporations are never liable to garnishment or trustee process in a case of foreign attachment, where they could not themselves be made defendants in a case of direct attachment for the debt sought to be reached in their hands as garnishees.[3]

8. *Private Corporations.*—A foreign corporation is liable precisely as a non-resident is. It is included in statutes, when not expressly named, under such terms as "non-resident debtor," "attachment defendant," "person," etc. There have been objections made to the including of such corporations under the terms "persons" and "citizens," but, for the purposes of the remedy, there is now no difficulty in holding such non-resident artificial persons under the general provisions of statutes authorizing the process against foreign or non-resident debtors, persons, and the like.

A corporation is foreign in every other State or country except that of its location and domicil. There is an exception to this general rule: If another State bestows upon foreign corporations the right of doing business within its bounds, and provides by statute that they shall have the same standing as domestic corporations, they are no longer liable to the remedy.[4]

Incorporation by the United States government does not affect the rule that the corporation is foreign or domestic according to its location.[5]

**1. Statutory Authorization Does Not Usually Include Cities.**—Merrell *v.* Campbell, 49 Wis. 535; Merwin *v.* Chicago, 45 Ill. 133; Chicago *v.* Halsey, 25 Ill. 485; Fortune *v.* St. Louis, 23 Mo. 239; Hawthorne *v.* St. Louis, 11 Mo. 59. *Compare* Pendleton *v.* Perkins, 49 Mo. 565; Moore *v.* Chattanooga, 8 Heisk. (Tenn.) 850; Memphis *v.* Laski, 9 Heisk. (Tenn.) 511; Baltimore *v.* Root, 8 Md. 95; Erie *v.* Knapp, 29 Pa. St. 173; Pittstown *v.* Plattsburgh, 18 Johns. (N. Y.) 407; People *v.* Mayor, etc., 2 Neb. 166.

**2.** Adams *v.* Tyler, 121 Mass. 380; Mayor, etc. *v.* Horton, 38 N. J. L. 88; Wales *v.* Muscatine, 4 Iowa, 302; Neuer *v.* O'Fallon, 18 Mo. 277.

**3.** Cases cited in the two notes immediately preceding.

**4. Foreign Corporation Described.**—Louisville, etc., R. Co. *v.* Letson, 2 How. (U. S.) 497; Covington Bridge Co. *v.* Shepherd, 20 How. (U. S.) 227; Merrick *v.* Van Santvoord, 34 N. Y. 208; Stevens *v.* Phœnix Ins. Co., 41 N. Y. 149.

**Rights of Residents, When Conferred by Statute.**—Phillipsburgh Bank *v.* Lackawanna R. Co., 3 Dutch. (N. J.) 206; Martin *v.* Mobile, etc., R. Co., 7 Bush (Ky.), 116. If chartered in any other State besides that of its origin, a corporation is domestic there. Sprague *v.* Hartford, etc., R. Co., 5 R. I. 233. The rights conferred depend upon statute; and the domestic character is not necessarily acquired by obtaining the privilege of doing business in a State other than that of the domicil of origin. South Carolina R. Co. *v.* People's Saving Institution, 64 Ga. 18.

**Foreign Corporations Included in the Term "Non-residents."**—Wilson *v.* Danforth, 47 Ga. 676; Andrews *v.* Michigan Cent. R. Co., 99 Mass. 534; First Nat. Bank *v.* Colby, 46 Ala. 432; Martin *v.* Branch Bank, 14 La. 415.

**5. National Banks.**—They are domestic corporations in the State in which they are located, but foreign elsewhere. The fact that they derive their powers from

Private corporations are domiciliated in the State of their origin, and are artificial persons liable to have their property attached, and their property and credits subjected to garnishment in the hands of third persons in all the other States. Beyond their own State they are treated as non-residents, precisely as though they were natural persons.[1] They are treated, however, as having a *quasi* domicil in other States than that of their origin, when authorized to do business there on condition of subjecting themselves to liability there to be served by ordinary process.[2] When sued at such domicil by ordinary process, the record should show the liability there in order to support the jurisdiction of the court.[3] Though operating

the Federal government does not affect their character as foreign or domestic; that depends upon locality. Bowen *v.* First Nat. Bank of Medina, 24 How. (N. Y.) 408; Cooke *v.* State Nat. Bank, 50 Barb. (N. Y.) 339; s. c., 52 N. Y. 96; Robinson *v.* Nat Bank of Newberne, 81 N. Y. 385.

A national bank located in Boston was held to be a foreign corporation in *New York*. Cooke *v.* State Nat. Bank, 50 Barb. (N. Y.) 339; s. c., 52 N. Y. 96.

1. **Domicil of a Corporation.**—The general rule is that a corporation is domiciliated only in the State which created it, and that it is incapable of passing beyond the lines of that State. Plimpton *v.* Bigelow, 93 N. Y. 592, 598; Merrick *v.* Van Santvoord, 34 N. Y. 208; Stevens *v.* Phœnix Ins. Co., 41 N. Y. 150; McQueen *v.* Middletown Mfg. Co., 16 Johns. (N. Y.) 5, Bank of Augusta *v.* Earle, 13 Pet. (U. S.) 519; Lafayette Ins. Co. *v.* French, 18 How. (U. S.) 404; Myer *v.* Liverpool Ins. Co., 40 Md 595; Peckham *v.* North Parish, 16 Pick. (Mass.) 274.

2. Exceptions to that rule are now recognized and established in the interest of commerce, so far as to hold a corporation liable in other States than that where it is chartered, if it does business in them, and has representatives there who may be legally cited to find the corporation. Barr *v.* King, 96 Pa. St. 485; Darlington *v.* Rogers, 13 Phila. (Pa.) 102; Libbey *v.* Hodgdon, 9 N. H. 394; Moulin *v.* Trenton Ins. Co., 24 N. J. L. 222.

A State permitting a foreign corporation to do business within its bounds may impose upon it the condition that it shall subject itself to liability as though it were domesticated. Paul *v.* Virginia, 8 Wall. (U. S.) 168; Lafayette Ins. Co. *v.* French, 18 How. (U. S.) 404; Newell *v.* Great Western Railway Co., 19 Mich. 344; Gibbs *v.* Queen Ins. Co., 63 N. Y. 114; s. c., 20 Am. Rep. 513; Fithian *v.* N. Y. & Erie R. Co., 31 Pa. St. 114; McAllister *v.* Pa. Ins. Co., 28 Mo. 214; Brauser *v.* New Eng. Ins. Co., 21 Wis. 506.

A foreign insurance company had an agent in *Georgia*, but was not doing business there; and it was held that he could not be garnisheed in a suit against the company, and that the Georgia court had no jurisdiction over the company. Schmidlapp *v.* La Confiance Ins. Co., 71 Ga. 246.

Foreign attachment certified to the court of common pleas in *Ohio* cannot reach the real estate of a resident of that State. Krumm *v.* Krauss, 26 Ohio St. 529. It lies against a non-resident corporation. Champion Co. *v.* Husten, 24 Ohio St. 503. The words "foreign corporations" in the statute (S. & C. 776) do not include those of the State. Boley *v.* Ohio Life, etc., Co., 12 Ohio St. 139. But the action lies against a non-resident stockholder in an Ohio corporation. Nat. Bank of New London *v.* Lake Shore, etc., R. Co., 21 Ohio St. 221.

Indebtedness, non-residence, and a levy essential to jurisdiction. Parker *v.* Miller, 9 Ohio, 108.

The proceeding held to be *in rem*, and therefore strict observance of the law necessary Humphrey *v.* Wood, Wright (Ohio), 566. The absence of one joint debtor not sufficient. Taylor *v.* McDonald, 4 Ohio, 149. Attachment for non-resident must be founded on contract or judgment. Pope *v.* Ins. Co., 24 Ohio St. 481. In foreign attachment, jurisdiction depends on the existence of property or rights in action. Myers *v.* Smith, 29 Ohio St. 120.

3. **Foreign Corporation Doing Business in the State.**—"When service is made within a State upon an agent of a foreign corporation, it is essential, in order to support the jurisdiction of the court to render a personal judgment, that it should appear somewhere in the record . . . that the corporation was engaged in business in the State . The jurisdiction of the court, under the writ, to dispose of

in different States, a corporation cannot be successfully garnisheed in one for a debt payable in another.[1] The rule which exempts a personal non-resident from garnishment under such circumstances is applicable to foreign corporations.[2]

the property attached cannot be doubted, so far as was necessary to satisfy the demand. No question was raised as to the validity of the judgment to that extent. The objection to it was to evidence that the amount rendered was an existing obligation or debt against the company. If the court had not acquired jurisdiction over the company, the judgment established nothing as to its liability beyond the amount which the proceeds of the property discharged." St. Clair *v.* Cox, 106 U. S. 350.

**1. Corporation Operating in Different States.** — An attachment was issued against a non-resident debtor, and a summons of garnishment served on the East Tenn., Va. & Ga. Railroad Co. by serving a station agent in *Georgia.* The answer of the garnishee showed that the company acted under charters from each of the States; that it was indebted to the attachment defendant, in Tennessee, for labor there performed, and where he resided; that his wages were exempt from attachment by the laws of *Tennessee;* that he had sued for his wages in that State, and had recovered, though the garnishment had been pleaded there by the company in defence to his suit. It was held that no debt was due to the attachment defendant in *Georgia,* by the garnishee (the R. Co.). Wells *v.* East Tenn., etc., R. Co., 74 Ga. 548. This case distinguished from Kyle *v.* Montgomery, 73 Ga. 337.

A carrier is not responsible for goods sold under an attachment, after having notified the owner thereof. Balt. & Ohio R. Co. *v.* Davis (Pa.), 10 Cent. Rep. 630.

**2. Garnishment of Foreign Corporations.** —A non-resident is not garnishable, unless he owe the attachment defendant a sum payable in the State, or hold goods of the defendant within the State where the writ is sued out. Tingley *v.* Bateman, 10 Mass. 343; Ray *v.* Underwood, 3 Pick. (Mass.) 302; Hart *v.* Anthony, 15 Pick. (Mass.) 445; Squair *v.* Shea, 26 Ohio St. 645.

Foreign corporations are exempt from garnishment, subject to the same exceptions, though the officers reside in the State and the statute provides that all corporations may be summoned under the trustee process. In announcing this principle, in *Massachusetts,* the court said: "It will be seen that the statute which was enacted in aid of creditors extends only to cases of foreign corporations having, at the time, property in the Commonwealth liable to be attached; giving our courts jurisdiction of such corporations, as defendants, only in cases where they have property within the Commonwealth. This statute, it will be observed, subjects foreign corporations to the same liability, as defendants, which attach to individuals, and nothing more than this; and there seems to be no good reason for extending their liabilities, in cases of the trustee process, beyond that which exists in cases of individuals residing in another State. Applying this principle to the facts of the present case, it would seem very clearly to follow that, as a general rule, foreign corporations are not liable to the trustee process. . . . It seems to us very clear that the circumstances of the residence here of individual members of this corporation can give no locality to the corporation within this Commonwealth. The individual members, as such, have no authority or capacity to act in the corporate name, or to represent the corporate interests; and, if their residence in any State were allowed to have the effect to make the corporation a domestic one, our corporations, instead of being local and limited, for most purposes, to the territorial limits of the States incorporating them, would have a corporate existence, rendering them liable to civil process, in as many different States as its various members might happen to reside in. Nor do we think the fact that individuals, who hold offices in such corporation, reside here, or that the books and records are kept here, can give the corporation so far the character of a domestic corporation as to subject it to suits here in which the corporation is summoned as trustee. We think that the jurisdiction of our courts, in suits against them, can only attach when they have property within the Commonwealth liable to attachment." Danforth *v.* Penny, 3 Metc. (Mass.) 564. Of like import: Gold *v.* Housatonic R. Co., 1 Gray (Mass.), 424; Larkin *v.* Wilson, 106 Mass. 120; Liverpool Ins. Co. *v.* Massachusetts, 10 Wall. (U. S.) 566; Willet *v.* Equitable Ins. Co., 10 Abb. Pr. (N. Y.) 193; Smith *v.* B. C. & M. R. Co., 33 N. H. 337; Bradford *v.* Mills, 5 R. I. 393; Myer *v.* Liverpool, etc.,

This rule, however, has not been invariably followed: funds in the hands of a common carrier have been attached, though payable in another State.[1]

Property *in transitu* cannot be attached in the hands of the carrier, except in the county where the writ is issued, it has been held; nor anywhere within the bounds of the State, if the service on the common carrier as garnishee was too late for the necessary orders from the superior officer to reach the subordinate agents in charge of the goods in time to stop the transit. And it is *queried* whether a common carrier may be garnisheed at all for goods already in transit and crossing the State.[2]

If the owner of baggage is a passenger, the common carrier cannot be garnisheed within the State as the possessor of it, in a suit against the passenger.[3]

Ins. Co., 40 Md. 595; State *v.* Boston, etc., R. Co., 25 Vt. 433. *Compare* Midland P. R. Co. *v.* McDermid, 91 Ill. 170.

Where a foreign corporation has assented, in consideration of privileges granted, to keep an officer within the State duly authorized to represent it in having service served upon him in its behalf, it may be legally garnisheed by service upon such representative. Jones *v.* N. Y. & Erie R. Co., 1 Grant (Pa.), 457; Fithian *v.* N. Y. & Erie R. Co., 31 Pa. St. 114; Barr *v.* King, 96 Pa. St. 485.

Operating within the State has been held sufficient to render a foreign railroad corporation liable to attachment and garnishment under a statute authorizing the corporation to do business within the State. Pennsylvania R. Co. *v.* Peoples, 31 Ohio St. 537.

Under a statute of *Illinois* providing that foreign corporations doing business within the State shall be subject to all liabilities that are imposed on domestic corporations, it was held that they were garnishable. Hannibal, etc., R. Co. *v.* Crane, 102 Ill. 249. And, in *Missouri*, under a general statute, foreign corporations were held amenable to garnishment where they had an agent within the State on whom process could be served. McAllister *v.* Pennsylvania Ins. Co., 28 Mo. 214.

A foreign railroad company is liable to garnishment in *Ohio*. Pennsylvania R. Co. *v.* Peoples, 31 Ohio St. 537. Like ruling has been had in *Wisconsin*. Brauser *v* New Eng. Fire Ins. Co., 21 Wis. 506.

If a corporation is chartered by more than one State, it is garnishable wherever chartered—not being deemed a foreign corporation because of its having also obtained a franchise elsewhere. Smith *v.* B. C. & M. R. Co., 33 N. H. 337; Balt. & O. R. Co. *v.* Gallahue, 12 Gratt. (Va.) 655. *Compare* Mahany *v.* Kephart, 15 W. Va. 609.

1. A common carrier has been held liable to garnishment for funds of the defendant in hand, though payable in another State. Adams *v.* Scott, 104 Mass. 164. *Compare* Bottom *v.* Clark, 7 Cush. (Mass.) 487; Whipple *v.* Robbins, 97 Mass. 107; Edwards *v.* Transit Co., 104 Mass. 159; Clark *v.* Brewer, 6 Gray (Mass.), 320.

2. If a common carrier has property which he is taking through the State, it has been held that it can be attached only if it is in the county where the writ is sued out. Ill. Cent. R. Co. *v.* Cobb, 48 Ill. 402; Sutherland *v.* Peoria Bank, 78 Ky. 250. The rule has been extended in *Wisconsin*, and it is held that a railroad company cannot be garnisheed, though property of the defendant *in transitu* be within the lines of the State at the time of the service of the summons, if the service came too late for the necessary orders to subordinates in charge; and, *semble*, that property in transit cannot be made the subject of garnishment whether in the county or not. Bates *v.* Chicago, etc., R. Co., 60 Wis. 296; s. c., 50 Am. Rep. 369. *Compare* St. Louis, etc., R. Co. *v.* Larned, 103 Ill. 293.

A non-resident common carrier, for losing a passenger's baggage within the State, is not liable to the process of foreign attachment. Porter *v.* Hildebrand, 14 Pa. St. 129.

3. In Western R. Co. *v.* Thornton, 60 Ga. 300, an agent of the company in charge of a trunk was sought to be garnisheed, in a suit against its owner, who was a passenger on the railroad; but he was held not amenable, because he did not have such possession, at the station

Whether an agent or trustee of a railroad company may be garnisheed in a suit against it, depends upon his relations to the company.[1]

9. *General Rule as to Both Persons and Corporations when Non-resident.*—Garnishment does not depend upon residence, whether foreign or not, but upon the question whether the property or credit sought to be subjected to the process is deliverable or payable to the defendant within the State where the process is issued.[2]

But if, without property so deliverable, or not owing debt there payable, and therefore exempt from garnishment, the foreign corporation or private non-resident cannot voluntarily answer so as to bind the attachment defendant.[3]

10. *When Foreign Corporation Held Not Liable.*—The liability of a foreign corporation to garnishment has been adjudged to de-

where he was located, as to enable him to deliver the trunk.

A railroad company in possession of borrowed cars could not be garnisheed therefor. Mich. Cent. R. Co. *v.* Chicago, etc., R. Co., 1 Ill. App. 399.

**1.** The fiscal agent of a railroad company cannot be garnisheed for funds of the company in his hands, in a suit by the creditor of the company, when he is not under the direction of the company. Wilder *v.* Shea, 13 Bush (Ky.). 128. But railroad bonds held by a trustee for stockholders, to be delivered in exchange for certificates of stock, have been held garnishable in his hands in a suit against the railroad company. Warren *v.* Booth, 51 Iowa, 215.

Creditors may reach, by garnishment, the profits and earnings of a railroad operated by a company which have mortgaged the road itself to bondholders. Miss., etc., R. Co. *v.* U. S. Express Co., 81 Ill. 534.

Should the receiver, appointed to represent a corporation, have to defend a suit in another State where property of the corporation has been attached, he must make himself a party to the suit there. South Carolina R. Co. *v.* Peoples' Saving Institution, 64 Ga. 18.

**2. General Rule.**—Both the defendant and the garnishee may be non-residents; but, if the latter be found within the State with property of the defendant deliverable there, or indebted to the defendant and the debt payable there, he may be garnisheed. Sawyer *v.* Thompson, 4 Foster (N. H.), 510; Young *v.* Ross, 11 Foster (N. H.), 201; Green *v.* Farmers' Bank, 25 Conn. 452; Ray *v.* Underwood, 3 Pick. (Mass.) 302; Hart *v.* Anthony, 15 Pick. (Mass.) 445; Nye *v.* Lipscombe, 21 Pick. (Mass.) 263; Tingley *v.* Bateman, 10 Mass. 343; Lovejoy *v.* Albee, 33 Me. 414; Baxter *v.* Vincent, 6 Vt. 614; Jones *v.* Winchester, 6 N. H. 497; Lawrence *v.* Smith, 45 N. H. 533; Miller *v.* Hove, 2 Cr. (C. C.) 622; Bates *v.* N. O., etc., R. Co., 4 Abb. Pr. (N. Y.) 72; Willet *v.* Eq. Ins. Co., 10 Abb. Pr. (N. Y.) 193; Cronin *v.* Foster, 13 R. I. 196; Waldron *v.* Wilcox, 13 R. I. 518.

**3.** If the garnishee is a non-resident without property deliverable, or indebtedness payable within the State when temporarily found there, he cannot waive his exemption from garnishment and bind the defendant by answering. Rindge *v.* Green, 52 Vt. 204.

A corporation domiciled in one State, yet doing business in another with a representative in the latter duly authorized to bind the corporation by being subjected to service, is garnishable. Commerce Bank *v.* Huntington, 129 Mass. 444. In such case the corporation may be treated in either State as a resident, and therefore garnishable. Smith *v.* B. C. & M. R. Co., 33 N. H. 337; Balt. & Ohio R. Co. *v.* Gallahue, 12 Gratt. (Va.) 655. If property be held in another State, under trust created by a judicial decree in that State, the trustee is accountable there only, though he reside where the attachment or garnishment writ be directed against him. Jenkins *v.* Lester, 131 Mass. 355; Curtis *v.* Smith, 60 Barb. (N. Y.) 9.

In *Virginia*, an insurance company incorporated under the laws of the United States, though complying with the laws of that State in relation to foreign insurance companies doing business there, is liable to foreign attachment. Cowardine *v.* Universal Life Ins. Co., 32 Gratt. (Va.) 445; Va. Code, ch. 36, § 19.

pend upon its assumption of domesticity in States where it operates, other than that of its domicil of origin. In other words that, as a foreign corporation, it is not subject to the process.[1]

**IV. Cause of Action Which This Remedy May Aid.**—1. *Debt Due.*—Ordinary debt due from the non-resident defendant to the plaintiff, and payable within the State, constitutes the usual cause of action which the extraordinary remedy of foreign attachment is designed to aid. In most of the States it must be certain and liquidated; in several it must be based upon contract; in some the statute authorization includes all money demands.[2]

1. It has been repeatedly held, however, that, unless the foreign corporation has agreed to become liable to garnishment as though it were domestic, or has voluntarily put itself under the operation of statutes which render it amenable, it is not liable. Duke *v.* R. I. Locomotive Works, 11 R. I. 599; Clark *v.* Chapman, 45 Ga. 486; Daniels *v.* Meinhard, 53 Ga. 359; Varnell *v* Speer, 55 Ga. 132; Claflin *v.* Iowa City, 12 Iowa. 284; Kennedy *v.* H. L. & S. Society, 38 Cal. 151; Raymond *v.* Rockland Co., 40 Conn. 401.

2. **Debts Due.**—Drake on Attach. (6th Ed.), ch. 2.

"**Payable Within the State.**"—Kneeland, in his Treatise on Attachments, ch. 8, pp. 95–99, says: "There has been some difficulty in ascertaining what is meant by the phrase 'cause of action arose,' as used both in the former and the present code (of *New York*). It was held at special term that the term 'cause of action' is synonymous with chose in action; that it refers to the contract itself, and not the breach of a contract, and that consequently the cause of action arises where the contract or note is made, and not where it is payable. Thus, a note made in Iowa, payable at a bank in the city of New York, is not a cause of action arising in New York Cantwell *v.* Dubuque West. R. Co., 17 How. Pr. (N. Y.) 16. This case substantially holds that the duty, not the breach of duty, is the cause of action.

"On the contrary, Judge Hand, at the special term of the same court, held that, whatever be the form of action, the breach of duty, and not the duty itself, is the cause of action, and that a bill drawn and accepted in Boston but made payable at a bank in New York, is a cause of action arising in New York. Bank of Commerce *v.* Rutland and Washington R. Co., 10 How. Pr. (N. Y.) 1. Although this decision was rendered prior to that of Cantwell *v.* Dubuque, etc., 17 How. Pr. (N. Y.) 16, last above cited, it was affirmed at the general term, and has since been quoted as authority on this point. . . . I think it safe, therefore, to adopt the rule that a cause of action arises at the place where the breach of duty occurs. In the case of bills, notes, or other contracts for the payment of money only, the breach of duty arises from the non-payment at the place where they are made payable. It follows that, in respect to such contracts, the cause of action arises when they are payable; and this follows the general rule, now quite well settled, that where a contract is made at one place, and to be performed at another, the contract, as to its validity, nature, obligation, and interpretation, is to be governed by the law of the place of its performance. [Cited, Bank of Commerce *v.* Rutland, etc., R. Co., 10 How. Pr. (N. Y.) 1; Fanning *v.* Cousequa, 17 Johns. (N. Y.) 511; Andrews *v.* Pond, 13 Pet. (U. S.) 65; and, for the same principles in regard to bills and notes, see Lee *v.* Selleck, 33 N. Y. 615.] But if the performance of a contract is partly in another State and partly in New York, the cause of action cannot be said to have arisen in this State if the contract was made and *payable* in another State.

"The New York supreme court, in a late case, held that, where a contract was made in *Canada*, to be by its terms performed there or here, and was in fact chiefly performed here, and the notice of discharge alleged to be a breach was given here, the cause of action may be said to have arisen here. This shows the distinction between the cause of action and the contract itself, for that certainly was a Canadian contract. Campbell *v.* Proprietors, etc., 18 How. Pr. (N. Y.) 418. In an earlier reported case (Conn. Mut. Life Ins. Co. *v.* Cleveland R. Co., 41 Barb. (N. Y.) 9, see also Hiller *v.* B. & M. R. Co., 70 N Y. 223), the same court held that, where a foreign corporation made in another State its bonds and coupons, secured by property in its own State but payable in the city of New York, the cause of action arises here,

Suits for unliquidated damages, and all actions for torts, are ordinarily denied the aid of this remedy, but in several States the statutes authorize its application in such causes. The wrongful conversion of personal property has been made a ground of attachment, though in but few States. Whatever the cause of action in which attachment is authorized, if the defendant be a non-resident, and the statute does not distinguish between domestic and foreign attachments, the latter may be employed, even though the authorization of the remedy be extended to other claim than debt.[1]

though the parties thereto are foreign corporations."

"A suit in the nature of a foreign attachment" cannot be maintained under the statutes of *Virginia*, unless the claim asserted be actually due. "Unless the bill avers that a debt is due the plaintiff by one who is a non-resident of this State, and who has estate and effects in this State, it is demurrable." Batchelder *v.* White, 80 Va. 103.

But it has been held, in some other States, if the debt be existent and certain, merely needing time to mature it, it may be reached. Benson *v.* Campbell, 6 Port. (Ala.) 455. *Compare* Jones *v.* Holland, 47 Ala. 732; Taylor *v.* Drane, 13 La. 62; Henderson *v.* Thornton, 37 Miss. 448; Bacon *v.* Marshall, 37 Iowa, 581; Cox *v.* Reinhardt, 41 Tex. 591.

**Debt Payable in Another State.**—Under a statute which provides that the plaintiff may have the property of the defendant attached "in an action upon a contract, express or implied, for the direct payment of money, which contract is made or is payable in this State," it was held, in *Oregon*, that a promissory note made in California could not be collected by attachment in Oregon without any stipulation that the note should be paid there. Trabant *v.* Rummell, 14 Oreg., 17.

**Debts on Contract.**—"Foreign attachment is limited, in respect to the cause of action, to debts contracted or owing by the defendant, which is only extended to actions *ex contractu*." Piscataqua Bank *v.* Turnley, 1 Miles (Pa.), 312; Porter *v.* Hildebrand, 2 Harris (Pa.), 129; Boyer *v.* Bullard, 102 Pa. St. 555; Holcomb *v.* Town of Winchester, 52 Conn. 447.

**1. Damages for Breach of Contract.**—It has been held that a claim for unliquidated damages for the breach of a contract may be secured by process of foreign attachment. New Haven Saw-Mill Co. *v.* Fowler, 28 Conn. 103, 107. *Compare*, as to whether unliquidated damages on contract constitute a debt, Gray *v.* Bennett, 3 Metc. (Mass.) 522; Mill Dam Foundry *v.* Hovey, 21 Pick. (Mass.) 455; Hazard *v.* Jordan, 12 Ala. 180; Joslyn *v.* Merrow, 25 Vt. 185. But the general rule is that the remedy is inapplicable to a suit for unliquidated damages.

**Unliquidated Damages.**—The plaintiff made affidavit that the defendant was non-resident and was indebted to him in the sum of $35,000 for rents and royalties accrued—$2 per ton for all ore mined and removed, and 10,000 tons to be mined and removed annually, etc. It was held that attachment would not lie for the damages accruing on breach of the covenant to mine and remove the stipulated quantity. Heckscher *v.* Trotter, 48 N. J. L. 419. "An attachment will not lie for unliquidated damages, and can be used only when the demand is for a certain sum." Schenck *v.* Griffen, 9 Vroom (N. J.). 462–7; Jeffery *v.* Wooley, 5 Halst. (N. J.) 123; Boyd *v.* King, 7 Vroom (N. J.), 21.

Under both species of attachment, the preliminary levy for unliquidated damages for tort and the like is not allowed. Ferris *v.* Ferris, 25 Vt. 100; Tarbell *v.* Bradley, 27 Vt. 535; Thompson *v.* Carper, 11 Humph. (Tenn.) 542; Hough *v.* Kugler, 36 Md. 186; Atlantic Mut. Ins. Co. *v.* McLoon, 48 Barb. (N. Y.) 27. Although in domestic attachment the statutes vary as to authorization with respect to actions *ex delicto* and for unliquidated damages; yet, as against a trustee or garnishee, such actions are not maintainable. Hugg *v.* Booth, 2 Ired. (N. Car.) 282; Deaver *v.* Keith, 5 Ired. (N. Car.) 374; Graham *v.* Moore, 7 B. Mon. (Ky.) 53; Rundlet *v.* Jordan, 3 Me. 47; Paul *v.* Paul, 10 N. H. 117; Despatch Line *v.* Bellamy Mfg. Co., 12 N. H. 205; Fish *v.* Field, 19 Vt. 141; Barker *v.* Esty, 19 Vt. 131; Boardman *v.* Roe, 13 Mass. 104; Foster *v.* Dudley, 10 Fost. (N. H.) 463; Lomerson *v.* Hoffman, 1 Dutch. (N. J.) 625.

**Tort.**—A claim for a tort is not a debt within the meaning of the term as used in the statute with regard to foreign attachment. Holcomb *v.* Town of Win-

**V. What May be Attached and What May Not.**—1. *In General.*—The foreign debtor's property, in his own possession, or in that of others subject to his control, may be attached—the latter by garnishment. The lawful possession of an assignee, mortgagee, or lienholder cannot be disturbed.[1]

chester, 52 Conn. 447. The court said in this case: "To hold that the word 'debt' as used in the statute concerning foreign attachment includes a right of action for a tort before it had become merged in a judgment would be to transcend all rules for the construction of statutes. . . . In other jurisdictions it has long been considered well settled that the word 'debt,' as used in the law of garnishment (as the process is elsewhere usually termed), includes only legal debts, or causes of action for which debt or *assumpsit* may be maintained, but never includes claims for torts. Freeman on Executions, §§ 162, 167; Cook *v.* Wallhall, 20 Ala. 334; Victor *v.* Hartford Fire Ins. Co., 33 Iowa, 210; Foster *v.* Dudley, 30 N. H. 463; Getchell *v.* Chase, 37 N. H. 106."

**1. Assignment Not Recorded in the County.**—An unrecorded assignment does not prevent the foreign attachment of property in the county, in *Pennsylvania*, though the levy be made subsequently to the making of the act of assignment. Steel *v.* Goodwin, 113 Pa. St. 288. The contrary doctrine prevailed in Northwestern Forwarding Co. *v.* Mahaffey, 36 Kan. 152. Upon the question: Borm *v.* Tuthill, 1 G. Greene (Iowa), 190; Hopping *v.* Burnam, 2 G. Greene (Iowa), 39; Norton *v.* Williams, 9 Iowa, 529; Parker *v.* Miller, 9 Ohio, 110; Bloom *v.* Noggle, 4 Ohio St. 45; Stowe *v.* Meserve, 13 N. H. 46; Carter *v.* Champion, 8 Conn. 549; Coffin *v.* Ray, 1 Metc. (Mass.) 212; People *v.* Cameron, 7 Ill. 468; Holden *v.* Garrett, 23 Kan. 98; Davis *v.* Ownsby, 14 Mo. 170; Valentine *v.* Havener, 20 Mo. 133; Stillwell *v.* McDonald, 39 Mo. 282; Potter *v.* McDowell, 43 Mo. 93; Reed *v.* Ownsby, 44 Mo. 204; Sappington *v.* Oeschli, 49 Mo. 244; Block *v.* Long, 60 Mo. 181; Tyrell *v.* Rountree, 7 U. S. 464.

**Assignment Without Notice.**—If foreign attachment is served on the garnishees before they have notice of a valid assignment, the effect is not to postpone the claim of the assignees to that of the attaching creditors. Wakefield *v.* Martin, 3 Mass. 558; Dix *v.* Cobb, 4 Mass. 512; Van Buskirk *v.* Warren, 32 Barb. (N. Y.) 457; Coit *v.* Bull, Kirby (Conn.), 149.

The reason is that the plaintiff in a foreign attachment stands on no better footing, as to the thing attached, than his debtor. Noble *v.* Thompson Oil Co., 79 Pa. St. 354.

If not recorded in the county, an assignment for the benefit of creditors does not have priority over a foreign attachment laid after the act of assignment. Steel *v.* Goodwin, 113 Pa. St. 288.

"A debt due from the garnishee to A, by assignment from B, may be taken by a foreign attachment against A." Apthorp *v.* Lockwood, 1 Root (Conn.), 198.

**Foreign Assignment with Preferences.**—An assignment for the benefit of creditors containing preferences, made in New York, conveying real property in *Illinois*, will not be held invalid in the latter State against *non-resident* attaching creditors, notwithstanding Starr & C., ch. 72, § 49, providing that "every provision in any assignment hereafter made in this State, providing for the payment of one debt or liability in preference to another, shall be void," as the laws of New York allow such preferences and the assignment was there made. May *v.* First Nat. Bank, 122 Ill. 551.

**Lienholders.**—What is legally held by a lienholder cannot be taken from him under a writ directed against the property of the principal owner. Williams *v.* Morgan, 50 Wis. 548; Perry *v.* Williams, 39 Wis. 339; Sargent *v.* Carr, 12 Me. 396; Carpenter *v.* Dresser, 72 Me. 377; De Wolf *v.* Dearborn, 4 Pick. (Mass.) 466; Robinson *v.* Mansfield, 13 Pick. (Mass.) 139; Townsend *v.* Newell, 14 Pick. (Mass.) 332; Stearns *v.* Dean, 129 Mass. 139; Seymour *v.* Newton, 105 Mass. 272; Haven *v.* Low, 2 N. H. 13; Morse *v.* Hurd, 17 N. H. 246; Inslee *v.* Lane, 57 N. H. 454; Thompson *v.* Rose, 16 Conn. 71; Brownwell *v.* Carnley, 3 Duer (N. Y.), 9; Bodega *v.* Perkerson, 60 Ga. 516; Wolfe *v.* Crawford, 54 Miss. 514; Henry *v.* Quackenbush, 48 Mich. 415; Moore *v.* Murdock, 26 Cal. 514; Rix *v.* Silknitter, 57 Iowa, 265; McNeill *v.* Glass, 1 Martin, N. S. (La.) 261; Skillman *v.* Bethany, 2 Martin, N. S. (La.) 104; Lambeth *v.* Turnbull, 5 Rob. (La.) 264.

The reason is that, as the attaching

2. *Debts Due Defendant.*—A debt, to be attachable in third hands, must be payable within the State of the jurisdiction where the suit against the attachment defendant is instituted.[1] It must be such that the defendant might collect it but for the attachment; that is, it must be due, under the rule of most of the States, though there are exceptions.[2] The rule is that it must be both due and payable within the State.[3]

creditor can have no greater rights as subrogee than the debtor, he cannot dispossess the lienholder when the latter cannot. Rix *v.* Silknitter, 57 Iowa, 265; Stephenson *v.* Walden, 24 Iowa, 84; Houghton *v.* Davenport, 74 Me. 590; Oliver *v.* Lake, 3 La. Ann. 78.

A chattel mortgagee may demand of the attaching officer payment of his claim, stating the amount and the nature of it. A demand by assignee, without stating the names of the parties to the mortgage, date of the contract, and time of payment, is insufficient. Wilson *v.* Crooker, 145 Mass. 571.

It has been held that a mortgagee of real estate has an attachable interest therein after the condition has been broken and his right of foreclosure has arisen. Thornton *v.* Wood, 42 Me. 282; Fay *v.* Cheney, 14 Pick. (Mass.) 399. *Compare* Smith *v.* Peoples' Bank, 24 Me. 185.

**1. Debt Due to a Non-resident.** — It is "liable to foreign attachment where the debtor is within reach of process. ' But a mere contract by a non-resident to sell property, for a certain price, to a person within the jurisdiction, is not such a debt, for the debt is not created until the contract is executed by the vendor." Furness *v.* Smith, 30 Pa. St. 520.

"A debt due to a non-resident is bound by a foreign attachment issued in this State [*Pennsylvania*], notwithstanding a previous assignment by him in trust, of all his estate and effects, where the assignment was not recorded within the county in which the debt attached was due, as required by the act of 3d of May, 1855, and no notice of the assignment was given to the attaching creditor." Philson *v.* Barnes, 50 Pa. St. 230.

Notes due by a resident to a non-resident debtor, and in the hands of another resident for collection, are subject to attachment. West *v.* Sanders, 1 Marsh. (Ky.) 112.

**2. Debt Due or becoming so** — "The statute with regard to foreign attachment (Gen. Statutes, p. 397, sec. 2) provides for such attachment 'where a debt is due from any person to such defendant.' *Held*, that the word 'due' is not used in the restricted sense of 'payable.' There must be, however, an existing indebtedness." Sand-blast File-sharpening Co. *v* Parsons, 54 Conn. 310.

There must be a valid debt due (or becoming so) to the defendant, to enable the attaching creditor to attach it in third hands. It must be such that the attachment defendant could maintain a suit to recover it against his debtor. Caldwell *v.* Coates, 78 Pa. St. 312; Paul *v.* Reed, 52 N. H. 136; Cobb *v.* Bishop, 27 Vt. 624; Morey *v.* Sheltus, 47 Vt. 342; Fellows *v.* Duncan, 13 Metc. (Mass.) 332; Geer *v.* Chapel, 11 Gray (Mass.), 18; Curtis *v.* Alvord, 45 Conn. 569; Victor *v.* Hartford Ins. Co., 33 Iowa, 210; Nesbitt *v.* Ware, 30 Ala. 68; Powell *v.* Sammons, 31 Ala. 552; Webster *v.* Steele, 75 Ill. 544.

"Any debt due by the garnishee in a foreign attachment to the defendant at the time of the answer to interrogatories is embraced by the attachment. A claim uncertain at the time of the attachment, but rendered certain at the time of the answer to the interrogatories is embraced. Franklin Fire Ins. Co. *v.* West, 8 W. & S. (Pa.) 350.

**3. Debt Due and Payable Within the State.**—If a Kentucky corporation, doing business in *Alabama*, owes a citizen and resident of the former State, this debt cannot be reached by garnishment proceedings in Alabama. Louisville, etc., R. Co. *v.* Dooley, 78 Ala. 524.

A debt created and payable in Missouri is not subject to garnishment in *Kansas*—all the parties being residents of Missouri, and the garnishee's debt to the defendant being exempt under the Missouri law, the garnishee doing business in Kansas and the plaintiff and defendant temporarily there. Missouri Pac. R. Co. *v.* Maltby, 34 Kan. 125.

A foreign corporation having no property of the defendant in *Nebraska*, and owing nothing to the defendant payable there, is not subject to garnishment there. Wright *v.* Chicago, etc., R. Co., 19 Neb. 175.

**Debt Not Due.**—"There is no judgment or authoritative *dictum* to be found in any book that money due upon such a

What is adjudged to be due to a plaintiff has been held attachable, when not *in custodia legis*.[1]

negotiable instrument can be attached before it is payable; and, in point of reason, policy, and usage, as well as upon principles of convenience and equity, we think it would be dangerous and wrong to introduce and establish a precedent of this kind. To adjudge that a note, which passes from hand to hand as cash, on which the holder may institute a suit in his own name, which has all the properties of a bank note payable to bearer, which would be embraced by a bequest of money, and which is actually in circulation in another State, should be affected in this way by a foreign attachment would be, in effect, to overthrow an essential part of the commercial system, and to annihilate the negotiable quality of all such instruments." Ludlow *v.* Bingham, 4 Dall. (Pa.) 47. *Compare* Kiefer *v.* Elsler, 18 Pa. St. 388; Day *v.* Zimmerman, 68 Pa. St. 72, under statute subsequent to the Ludlow case.

**Debt Exempt in one State, Yet Attachable in Another.**—A citizen of the State of *Ohio*, having a valid debt against another citizen of that State, which cannot be collected by legal process there by reason of the exemption laws of that State, and which laws make it a misdemeanor for such creditor to assign, transfer, or send out of the State such debt for the purpose of having it collected by proceedings in attachment in courts outside of that State, with intent to deprive such resident debtor of personal earnings so exempt, when the person or corporation owing the money intended to be attached is within the jurisdiction of said State, has a right to bring an action and attach such earnings for such debt in the courts of West Virginia, when the garnishee is a domestic corporation of the latter State, and the attachment is served on such garnishee in the county where the action is brought, notwithstanding such creditor may have sent the claim to West Virginia and instituted his action there for the purpose of evading the exemption laws of Ohio. Stevens *v.* Brown, 20 W. Va. 450, 451.

As State laws have no extra-territorial effect, a credit exempt from attachment in one State may be liable in another. A foreign corporation may be garnisheed for wages due the attachment defendant, if it come into the State where the attachment suit is instituted, engage in business there, and subject itself to process there, though wages be exempt from seizure in the State in which they were earned, and the attachment defendant to which they are owing be a non-resident. Burlington, etc., R. Co. *v.* Thompson, 31 Kan. 180; s. c., 16 Am. & Eng. R. R. Cas. 480. Debt is transitory and payable (unless there be a fixed place of payment) wherever the debtor may be found. Brauser *v.* New Eng. Ins. Co., 21 Wis. 506; Bank *v.* Railroad Co., 45 Wis. 172; Fithian *v.* Railroad Co., 31 Pa. St. 114.

**When Both Parties Non-resident and Debt Foreign.**—Both the plaintiff and defendant resided in New York, in a suit brought in *Vermont* on a contract made in New York. Upon that contract the plaintiff sought to charge the trustee, which was a body corporate existing under the laws of New York, operating a continuous line of railroad from Troy, N. Y., to Rutland, Vt. The debt claimed was for services rendered in New York, and due and payable there. The trustee was discharged. Towle *v.* Wilder, 57 Vt. 622.

But if both parties have residence in the State, the rule is different, though the debt be foreign in the sense of having been contracted in another State. Chicago, etc., R. Co. *v.* Ragland, 84 Ill. 375; Pierce *v.* Chicago, etc., R. Co., 36 Wis. 283; Conley *v.* Chilcote, 25 Ohio St. 320; Helfenstein *v.* Cave, 3 Iowa, 287; Newell *v.* Hayden, 8 Iowa, 140; Moore *v.* Chicago, etc., R. Co., 43 Iowa, 385.

**1. Judgment, When Attachable.**—A foreign railroad corporation that has accepted the privilege of extending its works trough Pennsylvania, on the condition that they keep at least one manager or other officer resident within the State, on whom process in actions against the company may be served, may be made a garnishee in an attachment execution, in respect to a debt owing by them to a non-resident. A judgment recovered against the company in the court of another State, may be attached under such process. Fithian *v.* N. Y. & Erie R. Co., 31 Pa. St. 114. A judgment is held attachable, though pending on a writ of error. Woodward *v.* Carson, 86 Pa. St. 176. "A judgment debt may be held by process of foreign attachment, although subsequent to the attachment the judgment creditor has taken out and commenced to levy his execution. Gager *v.* Watson, 11 Conn. 171.

**Judgment Debt.**—" By the Custom of

3. *Promissory Notes.*—A garnishee is not liable for a negotiable note which he holds for the attachment defendant, though the maker of an unnegotiable one may be charged as garnishee, at the suit of the payee before receiving notice of its assignment. After notice received, he should disclose the fact of assignment in his answer. If the note be assigned after his answer, he should make a supplemental answer and disclose the fact.

The maker of a negotiable note is subject to a different rule. He cannot be garnisheed in a suit against the payee, under an attachment served before the maturity of the note, unless it becomes due (while yet the property of the attachment debtor) before the rendition of judgment in the attachment proceedings.[1]

London, from which our foreign attachment system was principally derived, it is said that a judgment debt cannot be attached, and the same has been holden by the courts of *Massachusetts.* A fair, and, as we think, very obvious construction of our statute on this subject, as well as the general policy of our attachment laws, leads us to a different conclusion. It is enacted that 'Where debts are due from any person to an absent and absconding debtor, it shall be lawful for any creditor to bring his action against such absent and absconding debtor;' and that 'any debt due from such debtor to the defendant shall be secured to pay such judgment as the plaintiff shall recover.' The provisions of this statute were extended, in 1830, to the attachment of debts due to such persons as should be discharged from imprisonment. The language of this statute clearly embraces judgment debts as well as others, and the reason and equity of it are equally extensive. A judgment debt is liquidated and certain, and, in ordinary cases, little opportunity or necessity remains for controversy respecting its existence, character, or amount. The policy of our laws has ever required that all the property of a debtor, not exempted by law from execution, should be subject to the demands of his creditors, and that every facility consistent with the reasonable immunities of debtors, should be afforded to subject such property to legal process. It is true, as has been contended, that to subject judgment debts to attachment, and especially those upon which executions have issued, may in some cases produce inconvenience and embarrassment to debtors, as well as to creditors. Such consequences have resulted from the operation of our foreign attachment system in ordinary cases, etc. . . . ; but the general interest of the community in this respect has been considered as paramount to the possible and occasional inconveniences, etc." Gager *v.* Watson, 11 Conn. 168.

**Judgment Debt—Prescription.**—A judgment debt obtained in foreign attachment was presumed to have been paid after a lapse of twenty years, though the proceeding against the garnishee had been nominally pending all the while. Biddle *v.* Girard Nat. Bank, 109 Pa. St. 349.

1. Drake on Attach, (6th Ed.) §§ 574–588.

**Negotiable Notes.**—The general rule is that an attachment is unavailable against a *bona fide* holder of negotiable paper for value, who obtains it after attachment served on the maker as garnishee, before maturity and without notice. Ludlow *v.* Bingham, 4 Dall. (Pa.) 47; Enos *v.* Tuttle, 3 Conn. 27; Huff *v.* Miller, 7 Yerg. (Tenn.) 42; Hinsdell *v.* Stafford, 11 Vt. 309; Little *v.* Hale, 11 Vt. 482; Eunson *v.* Healy, 2 Mass. 32; Maine Ins. Co. *v.* Weeks, 7 Mass. 439; Grant *v.* Shaw, 16 Mass. 344; Cushman *v.* Haynes, 20 Pick. (Mass.) 132. "The negotiation of such note by the payee, after notice of the attachment, is a fraud upon the law, and the court from which the attachment issues may require the instrument to be placed in such custody as will prevent its improper transfer, taking care that payment of it be demanded at maturity, and, if necessary, proper notice given to indorsers—the money, if paid, to be in the place of the note, to abide the event of the proceeding." Kieffer *v.* Ehler, 18 Pa. St. 388. If the note is indorsed after maturity, judgment in the attachment will be a good defence to an action by the holder against the maker. Hill *v.* Kroft, 29 Pa. St. 186.

Where the defendant offered evidence of a foreign attachment against the plain-

tiff (insurance company), in which the notes sued on had been attached in his hands as garnishee, judgment obtained against him and the notes paid, the evidence was held inadmissible; but he, the garnishee, "might have protected himself against a double liability by notifying the holder of the notes of the attachment, and calling upon him to interplead; or, if he could not ascertain the holder, he might have shown the nature of the paper and its actual transfer, which would have been an answer to the attaching creditor." Flanagan *v.* Mechanic's Bank of Philadelphia, 54 Pa. St. 398; Day *v.* Zimmerman, 68 Pa. St. 72.

**Note Assigned—Notice.**—"The payee of a note drawn in this State in 1810 assigned it before its maturity, in New York, to S.; but, as it was then in this State, it was not actually indorsed and delivered until a fortnight later, and five days after the maker had been factorized as the debtor of the payee. Nine days before that process was served, the assignee mailed a letter at New York to the maker, notifying him of the assignment, which was never received. *Held*, that, the note, being a specialty, notice of the assignment was indispensable to make it hold against a factorizing creditor, and that the mailing of the assignee's letter was not equivalent to notice." Judah *v.* Judd, 5 Day (Conn.), 536.

But it is held that, if foreign attachment is served on garnishees before they receive notice of assignment, the claim of the assignees is not therefore postponed to that of the attaching creditors. Noble *v.* Thompson Oil Co., 79 Pa. St. 354; s. c., 21 Am. Rep., 66, 72 and cases there cited.

**Non-negotiable Note — Notice.** — "G. being indebted to T., gave him his note payable to the order of and indorsed by N. T. had it discounted before its maturity, in *New York*, where such a note was negotiable, though in this State it was not. Subsequently G., who had no notice of this, was factorized as the debtor of T. *Held*, that he was not indebted, since T. never had anything more than an equitable interest, under our laws, which might well be transferred without notice; while, on the other hand, by New York law, he had an absolute title, and might well transfer an absolute title without notice, as he did when he procured the discount of the note." Green *v.* Gillet, 5 Day (Conn.), 488.

**Promissory Note as a Chattel.**—A note or bond "cannot be levied on and sold at a judicial sale as a chattel." "*Semble:* A note deposited in pawn may be attached under an attachment and execution against the owner; but it is proper to return specifically what goods, etc., were attached." Rhoads *v.* Megonigal, 2 Pa. St. 39.

**Note Not Due at the Time of Service, Liable to Trustee Process.**—When the writ was served upon trustees (a firm), they were indebted to the attachment defendant, a railroad company (a foreign corporation). One of the trustees held the note of the railroad company at the time of service for nearly the whole amount. It became due before the date of the disclosure. At maturity it was credited to the firm (the trustees) and the note given up to the railroad company. Yet it was held that the trustees were chargeable for the whole of their indebtedness to the company at the time of the service, though it was not then all due. Donnell *v.* Portland, etc., R. Co., 76 Me. 33; s. c., 9 Am. & Eng. R. R. Cas. 139; Marratt *v.* Equity Ins. Co., 54 Me. 537, 540. *Compare* Ingalls *v.* Dennet, 6 Me. 79. Had the note been due at the time of service, and remained in the possession of the one partner holding it, it might have been used as set-off. Robinson *v.* Furbush, 34 Me. 509.

**Bank Check.**—It was held, in Fulweiler *v.* Hughes, 17 Pa. St. 440, in reference to statute, that a check, though not due and payable, may be attached; that the *bona fide* holder, who purchased it for value from one to whom the payee had made a gift of it, has title against the creditors of the payee, who was insolvent at the time of the gift, the purchaser knowing of the gift, but neither he nor the donee having knowledge at the time of the insolvency of the donor. Though the check was recoverable by creditors of the donor whilst it was in the hands of the donee, his sale for value, without knowledge by the purchaser of the insolvency of the donor, passed to the purchasers a good title.

**Municipal Bonds.**—"Where one obtained a judgment against a firm, issued an attachment thereon, and attached, in the hands of another firm, a debt payable in city bonds due by them to one of the firm defendants, and the court entered judgment upon the answers of the garnishees, with leave to the plaintiff to have execution against them for the debt, interest, and costs, and directed the sheriff to demand of them so many of the bonds as would, at their assessed value, satisfy the judgment and the costs, but, if the garnishee failed to deliver the bonds, then to levy the amount from their own goods and lands, the proceed-

4. *Stocks.*—Stocks in the defendant's name on the books of the corporation issuing them are attachable as his, unless he has honestly sold or disposed of them; and the transfer on the books may be enforced by the purchaser.[1]

The corporation is not debtor to the stockholders by reason of their owning shares, and should not be garnisheed as such, though there has been conflict on this point in decisions.[2] It seems clear that shares owned in a foreign jurisdiction are not reachable by attachment or garnishment. Their *situs* does not move with the corporation when it does business in different States, and, under

ings under the attachment were proper, and the entry of the judgment thereon was not erroneous." King *v.* Hyatt, 41 Pa. St. 229.

**1. Bank Stock.**—Stock of a bank, sold *bona fide*, and the certificate delivered to the purchaser with a power of attorney to transfer it on the books of the bank, was held "not liable to attachment as the property of the vendor, although still standing in his name on the books at the time of the attachment. A chose in action, equitably assigned, *held*, not subject to attachment as the property of the assignor. The plaintiff, in a foreign attachment, stands upon no better footing, as to the thing attached, than his debtor, the defendant in the attachment." United States *v.* Vaughan, 3 Binn. (Pa.) 394. Stock standing in the debtor's own name on the books of a corporation may be seized under attachment process or execution. Weaver *v.* Huntingdon, etc., R. Co., 50 Pa. St. 314; Peterson *v.* Sinclair, 83 Pa. St. 250; Shenandoah, etc., R. Co. *v.* Griffith, 76 Va. 913; s. c., 13 Am. & Eng. R. R. Cas. 120; Chesapeake, etc., R. Co. *v.* Paine, 29 Gratt. (Va.) 502.

"A share of bank stock attached cannot be transferred on a judgment in foreign attachment," the bank having been garnisheed. Gardiner *v.* Pa. Bank, 4 Yeates (Pa.), 377.

"The defendants, residing in *Indiana* and owning stock in a bank located there, lodged a certificate of the stock, with a blank power to sell and transfer it, with a corporation in this State, as collateral security for a loan, its value being considerably in excess of the loan. *Held*, that their equitable interest in the stock could not be reached by process of foreign attachment in this State." Winslow *v.* Fletcher, 53 Conn. 390. *Compare* Middletown Savings Bank *v.* Jarvis, 33 Conn. 372; Cooke *v.* Hallett, 119 Mass. 148.

**2.** Whether the shares of a stockholder can be subjected to garnishment by making the corporation in which they are held the garnishee in a suit against the stockholder, has been a subject upon which courts have differed. The affirmative has been held,—Chesapeake R. Co. *v.* Paine, 29 Gratt. (Va.) 502; *In re* Glen Iron Works, 17 Fed. Rep. 324;—and the negative,—Ross *v.* Ross, 25 Ga. 297; Planters & Merchants' Bank *v.* Leavens, 4 Ala. 753. "Whatever view may be taken as to the right to attach a debt owing by a foreign corporation to a non-resident, by service of notice on an agent of the corporation within the jurisdiction, we think, in respect to corporate stock, which is not a debt of the corporation in any proper sense, it would be contrary to principle to hold that it can be reached by such a notice. We are therefore of opinion that the fundamental condition of attachment proceedings—that the *res* must be within the jurisdiction of the court in order to an effectual seizure—is not answered in respect to shares in a foreign corporation by the presence here of its officers, or by the fact that the corporation has property and is transacting business here; and that section 647 [N. Y. Code] must be construed as applying to domestic corporations only." Plimpton *v.* Bigelow, 93 N. Y. 592. This doctrine is further supported: Moore *v.* Grunett, 2 Tenn. Ch. 375; Christmas *v.* Biddle, 13 Pa. St. 223; Childs *v.* Digby, 24 Pa. St. 26; Drake on Attach. (6th Ed.), §§ 244, 471–8; Waples on Attach. & Garn., 245–8.

One who has subscribed but not paid for stock in a corporation may be garnished as the debtor of the corporation in a suit against it, whether the defendant be resident or not. Meintz *v.* East St. Louis Rail Mill Co., 87 Ill. 48; Pease *v.* Underwriters' Union, 1 Ill. App. 285; Langford *v.* Ottumwa Water-Power Co., 59 Iowa, 283. *Compare* McKelvey *v.* Crockett, 18 Nev. 238. He is also garnishable for unpaid assessments due to the corporation in a suit against it. Faull *v.* Alaska G. & S. M. Co., 8 Sawy. (U. S.) 420; Hays *v.* Lycoming Ins. Co., 99 Pa. St. 621; Bingham *v.* Rushing, 5 Ala. 403.

statutory provision and its own assent, becomes amenable to process in all.[1]

(*a*) *Shares Owned Out of the State—Certificates Not Attachable.*—Stock certificates are not attachable when the shares which the certificates represent have their *situs* in another State. The shares owned, by a non-resident debtor, in a foreign corporation, sent into the State of the forum whence the attachment is sued out, are not reached by means of notice to a resident agent of the corporation. They are not really or constructively within the jurisdiction. Though the corporation may be doing business within the jurisdiction, under lawful authority to do so, that fact does not affect the *situs* of the shares. The corporation itself may be sued, but it is not the debtor of the attachment defendant by reason of his owning stock in the bank or company at its domicile in another State, and therefore it cannot be garnisheed with reference to such stock. Considered as the *res* of an attachment proceeding, the stock must be within the territorial jurisdiction of the court, to render it attachable. Considered as a debt due from the corporation (which it is not), it must be payable within the jurisdiction, to be liable.[2]

5. *Partnership Property.*—The general rule seems to be that, while the property of a partnership may be attached for the debt of one partner, a debt due the firm cannot be reached by garnishment for such purpose; for the property would remain subject to whatever liens might rest upon it relative to the partnership, while judgment against a garnishee, for a debt due the firm, divests the co-partner's title, which would be inconsistent with the rule that

**1. Stock—Situs.**—A foreign corporation, allowed to do business in *Tennessee*, was deemed domesticated when it had its chief office there; and its compliance with the legal requirements to become so was presumed. Its stock was held to have *situs* in that State under those circumstances, and to be attachable for the debt of a non-resident owner holding the certificates in his own State. Young & Fox *v.* South Tredegar Iron Co., 85 Tenn. 189.

**2. Stock Certificate.**—A certificate of stock in a bank of another State, sent here [Pennsylvania] for sale, is not subject to foreign attachment. The Planters' Bank of Mississippi owned shares of stock in the Commercial Bank of Natchez, which it assigned in trust for creditors. In a suit on a judgment against the Planters' Bank, the certificate for the shares, sent to brokers in Philadelphia for sale, was sought to be attached in their hands. The court said: "The attachment process is a proceeding *in rem*, and the matter and thing attached must be in the power and jurisdiction of the court. You might as well, by an ideal and constructive service on the person of a defendant resident in Mississippi, summon him to appear in our court, as to attach him to compel an appearance by attaching his bank stock in a bank located and established by law in Mississippi." Christmas *v.* Biddle, 13 Pa. St. 223.

Defendants, residing in Indiana, and owning stock in a bank there, pledged the certificate, with a blank power to sell and transfer, to a corporation in *Connecticut* as collateral for a loan, its value being considered in excess of the loan. It was held that their equitable interest in the stock could not be reached by foreign attachment in Connecticut. Winslow *v.* Fletcher, 53 Conn. 390; s. c., 55 Am. Rep. 122.

A transfer of stock in an incorporated company, when not entered on the books of the company, is not valid as against attaching creditors of the assignor without notice. *Iowa* Code, § 1078. Fort Madison Lumber Co. *v.* Batavian Bank, 71 Iowa, 270; Ryan *v.* Campbell, 71 Iowa, 760.

the debts of the firm must first be paid and its accounts settled. Equitable rights between the attachment debtor and the garnishee cannot be adjusted in a garnishment proceeding; nor can such proceeding be delayed until the settlement of the partnership affairs so that the portion belonging to the member against whom the attachment is directed shall have been ascertained.[1]

**1. Partnership Interest of One Member.** —In order to adjudge the trustee responsible in this suit, it must be decided that the funds of one partner may be applied to the payment of the debts of another partnership on the mere proof that the principal debtor has an interest in each firm. If this be correct, it will follow that a separate creditor of one partner will have greater equitable, as well as legal rights, than the partner himself has. The general rule undoubtedly is that the interest of each partner in the partnership funds is only what remains after the partnership accounts are taken; and, unless upon such an account the partner be a creditor of the fund, he is entitled to nothing. And if the partnership be insolvent, the same effect follows. Lyndon *v.* Gorham, 1 Gall. (C. C.) 367 (Story, J.); Church *v.* Knox, 2 Conn. 614; Winston *v.* Ewing, 1 Ala. 139; Barry *v.* Fisher, 39 How. Pr. (N. Y.) 521; Johnson *v.* King, 6 Humph. (Tenn.) 233; Towne *v.* Leach, 32 Vt. 747; Fisk *v.* Herrick, 6 Mass. 271; Peoples' Bank *v.* Shryock, 48 Md. 427.

**Partnership Property.**—In a proceeding by summons against one resident partner, and foreign attachment against a non-resident partner, it was held that the partnership property cannot be taken under the foreign attachment—only the separate property of the non-resident—under the laws of *Pennsylvania.* White and Schnebly's Case, 10 Watts (Pa.), 217. But lately it was held that "partnership effects are liable to be attached by process of foreign attachment in a suit brought against one of the partners to recover a private debt due by him,"—Morgan *v.* Watmough, 5 Whart. (Pa.) 125; McCarthy *v.* Imlen, 2 Dall. (Pa.) 277;—and the question thus settled.

"Where a debt is owed by a copartnership only one member of which resides in this State, it may be attached by process of foreign attachment, by leaving a copy of the writ with the resident member." Flagg *v.* Pratt, 32 Conn. 217.

**Partners Non-resident.**—If partners reside out of the State, property belonging to one of them may be attached within the State for the firm debt; and the fact that there is a co-obliger need not be disclosed. Dobbs *v.* The Justices, 17 Ga. 624.

Though the partnership may have been domiciliated within the State, while the partners themselves are non-residents, their property may be attached, after the dissolution of the firm, for its debts. Lobdell *v.* Bushnell, 24 La. Ann. 295. It seems that, before dissolution, the property of such a partnership may be attached, if the partners are non-residents. Voorhees *v.* Hoagland, 6 Blackf. (Ind.) 232. But if one of two partners is a resident, the goods of the firm are not attachable because the other lives out of the State. Wallace *v.* Galloway, 5 Coldw. (Tenn.) 510.

**Partnership—Misjoinder.** —Attachment was sued out against three alleged partners on the ground that they "reside out of the State of *Georgia,*" and it was levied by serving a summons of garnishment on a person indebted to them or possessed of property belonging to them. They appeared and dissolved the garnishment by giving security for the debt. On the hearing, it appeared that the firm sued was not indebted to the plaintiff, but that one of the three members of it was also a member of another firm, which was indebted to the plaintiff. The other two were released and their names stricken from the declaration; but the court refused to allow the names of the remaining defendant's copartners in the second firm to be inserted. The suit was against the wrong partnership. There could be no judgment on the bond, and no general judgment against the only remaining defendant in his individual capacity. Howes *v.* Patterson & Co., 76 Ga. 689. But one of several tenants in common would have been liable. Walter *v.* Kienstead, 74 Ga. 19.

**Joint and Joint and Several Obligations.**—A firm's property cannot be subjected to foreign attachment because a member is a non-resident, and is the defendant in the suit in which the property of his firm is sought to be made liable for the partnership debt. It cannot be under the common law, which requires that partners be jointly sued. Wiley *v.* Sledge, 8 Ga. 532. But if the obligation be joint and several, the firm's property might be successfully attached in a suit against the

6. *Money.*—When not in *custodia legis*, money may be attached,[1] though it cannot be taken from the possessor's person without his consent. It may be reached when in the hands of a third person, unless there is some character attached to it which renders it inviolable; as, pension-money in the hands of an agent or attorney to be paid to the pensioner.[2] Whether money collected by an officer, under an execution, can be levied upon as belonging to the plaintiff in execution, depends upon the character of the officer's possession; that is, if it is in the custody of the law in such a sense that only the court can make disposition of it, the levy cannot be made—the officer cannot be garnisheed as the trustee of the execution plaintiff *alias* the attachment defendant. But it has been held that, when such funds are no longer awaiting judicial order or distribution, and have been already ordered to be paid to the plaintiff, the rule is otherwise.[3]

Money in the hands of a servant of the attachment defendant is not garnishable in a suit against the latter.[4]

Money due on an insurance policy may be reached.[5]

Bonds payable in another State are not subject to garnishors.[6]

non-resident member. Drake on Attach. (6th Ed.), § 66; Green *v.* Pyne, 1 Ala. 235; Conklin *v.* Harris, 5 Ala. 213.

An averment, in the affidavit for attachment, that the defendants are indebted to the plaintiff, is sufficient to support evidence of joint indebtedness. Geiges *v.* Greiner, 2 Mich. (L. Ed.) 832; s. c., 5 New Eng. Rep. 546.

1. **Money Attachable.**—Sheldon *v.* Root, 16 Pick. (Mass.) 567; Turner *v.* Fendall, 1 Cr. (C. C.) 127; Handy *v.* Dobbin, 12 Johns. (N. Y.) 220.

2. **Pensions** unpaid, not garnishable. Adams *v.* Newell, 8 Vt. 190; Hayward *v.* Clark, 50 Vt. 612. After the pensioner has received his pay, the money is not distinguishable from his other funds. Cranz *v.* White, 27 Kan. 319; Webb *v.* Holt, 57 Iowa, 712. *Compare* Kellogg *v.* Waite, 12 Allen (Mass.). 529; Eckert *v.* McKee, 9 Bush (Ky.), 355.

3. **Money Payable to Plaintiff Under an Execution—Whether Attachable in the Sheriff's Hands.**—Drake on Attach. (6th Ed.), § 251; Waples on Attach. & Garn., 598, 599.

The rule that money in the hands of a sheriff, in his official capacity, cannot be attached does not apply to an attachment made pending the levy; nor is the levy, as between the debtor and the creditor, a satisfaction of the debt. Therefore, up to the time of the sale, there was a debt due to the plaintiff in execution, which was liable to attachment at the suit of his creditors. Winternitz's Appeal, 40 Pa. St. 490.

A public officer cannot be subjected, by process of foreign attachment, for moneys due from him, in his public capacity, to another, and the payment of which must appear in his official accounts." Stillman *v.* Isham, 11 Conn. 127; Spalding *v.* Imlay, 1 Root (Conn.), 551.

4. **Money in the Hands of a Ticket Agent.**—An attachment execution against a railroad company cannot be levied on money in the hands of its ticket agent, arising from the sale by them of tickets to passengers. Fowler *v.* Pittsburg, etc., R. Co., 35 Pa. St. 22.

5. **Money Due on Insurance Policy.**—A loss incurred on a fire-insurance policy, the amount of which is fixed by the award of persons mutually chosen by the insured and the insurer, may be levied on by attachment in execution, as a debt due to the insured. Boyle *v.* Franklin Fire Ins. Co., 8 W. & S. (Pa.) 76; Franklin Fire Ins. Co. *v.* West, 8 W. & S. (Pa.) 350; Girard Fire etc., Ins. Co. *v.* Field, 45 Pa. St. 129.

A claim upon an insurer after loss, but before its adjustment, is subject to process of foreign attachment. Knox *v.* Protection Ins. Co 9 Conn. 433.

6. **Non-resident's Property Under Garnishee's Control, but Out of the State.**—In an action brought in *Kansas*, against a railroad company of Missouri, the garnishee answered that the defendant was a foreign corporation; that it had bonds of the county of Leavenworth, Kan., which were in Missouri, and in his possession there as treasurer of the corporation, subject to the orders of the board of directors; and that he had no effects of the defendants

7. *Legacies.*—The general rule is, money bequeathed cannot be attached in the hands of an executor or administrator. He is not the debtor of the heir, and therefore cannot be garnisheed as such He is the representative of the testator. He is also a legal custodian. Besides, it would hinder and embarrass the settlement of the succession, were he liable to be charged as garnishee before the regular liquidation of the debts and the rendition of his account.[1]

There are exceptions to the general rule, however. Some of the States, by statute, make legacies attachable.[2] After the court of probate has rendered the judgment of distribution, and the sum due any given heir has been definitely ascertained, and there remains no other duty of the executor in regard to it than that of paying it over to the heir, it has been held that it may be attached in the executor's hands in a suit against the heir.[3]

in Kansas, and was not indebted to them. The garnishee was discharged. Wheat *v.* Platte City, etc., R. Co., 4 Kan. 370, 376.

An insolvent corporation was factorized as the debtor of A, who held some of its bonds, payable in New York, and secured by a mortgage to trustees, one of whom resided in this State. A had previously pledged the bonds to a New York bank as collateral security for a debt of less amount than their value; and, pending the suit, the trustees sold the mortgaged property for enough to pay off all the bonds—the avails of the sale being in the hands of the Connecticut trustee. *Held*, that the factorizing creditor might maintain a bill in equity against the trustees, the bank, A and the corporation, by virtue of Gen. Stat. p. 74, § 322 (giving factorizing creditors all the security which the debtor had), for a disclosure and account of the amount of the lien of the bank, and a decree enjoining the trustees to pay no more than that amount to the bank, and to hold the surplus to abide the judgment that should be rendered in the factorizing suit." Cander *v.* Penniman, 32 Conn. 238, 240. *Compare* Judah *v* Judd, 1 Conn. 312.

**1. Legacy—Effect of Attaching.**—The attachment of a legacy in the hands of an executor transfers the right to receive it to the attaching creditor, subject to the rights of the garnishee. If the legatee be indebted to the estate of the testator to an amount exceeding the legacy given to him, the executor has the same right to set off such indebtedness against the attaching creditor, as he would have had against the legatee. Strong's Executor *v.* Bass, 35 Pa. St. 333.

**General Rule that Legacies are Not Attachable.**—*Held*, in *Connecticut*, that a legacy in the hands of an executor cannot be taken by foreign attachment. Winchell *v.* Allen, 1 Conn. 386. That an executor is not liable, on a process of foreign attachment, for the amount of a legacy which, by the terms of the will, is not payable until a day after that when demand is made on the execution. Benton *v.* Dutcher, 3 Day (Conn.), 440; McClellan *v.* Solomon (Fla.), 2 South. Rep. 825; Hankinson *v.* Page (N. Y.), 31 Fed. Rep. 184; Barnes *v.* Treat, 7 Mass. 271; Whitehead *v.* Coleman, 31 Gratt. (Va.) 784.

**2. Legacy—When Attachable by Statute.**—Whether a legacy is attachable in *Pennsylvania*, or whether the *English* rule to the contrary prevails there, was queried in Ross *v.* McKinney, 2 Rawle (Pa.), 226. *Held*, that it cannot be, by process of foreign attachment, when it is in the hands of an executor. Shewell *v.* Keen, 1 Whart. (Pa.) 332.

Where one bequeathed the interest of a certain sum to his wife during her life, and his widow afterwards married again, it was held that the interest so accruing was not liable to foreign attachment at the suit of a creditor of the second husband. Robinson *v.* Woelpper, 1 Whart. (Pa.) 179.

By act of April 13, 1843, § 10, legacies were made attachable, in *Pennsylvania*, under execution.—Baldy *v.* Brady, 15 Pa. St. 103;—and, by another act in that State, they were subjected to liability to the process of foreign attachment,—Gochenaur's Exrs. *v.* Hostetter, 18 Pa. St. 414;—and the legacy or distributive share may be attached there before any settlement of the estate of the decedent,—Sinnickson *v.* Painter, 32 Pa. St. 384; Lorenz's Admrs. *v.* King, 38 Pa. St. 93; Holbrook *v.* Waters, 19 Pick. (Mass.) 354; Wheeler *v.* Bowen, 20 Pick. (Mass.) 563.

**3. Distributive Share.**—A distributive share is not liable to attachment in execu-

8. *Real Estate.*—Foreign attachment is not now confined to personalty, as formerly, but is generally allowed against realty. One is not obliged to show that no goods can be found, before having the right to attach land.[1]

Only the right, title, and interest of the attachment debtor in or to the land is affected by the levy.[2] The levy is made by obtaining control, posting upon the premises, or giving notice to the tenant in possession. and returning a proper description to the court with the executed writ. The posting need not be on each of several adjoining lots attached.[3]

The attachment lien attaches upon valid seizure;[4] but where

tion until ascertained by a settlement of the administrator's account. McCreary *v.* Topper, 10 Pa. St. 419. After the filing of his account, showing money in hand for distribution, an attachment will lie against the purchase-money, of land sold by him, in the hands of the purchaser at the suit of one of the legatees of the proceeds of the land. Brady *v.* Grant, 11 Pa. St. 361; Fitchett *v.* Dolbee, 3 Harr. (Del.) 267.

"Independently of the statute authorizing attachments against non-resident debtors, courts of chancery have jurisdiction, in suits against the heirs of non-resident debtors, to subject the personal estate of the decedent, found here, to the payment of his debts." Peterson *v.* Poignard, 6 B. Mon. (Ky.) 570; Hefferman *v.* Forward, 6 B. Mon. (Ky.) 568.

**Estate Under Administration.**—An absent debtor's distributable interest, in an estate in the hands of an administrator, may be subjected, by foreign attachment, to the payment of the debt. Moores *v.* White, 3 Gratt. (Va.) 139.

A creditor of a deceased debtor may proceed, by foreign attachment, against the heirs residing out of the State, to subject land or its proceeds in the State descended to them from the debtor. Carrington *v.* Didier, 8 Gratt. (Va.) 260. If the land has been sold under a decree at the suit of the heirs, and is in the hands of a commissioner, he should be made a party as such, and should be restrained, by indorsement on the process, from disposing of the proceeds. Carrington *v.* Didier, 8 Gratt. (Va.) 260.

It was held that a wife's interest as legatee in her father's estate, in the hands of the executor, may be subjected by the creditor of the husband, by a proceeding by foreign attachment, when the husband resides out of the State. But if the husband die pending the proceedings (his wife surviving him), the lien of the creditor is defeated, and the property belongs to the wife. Vance *v.* McLaughlin's Admr., 8 Gratt. (Va.) 289.

A non-resident debtor dying after the debt he owed has been prescribed, foreign attachment will not avail to recover the debt from his estate. Markle's Admr. *v.* Burch's Admr., 11 Gratt. (Va.) 26.

**1. Land Attachable.**—Drake on Attach. (6th Ed.), § 233.

**2.** Drake on Attach. (6th Ed.), § 234.

**3. Posting on Real Estate.** — When an order of attachment, issued against a non-resident, is levied upon several town lots, the failure of the officer to place a copy of the order on each lot does not render the service of the order void. Blake *v.* Rider, 36 Kan. 693; Wilkins *v.* Tourtellott, 28 Kan. 825; Head *v.* Daniels, 38 Kan. 1.

Where an officer returned that he had posted the notice on the premises, though the statute requires that the posting should be in "a conspicuous place," the court, under the legal presumption that the officer had done his duty, held the return sufficient. Lewis *v.* Quicker, 2 Metc. (Ky.) 284.

Where there is no prescribed form, and no evidence to show that the officer has failed in his duty, the court will presume in his favor with respect to a return. Miller *v.* Fay, 40 Wis. 633; Redus *v.* Wofford, 12 Miss. 579. But not when he had failed to state that he had posted at all, in his return. Sharp *v.* Baird, 43 Cal. 577.

**4. Real-estate Lien.** — When lands are seized upon a writ of foreign attachment, and judgment obtained, execution may issue without *scire facias* against the possessor as garnishee. Gibson *v.* Robbins, 9 Watts (Pa.) 156.

"A writ of foreign attachment, in *Pennsylvania*, executed upon real estate, binds the same from the time of its execution and before judgment, as well as against subsequent judgments as against purchasers and mortgagees." Schacklett & Glyde's Appeal, 11 Pa. St. 326.

land was taken under an insufficient affidavit, it was held to attach only upon the substitution of a proper one.[1]

Foreign attachment is not hindered by homestead exemption laws in favor of citizens;[2] nor by fraudulent anterior conveyance.[3] But a valid deed of trust has preference;[4] and a conveyance of the legal title subject to redemption by the grantor.[5]

**VI. Attaching in the Hands of Third Person.**—He is responsible for what he has of defendant's property, or for what he owes, from the time of service.[6] His answer binds him, but he may subsequently explain admissions made under a misapprehension.[7] His

"In foreign attachment the land itself can be attached and a lien obtained, which carries with it the accruing rents. But an attachment in execution cannot be levied on the land; that the *fi. fa.* must reach; the attachment is levied only of debts or choses in action." Evans *v.* Hamrick, 61 Pa. St. 19.

**1. Real Estate — Amended Affidavit.**— "Under sec. 11 of ch. 151 of the *W. Va.* Code of 1860, a foreign attachment suit in equity is brought, the affidavit is in form except that it does not state 'the nature of the plaintiff's claim,' as required by the amendment of 1867 to the first section of the chapter; a few months afterwards, but before any other rights had attached to the subject, an unexceptionable affidavit was filed, but there was no other order of attachment issued. *Held*, that the lien attached to the land as against everybody, at least from the filing of the second affidavit." Chapman *v.* Railroad Co., 26 W. Va. 300, 324; s. c., 9 Am. & Eng. R. R. Cas. 484.

**2. Exemption With Respect to Non-residents.** — Exemption laws, designed to shield the citizen from having his home and other designated property sold under execution, do not avail the non-resident for this purpose. Yelverton *v.* Burton, 26 Pa. St. 351; McCarthy's Appeal, 68 Pa. St. 217.

**3. Real Estate — Collateral Attack of Judgment.**—Attaching creditors obtained judgment against McCann, a non-resident notified only by publication. He had previously conveyed his land (the property attached) to McGuire. The attaching creditors brought a suit against McGuire to have their judgment declared a lien upon the land, and to set aside the said conveyance as fraudulent. The defendant resisted by making a collateral attack upon the attachment proceedings and judgment. *Held*, that the proceedings should be sustained unless absolutely void for jurisdictional defects; and that they should be liberally construed to uphold the judgment, although they might have been held insufficient in a direct proceeding by the judgment debtor to set them aside. Denman *v.* McGuire, 101 N. Y. 161.

**Real Estate Fraudulently Conveyed.**— It was held, in *Virginia*, that a creditor-at-large may maintain a suit in equity, in the nature of a foreign attachment, to set aside a fraudulent deed, conveying real estate, made by his debtor—both the debtor and the grantee living, and being out of the Commonwealth. Peay *v.* Morrison's Exrs., 10 Gratt. (Va.) 149.

**4. Land Deed of Trust.**—The rights of an assignee of bonds, secured by deed of trust on land sold by the assignor, are preferred to the rights of an attaching creditor whose attachment is subsequent to the assignment. Schofield *v.* Cox, 8 Gratt. (Va.) 533.

**5. Real Estate Attached After Legal Title Conveyed.** — In proceedings commenced against a non-resident by attachment of realty, where it appears that, before conveyance to defendant, the legal title had been conveyed to the sheriff under the insolvency laws, subject to a redemption by the grantor on the payment of the debts, and that the right of redemption had been sold under a decree, in an action pending at the time of the conveyance to the defendant, the bill should be dismissed. Culbertson's Representative *v.* Stevens (Va.), 4 S. E. Rep. 607.

**6.** Even the appearance of the garnishee has been held insufficient to cure defective service upon him. Masterson *v.* Missouri Pacific R. Co., 20 Mo. App. 653; McDonald *v.* Moore, 65 Iowa, 171. *Compare* Flournoy *v.* Ruttledge, 73 Ga. 735, and Lupton *v.* Moore, 101 Pa. St. 318.

**7. Attaching in Garnishee's Hands.**— Attachment of property or credit in the hands of a third person dates from the service upon him if there is really in his possession any property subject to garnishment, or if he is then indebted to the defendant. Conley *v.* Chilcote, 25 Ohio St. 320. Subsequent indebtedness is not sufficient. Hitchcock *v.* Miller, 48 Mich.

possession may be such that the defendant cannot reclaim it; and then the attaching creditor cannot, unless the defendant is estopped by his own fraud.[1] Trust funds are governed by the same rule as other property, with reference to the garnishability of the holder.[2]

1. *Right to Retain.*—Pending the action, the garnishee is the rightful custodian of property subjected to garnishment in his hands, and he is entitled to legal protection if disturbed. He cannot relieve himself by delivery to his principal, or to any other person, but must stand as a stakeholder till the court shall have charged or discharged him.[3]

2. *Jurisdiction.*— If nothing of the non-resident defendant's property is directly attached, and he is merely notified by publication, jurisdiction depends upon valid garnishment.[4] It is not

603; Hopson *v.* Dinan, 48 Mich. 612; Kimball *v.* Macomber, 50 Mich. 362; Kraft *v.* Raths, 45 Mich. 20; Conway *v.* Ionia Circuit Judge, 46 Mich. 28; Bishop *v.* Young, 17 Wis. 46. The admission, by the garnishee, that an assignment by the defendant is valid, precludes him from afterwards denying indebtedness to the defendant because a receiver has been appointed. Bartlett *v.* Wilbur, 53 Md. 485. But if he, in ignorance of a previous assignment, answers that he is indebted to the defendant, the garnishment cannot defeat the assignment. Sweet *v.* Read, R. I. 121.

A debtor's promise to pay in goods, does not make the goods attachable in his hands in a suit against the promisee. Jones *v.* Creus, 64 Ala. 368.

**1. Depends on the Nature of his Possession.**—One who holds property of the debtor merely by the sufferance of the latter may be garnisheed. Buddig *v.* Simpson, 33 La. Ann. 375. Sometimes the right of possession, without actual custody, has been thought to justify garnishment. Morse *v.* Holt, 22 Me. 180; Lane *v.* Nowell, 15 Me. 86. The creditor's right to attach in third hands is usually measured by that of the defendant to regain his property were there no suit; but it is greater in case the defendant is estopped from reclaiming, by his own fraud. National Bank of Missouri *v.* Staley, 9 Mo. App. 146; Cairo, etc., R. Co. *v.* Killenberg, 82 Ill. 295; Lundie *v.* Bradford, 26 Ala. 512; Fitzgerald *v.* Hollingsworth, 14 Neb. 188; Balt. & Ohio R. Co. *v.* Wheeler, 18 Md. 372; Armor *v.* Cockburn, 4 Martin, N. S. (La.) 667; Burnside *v.* McKinley, 12 La. Ann. 505; Skowhegan Bank *v.* Farrer, 46 Me. 293.

**2. Trust Funds.**—Whether trust funds may be attached in the hands of the trustee by garnisment depends upon the relation of the defendant to them—whether he is the owner, with right to recall them at will. McLaughlin *v.* Swann, 18 How. (U. S.) 217; Jackson *v.* Bank of U. S., 10 Pa. St. 61; Park *v.* Matthews, 36 Pa. St. 28; Bank of Northern Liberties *v.* Jones, 42 Pa. St. 536; Cook *v.* Dillon, 9 Iowa, 407; Huntington *v.* Risdon, 43 Iowa, 517; Haskell *v.* Haskell, 8 Metc. (Mass.) 545; Stevens *v.* Bell, 6 Mass. 339; Davis *v.* Marston, 5 Mass. 199; Pierson *v.* Weller, 3 Mass. 564; New England Ins. Co. *v.* Chandler, 16 Mass. 275; Richards *v.* Allen, 8 Pick. (Mass.) 405; Webb *v.* Peele, 7 Pick. (Mass.) 247; Tucker *v.* Clisby, 12 Pick. (Mass.) 22; Sparhawk *v.* Cloon, 125 Mass. 263; Daniels *v.* Ulridge, 125 Mass. 356; Wells *v.* Hawes, 122 Mass. 97; Thompson *v.* Stewart, 3 Conn. 171; Edson *v.* Trask, 22 Vt. 18; Thompson *v.* Stewart, 3 Conn. 171; Hearn *v.* Crutcher, 4 Yerg. (Tenn.) 461.

**3. The Garnishee's Possession.** — The court cannot rightfully order that the property of the defendant, held by the garnishee, he delivered to the sheriff pending the action. Hall *v.* Brooks, 89 N.Y. 33. Should the garnishee be divested, action for trespass would lie, but he could only recover for the injury done to himself. Goodrich *v.* Church, 20 Vt. 187; Burlingame *v.* Bell, 16 Mass. 318; Sweet *v.* Brown, 5 Pick. (Mass.) 178; Rockwood *v.* Varnum, 17 Pick. (Mass.) 289. He may protect the property, in his own name, as lawful custodian, just as a sheriff may. White *v.* Madison, 26 N. Y. 117. He cannot be divested by an execution in another suit, of later date. Bank of the State of Missouri *v.* Bredow, 31 Mo. 523; Keyser *v.* Mitchell, 67 Pa. St. 473; White *v.* White, 30 Vt. 338. He cannot divest himself by delivery to the defendant,—Aldrick *v.* Woodcock, 10 N. H. 99;—nor by delivery to any one,—Stiles *v.* Davis, 1 Black. (U. S.) 101; Walcott *v.* Keith, 2 Fost. (N. H.), 196.

**4. Property in Garnishee's Hands Giving Jurisdiction.**—It has been held that "the

necessary to the jurisdiction that the thing or debt attached in third hands should be actually in the hands of the executive officer of the court. The garnishee is, in some sense, the keeper of the property under the court, though not subject to the control of the sheriff as an ordinary keeper is.

3. *Rights of Garnishee.*—Whatever lien or privilege the garnishee may have in the property held by him, in relation to the defendant, he still has after being garnisheed; and the attaching creditor acquires no preference over him. His rights arising after garnishment are not affected by it. His relations to the attachment defendant usually determine his obligations with reference to the attaching creditor as a subrogee, after the garnishment has been judicially recognized.[1] For instance, if the defendant has really sold, to the person in possession, the property sought to be garnisheed, the attaching creditor can no more reach it than the vendor can.[2]

attachment of property of non-resident defendants in the hands of a garnishee gives the court jurisdiction to render a valid judgment against such defendants, even though the garnishee, by his answer, denies that he has property belonging to, or is indebted to, such defendants, and the fact of his liability is not ascertained until after the entry of such judgment,"—Keep *v.* Sanderson, 12 Wis. 352; *compare* Malley *v.* Altman, 14 Wis. 22;—and, when nothing is attached further than service of garnishment on the garnishee, that is held sufficient to jurisdiction if he holds property of the defendant, or owes him,—Kneeland *v.* Cowles, 4 Chand. (Wis.) 46;—but it is jurisdiction over the thing attached, or that secured by garnishment, only; and notice to the non-resident defendant is given,—Winner *v.* Hoyt, 68 Wis. 278; Corning *v.* Hoyt, 68 Wis. 294;—for, where there is no personal service upon the defendant, a suit in attachment is in the nature of a proceeding *in rem*, and the judgment will bind only the property attached,"—Atchison *v.* Rosalip, 4 Chand. (Wis.) 12;—and if no publication be made, the attachment proceedings will be void,—Cummings *v.* Tabor, 61 Wis. 185; Anderson *v.* Coburn, 27 Wis. 558, 563.

**1. Interested Garnishees.**—In a proceeding by foreign attachment, the home defendant (garnishee), having property of the absent defendant in his possession, for the keeping of which the absent defendant is indebted to him, is entitled to have his claim first satisfied out of the property, as against the attaching creditor. Williamson *v.* Gayle, 7 Gratt. (Va.) 152.

If he holds lands of the absent defendant upon a lease, the service of the attachment upon him only binds the rents then due—not those subsequently accruing. Haffey *v.* Miller, 6 Gratt. (Va.) 454.

Though the home defendant claims the land in his possession, and shows a receipt for the purchase-money, yet, as he does not pretend that he paid in money, and as his account against the absent debtor is not proved to the satisfaction of the court, the land will be held liable. Kelly *v.* Linkenhoger, 8 Gratt. (Va.) 104.

**2. Property Sold to Garnishee by Defendant.**—If, before service of garnishment, the garnishee has bought the property, sought to be reached, of the defendant, for valuable consideration, it cannot be attached in the hands of the garnishee; and he, as purchaser, may intervene to claim and defend his property. Elliot *v.* Maroney (D. C.), 10 Cent. Rep. 171.

If the property sought has been assigned to another by the defendant, the garnishee has been held not bound to disclose, in his answer, that the assignment was fraudulent, as he has no interest in such matters. Phipps *v.* Rieley, 15 Oreg. 494.

**When Garnishee Should Pay to the Plaintiff.**—If, in an attachment suit against a non-resident defendant (foreign insurance company), the writ is served on him, and afterwards the amount due from the garnishee is judicially ascertained to be less than the judgment against the non-resident defendant, such garnishee should be ordered to pay the amount of his indebtedness directly to the plaintiff as a credit on his judgment, and ought not be ordered to pay it to a receiver, and the receiver ordered to pay it to the plaintiff on his judgment, against the non-resident defendant. Webster Wagon Co. *v.* Peterson, 27 W. Va. 314.

A husband may be garnisheed in a suit against his divorced wife; and a wife may be in a suit against her husband.[1]

**VII. The Writ.**—The writ is so nearly like that in domestic attachment that it seems unnecessary to present it here at length. Authorities applicable to it in that form of the remedy are generally applicable to it in foreign attachment under the practice prevalent in nearly all the States. The statutory requisites for the writ of attachment of a non-resident's property differ little from those prescribed for its issuance against the property of a resident. An affidavit stating the ground on which the application is made is generally required, and made indispensable to the issuance of the writ.[2] The requirement of an attachment bond, though

1. **Husband Garnisheed in Suit Against His Wife.**—A pledge of chattels (her separate property), by a wife, for advances made by her husband, is void with respect to her creditors; and, upon divorce, the husband is chargeable with trustee process at the suit of third parties in an action against the wife. Porter *v.* Wakefield, 146 Mass. 25.

A wife, in a suit against her husband, may be garnisheed, and defaulted for answering, though incompetent to appear against him as a witness.

**Garnisheeing U. S. Marshal.**—A creditor may, by service of notice upon a Federal marshal who has wrongfully seized property on Sunday, make constructive levy of State attachment, subject to prior liens, without disturbing the marshal's possession. The court will hold the marshal liable as garnishee. Gumbel *v.* Pitkin, 124 U. S. 131; s. c., L. Ed. 374.

**Garnisheeing Customs Officer.**—A State officer cannot attach property in a United States bonded warehouse, or in possession of an officer of customs; but the party placing the property in the warehouse may be charged as trustee of the real owner. Peabody *v.* Maguire, 79 Me. 572.

When a Federal marshal takes property of one not named in the writ, the rightful owner may obtain relief by intervening. Gumbel *v.* Pitkin, 124 U. S. 131 (31 L. Ed. 374.)

**Non-resident Temporarily Present.**—"Service of process on a non-resident, while transiently within the State, will not suffice to hold him as garnishee." Green *v.* Farmers & Citizens' Bank, 25 Conn. 454.

2. **Affidavit** should be made on application for the writ. Hubbardston Lumber Co. *v.* Covert, 35 Mich. 254. The prior issue of summons need not be averred. Pickhardt *v.* Antony, 27 Hun (N. Y.), 269. Nor need jurisdiction be asserted. Branch *v.* Frank, 81 N. Car. 180. The statute should be substantially followed, even in the form of the oath, if a form is prescribed. Richards *v.* Donaughey, 13 Phila. (Pa.) 514; Lankin *v.* Douglass, 27 Hun (N. Y.), 517; Matthews *v.* Dare, 20 Md. 248; Emmitt *v.* Yeigh, 12 Ohio St. 335; Shockley *v.* Bullock, 18 Ga. 283; Barrill *v.* Humphrie's, 26 Ga. 514; Moody *v.* Levy, 58 Tex. 532; Reyburn *v.* Brackett, 2 Kan. 227; McCollem *v.* White, 23 Ind. 43; Hilton *v.* Ross, 9 Neb. 406.

The indebtedness should be sworn to, and shown to be such as the statute contemplates, but that fact stated in a sworn petition has been held sufficient. Foster *v.* Hall, 4 Humph. (Tenn.) 346; Endel *v.* Leibrock, 33 Ohio St. 254; Garner *v.* White, 23 Ohio St. 192; Dunlevy *v.* Schwartz, 17 Ohio St. 640. The oath to indebtedness should be positive. Manton *v.* Poole, 67 Barb. (N. Y.) 330; Black *v.* Scanlon, 48 Ga. 12.

Absence of the plaintiff from the State was held sufficiently stated, though by the petition and not the affidavit. Farley *v.* Farior, 6 La. Ann. 725. (Without swearing to the petition, this practice should not be relied upon.)

The plaintiff or his authorized representative should make the affidavit; if the latter, he should state his authorization therein. Miller *v.* Chicago, etc., R. Co., 58 Wis. 310; Wiley *v.* Aultman, 53 Wis. 560; Willis *v.* Lyman, 22 Tex. 268.

Corporations are represented by their presidents usually, but others may be authorized for the purpose. Trenton Banking Co. *v.* Haverstick, 6 Hals. (N. J.) 171; Faver *v.* Bank of Alabama, 10 Ala. 616.

Presumption of authority to make the affidavit is not to be inferred from the fact that the affiant is the plaintiff's attorney of record; though authorities differ on this point. Alexander *v.* Denaveaux, 53 Cal. 664; s. c., 59 Cal. 476; Austin *v.*

general, is not universal in foreign attachment, preliminary to the issuance of the writ.[1] The execution of the writ does not differ from that in domestic attachment; even the garnisheeing of third persons in possession is similar. Nor is there difference in case of wrongful levy, with respect to the damages incurred.

Foreign attachment may issue after the action has begun by summons.[2]

Latham, 19 La. 88; Gilkeson *v.* Knight, 71 Mo. 403.

Non-residence, though merely inferential from the facts sworn to, has been held sufficiently averred,—Mayor, etc., of New York *v.* Genet, 4 Hun (N. Y.), 487; McKiernan *v.* Massingill, 14 Miss. 375; James *v.* Dowell, 15 Miss. 333; Graham *v.* Ruff, 8 Ala. 171;—the inference, however, should be inevitable or most probable from the facts sworn,—Mulherrin *v.* Hill, 5 Heisk. (Tenn.) 58; Love *v.* Young, 69 N. Car. 65;—not necessarily, however, to the exclusion of all other hypotheses,—Cooney *v.* Whitfield, 41 How. Pr. (N. Y.) 6; Ware *v.* Todd, 1 Ala. 199; Talcott *v.* Rozenberg, 3 Daly (N. Y.), 203.

In *New England*, affidavit is not required where attachment is incidental to the summons in actions on contract debts, but it is generally required in the other States. Foster *v.* Jones, 1 McCord (S. Car.), 116; Hale *v.* Chandler, 3 Mich. 531; Bowen *v.* Slocum, 17 Wis. 181; Messner *v.* Hutchins, 17 Tex. 597; Clark *v.* Garther, 6 Ala. 139; Van Kirk *v.* Wilds, 11 Barb. (N. Y.) 520; and the cases cited above in this note. It has been held not required in *New York*, in foreign attachment. Van Etten *v.* Hurst, 6 Hill (N. Y.), 311; s. c., 41 Am. Dec. 748; Clark *v.* Luce, 15 Wend, (N. Y.) 479; Bates *v.* Relyea, 23 Wend. (N. Y.) 336.

**Affidavit by a Person Unauthorized.**—In a suit by a corporation against non-residents, the affidavit was made by a person not authorized to represent the plaintiff, and the proceedings were held void. Manley *v.* Headley, 10 Kan. 88; Challis *v.* Headley, 9 Kan. 684; Willis *v.* Lyman, 22 Tex. 268; Pool *v.* Webster, 4 Metc. (Ky.) 278; Dean *v.* Oppenheimer, 25 Md. 368.

The grounds alleged in the affidavit were "that the defendant is a foreign corporation or a non-resident of Brown county." *Held*, that there was no warrant for the issue of the attachment because the allegations were disjunctive and non-residence in the county not a statutory ground. Dickenson *v.* Cowley, 15 Kan. 269.

**1. Attachment Bond.**—The plaintiff is not invariably required to file an undertaking to secure the defendant in case of wrong, but many of the States require it; and the sum of the bond is usually double the amount of the plaintiff's claim. In *Louisiana*, it is half above. La. Code of Practice, 1867. In some States, as in *Wisconsin* and *South Carolina*, the bond is only for costs. Rev. Stat. Wis. 1878; Lynch S. Car. Code Pro. 1880. In the *New England States*, where attachment may follow ordinary summons, security for costs may be required. But of those States requiring bond to secure the defendant against damages, distinction is made in some in favor of foreign attachment. No bond is required before the issuance of the writ, in that species of attachment, in *Nebraska*. Marsh *v.* Steele, 9 Neb. 96; Olmstead *v.* Rivers, 9 Neb. 234. Nor in *Kansas*,—Simon *v.* Shelter, 25 Kan. 155;—"Where all the defendants against whom attachment is issued are non-residents, no bond need be given, although there be other resident defendants,"—Head *v.* Daniels, 38 Kan. 1. Like distinction is made in *Ohio*. Rev. Stat. 1880.

In *Pennsylvania* and *Delaware*, where foreign and domestic attachment are as plainly distinguished by statute as in the New England States, no bond is required in the proceeding against non-residents and foreign corporations. Brightly's Purdon's Digest, *verbo* ATTACHMENT; Rev. Stat. of Del. 1852.

In most of the States bond is required. Kellogg *v.* Miller, 6 Ark. 468; Ford *v.* Hurd, 4 S. & M. (Miss.) 683; Erwin *v.* Ferguson, 5 Ala. 158; Walker *v.* Bank of Mobile, 6 Ala. 452. Waples on Attach. & Garn. pp. 112–127.

**2. Attachment after Summons.**—Foreign attachment may issue pending action begun by summons if the defendant be non-resident. Stockham *v.* Boyd (Pa.), 11 Cent. Rep. 187.

Allegations of the principal defendant in trustee process should be filed before the adjudication upon the disclosure, though it is within the discretion of the court to allow the filing afterwards. Dill *v.* Wilbur, 79 Me. 561,

**VIII. Publication.**—The order for publication is made by the court, that the absent and non-resident debtor may be apprised of the proceeding against his property, and be offered his day in court for defence.[1] Under the former method of foreign attachment, when the object was not to obtain an absolute decree *in rem*, but merely a judgment *nisi, in personam*, the published notice was not employed; but now, when the object is to create and enforce a lien, just as in domestic attachment, the statutory requirement of the advertised invitation is all-important. Reasons drawn from the common law and from international law with respect to proceedings *in rem* might be adduced to show the essentiality of notice in order to final judgment, were the statutes silent; but, as they prescribe publication as one of the conditions under which the extraordinary remedy is authorized, no further reason need be suggested. Publication, however, does not *serve* the defendant who is beyond the jurisdiction, so as to render him amenable to personal judgment; it merely offers him the opportunity to come and defend.

The notice should appear of record.[3]

The object of the publication is to inform the absent defendant of the proceedings against his property; not to get service upon him as a party.[4]

The publication should be made without unreasonable delay, and necessarily within the time stated in the order; and it should comply with the statute as to the description of the property and

1. **Order of Publication.**—The court grants the order without any special application by the plaintiff or affidavit for the purpose, if the affidavit made at the institution of the proceedings is sufficiently full. Bray *v.* Marshall, 75 Mo. 327. In some States, however, there must be an oath to the fact that the defendant cannot be found in the State. Faulk *v.* Smith. 84 N. Car. 501.

2. **Newspaper Publication.**—Silence in the statute, on the subject of publication, would not justify the neglect of it. Hollingsworth *v.* Barbour, 4 Pet. (U. S.) 466. The advertised invitation, however, does not place the non-resident in court constructively to have personal judgment rendered against him (Pennoyer *v.* Neff, 951 U. S. 731, 734.), though some of the States treat it as "constructive service."

As the object is to inform the absentee, the publication, which he is presumed to read, should acquaint him with the proceedings as fully as if he were within hearing of a proclamation. Gilliland *v.* Cullem, 6 Lea (Tenn.), 521.

The advertised invitation should be in a paper of large circulation, when possible. Brewer *v.* Springfield, 97 Mass. 152; Soule *v* Chase, 1 Rob. (N. Y.) 222; Sheldon *v.* Wright, 5 N. Y. 497; Kellogg *v.* Carrico, 47 Mo. 157; Cincinnati *v.* Bickett, 26 Ohio St. 49; Beecher *v.* Stephens, 25 Minn. 146; Kerr *v.* Hitt, 75 Ill. 51.

3. **Recording the Notice.**—The papers containing the notice, with the oath of the publisher, officer or some one designated by law, should be filed in the case; at least there must be record evidence of the fact of publication, in some form. Brinsfield *v.* Austin, 39 Ala. 227; Johnston *v.* Hannah, 66 Ala. 127; Haywood *v* Collins, 60 Ill. 328; Bates *v.* Crow, 57 Miss. 696; Freeman *v* Thompson, 53 Mo. 183; Millar *v.* Babcock, 29 Mich. 526; Carleton *v.* Washington Ins. Co., 35 N. H. 162; *Ex parte* R. Co., 103 U. S. 794.

4. **Publication for Information Only.**—"The publication of notice, as required by statute in a case commenced by attachment, is not for the purpose of giving the court jurisdiction of the writ and the subject-matter of the suit, but to inform the defendant of the proceedings, and give him an opportunity to come in and defend." Williams *v.* Stewart, 3 Wis. 773.

other information needful to the defendant's proper understanding of that to which his answer is invited.[1] The description, however, is not usually minute.[2] The publication must appear as often, and for as long a time, as the order and the statute require.[3]

**1. Publication — Delay — Description.**— Real estate of a non-resident was attached in *Ohio*, and summons returned "not found." Notice by publication was not completed until eight months after the return of summons. It was held error to dismiss the action for an alleged want of jurisdiction by reason of the delay. Bacher *v.* Shawhan, 31 Ohio St. 271, in exposition of § 4988, Rev. Stat. of Ohio.

A farm was attached, in a suit against a non-resident, and publication made without description of the land. The debtor sold his farm and the unpaid price was reached by the garnishment of the purchaser, and paid into court, and the farm was released. *Held*, on appeal, that the notice was sufficient; that no description was required by the statute (Rev. Stat. of Ohio, § 5051); and that the release of the farm did not deprive the court of jurisdiction. Core *v.* Oil & Oil Land Co., 40 Ohio St. 636. Non-residence presumed from publication, in Ohio, when attachment is collaterally attached. Hammard *v.* Davenport, 16 Ohio St. 177.

**2. Publication—Description of Property Therein.**—Ordinarily, it is only necessary to state, for the information of the absent defendant, that property of his is attached or to be attached, unless the statute requires description. Harris *v.* Grodner, 42 Mo. 159. It is not usually required with respect to personal property. Race *v.* Maloney, 21 Kan. 38; Beckurch *v.* Douglas, 25 Kan. 229. "When attachment is levied on the land of a non-resident, and summons is not made on him, the court possesses no power to render a judgment against him and to order the sale of his property to satisfy the same, unless publication has been made as required by law; and the notice should contain a description of the property attached." Westcott *v.* Archer, 12 Neb. 345. There need not be a specific statement in the notice that the sale of the attached property will be ordered. Gilliland *v.* Cullem, 6 Lea (Tenn.), 521; Rapp *v.* Kyle, 26 Kan. 89.

The description is sufficient if the property is identified. Howard *v.* Daniels, 2 N. H. 137; Crosby *v.* Allyn, 5 Me. 453; Bacon *v.* Leonard, 4 Pick. (Mass.) 277; Whitaker *v.* Sumner, 9 Pick. (Mass.) 308. When property has been attached, and description is required by statute or ordered by the court, it is not a compliance to only name the property generally as located in the county. Hathaway *v.* Larrabee, 27 Me. 449; Henry *v.* Mitchell, 32 Mo. 512; Porter *v.* Byrne, 10 Ind. 146. But particular descriptions of property, in a publication notice, are not usually required. Moore *v.* Kidder, 55 N. H. 488.

**3. Publication—Time Required.**—The defendant is entitled to the full period named in the order. Swett *v.* Sprague, 55 Me. 190; Bogart *v.* Swezey, 26 Hun (N. Y.), 463; Lowenstine *v.* Gillispie, 6 Lea (Tenn.), 641; Colwell *v.* Bank of Steubenville, 2 Ohio, 229; Haskell *v.* Bartlett, 34 Cal. 281; Freeman *v.* Thompson, 53 Mo. 183; Pyle *v.* Cravens, 4 Litt. (Ky.) 17; Swayze *v.* Doe, 13 S. & M. (Miss.) 317; Saffaracus *v.* Bennett, 6 How. (Miss.) 277; Hunt *v.* Wickliffe, 2 Pet. (U. S.) 201. To postpone publication till the expiration of the time named in the order is fatal. Mojarietta *v.* Saens, 68 How. Pr. (N. Y.) 505; Blossom *v.* Estes, 59 How. Pr. (N. Y.) 381; s. c., 84 N. Y. 614. So also if the notice does not appear the number of times ordered. Dow *v.* Whitman, 36 Ala. 604; Swett *v.* Sprague, 55 Me. 190; Bachelor *v.* Bachelor, 1 Mass. 256; Lawlin *v.* Clay, 4 Litt. (Ky.) 283. And if time is fixed within which the trial may occur after the last appearance of the publication, it must be accorded to the defendant. Forsyth *v.* Warren, 62 Ill. 68; Vairin *v.* Edmonson, 10 Ill. 270; Andrews *v.* Ohio R. Co., 14 Ind. 169; Muskingum Valley Turnpike *v.* Ward, 13 Ohio, 120; Haywood *v.* Russell, 44 Mo. 252. And all statute requirements with respect to the time of publication must be observed. King *v.* Harrington, 14 Mich. 532; Likens *v.* McCormick, 39 Wis. 313; Sexton *v.* Rhames, 13 Wis. 99; Morris *v.* Hogle, 37 Ill. 150; Schnell *v.* Chicago, 38 Ill. 382; Pomeroy *v.* Betts, 31 Mo. 419; Bobb *v.* Woodward, 42 Mo. 482; Scorpion S. M. Co. *v.* Marsano, 10 Nev. 370; Grewell *v.* Henderson, 5 Cal. 465; People *v.* Huber, 20 Cal. 81; Lawrence *v.* State, 30 Ark. 719; Cook *v.* Farren, 34 Barb. (N. Y.) 95; Lovejoy *v.* Lunt, 48 Me. 377; Zacharie *v.* Bowers, 3 S. & M. (Miss.) 641; Mitchell *v.* Woodson, 37 Miss. 567; Magoffin *v.* Mandaville, 28 Miss. 354; Crabb *v.*

**IX. Return of the Writ.**—In the present system of attachment, making little distinction between foreign and domestic, the requisites of the return are the same whichever is employed. The officer must report to the court when, and how, and what he has attached,[1] without being obliged to observe nicety or undue particularity.[2] He must, however, substantially comply with the statute;[3] and his description of the property must certainly identify it.[4]

It has been held that reference to the property attached under prior writs, and identifying it as the same property levied upon in the writ returned, is sufficient description.[5] The writ may be quashed because of fatal defects in the return.[6]

**X. Appearance of the Defendant.**—The debtor, by "surrendering his body," does not now terminate the attachment proceedings. There is no significance in his mere "surrender," since the abolishment of imprisonment for debt. His entering bail for his personal appearance is no longer a satisfaction of the writ under which his property is attached. Giving security for the attachment defendant's claim is now the only way in which he can put an end to a valid proceeding and render the suit wholly a personal one.

The debtor's appearance in the case against him, whether special or general, is subject to the ordinary rules governing litigants with respect to it; and, so far as those rules are peculiar to attachment causes, they are applicable to the foreign and the domestic alike. It would therefore be a useless lengthening of this article to enlarge on the subject of the defendant's appearance.

Where distinction between foreign and domestic attachment is

Atwood, 10 Ind. 322, 331; Hill *v.* Faison, 27 Tex. 428; Coleman *v.* Anderson, 10 Mass. 105; Gary *v.* May, 16 Ohio, 66; Bussey *v.* Leavitt, 12 Me. 378.

1. Paine *v.* Farr, 118 Mass. 74; Bryan *v.* Trout, 90 Pa. St. 492; Moore *v.* Kidder, 55 N. H. 488; Nichols *v.* Patten. 18 Me. 231; Willard *v.* Sperry, 16 Johns. (N. Y.) 121; Moore *v.* Coates, 43 Miss. 225.

2. Banister *v.* Higginson, 15 Me. 73; Rowan *v.* Lamb, 4 Greene (Iowa), 468; Baldwin *v.* Conger, 17 Miss. 516.

3. Saunders *v.* Columbus, etc., Ins. Co., 43 Miss. 583; Tucker *v.* Byars. 46 Miss. 549; Pond *v.* Baker, 55 Vt. 400; Thompson *v.* Eastburn, 16 N. J. L. 100; Stodart *v.* McMahan, 35 Tex. 267.

4. Fenglein *v.* Cairo, etc., R. Co., 6 Mo. App. 580; Porter *v.* Pico, 55 Cal 165; Ela *v.* Shepard, 32 N. H. 277; Bryant *v.* Osgood, 52 N. H. 182; Carleton *v.* Ryerson, 59 Me. 438; Fullam *v.* Stearns, 30 Vt 443; Rodgers *v.* Bonner, 55 Barb. (N. Y.) 9; Hancock *v.* Henderson, 45 Tex. 479.

5. **Description of Property in the Writ.**—A writ of foreign attachment having been served, which contained a sufficient description of the property, the sheriff in subsequent writs described it as "the same property attached by me as the property of A by virtue of a writ of foreign attachment issued at the suit of B, the time and manner of service being stated in full by my return to said writ." *Held.* that this recital bound both the sheriff and his privies, the execution creditors, and subordinated their writs to the previous attachment. Jaffray's Appeal, 101 Pa. St. 583.

6. **Defective Return.**—"In a direct proceeding to set aside a foreign attachment, the court will quash or reverse where the sheriff has omitted to return a service on a person in possession of the land attached, or to make publication if the possession be vacant;" but such omission is not held fatal to a collateral proceeding to recover the land. Sterrett *v.* Howarth, 76 Pa. St. 438.

"The power of quashing the writ of foreign attachment is limited to proceedings that are irregular, defective, or improper." Steel *v.* Goodwin, 113 Pa. St. 288.

still observed, appearance does not now operate the dissolution of the attachment.[1]

The defendant may appear by attorney duly authorized. An attorney *ad litem* cannot bind the defendant if he has no other authority than his appointment by the court.[2] It was held that a non-resident may appear specially by attorney in a circuit court of the United States and have attachment of his property dismissed on the ground of his non-residence and his not being served with process.[3]

Although one appear specially merely to move a change of venue from a county in which he has nothing of his attached, to another where it is located and attached, it is held that the attachment lien was good from the date of the levy.[4]

**1. Appearance of the Debtor.**—In *Pennsylvania*, where foreign attachment was formerly deemed dissolved upon the appearance of the defendant, and his giving bail, it is held that his appearance, and judgment against him by agreement, does not release the garnishee nor dissolve the attachment. Littell *v.* Scranton Company, 42 Pa. St. 500. In this case the court explained the change in the law of the State by which the practice was made to differ from the former method of foreign attachment to compel appearance and the giving of bail.

For special and general appearance in attachment suits, see Waples on Attach. & Garn., pp. 388–394.

**2. Appearance by Attorney.**—In a foreign attachment suit before a justice of the peace in *Arkansas*, an attorney *ad litem* was appointed by the justice for the defendant. There was judgment for the plaintiff, and the attached property—land—was sold. The purchaser sued the occupant in ejectment and recovered; but, upon appeal, it was held that the appearance of the attorney *ad litem* in the attachment case did not give the justice jurisdiction over the attachment defendant. It was held, further, however, that the court trying the ejectment suit should have admitted offered evidence to show that the attachment defendant ratified the appointment of the attorney *ad litem*, by himself engaging the same attorney. Visart *v.* Bush, 46 Ark. 153.

The appearance of an authorized attorney cures defects of service on a foreign corporation. Weed Sewing-Machine Co. *v.* Boutelle, 56 Vt. 570.

**3. Non-resident Unserved Specially Appearing to Dismiss Attachment in U. S. Court** —The Des Moines & Minn. R. Co., an Iowa corporation, sued John B. Alley, of Mass., for about $100.000, and asked attachment against his property in Iowa as that of a non-resident, filing the sworn complaint and bond, as required. The writ issued and shares of stock were attached, and Alley returned "not found." Affidavit of his non-residence was then filed and application for publication made. Alley appeared specially, by attorney, and filed a special plea to the jurisdiction, and moved the dismissal of the suit. The court sustained the motion. *Mandamus* was then asked of the U. S. supreme court to compel the circuit court to reinstate the cause and order the publication, and was refused. Waite, C. J., for the court, said: "Under § 739 of the revised statutes, no civil suit not local in its nature can be brought in the circuit court of the United States against an inhabitant of the United States, by original process, in any other State than that of which he is an inhabitant or in which he is found on serving the writ. It is conceded that the person against whom this suit was brought in the circuit court was an inhabitant of the State of Massachusetts, and was not found in or served with process in *Iowa*. Clearly, then, he was not suable in the circuit court of the district of Iowa, and, unless he could be sued, no attachment could issue from that court against his property." *Ex parte* Railway Co., 103 U. S. 794.

**4. Appearance to Change Venue** —An action was commenced against a non-resident, and property attached in a county other than that in which the suit was instituted. The defendant specially appeared and moved for a change of venue to the county in which his property had been attached. The motion was granted. *Held*, that the attachment lien was good from the date of the levy, and outranked that of another attachment brought, prior to the change of venue, in the county to which the first-mentioned case was removed, and brought in that

General appearance to defend the suit may be made in *Virginia* at any time while the cause is pending, even just before the sale, when the defendant non-resident has not been legally served, being merely notified by publication or its equivalent.[1] He may have the case reopened after judgment, and may have it transferred to a Federal court then on proper grounds.[2]

Under the prevalent system, the foreign defendant, upon general appearance, may dissolve attachment by bonding, where that is the practice in ordinary attachment, and resort to any means of defence proper for a resident.[3]

Without appearance in the court below, the non-resident cannot be heard in an appellate court, though he may reap the advantages of an appeal made by co-defendants who did appear in the court *a quo*.[4]

county. Laird Bros. *v.* Dickerson, 40 Iowa, 665. *Compare* Courtney *v.* Carr, 6 Iowa, 238.

Under *Wisconsin* Laws, 1880, ch. 222, a sheriff cannot make constructive levy upon logs on Chippewa river and its branches, in another county. Shafer *v.* Hogue (Wis.), 35 N. W. Rep. 928.

**1. Appearance Pending the Suit and Before Sale.**—Defendant in a foreign attachment may appear pending the suit, tender security for costs, and have it reheard, under the *Virginia* Code 1873, ch. 148, § 27.

Chilton, in 1878, sued out foreign attachments against Smith & Wimsatt, non-residents, and L., home defendant. The original summons was served on L., and, as to S. & W., was returned, "S. & W. non-residents." After the return day another summons was returned, indorsed, "Hereby we acknowledge legal service of the within," which acknowledgment was made in the District of Columbia. In 1879, sale of the attached effects was decreed. In 1880, before the decree was executed, S. & W. appeared and petitioned that the cause be reheard. *Held*, on appeal, that the acknowledgment of service out of the jurisdiction was only equivalent to posting or publication notice; that the defendants non-resident could appear, at any time within five years from the date of the decree, to have the cause reheard. Smith *v.* Chilton, 77 Va. 535.

**2. Appearance After Judgment.**—A non-resident insurance company was sued by a citizen of *Virginia*, in his own State, on a contract made outside of the State. On his affidavit that the company is a non-resident corporation having effects in P. county of his State, attachment was issued to levy upon those effects, and publication made. Judgment was rendered April, 1878, against the corporation defendant. In September, 1878, the defendant petitioned the court to reopen the case, which was allowed under the statute (ch. 148, § 27), and then the case was removed to the U. S. circuit court on the ground that it was between citizens of different States. Smith *v.* Life Association of America, 76 Va. 380.

The unserved non-resident defendant may appear at any time pending the suit (in *Virginia*), and, tending security for costs, have an attachment cause reheard. Anderson *v.* Johnson, 32 Gratt. (Va.) 558.

**3. Appearing and Bonding, etc.**—The defendant, having replevied a bark attached as the property of non-resident debtors, by executing a bond and security to satisfy the judgment if rendered for plaintiff, the court held that the vessel was released from the lien of attachment, and the attachment itself dissolved, and the action rendered an ordinary one at common law. Walter *v.* Kierstead, 74 Ga. 19.

After general appearance, the defendant in foreign attachment has the same rights of defence, of bonding the property attached, of appeal, and of recovering damages for a wrongful levy as in domestic attachment. So these subjects do not specially belong to this branch of the general subject. The authorities are applicable to both.

**4. Appeal.**—In a foreign attachment, *held*, that the absent defendant, who does not appear in the court below, cannot appeal; but that, there being two absent defendants sued for a joint debt, one of whom appears and answers, and, there being a joint decree against both, upon the appeal of the one who did appear the decree may be reversed as to both. Lenow *v.* Lenow, 8 Gratt. (Va.) 349.

**XI. Judgment and Execution.**—The final judgment against the attachment defendant, though personal in form, should show its character as a decree *in rem* by awarding privilege upon the property attached, or directing special execution against it But because of the recognized character of the proceeding as a remedy to create and enforce a lien, the privilege ought to be deemed implied when not expressed in the decree, unless there is statutory inhibition. There has not been perfect uniformity in the decisions on this point.[1]

The lien, created as a hypothetical one by the attachment or garnishment, is rendered certain by the judgment sustaining the attachment; and, by retroaction, it is made a true lien from its creation by the levy or the service on the garnishee, as the case may be.[2]

**1. Judgment with Privilege.**—Personal judgment is held to imply a recognition of the lien created by attachment, though the privilege be not expressed. Betancourt *v.* Eberlin, 71 Ala. 461, 467; Waynant *v.* Dodson, 12 Iowa, 22; Coleman *v.* Waters, 13 W. Va. 278.

But not if the attachment has been dissolved, or if the final decree shows that no privilege upon the property attached is meant to be conferred. Wasson *v.* Cone, 86 Ill. 46; Love *v.* Voorhies, 13 La. Ann. 549.

On the other hand, it has been held that the decree should award special execution on the property attached, in order to preserve the lien,—Johnson *v.* Holley, 27 Mo. 595;—though the form of the judgment may be changed to effect this result regarding the lien,—Massey *v.* Scot, 49 Mo. 278. But, in *Missouri*, the judgment is not special if the attachment defendant has made himself a party. Jones *v.* Hart, 60 Mo. 351: Huxley *v.* Hurrold, 62 Mo. 516; Philips *v.* Stewart, 69 Mo. 149; Borum *v.* Reed, 73 Mo. 461; Maupin *v.* Lead-Mining Co., 78 Mo. 24.

If there is no recognition of the attachment, expressed or implied, in the decree, and no special execution, the judgment is simply personal, and the attachment proceedings nugatory, in *Indiana*. State *ex rel. v.* Manly, 15 Ind. 8; Foster *v.* Dryfus, 16 Ind. 158; McCollem *v.* White, 23 Ind. 43; Perkins *v.* Bragg, 29 Ind. 507; Moore *v.* Jackson, 35 Ind. 360; Lowry *v.* Howard, 35 Ind. 170; Gass *v.* Williams, 46 Ind. 253; Lowry *v.* McGee, 75 Ind. 508; Smith *v.* Scott. 86 Ind. 346. The consummation of the lien by the proceedings subsequent to its incipiency is necessary. State *ex rel. v.* Miller, 63 Ind. 475; Excelsior, etc., Co. *v.* Lukens, 38 Ind. 438; Lowry *v.* McGee, 75 Ind. 508.

Formal recognition of the lien, in the judgment, is not necessary in all the States; and since the attachment suit is nominally *in personam*, the judgment may be nominally so, yet really be *in rem*. Even in *Missouri*, sureties cannot avail themselves of the lack of judgment "with privilege" and special execution, if the attached property has been executed after the sustaining of the attachment. Thole *v.* Watson, 6 Mo. App. 591.

**2. The Judgment Perfects the Lien.**—The lien is perfected by judgment which is retroactive in effect upon the levy. Goodwin *v.* Richardson, 11 Mass. 475; Cushing *v.* Hurd, 4 Pick. (Mass.) 253; Coffin *v.* Ray, 1 Metc. (Mass.) 212; Van Loan *v.* Kline, 10 Johns. (N. Y.) 129; Tennant *v.* Battey, 18 Kan. 324; Scarborough *v.* Malone, 67 Ala. 570.

Prior to judgment, the lien cannot be asserted in a separate action to set aside a conveyance by the debtor-owner of the property on which the inchoate lien is being created. Tennant *v.* Battey, 18 Kan. 324.

The judgment perfects the lien, and renders it complete from its incipiency; and it may be vindicated upon the property attached. Porter *v.* Pico, 55 Cal. 165; Tyrel's Heirs *v.* Rountree, 7 Pet. (U. S.) 464; Wallace *v.* McConnell, 13 Pet. (U.S.) 136; Van Loan *v.* Kline, 10 Johns. (N. Y.) 129; Warden *v.* Adams, 15 Mass. 233.

If only general execution be issued, the attachment is not thereby waived. Liebman *v.* Ashbacker, 36 Ohio St. 94.

A writ of attachment, and an order of publication notifying a non-resident thereof, having been issued against certain lands belonging to him, he made default; and general execution was issued, under which the sheriff levied upon the attached lands, selling them to M. *Held*, that

Final judgment against the garnishee, previously charged, cannot be rendered prior to that against the defendant.[1]

Though the judgment against the garnishee is a personal one, that against the property or credit in his hands is *in rem* when the principal defendant is not in court.[2] But in several States it is

while there should have been judgment to be levied of the attached property, and a special execution issued thereon, yet, as the property levied upon and sold was only that actually seized by the attachment, the deed given by the sheriff to M. would be upheld, in ejectment against him by one claiming under the non-resident. Burnett *v.* McCluey, 92 Mo. 230.

**1. Judgment Against the Garnishee.**— Final judgment must have been rendered against the defendant or the attached property, or both (as the statute in any State may require), before the previously charged garnishee can be finally adjudged to surrender his possession of the attachment debtor's property for execution, or pay his debt due the defendant into court. Lee *v.* Ryall, 68 Ala. 354; Randolph *v.* Little, 62 Ala. 376; Toledo R. Co. *v.* Raynolds, 72 Ill. 487; Hoffman *v.* Simon, 52 Miss. 302; Murdock *v.* Daniel, 58 Miss. 411; Lingardt *v.* Deitz, 30 Ark. 224; Washburne *v.* New York, etc., Co., 41 Vt. 50; Rowlett *v.* Lane, 43 Tex. 174; Bushnell *v.* Allen, 48 Wis. 460; Bryan *v.* Dean, 63 Ga. 317; Collins *v.* Friend, 21 La. Ann. 7; Railroad *v.* Todd, 11 Heisk. (Tenn.) 549; Langford *v.* Ottumwa Water-Power Co., 53 Iowa, 415; Whorley *v.* M. & C. E. Co., 72 Ala. 20.

The judgment against the garnishee is limited to the sum set forth in the writ. Hoffman *v.* Simon, 52 Miss. 302; Cairo, etc., R. Co. *v.* Killenburgh, 92 Ill. 142.

Only such proceedings as would render the decree against the defendant void can be urged by the garnishee to prevent the final order against himself. Benson *v.* Holloway, 59 Miss. 358. If service has been admitted by the defendant, the garnishee cannot oppose the decree for want of process against the defendant. Sadler *v.* Prairie Lodge, 59 Miss. 572. The garnishee may insist that the specific sum claimed of him, and which he must pay, shall be stated in the final order. Randolph *v.* Little, 62 Ala. 396.

The judgment against the defendant may be valid, yet that against the garnishee void, if the garnishment was fatally defective. Greene *v.* Tripp, 11 R. I. 424. But the judgment against the garnishee cannot be valid if that against the defendant is void. Railroad *v.* Todd, 11 Heisk. (Tenn.) 549; Matheney *v.* Earl, 75 Ind. 531. If on appeal the defendant obtains a reversal of the judgment against himself, the garnishee is consequently released, notwithstanding the judgment against himself was not appealed from by him. Clough *v.* Buck, 6 Neb. 343.

The garnishee, appealing, can assign as error whatever would make the judgment void. Erwin *v.* Heath, 50 Miss. 795; Lee *v.* Carrollton, S. & L. Asso., 58 Ind. 301, —but he cannot set up such errors and regularities as the judgment against the defendant has cured,—Earl *v.* Matheney, 60 Ind. 202.

Joint judgment against the defendant and garnishee is unlawful. Masters *v.* Turner, 10 Phila. (Pa.) 482.

The garnishee is protected by the judgment. Oppenheim *v.* Pittsburg, etc., R. Co., 85 Ind. 491; Howard *v.* McLaughlin, 98 Pa. St. 440; McDonald *v.* Sincox, 98 Pa. St. 619: Woods *v.* Milford Savings Inst., 58 N. H. 184; Cottle *v.* Am. Screw Co., 13 R. I. 627.

**2. Judgment in Rem.**— A judgment against an absent debtor, not personally served and not appearing, on a process of foreign attachment, can be enforced only *in rem* against the effects in the hands of the garnishee, or against the debts due by the garnishee to the judgment debtor. Beach *v.* Swift, 2 Conn. 274. *Compare* McBride *v.* Protection Ins. Co., 22 Conn. 257. Such judgments are in form *in personam*, but in effect *in rem*. It is not necessary, however, to state in the affidavit that the absent defendant has property within the State. Kenney *v.* Georgen, 36 Minn. 190.

A judgment that has been rendered in an attachment suit against an absentee, represented by a curator *ad hoc*, is one *in rem*, and not *in personam*. Huber *v.* Abbott (La.), 3 South. Rep. 259.

When the statute prescribes that the judgment must be *in rem*, if the attachment debtor, invited by publication, has not appeared and become a party, a neglect of this requirement is fatal. The *Iowa* Code, § 2881, so prescribing an attachment judgment was disregarded in a collateral suit because the court which rendered it had not obeyed the requirement. "The court might have rendered a judgment *in rem*

so far treated otherwise as to allow the old foreign attachment right of appearance within "a year and a day," or some time stipulated by statute, for the purpose of giving security and defending the suit.[1] And the old practice, under "the custom" of "giving pledges to restore," is virtually observed in States where the attaching creditor, after judgment, must give bond before sale.[2]

A personal decree, as in a mere action of debt, should be rendered when the plaintiff has made out his case against a non-resident who is in court, though the attachment may have failed.[3]

**FOREIGN CONTRACT.**—See CONFLICT OF LAWS, 3 AM. AND ENG. ENCYC. OF LAW, 499.

but did not," was said of the attachment case when the purchaser of the property attached and sold was decided against in an action of ejectment. Smith *v.* Griffin, 59 Iowa, 409. To the same effect: Lutz *v.* Kelly, 47 Iowa, 307; Hakes *v.* Shupe, 27 Iowa, 465, etc.

1. **Judgment Against Non-resident—When Final.**—In some of the States, judgment is not final against the non-appearing foreign debtor till the lapse of a stipulated time; for instance, two years in *Iowa.*—Bond *v.* Epley, 48 Iowa, 606; Code, § 2877; McClain's Stat.;—within which time the judgment debtor may appear and set aside the proceeding on proper showing. And, in *Nebraska*, the judgment may be thus opened within five years in such case. Savage *v.* Aiken, 14 Neb. 315. And see, for *Wisconsin* law, Berry *v.* Nelson, 4 Wis. 91; Berry *v.* Doty, 5 Wis. 605. And there is like provision in *Minnesota.* And, in *Tennessee*, there is a "stay-order" in the judgment. Mulloy *v.* White, 3 Tenn. Ch. 9. In *Mississippi*, the time is "a year and a day." Hiller *v.* Lambkin, 54 Miss. 14. Similar provisions may be found in the statutes of *New Jersey* and several other States.

2. **Bond by Plaintiff Before Sale.**—In *Kentucky*, an order for the sale of property attached, in which the defendant has not been served and has not appeared, but merely notified, cannot be made until the plaintiff has executed a bond to secure the defendant, as required by statute. Gill *v.* Johnson, 1 Metc. (Ky.) 652; Harris *v.* Adams, 2 Duv. (Ky.) 142. So in *Virginia.* Anderson *v.* Johnson, 32 Gratt. (Va.) 558. Such bond, also, is required in *Maryland*, under like circumstances,—Dawson *v.* Contee, 22 Md. 27;—and the defendant is allowed a year and a day after the judgment *nisi*, to come and defend the action on its merits,—Mears *v.* Andreon, 31 Md. 229;—but, when bond not required, see Anderson *v.* Graff, 41 Md. 601. *Held*, that bond by plaintiff was unnecessary after a "year and a day." Wallace *v.* Forrest, 2 Har. & M. (Md.) 261. Sale without bond to restore, etc., by plaintiff was held absolutely void, in *Mississippi.* Hiller *v.* Lambkin, 54 Miss. 14. "Stay order:" Mulloy *v.* White, 3 Tenn. Ch. 9; Railroad *v.* Todd, 11 Heisk. (Tenn.) 549.

3. **Personal Decree.**—It has been held, in *Virginia*, that an attaching creditor, proving his debt, is entitled to a personal decree against his absent debtor, though the property attached may be adjudged to another defendant. Schofield *v* Cox, 8 Gratt. (Va.) 533; Williamson *v.* Gayle, 7 Gratt. (Va.) 152; O'Brien *v.* Stephens, 11 Gratt. (Va.) 610. [But the court must have jurisdiction over the person of the defendant.]

It was held, in *Michigan*, that a judgment by default, against a non-resident, served out of the State, authorizes garnishment proceedings to reach his property within the State. (Campbell, J., dissenting) Moore *v.* Speed, 55 Mich 84.

**Authorities.**—Locke on Foreign Attachment; Brandon on Foreign Attachment; Cowen on Attach.; Drake on Attach. (6th Ed.); Waples on Attach. & Garn.; Kneeland on Attach.; Wade on Attach.; Waples on Proceedings *In Rem*, Book IV., Ch. LV.

**FOREIGN CORPORATIONS.**—(See also CORPORATIONS (PRIVATE); INTERSTATE COMMERCE; RECEIVERS; STOCK; STOCKHOLDERS; TAXATION.)


**I. Definition,** 329.
**II. Name of Foreign Corporations,** 330.
**III. Domicil of Foreign Corporations,** 330.
**IV. Authority and Powers of Foreign Corporations,** 331.
1. *Comity the Basis of Recognition,*
(*a*) *Repeal of Comity,* 332. [332.
(*b*) *Exclusion,* 333.
2. *General Limitations of Powers,*
(*a*) *General Laws,* 334. [334.
(*b*) *Special Franchise,* 334.
(*c*) *State Policy,* 335.
(*d*) *Charter Limitations,* 336.
3. *Statutory Conditions Imposing Limitations,* 338.
(*a*) *When Conditions Precedent,* 340.
(*b*) *Effect of Non-compliance—Penalties,* 340.
(*c*) *What Constitutes Doing Business Within Statutes,* 346.
(*d*) *Corporations Holding Patent-rights,* 350.
(*e*) *Constitutionality of Retaliatory Statutes,* 351.
(*f*) *Invalid Acts—Remedy,* 353.
(*g*) *Estoppel—Ultra Vires,* 354.
(*h*) *Miscellaneous,* 354.
4. *Powers as to Meetings,* 356.
5. *Powers as to Real Estate,* 357.
(*a*) *Mortgages,* 360.
(*b*) *Devise,* 361.
(*c*) *Eminent Domain,* 364.
(*d*) *Lease,* 365.
(*e*) *Trustees.* 365.
6. *Powers made those of Domestic Corporations,* 365.
7. *Powers as to Personal Property,* 365.
**V. Constitutional Rights of Foreign Corporations,** 365.
1. *When Citizens under United States Constitution,* 365.
(*a*) *Discrimination,* 366.
(*b*) *Citizenship for Purposes of Jurisdiction,* 367.
(*c*) *Standing in Courts,* 367.
2. *Interstate Commerce,* 368.
**VI. Liability for Torts,** 369.
**VII. Liability to Taxation,** 369.
(*a*) *State Taxation and Interstate Commerce,* 371.
**VIII. Actions By and Against Foreign Corporations,** 375.
(*a*) *At Common Law,* 375.
(*b*) *By Statute,* 377.
(*c*) *Jurisdiction,* 377.
(*d*) *In Federal Courts,* 380.
1. *Service of Process,* 382.
(*a*) *At Common Law,* 382.
(*b*) *By Statute,* 382.
(*c*) *Service upon Officer Casually in State,* 384.
(*d*) *Who are Proper Agents for Service of Process,* 386
(*e*) *Miscellaneous Matters Relating to Service of Process,* 389.
2. *Judgments Against,* 390.
3. *Attachment and Garnishment,* 393.
(*a*) *In General,* 393.
(*b*) *Practice and Pleading,* 396.
(*c*) *Consolidated Corporations,* 396.
(*d*) *Exemption Laws,* 396.
4. *Limitation of Actions,* 397.
5. *Actions by or against Non-residents,* 399.
6. *Removal of Causes,* 401.
7. *Incidents of Actions,* 402.
**IX. Consolidation of Foreign Corporations.** See CORPORATIONS (PRIVATE).
**X. Dissolution of Foreign Corporations,** 404.
1. *Generally,* 404.
2. *Protection of Home Creditors,* 405.
3. *Appointment of Receivers,* 408.
4. *Recognition of Receivers,* 409.


**I. Definition.**—A corporation of one State or government, which, by the comity recognized among States and nations, is permitted, with or without restrictions, to exercise the powers with which it is endowed in other sovereignties. In *Indiana*, it has been thus defined: A corporation created by or under the laws of any other State, government, or country, or, one not incorporated or organized in this State.[1]

1. Daly *v.* National Life Ins. Co., 64 Ind. 1.

**Definition in New York Code.**—A "domestic corporation" is a corporation created under or by the laws of the State, or located in the State and created by or under the laws of the United States, or by or pursuant to the laws in force in the Colony of New York before the 19th day of April, in the year 1775. Every other corporation is a foreign corporation. New York Code of Civil Procedure, § 3343.

Whether, after organization, it could

**II. Name of Foreign Corporations.**—A Federal court cannot interfere to prevent the organization of a corporation bearing the same name as that of a foreign corporation doing business in the State.[1] When a judgment is obtained against a corporation in an erroneous name, and the judgment is transferred to another State, the correct corporate name may be used in the latter State, accompanied by an averment that it is the same company.[2]

**III. Domicil of Foreign Corporations.**—A foreign corporation has its domicil in the State from which it derives its existence, or is, at least, primarily a citizen of that State.[3] Its right to transact busi-

interfere to prevent the use of the name in fraud of the rights of the foreign corporation, *quære*.

1. Lehigh Valley Coal Co., *v.* Hamblen (Ill.), 23 Fed. Rep. 225.

If the persons composing a corporation formed under the laws of one State should become also incorporated under the laws of another State, the two organizations will constitute separate and distinct corporate bodies, and the one cannot form an integral part of the other; and the corporation of the one State cannot enjoin the formation of a new corporation in the same State under a similar name, to prevent an injury to the business of buying and selling of the foreign corporation in such State. If a domestic corporation, after its members have procured an incorporation of themselves in a sister-State, by the same name, should abandon the business, practically, in the original State, and there keep its organization only in name to prevent others from transacting the same business, it cannot, in equity, maintain a bill to enjoin the formation of another corporation in the original State by a similar name, to engage in the same business, when none of its trade-marks are sought or intended to be used by the latter. Drummond Tobacco Co. *v.* Randle, 114 Ill. 412.

2. Lafayette Ins. Co. *v.* French, 18 How. (U. S.) 404; Medway Cotton Manf. *v.* Adams, 10 Mass. 360; New York African Soc. *v.* Varick, 13 Johns. (N. Y.) 38. See also Inhabitants *v.* String, 5 Halst. (N. J.) 323.

3. See, generally, CORPORATIONS (PRIVATE); DOMICIL OF CORPORATIONS.—The domicil of a corporation is determined by the place in which it transacts business, not by that where the bulk of its property lies, nor where its chief officers reside. It has its domicil in the State whose legislature has created it. Baltimore, etc., R. Co. *v.* Glenn, 28 Md. 287; Merrick *v.* Van Santvoord, 34 N. Y. 208; Crowley *v.* Panama, etc., R. Co., 30 Barb. (N. Y.) 99; International Life Ins. Co. *v.* Sweetland, 14 Abb. Pr. (N. Y.) 240; Runyan *v.* Coster, 14 Pet. (U. S.) 122; Tombigbee R. Co. *v.* Kneeland, 4 How. (U. S.) 16; *Ex parte* Schollenberger, 95 U. S. 369; Bank of Augusta *v.* Earle, 13 Pet. (U. S.) 519, 521; Insurance Co. *v.* Francis, 11 Wall. (U. S.) 216; Covington *v.* Shepherd, 20 How. (U. S.) 232; Tioga R. Co. *v.* Blossburg, etc., R. Co., 20 Wall. (U. S.) 148; McCall *v.* Byram Mfg. Co., 6 Conn. 428; Newport, etc., Bridge Co. *v.* Woolley, 78 Ky. 523; s. c., 7 Am. & Eng. R. R. Cas. 18.

In Merrick *v.* Van Santvoord, 34 N. Y. 218, the court observed: "A corporation is an artificial being, and has no dwelling either in its office, its warehouses, its depots, or its ships. Its domicil is the legal jurisdiction of its origin, irrespective of the residence of its officers or the place where its business is transacted. It retains that domicil until it ceases to exist."

A corporation may be deemed to have two domicils when a just construction of a statute so requires. Atty.-Gen. *v.* Bay State Mining Co., 99 Mass. 163; Rickes *v.* American Loan, etc., Co., 140 Mass. 350. See also Carron Iron Co. *v.* MacLaren, 5 H. L. Cas. 416.

But a corporation can have a constructive residence, so as to subject it like a natural person, to be charged with taxes and be submitted to a special jurisdiction. Cromwell *v.* Ins. Co., 2 Rich. (S. Car.) 512; Glaize *v.* S. Carolina R. Co., 1 Strobh. (S. Car.) 70.

"It may be maintained that a corporation may have two domicils. In support of this view are cited cases in which it has apparently been decided that a corporation can, for the purpose of being sued, have a domicil in each of two countries. Such cases are not decisive, for liability to be sued does not, in the case of a corporation any more than of an individual, depend upon domicil. They may each be sued in the courts of this country, if amenable to the process of our courts. There is in this respect no difference between a foreign individual and a foreign corporation, except

ness elsewhere, however universally recognized, is dependent upon comity.[1] While it may be given a constructive domicil in a foreign State or country, and be encouraged or forced to acquire a residence there which is at least sufficient to give jurisdiction over it, its character as a foreign corporation is not thereby changed.[2]

**IV. Authority and Powers of Corporations Outside of State of Incorporation.**[3]—Powers exercised by a corporation in a State other than that of incorporation are valid, or not, as the laws of the State in which they are used prohibit or either expressly or impliedly permit their exercise; and no corporation can make a valid contract without the sanction, express or implied, of such State,[4] unless involving some right secured by the Constitution of the United States.[5]

While a corporation can have no legal existence outside of the sovereignty which created it,[6] still, by the general law of comity

that the individual may be amenable to process both in his person and in his property, whilst a corporation domiciled abroad can (it is conceived) only be amenable to process through its property and through its agents. On the whole, the better opinion seems to be that a corporation has, following the analogy of an individual, one principal domicil, at the place where the centre of its affairs is to be found, and that the other places, in which it may have subordinate offices, correspond, as far as the analogy can be carried out at all, to the residence of an individual." Dicey on Domicil, p. 110. See also, *post*, this title, ACTIONS BY AND AGAINST.

1. See, *ante*, this title, POWERS, COMITY THE BASIS OF RECOGNITION.

2. A corporation is a creature of the sovereign will, and, when created by one sovereignty, it can operate within another's limits only by the latter's express permission or by permission implied from prinples of comity, but such permission does not make it any the less a foreign corporation. Cooley, J., in State Treasurer *v.* Auditor-General, 46 Mich. 224; s. c., 13 Am. & Eng. R. R. Cas. 296.

3. The principles, and those which follow and are collateral to them, are so thoroughly well settled, and so constantly repeated in the authorities, that the citation of further references is deemed unnecessary. They form the basis of recognition of foreign corporations in all jurisdictions, and are mentioned or impliedly recognized in nearly all cases where foreign corporations are litigating parties.

4. Bank of Augusta *v.* Earle, 13 Pet. (U. S.) 519; Tombigbee R. Co. *v.* Kneeland, 4 How. (U. S.) 16; New York Floating Derrick Co. *v.* New Jersey Oil Co., 3 Duer (N. Y.), 648; McCluer *v.* Manchester, etc., R. Co., 13 Gray (Mass.), 124; Kennebec Co. *v.* Augusta Ins., etc., Co., 6 Gray (Mass.), 204; Lathrop *v.* Commercial Bank, 8 Dana (Ky.), 114; Hadley *v.* Freedman's Sav., etc., Co., 2 Tenn. Ch. 122; Williams *v.* Creswell, 51 Miss. 817; Frazier *v.* Willcox, 4 Rob. (La.) 518; Baltimore, etc., R. Co. *v.* Glenn, 28 Md. 287; Newburg Petroleum Co. *v.* Weare, 27 Ohio St. 343; Ohio Life Ins., etc., Co. *v.* Merchants' Ins., etc., Co., 11 Humph. (Tenn.) 22; Wood, etc., Mining Co. *v.* King, 45 Ga. 34; Hoyt *v.* Thompson, 19 N. Y. 207; Bard *v.* Poole, 12 N. Y. 495; Western *v.* Genesee Mut. Ins. Co., 12 N. Y. 258; Hoyt *v.* Shelden, 3 Bosw. (N. Y.) 267; Baltimore, etc., R. Co. *v.* Pittsburg, etc., R. Co., 17 W. Va. 812; Chapman *v.* Pittsburg, etc., R. Co., 18 W. Va. 184; s. c., 9 Am. & Eng. R. R. Cas. 484; State Treasurer *v.* Auditor-General, 46 Mich. 224; s. c., 13 Am. & Eng. R. R. Cas. 296. See also authorities cited in succeeding notes.

5. Erie R. Co. *v.* State, 31 N. J. Law 531; State *v.* American Exp. Co., 7 Biss. (C. C.) 230; Canada Southern, etc., R. Co. *v.* Gebhard, 109 U. S. 537. See, *post*, CONSTITUTIONAL RIGHTS.

6. Paul *v.* Virginia, 8 Wall. (U. S.) 181; Runyan *v.* Coster's Lessee, 14 Pet. (U. S.) 129; Covington *v.* Shepherd, 20 How. (U. S.) 232; Insurance Co. *v.* Francis, 11 Wall. (U. S.) 216; Tioga, etc., R. Co. *v.* Blossburg, etc., R. Co., 20 Wall. (U. S.) 148; Plimpton *v.* Bigelow, 93 N. Y. 598; Merrick *v.* Van Santvoord, 34 N. Y. 208; Stevens *v.* Phœnix Ins. Co., 41 N. Y. 150; Chafee *v.* Fourth Natl. Bank, 71 Me. 539; Baltimore, etc., R. Co. *v.* Glenn, 28 Md. 287; Myer *v.* Liverpool, etc., Ins. Co., 40 Md. 595.

prevailing between foreign States and countries and the different States of the Union, a corporation created by one sovereignty may transact business in the usual way, by the usual agencies, and make contracts if authorized by charter, in another sovereignty and sue in its courts.[1]

1. COMITY THE BASIS OF RECOGNITION.—The comity which forms the basis of recognition of corporations incorporated under another sovereignty is binding on the courts as being part of the common law of the State. It is the comity of the nation, ascertained in the same way, and guided by the same reasoning by which all other principles of municipal law are ascertained and guided."[2]

(*a*) *Repeal of Comity.*—The law of comity governs unless a State expressly indicates an intention to repeal; nor can a prohibition of a foreign corporation to transact business within the State limits be inferred from the fact that its legislature has made no provision for the formation of similar corporations, or allows corporations to be formed only by general laws.[3]

**1.** Bank of Augusta *v.* Earle, 13 Pet. (U. S.) 519.

In Christian Union *v.* Yount, 101 U. S. 352, Harlan, J., stated the rule as follows: "In harmony with the general law of comity obtaining among the States composing the Union, the presumption should be indulged that the corporation of one State, not forbidden by the law of its being, may exercise within any other State the general powers conferred by its own charter, unless it is prohibited from so doing either in the direct enactments of the latter State, or by its public policy to be deduced from the general course of its legislation, or from the settled adjudications of its highest court." See also Tombigbee R. Co *v.* Kneeland, 4 How. (U. S.) 16; Cowell *v.* Springs Co., 100 U. S. 55; Williams *v.* Creswell, 51 Miss. 817; Silver Lake Bank *v.* North, 4 Johns. Ch. (N. Y.) 370; Bard *v.* Poole, 12 N. Y. 495; Merrick *v.* Van Santvoord, 34 N. Y. 208; British Am. Land Co. *v.* Ames, 9 Metc (Mass.) 391; Martin *v.* Mobile, etc., R. Co., 7 Bush (Ky.), 116: Guaga Iron Co. *v.* Dawson, 4 Blackf. (Ind.) 202; Leasure *v.* Union Mut. Life Ins. Co., 91 Pa. St. 491; Dodge *v.* City of Council Bluffs, 57 Iowa, 560; Frazier *v.* Willcox, 4 Rob. (La.) 517; Life Asso. *v.* Levy, 33 La. Ann. 1203; Kennebec Co. *v.* Augusta Ins. Co., 6 Gray (Mass.), 204; Flash *v.* Conn, 16 Fla. 428; Newburg Petroleum Co. *v.* Weare, 27 Ohio St. 343; Western Union Tel. Co. *v.* Mayer, 28 Ohio St. 521; Bank of Washtenaw *v.* Montgomery, 3 Ill. 422; Santa Clara Female Acad. *v.* Sullivan, 116 Ill. 375; Baltimore, etc., R. Co. *v.* Glenn, 28 Md. 287; Wood Hydraulic, etc., Co. *v.* King, 45 Ga. 34; Home Ins. Co. *v.* Davis, 29 Mich. 238; Kerchner *v.* Gettys, 18 S. Car. 525.

**2.** Story's Conflict of Laws, § 36; Bank of Augusta *v.* Earle, 13 Pet (U. S.) 589; Thompson *v.* Waters, 25 Mich 224; State *v.* McCullough, 3 Nev. 218. See Schibsby *v.* Westenholz, L. R. 6 Q. B. 159; Williams *v.* Jones, 13 M. & W. 633; Warrender *v.* Warrender, 2 Cl. & Fin. 529; s. c., 9 Bligh, 115.

**3.** Cowell *v.* Springs Co., 100 U. S. 59; Christian Union *v.* Yount, 101 U. S. 356; Stevens *v.* Pratt, 101 Ill. 206; Thompson *v.* Waters, 25 Mich. 224; Bank of Augusta *v.* Earle, 13 Pet. (U. S.) 594; Merrick *v.* Van Santvoord, 34 N. Y. 221.

In Bank of Augusta *v.* Earle, 13 Pet. (U. S.) 592, the court observes: "Whenever a State sufficiently indicates that contracts which derive their validity from its comity are repugnant to its policy, or are considered as injurious to its interests, the presumption in favor of its adoption can no longer be made."

In Leasure *v.* Union Mut. Ins. Co., 91 Pa. St. 491, a local statute of mortmain was held enforceable against foreign corporations. See also Leasure *v.* Hillegas, 7 S. & R. (Pa.) 313; Runyan *v* Coster, 14 Pet. (U. S.) 122; Methodist Church *v.* Remington, 1 Watts (Pa.), 219; Miller *v.* Porter, 53 Pa. St. 292; Grant *v.* Henry Clay Coal Co., 80 Pa. St. 208.

Where the power of a fire insurance company is revoked by the commissioner of insurance, it cannot thereafter recover on instalment notes for fire insurance upon which, by the terms of the policies,

(*b*) *Exclusion.*—A State may exclude from its limits entirely corporations chartered by other States, if done expressly, and the reasons or motives cannot be inquired into.[1]

payments fall due in advance. Otherwise it would be able, in a measure, were it inclined, to evade fear from future statutes by long policies. Am. Ins. Co. *v.* Stoy, 41 Mich. 385, 402.

1. Blair *v.* Perpetual Ins. Co., 10 Mo. 564. A State has the right entirely to exclude such corporations from its territory, or, having given a license, to revoke it, in its discretion, for good cause, or without cause; the motive or intention of the State in so doing is not open to inquiry. The company has no constitutional right to transact its business in such State, and hence its exclusion therefrom for whatever cause violates no constitutional right. Doyle *v.* Continental Ins. Co., 94 U. S. 535. See also, as to power of State to prohibit foreign corporation to contract, Paul *v.* Virginia, 8 Wall. (U. S.) 168; Lafayette Ins. Co. *v.* French, 18 How. (U. S.) 404; Ducat *v.* Chicago, 10 Wall. (U. S.) 410; Liverpool Ins. Co. *v.* Massachusetts, 10 Wall. (U. S.) 566; Warren Mfg. Co. *v.* Ætna Ins. Co., 2 Paine (C. C.), 501; Home Ins. Co. *v.* Davis, 29 Mich. 238; Commonwealth *v.* Milton, 12 B. Mon. (Ky.) 212; Phœnix Ins. Co. *v.* Commonwealth, 5 Bush (Ky.), 68; Gill's Adm'r *v.* Kentucky, etc., Gold-Mining Co., 7 Bush (Ky.), 635; Matthews *v.* Theological Sem., 2 Brewst. (Pa.) 541; Fire Dept. *v.* Noble, 3 E. D. Smith (N. Y.), 449; Slaughter *v.* Commonwealth, 13 Gratt. (Va.) 767; Western Union Tel. Co. *v.* Mayer, 28 Ohio St. 521; Milnor *v.* N. Y. & N. H. R. Co., 53 N. Y. 363; People *v.* Fire Asso. of Phila., 92 N. Y. 311; Taten *v.* Wright, 23 N. J. L. 429; St. Clair *v.* Cox, 106 U. S. 350; s. c., 1 Am. & Eng. Corp. Cas. 19; Ohio, etc., R. Co. *v.* Wheeler, 1 Blatchf. (U. S.) 286; Day *v.* Newark India Rubber Co., 1 Black. (U. S.) 628; New Hope, etc., Co. *v.* Poughkeepsie Co., 25 Wend. (N. Y.) 648; Thompson *v.* Waters, 25 Mich. 214; Milwaukee Fire Dept. *v.* Helfenstein, 16 Wis. 136; Pierce *v.* People, 106 Ill. 13; Cowell *v.* Springs Co., 100 U. S. 59; Christian Union *v.* Yount, 101 U. S. 352; Relf *v.* Rundle, 108 U. S. 226; Railroad Co. *v.* Kountz, 104 U. S. 11; Canada Southern R. Co. *v.* Gebhardt, 109 U. S. 537; Carroll *v.* E. St. Louis, 67 Ill. 568; Ducat *v.* Chicago, 48 Ill. 172; Starkweather *v.* Bible Society, 72 Ill. 50; Elston *v.* Blanchard, 2 Scam. (Ill.) 420; Willard *v.* People, 4 Scam. (Ill.) 461; McCall *v.* Byram, 6 Conn. 428; State *v.* McCullough, 3 Nev. 218; Land Grant R. Co. *v.* Coffee City, 6 Kan. 252; Marsh *v.* Bennett, 5 McLean (C. C.), 117; Balt. & Ohio R. Co. *v.* Glenn, 28 Md. 287; Merrick *v.* Van Santvoord, 34 N. Y. 208; Blackstone Mfg. Co. *v.* Inhabitants of Blackstone, 13 Gray (Mass.), 488; Am. Mut. L. Ins. Co. *v.* Owen, 15 Gray (Mass.), 491; Washington Co. Ins. Co. *v.* Chamberlain, 16 Gray (Mass.), 165; Hutchins *v.* New England Coal-Mining Co., 4 Allen (Mass.), 580; Folger *v.* Columbian Ins. Co., 99 Mass. 267, 271; British-Am. Land Co. *v.* Ames, 6 Metc. (Mass.) 391; Elston *v.* Pigott, 94 Ind. 18; s. c., 8 Am. & Eng. Corp. Cas. 185.

In Paul *v.* Virginia, 8 Wall. (U. S.) 168, it was held that a State may practically exclude foreign corporations. It may restrict them to particular localities, or exact such security for the performance of their contracts as will best promote the public interests. The whole matter rests in the discretion of the State. See also Western Union Tel. Co. *v.* Mayer, 28 Ohio St. 539, and cases cited.

A license to a foreign corporation to enter a State does not involve a permanent right to remain. Subject to the laws and Constitution of the United States full power and control over its territories, its citizens, and its business belong to the State. And even where the condition requires an agreement which would be void as contrary to the United States Constitution, e.g., agreement never to resort to the Federal courts, still the State may legally exclude therefrom all foreign corporations which refuse to so agree with the State. Doyle *v.* Continental L. Ins. Co., 94 U. S. 535.

The *Wisconsin* legislature enacted that if any foreign insurance company transferred a suit brought against it from the State courts to the Federal courts, the secretary of State should revoke and cancel its license to do business within the State. An injunction to restrain him from so doing, because such a transfer is made, cannot be sustained. The suggestion that the intent of the legislature is to accomplish an illegal result, to wit, the prevention of a resort to the Federal courts, is not accurate. The effect of this decision is that the company must forego such resort, or cease its business in the State. The latter result is here accomplished. Doyle *v.* Continental L. Ins. Co., 94 U. S. 535,

2. GENERAL LIMITATIONS OF POWERS.—(*a*) *General Laws.*—Any corporation doing business in a State other than that of its incorporation is bound by the general laws of such State, the law of comity entitling it to no exemption from the action of such laws, other than may be made by legislative enactment.[1]

(*b*) *Special Franchise.*—Comity does not confer any franchise, but that of acting in a corporate capacity, upon a foreign corporation;

distinguishing Ins. Co. *v.* Morse, 20 Wall. (U. S.) 445. Justices Bradley, Swayne, and Miller dissented, saying, in their opinion: "If these States can, at will, deprive them [foreign corporations] of the right to resort to the courts of the United States, then in large portions of the country the government and laws of the United States may be nullified and rendered inoperative with regard to a large class of transactions constitutionally belonging to their jurisdiction. The whole thing, however free from intentional disloyalty, is derogatory to that mutual comity and respect which ought to prevail between the State and general governments, and ought to meet the condemnation of the courts whenever brought within their proper cognizance." Where, however, Congress has authorized a railroad company, incorporated by a State, to construct a road within an organized territory, such territory, having become a State, could only interfere with such road on the same terms that it could refuse a recognition of its own previously granted right; for in such matters, the State would succeed only to the authority of Congress over the territory. Railroad Co. *v.* Baldwin, 103 U. S. 426; Van Wyck *v.* Knevals, 106 U. S. 360.

1. Milnor *v.* New York, etc., R. Co., 53 N. Y. 363; Bard *v.* Poole, 12 N. Y. 505; Silver Lake Bank *v.* North, 4 Johns. Ch. (N. Y.) 370; McGregor *v.* Erie R. Co., 35 N. J. Law, 115; Bank of Augusta *v.* Earle, 13 Pet. (U. S.) 539; Stetson *v.* City Bank, 2 Ohio St. 174; Lewis *v.* Bank of Kentucky, 12 Ohio, 132; Pierce *v.* Crompton, 13 R. I. 312.

**Devise.**—Devises of real estate to corporations, except under certain circumstances, are, under the *New York* statute of wills, void; and a devise made, to a foreign corporation, in New York is therefore void, though authorized by its charter to receive devises. White *v.* Howard, 38 Conn. 342. See also United States *v.* Fox, 94 U. S. 315, where testator devised lands in New York to the United States government, and it was held that the State had absolute power to regulate the devolution of property, and that the term "person" could not be extended to the United States, and the term "corporation" in the statute only applied to one created under the State laws, and therefore such devise of real estate was void, though the gift of personalty was good. See also Boyce *v.* City of St. Louis, 29 Barb. (N. Y.) 650; Starkweather *v.* Am. Bible Soc., 72 Ill. 50. See, *infra*, POWERS AS TO REAL ESTATE.

On the other hand, in a State where corporations are allowed by law to receive lands by devise, a corporation may take such devise, though prohibited by law in the State of its incorporation. Ohio Life Ins. Co. *v.* Merchants' Ins. Co., 11 Humph. (Tenn.) 1.

**Usury.**—A foreign corporation, although permitted by its charter to take a higher rate of interest, must conform to the usury laws of the State. Hitchcock *v* United States Bank, 7 Ala. 386; Knox *v.* United States Bank, 26 Miss. 655; Bard *v.* Poole, 12 N. Y. 495; Philadelphia Loan Co. *v.* Towner, 13 Conn. 249; Bank of Louisville *v.* Young, 37 Mo. 398. *Compare* Larwell *v.* Hanover Savings, etc., Soc., 40 Ohio St. 274; Angell & Ames Corp. (11th Ed.) § 374, note; Morawetz Corp. (2d Ed.) § 507.

In U. S. Mortgage Co. *v.* Sperry (Ill.), 24 Fed. Rep, 838, it was held that the limitation in a New York charter that no loan should be made at a rate of interest exceeding the legal rate did not mean the legal rate of New York, but of the place of the loan; and that, even if the legal rate of New York was meant, a violation of the charter could not be taken advantage of by a defendant under a plea of *ultra vires*, but that it must be left to the State of New York to deal with such violation. See National Bank *v.* Matthews, 98 U. S. 621. *Contra*, Scammon *v.* U. S. Mortgage Co., 17 Chi. Leg. News, 234.

Statutes which forbid the interposition of the defence of usury by a corporation apply also to foreign corporations. Southern Life & F. Co. *v.* Packer, 17 N. Y. 51.

**Penal Laws.**—The penal laws of a State will be enforced against a foreign corporation doing business therein. McGregor *v.* Erie R. Co., 35 N. J. L. 115.

and such special franchises or privileges as eminent domain or exemption from taxation, though given in the State of incorporation, cannot be enforced[1] in other States, unless by express legislative permission.[2]

(*c*) *Policy of State Controls Admission.*—Whenever a State, by direct enactments, or by its public policy to be deduced from its general course of legislation or the settled adjudications of its highest court, indicates that contracts deriving validity from its comity are repugnant to such policy or injurious to such interests, the presumption in favor of its adoption can no longer be made.[3] The expression of such policy must, however, be clear and positive.[4]

**1.** State *v.* Boston, etc., R. Co., 25 Vt. 438; Middle Bridge Co. *v.* Marks, 26 Me. 326. See also, *infra*, POWERS AS TO REAL ESTATE.

It was held in Bard *v.* Poole, 12 N. Y. 495, that it was essential to the validity of a contract by a State corporation that it must be one which would be valid if made at the same place by a natural person not a resident of the State.

Without express permission, a business not open to individuals cannot be carried on by a foreign corporation. People *v.* Howard, 50 Mich. 239.

**2.** Union Pacific R. Co. *v.* Burlington; etc., R. Co., 1 McCrary (C C.), 452. Dodge *v.* Council Bluffs, 57 Iowa, 560. *Compare* Holbert *v.* St. Louis, etc., R. Co., 45 Iowa, 26.

**3.** Bank of Augusta *v.* Earle, 13 Pet. (U. S.) 592; Meyers *v.* Manhattan Bank, 20 Ohio, 301; Runyan *v.* Coster's Lessee, 14 Pet. (U. S.) 122; Bank of Marietta *v.* Pindall, 2 Rand. (Va.) 465, 473; Rees *v.* Conocscheague Bank, 5 Rand. (Va.) 326; Carroll *v.* City of East St. Louis, 67 Ill. 586; Starkweather *v.* Am. Bible Soc., 72 Ill. 50. United States Trust Co. *v.* Lee, 73 Ill. 144; United States Mortgage Co. *v.* Gross, 93 Ill. 483; Christian Union *v.* Yount, 101 U. S. 353.

So, a foreign corporation will not be allowed to do acts which are prohibited by the State laws to its own citizens or corporations in a similar business, the State by the common law having the right to limit the organization and privileges of corporations of its own creation. People *v.* Howard, 50 Mich. 239.

In *Illinois*, it is declared to be against public policy to create a perpetuity in lands; so, foreign corporations, authorized by their charters to buy and sell lands without any provision to compel them to sell within a certain time, cannot purchase lands, as tending to create a perpetuity. Carroll *v.* East St. Louis, 67 Ill. 568; U. S. Trust Co. *v.* Lee, 73 Ill. 142; American Christian Union *v.* Yount, 101 U. S. 353; Santa Clara Female Academy *v.* Sullivan, 116 Ill. 375. This, however, does not apply to corporations for loaning money on real-estate securities. U. S. Mortgage Co. *v.* Gross, 93 Ill. 483. *Compare* Stevens *v.* Pratt, 101 Ill. 206.

Where a corporation is organized as a foreign corporation for the purpose of evading the laws of other States, comity will not be extended; and a corporation chartered to do business in any State but the one so incorporating it will not be allowed to transact business in the State in which it is foreign. Land Grant R. Co. *v.* Commissioners, 6 Kan. 245. *Compare* Hanna *v.* International Petroleum Co., 23 Ohio St. 622; State *v.* Milwaukee, etc., R. Co., 45 Wis. 579; Runyan *v.* Coster's Lessee, 14 Pet. (U. S.) 122, 130; Second Nat. Bank *v.* Lovell (Ohio), 2 Cin. S. C. Rep. 400; Newburg Petroleum Co. *v.* Weare, 27 Ohio St. 352; Hill *v.* Beach, 12 N. J. Eq. 31; Smith *v.* Alvord, 63 Barb. (N. Y.) 423; Merrick *v.* Van Santvoord, 34 N. Y. 222; Merrick *v.* Brainard, 38 Barb. (N. Y.) 574.

**State Lotteries.**—A foreign lottery corporation, whose business is lawful in its domicil, cannot engage in the same in a State where the business is unlawful. Those who sell or advertise for it in the latter State may be prosecuted. But a contract to advertise in other States, where the business is not illegal, does not violate the law of the State prohibiting lotteries so as to render the contractor liable to indictment. People *v.* Noelke, 29 Hun (N. Y.), 461; Grover *v.* Morris, 73 N. Y. 473; Wilkinson *v.* Gill, 74 N. Y. 463; Ormes *v.* Dauchy, 82 N. Y. 443; Lemon *v.* Grosskoff, 22 Wis. 447.

**4.** Cowell *v.* Springs Co., 100 U. S. 55; Christian Union *v.* Yount, 101 U. S. 352; Stevens *v.* Pratt, 101 Ill. 206; Commercial Union Assoc. Co. *v.* Scammon, 102 Ill. 46; Carroll *v.* East St. Louis, 67 Ill. 568.

(*d*) ***Charter Limitations.***—The powers which a foreign corporation may exercise depend upon two considerations—first, whether it was endowed with the power in the State of its creation,[1] and, second, conceding the original existence of the power, whether another State will permit its exercise.[2] It is well settled that a corporation can do no acts and make no contracts except such as are authorized by its charter;[3] and these acts must be done by such officers and agents, and in such manner, as the charter authorizes.[4] A State will never concede permission to a foreign corporation to exercise powers beyond the terms of its charter.[5] Knowledge of the limitations imposed upon a foreign corporation by its charter, or the general laws of the home State, will commonly be imputed to those dealing with them.[6]

1. See CORPORATIONS (PRIVATE), POWERS OF CORPORATIONS, 4 Am. & Eng. Encyc. of Law, 207.

2. See, *supra*, this title, GENERAL LIMITATIONS OF POWERS.

3. Bank of Augusta *v.* Earle, 13 Pet. (U. S.) 588 (Taney, J.): "If the law creating the corporation does not, by the true construction of the words used in the charter, give it the right to exercise its powers beyond the limits of the State, all contracts made by it in other States would be void. . . . The corporation must, no doubt, show that the law of its creation gave it authority to make such contracts through such agents. Every power, however, of the description of which we are speaking, which a corporation exercises in another State, depends for its validity upon the laws of the sovereignty in which it is exercised; and a corporation can make no contract without this sanction, express or implied." See also Bockover *v.* Life Assoc., 77 Va. 85; s. c., 6 Am. & Eng. Corp. Cas. 603; Bank of Washtenow *v.* Montgomery, 2 Scam. (Ill.) 422; Metropolitan Bank *v.* Godfrey, 23 Ill. 579; Ohio Life Ins., etc., Co. *v.* Merchants' Ins., etc., Co., 11 Humph. (Tenn.) 24; Aspinwall *v.* Ohio, etc., R. Co., 20 Ind. 492; Thompson *v.* Waters, 25 Mich. 222; Pierce *v.* Crompton, 13 R. I. 312; Bard *v.* Poole, 12 N. Y. 505; Hitchcock's Heirs *v.* United States Bank, 7 Ala. 386. *Compare* Milnor *v.* N. Y., etc., R. Co., 53 N. Y. 363.

In Relfe *v.* Rundle, 103 U. S. 222, Waite, C.J., observes: "No State need allow the corporations of other States to do business within its jurisdiction unless it chooses, with perhaps the exception of commercial corporations; but if it does, without limitation, express or implied, the corporation comes in as it has been created. Every corporation necessarily carries its charter wherever it goes, for that is the law of its existence. It may be restricted in the use of some of its powers while doing business away from its corporate home, but every person who deals with it everywhere is bound to take notice of the provisions which have been made in its charter for the management and control of its affairs both in life and after dissolution."

In Diamond Match Co. *v.* Powers, 51 Mich. 145; s. c., 8 Am. & Eng. Corp. Cas. 144, where a foreign corporation owning large amounts of real estate in *Michigan* brought a writ of *mandamus* against a register of deeds to enforce access to county records in order to investigate titles and the privilege demanded was refused, the court observes: "Unless the State of Delaware, to which it owes its existence, and within whose dominion it belongs, has legally empowered it to deal in land and in land titles, it cannot engage in such affairs in Michigan. Thompson *v.* Waters, 25 Mich. 214. For the purpose of exercising any business activities here, it must rely on the comity of the State, and not on any inherent absolute right, because it has none. And the State, in extending its comity, may go no further than its pleasure dictates. It may stop short and tolerate but a part of the relator's powers, or a limited rather than a full exertion of them. But it will never concede permission to go beyond a charter."

4. The binding power of an agent's acts upon a corporation depends on the terms of the charter, and their legality on the laws in force where the act is performed. Ellsworth *v.* St. Louis, etc., R. Co., 98 N. Y. 553.

5. Diamond Match Co. *v.* Powers, 51 Mich. 145; s. c., 8 Am. & Eng. Corp. Cas. 144.

6. Bockover *v.* Life Assoc., 77 Va. 85; s. c., 6 Am. & Eng. Corp. Cas. 603. See also Relfe *v.* Rundle, 103 U. S. 222.

The word "charter" does not always include the general laws of the incorporating State, or even sometimes all the conditions or terms of the charter itself. The rule, as usually stated, is that all such laws or charter limitations as owe their origin simply to the local policy of a State, which there is no good reason for extending beyond State limits, and which it cannot be supposed were expected to be so extended, will not be presumed to have entered into the charter contract, or to have been intended to regulate the company's transactions outside of the State, and hence do not affect the validity of such transactions.[1]

In Hoyt *v.* Thompson's Exr., 19 N. Y. 208, the Morris Canal & Banking Co., a New Jersey corporation, being the holder of a bond and mortgage for $60,000 upon property within the State, assigned the same to the State of *Michigan* and Michigan sold and delivered the security to the defendant in the city of New York, who paid the price agreed on. The assignment to the State of M. was the act of the corporation, and so far valid. But it was voidable as to creditors, according to the provisions of a general law of *New Jersey*, applicable to all insolvent corporations. The defendant was not shown to have notice of that law, or of the fact of insolvency. *Held*, that he was to be deemed a *bona fide* purchaser, and, as such, that he had acquired a good title to the security; Defendant's title, as against the foreign corporation which assigned the security to his assignor, did not rest upon any principle of interstate comity, but upon the *jus disponendi*, or right of the corporation to transfer its effects, and also upon the doctrine that a voluntary transfer of personal estate, good by the law of the State where it is made, is good everywhere.

1. Thompson *v.* Waters, 25 Mich. 214; Ohio Life Ins. Co. *v.* Merchants' Ins. Co., 11 Humph. (Tenn.) 1; Relfe *v.* Rundle, 103 U. S. 222. See also Hoyt *v.* Thompson's Exr., 19 N. Y. 207. *Compare* Hoyt *v.* Thompson, 5 N. Y. 320.

In Ellsworth *v.* St. Louis, etc., R. Co., 98 N. Y. 553, where an Illinois charter prohibited a corporation from disposing of its bonds at less than eighty cents on the dollar, it was held that there was nothing in the laws of *New York* which rendered the contract illegal, and the provision did not apply to a sale made in New York; and, even if the charter granted under the statutes of another State contained prohibitions which would have rendered the contract illegal in that State if made there, they did not have that effect in New York, or any effect except as restriction upon the power of the corporation or its officers.

There is a distinction between an incapacity to take created by the statute of a State which is local, and a prohibitory clause in a charter which everywhere cleaves to the corporation; and, while corporations are prohibited by statute from taking by devise in *New York*, nevertheless a corporation chartered in New York may take by devise in *Connecticut*. White *v.* Howard, 38 Conn. 342.

Where a devise was made in *Massachusetts* to a New York corporation, it was held that, there being no prohibition in Massachusetts, the corporation could take, and, the devise being a charity, could be held in abeyance until the New York legislature could by statute enable the corporation to take. Fellows *v.* Miner, 119 Mass. 541. *Compare* Baker *v.* Clarke Institution, 110 Mass. 88; Ould *v.* Washington Hospital, 95 U. S. 313.

The *New Jersey* act voiding the transfer of property by an insolvent corporation does not affect a transfer made by a New Jersey corporation in New York. Hoyt *v.* Shelden, 3 Bosw. (N. Y.) 267. See also Hoyt *v.* Thompson, 5 N. Y. 320; s. c., 19 N. Y. 208; Ohio Life Ins., etc., Co. *v.* Merchants' Ins., etc., Co., 11 Humph. (Tenn.) 24. *Compare* Chafee *v.* Fourth Nat. Bank, 71 Me. 514.

In Pierce *v.* Crompton, 13 R. I. 312, it was held that where it appeared a corporation, by reason of the *New York* statute preventing an assignment in contemplation of insolvency, could not make such an assignment in New York, such an instrument could not be upheld in *Rhode Island*, where no statute forbids its execution. The latter State merely permitted the exercise, within its limits, of such powers as the corporation already possessed; no additional powers were conferred by the mere doing business in Rhode Island.

Where a banking corporation was prohibited by its charter from charging more than six per cent interest on its loans and discounts, it was held it might charge a higher rate in foreign States if allowed by the laws of such States. Hitchcock *v.*

3. STATUTORY CONDITIONS IMPOSING LIMITATIONS.—It is a consequence of the right of a State to entirely exclude foreign corporations,[1] that such conditions may be imposed upon them in the transaction of business within the State limits as may be deemed expedient.[2] These statutes are subject, however, to the constitutional limitations upon the power of States,[3] and must recognize principles of natural justice.[4] In pursuance of this policy, statutes have been passed in most, if not in all, the States, which commonly require that a foreign corporation, before transacting business in the State shall obtain a license; record its articles of association, disclosing

United States Bank, 7 Ala. 386; Bard *v.* Poole, 12 N. Y. 495. See Miller *v.* Tiffany, 1 Wall. (U. S.) 310; Depau *v.* Humphreys, 20 Mart. (La.) 1; Bullard *v.* Thompson, 35 Tex. 318.

*Missouri* Rev. Stat. § 818, provides that no officer or employee of any railroad corporation shall be interested in furnishing supplies to such company, nor in the business of transportation, as a common carrier, of freight or passengers over the works owned, leased, or operated by the company of which he is officer or employee. Plaintiff was stock agent of defendant, a corporation created in Missouri, and operating a road in Texas; and, while so employed, he made a contract with defendant whereby he leased for a term of years certain of defendant's stock-yards in Texas, defendant to pay him $1 per car for loading and unloading stock, for which he was to furnish forage, to be charged against shippers and collected by him. *Held*, that the contract of lease was void under the *Missouri* statute. Rue *v.* Missouri Pac. R. Co. (Texas, 1888), 8 S. W. Rep. 533. *Held also*, that, the contract being void in its inception, no act of ratification could make it valid. Rue *v.* Missouri Pac. R. Co. (Texas, 1888), 8 S. W. Rep. 533, *citing* Story Confl. Law, § 106, and note *a*; Matthews *v.* Skinkner, 62 Mo. 331; Black *v.* Canal Co., 22 N. J. Eq. 428. The court say: "Had the contract been entered into by the president and secretary of the company after resolution adopted by the board of directors authorizing them to make it, and had it been executed with strict observance of all formalities, it would have been void, because it was probibited by the laws of the State from which appellee derived its existence and its powers."

**Actions For Torts.**—The statutory right of action against corporations for negligence causing death is confined in its operation to the State where it is in force, and cannot be applied to foreign corporations in a State where no such statute exists, although the person injured may be a citizen of the former State. See CONFLICT OF LAWS, 3 Am. & Eng. Encys. of Law, 521, and authorities *contra* there cited.

A statute of one State, by which a right of action for personal injuries survives, will not be enforced by the courts of another State, where the common law, by which such course of action dies with the person, is unchanged. Railway Co. *v.* Richards (Texas, 1887), 4 S. W. Rep. 627, reviewing the cases wherein action is allowed to survive in the other State, and wherein it is not.

1. See, *supra*, this title, EXCLUSION.

2. The legislature may prescribe conditions under which a foreign insurance company may transact business, and how its agents shall be qualified. List *v.* Pennsylvania, 118 Pa. St. 322; Doyle *v.* Continental Ins. Co., 94 U. S. 541; State *v.* Fosdick, 21 La. Ann. 434; W. U. Tel. Co. *v.* Mayer, 28 Ohio St. 539; Slaughter *v.* Commonwealth, 13 Gratt. (Va.) 767; Tatem *v.* Wright, 3 Zabr. (N. J.) 429; Fire Dept. *v.* Noble, 3 E. D. Smith (N. Y.) 449. Peirce *v.* People, 106 Ill. 11; People *v.* Fire Asso. of Phila., 92 N. Y. 311; s. c., 1 Am. & Eng. Corp. Cas. 1; Goldsmith *v.* Home Ins. Co., 62 Ga. 379; Granite, etc., Aid Assoc. *v.* Porter, 58 Vt. 581; Charter Oak Life Ins. Co. *v.* Sawyer, 44 Wis. 387.

3. See, *infra*, CONSTITUTIONAL RIGHTS.

The nature or degree of discrimination belongs to the State to determine, subject only to such limitations upon her sovereignty as may be found in the fundamental law of the Union. Ducat *v.* Chicago, 10 Wall. (U. S.) 410; Philadelphia Fire Asso. *v.* New York, 119 U. S. 110; s.c., 15 Am. & Eng. Corp. Co. 421; Pembina Mining Co. *v.* Pennsylvania, 125 U. S. 181.

4. St. Clair *v.* Cox, 106 U. S. 350; s. c., 1 Am. & Eng. Corp. Cas. 19; Pembina Mining Co. *v.* New York, 119 U. S. 110; s. c., 15 Am. & Eng. Corp. Cas. 421, dissenting opinion of Harlan, J., and authorities cited.

the nature and objects of the corporation, the names of members, etc.; publish statements, appoint a resident agent with a duly executed, acknowledged, and recorded power of attorney upon whom process may be served; submit its business affairs to examination, in order to test its financial soundness; make agreements not to transfer suits brought in State courts to the Federal courts; deposit funds with the State; etc.[1]

To aid in the enforcement of these statutes, penalties of various degrees of severity are imposed upon the corporation itself, its officers, or the agents who transact the business within the State. These statutes sometimes deny to the corporation a power to enforce contracts made elsewhere or before compliance, and inflict upon officers or agents who neglect their provisions penalties which often extend to fine and imprisonment. In some instances foreign corporations are placed under all the burdens and liabilities of domestic corporations, and in others the statutes are retaliatory[2] in character, being intended to exact from foreign corporations just what would be exacted by the home State of the foreign corporation from corporations of other States doing business there.

**1. Example of Statutes Regulating Foreign Corporations.**—The provisions of many of these statutes and their construction incidentally appear throughout this section and title. The *Arkansas* act of April 4, 1887, is quoted in full as an example:

"An act to prescribe the condition upon which foreign corporations may do business in this State.

"Be it enacted by the general assembly of the State of *Arkansas:*

"Sec. 1. Before any foreign corporation shall begin to carry on business in this State, it shall, by its certificate, under the hand of its president and seal of such company, filed in the office of the secretary of state, designate an agent, who shall be a citizen of this State, upon whom service, summons, and other process may be made. Such certificate shall also state the principal place of business of such corporation in this State. Service upon such agent shall be sufficient to give jurisdiction over such corporation to any of the courts of this State.

"Sec. 2. If any such foreign corporation shall fail to comply with the provisions of the foregoing section, all its contracts with citizens of this State shall be void as to the corporation, and no court of this State shall enforce the same in favor of the corporation.

"Sec. 3. Any foreign corporation that has heretofore engaged in business or made contracts in this State, may, within ninety days from the passage of this act, file such certificate with the secretary of state; and thereon all their contracts made before this act goes into effect are hereby declared as if said certificate had been filed before they began business in the State.

"Sec. 7. This act shall take effect and be in force from and after its passage."

Approved, April 4, 1887.

*Oregon* act Oct. 21, 1864, § 8, provides: "A foreign corporation, before transacting business in the State, must duly execute and acknowledge a power of attorney, and cause the same to be recorded, etc." Construed in *In re* Comstock, 3 Sawy. (C. C.) 218; Bank, etc., *v.* Page, 6 Oreg. 431; Semple *v.* Bank, 5 Sawy. (C. C.) 88; Oregon, etc., Investment Co. *v.* Rathburn, 35 Sawy. (C. C.) 32; Northwestern, etc., Ins. Co. *v.* Elliott, 7 Sawy. (C. C.) 17; Orange, etc., Bank *v.* Traver, 7 Sawy. (C. C.) 210.

*Massachusetts* Rev. Stats. 1836, ch. 39, § 42; Mass. Rev. Stats. Supp. 1836–1853, ch. 273.

*Alabama* Code 1876, tit. 12, ch. 6 § 1444.

*Indiana* act 1852, Ind. Rev. Stats. 1876, and act 1865, Ind. Rev. Stats. 1876.

*Missouri,* 1 Rev. Stats. 1855, ch. 84, p. 885.

*Illinois* Laws of 1855, p. 46; Scate's Comp., § 1, p. 596.

*Ohio* 2 Sayler's Stats. p. 1353, § 19.

*Vermont* Laws 1874, act No. 1, sec. No. 2; Vt. Rev. Laws § 3607 (as amended by No. 45, Acts of 1884).

**2.** See, *infra,* CONSTITUTIONALITY OF RETALIATORY STATUTES.

Such statutes are in the nature of the other police laws of States, and are designed to protect the State's citizens from loss and imposition,[1] and to secure convenient means of obtaining jurisdiction in the local courts.[2] If retaliatory in character, they seem intended to measure the privileges of foreign corporations by those which the State's own corporations would receive in other States. It has been well pointed out that their primary purpose is not to render the contracts and dealings of corporations which have not complied with the statutes void and unenforceable, and that, unless this result necessarily follows from the terms of the statute, it should not be implied.[3]

(*a*) *When Conditions Precedent.*—Such statutes usually constitute conditions precedent, and must be complied with before the corporation can lawfully transact business.[4]

(*b*) *Effect of non-compliance—Statutory Penalty.*—Where such requirements amount to conditions precedent, or it is declared in express terms that acts before compliance shall be void, these provisions are given effect;[5] but when a pecuniary penalty is imposed upon the corporation or its agents, the penalty has usually been relied upon as a sufficient enforcement of the statute, and its requirements do not constitute conditions precedent.[6]

Cases construing such statutes show, however, an unfortunate difference of opinion. But no doubt the conflict may find a partial explanation in the varying terms of the statutory provisions. It

1. Erie Railway Co. *v.* State, 31 N. J. Law, 531.

2. Morawetz Corp. (2d Ed.) § 665; Act *Arkansas*, April 4, 1887, quoted *supra*.

3. "The object of the various statutes providing that foreign corporations, before transacting business, shall comply with specified conditions, such as filing copies of their charters, making statements of their financial condition, appointing agents upon whom process can be served, etc., is to protect parties dealing with these companies from imposition, and to secure convenient means of obtaining jurisdiction in the local courts. These statutes place foreign corporations in the same position as domestic corporations in the particulars provided for. It is clearly not the primary purpose of the legislature, in passing these statutes, to render the contracts and dealings of corporations which have not complied with the statutes void and unenforceable. Hence, where the legislature has not expressly declared that this result shall follow from a failure to comply with the statute, the courts ought not to imply such a result unless this be necessary in order to attain the primary object for which the statute was passed." Morawetz Corp. (2d Ed.) § 665.

4. Farmers', etc., Ins. Co. *v.* Harrah, 47 Ind. 236; Hoffman *v.* Banks, 41 Ind. 1; Union Cent. Life Ins. Co. *v.* Thomas, 46 Ind. 44; Rising Sun Ins. Co. *v.* Slaughter, 20 Ind. 520; American Ins. Co. *v.* Pressell, 78 Ind. 442; Cincinnati Mutual, etc., Co. *v.* Rosenthal, 55 Ill. 85; Stevens *v.* Pratt, 101 Ill. 206; Ætna Ins. Co. *v.* Harvey, 11 Wis. 394; Lycoming Fire Ins. Co. *v.* Wright, 55 Vt. 526; Lycoming Fire Ins. Co. *v.* Wright (Vt. 1888), 12 Atl. Rep. 107; Haverhill Ins. Co. *v.* Prescott, 42 N. H. 547; National, etc., Fire Ins. Co. *v.* Pursell, 10 Allen (Mass.), 232; Wiliams *v.* Cheney, 3 Gray (Mass.), 215; Stewart *v.* Northampton, etc., Co., 38 N. J. Law, 436; *Re* Comstock, 3 Sawy. (C. C.) 210; Bank, etc., *v.* Page, 6 Oreg. 431; Oregon, etc., Investment Co. *v.* Rathbun, 5 Sawy. (C. C.) 32; Semple *v.* Bank, 5 Sawy. (C. C.) 88.

5. Union, etc., Life Ins. Co. *v.* McMillen, 24 Ohio St. 67; Brooklyn Life Ins. Co. *v.* Bledsoe. 52 Ala. 538; Clark *v.* Middleton, 19 Mo. 53. See also authorities cited in preceding note.

6. Ehrman *v.* Teutonia Ins. Co., 1 McCrary (C. C.), 123; Northwestern, etc., Ins. Co. *v.* Overholt, 4 Dill. (C. C.) 187; Columbus Ins. Co. *v.* Walsh, 18 Mo. 229; Clark *v.* Middleton, 19 Mo 53; Peoria, etc., Ins. Co. *v.* Walser, 22 Ind. 73.

has been frequently held that the omission by an insurance company to carry out the provisions of a statute renders its contracts of insurance void.[1] Such a contract could not, therefore, annul a policy, in a domestic company, conditioned to become void if other insurance were effected.[2] Premium notes taken before compliance

1. *Oregon.*—A foreign corporation, before transacting business in the State, must duly execute and acknowledge a power of attorney to an agent on whom process may be served, and cause the same to be recorded in the county clerk's office of each county where it has a resident agent.

Act, Oct. 21, 1864, § 8.—Under this act it has been held that, before complying with it, a corporation had no power to contract or sue in the State; that the act was prohibitory, and anything done by the corporation contrary to it was illegal and void. *In re* Comstock, 3 Sawy. (C. C.) 218. And it was held in this case that a party who contracted with such non-complying company is not estopped to show the illegality of the contract.

This case was followed by the state court in Bank, etc., *v.* Page, 6 Oreg. 431; Semple *v.* Bank, 5 Sawy. (C. C.) 218. But the act cannot apply to foreign corporations in general, but to those only which are indicated in the title of the act, under the constitutional requirement that the subject of an act must be expressed in its title. Oregon & W. Trust, etc., Co. *v.* Rathbun, 5 Sawy. (C. C.) 32; Lycoming Ins. Co. *v.* Wright, 55 Vt. 526; Lycoming Ins. Co. *v.* Wright (Vt. 1888), 12 Atl. Rep. 107. See also Granite State, etc., Assoc. *v.* Porter, 58 Vt. 581.

A statute which imposes a penalty for doing an act except as prescribed, amounts to a prohibition to do the act otherwise, and a contract for its performance is void. Ætna Ins. Co. *v.* Harvey, 11 Wis. 394. Such penalty was not regarded by the *Missouri* court as prohibitory. Columbus Ins. Co. *v.* Walsh, 18 Mo. 229; Clark *v.* Middleton, 19 Mo. 53, in which case the omission was to take out licenses. These cases were disapproved by the *Wisconsin* court, which preferred to follow Williams *v.* Cheney, 3 Gray (Mass.), 215; Jones *v.* Smith, 3 Gray (Mass.), 500.

Under *Illinois* statute providing that it shall not be lawful for foreign insurance companies to do business in the State without first procuring a certificate of authority from the auditor of the State, it was held that a contract of insurance made in violation of said statute was void, and that recovery could not be obtained by the company in a suit by it upon a stock and premium note. The court said: "When the legislature prohibits an act or declares that it shall be unlawful to perform it, every rule of interpretation must say that the legislature intended to interpose its power to prevent the act, and, as one of the means of its prevention, that the courts shall hold it void. This is as manifest as if the statute had declared that it should be void." And, again: "That such provisions were demanded, is no doubt true; and that they are highly remedial, we do not doubt." Penalty on company for violation of the statute does not cause contrary decision. Cincinnati Mut. Health Assur. Co. *v.* Rosenthal, 55 Ill. 85.

In *Massachusetts*, also, it has been said quite frequently that, until compliance with such a statute, premium notes cannot be sued on by the company. Such are the plain words of the statute. Nat. Mut. Fire Ins. Co. *v.* Pursell, 10 Allen (Mass.), 231; Roche *v.* Ladd, 1 Allen (Mass.), 436; Williams *v.* Cheney, 3 Gray (Mass.), 215.

The Massachusetts Gen. Stat. ch. 58. §§ 68, 69, 72, provide that the contract of the insurance company not complying shall not be void, but recovery of assessments or premiums cannot be had until compliance, the agent, however, being liable to the penalty imposed by section 74.

*Held*, under such act, that, where policy issued before and suit instituted after compliance, the company could recover assessment. Nat. Mut. Fire Ins. Co. *v.* Pursell, 10 Allen (Mass.), 231; Roche *v.* Ladd, 1 Allen (Mass.), 436, accordingly, seem no longer to be authority.

The premium note is not void because the capital stock of the company is less than directed, under Massachusetts statute. Provincial Ins. Co. *v.* Lapsley, 15 Gray (Mass.), 262.

2. When a statute commands the filing of a power of attorney authorizing agents of any foreign insurance company to accept service of process, and subjecting agents doing business for such a company, in violation thereof, to indictment and fine, and providing that such corporations not complying shall not enforce the contracts by their agents in the courts of the State, an insurance by such a company is void. Being void, it cannot annul another insurance by a domestic company under a pol-

are absolutely void, or, at least, cannot be recovered upon by the corporation until compliance with the statute is had;[1] nor can it recover from its agent premiums collected by him, until it complies.[2] A premium note given to a non-complying mutual insurance company will not support suit upon it. The fact that the company is a mutual, and not a stock, company is immaterial.[3] Money paid upon a premium note given to a non-complying company may be recovered back. The party paying the money is not so far *particeps criminis* as to prevent such recovery.[4] The sureties upon an agent's bond are not bound where the statute has not been complied with, the doing of business by such agent being prohibited.[5]

On the other hand, it has been held that a foreign insurance com-

icy containing a stipulation forbidding other insurance and rendering the said domestic policy void if the stipulation should be broken. Rising Sun Insurance Co. *v.* Slaughter, 20 Ind. 520.

In New Eng. Fire & M. Ins. Co. *v.* Robinson, 25 Ind. 536, the court expressed views contrary to those declared in Rising Sun Ins. Co. *v.* Slaughter, 20 Ind. 520. and intimated strongly that their opinion was that contracts of non-complying companies were not void as against the company; but they said that defendant had submitted to the jurisdiction of the court, and that they would not presume there had been non-compliance; and so they passed the question by. See also Morawetz Corp. (2d Ed.), § 663, note, and authorities cited.

Barbor *v.* Boehm, 21 Neb. 450; Cincinnati, etc., Co. *v.* Rosenthal, 55 Ill. 86.

1. American, etc., Ins. Co. *v.* Stoy, 41 Mich. 388; Columbia Ins. Co. *v.* Kinyon, 37 N. J. 33; Cincinnati, etc., Ass. Co. *v.* Rosenthal, 55 Ill. 86; Ford *v.* Buckeye State Ins. Co., 6 Bush (Ky.), 135.

Under *New York* statute prohibiting corporations not authorized by laws of New York from keeping office for discount or deposit, *held*, that no action can be maintained by a company lacking the authority, either for money loaned, or on the note or other security taken. Earlier cases, avoiding the note but allowing recovery on the count for money lent, questioned, though not denied in view of the peculiar wording of the charters in those cases. New Hope, etc., Co. *v.* Poughkeepsie Silk Co., 25 Wend. (N. Y.) 648.

2. Thorne *v.* Travelers Ins. Co., 80 Pa. St. 15.

It is no defence, to an action by a corporation on the bond of its agent to recover for the agent's default, that at the time of the default it was a foreign corporation doing business, in the State where the action was brought, without having complied with the laws of such State regulating foreign corporations doing business therein. Singer Mfg. Co. *v.* Hardee (New Mex. 1888), 16 Pac. Rep. 605. But see *post*, note 5.

3. Lamb *v.* Lamb (Ind.), 13 Nat. Bank Reg. 17; Williams *v.* Cheney, 3 Gray (Mass.), 215.

The wording of *Mass.* R. Stat. ch. 37, § 42, and Stat. 1847, ch. 273, c. 2, prohibiting fire-insurance companies from insuring in that State without actual payment and investment of a certain amount of capital stock, does not apply to mutual insurance companies. Williams *v.* Cheney, 3 Gray (Mass.), 215.

4. Union Central L. Ins. Co. *v.* Thomas, 46 Ind. 46.

5. Mutual Benefit L. Ins. Co. *v.* Bales, 92 Pa. St. 352. And the sureties are not held, though for previous years such agent had regularly been certified. Mutual Benefit L. Ins. Co. *v.* Bales, 92 Pa. St. 352, following Thorne *v.* Travelers Ins. Co., 30 Smith (80 Pa.), 15.

However, in *Indiana*, where the statute provides for certificate of the auditor-general authorizing the agent to transact business in the State, it was held that the agent became empowered to do business on obtaining the certificate, and that bonds might then be given binding sureties, and that omission of the agent to comply with the statutory requirement that he should file the papers as to authority to receive service of process, certificate of auditor-general, etc., in the State circuit court, did not prevent the bond from being valid against the sureties; for such requirement did not constitute condition precedent to doing business, the agent's power coming into being on obtaining the certificate. U. S. Life Ins. Co. *v.* Adams, 7 Biss. (C. C.) 30.

pany can recover upon a premium note, although it has failed to comply with the statute.[1] Premium notes executed to insurance companies which have not observed the statutory provisions have been held not void, but the power to sue upon and collect them is suspended until compliance.[2]

The prohibition of business until compliance does not deny power to sue in the courts.[3] The prohibition is against persons

1. Union Ins. Co. *v.* Smart, 60 N. H. 458.

**Conflicting Indiana Decisions.**—On the question whether contracts of non-complying corporations are valid in Indiana, the decisions are clear as respects corporations in general, though not so as to contracts in the regular business of foreign insurance companies.

Foreign corporations in general, were regulated by Indiana act of June 17, 1852, 1 R. S. 1876, p. 373, which provided that no foreign corporation should sue on any contract before a compliance by its agent, and subjected the agent—not the company—to fine, upon indictment, on neglect or refusal to comply. Under this act, it is well settled that the penalty, aimed not at the company, but at the agent, merely abates action by the company on a contract until compliance. Wood Mowing, etc., Co. *v.* Caldwell, 54 Ind. 270; Singer Mfg. Co. *v.* Brown, 64 Ind. 548.

In Daly *v.* Nat. Life Ins. Co., 64 Ind. 1, the action was by a foreign insurance company, not, however, upon a contract of insurance, but on one of loan. The contract was held enforceable, but not until compliance, the case being treated as under act of 1852.

But there is a difficulty in understanding the decisions relative to contracts by foreign insurance companies, concerning which Indiana act, Dec. 21, 1865, 1 R. S. 1876 p. 594, positively prohibited any contracts of insurance until compliance, and imposing penalties, not merely on offending agents, but on any person violating the act, though containing no provision what the effect of non-compliance would be. Contracts in violation of the act were for awhile held void. Hoffman *v.* Banks, 41 Ind. 1; Union Cent. Life Ins. Co. *v.* Thomas, 46 Ind. 44; Farmers', etc., Ins. Co. *v.* Harrah, 47 Ind. 236;—all cited by the court without disapproval in Wood Mowing, etc., Co. *v.* Caldwell. 54 Ind. 273.

In 1879, in Behler *v.* German Mut. Fire Ins. Co., 68 Ind. 348, 354, the court held that a policy was good as against the company, saying: "There is a clear difference between a case wherein a corporation pleads its want of power to avoid its own obligation when it has received a benefit, and one wherein its want of power is pleaded against it to prevent it from obtaining a benefit without performing its own obligation. In one case the rule protects right, in the other prevents wrong; and thus both are made consistent with the fundamental principle in jurisprudence that no one shall take advantage of his own wrong;"—referring, for illustration to, Tippecanoe County *v.* Lafayette, etc., R. Co., 50 Ind. 85.

2. In *Indiana*, it has been held that where the foreign corporation does not comply with statute requiring filing of instrument authorizing service of process on agent, the omission constitutes good defence to action on contract brought by it; not in bar, however, but in abatement, as an action prematurely brought until the corporation or its agent should comply with the provisions of the statute. Wood Mowing, etc., Co. *v.* Caldwell, 54 Ind. 270; Daly *v.* Nat. Life Ins. Co., 64 Ind. 548; Singer Mfg. Co. *v.* Brown, 64 Ind 548. If the omission is apparent from the complaint, it is demurrable. Wood Mowing Co. *v.* Caldwell, 54 Ind. 270.

But the provisions of the act are applicable only to actions brought for the enforcement of contracts, and have no applicability whatever to actions such as replevin brought by a foreign corporation, or its agent to recover the possession of its property. Smith *v.* Little, 67 Ind. 556. The statute says, "Such foreign corporations shall not enforce in any courts of this State any contracts made by their agents," etc. The action in the case just cited was replevin for the value of sewing-machines stored with defendant and alleged to have been sold away by him tortiously. See also Domestic Sewing-machine Co. *v.* Hatfield, 58 Ind. 187; American Ins. Co. *v.* Willman, 69 Ind. 413; Express Co. *v.* Daniels, 32 Ind. 19.

3. American Button-hole, etc., Co. *v.* Moore, 2 Dak. 280; Utley *v.* Clark Gardner L. Mining Co., 4 Col. 369.

The *Wisconsin* court held that foreign corporations may maintain suits in the courts of that State; and that foreign insurance companies may take securities in Wisconsin for debts due them from resi-

acting for non-complying corporations, and penalties are inflicted upon such persons alone. The maker of a premium note cannot show non-compliance so as to avoid payment.[1] Such statutes do not invalidate policies of the non-complying foreign insurance company or prejudice the policy-holder.[2] A premium note, void for want of compliance, is good in the hands of a *bona fide* holder for value without notice.[3]

It seems that the contract of the non-complying company is valid against it.[4] Whether the holder can recover upon an insurance policy against a non-complying company, has been queried.[5] The corporation cannot take advantage of its omission to comply, in order to escape the service of process.[6]

dents thereof, without complying with the statutory conditions as to their transaction, in such State, of the business of insurance. Charter Oak Life Ins. Co. *v.* Sawyer, 44 Wis. 387. Ryan, C. J., said: "It would be intolerable injustice if a creditor corporation in one State could not sue its debtor in another. Such corporations, denied judicial process against their debtors in the courts of the debtor's domicil, might well exclaim, as Chancellor Kent, I think, once said: '*Quod genus hoc hominum? quære hunc tam barbara morem permittit patria? Hospitio prohibemur arenæ.*'"

1. Union Mut. Life Ins. Co. *v.* McMillen, 24 Ohio St. 67.

*Alabama* constitutional provision declaring that no foreign corporation "shall do any business in this State without having at least one known place of business and an authorized agent or agents therein" does not render void a contract made by a corporation which has not complied with its terms; and the other party to the contract, having received the benefits, cannot be heard to question the capacity of the corporation, on this account, to make it. Sherwood *v.* Alvis, 83 Ala. 115; Const. art. XIV, § 4.

Nor is the contract made void by Alabama statute of 1887 pointing out the mode of declaring and making known the designated place of business, and the authorized agent or agents to reside thereat, and imposing heavy penalties on foreign corporations and their agents for engaging in business without complying with the statute, and providing means for their collection. Sherwood *v.* Alvis, 83 Ala. 115, citing Sedg. Stat. & Con. Construction, (Ed. of 1874), 339–341; Alabama, etc., R. Co. *v.* McAlpine, 71 Ala. 545.

The court, per Stone, C. J., said, *inter alia:* "On the other hand, following a well-established, uniform rule, we have declared that, if a person contract with a corporation in a matter within its corporate power, the mere making of such contract estops the promisor from disputing the corporation's regular and complete organization. Lehman *v.* Warner. 61 Ala. 455;"—citing also on this point Smith *v.* Sheeley, 12 Wall. (U. S.) 358, where a bank incorporated by the Nebraksa territorial legislature, but not having its charter confirmed by congress, as was required by act of Congress of July 1, 1836, was held not to be exposed to collateral question of its power to receive grants.

The court also said: "We are aware that this court has held the clause in the constitution we have been considering to be prohibitory, without legislative action to give it effect. American U. Tel. Co. *v.* W. U. Tel Co., 67 Ala. 26; Beard *v.* U. & Am. Pub. Co., 71 Ala. 60. Neither of these cases, however, was decided on that question. Nor did we consider what effect the constitutional prohibition would have on contracts made by foreign corporations without compliance with its requirements. This case brings that question before us for the first time."

2. Ehrman *v.* Teutonia Ins. Co., 1 McCrary (U. S.), 123.

3. The fact that the holder was treasurer, director, and one of the executive committee of the company is not conclusive that he had notice. Williams *v.* Cheney, 3 Gray (Mass.), 215. The notes are not void, now, in Massachusetts, under subsequent act.

4. New Eng., etc., Co. *v.* Robinson, 25 Ind. 536; Lycoming Fire Ins. Co. *v.* Wright, 55 Vt. 526, referring to Taylor *v.* Weld, 5 Mass. 116.

5. Cin. Mut. Health Assur. Co. *v.* Rosenthal, 55 Ill. 86; Columbia F. I. Co. *v.* Kinyon, 37 N. J. 33.

6. It has been held, in *Pennsylvania*, that, although the transaction of business by the foreign corporation without compliance with constitutional and legislative requirement that such corporations

Omission to comply with the statute will not prevent a corporation from maintaining a suit upon promissory notes received by it there for goods sold and delivered in the State where it was incorporated,[1] or from bringing suit after filing security for costs like other non-residents.[2] The foreign corporation need not aver in its complaint that it has complied with the statute.[3] An answer setting up that plaintiff is a foreign corporation which had not, at the time when the contract was made, complied is bad on demurrer.[4] The certificate issued by the State is not conclusive; and

should establish an office in the State and should report the name of its agent, is undoubtedly illegal, yet the corporation itself cannot take advantage of this illegality to escape service of process. Suit may be instituted by service of process on the corporation agent within the Commonwealth, respecting at least the corporation's unfinished business in the State, notwithstanding the said omissions by the corporation. Hagerman *v.* Empire Slate Co., 97 Pa. St. 534. Of course, where the company appoints an agent, under the statute, on whom service can be made, the service cannot be on one not so designated. Liblong *v.* Kansas F. I. Co., 1 Norr. (Pa.) 413.

1. The statute of *Dakota* which provides that no foreign corporation "shall transact any business within this Territory, or acquire, hold, and dispose of property, real, personal, or mixed," within the Territory, until it shall have complied with certain requirements of the law (Civ. Code, § 567), will not prevent a corporation from maintaining a suit in that Territory on promissory notes received by it there for goods sold and delivered in the State where it was incorporated. Fuller, etc., Mfg. Co. *v.* Foster (Dak.), 30 N. W. Rep. 166, citing Cooper Mfg. Co. *v.* Ferguson, 113 U. S. 727.

2. American Button-Hole, etc., Co. *v.* Moore, 2 Dak. 280.

3. American, etc., Co. *v.* Moore, 2 Dak. 280; New England F. & M. Ins. Co. *v.* Robinson, 25 Ind. 536.

In *assumpsit* by a foreign corporation, where due organization under the laws of its *habitat* is alleged, failure to file the articles of incorporation with the declaration is not ground for plea in abatement. Demurrer to such plea sustained. Meyer *v.* Black (New Mexico, 1888), 16 Pac. Rep. 620. The court say: "The declaration alleged that plaintiff was a corporation duly organized under the laws of *Illinois*. This was a traversable averment of fact, which could only be reached by a proper plea. The fact being properly averred, the articles of incorporation would be merely evidence to establish that fact."

Omission, in statement filed, of a copy of act of incorporation, which copy the statute required, was held not to visit upon the company avoidance of its contracts, since the State auditor furnished certificate of authority, etc., though he omitted to furnish the copy of the statute —which, however, had been furnished himself by the company. American Ins. Co. *v.* Butler, 70 Ind. 7.

In suit on behalf of foreign insurance company on a premium note, the declaration was held fatally defective in not alleging that the plaintiff company had obtained a license, which was in force, to transact insurance business at the time contract was entered into. Without the license required by the statute, the company could not enter into a legal contract. Facts necessary to show a legal cause of action should have been averred. Whether the contract was valid as against the company, the court would not say. Lycoming Fire Ins. Co. *v.* Wright, 55 Vt. 526, citing Kent *v.* Lincoln, 32 Vt. 591.

In action against fire-insurance company, to recover penalty prescribed by *Wisconsin* R. S. § 1920, for failure to file annual statement, if the complaint undertakes to state the particular facts constituting the cause of action it must state all the material facts necessary to constitute such cause of action, including the fact that the defendant company was licensed to do business in the State. So held on appeal from a judgment rendered on default, and reversing same in accordance with such rule. State of Wisconsin *v.* Citizens' Ins. Co., 71 Wis. 411.

4. The contract is not void, and the answer is therefore insufficient unless it avers that the requirements had not been complied with at or prior to the commencement of the action. Singer Mfg. Co. *v.* Brown, 64 Ind. 548.

parol evidence is admissible to show deceit in obtaining it.[1] In an action by an insurance company upon a premium note, compliance will be presumed, in the absence of evidence.[2]

(*c*) *What Constitutes Doing Business Within Statutes.*—The doing of a single act of business, such as contracting in one State to sell and deliver there machinery to be manufactured in the home State, with no purpose to do any other business or to have a place of business, does not constitute doing business, within such statutes.[3]

In action by a foreign corporation on contract, an answer that "plaintiff had not complied with the provisions of an act of the general assembly" respecting foreign corporations, lacks the precision and certainty of a plea in abatement, and stating not facts, but a conclusion only, is insufficient to bar the action. Singer Mfg. Co. *v.* Effinger, 79 Ind. 264.

A decree of foreclosure, and title acquired under a sale pursuant thereto, by a foreign corporation plaintiff cannot be questioned upon the ground that the corporation had not filed a power of attorney as required by *Indiana* R. S. 1881, § 3022, the fact being available only by answer in abatement. Elston *v.* Piggott, 94 Ind. 14; s. c., 8 Am. & Eng. Corp. Cas. 185.

1. Thorne *v.* Travelers Ins. Co., 80 Pa. St. 15.

**Declarations of Agent.**—Declarations, of insurance agent of fire-insurance company, made after the transaction, that he had not, at the time the policy was issued, filed certificate with county auditor, as the statute required, is inadmissible in evidence against the company to show the non-compliance. Declarations of agent bind him only in regard to a pending transaction, and, as the writer says, *dum fervet opus*. Union Cent. L. Ins. Co. *v.* Thomas, 46 Ind. 47.

**Parol Evidence** —There being no law in *Vermont* requiring the license of a foreign insurance company for transacting business in that State to be recorded, or requiring the fact that such license had been issued to be recorded, it is competent to prove by parol that one has been issued when its loss has been shown. Lycoming Fire Ins. Co. *v.* Wright (Vt. 1888), 12 Atl. Rep. 107.

2. Williams *v.* Cheney, 3 Gray (Mass.), 215; New England F. & M. Ins. Co. *v.* Robinson, 25 Ind. 536; Knapp *v.* Ins. Co. (C. C.), 30 Fed. Rep. 607; Lycoming Fire Ins. Co. *v.* Wright (Vt. 1888), 12 Atl. Rep. 107.

**Transitory Actions** —*Semble*, that the consent to be sued through certain agencies, required before permission to foreign corporations to transact business, is not limited simply to causes of action arising within the State, but extends to all transitory actions. *Per* Matthews, Justice, in oral opinion in Mohr *v.* Ins. Co. (U. S. C. C., Ohio), 12 Fed. Rep. 474.

**Renewals of License.**—Under *Indiana* statute requiring renewal, in January and July, of the statement, instrument, and evidence, by or for agents of foreign insurance companies, such a company may validly transact business all through January and July, respectively, though such renewals be not filed till the last day thereof. American Ins. Co. *v.* Pettijohn, 62 Ind. 382.

**Insurance Without the State.**—The prohibition is not to be construed as applying to insurance where the insurance is held to be without the State, as in this case, where the applicant in Indiana wrote to the Ohio office of the company for insurance on hay which was being shipped to New Orleans, and the policy was issued from the Cincinnati office. And even if the contract were not enforceable in the State of the applicant, still it would be in the other State, against the insured on his premium note. Eureka Ins. Co. *v.* Parks, 1 Cin. C. Rep. (Ohio) 574. Citing Hyde *v.* Goodnow, 3 Comst. (N. Y.) 266; Western *v.* Genesee Mut. Ins. Co., 2 Kern. (N. Y.) 258; and particularly Huntley, Receiver, *v.* Merrill, 32 Barb. (N. Y.) 626.

As to place of contract, see May on Insurance, § 66.

3. In Cooper Mfg. Co. *v.* Ferguson, 113 U. S. 127; s. c., 8 Am. & Eng. Corp. Cas. 178, the court, Woods, J., observed: "Reasonably construed, the constitution and statute of *Colorado* forbid, not the doing of a single act of business in the State, but the carrying on of business by a foreign corporation without the filing of a certificate and the appointment of an agent, as required by the statute. The constitution requires the foreign corporation to have one or more 'known places of business in the State before doing any

The same principle has been applied to soliciting and receiving newspaper subscriptions;[1] to persons engaged in appointing

business therein. This implies a purpose at least to do more than one act of business. For a corporation that has done but a single act of business, and purposes to do no more, cannot have one or more known places of business in the State. To have known places of business, it must be carrying on, or intending to carry on, business. The statute passed to carry the provision of the constitution into effect makes this plain, for the certificate which it requires to be filed by a foreign corporation must designate the principal place in the State where the business of the corporation is to be carried on. The meaning of the phrase 'to carry on' when applied to business is well settled. In Worcester's Dictionary the definition is: 'To prosecute, to help forward, to continue, as to carry on business.' The definition given to the same phrase in Webster's Dictionary is: 'To continue, as to carry on a design; to manage or prosecute, as to carry on husbandry or trade.' The making, in Colorado, of the one contract sued on in this case, by which one party agreed to build and deliver in Ohio certain machinery and the other party to pay for it, did not constitute a carrying on of business in Colorado.

"The obvious construction, therefore, of the constitution and the statute is that no foreign corporation shall begin any business in the State, with the purpose of pursuing or carrying it on, until it has filed a certificate designating the principal place where the business of the corporation is to be carried on 'in the State, and having an authorized agent, residing at such principal place of business, on whom process may be served. To require such a certificate as a prerequisite to the doing of a single act of business when there was no purpose to do any other business or have a place of business in the State, would be unreasonable and incongruous.

"The case of Potter *v.* Bank of Ithaca, 5 Hill (N. Y.), 490, tends to support this conclusion. The charter of the bank, provided that its operations of discount and deposit should be carried on in the village of Ithaca, and not elsewhere. The cashier discounted a note in the city of New York, for the purpose of securing a demand due the bank, and the fact that the note was discounted in New York City was set up as a defence to a suit on the note. In giving judgment for the bank, Nelson, C. J., said the statute 'obviously relates to the regular and customary business operations of the bank, and does not apply to a single transaction, like the one in question.' A similar ruling was made in Suydam *v.* Morris Canal & Banking Co., 6 Hill. (N. Y.), 217. See also Graham *v.* Hendricks, 22 La. Ann. 523."

In the case from which quotation has just been made, the majority of the court placed their decision on the interpretation given by them to the constitution and statute of Colorado, and did not find it necessary to decide whether their provisions invade the exclusive right of congress to regulate commerce among the several States; but Justices Matthews and Blatchford filed an opinion concurring in the judgment, but on the ground that there was interference with commerce among the States, and therefore that the act could not vitiate the contract. They said: "It is quite competent, no doubt, for Colorado to prohibit a foreign corporation from acquiring a domicil in that State, and to prohibit it from carrying on within that State its business of manufacturing machinery; but it cannot prohibit it from selling in Colorado, by contracts made there, its machinery manufactured elsewhere, for that would be to regulate commerce among the States.

"In Paul *v.* Virginia, 8 Wall. (U. S.), 168, the issuing of a policy of insurance was expressly held not to be a transaction of commerce, and, therefore, not excluded from the control of State laws; and the decision in that case is predicated upon that distinction. It is therefore not inconsistent with these views."

And see Mr. Morawetz's work on Private Corporations, § 321, where he says that it has been held in various cases that a prohibition from engaging in a particular course of dealing does not include a prohibition from doing exceptional acts, although the repetition of these acts would constitute the prohibited course of dealing.

1. Beard *v.* Union & American Pub. Co., 71 Ala. 60; s. c., 5 Am. & Eng. Corp. Cas. 1. Stone, J., said, in the opinion in this case: "There must be a doing of some of the works or an exercise

agents to transact the business of the corporation;[1] to obtaining subscriptions to the stock of a foreign insurance company;[2] to supplying another with the means of doing business, such as licensing, in another State, local telephone companies to use patent rights;[3] to the making of occasional purchases either by correspondence, or the sending of an agent for that purpose;[4] the selling of tickets by a railroad company;[5] the adjustment of a loss by an uncertified agent of an insurance company.[6] The foreign corporation must transact within the State some substantial part of its ordinary business, through an agent appointed for the purpose.[7] The owning, by a foreign corporation, of shares of stock in local companies or of interests in local limited partnerships does not amount to doing business, within taxation statutes.[8]

of some of the functions, for which the corporation was created, to bring the case within that clause."

1. Morgan *v.* White, 101 Ind. 413.

2. In Payson *v.* Withers, 5 Biss. (C. C.) 269, the court said: "Conceding that a State would have the power to prevent any of its citizens from subscribing, within its own limits, to the stock of a corporation of another State, it would require a clear and explicit declaration that such a subscription should be null and void except upon compliance with certain terms. The obtaining of subscriptions was an act preliminary to the commencement of its business."

3. United States *v.* American Bell Tel. Co. (C. C. Ohio), 29 Fed. Rep. 17.

4. Under U. S. R. S. § 739, providing that civil suits must be against citizens of United States in the district of which he is an "inhabitant" or in which he is "found at the time of serving the writ," the Federal court is to determine whether a foreign corporation has transacted business to such extent, within the district, and has such representative or agent therein, that jurisdiction to render a personal judgment is acquired by the court through service on such agent. St. Louis Wire-mill Co. *v.* Consolidated Barb-wire Co. (Mo.), 32 Fed. Rep. 802. Occasional purchases at St. Louis, either by correspondence or occasional sending of an agent for the purpose, did not make the foreign corporation to be "doing business" in *Missouri*, under such law, and this notwithstanding Mo. R. S. § 3489, providing that when a non-resident corporation has no office or place of business within the State, summons may be served upon any "officer, agent, or employee in any county where service may be obtained." And occasional purchases by sending of agent were held not to cause the foreign corporation to be engaged in business in New York so as to confer jurisdiction on the Federal court of the district there. Good Hope Co. *v.* Railway Barb-fencing Co. (N. Y.), 22 Fed Rep. 635.

5. In Doty *v.* Michigan Central R. Co., 8 Abt. Pr. (N. Y.) 427, it was held that a foreign railroad corporation having the whole road and traffic without the limits of New York State, and having no office there, is not a corporation doing business within that state, although tickets for passage over their road are sold there by the company's agent.

6. People *v.* Gilbert, 44 Hun (N. Y.), 522.

In an action against an insurance company by a foreign corporation, where the only business done by plaintiff in the State where the action was brought related to the policy of insurance, the objection that such corporation has not complied with the statutes in regard thereto will not be regarded. Tabor *v.* Goss & Phillips Mfg. Co. (Cal. 1888), 18 Pac. Rep. 537. The court said: "There is nothing in the objection; and, if there was, the case of Utley *v.* Mining Co., 4 Colo. 369, cited, shows it to be matter of defence, to be pleaded in bar of the action."

7. United States *v.* American Bell Telephone Co., 29 Fed. Rep. 17.

8. Where a corporation chartered in Ohio bought crude petroleum in Pennsylvania, through brokers and others, but without making a permanent investment there, and shipped the petroleum to and refined it outside of the State, and owned interests in individual partnerships doing business in Pennsylvania as producers, refiners, or transporters of oil, and also shares of stock in Pennsylvania corporations, and also interests in limited partnerships doing business in Pennsylvania

Where the agent of an insurance company sends to the home office, in another State, premiums, etc., which are there examined and accepted, it has been held that the contract is made in the home State, and not at the residence of the agent, although the agent may perhaps be liable for a violation of the statute.[1] It has been held that taking an application for a policy, and forwarding it to the home office in another State, is not "doing insurance business;" but taking a note for an instalment of premiums, and transmitting it to the company, is "doing insurance business." [2]

The owning, by a foreign corporation, of interests in individual partnerships within a State, constitutes a doing of business, within taxation statutes.[3] The receiving of lands by devise is sufficient

as producers, refiners, or transporters of oil, but never received any special authority to transact business in Pennsylvania, it was held that the ownership of interests in individual partnerships doing business as aforesaid did, but that the ownership of shares of stock in Pennsylvania corporations, and of the interests in Pennsylvania limited partnerships doing business as aforesaid, and the producers of oil as aforesaid did not, constitute a doing of business in the Commonwealth so as to subject the corporation to taxation, under the act requiring foreign corporations "doing business in this Commonwealth" to pay a certain tax upon their capital stock. Commonwealth *v.* Standard Oil Co., 101 Pa. St. 119.

1. The fact that the company and its agent had not complied with the *Indiana* statute does not invalidate the policy. It is not competent for the legislature of one State to declare that its citizens shall not be allowed to make such contracts as they please, out of the State. Lamb *v.* Bowser, 7 Biss. (U. S.) 315 On appeal to circuit court, same book, p. 372, *Semble*, that the policy issued on receipt of the note and proposal would be valid and enforceable. Gresham, J., said: "The Winnesheick Insurance Company, being a foreign corporation, could act in this State only by agents; and agents of such corporations, being expressly prohibited by the statute from making any contracts or transacting any ordinary business in this State except as herein provided, it would seem that the company as well as the agent, acted in violation of law in establishing the agency in Noble county and in taking and forwarding the application and premium note. [Citing Union Central Life Ins. Co. *v.* Thomas, 46 Ind. 44; Ætna Ins. Co. *v.* Harvey, 11 Wis. 394.]

"And, for thus violating the law of the State, the agent might have been prosecuted and punished. But it does not follow that, because the company and its agents thus violated the law of Indiana, the contract entered into in Illinois was illegal and void."

Where an application for insurance was received by the agent in Ohio of a New York corporation, together with the premium note of the applicant, and by him transmitted to the office of the company in New York, where they were received, passed upon, and approved, and from which a policy was executed and transmitted to the applicant by mail, and the agent himself had no power to make insurance, it was held that the contract was made in New York. Hence, it did not come within the terms of a statute of *Ohio* declaring that "no policy of insurance shall be signed, issued, or delivered" in that State by any company not chartered by the laws thereof, except by any agent of such company who should first have obtained a license in the manner prescribed by the act. A suit thereupon in *New York*, by a receiver of the company, upon the premium notes, was sustained. Hyde *v.* Goodnow, 3 Comstock (N. Y.), 266.

2. Hackeny *v.* Leary, 12 Oreg. 40.

3. Commonwealth *v.* Standard Oil Co., 101 Pa. St. 119.

In People *v.* Horn Silver Mining Co., (N. Y. 1887). 18 Am. & Eng. Corp. Cas. 210, it was held that a corporation, organized under the laws of *Utah* for the purposes of conducting a general mining business in all its branches, mining ore and manufacturing it into bullion, which was first shipped to Chicago and smelted and refined, and then to the city of New York, where it was assayed, for which the company paid 2 per cent, and the receipts issued for the silver by the Assay Office were sold, and so much as were not used were transmitted to Utah and Chicago, is not engaged in "manufactur-

doing business to place a foreign corporation upon the same footing with domestic corporations, under the *Illinois* statutes.[1] The loaning of money by an insurance company is within the prohibition of such statutes.[2]

(*d*) *Corporations Holding Patent-rights.*—It has been held that conditions in a statute could not be applied to a foreign corporation which is the owner or assignee of letters patent of the United States, in its transactions, in a State, which are connected with the manufacture, use, or sale of an invention.[3]

ing within this State" so as to exempt it from taxation under the *New York* act of 1881, ch. 361. A corporation which for several years had offices in New York, whose directors held their annual meetings there, whose dividends were declared and paid there, and a very substantial portion of whose business was done in said city, was "doing business in this State," within the meaning of the act of 1881, and was subject to taxation.

1. Santa Clara Female Academy *v.* Sullivan, 116 Ill. 375.

2. Daly *v.* National Life Ins. Co., 64 Ind. 1.

**Office for Discount. Within Statute.**—Query whether an agreement between a foreign banking institution and a citizen of *Pennsylvania*, by which the bank notes of the institution were to be kept in circulation by means of lending or discounting negotiable paper with them, is such an establishment of an office of discount in that State as to be a violation of Pennsylvania act, March 28, 1808, forbidding foreign companies to establish a banking-house or office of discount and deposit in Pennsylvania under penalty of $2000. Stewart *v.* U. S. Ins. Co., 9 Watts (Pa.). 126.

**Pleadings.**—In Hull *v.* Ala. Gold, etc., Ins. Co. (Ga.), 3 S. E. Rep. 903, it was held that a foreign insurance corporation cannot defend on the ground that the pleadings and proof failed to allege that the company was doing business in that State (Georgia) when the application for the policy, and the policy itself, and the declaration showing that the company was doing business in that State, and the company did not aver or show anything to the contrary, and then even though the payment of the policy was to be outside of the State, and a statute providing for foreign corporations doing business in the State applied.

3. Grover & Baker Sewing-machine Co. *v.* Butler, 53 Ind. 454. The court cited from the language in *Ex parte* Robinson, 2 Biss. (C. C.) 309, which was a decision of the U. S. circuit court upon an *Indiana* statute enacted "to regulate the sale of patent-rights, and to prevent frauds in connection therewith." 3 Ind. Stat. 364. In that case, Davis, J., said: "The property in inventions exists by virtue of the laws of Congress, and no State has a right to interfere with its enjoyment, or to annex conditions to the grant. If the patentee complies with the law of Congress on the subject, he has a right to go into the open market anywhere within the United States and sell his property. If this were not so, it is easy to see that a State could impose terms which would result in a prohibition of the sale of this species of property within its borders, and in this way nullify the laws of Congress which regulate its transfer, and destroy the power conferred upon Congress by the Constitution."

In Helm *v.* Bank, 43 Ind. 167, the language quoted was recited with approval, and the statute held unconstitutional. (The statute was the one requiring, in the body of promissory notes given for patents, the words, "given for a patent-right.")

Grover & Baker S. M. Co. *v.* Butler, 53 Ind. 454, was followed in the same year by Wood Mowing, etc., Co. *v.* Caldwell, 54 Ind. 270; in 1878, in Shook *v.* Singer Mfg. Co., 61 Ind. 520. See citations in Cooley Const. Lim. (5th Ed.) p. 11.

This is not the place for presentation of the conflicting decisions upon the constitutionality of statutes requiring that notes for patent-rights shall state that they are so given. But as to the question before us, it is said, in the note, 22 American Rep. 67, that Grover & Baker Sewing-mach. Co. *v.* Butler, 53 Ind. 454, is an unwarrantable extension of the cases upholding the constitutionality of the notes-statutes. The editor says:

"In Livingston *v.* Van Ingen, 9 Johns. Ch. (N. Y.) 507, Chancellor Kent said: 'The power granted to Congress goes no further than to secure to the author or inventor a right of property, which, like every other species of property, must be used and enjoyed within each State ac-

(*e*) *Constitutionality of Retaliatory Statutes.*—Late statutes in several States regulate the licensing, taxation, and fines of certain foreign corporations by imposing upon them the same regulations in these regards as the home State of such corporations place upon corporations of other States doing business there. Such statutes do not prescribe the liabilities of foreign corporations in express terms, but make them such as the existing or future laws of the home State may provide, the statutes to become operative only when the latter State demands more from foreign corporations within its borders than would be demanded from companies of that State doing business in the State adopting the statute.[1] The effort has been made to have such legislation declared unconstitutional, as attempting to levy different fees for the same privilege from different members of the same class, or as enacting the laws of another State into those of the State in question, or as void for uncertainty.[2] It has also been claimed that such legislation vio-

cording to the laws of such State. The power of Congress is only to ascertain and define the right of property; it does not extend to regulating the use of it. That must be exclusively of local cognizance. If the author's book or print contains matter injurious to public morals or peace, or if the inventor's machine or other production will have a pernicious effect upon the public health or safety, no doubt a competent authority remains within the State to restrain the use of the patent-right.'

"In the Grover & Baker case [Grover, etc., Co. *v.* Butler, 53 Ind. 454], the law condemned was a general law, and uniform in its operations; besides this, it did not in any degree interfere with the sale or assignment of rights under letters patent, as did the other cases cited, but the interference, if any, was limited to the sale of articles resulting from the patented invention."

The distinction is clearly pointed out in Patterson *v.* Kentucky, 97 U. S. 501. It is there held that where, by the application of the invention or discovery for which letters patent have been granted by the United States, tangible property comes into existence, its use is, to the same extent as that of any other species of property, subject, within the several States to the control which they respectively impose in the legitimate exercise of their powers over their purely domestic affairs, whether of internal commerce or of police. In that case, it was held that a *Kentucky* statute providing for inspection of illuminating, oils, etc., directing that all oils should be of a certain test, was not void as respects patented oils. This case is re-cited in note, 26 Am. Rep. 517. See, to same effect, State *v.* Telephone Co., 36 Ohio St. 296; 38 Am. Rep. 583.

In 1878, in Fry *v.* State, 63 Ind. 552, the court held that, notwithstanding the conferring on Congress of power to regulate commerce "among the several States," a statute making it a crime to act as "ticket-scalper" was constitutional. And in Toledo Agricultural Works *v.* Work, 70 Ind. 253 (1880), it was held that, to an answer alleging the plaintiff to be a foreign corporation, and that it had not complied with the law of the State in respect to foreign corporations, a reply which alleged that the article sold was constructed by authority of letters patent issued by the United States, and that the plaintiff had a right to sell notwithstanding any law of the State, was bad on demurrer.

1. The *New York* law provided that a fire-insurance company shall pay to the superintendent of the insurance department, for taxes, fines, etc., an amount equal to that imposed by the existing or future laws of the State of its origin, upon New York companies seeking to do business there, when such amount is greater than is required by the New York laws. Laws of 1865, ch. 694, as amended by laws 1875, ch. 60.

2. State, etc., *v.* Insurance Co. of N. Am. (Ind. 1888), 20 Am. & Eng. Corp. Cas. 598; Blackman *v.* Royal Ins. Co. (Ind. 1888), 17 N. E. Rep. 580.

As such a condition is in the nature of a license fee, it was held, in *New York*, not to violate the constitutional provision that "Every law which imposes, continues, or revives a tax shall distinctly state the tax and the object to which it is to be applied, and it shall not be sufficient to refer to any other law to fix such

lates the Fourteenth Amendment of the Constitution of the United States, that no State "shall deny to any person within its jurisdiction the equal protection of the laws." [1] But these statutes have been sustained as constitutional in *Indiana*,[2] *Illinois*,[3] *Kansas*,[4] *Georgia*,[5] *New York*,[6] and in the United States supreme

tax or object." People *v.* Fire Assoc. of Phila., 92 N. Y. 311; s. c., 1 Am. & Eng. Corp. Cas. 1, citing People *v.* Chenango Supervisors, 8 N. Y. 326.

1. Philadelphia Fire Assoc. *v.* New York, 119 U. S. 110; s. c. 15, Am. & Eng. Corp. Cas. 421; People *v.* Fire Assoc. of Philadelphia, 92 N. Y. 311; s. c., 1 Am. & Eng. Corp. Cas. 1.

2. Ind. R. S. 1883, § 3773, providing that insurance companies of States which require from foreign insurance companies taxes, penalties, licenses, deposits, obligations, and securities greater than are required by the *Indiana* laws, shall have imposed upon them in Indiana the same obligations or prohibitions, insurance companies of other nations to be held as of the State where they elect to make their deposit and establish their principal agency in the United States, is not unconstitutional as attempting to levy different fees for the same privilege from different members of the same class. State of Ind. *v.* Ins. Co. of N. Am. (Ind. 1888), 20 Am. & Eng. Corp. Cas. 598.

The law of the State of the foreign insurance company designating certain city officers to receive the taxes for license fees from foreign insurance companies shall not in such respect be followed, but the State claiming under the retaliation law shall receive the payments through the State officers appointed by its own law. Blackman *v.* Royal Ins. Co. (Ind. 1888), 17 N. E. Rep. 580. See also, as bearing upon the subject, Ins. Co. *v.* Brim, 111 Ind. 281; Insurance Co. *v.* Burdette, 112 Ind. 204.

3. Home Ins. Co. *v.* Swigert, 104 Ill. 653 (Scott, C. J., dissenting). In this case it was also held that the fact that for twelve years no case arose calling for enforcement of the retaliation section did not prevent its operation when the occasion arose.

In the *Illinois* case, Mr. Justice Dickey said: "I concur in the view that the statute is valid, but I doubt whether our statute was intended to apply to a case where the imposition by the foreign statute is in no sense a discrimination against corporations of this State."

4. Phœnix Ins. Co. *v.* Welch, 29 Kan. 672. In this case the court said: "The legislature may classify for the purposes of taxation or license; and, when the classification is in its nature not arbitrary, but just and fair, there can be no constitutional objection to it. Here foreign insurance companies are classified by the States from which they come, and, when we consider the purposes of such classification, it cannot be held that there is anything arbitrary or unjust therein. But, doubtless this charge is not to be considered as within the constitutional restrictions as to taxation, but rather in the nature of a license or condition of entering this State and transacting business within its limits." Approved by the Indiana court. The contingency arises when the laws of another State impose the additional burdens and conditions, and is not delayed until some corporation of the State enacting the retaliatory statute is actually subjected to such burdens and conditions. Phœnix Ins. Co. *v.* Welch, 29 Kan. 672.

5. In *Georgia*, the statute was held to apply to the terms of entry into the State, and not to the annual revenue tax. Pennsylvania corporations being required by the State officer to pay 3 per cent., under the annual revenue tax law, and New York companies 2 per cent., the supreme court held that he was rightly enjoined from collecting more than 1 per cent., the rate fixed by the general tax law on foreign insurance companies, notwithstanding the Pennsylvania tax law required from fire-insurance companies 3 and the New York law 2 per cent. Goldsmith *v.* Home Ins. Co., 62 Ga. 379. "The *Georgia* statute required the fire-insurance company to make the same deposit for a like purpose, and to pay . . . for taxes, fines, penalties, certificates of authority, license fees, and otherwise an amount equal," etc.

6. People *v.* Fire Assoc. of Philadelphia, 92 N. Y. 311; s. c., 1 Am. & Eng. Corp. Cas. 1. In an able and interesting opinion, the court, in the above case, quotes, approvingly, State *v.* Parker, 26 Vt. 365, where it was said: "If the operation of a law may fairly be made to depend upon a future contingency, then it makes no essential difference what is the nature of the contingency so it be an equal and fair one, a moral and legal one, not opposed to sound policy,

court.[1] They have been held unconstitutional, in *Alabama*, upon the ground that such retaliation confides to a foreign jurisdiction that legislative discretion which the Alabama general assembly are constitutionally bound to exercise themselves, and which they cannot delegate or commit to another.[2] In *New Hampshire*, a defence based upon such a statute was held valid, but there was no discussion of the constitutional question.[3]

(*f*) *Invalid Acts—Remedy.*—It seems that the invalid acts of a foreign corporation which constitute an abuse of the powers granted by comity are in general impeachable only by the state in a direct proceeding,[4] though, where there is a total

*and so far connected with the object of the statute as not to be a mere idle and arbitrary one.*" And, again: "One may find any number of cases, in the legislation of Congress, where statutes have been made dependent upon the shifting character of the revenue laws, or the navigation laws, or commercial rules, edicts, or restrictions of other countries." Illustration is found in the non-intercouse acts, beginning with the year 1809, dependent on the action of France. See Bull *v.* Read, 13 Gratt. (Va.) 78; Cargo of Brig Aurora *v.* U. S., 7 Cranch (U.S.), 386; Williams *v.* Bank of Michigan, 7 Wend. (N. Y.), 540.

In the *New York* case it was said that it seems that the foreign insurance company, even if the act be unconstitutional, waives such objection if it enter the State, citing the cases of Embury *v.* Conner, 3 N. Y. 511; Sherman *v.* McKeon, 38 N.Y. 267; Phyfe *v.* Eimer, 45 N. Y. 103; Vose *v.* Cockroft, 44 N. Y. 415.

In the New York decision, distinction was drawn between the question before the court and the question in Barto *v.* Himrod, 8 N. Y. 483, where the New York law referring to the people the enacting, by popular vote, of a certain school-law, was held void.

(In Illinois, a Pennsylvania statute of somewhat similar purpose, in reference to liquor regulation, was referred to as supporting the statutes now under consideration. Home Co. *v.* Swigert, 104 Ill. 653, citing Locke's appeal, 72 Pa. St. 498.)

See, generally, Bank of Rome *v.* Rome Village, 18 N.Y. 39. There a law conferred certain powers on municipalities, but was not to be exercised until approval by two thirds of the taxpayers. The law was complete. Distinction was taken that the law took effect immediately, though the village was not compelled to act under it unless the taxpayers so determined. *Held*, therefore, the act was valid. And see Starin *v.* Genoa Town, 23 N. Y. 439; Bank of Chenango *v.* Brown, 26 N. Y. 467; Clarke *v.* Rochester City, 28 N. Y. 605.

When, under such a retaliation act, the tax payable was 3 per cent. on premiums, and by another act 2 per cent. was to go to the local fire department, *held*, that, if there was no treasurer of the fire department, as mentioned, to receive payment, the amount should be handed to the State superintendent like the rest of the tax due. People of N. Y. *v.* Fire Assoc. of Phila., 92 N. Y. 311.

1. Philadelphia Fire Assoc. *v.* New York, 119 U. S. 110; s. c., 15 Am. & Eng. Corp. Cas. 421 (Harlan, J., dissenting).

2. Clark *v.* Mobile, 10 Ins. Law J. 357, and note (May, 1881). Clark & Murrel, agents for a Mississippi insurance company, paid $1000 to the State of *Alabama*, though the usual fee to agents of foreign insurance companies was $100, $1000 being the fee in Mississippi to foreign insurance companies. *Held*, that such retaliation section was void, as payment thereunder afforded no protection, and could not be available in favor of the agents in a claim by the port of Mobile for $10 license tax, pursuant to municipal ordinance.

3. Haverhill Ins. Co. *v.* Prescott, 42 N. H. 547 (1861). It was held in this case that, since the law of the foreign State would make a contract by a non-complying *New Hampshire* insurance company void, likewise contracts by the company from that State doing business in New Hampshire were void.

4. See, as to domestic corporations, 1 Green's Price's *Ultra Vires* (2d Am. Ed.), p. 729; Dillon Mun. Corp. (3d Ed.) § 574; Gold-Mining Co. *v.* Nat. Bank, 96 U. S. 640; Chambers *v.* St. Louis, 29 Mo. 543; Goundie *v.* Water Co., 7 Pa. St. 233; Land *v.* Coffman, 50 Mo. 243; Myers *v.* Croft, 13 Wall. (U. S.) 291; Smith *v.* Sheeley, 12 Wall. (U. S.) 358.

As to foreign corporations, National

absence of power to act, the attempted acts and contracts are void.[1]

(*g*) *Estoppel—Ultra Vires.*—As between a foreign corporation and third parties, the corporation will be bound by its own acts although *ultra vires*.[2]

(*h*) *Miscellaneous.*—In complying with the conditions of such statutes, it is not necessary that the name of the particular agent be inserted in the certificate.[3] The conditions apply, in *Massachusetts*, not only to agents acting under some general and formal appointment, but also to such as may be employed only occasionally or in a single transaction;[4] but, in *Indiana*, they do not apply

Bank *v.* Matthews, 98 U. S. 621; Cowell *v.* Springs Co., 100 U. S. 55; U. S. Mortgage Co. *v.* Sperry (Ill.), 24 Fed. Rep. 838; Barnes *v.* Suddard, 117 Ill. 237; Alexander *v.* Tolleston Club of Chicago, 110 Ill. 65; s. c., 8 Am. & Eng. Corp. Cas. 239; State *v.* Woodward, 89 Ind. 110. See Williams *v.* Hinksmeister (Pa.), 26 Fed. Rep. 889.

1. Abbott *v.* Omaha Smelting Co., 4 Neb. 416; Leazure *v.* Hillegas, 7 Serg. & Rawle (Pa.), 313; Hough *v.* Cook Co. Land Co., 73 Ill. 23; Baird *v.* Bank, 11 Serg. & Rawle (Pa.), 411; Cin. Mut. Health Assoc. *v.* Rosenthal, 55 Ill. 85; Mokelumne Hill, etc., Mining Co. *v.* Woodbury, 14 Cal. 424; Leasure *v.* Union Mut. Life Insurance, 91 Pa. St. 491.

2. N. E. Ins. Co. *v.* Robinson, 25 Ind. 536; Bissell *v.* Mich. Southern, etc., R. Co., 22 N. Y. 258; York & Penn. Line Co. *v.* Urnans, 17 How. (U. S.) 30; Blackburn *v.* Selma, etc., R. Co., 2 Flip. (U. S.) 525; Ehrman *v.* Teutonia Life Ins. Co. (Ark.), 1 Fed. Rep. 471.

Where a foreign corporation has failed to comply with the statute as to the appointment of an agent, but is actually doing business in the State and is represented by an agent, the corporation is estopped to deny the validity of service upon him. Hagerman *et al. v.* Empire State Co., 97 Pa. St. 534. See Funk *v.* Anglo-American Ins. Co., 27 Fed. Rep. 336.

Where a corporation, *ab initio*, is unable to take property, a deed will not operate as an estoppel. To do so, it must be valid. Fowler *v.* Scully, 72 Pa. St. 457; Abbott *v.* Omaha Smelting Co., 4 Neb. 416; Starkweather *v.* Am. Bible Soc., 72 Ill. 50; Jackson *v.* Cory, 8 Johns. (N. Y.) 385; Lowell *v.* Daniels, 2 Gray (Mass.), 161; McGregor *v.* Wait, 10 Gray (Mass.), 72; Pierce *v.* Chace, 108 Mass. 254; Merriam *v.* Boston, etc., R. Co., 117 Mass. 241; Pells *v.* Webquish, 129 Mass. 469; Fairtitle *v.* Gilber, 2 T. R. 169; 2 Bigelow Estoppel, ch. 9.

In Bank of U. S. *v.* Owens, 2 Pet. (U. S.) 538, it was distinctly laid down that contracts in violation of the provisions of a statute, though not expressly made void by it, are null and will not be enforced.

In Fowler *v.* Scully, 72 Pa. St. 457, a mortgage was given to a national bank to secure future advances, and afterwards the mortgagor made an assignment for the benefit of creditors. *Held*, that the assignor might resist the mortgage on the ground of its invalidity, and that no action could be sustained on it; as, under the Currency Act, no other than personal security can be taken by a bank for a loan. See also Keen *v.* Coleman, 39 Pa. St. 299; Merriam *v.* Boston, etc., R. Co., 117 Mass. 241; Caffrey *v.* Dudgeon, 38 Ind. 512; Steadman *v.* Duhamel, 1 C. B. 888; Fairtitle *v.* Gilber, 2 T. R. 169; *In re* Comstock, 3 Sawy. (U. S.) 218; Semple *v.* Bank of British Columbia, 5 Sawy. (U. S.) 88.

3. In Goodwin *v.* Colorado Mort. Investment Co. of London (Limited), 110 U. S. 1; s. c., 8 Am. & Eng. Corp. Cas. 147, it was held that a certificate signed and acknowledged by the president and secretary of a foreign corporation, and filed with the secretary of state and in the office of the recorder of deeds for the county in which it is proposed to carry on business, stating that "The principal place where the business shall be carried on in the State of Colorado shall be at Denver in the county of Arapahoe, in said State, and that the general manager of said corporation, residing at the said principal place of business, is the agent upon whom process may be served in all suits that may be commenced against such corporation," is a sufficient compliance with the requirements of the constitution of *Colorado* in that respect. It was not necessary to give the name of the particular person who happened at the date of the certificate to fill that position.

4. Hartford Ins. Co. *v.* Matthews, 102 Mass. 225.

to persons engaged in appointing agents to do business for the corporation.[1]

The penalties of fine and imprisonment imposed on foreign life-insurance companies doing business in *Missouri*, without a certificate, are visited upon the resident agent.[2] The naming of certain penalties implies the exclusion of others.[3] So far as concerns the liability of the agent to the penalty prescribed in *Illinois*, it matters not where the contract of insurance was made; what the legislature desired to accomplish, was to prevent them being made at all.[4] In actions for penalties, the plaintiff must show facts bringing the case clearly within the terms of the statute, fairly and reasonably construed.[5] Under the *Pennsylvania* statute, agents taking action relating to risk, who have not complied with the conditions imposed upon agents of foreign insurance companies, are indictable.[6] The *Wisconsin* statute imposing a forfeiture is penal; and the United States supreme court has no jurisdiction, under the Judiciary Act, of an action brought by the State of Wisconsin against a foreign insurance company upon a judgment for the penalty imposed by that statute.[7]

1. Morgan *v.* White, 101 Ind. 413.

2. State *v.* N. Y. Life Ins. Co., 81 Mo. 89.

3. In King *v.* National Mining, etc., Co., 4 Mont. 1; s. c., 4 Am. & Eng. Corp. Cas. 14, it was held that foreign corporations are not prohibited from doing business in the Territory by failure to comply with the requirements of section 46 of the General Corporation Laws. Although the provisions of said section are mandatory in terms, the next following section limits their effect by prescribing the penalties for such failure. Certain penalties being prescribed, they must be held to be the only ones, under the doctrine *Expressio unius est exclusio alterius.*

4. In Pierce *v.* State of Illinois, 106 Ill. 11; s. c., 3 Am. & Eng. Corp. Cas. 8, it is held that a statute regulating the admission of an insurance company to transact business in *Illinois* is constitutional. It is competent for the legislature to declare all contracts of insurance made by a citizen of that State with a foreign insurance company having no right to do business there, void, on the ground of being contrary to the public policy of the State; and, in furtherance of the same object, the legislature may declare it a penal offence for any one to do anything there, whether acting on behalf of the insurer or the insured, by way of aiding in effecting insurance in such companies not qualified to do such business under Illinois laws.

5. Allen *v.* Stevens, 29 N. J. L. 509; Nerona C. C. Co. *v.* Murtaugh, 50 N. Y. 314.

"The conditions upon which the penalty attaches must be affirmatively shown to have existed." Comrs. of Pilots *v.* Vanderbilt, 31 N. Y. 265.

"If the penalty is imposed for conduct or neglect in a particular capacity, it must be stated that the defendant was acting in that capacity." Trowbridge *v.* Baker, 1 Cow. (N. Y.) 251; Abb. Tr. Ev. 771.

6. In List *v.* Commonwealth, 118 Pa. St. 322, defendant, "inspector" of risks for a foreign insurance company not authorized to do business in *Pennsylvania*, called on parties in Pittsburg, in that State, gave them his card as inspector, together with the company's form of premium note, and its financial statement, officers' names, etc. He also requested permission to inspect buildings of one W., for the purpose of enabling his company to place a policy of insurance thereon. He did inspect certain other buildings, and reported to his company, which thereupon issued a policy and received the premiums. *Held*, he was "agent" and "took action," and was indictable.

7. *Wisconsin* Rev. Stat. § 1920, imposing a forfeiture of $500 a month upon any insurance company of another State doing business in Wisconsin without having deposited with the proper officers a full statement of its property and business during the preceding year, such forfeiture to be recovered in an action in the name of the State, is strictly a penal statute, punishing an offence against the State; and therefore, under the United States Judiciary Act, 1789, ch. 20, § 13 (R. S. § 687), giving the

4. POWERS AS TO MEETINGS—The right of corporations to hold directors' meetings outside the home State is commonly recognized,[1] as acts done outside of such State by or for a corporation are

United States supreme court "exclusive jurisdiction of controversies of a civil nature where a State is a party," etc., such court has no jurisdiction of an action brought by the State of Wisconsin against an insurance company of another State upon a judgment for the penalty imposed by that statute. Wisconsin *v.* Pelican Ins. Co., 127 U. S. 295.

**Licenses Under Wisconsin Statute.**—The Wisconsin statute, § 1954, as to foreign life or accident insurance companies, and § 1920 as to foreign fire insurance companies, imposing penalties for non-compliance with their provisions, refer to foreign licensed companies. Both sections make the companies non-complying liable to have their licenses or certificates revoked. State *v.* Citizens' Ins. Co., 71 Wis. 411.

**Common Law Included by Implication in Vermont Statute.**—Vermont Laws, 1874, Act 1, § 2, prohibited fire-insurance companies from transacting business in Vermont unless such company was responsible by "the laws of the State" in which said company or companies were situated, for the acts and neglects of its agents. *Held*, that "the laws of the State," as here used, were not restricted to statute laws, but included as well the common law. The design was to secure the old common-law principle of responsibility for acts and neglects of agent within the scope of his authority, and to prevent its annihilation by the common clause in policies seeking to make the insurance agent the agent, not of the company, but of the assured. Lycoming Fire Ins Co. *v.* Wright (Vt. 1888), 12 Atl. Rep. 107.

**Mandamus to Superintendent of Insurance.**—Where a foreign insurance company, tendering compliance with the laws of *Ohio*, applies for authority to transact its business within that State, the superintendent of insurance has no power, in the exercise of a mere arbitrary discretion, to refuse such admission. It is within the province of such superintendent, in considering the application of such insurance company for admission to transact business within the State, to inquire into its financial soundness, and if, upon such inquiry, made in good faith, he is not satisfied with its financial soundness, he is invested with discretion to refuse such admission; and his exercise of such discretion will not be controlled by *mandamus*. State of Ohio *v.* Moore, 39 Ohio St. 486; s. c., 5 Am. & Eng. Corp. Cas. 3.

**Quo Warranto to Insurance Commissioner.**—*Quo warranto* is the proper proceeding to try the right of a foreign corporation to carry on business in *Minnesota*. The insurance commissioner, in issuing certificates to foreign corporations, acts in a ministerial capacity. His determination is not judicial and final. State *v.* Fidelity, etc., Ins. Co. (Minn., Dec. 29, 1888), 41 N. W. Rep. 108.

1. Galveston R. Co. *v.* Cowdrey, 11 Wall. (U. S.) 459; Bellows *v.* Todd, 39 Iowa, 209; Arms *v.* Corant, 36 Vt. 745; Bassett *v.* Monte Christo M. Co., 15 Nev. 293; Ohio, etc., R. Co. *v.* McPherson, 35 Mo. 13; Wright *v.* Bundy, 11 Ind. 398; McCall *v.* Byram Mfg. Co., 6 Conn. 428; Wood Hydraulic Hose Mfg. Co. *v.* King, 45 Ga. 34; Smith *v.* Alvord, 63 Barb. (N. Y.) 415; Saltmarsh *v.* Spaulding (Mass. 1888), 20 Am. & Eng. Corp. Cas. 514. *Compare* Hiller *v.* Parrish, 14 N. J. Eq. 380; Ormsby *v.* Vermont Copper Mfg. Co., 56 N. Y. 623.

Where a corporation is organized for the purpose of doing business outside the State, and its contracts are made and business conducted in another State, and its by-laws, while they provide for an annual meeting and election of officers in the former State, provide also for directors' meetings for business in the latter State, the appointment of agents and the filling of vacancies in the board of directors there, a vote authorizing certain officers to mortgage land in the latter State may properly be taken by the directors in said State. Saltmarsh *v.* Spaulding (Mass. 1888), 20 Am. & Eng. Corp. Cas. 515.

The court said: "It would certainly be an extraordinary anomaly if, while, by the comity prevailing between the States, the corporation was allowed to conduct its business, it could disavow the acts of those whom it has appointed to direct its business here on the ground that the votes by which they were done were passed here. The case cited of Miller *v.* Ewer, 27 Me. 509, to sustain the statement in Ang. & A. Corp. § 274, on which the demandant relies, only holds that a corporation established under a charter of the State of *Maine* could not organize in another State, and that the attempt to do so was void, but recognizes fully that a corporation duly organized, and acting within the

valid unless they are especially restricted.[1] This right does not extend, however, to meetings of stockholders.[2] Where a corporation has been chartered and organized under the laws of two States, it may lawfully hold its meetings and transact its business in either.[3]

5. POWERS AS TO REAL ESTATE—The power of foreign corporations to hold real estate depends, first, upon the same general considerations which affect all corporations,[4] and, second, upon the laws and policy of the State where the land is situated. The principle is recognized as inviolable that the local law must regulate the mode of acquiring and the right to hold land.[5] In the absence of re-

limits of the State granting the charter, may, by agents duly constituted, act and contract without the limits of the State."

1. Bank of Augusta *v.* Earle, 13 Pet. (U. S.) 519; Hutchins *v.* New England Coal. Mfg. Co., 4 Allen (Mass.), 580; Blair *v.* Perpetual Ins. Co., 10 Mo. 559; New York Floating Derrick Co. *v.* New Jersey Oil Co., 3 Duer (N. Y.), 648; Tombigbee R. Co. *v.* Kneeland, 4 How. (U. S.) 16; Wood Hydraulic Hose Mfg. Co. *v.* King, 45 Ga. 34; Dodge *v.* City of Council Bluffs, 57 Iowa, 560. See Muneford *v.* Am. Life Ins., etc., Co., 4 N. Y. 463.

Where a franchise is granted without restriction, it may be exercised by the corporation wherever it may wish. Merrick *v.* Van Santvoord, 34 N. Y. 208; Kerchner *v.* Gettys, 18 S. Car. 521.

2. Aspinwall *v.* Ohio, etc., R. Co., 20 Ind. 492; Freeman *v.* Machias Water-power Co., 38 Me. 343; Ormsby *v.* Vermont Copper Mfg. Co., 56 N. Y. 623; Plimpton *v.* Bigelow, 93 N. Y. 592; Ohio, etc., R. Co. *v.* McPherson, 35 Mo. 13; Camp *v.* Byrne, 41 Mo. 525; Land Co. *v.* Laigle, 59 Tex. 339; Heath *v.* Silverthorne, etc., Co., 39 Wis. 146; Bellows *v.* Todd, 39 Iowa, 209; Miller *v.* Ewer, 27 Me. 509 (explained in Saltmarsh *v.* Spaulding (Mass. 1888), 20 Am. & Eng. Corp. Cas. 514). *Compare* Copp *v.* Lamb, 12 Me. 312.

A corporation dwells in the place where its business is transacted. Bank of Augusta *v.* Earle, 13 Pet. (U. S.) 519; Taylor *v.* Gas & Coke Co., 11 Ex. 1; Connecticut, etc., R. Co. *v.* Cooper, 30 Vt. 476; Stout *v.* Sioux City, etc., R. Co., 3 McCrary (C. C.), 1; Plimpton *v.* Bigelow, 93 N. Y. 592.

In State, etc., *v.* Milwaukee, etc., R. Co., 45 Wis. 579, the court observed: "It is the duty of a corporation to keep its principal place of business, its books and records, and its principal offices within the State which incorporated it, to an extent necessary to the fullest jurisdiction and visitorial power of the State and its courts, and the efficient exercise thereof in all proper cases which concern said corporation." *Compare* Morawetz Corp. (2d. Ed.) § 361.

In has been held that, if all the shareholders acquiesce in the holding of a meeting outside of the State limits, acts done thereat would be perfectly valid. Camp *v.* Byrne, 41 Mo. 525.

Field, J., said, in St. Clair *v.* Cox, 106 U. S. 350: "All that there is in the legal residence of a corporation in the State of its creation consists in the fact that by its laws the corporators are associated together, and allowed to exercise, as a body, certain functions, with a right of succession in its members."

3. In Covington, etc., Bridge Co. *v.* Mayer, 31 Ohio St. 325, the court observed: "We are satisfied that this corporation, having been chartered and organized under the laws of both States, might lawfully hold its meetings and transact its corporate business in either State. To hold otherwise would be to make every corporate act of the company ineffectual unless repeated in both States."

In Graham *v.* Boston, etc., R. Co., 118 U. S. 161, it was held that a railroad company composed of distinct corporations chartered by the legislatures of different States, having one set of shareholders and a united capital stock, has a domicil in each State, and a business meeting held in any one State will bind the corporation as to its property everywhere. Blackburn *v.* Selma, etc., R. Co., 2 Flip. (C. C.) 525; Ohio, etc., R. Co. *v.* Wheeler, 66 U. S. 286; Bridge Co. *v.* Mayer, 31 Ohio St. 317; State *v.* Northern Central R. Co., 18 Md. 193; Sprague *v.* Hartford, etc., R. Co., 5 R. I. 233.

4. See CORPORATIONS (PRIVATE), Powers as to Real Estate, 4 Am. & Eng. Encyc. of Law, 230 *et seq.*

5. In American, etc., Christian Union *v.* Yount, 101 U. S. 352, the court observed: "In harmony with the general law of comity obtaining among the States

strictions in its charter powers, and limitations in the local law, the implied right of foreign corporations to acquire and hold real estate is everywhere recognized.[1] It is the policy of the United

composing the Union, the presumption should be indulged that a corporation of one State, not forbidden by the law of its being, may exercise within any other State the general powers conferred by its own charter, unless it is prohibited from so doing either in the direct enactments of the latter State or by its public policy to be deduced from the general course of legislation or from the settled adjudications of its highest court." It was accordingly held that while it is a principle as inviolable as it is fundamental and conservative that the right to hold land and the mode of acquiring title to land must depend altogether upon the local law of the territorial sovereign, the presumption will be, unless rebutted as above explained, that a foreign corporation may exercise in a State the rights to acquire real estate. See also Binney's case, 2 Bland Ch. (Md.) 147.

The courts of the State where the lands are must determine for themselves whether the charter of the foreign corporation enables it to take or hold real estate in such State; and decisions of tribunals without the State are authority only from the reasoning therein contained.

Boyce *v.* St. Louis, 29 Barb. (N. Y.) 650, citing Birthwhiste *v.* Vardill, 7 Clark & Fin. 895, where it was held that the capacity of a child to inherit English lands as heir must be determined by the *English* law, and not by the *Scotch* law which recognized the child as legitimate though he was born before the marriage of his parents,—citing also Story Confl. Laws, §§ 428, 430, 474; Nicholas *v.* Leavitt, 4 Sandf. (N. Y.) 286; Hosford *v.* Nichols, 1 Paige (N. Y.), 226; Chapman *v.* Robertson, 6 Paige (N. Y.), 627.

In an action of ejectment by a plaintiff tracing his title to certain lands in *Utah* by *mesne* conveyances, through a certain corporation organized under the laws of California, it was not necessary that he should show by the laws of California that said corporation was authorized to hold real estate, the rights of a corporation to hold and convey property not being determined under the laws of the State under which it is organized, but by the laws of the government in which it is doing business and in which it acquires the property. Tarpey *v.* Deseret Salt Co. (Utah Ty. 1888), 17 Pac. Rep. 631. The court say: "This must be true, as a result of the rule that it is a question only between the corporation and the government," etc.

1. Am. Christian Union *v.* Yount, 101 U. S. 352; Cowell *v.* Colorado Springs Co., 100 U. S. 55; Runyan *v.* Coster, 14 Pet. (U. S.) 122, 130; New Hampshire Land Co. *v.* Tilton (N. H.), 19 Fed. Rep. 73; Thompson *v.* Waters, 25 Mich. 214; United States Trust Co. *v.* Lee, 73 Ill. 142; Columbus Buggy Co. *v.* Graves, 108 Ill. 459; Barnes *v.* Suddard, 117 Ill. 237; Northern Trans. Co. *v.* Chicago, 7 Biss. (C. C.) 45; New York Dry Docks *v.* Hicks, 5 McLean (C. C.), 111; Whitman Mfg. Co. *v.* Baker, 3 Nev. 386; National Trust Co. *v.* Murphy, 30 N. J. Eq. 408; Lumbard *v.* Aldrich, 8 N. H. 31; State *v.* Boston, etc., R. Co., 25 Vt. 433; Claremont Bridge Co. *v.* Boyce, 42 Vt. 736; Page *v.* Heineberg, 40 Vt. 81; American Bible Society *v.* Marshall, 15 Ohio St. 541; State *v.* Sherman, 22 Ohio St. 433; Leazure *v.* Hillegas, 7 S. & R. (Pa.) 313; Baird *v.* Baird, 11 S. & R. (Pa.) 411; Thompson *v.* Swoope, 24 Pa. St. 474; Silver Lake Bank *v.* North, 4 Johns. Ch. (N. Y.) 370; Merrick *v.* Van Santvoord, 34 N. Y. 214; Henriques *v.* Dutch East India Co., 2 Ld. Raym. 1533; 2 Kent Com. (12th Ed.) 283, note; Elston *v.* Piggott, 94 Ind. 14; s. c., 8 Am. & Eng. Corp. Cas. 185.

In Cowell *v.* Colorado Springs Co., 100 U. S. 55, it was held that, by the general comity which, in the absence of positive directions to the contrary, obtains throughout the States and Territories of the United States, corporations created in one State or Territory are permitted to carry on any lawful business in another State or Territory, and to acquire, hold, and convey property there, equally as individuals.

It was said, in *Michigan*, respecting an Indiana corporation, that its power to take and hold Michigan land depended first on the *Indiana* law, and then by the Michigan laws and the policy indicated thereby. The mere right of such corporation to purchase and sell property not being in its nature strictly a franchise, will be recognized and protected in another State, subject only to the qualification that the enjoyment and exercise of such rights shall not be contrary to the laws or settled policy of the latter State, or prejudicial to its interests or those of its citizens. An affirmative enabling act of the State is not necessary to enable a foreign corporation to take lands in such State. *Held*, accordingly, that the Indiana corporation

States, as regards its Territories, to limit this right to the holding of a specified amount, which was accordingly done in a late statute,[1] And, in perhaps all of the States, statutes of similar purpose and import exist, or else the limitation is to "real estate necessary to their use," or their powers in this regard are made similar to those of the domestic corporations of the State.[2]

It is also settled that, where a foreign corporation is incompetent to take title to real estate because of statutes prohibiting or limiting its powers, a conveyance to it is not void but voidable. The question cannot be raised in collateral proceedings, but is only assailable in a direct proceeding by the State.[3]

could take land in Michigan. Thompson *v.* Waters, 25 Mich. 214.

A foreign corporation may take a deed of land in *Illinois* where a domestic corporation could. Hence, foreign corporations, for pecuniary profits, may acquire real estate in Illinois as far as is necessary to the transaction of their business. And whether, in taking it, the corporation has exceeded its powers is a question with which only the State is concerned. Illinois Rev. Stat. 1874, ch. 32, § 26; Barnes *v.* Suddard, 117 Ill. 237.

A foreign corporation of an American State may purchase *Kentucky* land, or take mortgage thereon to secure the same. At common law, there was nothing to prevent corporations from taking land, and, in the absence of discrimination by statute against foreign American companies, which cannot be considered aliens, they have the same rights, and the restrictions in regard thereto, as are possessed or encountered by domestic corporations. Lathrop *v.* Commercial Bank of Scioto, 8 Dana (Ky.), 114, 120 (1839).

1. **United States Statute, 1887.**—Ownership of real estate in the Territories and in the District of Columbia restricted to American citizens, excepting cases of aliens acquiring land by inheritance, or in payment of existing debts, or where the right to acquire and hold land is secured to them by existing treaties; land to be acquired, held, or owned by corporations, except railway, canal, or turnpike corporations, limited to 5000 acres, and in case of such excepted corporations to so much as shall be necessary for purposes of operating their railway, etc., unless held by grant from United States; violations of the act to result in forfeiture of the land. U. S. act, March 3, 1887, 24 Stat. at L. ch. 340, p. 476.

2. **New Jersey Statute, 1887.**—The act concerning corporations (Rev. p. 195, § 99) amended so as to authorize foreign corporations having charter authority to engage in the business of acquiring, holding, mortgaging, leasing, and conveying real estate to pursue the conduct of such business in the State of New Jersey, and to that end to acquire, hold, mortgage, lease, and convey real estate therein. New Jersey act, 1887, April 11 (L. 1887, ch. 124).

**New York Statute, 1887.**—Corporations organized under laws of any other State, doing business in the State of New York, authorized to hold and purchase real estate within that State necessary for their use, and to convey same by deed or otherwise. N. Y. act, May 24, 1887 (L. 1887, ch. 450, p. 551).

A *Pennsylvania* statute provides that no foreign corporation shall acquire and hold any real estate in that State, "directly in the corporate name, or by or through any trustee or other device whatsoever," unless authorized by statute of that State (act April 26, 1855, § 5). *Held*, that such a corporation could not evade the statute by purchasing the franchise of a Pennsylvania corporation owning such real estate as allowed by its charter, and that the real estate would, on such purchase, escheat to the State. Commonwealth *v.* New York, etc., R. Co., 114 Pa. St. 340.

3. In Cowell *v.* Colorado Springs Co., 100 U. S. 55, it was held that, when a corporation is authorized by statute to hold real property necessary to enable it to carry on its business, the inquiry whether any particular property is necessary for that business is a matter between the government of the State and the corporation, and is no concern of third parties. It would create great inconveniences and embarrassments if, in actions by corporations to recover the possession of their real property, an investigation was permitted into the necessity of such property for the purposes of their incorporation, and the title made to rest upon the proof of that necessity. See also National, etc., Co. *v.* Clarkin, 14 Cal. 552; Barnes *v.* Suddard, 117 Ill. 237.

(*a*) *Mortgages.*—Foreign corporations may also make and execute mortgages, receive and foreclose them;[1] but the burden is upon the corporation, or those claiming under it, to show that by its charter it is a body politic authorized to take or convey lands.[2]

A foreign corporation which has not complied with statutory conditions regulating its transaction of business in a State, is not thereby rendered incapable of taking a mortgage upon real estate.[3] It may buy land at an execution sale in its favor,[4] there being

The capacity of a foreign corporation to take and hold title to land cannot be raised collaterally. Such a question can only be made in behalf of the State in a direct proceeding. Hough *v.* Cook Co. Land Co., 73 Ill. 23; Brown *v.* Phillips, 16 Iowa, 210; People *v.* Mauran, 5 Den. (N. Y.) 389; Page *v.* Heineberg, 40 Vt. 81; Tarpey *v.* Deseret Salt Co. (Utah Ty. 1888), 17 Pac. Rep. 631. *Compare* Alexander *v.* Tolleston Club, 110 Ill. 65; s.c., 8 Am. & Eng. Corp. Cas. 239.

1. A foreign corporation may take a mortgage to secure a claim. It may enforce the remedy and may levy execution, with all the rights of any other levying creditor. American Mut. Life Ins. Co. *v.* Owen, 15 Gray (Mass.), 491; Silver Lake Bank *v.* North, 4 Johns. Ch. (N. Y.) 370; Lathrop *v.* Commercial Bank of Scioto, 8 Dana (Ky.), 114; Lumbard *v.* Aldrich, 8 N. H. 31; New York Dry Dock *v.* Hicks, 5 McLean (U. S.), 111; Farmers' Loan Co. *v.* McKinney, 6 McLean (C. C.), 1; Hards *v.* Connecticut, etc., Ins. Co., 8 Biss. (C. C.) 236; Life Ins. Co. *v.* Overholt, 4 Dill. (C. C.) 287; Stevens *v.* Pratt, 101 Ill. 206; National Trust Co. *v.* Murphy, 30 N. J. Eq. 408; Lebanon Savings Bank *v.* Hollenbeck, 29 Minn. 322; Leasure *v.* Union Mut. Life Ins. Co., 91 Pa. St. 491; Bard *v.* Poole, 2 Kern. (N. Y.) 495. *Compare* U. S. Mortgage Co. *v.* Gross, 93 Ill. 483.

In *New York*, it was held that if an incorporated bank of another State lend money and take a mortgage in New York State, it is not a violation of New York act of 1818 relative to banks, etc., for restraining unincorporated associations from carrying on banking business. Silver Lake Bank *v.* North, 4 Johns. Ch. (N. Y.) 373.

In Saltmarsh *v.* Spaulding (Mass. 1888), 20 Am. & Eng. Corp. Cas. 514, it was held that the provisions of the Mass. Pub. Stat., ch. 106, § 103, relating to conveyances or mortgages by corporations, refers only to corporations subject to the provisions of that chapter, and is not applicable to foreign corporations. A mortgage executed by a foreign corporation upon its real estate situate in Massachusetts, in accordance with the laws of the State, by which it was created, is valid in *Massachusetts*. The court observes: "While the general principle no doubt is that the law of the place where real property is situate exclusively governs as to the title of the parties therein, the disposition and mode of transfer thereof, and the solemnities attending such transfer, and while we do not doubt that it would be possible to provide by legislation that foreign corporations permitted to own real property situate in this State should only transfer the same by authority of the stockholders, no such provision has been made. Attorney-General *v.* Bay State Mining Co., 99 Mass. 148. While they must comply, in their forms of conveyance, with those here required, they derive their authority to make them from the rules imposed upon them by the State where they are created."

2. Angell & Ames Corp. (Ed. of 1882) § 162, and authorities cited.

3. *Colorado Territory* act requiring filing in 30 days, of evidence of incorporation of foreign corporation, entering therein, but containing nothing to indicate that this was a condition on which they might continue in business, but providing penalty on the officers failing to comply, was held not to render the non-complying foreign corporation incapable of taking a mortgage on real estate in the late Territory; and it was held that no prohibition to continue in business could be implied from these enactments. Northwest. Mut. L. Ins. Co. *v.* Overholt, 4 Dill. (C. C.) 287.

4. Elston *v.* Piggott, 94 Ind. 14; s. c., 8 Am. & Eng. Corp. Cas. 185. A foreign corporation had commenced a suit to foreclose a mortgage, in the United States circuit court, before *Indiana* R. S. §§ 3029, 3030 were enacted, and obtained a decree afterwards. It began another suit against another party, in that court, after that statute took effect, and still later it became the purchaser of lands sold at judicial sale to satisfy its first decree, and took a deed therefor. *Held*, that the

no statute to prevent it, and can convey the title thus acquired.[1]

But a non-complying company cannot enforce a mortgage for money loaned by its agent; the mortgage is not void, but its enforcement must await compliance by the company.[2]

(*b*) *Devise.*—The power of all corporations to take property by devise is regulated by statute in various States. The implied power of corporations, both domestic[3] and foreign,[4] to take and hold real estate, except as limited by law, is well recognized. But it seems to be an unquestioned principle that a State may place

corporation took title, notwithstanding the statute, which is void so far as by its terms it undertakes to affect the title.

"We know, as matter of general history, that for many years foreign corporations have loaned money on mortgage security, and that there is no decision questioning their right to buy land at sales on decrees in their favor. We know also that their right to make such loans has been expressly recognized. Pancoast *v.* Travelers Ins. Co., 79 Ind. 172. We know too that the legislature has tacitly, if not expressly, recognized this general right by enacting laws restricting and limiting it. If there is no such general right, then for a long series of years the legislature has been paying deference to a mere shadow." Elston *v.* Piggott. 94 Ind. 14; s. c., 8 Am. & Eng. Corp. Cas. 185.

1. In Lumbard *v.* Aldrich, 8 N. H. 31, it was said: "If foreign corporations may sue here, they must be entitled to the benefit of their judgments, according to the ordinary course of law. They may therefore levy on land in satisfaction of their executions." Again: "If they may thus acquire a title, it would be exceedingly absurd to say that they might not obtain an action for possession, or that they could not convey the title thus acquired." Lumbard *v.* Aldrich, 8 N. H. 31; Cooley Const. Lim. (5th Ed.) 152.

2. Daly *v.* Nat. L. Ins. Co., 64 Ind. 1. Non-compliance with statutory requirement as to consent to be sued, and authorizing service on agent, does not make void a mortgage taken by a foreign corporation, though it can be set up by plea in abatement as showing the premature bringing of the action. Daly *v.* Ins. Co., 64 Ind. 5; Walter A. Wood, etc., Co. *v.* Caldwell, 54 Ind. 270.

In *Oregon*, the United States circuit court held that the non-complying corporation could not purchase at the sheriff's sale on a mortgage executed to such company. In that State, mortgages are but securities and do not entitle to possession; and, even though the foreign corporation obtain a decree directing sale upon it, which as between the parties is *res adjudicata* and settles the question as to that suit, yet, as mortgages are but security, the possession or conveyance by the sheriff is another matter, and the title conveyed to the foreign corporation is void. Semple *v.* Bank of British Columbia, 5 Sawy. (C. C.) 88.

**Ejectment.**—A foreign corporation may bring an action of ejectment. New York Dry Dock *v.* Hicks, 5 McLean (C. C.), 111. And real actions. American, etc., Ins. Co. *v.* Owen, 15 Gray (Mass.), 493; Smith *v.* Little, 67 Ind. 549.

Real action by foreign corporations has been sustained by the United States circuit court in Society for Propagation of the Gospel *v.* Wheeler, 2 Gall. (U. S.) 105; and by the supreme court of the United States, in Runyan *v.* Coster's Lessee, 14 Pet. (U. S.) 122.

**Chattel Mortgage.**—*Arkansas* statutes require chattel mortgages to be recorded in a county where the mortgagor resides. Such a mortgage executed by a foreign corporation doing business in a certain county was recorded there. Subsequently certain creditors obtained judgment against the corporation and seized the personal property under execution. The mortgagees afterwards sought to foreclose the mortgages joining the judgment creditors as defendants. *Held*, that. as the corporation had no residence in Arkansas, the recording the mortgage did not give the mortgagees a lien as against creditors who had sued upon the foreclosure proceedings. Watson *v.* Thompson Lumber Co. (Ark. 1887), 17 Am. & Eng. Corp. Cas. 211.

3. See CORPORATIONS (PRIVATE), Powers as to Real Estate, 4 Am. & Eng. Encyc. of Law, 230.

4. See. *supra*, this title, POWERS AS TO REAL ESTATE.

upon corporations of its own creation such limitations or prohibitions in this regard as its policy may dictate; and, if a State may not also regulate the acquisition by foreign corporations of real property within its boundaries, the essential doctrines of real estate law and the established limitations upon the law of comity must be overthrown.[1] It is accordingly settled that foreign corporations cannot acquire by purchase large quantities of land in a State if the State's implied policy forbids it;[2] nor can a corporation, with power under its charter to take by devise, so take property in a State whose laws prohibit such devises.[3]

In some of the States, devises to corporations are forbidden except under certain conditions; and the question of the application of such statutes to foreign corporations has arisen. They clearly apply to foreign corporations attempting to so take property in a State where they are in force;[4] but they belong to that class of local statutes which do not necessarily follow foreign corporations into other jurisdictions.[5] It has been pointed out that they are intended to regulate the testamentary capacity of citizens in the State where they are adopted, and not to affect citizens of other States, and that their primary purpose is to define such testamentary capacity rather than to regulate corporations in the acquistion of property.[6] Accordingly, where a foreign corporation is generally competent to take land, the prohibition in the Statute of Wills of the State which created it against all devises of lands to corpo-

1. See authorities cited, *supra*, POWERS AS TO REAL ESTATE.

2. "In Carroll *v.* East St. Louis, 67 Ill. 568, the question was whether the Connection Land Co., a corporation created in another State for the sole purpose of buying and selling lands, had power to purchase and hold title to lands in the State of *Illinois*. The decision was that it could not, for the reason—and no other is assigned—that, if the company were permitted to exercise its functions in Illinois to the full extent authorized by its charter, it could acquire lands without limit as to quantity and hold them in perpetuity; that such privileges had never been accorded by Illinois to her own domestic corporations, and were inconsistent with her settled public policy against perpetuities, as indicated, not by direct express enactment, but with absolute certainty by the general course of its legislation from the very organization of the State." American, etc., Christian Union *v.* Yount, 101 U. S. 352.

3. United States *v.* Fox, 94 U. S. 315; White *v.* Howard, 46 N. Y. 144; Boyce *v.* City of St. Louis, 29 Barb. (N. Y.) 650.

In Fellows *v.* Miner, 119 Mass. 541, it was held that when a corporation of *New York* which had no power to take by devise wished to take by devise in *Massachusetts*, being a charity, it was entitled to the favor of the court, and the devise would be kept in abeyance to permit of the passage of an enlarging act in New York which would authorize the corporation to so take the property. *Compare* Baker *v.* Clarke Inst., 110 Mass. 88; Ould *v.* Washington Hospital, 95 U. S. 313.

4. See authorities cited in preceding note.

5. In White *v.* Howard, 38 Conn. 342, the court observed: "There is no prohibition in the charter; the inability is created by the *New York* Statute of Wills, expressly excepting corporations from taking by devise. Now, this corporation brings with it from New York its charter, but it does not bring with it the New York Statute of Wills, and cannot bring it to be recognized as law within this jurisdiction. There is an obvious distinction between an incapacity to take created by the statute of a State which is local, and a prohibitory clause in a charter which everywhere cleaves to the corporation."

6. Thompson *v.* Swoope, 24 Pa. St. 474; Morawetz Corp. (2d Ed.) § 332. *Compare* Van Sant *v.* Roberts, 3 Md. 119; Brown *v.* Tompkins, 49 Md. 423.

rations, does not prevent it from taking and holding land in a State, by devise of one of that State's citizens, if such devise is not there unlawful.[1] In the absence of some such restrictions, the implied power of foreign corporations to take and hold real and personal property by devise or gift is undoubted.[2]

1. In Starkweather *v.* American Bible Soc., 72 Ill. 50, there was a devise by a citizen of Illinois, of land in that State, to a corporation of New York, which was incapable, under the laws of that State, of taking property by devise. It was held that *New York* had no power to create a body incapable of taking land in that State by devise, and yet with power to so take lands in a foreign jurisdiction. The principles announced in Carroll *v.* East St. Louis, 67 Ill. 568, were regarded as conclusive against the claim of the Bible Society; "as," said the court, "all of the inconveniences and injuries are as likely to ensue in this, and other cases like it, as in that."

In American, etc., Christian Union *v.* Yount, 101 U. S. 352, the devise was made in Illinois, by a citizen thereof, to a corporation of New York made capable of taking, receiving, purchasing, and holding real estate for the purposes of its incorporation, and for no other purpose, to certain specified amounts, and no question was raised of its power, consistent with its own charter and the laws of New York, to acquire, for the purposes of its creation, real estate within these limits. In holding that the devise was valid, and distinguishing the cases of Carroll *v.* East St. Louis, 67 Ill. 568, and Starkweather *v.* American Bible Soc., 72 Ill. 50, Harlan, J., observes:

"The Starkweather case was held to be concluded by the principles announced in the Carroll case, for the reason perhaps that the property devised could, consistently with the will of the testator and the charter of the society, have been held for a period of time beyond that allowed to similar corporations of *Illinois* holding lands in that State. Upon no other ground are we able to understand how the Starkweather case was concluded by the principles announced in Carroll *v.* East St. Louis, 67 Ill. 568. Neither decision warrants the conclusion that, at the date of the deed to appellant, a benevolent, religious, or missionary corporation of another State, having authority under its own charter to take lands in limited quantities for the purposes of its incorporation, was forbidden, by the statutes or public policy of Illinois, from taking title, for such purposes, to real property in that State under a conveyance from one of its citizens, duly executed and recorded as required by its laws. The conveyance to the appellant can be sustained without in any degree impairing or doing violence to the fundamental principle enunciated in the Carroll case, viz., that the corporations cannot acquire lands in Illinois, in large quantities, to be held, or which may be held, in perpetuity. It can also be sustained, without violating the main proposition laid down in the Starkweather case, viz., that a foreign corporation, forbidden, by the laws of the State creating it, to acquire lands there by devise, could not, by that mode, take lands in Illinois, in the absence of a statute of that State assenting thereto. We cannot presume that it is now, or was in 1870, against the public policy of Illinois that one of its citizens should convey real estate there situated to a benovelent or missionary corporation of another State of the Union for the purpose of enabling it to carry out the objects of its creation, when that State permitted its own corporations, organized for like purposes, to take real estate within its limits, by purchase, gift, devise, or in any other manner."

In Santa Clara Female Acad. *v.* Sullivan, 116 Ill. 375. it was held that a corporation created by the laws of *Wisconsin* for educational purposes, with the power to acquire and hold real estate, is capable of taking by devise lands in Illinois. The court revieved the Illinois statutes, and showed that they were not only not prohibitory of corporations for educational purposes holding land in that State, but expressly empowered such corporations to take by devise and grant, without limit in quantity and value, except when held beyond a certain length of time, and said that there was no discrimination against foreign corporations, which were to be hospitably received on footing equal with those domestic. Receiving tuition fees, or "pecuniary profit," all of which are applied to educational purposes, does not alter the decision.

2. American Bible Soc. *v.* Marshall, 15 Ohio St. 537; Thompson *v.* Swoop, 24 Pa. St. 480; Sherwood *v.* American Bible Soc., 4 Abb. Ct. App. Dec. (N. Y.) 227; White *v.* Howard, 38 Conn. 342; Hollis

(*c*) *Eminent Domain.*—The power of eminent domain granted to a corporation of one State is not such a privilege as will be extended by comity alone to the corporation's transactions in another State.[1] But a State may confer upon a foreign corporation the right of eminent domain;[2] and, by consent of the legislature, a foreign corporation may exercise it as a *quasi* successor of another corporation to which it was originally granted.[3] So, the same right may be conferred upon a consolidated company composed in part of a foreign corporation.[4]

*v.* Drew Theol. Sem., 95 N. Y. 166; Morawetz Corp. (2d Ed.) § 961.

**1. Eminent Domain.**—Middle Bridge Co. *v.* Marks, 26 Me. 326; State *v.* Boston, etc., R. Co., 25 Vt. 433. *Compare* Baltimore, etc., R. Co. *v.* P.W. & Ky. R. Co., 17 W. Va. 812; s. c., 10 Am. & Eng. R. R. Cas. 444.

**2.** Lewis on Eminent Domain (1888), § 242; State of Ohio *v.* Sherman, 22 Ohio St. 434; Morris Canal & Bkg. Co. *v.* Townsend, 24 Barb. (N. Y.) 658; Matter of Townsend, 39 N. Y. 171; New York & Erie R. Co. *v.* Young, 33 Pa. St. 175; Dodge *v.* Council Bluffs, 57 Iowa, 560; Abbott *v.* N. Y., etc., R. Co., 145 Mass. 450; s. c., 33 Am. & Eng. R. R. Cas. 146; Gray *v.* St. Louis, etc., R. Co., 81 Mo. 126.

In *Iowa*, it was held that, although a foreign corporation did not have power to condemn land in that State, a domestic corporation, organized at the instance of a foreign corporation, could condemn land for the purpose of leasing it to such foreign corporation. Lower *v.* Chi. & Quincy R. Co., 59 Iowa, 563. The Iowa statute conferred power on "railroad corporations organized under the laws of this State." *Held*, necessarily, a denial of the right to foreign corporations. Holbert *v.* St. Louis, etc., R. Co., 45 Iowa, 23.

**3.** Abbott *v.* N. Y. & N. E. R. Co., 145 Mass. 450; s. c., 33 Am. & Eng. R. R. Cas. 146.

The defendant's grantor, a foreign corporation, purchased the franchise of the Midland R. Co., a *Massachusetts* corporation with general powers, and located in March, 1866; *held*, that by a course of legislation of nearly 20 years, Massachusetts had dealt with defendant and its predecessors as having good title to the road, and as having possessed the powers assumed by them; and under such legislation the location of the road-bed was valid. The court say that, in the transfer of the power, the legislative consent may be inferred somewhat more readily than when the whole question is new; since the *delectus personarum* is of little more than theoretical importance, and is the least determining element in the more common cases where the power is conferred. A legislative contemplation that the road would not only connect but unite with roads without the State shows that power to sell was not confined to domestic purchasers.

An act is constitutional, although the lands appropriated are to be used by the foreign corporation for the maintenance of a navigable canal which runs along the border of the State, but without its limits. *Re* Peter Townsend, 39 N. Y. 171, cited by the Massachusetts court in Abbott *v.* N. Y. & N. E. R. Co., 145 Mass. 450; s. c., 33 Am. & Eng. R. R. Cas. 146.

**4.** Toledo, etc., R. Co. *v.* Dunlap, 47 Mich. 456, 465; Lewis on Eminent Domain (1888), § 242. Constitutional provisions in some States forbid the power to foreign corporations. Lewis on Eminent Domain (1888), § 242. The *Nebraska* constitution denies the power to a foreign corporation unless it organizes as a corporation under laws of that State; and it was held that it could not proceed as lessee or otherwise of a domestic corporation. State *v.* Scott, 22 Neb. 643 (1888); Trester *v.* Missouri Pac. R. Co. (Neb.), 36 N. W. Rep. 502.

In Morris Canal & Bkg. Co. *v.* Townsend, 24 Barb. (N. Y.) 658, the legislature authorized the taking by the foreign corporation. The statute was held constitutional. In Abbott *v.* N. Y. & New Eng. R., 145 Mass. 450 (1888); s. c., 33 Am. & Eng. R. R. Cas. 146, it was held that, although the power to take land by the right of eminent domain, which has been granted by the legislature to a domestic railroad corporation, will not pass to a foreign corporation succeeding by deed to the rights and powers of the domestic corporation, without the assent of the legislature, such assent may be gathered by implication from a series of acts of the legislature.

(*d*) *Lease.*—A foreign corporation may take a lease of premises for its business.[1]

(*e*) *Trustees.*—A foreign corporation may be made a trustee of property real and personal.[2]

6. POWERS MADE THOSE OF DOMESTIC CORPORATIONS.—In some States, the statutes regulating the management and transactions of foreign corporations subject them to the same duties, liabilities, and restrictions as domestic corporations, and confer upon them substantially the same powers.[3]

7. POWERS AS TO PERSONAL PROPERTY.—The power of foreign corporations, except as limited by their charters, to acquire and deal with personal property is unlimited.[4]

**V. Constitutional Rights.**—Those rights guaranteed by the Federal Constitution—protection of property, hearing of claims according to law, non-impairment of contracts, taking of property only by due process of law—belong to corporations independently of the franchise of acting in a corporate capacity and as an association of individuals who are citizens of the United States, whether recognized as a corporation or not.[5]

1. NOT CITIZENS UNDER FEDERAL CONSTITUTION.—A State having the power to entirely exclude foreign corporations, it follows

**1. Lease.**—A foreign corporation may take a lease of premises for its business. Every corporation may contract; and, having purchased and paid for real estate, the vendor cannot take it back at his pleasure, nor make the contract null and void as to him. The State, by virtue of its transcendental power, may escheat it. But this principle does not extend to a lease or to a contract, express or implied, for the purpose of enabling a corporation to carry on its business. Steamboat Co. *v.* McCutcheon, 13 Pa. St. 13. See Northern Trans. Co. *v.* Chicago, 7 Biss. (C. C.) 45; Black *v.* Delaware & R. Canal Co., 22 N. J. Eq. 130, 422.

In Baltimore, etc., Steamboat Co. *v.* McCutcheon, 13 Pa. St. 13. Coulter, J., observed: "Some things lie too deep, in the common-sense and common honesty of mankind, to require either argument or authority to supply them."

**2.** Farmers' Loan & Trust Co. *v.* Chicago, etc., R. Co. (Ind.), 27 Fed. Rep. 146.

In United States Trust Co. *v.* Lee, 73 Ill. 142 (1874), the *Illinois* court held that a foreign corporation cannot purchase and hold real estate in Illinois beyond what is necessary for the transaction of its business or the collection of its debts, either for its own benefit or in trust for others.

In the case just cited, a New York corporation, with power to act as trustee in carrying out the provisions of a will devising real estate, and which was by the courts of that State appointed such trustee, under which the corporation took the charge and management of all the real estate devised, including real estate in Illinois, filed a bill in Illinois to be appointed trustee to carry out the provisions of the will. But it was held that the foreign corporation could not hold real estate in Illinois in trust, and that the bill was properly dismissed. McAlister and Sheldon, JJ., dissented.

**3.** *New York* Penal Code, 1881, § 613; *Pennsylvania*, Purd. Dig. 1883, title Corporations, § 132; *Colorado* Gen. Stat. 182, ch. 19, § 24.

The *Illinois* provision, Ill. Rev. Stat. (1 Starr & Curtis Stat.) ch. 32, § 26, has been held to imply that foreign and domestic corporations have the same powers. Barnes *v.* Suddard, 117 Ill. 237; Santa Clara Female Academy *v.* Sullivan, 116 Ill. 375; Stevens *v.* Pratt, 101 Ill. 217. See also constitution of *Arkansas*.

**4.** Am. Mut. Life Ins. Co. *v.* Owen, 81 Mass. 491; Lumbard *v.* Aldrich, 8 N. H. 31; Thompson *v.* Waters, 25 Mich. 225; Page *v.* Heineberg, 40 Vt. 81.

**5.** Importing Co. of Georgia *v.* Locke, 50 Ala. 335; Society Prop. Gosp. *v.* New Haven, 8 Wheat. (U. S.) 483; Lafayette Ins. Co. *v.* French, 18 How. (U. S.) 407; Doyle *v.* Continental Ins. Co., 94 U. S. 539; Barclay *v.* Talman, 4 Edw. Ch. (N. Y.) 123; Vermont *v.* Soc. Prop. Gosp., 1 Paine (C. C.), 653; Merrick *v.* Van Santvoord, 34 N. Y. 208.

that such corporations are not citizens within the purview of the Constitution of the United States, and are not entitled to privileges and immunities as citizens of the several States.[1]

(*a*) *Discrimination.*—A State may therefore discriminate against corporations chartered by another State, and in favor of its own; and such discrimination is not against the individual citizens of the other State.[2]

1. Paul *v.* Virginia, 8 Wall. (U. S.) 177; Ducat *v.* Chicago, 10 Wall. (U. S.) 410; Railway Co. *v.* Whitton, 13 Wall. (U. S.) 270; Warren Mfg. Co. *v.* Ætna Ins. Co., 2 Paine (C. C.), 501; Liverpool Ins. Co. *v.* Massachusetts, 10 Wall. (U. S.) 566; Doyle *v.* Continental Ins. Co., 94 U. S. 535; Cooper Mfg. Co. *v.* Ferguson, 113 U. S. 727; Philadelphia Fire Assoc. *v.* New York, 119 U. S. 110; s. c., 15 Am. & Eng. Corp. Cas. 421.

*Kentucky* act, 1860, March 2 (Meyer Supp. 228), requiring the agents of foreign express companies doing business within the State to first obtain a license therefor does not violate the provision of the Federal Constitution that "The citizens of each State shall be entitled to all the immunities of citizens of the several States," a corporation not being included in the term "citizen." Woodward *v.* Commonwealth (Ky. 1887), 7 S. W. Rep. 613.

2. Ducat *v.* Chicago, 10 Wall. (U. S.) 414; Paul *v.* Virginia, 8 Wall. (U. S.) 168; Insurance Co. *v.* New Orleans, 1 Woods (C. C.), 85; Bank of Augusta *v.* Earle, 13 Pet. (U. S.) 519; Lafayette Ins. Co. *v.* French, 18 How. (U. S.) 404; Liverpool Ins. Co. *v.* Massachusetts, 10 Wall. (U. S.) 566; Doyle *v.* Continental Ins. Co., 94 U. S. 535; Cooper Mfg. Co. *v.* Ferguson, 113 U. S. 727; s. c., 8 Am. & Eng. Corp. Cas. 178; Philadelphia Fire Assoc. *v.* New York, 119 U. S. 110; s. c., 15 Am. & Eng. Corp. Cas. 421.

In Philadelphia F. Assoc. *v.* New York, 119 U. S. 110; s. c., 15 Am. & Eng. Corp. Cas. 421, Blatchford, J., observed, referring to Paul *v.* Virginia, 8 Wall. (U. S.) 168: "The view announced was that corporations are not citizens within the clause first cited, on the ground that the privileges and immunities secured to the citizens of each State, in the several States, are those which are common to the citizens of the latter States, under their constitutions and laws, by virtue of their being citizens; and that, as a corporation created by a State is a mere creation of local law, even the recognition of its existence by other States, and the enforcement of its contracts made therein, depend purely on the comity of those States—a comity which is never extended where the existence of the corporation or the exercise of its powers is 'prejudicial to their interests or repugnant to their policy.' And the court, speaking by Mr. Justice Field, said: 'Having no absolute right of recognition in other States, but depending for such recognition and the enforcement of its contracts upon their assent, it follows, as a matter of course, that such assent may be granted upon such terms and conditions as those States may think proper to impose. They may exclude the foreign corporation entirely; they may restrict its business to particular localities, or they may exact such security for the performance of its contracts with their citizens as in their judgment will best promote the public interest. The whole matter rests in their discretion.'"

Corporations are not citizens, within the meaning of the clause of the United States Constitution declaring that the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States. Art. IV, § 2, cl. 1.

A private corporation is indeed included under the designation of "person" in Amendment XIV, § 1. The provisions in said section that "No State shall deny to any person within its jurisdiction the equal protection of the laws," do not prohibit a State from requiring, for the admission within its limits of a corporation of another State, such conditions as it chooses. The object of the amendment is to prevent any person or class of persons from being singled out as a special subject for discriminating and hostile legislation. The equal protection is only such accorded to similar associations within the jurisdiction of the State. A foreign corporation is not within the jurisdiction. "The office it hires is within such jurisdiction, and, on condition that it pays the required license tax, it can claim the same protection in the uses of the office that any other corporation having a similar office may claim. It would then have the equal protection of the law so far as it had anything within the jurisdiction of the State; and the constitutional amendment requires nothing more. The State is not prohibited from discriminating in the privileges it may grant to foreign corporations as a

(*b*) *Citizenship Assumed for Purposes of Federal Jurisdiction.*—For the purpose of jurisdiction, it is conclusively presumed that all the stockholders are citizens of the State which by its laws created the corporation.[1] The fact that some of them are not citizens of such State is not material.[2]

(*c*) *Standing as Citizens in State Courts.*—The same construction of the citizenship of a foreign corporation seems to have been made in a suit in a State court—that, for purposes of suing and being sued, a corporation has the same rights as the citizens of which it is composed, who are presumed to be citizens of the State which incorporated it.[3]

condition of their doing business or hiring offices within its limits," etc. Corporations lawful in their domicil may be unwelcome; as, a lottery company. And even where the business of the foreign corporation is lawful in the State it wishes to enter, the State may wish to limit their number or regulate their business pursuant to the policy governing similar domestic corporations. "The only limitation upon this power of the State to exclude a foreign corporation from doing business within its limits or hiring offices for that purpose, or to exact conditions for allowing the corporation to do business or hire offices there, arises where the corporation is in the employ of the Federal government, or where its business is strictly commerce, interstate or foreign. The control of such commerce being in the Federal government, is not to be restricted by State authority." Pembina Mining Co. *v.* Pennsylvania, 125 U. S. 181.

Conditions of entry may be reasonable or unreasonable. They are absolutely in discretion of the legislature. Hartford Fire Ins. Co. *v.* Raymond (Mich.), 38 N. W. Rep. 482.

1. In Bank *v.* Deveaux, 5 Cranch (U. S.), 61, Marshall, C. J., said: "That invisible, intangible, and artificial being, that mere legal entity, a corporation aggregate, is certainly not a citizen, and consequently cannot sue or be sued in the courts of the United States unless the rights of the members in this respect can be exercised in their corporate name;" and decided that the character of the individuals composing the corporation could be looked to. Bank of Augusta *v.* Earle, 13 Pet. (U. S.) 586.

A corporation itself can be a citizen of no State, in the sensein which the word "citizen" is used in the Constitution of the United States. A suit may be brought in the Federal courts by or against a corporation, but in such case it is regarded as a suit brought by or against the stockholders of the corporation; and it is conclusively presumed, for purposes of jurisdiction, that all the stockholders are citizens of the State which, by its law, created the corporation. Muller *v.* Dows, 94 U. S. 445.

It is well settled that a corporation created by a State is a citizen of the State, within the meaning of those provisions of the Constitution and statutes of the United States which define the jurisdiction of the Federal courts. State of Wisconsin *v.* Pelican Ins. Co., 8 Sup. C. Rep. (U. S. 1880) 1370.

A corporation, for jurisdictional purposes, is a citizen of the State by which it was created, even if all its business is transacted elsewhere and all its offices and places of business are outside of the State. Pacific R. Co. *v.* Missouri Pac. R. Co. (Kan.), 23 Fed. Rep. 565. See Paul *v.* Virginia, 8 Wall. (U. S.) 177; Insurance Co. *v.* Francis, 11 Wall. (U. S.) 210; Ohio, etc., R. Co. *v.* Wheeler, 1 Black (U. S.), 286; Louisville, etc., R. Co. *v.* Letson, 2 How. (U. S.) 514; Marshall *v.* Baltimore, etc., R. Co., 16 How. (U. S.) 314; Lafayette Ins. Co. *v.* French, 18 How. (U. S.) 404; Covington Drawbridge Co. *v.* Shepherd, 20 How. (U. S.) 227; Railway Co. *v.* Whetton, 13 Wall. (U. S.) 283; Railroad Co. *v.* Harris, 12 Wall. (U. S.) 65; Eaton *v.* St. Louis, etc., Co. (Mo.), 7 Fed. Rep. 139. So, also, a corporation chartered by a foreign State or country may be treated as a citizen or subject of such State or country. Steamship Co. *v.* Tugman, 106 U. S. 118.

2. Louisville, etc., R. Co. *v.* Letson, 2 How. (U. S.) 497; Stafford *v.* Am. Mills Co., 13 R. I. 311. See also, *infra*, this title, ACTIONS; REMOVAL OF CAUSES.

3. B. & O. R. Co. *v.* Carey, 28 Ohio St. 208; Shaft *v.* Phœnix Life Ins. Co., 67 N. Y. 544; Ziegler *v.* Central, etc., R. Co., 11 Nev. 350; Railroad Co. *v.* Harris, 12 Wall. (U. S.) 65; Covington Drawbridge Co. *v.* Shephard, 20 How. (U. S.) 232; North Noonday, etc., R. Co. *v.* Orient, etc., Co. (Cal.), 1 Fed. Rep. 522; Farmers', etc., Co. *v.* Maquil-

2. INTERSTATE COMMERCE, POLICE LAWS, ETC.—Foreign corporations, in the course of their business dealings, are frequently confronted with State legislation which, it may be claimed, amounts to an attempted regulation of interstate commerce, within the constitutional prohibition. The subject is an extended one, and cannot be fully treated here. (See INTERSTATE COMMERCE; TAXATION, etc.). Most of these questions arise where a State imposes upon railroads, insurance companies, and other foreign corporations taxes and license fees.[1] In other instances, the regulation of the freight charges of common carriers is undertaken,[2] or it is alleged that the police laws of the State amount to an interference with commerce. The decisions upon the latter branch of the subject are treated in a slightly different application under other portions of this title.[3] It is settled that issuing a policy of insurance is not a transaction of commerce;[4] and, in the latest development of this principle, it seems that the power of a State to impose upon foreign insurance companies the most exacting conditions is practically unlimited, and is regarded as almost exclusively a matter of State policy.[5] But these and similar decisions expressly recognize that a State act which imposes limitations upon the power of foreign corporations to make contracts within the State for the carrying on of commerce between the States would infringe upon the exclusive power of Congress.[6]

lan, 3 Dill. (C. C.) 379; Minnett *v.* Milwaukee & St. Paul R. Co., 3 Dill. (C. C.) 460.

1. See, *infra*, this title, LIABILITY TO TAXATION.

2. See FREIGHT.

3. See, *supra*, this title, STATUTORY LIMITATIONS UPON POWERS; see, *infra*, this title, LIABILITY TO TAXATION.

4. Paul *v.* Virginia, 8 Wall. (U. S.) 168; Ducat *v.* Chicago, 10 Wall. (U. S.) 410; Liverpool Ins. Co. *v.* Massachusetts, 10 Wall. (U. S.) 566; Doyle *v.* Continental Ins. Co., 94 U. S. 535; Philadelphia Fire Assoc. *v.* New York, 119 U. S. 110; s. c. 15 Am. & Eng. Corp. Cas. 421.

In Paul *v.* Virginia, 8 Wall. (U. S.) 168, the court observed, by Field, J.: "Issuing a policy of insurance is not a transaction of commerce. The policies are simple contracts of indemnity against loss by fire, entered into between the corporations and the assured, for a consideration paid by the latter. These contracts are not articles of commerce in any proper meaning of the word. They are not subjects of trade and barter, offered in the market as something having an existence and value independent of the parties to them. They are not commodities, to be shipped or forwarded from one State to another, and then put up for sale. They are like other personal contracts between parties, which are completed by their signature and the transfer of the consideration. Such contracts are not interstate transactions, though the parties may be domiciled in different States. The policies do not take effect—are not executed contracts—until delivered by the agent in Virginia. They are then local transactions, and are governed by the local law. They do not constitute a part of the commerce between the States any more than a contract for the purchase and sale of goods in Virginia by a citizen of New York while in Virginia would constitute a portion of such commerce."

5. Philadelphia Fire Assoc. *v.* New York, 119 U. S. 110; s. c., 15 Am. & Eng. Corp. Cas. 421.

6. In Cooper Mfg. Co. *v.* Ferguson, 113 U. S. 727; s. c., 8 Am. & Eng. Corp. Cas. 178, the facts were that a corporation of Ohio contracted in Colorado to manufacture machinery in Ohio to be there delivered for transportation to the purchasers in Colorado. The majority of the court, while reaffirming the principle stated in the text, based its decision upon the fact that this did not amount to a transaction of business, within the *Colorado* statute regulating foreign corporations. But Justices Matthews and Blatchford, in a separate concurring opinion,

**VI. Liability for Torts.**—Foreign corporations may be sued for torts, and are liable to the same extent as domestic corporations.[1]

An action for a tort may also be maintained by a foreign corporation.[2]

**VII. Liability to Taxation.**—That foreign corporations are liable to taxation, is too well settled to admit of question.[3] The character and amount of these taxes, the method of assessment and collection, are matters of local policy which are regulated in

take a different view: "Whatever power may be conceded to a State, to prescribe conditions on which foreign corporations may transact business within its limits, it cannot be admitted to extend so far as to prohibit or regulate commerce among the States; for this would be to invade the jurisdiction which, by the terms of the Constitution of the United States, is conferred exclusively upon Congress." After reciting the facts, the opinion continues: "That was commerce; and, to prohibit it, except upon conditions, is to regulate commerce between Colorado and Ohio, which is within the exclusive province of Congress. It is quite competent, no doubt, for Colorado to prohibit a foreign corporation from acquiring a domicil in that State, and to prohibit it from carrying on within that State its business of manufacturing machinery; but it cannot prohibit it from selling in Colorado, by contracts made there, its machinery manufactured elsewhere, for that would be to regulate commerce among the States."

1. **Torts.**—Austin *v.* N. Y., etc., R. Co., 25 N. J. L. 381; Bissell *v.* Mich. Southern, etc., R. Co., 22 N. Y. 258; Ahern *v.* Nat. S. S. Co., 3 Daly (N. Y.), 399; People *v.* N. Y. Cent. R., 30 How. Pr. (N. Y.) 148; State *v.* Northern R. Co., 18 Md. 193.

2. Portsmouth Livery Co. *v.* Watson, 10 Mass. 91; Am. Mut. Life Ins. Co. *v.* Owen, 81 Mass. 491.

**Statutory Actions for Negligence Causing Death.**—In Crowley *v.* Panama R. Co., 30 Barb. (N. Y.) 99, where a railroad was chartered for the purpose of operating outside of the State of *New York*, it was held that a statute constituting the killing of a person an actionable tort had no extra-territorial force, and the company was not liable for the death of such person in a foreign State. See also Selma, Rome & D. R. Co. *v.* Lacey, 43 Ga. 461.

In *Alabama*, it was said that, though the statutes of the two States were the same; an enforcement of the remedy, by comity, would be none the less impracticable. Foster *v.* Glazener, 27 Ala. 391; Texas, etc., R. Co. *v.* Richards (Tex.), 4 S. W. Rep. 627; Willis *v.* Missouri Pac. R. Co., 61 Tex. 432; s. c., 48 Am. Rep. 301; Needham *v.* Grand Trunk R. Co., 38 Vt. 294; Whitford *v.* Panama R. Co., 3 Bosw. (N. Y.) 67; s. c., 23 N. Y. 465; Beach *v.* Bay State Co., 30 Barb. (N. Y.) 433; Richardson *v.* N. Y. Cent. R. Co., 98 Mass. 85; Woodward *v.* Michigan, etc., R. Co., 10 Ohio St. 121. *Compare* Shedd *v.* Moran, 10 Ill. App. 618; Hyde *v.* Wabash, etc., R. Co., 61 Iowa, 411; s. c., 47 Am. Rep. 820. See also authorities cited, CONFLICT OF LAWS, 3 Am. & Eng. Encyc. of Law, 521.

3. Western Union Tel. Co. *v.* Mayer, 28 Ohio St. 521; British, etc., Life Ins. Co. *v.* Commissioners, etc., 31 N. Y. 32; Western Union Tel. Co. *v.* Lieb, 76 Ill. 172; Boston Loan Co. *v.* Boston, 137 Mass. 332; Liverpool, etc., Ins. Co. *v.* Massachusetts, 10 Wall. (U. S.) 566.

In Western Union Tel. Co. *v.* Massachusetts, 125 U. S. 549, referring to the taxation of foreign corporations, the court said: "Its property in the State is subject to taxation the same as other property, and it may undoubtedly be taxed in a proper way on account of its occupation and its business." See also Telegraph Co. *v.* Texas, 105 U. S. 460.

It is undoubtedly competent for the legislature to lay a franchise or license tax upon foreign corporations for the privilege of doing business within the State. Commonwealth *v.* Standard Oil Co., 101 Pa. St. 145. As to what are franchise taxes, see Cooley on Taxation (Ed. of 1886), pp. 379, 380.

*Pennsylvania* act, April 4, 1873, § 17, providing that "It shall not be lawful for any city, county, or municipality to impose or collect any license fee or tax upon insurance companies or their agents authorized to transact business under this act" applies to domestic and to foreign corporations, but does not constitute such a contract as will prevent future taxation of companies so organized. Ætna Fire Ins. Co. *v.* Reading City, 119 Pa. St. 417.

the several States by statute. It has been held that a State cannot tax a foreign corporation upon a principle different from that under which it may tax a domestic corporation.[1] (See TAXATION.)

A stockholder's interest in his shares of stock is personal, and is controlled by the law of his domicil in the matter of taxation; and it is accordingly settled that a citizen of a State may be there taxed upon the amount of stock held by him in a foreign corporation.[2] But corporate shares of non-residents are not taxable.[3]

1. In Erie R. Co. *v.* State, 31 N. J. L. 531, the court observed: "It is not denied that the corporate existence of a company is recognized, not by right, but of grace, in foreign jurisdictions, nor that each government has the competence to refuse to recognize such existence except on its own conditions. The principle is universally acknowledged. Hence, laws requiring insurance companies and other foreign corporations to file bonds and submit to other exactions, as a prerequisite to their admission in an incorporated capacity into the State. Such laws, when rightfully made, are evidently mere police regulations designed to protect the citizens of the State in which they are enacted from loss or imposition; and on this ground their legality cannot be drawn in question. But a tax law, having revenue for its object, is based upon a principle entirely different. The right to tax for revenue is the right of the government to take so much of the property of the person or company upon which the tax falls as such government may deem necessary for its public wants. The act of taking the property, therefore, must of necessity be an acknowledgment of the legal *status* of the person or company whose property is taken. To assert that the company whose property is thus taken has no rights but such as the government taking it chooses to confer is to assert that such company has no title to its property but such as may be conceded to it by the taxing power. It seems to be utterly inconsistent with legal principles, which have always been deemed axiomatic, to hold that a government can recognize the legal existence of a foreign corporation for the purpose of taxation, and at the same time can deny such legal existence for the purpose of depriving it of those rights which belong to every individual or company known to the law. Such a doctrine would obviously offer the entire property of foreign corporations as a prize to the rapacity of any State in whose territories it might be or over which it might happen to be carried."

A foreign corporation is not required, by the *Louisiana* constitution, to be licensed by a different mode from that provided for home companies. The constitution is not imperative, but simply permissive of such mode. Such corporation cannot complain that the license claimed is based on the system adopted for home organizations. State *v.* Liverpool & London & G. Ins. Co. (La. 1888), 4 South. Rep. 504.

2. In McKeen *v.* County of Northampton, 49 Pa. St. 519, it was held that capital stock owned be a citizen of *Pennsylvania*, in a manufacturing corporation located in another State, is taxable for State and county purposes. See also Whitsell *v.* Northampton County, 49 Pa. St. 536; Nashua Savings Bank *v.* Nashua, 46 N. H. 389; Smith *v.* Exeter, 37 N. H. 556; Conwell *v.* Connersville, 15 Ind. 150; Seward *v.* Rising Sun, etc., Co., 79 Ind. 351; State *v.* Branin, 3 Zab. (N. J.) 484; State *v.* Bentley, 3 Zab. (N. J.) 532; Great Barrington *v.* County Comrs., 16 Pick. (Mass.) 572; Newark City Bank *v.* Assessor, 30 N. J. L. 13; Dyer *v.* Osborne, 11 R. I. 321; City and County of San Fransisco *v.* Fry, 63 Cal. 470; s. c., 1 Am. & Eng. Corp. Cas. 431. *Compare* Minot *v.* Philadelphia, etc., R. Co., 18 Wall. (U. S.) 206.

In Sturges *v.* Carter, 114 U. S. 511, it was decided that stock held by a citizen of *Ohio*, in a foreign corporation, is taxable, notwithstanding the payment by the corporation of a tax on its property situated in the State.

In San Francisco *v.* Mackey, 22 Fed. Rep. 602; s. c., 10 Sawy (C. C.) 431, it was held that the *California* constitution prohibits double taxation. Where, therefore, the tangible property of a corporation is in Nevada, and is there taxed, the shares cannot be assessed to the holders in California. *Compare* City, etc., of San Francisco *v.* Fry, 63 Cal. 490.

3. North Carolina R. Co. *v.* Alamance Co. Commissioners, 91 N. Car. 454; Union Bank *v.* State, 9 Yerg. (Tenn.) 490; Railroad Co. *v.* Pennsylvania, 15 Wall. (U. S.) 146.

As to whether a State may impose a tax on the shares of a corporation of its own creation, held by non-citizens,

(*a*) *State Taxation and Interstate Commerce.*—It is equally well settled that a State cannot impose such taxation upon foreign corporations as will amount to a regulation of interstate commerce. This subject must be more fully treated elsewhere. (See INTERSTATE COMMERCE.) This prohibition extends to every form of taxation, such as duties laid upon the transportation of subjects of interstate commerce, receipts derived from such transportation, or taxation of the occupation or business of carrying it on.[1] Thus, statutes have been held unconstitutional which attempted to tax goods and merchandise in transportation from or to a State,[2] or passenger traffic of railroads and other carriers,[3] or the transmis-

see State Tax on Foreign-held Bonds; Buchanan *v.* Smith, 16 Wall. (U. S.) 309; Maltby *v.* Reading, etc., R. Co., 52 Pa. St. 140.

**Statutory Liability of Agent for Taxes.**—It is competent for the legislature, in levying a tax upon the gross receipts of the business conducted in the State by a foreign corporation, to require it to be paid by the resident agent; and this liability, on default by him, may be enforced by action against him personally. Alabama *v.* Sloss (*Alabama*, 1888), 83 Ala. 93; citing Sumter Co. *v.* Bank, 62 Ala. 464: "The liability of the agent is not imposed in the nature of a penalty for failure to return the sworn statement, but is the mode provided to collect the taxes."

1. In Leloup *v.* Port of Mobile, 127 U. S. 640; s. c., 21 Am. & Eng. Corp. Cas. 26, the court, by Bradley, J., observes: "No State has the right to lay a tax on interstate commerce in any form, whether by way of duties laid on the transportation of the subjects of that commerce, or on the receipts derived from that transportation, or on the occupation or business of carrying it on; and the reason is that such taxation is a burden on that commerce, and amounts to a regulation of it, which belongs solely to Congress. This is the result of so many recent cases, that citation is hardly necessary. As a matter of convenient reference, we give the following list: Case of State Freight Tax, 15 Wall. (U. S.) 232; Pensacola Telegraph Co. *v.* Western Union Telegraph Co., 96 U. S. 1; Mobile *v.* Kimball, 102 U. S. 691; Western Union Telegraph Co. *v.* Texas, 105 U. S. 460; Moran *v.* New Orleans, 112 U. S. 69; s. c., 5 Am. & Eng. Corp. Cas. 311; Gloucester Ferry Co. *v.* Pennsylvania, 114 U. S. 196; s. c., 13 Am. & Eng. Corp. Cas. 365; Brown *v.* Houston, 114 U. S. 622; Walling *v.* Michigan, 116 U. S. 446; Picard *v.* Pullman Southern Car Co., 117 U. S. 34; s. c., 24 Am. & Eng. R. R. Cas. 511; Wabash Railway Co. *v.* Illinois, 118 U. S. 557; s. c., 26 Am. & Eng. R. R. Cas. 1; Robbins *v.* Shelby County Taxing District, 120 U. S. 489; s. c., 16 Am. & Eng. Corp. Cas. 1; Philadelphia & Southern Steamship Co. *v.* Pennsylvania, 122 U. S. 326; s. c., 18 Am. & Eng. Corp. Cas. 1; Western Union Telegraph Co. *v.* Pendleton, 122 U. S. 347; s. c., 18 Am. & Eng. Corp. Cas. 56; Ratterman *v.* Western Union Telegraph Co., 127 U. S. 411; s. c., 21 Am. & Eng. Corp. Cas. 1."

2. State Freight Tax Cases, 15 Wall. (U. S.) 232; Minot *v.* Philadelphia, etc., R. Co., 18 Wall. (U. S.) 206; Ogilvie *v.* Crawford Co. (Iowa), 7 Fed. Rep. 745; Walling *v.* Michigan, 116 U. S. 446; Erie R. Co. *v.* State, 31 N. J. L. 531; State *v.* Carrigan, 39 N. J. L. 35; Standard Oil Co. *v.* Bachelor, 89 Ind. 1; Blount *v.* Monroe Co., 60 Ga. 61; Appeal Tax Court *v.* Pullman Car Co., 50 Md. 452.

3. Crandall *v.* Nevada, 6 Wall. (U. S.) 35; Henderson *v.* Mayor, 92 U. S. 259; Gloucester Ferry Co. *v.* Pennsylvania, 114 U. S. 196.

It was held in Hays *v.* Steamship Co., 17 How. (U. S.) 596, that a vessel registred in New York, plying between Panama and San Fransisco, was not taxable in California; in St. Louis *v.* Ferry Co., 11 Wall. (U. S.) 423, that ferry-boats running to a city, but owned in another State, are not taxable in the city as property within it. See also State *v.* Haight, 30 N. J. L. 428; People *v.* Comrs., 11 Alb. L. J. 401; Morgan *v.* Parham, 16 Wall. (U. S.) 471; Commonwealth *v.* Hays, 8 B. Mon. (Ky.) 1.

In Gloucester Ferry Co. *v.* Pennsylvania, 114 U. S. 197, decided in 1885, the United States supreme court held that the business of receiving and landing of passengers and freight in interstate passage is incident to the transportation, and that a State tax on such receiving and landing is a tax on transportation and on commerce inter-State or foreign; and that the ferry company, whose only property

sion of telegrams,[1] or locomotive engineers under the form of li-

in *Pennsylania* was the ferry-slip, was not taxable in that State upon its capital stock under pretence of existence in Pennsylvania.

*Michigan* Laws, 1885, No. 153, § 2, provide that "all shares in foreign corporations (except national banks) owned by inhabitants of this State" shall be taxed. "Shares in corporations, the property in which is taxable to itself, shall not be assessed to the shareholders." Section 4 provides all corporate property, except where some other provision is made by law, shall be assessed to the corporation as to a natural person, where its principal office is in that State. Section 13, subd. 2, requires each person to set forth, as property liable to taxation, "all shares in foreign corporations (except national banks), and their value." And, by § 2, it is provided that, for the purpose of taxation, personal property "shall include all goods and chattels within the State; all ships, boats, and vessels belonging to inhabitants of this State;" and that the personal property of a non-resident cannot be taxed unless it has an actual *situs* in the State. Plaintiff, a resident of defendant township, was taxed on stock in a foreign corporation, whose boats lying at Benton, in the State, were taxed there. *Held*, that, as the boats were improperly taxed, the stock was liable to be taxed by defendant. Graham *v.* St. Joseph Township, (Mich.) 35 N. W. Rep. 808.

1. Federal Const., art. 1, §§ 8, 9, etc.; Patterson on Federal Restraints on State Action, 141–143; Pensacola Tel. Co. *v.* West. Un. Tel. Co., 96 U. S. 1; W. Un. Tel. Co. *v.* Texas, 105 U. S. 460; W. Un. Tel. Co. *v.* Pendleton, 122 U. S. 347; Am. Un. Tel. Co. *v.* W. Un. Tel. Co., 67 Ala. 26.

A State statute which authorizes an injunction to be issued to restrain a corporation, organized under the laws of another State, whose taxes are in arrear, from prosecuting its business within the State until the taxes are paid is void so far as it assumes to confer power upon a court to so restrain a telegraph company which has acccpted the provisions of U. S. Rev. St., § 5263, from operating its lines over military and post roads of the United States. West. Un. Tel. Co. *v.* Massachusetts, 125 U. S. 530. The court say: "We do not deprive the State of the power to assess and collect the tax. If a resort to a judicial proceeding to collect it is deemed expedient, there remains to the court all the ordinary means of enforcing its judgment—executions, sequestration, and any other appropriate remedy in chancery."

If it could be ascertained what telegrams were confined wholly within the State, a tax on those might be imposed by it. The privilege carries no exemption from the ordinary burdens of taxation in a State within which they may own or operate lines of telegraph. West. Un. Tel. Co. *v.* Texas, 105 U. S. 460; West. Un. Tel. Co. *v.* Massachusetts, 125 U. S. 548.

The laws of *Massachusetts* imposed a tax upon the Western Union Telegraph Company on account of the property owned and used by it within that State, the value of which is to be ascertained by comparing the length of its lines in that State with the length of its entire lines. Such a tax was essentially an excise tax upon the capital of the corporation, in an attempt to ascertain the just amount which the corporation should pay upon the amount and value of the capital so employed by it in the State, and was valid. Western Union Telegraph Co. *v.* Massachusetts, 125 U. S. 530.

And it has been held, in a State court, that the act of Congress above alluded to, authorizing telegraph companies to use any military or post roads, etc., in any State, does not prevent the giving of effect, as to such companies, of the State law providing that no foreign corporation shall do business without having at least one known place of business, and an authorized agent therein. It was accordingly held that a court of equity will not interfere, by injunction at the suit of a foreign telegraph company, to prevent a rival company from obstructing the erection of its poles and wires when the bill does not show that the complainant has any known place of business or any agent in the State, nor that it has acquired any property or rights of property there. American Union Tel. Co. *v.* West. Un. Tel. Co., 67 Ala. 26

Telegraph companies may prosecute their business into any State, upon the public domain of the United States, or along the military and post roads of the United States, which may have been, or may hereafter be, declared such by act of Congress, and over, under, or across the navigable streams or waters of the United States, on certain conditions, including, *inter alia*, a concession by the company of priority to messages of the United States government at rates to be fixed annually by the Postmaster-general, a

censes.[1] On the other hand, taxes imposed upon foreign corporations have been sustained as constitutional in such instances as the following: Taxes and license fee regulations imposed upon foreign insurance companies; the licensing of foreign corporations doing business within a State;[3] sewing-machine companies manufactur-

reservation to the government of the privilege of purchasing the lines, etc., of the company at an appraised value, and a written acceptance by the company of the restrictions and obligations of the act. Act of Congress of July 24, 1886, 14 Stat. at L. 221 (Rev. St. § 5263 *et seq.*).

The act is not limited in its operation to such military and post roads as are upon the public domain. Pensacola Tel. Co. *v.* West. Un. Tel. Co., 96 U. S. 1.

Congress, by act of June 8, 1872, ch. 335, 17 Stat. at L. 308 (Rev. St. §. 3964 *et seq.*), declares all railway lines in the United States to be post-roads. Patterson, Federal Restraints on State Action, 141.

Under this legislation, it was held that a telegraph company of New York, which had secured a right of way, by private arrangement with a railroad company owning a line through certain counties in *Florida*, could not be debarred from using the line in said counties by the State of Florida. Nor was a monopoly granted by Florida to a Pensacola corporation valid as against such a foreign corporation. And this, irrespective of whether certain Florida statutory invitation, subsequent to the grant of the monopoly, inviting foreign corporations into the State, affected the question or not. Pensacola Tel. Co. *v.* West. Un. Tel. Co., 96 U. S. 1.

Massachusetts Pub. St. c. 13, § 40, provide that every railroad and telegraph company shall pay annually a tax upon its corporative franchise, at a valuation thereof equal to the aggregate value of the shares in its capital stock, after deducting from such valuation such portion as is proportionate to the length of the line lying without the State; and also an amount equal to the value of the real estate and machinery located and subject to local taxation within the State. *Held*, that the right to tax telegraph companies, under this statute, is not impaired by U. S. Rev. St. §§ 5263–5266, relating to telegraph lines over military and post roads, under navigable waters, etc. Attorney-general *v.* West. Un. Tel. Co. (Mass.), 33 Fed. Rep. 129. And see Delaware Railroad Tax Case, 18 Wall. (U. S.) 206: Fargo *v.* Michigan, 121 U. S. 230; Phila., etc., Co. *v.* Pa., 122 U. S. 326.

1. An *Alabama* statute requiring locomotive engineers in that State to be examined and licensed by a board appointed for the purpose, and subjecting offenders to penalty and imprisonment, was held not to be contrary to the United States Constitution so far as it affected engineers engaged on trains running from a point in Alabama to a point in Mississippi. Smith *v.* Alabama, 124 U. S. 465.

2. Paul *v.* Virginia, 8 Wall. (U. S.) 168; Ducat *v.* Chicago, 10 Wall. (U. S.) 410; Liverpool Ins. Co. *v.* Massachusetts, 10 Wall. (U. S.) 566; Doyle *v.* Continental Ins. Co., 94 U. S. 535; Philadelphia Fire Assoc. *v.* New York, 92 N. Y. 311; s. c., 1 Am. & Eng. Corp. Cas. 1; Philadelphia Fire Assoc. *v.* New York, 119 U. S. 110; s. c., 15 Am. & Eng. Corp. Cas. 421.

3. *Pennsylvania* act, June 7, 1879, prohibiting foreign corporations, except insurance companies, which do not invest or use their capital in that State, from keeping an office in that State for the use of its officers, stockholders, agents, or employees unless it shall have first obtained a license therefor by paying one mill on each dollar of its authorized capital stock, is not in violation of U. S. Const. art, 1, § 8,—the commerce clause,—there being no attempt to prohibit the transportation or sale of the corporation's products in the States. Pembina Consol. Silver-mining Co. *v.* Pennsylvania, 125 U. S. 181.

**Kentucky Taxing Act Does Not Repeal License Act.**—Kentucky act, 1864, Feb. 20 (Myer, Supp. 480), requiring the payment of a tax of 6 per cent upon the net profits of the business done by any express company within the State does not repeal, either expressly or by implication, act, March 2, 1860 (Myer, Supp. 22), requiring agents of foreign express companies to take out licenses before transacting business within the State. Woodward *v.* Commonwealth (Ky., 1887), 7 S. W. Rep. 613.

Kentucky act, 1870, March 2d, requiring foreign express companies doing business within the State to pay certain fees each year upon renewing their licenses, does not affect the provisions of act, 1860, March 2d, which requires each agent of such companies to take out a license before doing business. Woodward *v.* Commonwealth (Ky., 1887), 7 S. W. Rep. 613.

ing their machines outside of a State and selling them within it are taxable;[1] taxes upon the receipts of telegraph companies derived in part from interstate commerce, where they are separable from others;[2] franchise taxes of railroad companies chartered by Congress, under certain circumstances;[3] taxes upon the rolling-stock of railroad companies, under certain circumstances.[4]

1. Where, by a general tax act of a State, a specific tax is assessed upon "every sewing-machine company selling or dealing in sewing-machines, by itself or its agents, in this State," such act includes foreign corporations. It does not violate the equal privilege clause of the Federal Constitution. The fact that no domestic companies are at the time engaged in such business within the State is immaterial, and cannot vary the rule. Singer Mfg. Co. *v.* Wright (Ga.), 33 Fed. Rep. 121.

A corporation regularly admitted within the State is a "person within the jurisdiction," and is entitled to the equal protection, etc.; but this clause in the Fourteenth Amendment does not forbid proper classification for tax purposes.

2. A single tax assessed under the laws of *Ohio*, upon the receipts of a telegraph company, which were derived partly from interstate commerce and partly from commerce within the State of Ohio, but which were returned and assessed in gross, and without separation or apportionment, but which are capable of separation, is not wholly invalid, but is invalid only in proportion to the extent that such receipts were derived from interstate commerce. And, while a circuit court of the United States should enjoin the collection of the tax upon the portion of the receipts from interstate commerce, it should not interfere with those derived from commerce entirely within the State. Ratterman *v.* Western Un. Tel. Co., 127 U. S. 411; s. c., 21 Am. & Eng. Corp. Cas. 1, reviewing the decisions of the United States supreme court respecting the taxation of telegraph companies. And see also, as to partial validity, State Freight Tax, 15 Wall. (U. S.), 232, where the tax, so far as it applied to domestic freight, was held valid.

The court, in the Ratterman case, said; *inter alia:* "Nor do we believe, if there were allegations, either in the bill or answer, setting up that part of the tax was from interstate commerce and part from commerce wholly within the State, that there would have been any difficulty in securing the evidence of the amount of receipts chargeable to these separate classes of telegrams, by means of the appointment of a referee or master."

3. Taxation of the franchise of a railway granted by act of Congress, by the Territories, is not in conflict with the constitutional grant to Congress of the power to regulate commerce among the several States; nor is the taxation void as taxation of a Federal agency, in the absence of such restriction in the grant of the taxing power to the Territory, as Congress may permit the Territory to do so. Such permission it gave in this case, by saying that the right of way shall be exempt from taxation. Atlantic & Pac. R. Co. *v.* Leseuer (Arizona Ty. 1888), 19 Pac. Rep. 157.

4. Virginia acts, 1881–82, § 20, ch. 119, providing for taxation of the rolling-stock of "every railroad company not exempted from taxation by virtue of its charter" is, by its terms, inapplicable to the rolling-stock of a foreign corporation, which is used on its leased railways within the State, owned by home corporations not exempt. Marye *v.* Baltimore & O. R. Co., 127 U. S. 117, affirming Baltimore, etc., R. Co. *v.* Allen (Va.), 22 Fed. Rep. 376.

In Marye *v.* Balto. & Ohio R. Co., 127 U. S. 117, the supreme court said, per Matthews, J.. "If the Baltimore & Ohio Railroad Company is permitted by the State of *Virginia* to bring into its territory, and there habitually to use and employ, a portion of its movable personal property, and the railroad company chooses to do so, it would certainly be competent and legitimate for the State to impose upon such property, thus used and employed, its fair share of the burdens of taxation imposed upon other similar property used in the like way by its own citizens. And such a tax might be properly assessed and collected, in cases like the present, where the specific and individual items of property so used and employed were not continuously the same, but were constantly changing, according to the exigencies of the business. In such cases the tax might be fixed by an appraisement and valuation of the average amount of the property thus habitually used, and collected by distraint upon any portion that might at any time be found. Of course, the lawfulness of a tax upon vehicles of transportation used by common carriers might have to be considered, in particu-

It has been held that a statute of *New Mexico* requiring the filing of its charter by a foreign corporation and denying to it authority to do business until it has designated a place of business and an agent to receive service of process seems to be void so far as it would prevent the company from doing business in the way of sales of commodities in the Territory because it is an interference with interstate commerce.[1]

**VIII. Actions by and Against Foreign Corporations.**—(*a*) *At*[1] *Common Law.*—The right of foreign corporations to sue in other jurisdictions, although founded upon comity, is recognized as a principle of the common law.[2] Their liability to actions, while equally

lar instances, with reference to its operation as a regulation of commerce among the States; but the mere fact that they were employed as vehicles of transportation in the interchange of interstate commerce would not render their taxation invalid."

For the purpose of taxation, the *situs* of the rolling-stock of a railway company is where it is habitually used. If the specified property be constantly changing, the amount may be fixed by the average amount so used. Atlantic & Pac. R. Co. *v.* Leseuer (Ariz. 1888), 19 Pac. Rep. 157.

In Baltimore, etc., R. Co. *v.* Allen (Va.), 22 Fed. Rep. 376, it was held, where a railroad leased roads in another State, that rolling-stock used on them was not there taxable, but in the State of the domicil of the corporation.

In Carlisle *v.* Pullman Palace Car Co., 8 Colo. 320; s. c., 54 Am. Rep. 553, it was held that sleeping-cars owned by a foreign corporation and used on railroads in *Colorado* were taxable by the State, but not by a county.

**1.** Singer Mfg. Co. *v.* Hardee (New Mex. 1888), 16 Pac. Rep. 605. *Compare* Kidd *v.* Pearson, 128 U. S. 1.

A statute of a State forbidding sale of liquor imported into a State, except in the original packages, and excepting for medical, etc., purposes, does not infringe the commerce clause of the Federal Constitution; nor is it affected by the fact that the manufacturer of such spirits intends to export them when manufactured. Kidd *v.* Pearson, 128 U. S. 1.

**2.** Henriques *v.* Dutch East India Co., 1 Ld. Raym. 1532; State *v.* Boston, etc., R. Co., 25 Vt. 433; Frazier *v.* Willcox, 4 Rob. (La.) 518; Slaughter *v.* Commonwealth, 13 Gratt. (Va.) 767; Hartford Bank *v.* Barry, 17 Mass. 97; Marine Bank *v.* Jauncey, 1 Barb. (N. Y.) 486; Savage Mfrs. Co. *v.* Armstrong, 17 Me. 34; Hahnemannian Ins. Co. *v.* Beebe, 48 Ill. 88; Orange Nat. Bank *v.* Traver, 7 Sawy. (U. S.) 210; Utley *v.* Clark, etc., Mining Co., 4 Colo. 369; South Boston Iron Co. *v.* Boston Locomotive Works, 51 Me. 585; Bank of Augusta *v.* Earle, 13 Pet. (U. S.) 519; Tombigbee R. Co. *v.* Kneeland, 4 How. (U. S.) 16; New Jersey, etc., Bank *v.* Thorp, 6 Cow. (N. Y.) 46; Silver Lake Bank *v.* North; 4 Johns. Ch. (N. Y.) 370; Bard *v.* Poole, 12 N. Y. 495; Mut. Ben. Life Ins. Co. *v.* Davis, 12 N. Y. 509; Direct U. S. Cable Co. *v.* Dominion Tel. Co., 84 N. Y. 153; Hibernia Nat. Bank *v.* Lacombe, 84 N. Y. 367; New York Dry-dock *v.* Hicks, 5 McLean (U. S.), 111; New York Firemen Ins. Co. *v.* Ely, 5 Conn. 560; Lewis *v.* Bank of Kentucky, 12 Ohio, 132; Guago Iron Co. *v.* Dawson, 4 Blackf. (Ind.) 202; Bank of Washtewan *v.* Montgomery, 2 Scam. (Ill.) 427; Lucas *v.* Bank of Georgia, 2 Stew. (Ala.) 147; United States *v.* Insurance Companies, 22 Wall. (U. S.) 99; Insurance Co. *v.* The C. D. Jr., 1 Woods (U. S.), 72; Leasure *v.* Union Mut. Ins. Co., 91 Pa. St. 491; Freeman's Bank *v.* Ruckman, 16 Gratt. (Va.) 126; Bank of Marietta *v.* Pindall, 2 Rand. (Va.) 473; American Colonization Soc. *v.* Gartrell, 23 Ga. 448; Savage Mfrs. Co. *v.* Armstrong, 17 Me. 34; Importing, etc., Co. *v.* Locke, 50 Ala. 332; British-American Land Co. *v.* Ames, 6 Metc. (Mass.) 391; Portsmouth Livery Co. *v.* Watson, 10 Mass. 91; Lycoming Fire Ins. Co. *v.* Langley, 62 Md. 196; Dutch West India Co. *v.* Van Moses, 1 Stra. 612; 2 Ld. Raymond, 1532; National Bank of St. Charles *v.* De Bernales, 1 C. & P. 569; Newby *v.* Van Oppen, L. R. 7 Q. B. 293.

Where a corporation is empowered to administer estates, it may sue in another State upon notes and bills of exchange of which it is seized as administrator in the State of incorporation, though it could not take out letters of administration in the State where it sues. Fidelity Ins., etc., Co. *v.* Niven, 5 Del. 416.

A foreign corporation may sue to enforce a loan,—Leasure *v.* Union Mut. Life Ins. Co., 91 Pa. St. 491; American, etc.,

well established, depends upon how far jurisdiction over them has been properly acquired.[1] Instances illustrating the availability of equitable remedies are cited in the notes.[2] It follows, of course,

Ins. Co. *v.* Owen, 15 Gray (Mass,), 491;—or to recover from its agents money had and received, to its use,—U. S. Exp. Co. *v.* Lucas, 36 Ind. 361.

1. In Libbey *v.* Hodgdon, 9 N. H. 396, the court, Wilcox, J., observed: "If, upon principles of law or comity, corporations created in one jurisdiction are allowed to hold property and maintain suits in another, it would be strange indeed if they should not also be liable to be sued in the same jurisdiction. If we recognize their existence for one purpose, we must also for the other. If we admit and vindicate their rights, even-handed justice requires that we also enforce their liabilities, and do not send our citizens to a foreign jurisdiction in quest of redress for injuries committed here. There may be difficulties in procuring legal service of a writ upon a foreign corporation; and so, in case of an individual residing in a foreign jurisdiction, it may be difficult or impossible to procure such service of process upon him as to subject him to the jurisdiction of our courts. But in either case, when the service can be made, or when the person of the corporation appears and submits to our jurisdiction, we see no objection to the authority of the court to proceed."

Corporations may be sued in a State in which they were not incorporated. Rand *v.* Proprietors, 3 Day (Conn.), 447; Lafayette Ins. Co. *v.* French, 18 How. (U. S.) 407; Railroad Co. *v.* Harris, 12 Wall. (U. S.) 65; Bushel *v.* Commonwealth Ins. 15 S. & R. (Pa.) 176; Eby *v.* Northern Pac. R. Co., 13 Phila. (Pa.) 144; North Missouri R. Co. *v.* Akers, 4 Kan. 488; Ocean Ins. Co. *v.* Portsmouth Marine R. Co., 3 Metc. (Mass.) 420; St. Louis, etc., Ins. Co. *v.* Cohen, 9 Mo. 421; Folger *v.* Columbian Ins., 99 Mass. 267; Selma, etc., R. Co. *v.* Tyson, 48 Ga. 351; City Fire Ins. Co. *v.* Corrugi, 41 Ga. 660; Knott *v.* Southern Life Ins. Co., 2 Woods (U. S.), 481; Weymouth *v.* Washington, etc., R. Co., 1 McArthur (U. S.), 19; Blackburn *v.* Selma, etc., R. Co., 2 Flip. (U. S.) 525; Chicago & N. W. R. Co. *v.* Chicago & Pac. R. Co., 6 Biss. (U. S.) 219; New Orleans, etc., R. Co. *v.* Wallace, 50 Miss. 244; Equitable Life Assoc. *v.* Vogel, 76 Ala. 441; Newby *v.* Von Oppen, L. R. 7 Q. B. 393. *Compare* Smith *v.* Mutual Life Ins. Co., 14 Allen (Mass.), 336.

Where a foreign insurance company transacted business in the State through a resident agent, who transacted it as usually transacted by the resident agent of a non-resident corporation, the company may be sued, provided the statutes of the State do not prohibit such suit by service of process on the agent. Moch *v.* Virginia F. & M. Ins. Co. (Va.), 10 Fed. Rep. 696.

**Massachusetts Law.**—It was formerly held, in Massachusetts, under earlier statutes, that a foreign corporation could not be sued there though the corporation had there leased property and had agents there to manage its affairs, unless its property were attached. This is now altered by statute. Danforth *v.* Penny, 3 Metc. (Mass.) 564; Gold *v.* Housatonic R., 1 Gray (Mass.), 424; Larkin *v.* Wilson, 106 Mass. 120; Andrews *v.* Mich. Cent. R., 99 Mass. 534.

As to suits by or against in Massachusetts: Desper *v.* Continental Watermeter Co., 137 Mass. 252; Andrews *v.* Michigan Cent. R. Co., 99 Mass. 534; Nat. Bank *v.* Huntington, 129 Mass. 444; Peckham *v.* Haverhill Parish, 16 Pick. (Mass.) 274; Hayden *v.* Androscoggin Mills (Mass.), 1 Fed. Rep. 93; Boston Electric Co. *v.* Electric Gas-lighting Co. (Mass.), 23 Fed. Rep. 838.

2. **Equitable Proceedings.**— In Carbon Iron Co. *v.* McLaren, 5 H. L. C. 416, the court said: "The ground of application of appellants was that they, as a foreign corporation (for this purpose, at least foreign), were not affected by any of the rules of the court of chancery, and that they ought to be allowed to pursue their own remedy as they might think fit. There is no doubt as to the power of the court of chancery to restrain persons within its jurisdiction from instituting or prosecuting suits in foreign courts wherever the circumstances of the case make such an interposition necessary or expedient. The court acts *in personam*, and will not suffer any one within its reach to do what is contrary to its notions of equity merely because the act to be done may be, in point of locality, beyond its jurisdiction."

In Great Falls Mfg. Co. *v.* Wooster, 23 N. H. 462, a corporation of *New Hampshire* obtained an injunction against injuries to a dam in Maine.

The court of chancery refused to grant an injunction to prevent a foreign corporation from applying to the legislature of the State of its incorporation for power

that the direct or implied acceptance of these rules is constantly taking place wherever jurisdiction over foreign corporations is sustained by the courts.

(*b*) *By Statute.*—It is within the power of States to regulate and control actions by and against foreign corporations; and rights of action are held to be subject to the terms of such statutes.[1] This legislation has for its object the protection of the States' citizens by facilitating legal proceedings against foreign corporations and obviating the difficulties in the way of acquiring jurisdiction over them. Stringent requirements as conditions of lawful entry have already been referred to;[2] and the regulations as to service of process upon officers and agents are numerous and various.[3]

(*c*) *Jurisdiction.*—At common law, jurisdiction over foreign corporations must be acquired by proper service of process, by a voluntary appearance,[4] or the court may permit a proceeding *in rem* against the corporation where some property or chose in

to increase its capital stock, on equitable grounds. Bill *v.* Sierra Nevada Co., 1 De G., F. & J. 177.

**Injunction.**—An injunction was granted to prevent the secretary of state of Wisconsin from revoking the license of a foreign corporation at the prayer of such corporation. Doyle *v.* Continental Ins. Co., 4 Otto (U. S.), 535. See also as to granting of injunctions, Fisk *v.* Chicago, R. I., etc., R. Co., 4 Abb. Pr. (N. Y.) N. S. 378; Carbon Iron Co. *v.* MacLaren, 5 H. L. C. 416.

In Stillman *v.* Whiterock Mfg. Co., 3 Woodb. & M. (U. S.), 538, it was held that power to enjoin is limited by territorial jurisdiction.

In Northern Ind. R. Co. *v.* Mich. Cent. R. Co., 5 McLean (U. S.), 444, where a bill was filed by a corporation in one State against a corporation doing business in another State, it was held that the circuit court of the United States in the former State had no jurisdiction to enjoin.

**Mandamus, etc.**—On prayer of a foreign corporation, a petition for *mandamus* was heard to compel the secretary of state to annul the revocation of its license and denied on its merits. State *v.* Doyle, 40 Wis. 220.

*Mandamus* was granted to compel a person holding the books of a foreign corporation as officer to turn them over to the rightful officer. Curtis *v.* McCullough, 3 Nev. 202.

Where specific performance of a contract to open and maintain ditches in South Carolina was attempted to be enforced on a *Georgia* corporation, it was held in Georgia that the court had no jurisdiction. Port Royal R. Co. *v.* Hammond, 58 Ga. 523.

Where a corporation of the State of *New Jersey* did business and kept its books outside of the State, it was compelled to bring the books in for inspection of resident members. Huyler *v.* Cragin Cattle Co., 40 N. J. Eq. 392.

1. Green's Brice's *Ultra Vires*, 7, citing Lathrop *v.* Union Pac. R. Co., 1 McArthur (D. C.), 234; Dallas *v.* Atlantic, etc., R. Co., 2 McArthur (D. C.), 146; Howell *v.* Chicago, etc., R. Co., 51 Barb. (N. Y.) 378; Fisk *v.* Chicago, etc., R. Co., 53 Barb. (N. Y.) 513; Redmond *v.* Hoge, 3 Hun (N. Y.), 171; Barnett *v.* Chicago, etc., R. Co., 4 Hun (N. Y.), 114; Latimer *v.* Union Pac. R. Co., 43 Mo. 105; Newell *v.* Great West. R. Co., 19 Mich. 336; Camden Rolling-mill Co. *v.* Swede Iron Co., 32 N. J. L. 15; Nat. Condensed Milk Co. *v.* Brandenburg, 40 N. J. L. 111; Baltimore, etc., R. Co. *v.* Wightman, 29 Gratt. (Va.) 431; North Missouri R. Co. *v.* Akers, 4 Kan. 488; City Ins. Co. *v.* Carrugi, 41 Ga. 660; Bawkright *v.* Insurance Co., 55 Ga. 194; Weight *v.* Liverpool, etc., Ins. Co., 30 La. Ann. 1186.

2. See, *supra*, this title, STATUTORY CONDITIONS IMPOSING LIMITATIONS.

3. See, *infra*, this title, SERVICE OF PROCESS.

4. Morawetz Corp. (2d Ed.) § 977, citing Libbey *v.* Hodgdon, 9 N. H. 396; Newby *v.* Von Oppen, L. R. 7 Q. B. 293; Lafayette Ins. Co. *v.* French, 18 How. (U. S.) 407; Eby *v.* Northern Pacific R. Co., 13 Phila. (Pa.) 144; North Missouri R. Co. *v.* Akers, 4 Kan. 488; City Fire Ins. Co. *v.* Carrugi, 41 Ga. 670; Bushel *v.* Commonwealth Ins. Co., 15 S. & R. (Pa.) 176; St. Louis, etc., Ins. Co. *v.* Cohen, 9 Mo. 421, 441. *Compare* Smith *v.* Mutual Life Ins. Co., 14 Allen (Mass.), 336.

action exists within the limits of its jurisdiction.[1] It has been held that, although residence of the plaintiff or the existence in the State of property of the defendant corporation is required by statute, in *Wisconsin*, to confer jurisdiction, yet these matters do not form part of the cause of action.[2]

The courts of a State in which a foreign corporation sues or is sued will not assume jurisdiction where it cannot properly exist. A foreign corporation not in business in a State, and not having attachable property there, cannot be sued in such State.[3] When the subject-matter in litigation is such that the court cannot do complete justice, it must decline to assume jurisdiction.[4] Upon

1. To give a court jurisdiction, a real defendant, against whom the plaintiff is entitled to a judgment, must be found and served with process within the limits of its jurisdiction, or some property or chose in action must be found there against which the court can proceed *in rem*. Every attempt on the part of one nation or State, by its legislature, to grant jurisdiction to its courts over persons or property not within its territory is regarded elsewhere as mere usurpation; and all judicial proceedings in virtue thereof are held utterly void. Latimer *v.* Union Pac. R. Co., 43 Mo. 105.

In Coffin *v.* Chicago, etc., Constr. Co., 67 Barb. (N. Y.) 337, it was held that the courts of *New York* have jurisdiction of an action for the sale of the collateral security of a foreign corporation, held in that State, as far as the jurisdiction depends upon the corporation having property within the State.

It was held, in *Georgia*, that it would be unreasonable to extend, by construction, the statutes of Georgia to embrace suits *in personam*, on contracts, beyond contracts made by the agents in that State, and with which they are familiar, and which they will know how to defend; that the remedy on the foreign contract or judgment is *in rem*, by attachment or garnishments (such remedy will reach all the property belonging to the foreign corporation in Georgia); that the courts in that State have no jurisdiction of suits *in personam* unless the contract sued on has been made in Georgia, or the Georgia agent is connected therewith within the scope of his authority, as maker of such contract. Bawkright *v.* Liverpool & Lond., etc., Co., 55 Ga. 194. See also Natl. Cond. Milk Co. *v.* Brandenburgh, 40 N. J. L. 111.

2. Accordingly, in an action in *Wisconsin*, against a Pennsylvania insurance company, upon a policy upon Minnesota property, it was held that failure to state in complaint that plaintiff was a Wisconsin resident, or that defendant company had property in Wisconsin, was not demurrable. The (Federal) court said: "If the defendant could have shown by affidavit that the plaintiff was a citizen of Minnesota, and that the defendant had no property in this State, he probably could have got the case dismissed on motion by appearing specially for that purpose, it appearing by the complaint that the cause of action did not arise in this State. But, by entering a general appearance, and putting in a general demurrer, the defendant waived any defect in the service, and, by proceeding to remove the case to this court, it submits itself to the jurisdiction of the court in a case standing as this does." The case arose in the State court, and was removed. Friezen *v.* Allemania Fire Ins. Co. (Wis.), 30 Fed. Rep. 349.

3. And, if it have attachable property in that jurisdiction, the judgment is not a personal one, and will not support suit elsewhere. Lathrop *v.* Union Pac. R. Co., 1 McArthur (D. C.), 234.

4. Wilkins *v.* Thorne, 60 Md. 253; Port Royal R. Co. *v.* Hammond, 58 Ga. 523; Howell *v.* Chicago, etc., R. Co., 51 Barb. (N. Y.) 378; Cumberland Coal Co. *v.* Hoffman Coal Co., 30 Barb. (N. Y.) 171; Gregory *v.* New York, etc., R. Co., 40 N. J. Eq. 44; Kansas, etc., Construction Co. *v.* Topeka, etc., R. Co., 135 Mass. 34. In this latter case it was held that a foreign construction company cannot maintain a bill in equity, in *Massachusetts*, against a foreign railroad corporation and a citizen of Massachusetts, to enforce specific performance of a covenant in a contract for the delivery of bonds and certificates of stock in payment of work to be performed by the construction company in a foreign State, and to restrain by injunction the citizen of this Commonwealth from disposing here of shares of stock and bonds of the

this ground a court declined to restrain the payment of a stock dividend or to investigate as to whether the dividend was declared wilfully or wrongly, as it could not regulate the internal affairs of a foreign corporation.[1] An internal disorder in the foreign company, such as a controversy between stockholders and president and directors, must be left to the courts of the home State.[2] A statute authorizing service of process upon any white person in a foreign corporation's employ, or doing business for it, upon affidavit of the corporation's non-residence, does not authorize suits against it, except upon causes of action originating in the State or upon contracts entered into with reference to a subject-matter within the State.[3] Rights conferred by letters patent have no especial locality,[4] and a bill in equity filed against a foreign corporation to enforce specific performance of a contract to convey letters patent was dismissed in *Massachusetts*.[5] In an action against a foreign corporation for negligence causing death, the grant of administration upon the decedent's estate does not make the cause of action originate where the letters are granted.[6]

railroad company, alleged to have been delivered to him in violation of the plaintiff's rights, although the railroad corporation has an office in this Commonwealth for the transfer of shares of its capital stock, and has appeared by attorney in the suit. See also Smith *v.* Mut. Life Ins. Co., 14 Allen (Mass.), 336.

1. Howell *v.* Chicago & N. W. R. Co., 51 Barb. (N. Y.) 378. See also Redmon *v.* Endfield Mfg. Co., 13 Abb. Pr. N. S. (N. Y.) 332, where the court declined to compel a dividend, though some of the directors and part of the funds were in the State; and see Stafford *v.* American Mills Co., 13 R. I. 310.

2. Wilkins *v.* Thorne, 60 Md. 253; North State Copper, etc., Co. *v.* Field, 64 Md. 151. And, *held*, in the latter case, that, where the act of a foreign corporation affects one solely in his capacity as a member of the corporation, such act may be said to relate to the management of the internal affairs of the corporation; but it is otherwise where it affects his individual rights only.

3. Central Railroad, etc., Co. *v.* Carr, 76 Ala. 388. So that a passenger injured in Georgia, while travelling between Alabama and Georgia, was held not to be able to sue in *Alabama* for the injury. The court said they would not decide how it would be in case of breach of a contract to be performed partly in each State.

In *New Jersey*, it was held that, where the foreign corporation had, and had had, no place of business in the State, and the contract was not made in the State, the company was not suable in the State. The mere presence of a director or other subordinate officer was not to be the means of dragging the company into the foreign State. Camden Rolling-mill Co. *v.* Swede Iron Co., 32 N. J. L. 15. So also in *Michigan*. Newell *v.* Great West. R. Co., 19 Mich. 836.

In Baltimore, etc., R. Co. *v.* Wightman, 29 Gratt. (Va.) 431, a corporation chartered in another State and leasing and operating a Virginia railroad was held suable in *Virginia* for injuries on the said railroad; and it was held also that such company has no right to remove the suit to the Federal court. See, to same effect, Balt. & O. R. Co. *v.* Noell's Admr., 32 Gratt. (Va.) 394, where the court said that, whilst the Baltimore & Ohio R. Co., as a corporation of the State of Maryland, can have no legal existence outside of that State, yet, as the lessee of a Virginia railroad company, exercising all the powers and functions of the latter, it may be subject to all its duties and obligations. So acting, it may be treated as a Virginia corporation *quoad* the line of railroad under its control in Virginia, so far, at least, as its liability to the citizens of Virginia is concerned.

The courts have no jurisdiction to compel distribution of assets among stockholders of a foreign corporation, even where the trustees are residents. Redmon *v.* English Mfg. Co., 13 Abb. Pr. N. S. (N. Y.) 332.

4. Carver *v.* Peck, 131 Mass. 291.

5. Desper *v.* Continental Water-meter Co., 137 Mass. 252.

6. Lung Chung *v.* Northern Pac. R. Co. (Oreg.), 19 Fed. Rep. 254.

The act of Congress describing the place where a person may be sued is not one affecting the general jurisdiction of the courts; it is rather in the nature of a personal exemption in favor of a defendant which foreign corporations, as well as individuals, may waive. The designation, under a State statute, of a person upon whom process may be served is a waiver of this exemption.[1] An appearance by attorney, and answering generally, in an action is such consent as will confer jurisdiction.[2] But jurisdiction of the person is of no avail if jurisdiction of the subject-matter be lacking; and, where the court has no jurisdiction of the subject-matter, appearance and answer will not give it.[3]

The circumstances which render a foreign coropration liable to actions need not be set forth in the *præcipe*, or summons.[4] Allegations in a plea in abatement, which are presented to quash return of service, showing that the cause of action and the subject-matter of the suit are not sufficient to give jurisdiction to the court, do not amount to an appearance.[5]

(*d*) *In Federal Courts.*—Actions by and against foreign corporations in the Federal courts are dependent for their validity upon the local laws.[6]

Federal courts have no jurisdiction over foreign corporations, in the absence of local laws conferring jurisdiction on the State

1. It was accordingly held that the act of congress of 1875 providing "that no civil suit shall be brought before either of said courts against any person by any original process or proceeding in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving," did not prevent service on the designated person. Gray *v.* Quicksilver M. Co., 21 Fed. Rep. 288.

2. McCormick *v.* Pa. Cent. R. Co., 49 N. Y. 303; Brooks *v.* N. Y., etc., R. Co., 30 Hun (N. Y.), 47.

A corporation may voluntarily appear by attorney. Att.-Gen. *v.* Guardian Mut. L. Ins. Co., 77 N. Y. 272; Murray *v.* Vanderbilt, 39 Barb. (N. Y.) 140.

A foreign corporation, by filing an answer, waives the right to be sued only in the district of the State creating it; and, if the suit be in equity to enforce a lien or claim to property within the Federal district where sued, the jurisdiction is not limited to the property situated within the district, but is plenary for all proper purposes after such voluntary appearance. Blackburn *v.* Selma, etc., R. Co., 2 Flip. (U. S.) 525.

Where a foreign corporation demurred to petition (1) because the court had no jurisdiction, and (2) because the petition presented no sufficient cause of action, it was held that the second objection waived the first and brought the foreign corporation into court for all purposes. Dallmeyer *v.* Farmers, etc., Ins. Co. (U. S. C. C. W. D. of Missouri), 4 Cent. L. J. 464, note.

3. McCormick *v.* Pennsylvania R. Co., 49 N. Y. 303; Cappentier *v.* Mintum, 65 Barb. (N. Y.) 293; Harriott *v.* New Jersey, etc., Transp. Co., 8 Abb. Pr. (N. Y.) 284; s. c., 4 Hill (N. Y.), 262; Landers *v.* Staten Island R. Co., 53 N. Y. 450.

4. Benwood Iron Works *v.* Hutchinson, 101 Pa. St. 359.

5. United States *v.* American Bell Teleph. Co. (Ohio), 29 Fed. Rep. 18.

6. *Ex parte* Schollenberger, 96 U. S. 369; Eaton *v.* St. Louis, etc., Co. (Mo), 7 Fed. Rep. 139; West *v.* Home Ins. Co., 18 Fed. Rep. 622; Boston Electric Co. *v.* Electric Gas-lighting Co. (Mass.), 23 Fed. Rep. 838; Cowles *v.* Mercer Co., 7 Wall (U. S.) 118; Baltimore, etc., R. Co. *v* Koontz, 104 U. S. 5; New England Mut. L. Ins. Co. *v.* Woodworth, 111 U. S. 138.

That a railroad company chartered by another State is a foreign corporation, and, as such, entitled to sue in the United States courts, is no longer an open question. Taylor Co. *v.* Baltimore, etc., R. Co. (W. Va.), 35 Fed. Rep. 161; Baltimore, etc., R. Co. *v.* Harris, 12 Wall. (U. S.) 65; Baltimore, etc., R. Co., *v.* Koontz, 104 U. S. 5; Goodlett *v.* Louisville, etc., R. Co., 122 U. S. 391.

courts, even though the corporation does business through an agent and has an office within the district.[1] In construing a State statute as to personal judgments against foreign corporations, the Federal court follows the State court's interpretation.[2]

1. Eaton *v.* St. Louis, etc., Mining Co., 2 McCrary (C. C.), 362.

2. Eaton *v.* St. Louis, etc., Mining Co., 2 McCrary (C. C.), 362.

However, a corporation, by doing business in a State as permitted by the laws thereof, having a resident agent, etc., does not become a citizen of that State for the purpose of Federal jurisdiction. Taylor on Priv. Cor. (2d Ed.) § 412, note 1; Ins. Co. *v.* Francis, 11 Wall. (U. S.) 210; Williams *v.* Mo., Kan. & Tex. R. Co., 3 Dill. (U. S.) 267; Stevens *v.* Phœnix Ins. Co., 41 N. Y. 149.

A corporation created by a State other than the State of *New York* does not, by reason of its having an office and transacting material branches of its business within the State of New York, or by force of the State statute of New York of April 10, 1855 (Laws of 1855, ch. 279), lose the privilege, which otherwise belongs to it as a corporation created by another State, of having all its members regarded as citizens of that State, within the meaning of the acts of Congress in regard to the removal of causes into the circuit courts of the United States. Hatch *v.* Chi., R. I. & Pac. R. Co., 6 Blatchf. (U. S.) 105. If a New York citizen be sued with the corporation aforesaid, then there cannot be removal unless the New York party is merely a nominal one. Hatch *v.* Chi., R. I. & Pac. R. Co., 6 Blatchf. (U. S.) 105; Wormley *v.* Wormley, 8 Wheat. (U. S.) 421, 451.

A corporation, for jurisdictional purposes, is a citizen of the State by which it was created, even if all its business is transacted elsewhere and all of its offices and places of business are outside of the State. Pacific R. Co. *v.* Mo. Pac. R. Co. (Kan.), 23 Fed. Rep. 565.

A company incorporated under the laws of a State, and acquiring the ownership of a patent for an invention, and licensing others to use the invention under it, does not thereby become national in its character, nor become domesticated within another State, where it has licensed others to use its patent, in such manner that it may be sued in a circuit court of the United States for that State as "found" within the State. United States *v.* Am. Bell Tel. Co. (Ohio), 29 Fed. Rep. 17.

It is not sufficient, to give this court jurisdiction *in personam* over a foreign corporation, that it has property rights, however extensive, within the district, or that it has pecuniary interests, however valuable, in business managed and conducted by others. United States *v.* Am. Bell Tel. Co. (Ohio), 29 Fed. Rep. 17.

It has frequently been held that a foreign corporation is not "found" in a district, so as to authorize service under statute prohibiting service on any defendant, except in that district in which he shall be found. Stillwell *v.* Empire Fire Ins. Co. (U. S. C. C., Ark. Dis.), 4 Cent. L. J. 463; Pomeroy *v.* N. Y. & N. Haven R. Co., 4 Blatchf. (U. S.) 120; Dallmeyer *v.* Farmers, etc., Ins. Co., 4 Cent. L. J. 464, note.

And, in Stillwell *v.* Ins. Co., just mentioned, it was so held notwithstanding a statute requiring every insurance company not of the State to file with the auditor a written stipulation agreeing that all legal process affecting them served on the auditor or agent within the State should have the same effect as if served on the company.

A foreign corporation doing business in *Minnesota* commenced an action in the circuit court for the foreclosure of a mortgage, and then discontinued the same, and commenced another for the same purpose in the State courts. *Held*, that, while the bringing of the action in the first instance, in the Federal court, was in violation of the Minn. stat. (Gen. L. 1885, c. 183), yet the right of the corporation to maintain the action in the State court was not affected. Northwest, etc., Ins. Co. *v.* Brown, 36 Minn. 108; Northwestern, etc., Ins. Co. *v.* Stone, 36 Minn. 108.

A State statute requiring agreement by every foreign fire-insurance company doing business in the State that service on agent therein should be held as service on the company, applies in favor of process of the United States courts of that State. Knott *v.* Southern Life Ins. Co., 2 Woods (U. S.), 479; N. E. Mut. L. Ins. Co. *v.* Woodworth, 111 U. S. 146.

A corporation may be "found," under a judiciary act, in a State other than that in which it is created. The former decisions are modified. Knott *v.* Southern Life Ins. Co., 2 Woods (U. S.), 479; Railroad Co. *v.* Harris, 12 Wall. (U. S.) 81; Merchants' Mfg. Co. *v.* Grand Trunk R. Co., 63 How. Pr. (N. Y.) 459.

1. SERVICE OF PROCESS.—(*a*) *At Common Law.*—At common law, since there could be no personal service from the nature of the body, service of process was made upon the proper officer so as to secure that it came to the knowledge of the corporation; and the person served must have been in the nature of a head officer, whose knowledge would be that of the corporation.[1]

(*b*) *By Statute.*—Service of process upon foreign corporations is now commonly regulated by statute. Such statutory regulations may declare what shall constitute sufficient service and prescribe such conditions as are deemed in the best interests of the State.[2]

It is essential to the jurisdiction of the court that process shall have been validly served, and a judgment against the corporation after such service may be enforced in another State.[3] And it has been held, where the corporation asserts the want of jurisdiction on the ground that the service was not on the proper agent, the plea to the jurisdiction estops the corporation from retrying that question in another State in a suit there upon the judgment obtained.[4]

1. Blackburn, J., in Newby *v.* Colt's Fire-arms Co., L. R. 7 Q. B. 296, citing 1 Tidd's Practice, 121 (Ed. of 1828); see also Chamberlain *v.* Mammoth Mining Co., 20 Mo. 96.

The court in Newby *v.* Colt's Fire-arms Co., L. R. 7 Q. B. 296, were further of opinion that, when the company was a foreign corporation, the proper officer is the head of the branch in *England*, and that it was unnecessary to serve the officer at the head office abroad. See too Glaize *v.* So. C. R. Co., 1 Strobh. (S. Car.) 73.

2. In St. Clair *v.* Cox, 106 U. S. 350; s. c., 1 Am. & Eng. Corp. Cas. 19, the court observed: "A corporation of one State cannot do business in another without the latter's consent, express or implied; and that consent may be accompanied with such conditions as it may think proper to impose. . . . The State may therefore impose, as a condition upon which a foreign corporation shall be permitted to do business within her limits, that it shall stipulate that, in any litigation arising out of its transactions in the State, it will accept as sufficient the service of process on its agents or persons specially designated; and the condition would be eminently fit and just. And such condition and stipulation may be implied, as well as expressed. If a State permits a foreign corporation to do business within her limits, and at the same time provides that, in suits against it for business there done, process shall be served upon its agents, the provision is to be deemed a condition of the permission; and corporations that subsequently do business in the State are to be deemed to assent to such condition as fully as though they had specially their agents to receive the service of the process. Such condition must not, however, encroach upon that principle of natural justice which requires notice of a suit to a party before he can be bound by it. It must be reasonable, and the service provided should be only upon such agents as may be properly deemed representatives of the foreign corporation."

The State legislature may declare what shall constitute sufficient service of process upon foreign corporations. Pope *v.* Terre Haute Car Mfg. Co., 87 N. Y. 137; City Fire Ins. Co. *v.* Carrugi, 41 Ga. 660. And the legislature may properly authorize suit *in personam*.

**New York**.—Under the New York statutes, service within that State on the proper officer of a foreign corporation is equivalent to personal service on a non-resident natural person. Barnett *v.* Chicago & Lake Huron R. Co., 4 Hun (N. Y.), 114.

Where the statute requires appointment of attorney to receive service, and for filing of written power to him with the secretary of state, process is required to be on such agent. Thayer *v.* Tyler, 10 Gray (Mass.), 164.

3. Where a law of *Ohio* allowed an Indiana corporation to do business in Ohio on condition that process might be validly served on the corporation's agent, judgment against the corporation, obtained by means of such process, ought to have been received in Indiana with the same faith and credit that it was entitled to in Ohio. Lafayette Ins. Co. *v.* French, 18 How. (U. S.) 404.

4. Moch *v.* Virginia Fire, etc., Co., (Va.) 10 Fed. Rep. 696.

In *Louisiana*, the equivalent in this

At common law, a foreign corporation may be sued where it locates offices to transact business, and whenever effective service can be had upon it or its property.[1] Where a State makes conditions as to the right of foreign corporations to do business, and regulates service of process upon them, a foreign corporation so doing business is assumed to consent to the conditions, and to agree to be bound thereby.[2] Such conditions need not be expressed,

respect of the common-law plea to the jurisdiction is the peremptory exception. Moch *v.* Virginia Fire, etc., Co. (Va.), 10 Fed. Rep. 696.

1. Bank of Augusta *v.* Earl, 13 Pet. (U. S.) 519; North Missouri R. Co. *v.* Akers, 4 Kan. 488; Libbey *v.* Hodgdon, 9 N. H. 394; Morawetz Corp. (2d Ed.) § 977, and authorities cited.

If a company were to locate an office, and its principal officer were to do business there, there is no question as to his liability to be served. City Fire Ins. Co. *v.* Carrugi, 41 Ga. 671; Kushel *v.* Ins. Co., 15 S. & R. (Pa.) 176.

In Gray *v.* Quicksilver-mining Co. (C. C. Cal.) 8 Am. & Eng. Corp. Cas. 161, it was held that where a corporation organized under the laws of one State, and doing business in another, files in the proper office of the latter State a designation of a person residing therein, in pursuance of the requirements of the laws of said State, upon whom process may be served, such corporation so filing such designation thereby waives its right to be exempt from suit in the national courts held in the district embracing said State, under the provisions of section 1 of the act of Congress of 1875 relating to the jurisdiction of United States courts, and consents to be sued in the district embracing the State where said designation is filed and the business of said corporation is so carried on. The court observes: "It is insisted that a corporation, under the decisions of the United States supreme court, can only be regarded as an inhabitant of the State under whose laws it derives and continues its existence, and, for similar reasons, that it cannot be found in any other State, and therefore it is not liable to be sued in any other State; and so it has been frequently held in this and other circuits, where there were no facts or circumstances to affect the question; but the supreme court has directly held that this provision of the United States statute is not one affecting the general jurisdiction of the courts. It is one, rather, in the nature of a personal exemption in favor of a defendant, and it is one which he may waive; and that filing a designation of a person upon whom service may be made in another State, in pursuance of the laws of such State requiring a party to be designated upon whom service of process may be made, is a waiver of its privilege, and constitutes a consent to be sued in such State."

"In *Ex parte* Schollenberger, 96 U. S. 377, the supreme court says, upon this subject: 'A corporation cannot change its residence or its citizenship. It can have its legal home only at the place where it is located by or under the provision of its charter; but it may, by its agents, transact business anywhere, unless prohibited by its charter or excluded by local laws. In such circumstances, it seems clear that it may, for the purpose of securing business, consent to be "found" away from home for the purpose of a suit, as to matters growing out of its transactions. The act of Congress describing the place where a person may be sued is not one affecting the general jurisdiction of the courts. It is rather in the nature of a public exemption in favor of a defendant, and it is one which he may waive. If the citizenship of the parties is sufficient, a defendant may consent to be sued anywhere he pleases, and certainly, therefore, will not be ousted because he has consented. Here the defendant companies have provided that they can be found in a district other than that in which they reside, if a particular mode of proceeding is adopted and they have been so found. In each case, therefore, the circuit court has jurisdiction of the causes, and should proceed to hear and decide them.'" See also Railroad Co. *v.* Harris, 12 Wall. (U. S.) 65; St. Clair *v.* Cox, 106 U. S. 350; New England, etc., Ins. Co. *v.* Woodworth, 111 U. S. 146.

2. McNichol *v.* U. S. Mercantile Rep. Agency, 74 Mo. 457; McAllister *v.* Ins. Co., 28 Mo. 214; Gibbs *v.* Queen Ins. Co., 63 N. Y. 114 (elaborate opinion); Merchants Mfg. Co *v.* Grand Trunk R. Co., 63 How. Pr. (N. Y.) 459; Ehrman *v.* Teutonia Ins. Co., 1 McCrary (U. S.), 123; Wegmough *v.* Washington, etc., R. Co., 1 McA. (U. S.) 10; Pomeroy *v.* New York, etc., R. Co., 4 Blatchf. (U. S.) 121; Meyers *v.* Dorr, 13 Blatchf. (U. S.) 22; Lafayette Ins. Co. *v.* French, 18 How.

but may be implied. They must not, however, encroach upon that principle of natural justice which requires notice of a suit to a party before he can be bound by it. The conditions regulating service of process must be reasonable, and the service provided should be only upon such agents as may be properly deemed representatives of the foreign corporation.[1] A voluntary appearance by a foreign corporation is equally effective with proper service of process; and the foreign corporation is precluded from afterwards questioning jurisdiction over the person.[2]

(*c*) *Service upon Officer Casually in a State.*—At common law, should the chief officer of a foreign corporation come into a State on business unconnected with the corporation, he would not so represent it there that service of process on him would be valid.[3] The undoubted weight of authority is to the effect that an officer of a foreign corporation casually within a State, but not there on duty as such officer, nor authorized in any way by his corporation to submit to service, cannot be served with process so as to give jurisdiction over the corporation.[4] In any event, judgment against

(U. S.) 408. *Ex parte* Schollenberger, 96 U. S. 369; Stillwell *v.* Empire Fire Ins. Co., 4 Cent. L. J. 463; Stevens *v.* Pratt, 101 Ill. 206; National Bank *v.* Huntingdon, 129 Mass. 444.

In Lafayette Ins. Co. *v.* French, 18 How. (U. S.) 404, the court went still further than did the New York court, and held that the judgment was enforceable even beyond the State. See also Copin *v.* Adamson, L. R. 9 Exch. 345; s. c., 10 Moak Eng. R. 492; Schibsby *v.* Westenholz, L. R. 6 Q. B. 155.

The State may prescribe, as a condition of the entrance therein of a foreign corporation, that such corporation shall consent to be sued there. "If it do business there, it will be presumed to have assented, and will be bound accordingly." Railroad Co. *v.* Harris, 12 Wall. (U. S.) 81; Lafayette Ins. Co. *v.* French, 18 How. (U. S.) 405.

1. St. Clair *v.* Cox, 106 U. S. 350; s. c., 1 Am. & Eng. Corp. Cas. 19.

2. No. Mo. R. Co. *v.* Akers, 4 Kan. 488. A case was brought, in a *Wisconsin* court, against a foreign corporation, in which, under the Wisconsin statute, the court could have had no jurisdiction had defendant objected by making affidavits showing (1) that plaintiff was a non-resident, or (2) that the foreign corporation had no property in the State. But instead, defendant appeared generally, and demurred because the court had no jurisdiction and because the complaint did not state sufficient cause of action. After putting in the demurrer, defendant had the case removed to the Federal court, where again it demurred. *Held*, that the defendant had waived any defect in the service and had submitted itself to the court. Friezen *v.* Allemania Fire Ins. Co. (Wis.), 30 Fed. Rep. 350, citing Johnson *v.* Trade Ins. Co., 132 Mass. 432; Clay Fire, etc., Co. *v.* Huron Salt & Lumber Mfg. Co., 31 Mich. 346; Mohr *v.* Ins. Co. (Ohio), 12 Fed. Rep. 474; Carstairs *v.* Ind. Co. (Ind.), 13 Fed. Rep. 823; Dennick *v.* R. Co., 103 U. S. 11; Edwards *v.* Ins. Co. (N. Y.), 20 Fed. Rep. 452; Conugar *v.* Galena, etc., R. Co., 17 Wis. 477; Upper Miss. Transp. Co. *v.* Whittaker, 16 Wis. 233.

The full faith and credit clause in the Federal Constitution applies only where the corporation was brought into court either by service of process within its jurisdiction or by an appearance to the action. Moulin *v.* Trenton Mut., etc., Co., 24 N. J. L. 222.

3. Bushel *v.* Commonwealth Ins Co., 15 S. & R. (Pa.) 176. See also City Fire Ins. Co. *v.* Carrugi, 41 Ga. 671, where service on occasion of such accidental visit is said to be doubtful. Gives no jurisdiction: Latimer *v.* Union Pac. R. Co., 43 Mo. 105. In Newell *v.* Great Western R. Co., 19 Mich. 345, it was said that the court would not infer that the legislature meant to authorize service on a foreign corporation by service on officer accidentally or casually in the State, the action being by a non-resident, the cause of action arising beyond the State, the machinery, etc., of the company being also beyond the State; and held such service void.

4. St. Clair *v.* Cox, 106 U. S. 350; s. c., 1 Am. & Eng. Corp. Cas. 19; Good

a foreign corporation not doing business in a State, but obtained by service of process upon an officer casually in a State, cannot be enforced elsewhere.[1]

An opposite view has been asserted by some *New York* courts, but these decisions certainly conflict with the commonly accepted opinion.[2]

Hope Co. *v.* Railway Barb-fencing Co. (N. Y.), 22 Fed. Rep. 635; Moulin *v.* Trenton Mut., etc., Co., 24 N. J. L. 222; McQueen *v.* Middleton Mfg. Co., 16 Johns. (N. Y.) 5; Middlebrooks *v.* Ins. Co., 14 Conn. 301; Peckham *v.* North Parish, 16 Pick. (Mass.) 286; Newell *v.* Great West. R. Co., 19 Mich. 336; Minnesota *v.* Eau Claire Dells Imp. Co., 26 Minn. 233. *Compare* Benwood Iron Works *v.* Hutchinson, 101 Pa. St. 359.

In St. Clair *v.* Cox, 106 U. S. 350; s. c., 1 Am. & Eng Corp. Cas. 19, the court, Field, J., observes: "In McQueen *v.* Middleton Mfg. Co., 16 Johns. (N. Y.) 7, decided in 1819, the supreme court of *New York*, in considering the question whether the law of that State authorized an attachment against the property of a foreign corporation, expressed the opinion that a foreign corporation could not be sued in the State, and gave as a reason that the process must be served on the head or principal officer within the jurisdiction of the sovereignty where the artificial body existed; observing that, if the president of a bank went to New York from another State, he would not represent the corporation there, and that his functions and his character would not accompany him when he moved beyond rhe jurisdiction of the government under whose laws he derived his character. The opinion thus expressed was not perhaps necessary to a decision of the case, but nevertheless it has been accepted as correctly stating the law. It was cited with approval by the supreme court of *Massachusetts* in 1834, in Peckham *v.* North Parish in Haverhill, 19 Pick. (Mass.) 274, the court adding that all foreign corporations were without the jurisdiction of the process of the courts of the commonwealth. Similar expressions of opinion are found in numerous decisions, accompanied sometimes with the suggestions that the doctrine might be otherwise if the foreign corporation sent its officer to reside in the State and transact business there on its account. Libby *v.* Hodgdon, 9 N. H. 394; Moulin *v.* Trenton Ins. Co., 24 N. J. L. 222."

In the circuit court of the United States, Wallace, J., was of a contrary opinion. He held that a foreign corporation is not "found" within a district, within N. Y. Rev. Stat. § 739, for service of process, when its president comes temporarily into such district upon the business of the corporation, such corporation having no office or place of business therein, and not having transacted any business therein, except that which the president came to settle.

In Good Hope Co. *v.* Railway Barb-fencing Co. (N. Y.), 22 Fed. Rep. 634, the court said: "It is quite clear that service of process upon an agent of a foreign corporation while merely casually present in the State is not equivalent to a personal service upon an individual, in conferring jurisdiction upon a court to render a personal service; and such a judgment would be treated as void for want of jurisdiction by other tribunals than those of the State where it was obtained. The authorities may be found in the note to § 522, Morawetz Priv. Corp. The subject has recently been considered by the supreme court of the United States, in St. Clair *v.* Cox, 106 U. S. 350, and Mr. Justice Field, speaking for the court, said: 'We are of opinion that, when service is made within the State upon an agent of a foreign corporation, it is essential, in order to support the jurisdiction of the court to render a personal judgment, that it should appear somewhere in the record that the corporation was engaged in business in the State,'"

Jurisdiction, in *Georgia*, is not acquired by service on the auditor of an insurance company which did business in South Carolina and Florida but none in Georgia, although the auditor resided in Georgia and examined claims, and when in funds sometimes paid them or gave checks. Schmidlapp *v.* La Confiance Ins. Co., 71 Ga. 246.

1. Middlebrooks *v.* Ins. Co., 14 Conn. 301; Moulin *v.* Trenton Mut., etc., Co., 24 N. J. L. 222; Good Hope Co. *v.* Railway Barb-fencing Co. (N. Y.), 22 Fed. Rep. 635; Hulbert *v.* Ins. Co., 4 How. Pr. (N. Y.) 275; Brewster *v.* Railroad Co., 5 How. Pr. (N. Y.) 183; Bates *v.* Railroad Co., 13 How. Pr. (N. Y.) 516; Latimer *v.* Union Pac. R. Co., 43 Mo. 105; McNichol *v.* United States Merc. Agency, 74 Mo. 457. *Compare* Wisconsin *v.* Pelican Ins. Co., 127 U. S. 265.

2. Section 432 of the *New York* Code

(*d*) *Who are Proper Agents for Service of Process.*—Statutes regulating service of process on foreign corporations frequently designate "a managing agent" as the proper person upon whom to make service, or designate certain other agents of the company for this purpose. An agent on whom service can be made must be one actually appointed by or representing the corporation as a matter of fact, and not one created by implication or construction contrary to the intention of the parties.[1] The value, as precedents, of many of the decisions as to who are managing agents and other representatives of the corporation, within the terms of such statutes, will depend upon the provisions of the statutes themselves.

In *Massachusetts*, it is provided by statute that foreign corporations must there appoint the commissioner of corporations its attorney, upon whom process may be sworn.[2] Similar statutes as to insurance companies exist in several States. In *Nebraska*, it

provides that personal service of the summons upon a foreign corporation may be made by delivering a copy thereof within the State to the president, secretary, or treasurer thereof. In order to make such service effectual, it is not needful that the officer served should be here in his official capacity, or engaged in the business of the corporation, or that the corporation should have any property within the State, or that the cause of action should have arisen within the State. Pope *v.* Terre Haute Car Mfg. Co., 87 N. Y. 137. The court observed: "The object of all service of process for the commencement of a suit or other legal proceeding is to give notice to the party proceeded against; and any service which reasonably accomplishes that end answers the requirements of natural justice and fundamental law. And what service may be deemed sufficient for that purpose is to be determined by the legislative power of the country in which the proceeding is instituted, subject only to the limitation that the service must be such as may be reasonably expected to give the notice aimed at."

In Hiller *v.* Burlington, etc.. R. Co., 70 N. Y. 223, the cause of action was held to have arisen in New York. A director was served while temporarily in that State, and it was held to be a good service.

1. United States *v.* Am. Bell Tel. Co. (Ohio), 29 Fed. Rep. 18.

The term "managing agent" implies the carrying on of the corporate business, or some substantial part thereof, by means of an agent who manages and conducts the same within the limits of the State, for and on account of the foreign corporation. United States *v.* Am. Bell Tel. Co. (Ohio), 29 Fed. Rep. 18.

In Upper Miss. Transp. Co. *v.* Whittaker, 16 Wis. 233, it was held that the captain of a steamboat was not a "managing agent." The court say: "This statute relates to an agent having a general supervision over the affairs of the corporation." See also Lake Shore, etc., R. Co. *v.* Hunt, 39 Mich. 470.

In Reddington *v.* Mariposa L. & M. Co., 19 Hun (N. Y.), 405, the court say: "It is quite clear that the legislature attached importance to the term 'managing agent,' and employed it to distinguish a person who should be invested with general power, involving the exercise of judgment and discretion, from an ordinary agent and employee who acted in an inferior capacity."

In Flynn *v.* Hudson Riv. R. Co., 6 How. Pr. (N. Y.) 308, the court held that a "managing agent" contemplated by the statute was one having "the same general supervision and control of the general interests of the corporation that are usually associated with the office of cashier or secretary" The *Ohio* process act (§ 5044, R. S.) classes "managing agent" with "cashier," "secretary," and "treasurer," and next after "president" or "chief officer" of the corporation.

Service on chief officer of agency in Cincinnati was held good. Am. Exp. Co. *v.* Johnston, 17 Ohio St. 641.

When a foreign corporation has not designated a person on whom process may be served, the service may be on its managing agent. Thomas *v.* Placerville G. O. M. Co., 75 Cal. 600.

2. Massachusetts act, 1884, ch. 330.

has been held that service upon a managing agent is good though he be not a resident.[1]

The following have been held to be agents upon whom process might be served: Managing agent of a bank;[2] superintendent and general managing agent of a railroad;[3] an insurance agent;[4] the general superintendent for the State of an express company;[5] local agent of a commercial agency;[6] railroad treasurer;[7] local agent of a slate-quarry;[8] attorney of record, where the agent is

1. Porter *v.* Railroad Co., 1 Neb. 15. Under *Nebraska* Civil Code, § 912, a summons against a corporation may be served upon its chief officer if he be found in the country. If not so found, then upon its cashier, treasurer, secretary, clerk, or managing agent; or, if none of these can be found, by copy left at the office or usual place of business of such corporation, with the person having charge thereof. This, as to corporations in general, was held to include foreign corporations, as well as section 914, which applies to foreign corporations expressly, except where there are special provisions to the contrary. Said section 914 provides for service on managing agent of foreign corporation, in case there is one in the State. For this policy is to apply the remedy, as far as possible, at the place where the injury was sustained. Chicago, B. & Q. R. Co. *v.* Manning (Neb. 1888), 37 N. W. 462.

2. The "managing agent" of a home company, under such a statute, was held to be a person engaged in closing up the affairs of the bank corporation; was in the habit of making its semi-annual reports to the bank-comptroller; employed attorneys to attend to its business; and was the only person exercising a general supervision over its affairs. Carr *v.* Commercial Bank, 19 Wis. 272.

3. In *New York*, service on the superintendent and general managing agent of a foreign railroad corporation, in the possession of and using a railroad in that State, was held a good service, within section 134 of the code. Pres't, etc., of Bk. of Commerce *v.* Rutland & Wash. R. Co., 10 How. Pr. (N. Y.) 1.

4. A local agent of ——, an insurance company of a distant State, who solicits insurance, takes the application, receives the premium, and delivers the policy is to be regarded as the agent of the company for the purpose of receiving notice of an additional insurance, no particular notice being required in the policy. Phœnix Ins. Co. *v.* Spiers (Ky. 1888), 8 So. West. Rep. 453. See also Bain *v.* Globe Ins. Co., 9 How. Pr. (N. Y.) 448.

**Service on Insurance Agents under Maryland Statutes.**—Maryland act, 1868 ch. 471, § 211, authorizing service on any agent of a foreign corporation, does not govern service on foreign insurance companies; for the Maryland act of 1878 establishing the State Insurance Department provided that service should be on the agent appointed by the company, in pursuance of said late act, or, in case of his death, on the insurance commissioner. Hence, service on local agent of the company, and mailing a copy of the process to the general agent authorized to receive process, in a suit against an insurance company of another State, was held not to be good service, and order of court quashing the sheriff's return was affirmed. Oland *v.* Agricultural Ins. Co. (Md.), 14 Atl. Rep. 669.

5. In a case where there was a general "superintendent" for the State, and two or more local agents in a certain county, one of whom was stationed at London in said county and kept an office there where he received and forwarded packages for the express company and did all the business of the company usually transacted in such receiving and forwarding offices, it was held that such London agent was "managing agent," and that service was sufficient. American Express Co. *v.* Johnson, 17 Ohio St. 641.

6. Augerhœfer *v.* Bradstreet's Co. (Tex.), 22 Fed. Rep. 305.

7. A foreign railroad corporation having an office for convenience of stockholders and for the better management of its finances and other business, where its principal officers are to be found, and where it carries on such business as is usually carried on in the office of the president and treasurer of a railroad corporation, has a usual place of business, and under *Massachusetts* Stat. 1870, ch. 194, may be summoned as trustee by process served on its treasurer. Nat. Bk. of Commerce *v.* Huntington, 129 Mass. 444.

8. Where no agent was named to the State, nor appointed by regular act of

in contempt; [1] an agent who fills that capacity in the very transaction out of which the suit arises; [2] an agent intrusted with the management and supervision of a manufacturing company; [3] section foreman of a railroad company; [4] railroad-train conductor. [5]

The following have been held not to be proper agents for the service of process: An attorney at law who has claims to collect for a foreign corporation is not a local agent; [6] local agent in a country town, of an insurance company, with limited authority; [7] travelling agent; [8] ticket agent of a railroad com-

the directors, but one was requested by the president to look after the company's affairs as lessor of a certain slate-quarry, etc., and such person received royalties, leased houses from time to time, and returned moneys and submitted accounts to the company, it was held that he could be served with process in a suit on a mortgage respecting some of the land owned by such foreign corporation. Hagerman *v.* Empire Slate Co., 97 Pa. St. 534.

1. Under the practice authorized by the *California* code, where the agent of a foreign corporation, which is charged with contempt, wilfully conceals himself to avoid service of an order to show cause, service may be made upon its attorney of record. Eureka, etc., Co. *v.* Yuba County, 116 U. S. 410.

2. Pullman Co. *v.* Nolan (Tenn.), 22 Fed. Rep. 276; Estes *v.* Bedford (N. Y.), 8 Am. & Eng. Corp. Cas. 153.

3. Shackleton *v.* Wainwright Mfg. Co., 7 N. Y. State Rep'r, 872, citing Palmer *v.* Pa. Co., 35 Hun (N. Y.), 369.

4. A section foreman is a "local superintendent of repairs," on whom process against his railroad may be served in the absence of designation by the company of some person on whom service can be made. If it bears hardly on the company to have service on a section foreman remote from telegraph and post offices, let the company comply with the statute and appoint a person in an appropriate place to receive service. St. Louis, etc., R. Co. *v.* Deford, 38 Kan. 299.

5. Under *Indiana* legislation providing that, in suits for stock killed, service might be on railroad-train conductor, and a statute applicable to all suits against railroad companies said that, where the chief officer is not found in the county, service might be on its cashier, clerk, etc., or general or special agent, it was held, in a case of loss of a mare in a well left uncovered by the company, that service was well made on a train-conductor. The court said: "We think the conductor at least a special agent of the railroad company, and one peculiarly proper for receiving service of process; because his duties take him along the line of the road to that extent that will generally enable him daily to communicate with the chief officers of the corporation, whose duty it would be to attend to suits against it." New Albany, etc., R. Co. *v.* Grooms, 9 Ind. 243. See also New Alb., etc., R. Co. *v.* Tilton, 12 Ind. 3.

6. An attorney at law, who has claims to collect for a foreign corporation, is not a "local agent" on whom process can be served. "Local agent" means one residing either permanently or temporarily in the State for the purpose of his agency; and does not include a mere transient agent, like a lawyer employed to collect a debt. And this is so, although the statute provides that "Any person receiving or collecting moneys within this State for or on behalf of any corporation of this or any State or government shall be deemed a 'local agent,' for the purpose of service." Moore *v.* Freeman's Nat. Bk., 92 N. Car. 590.

7. Service on a local agent in a country town, whose authority was only to receive applications for insurance and give binding receipts therefor, was held void in *Louisiana*, where the corporation had residing in New Orleans a general agent and a local board of directors. Weight *v.* Liverpool, Lond. & Globe Ins. Co., 30 La. Ann. 1186. But a company cannot avoid service by revocation of proper agent's authority on eve of suit. Such agent may, notwithstanding, be served. Michael *v.* Mut. Ins. Co., 10 La. Ann. 737.

8. Under a *Pennsylvania* statute allowing corporations to be sued in any county where they may "have an agency or transact any business," it was held, in a suit having nothing to do with any business with which a travelling agent has any duties, that service on him was not a valid service on the company. Especially was this so in the light of other legislation, viz.: Act of 1857 allowing suit in

pany;[1] baggage agent of a railroad company;[2] captain of a steamboat.[3]

(*e*) *Miscellaneous Matters Relating to Service of Process.*—An express power of attorney to accept or receive service is not a necessity, especially where the State law requires the presence of at least one agent for such purpose, and requires every agent of general powers to have such warrant.[4]

The Federal courts follow the State law as to service of process.[5]

Where the sheriff's return shows a valid service, it is conclusive.[6] Should service be made on an officer casually present, and the corporation is not suable in the State upon the contract or matter on which the action is founded, then a plea to the jurisdiction is the proper remedy.[7] A return of service in the words of the

county where insured property is situated; act of 1851 allowing suit in any county where the company habitually transact business by an agency or branch. Parke *v.* Commonwealth Ins. Co., 44 Pa. St. 422. Lowrie, C.J., said: "That corporations should be liable to be sued in any county where they had ever had any matters of business treated about by an agent or by any plaintiff who may choose to sue them there, whether this claim originated there or not, is surely beyond the intention of the legislature."

1. Doty *v.* Michigan Central R. Co., 8 Abt. Pr. (N. Y.) 427; Dallas *v.* Railroad Co., 2 McArthur (U. S.), 146. Such a statute does not enlarge the jurisdiction, it merely prescribes process. Camden Rolling-mill Co. *v.* Swede Iron Co., 32 N. J. L. 15.

2. Flynn *v.* Hudson River R. Co., 6 How. Pr. (N. Y.) 308.

3. Upper Mississippi Transp. Co. *v.* Whittaker, 16 Wis. 233.

4. Moch *v.* Va. Co. (Va.), 10 Fed. Rep. 696.

No sound reason appears why, to the extent of their agency, officers and agents are not to be equally deemed to represent it when their corporations are called to legal responsibility in the States for which they are respectively appointed for their transactions. "Serving process on its agents in other States for matters within the sphere of their agency is, in effect, serving process on it as much so as if such agent resided in the State where it was created." St. Clair *v.* Cox, 106 U. S. 356.

5. Lung Chung *v.* N. Pac. R. Co. (Oreg.), 19 Fed. Rep. 254; Eaton *v.* St. Louis, etc., Mining Co., 2 McCrary (U. S.), 369; *Ex parte* Schollenberger, 96 U. S. 369; Knott *v.* Southern Life Ins. Co., 2 Woods (U. S.), 479; Northeastern Mut., etc., Ins. Co. *v.* Woodworth, 111 U. S. 146.

6. Benwood Iron Works *v.* Hutchinson, 101 Pa. St. 359, citing Camden Rolling-mills Co. *v.* Swede Iron Co., 32 N. J. L. 15; Newell *v.* Great Western R. Co., 19 Mich. 336.

As the return must be considered as conclusive between the parties to the action, it is error to set aside the service upon extraneous evidence. Affidavits and depositions are no part of the record. Benwood Iron Works *v.* Hutchinson, 101 Pa. St. 362; Kennard *v.* R. Co., 1 Phila. (Pa.) 41; Kleckner *v.* Lehigh Co., 6 Whart. (Pa.) 66; Lehigh Valley Ins. Co. *v.* Fuller, 81 Pa. St. 398; Liblong *v.* Ins. Co., 82 Pa. St. 413. *Compare* St. Clair *v.* Cox, 106 U. S. 350; s. c., 1 Am. & Eng. Corp. Cas. 19, where it was held that, the transaction of business by a corporation in the State appearing, a certificate of service by the proper officer on a person who is its agent there is sufficient *prima facie* evidence that the agent represented the company in the business. But the corporation may, when the record is offered as evidence in another State, show that the agent stood in no such representative character to the company as would justify the service of the writ on him.

Where service is to be on certain specified officers, or on an agent designated by the corporation, and in the absence of such officers or of such designated person, then on the managing agent, the return of the sheriff showing service on agent who transacted the business will not be held insufficient if it fail to state the absence of the officer or person chosen by the company, if the company themselves assent to such absence. Pullman Co. *v.* Nolan (Tenn.), 22 Fed. Rep. 276.

7. Benwood Iron Works *v.* Hutchinson, 101 Pa. St. 359.

statute, but omitting to set forth the character of the agent served, is *prima facie* good, though not conclusive.[1]

The regularity of the service cannot be tested on a case stated; it should be pleaded in abatement.[2] Where affidavits leave the nature and extent of the agency of the person served in doubt, the burden is on the corporation to establish the irregularity clearly, it being within their power to show the precise relations of the agent towards them.[3] A foreign corporation against which garnishee process has been served is not to be considered in default for want of answer after disclosure filed by a general agent who does business in the State and is authorized to receive service of process. Under the statute, such agent may answer or disclose in garnishee cases.[4]

2. JUDGMENTS AGAINST FOREIGN CORPORATIONS.—Under the common law, a judgment against a foreign corporation has the same legal effect as that given to a judgment against an individual under similar circumstances.[5] It is essential to the validity of such a judgment that the court rendering it shall have had jurisdiction acquired by proper service of process.[6] Where these pre-

1. Hageman *v.* Empire Slate Co., 97 Pa. St. 534; Liblong *v.* Kansas Fire Ins. Co., 82 Pa. St. 413.

2. Libbey *v.* Hodgson, 9 N. H. 394.

3. Donadi *v.* New York State Mut. Ins. Co., 2 E. D. Smith (N. Y.), 519.

**Evidence to Show Valid Service on Director.**—It was held that, for the purpose of a motion to set aside service on a director residing in *New York*, of a Wisconsin corporation, the records of defendant showing the election of the person upon whom service was made, as a director, were sufficient to establish that he was one in fact. Childs *v.* Harris Mfg. Co., 104 N. Y. 477.

4. Lorman *v.* Phœnix Ins. Co., 33 Mich. 65.

5. Lafayette Ins. Co. *v.* French, 18 How. (U. S.) 404, 407. Where a statute of *Ohio* allowed an *Indiana* corporation to do business in Ohio on condition that process might be validly served on the corporation's agent, judgment against the corporation, obtained by means of such process, ought to have been received in Indiana with the same faith and credit that it was entitled to in Ohio.

6. See, *supra*, this title, SERVICE OF PROCESS.

The rule that sentence pronounced against a party without hearing him or giving him opportunity to be heard is not a judicial determination of his rights, and is not entitled to respect in any other tribunal,—Windsor *v.* McVeigh, 93 U. S. 274,—Prevails, of course, with respect to judgments against foreign corporations. St. Clair *v.* Cox, 106 U. S. 350.

Where a suit by attachment was brought, under *Michigan* statute authorizing the process and inventory to be served on "any officer, member, clerk, or agent of such corporation" within the State, the statute providing further that the service should have the effect of personal service of summons in suits began by summons; and return was made of attachment of certain property, and service of the writ and inventory by delivering the same personally to B., agent of the said defendant; and defendant entered no appearance, and plaintiff obtained judgment *in personam* for the amount of his demand; it was held that the record was properly excluded in another suit, in which it was offered in evidence as a set-off; and, where it was objected to because the court rendering the judgment had not jurisdiction of the parties, it was properly excluded, (1) because it did not appear therefrom that the corporation was doing business in the State at the time of the service of the writ on B, and (2) had that fact appeared, the corporation might have shown that his relation to it did not justify such service. St. Clair *v.* Cox, 106 U. S. 350.

And query was made in the case just cited, whether authorizing service of a copy of a writ of attachment as a summons on some of the persons named in the statute—a member, for instance, of the foreign corporation, that is, a mere stockholder—is not a departure from the principle of natural justice mentioned in La-

requisites exist, such a judgment is entitled, under the full faith and credit clause of the Constitution, to be enforced in another State.[1] Thus, a judgment obtained against a foreign corporation for borrowed money may be sued upon in another State, although the corporation's business is that of a railroad which is operated in a distant State.[2]

It is settled, however, that a court, when called upon to enforce such a judgment for or against a foreign corporation, may examine into the jurisdiction of the court which rendered it over the subject-matter and parties, and respecting the service of process, and into allegations of fraud.[3] Where it appears that the judgment was obtained after service of process upon an officer casually within the State, who therefore did not properly represent the corporation, which was not actually doing business within the State, it will not be enforced.[4] So a personal judgment obtained upon notice to the foreign corporation by publication only, there being no appearance, will be deemed null and void, and will support no action outside of the State rendering it.[5]

fayette Ins. Co. *v.* French, 18 How. (U. S.) 404, which forbids condemnation without citation.

1. Lafayette Ins. Co. *v.* French, 18 How. (U. S.) 404; Gibbs *v.* Queen Ins. Co., 63 N. Y. 114; Weymouth *v.* Railroad Co., 1 McArthur (U. S.), 19.

The full faith and credit clause in the national Constitution applies to judgments against foreign corporations. Moulin *v.* Trenton Mut., etc., Co., 24 N. J. L. 222.

2. Weymouth *v.* Railroad Co., 1 McArthur (U. S.), 19.

An Ohio corporation which has obtained a judgment in *Ohio* against another Ohio corporation may maintain a bill in equity in *Massachusetts* against the officers of the debtor corporation for discovery of the names of its stockholders and of the number of shares held by each if the officers reside in Massachusetts and the books of the corporation are kept there in order, by a suit in Ohio, to enforce a personal liability imposed upon such stockholders by Ohio law. Post *v.* Toledo, Cincinnati, etc., R. Co., 144 Mass. 341. *Compare* New Haven Horse-nail Co. *v.* Linden Spring Co., 142 Mass. 349.

Individual liability of shareholders can be enforced in a foreign State only by the remedies provided by the laws of that State. Morawetz Corp. (2d Ed.) § 876.

3. See Moch *v.* Va. Fire Ins. Co. (Va.), 10 Fed. Rep. 696; Story on Confl. of Laws, § 608; 1 Kent Com. 261, 262, and notes.

4. Middlebrooks *v.* Ins. Co., 14 Conn. 501; Moulin *v.* Trenton Mut. etc., Co., 24 N. J. L. 222; Good Hope Co. *v.* Railway Barb-fencing Co. (N. Y.), 22 Fed. Rep. 635; Hulbert *v.* Ins. Co., 4 How. Pr. (N. Y.) 275; Brewster *v.* Railroad Co., 5 How. Pr. (N. Y.) 183; Bates *v.* Railroad Co., 13 How. Pr. (N. Y.) 516; Latimer *v.* Union Pac. R. Co., 43 Mo. 105; McNichol *v.* United States Merc. Agency, 74 Mo. 457. *Compare* Wisconsin *v.* Pelican Ins. Co., 127 U. S. 265.

5. Latimer *v.* Union Pac. R. Co., 43 Mo. 105; Pennoyer *v.* Neff, 95 U. S. 714.

In St. Clair *v.* Cox, 106 U. S. 350; s. c., 1 Am. & Eng. Corp. Cas. 19, the court observed: "In Pennoyer *v.* Neff, 95 U. S. 714, we had occasion to consider at length the manner in which State courts can acquire jurisdiction to render a personal judgment against non-residents, which would be received as evidence in the Federal courts; and we held that personal service of citation on the party, or his voluntary appearance, was, with some exceptions, essential to the jurisdiction of the court. The exceptions related to those cases where proceedings are taken in a State to determine the *status* of one of its citizens towards a non-resident, or where a party had agreed to accept notification to others or service on them as citation to himself. The doctrine of that case applies, in all its force, to personal judgment of State courts against foreign corporations. The court rendering them must have acquired jurisdiction over the party by a personal service or voluntary appearance, whether the party be a corporation or a natural person. There is only this difference: a corporation being an artificial being, can act only through agents, and only through them can be reached, and process must

In a late and interesting case, the United States supreme court has held that it has no original jurisdiction to enforce the judgments of a State, under penal statutes, against foreign insurance companies; and that, to avoid doing so, it can go back of a judgment of the State court, upon which suit is brought to see whether or not it was for a penalty.[1]

In an effort to vacate a judgment by default against a foreign corporation, if the contract sued upon was made in the State, inquiry as to whether in truth the contract was made will not be entered into on such motion or on motion to set aside service; such investigation must be reserved for the trial.[2] Instances of the discretionary power of the courts, in judgments by default against foreign corporations, are cited in the notes.[3]

therefore be served upon them. In a State where a corporation is formed it is not difficult to ascertain who are authorized to represent and act for it. Its charter, or the statutes of the State, will indicate in whose hands the control and management of its affairs are placed. Directors are readily found, as also the officers appointed by them to manage its business. But the moment the boundary of the State is passed, difficulties arise; it is not so easy to determine who represent the corporation there, and under what circumstances service on them will bind it."

A personal judgment against a corporation can be obtained only where the court has jurisdiction over its person by due service of process. Judgment under statutory process of foreign attachments, which is in the nature of a proceeding *in rem*, subjects the goods attached to the judgment when recovered; but in such case, if the goods attached are insufficient to satisfy the judgment, no suit can be sustained upon the judgment for the deficiency, owing to the defendants not being personally amenable in the first suit. Warren Mfg. Co. *v.* Etna Ins. Co., 2 Paine (U. S.), 501; Barnett *v.* Chicago & Lake H. R. Co., 4 Hun (N. Y.), 114.

That the officers of a foreign corporation are in possession of the property by purchase under judgment and execution will not prevent a court from examination of their action when the case made before it leads to the conclusion that the suit in which that judgment was recovered was a contrivance designed to protect them in the possession of the property of the company, as against the receiver, and the creditors, and stockholders. Bidlack *v.* Mason, 26 N. J. Eq. 230.

1. Wisconsin *v.* Pelican Ins. Co., 127 U. S. 265. The court observed: "The application of the rule to the courts of the several States, and of the United States, is not affected by the provisions of the Constitution and of the act of Congress by which the judgments of the courts of any State are to have such faith and credit given to them in every court within the United States as they have by law or usage in the State in which they were rendered. Const. art. 4, § 1; act, May 26, 1790, ch. 11 (1 St. 122); Rev. Stat. § 905. Those provisions establish a rule of evidence, rather than of jurisdiction."

In the case under consideration, the State of *Wisconsin* had received judgment in the State court against the foreign insurance company, in an action for penalty for non-compliance by the company with the statutory conditions for doing business in the State. Upon this judgment, Wisconsin sued in the United States supreme court. In addition to what has already been indicated, the court said, per Mr. Justice Gray:

"The essential nature and real foundation of a cause of action are not changed by recovering judgment upon it; and the technical rules which regard the original claim as merged in the judgment, and the judgment as implying a promise by the defendant to pay it, do not preclude a court to which a judgment is presented for affirmative action (while it cannot go behind the judgment for the purpose of examining into the validity of the claim) from ascertaining whether the claim 'is really one of such a nature that the court is authorized to enforce it;'" citing Louisiana *v.* New Orleans, 109 U. S. 285, 288, 291; Louisiana *v.* St. Martin's Parish, 111 U. S. 716; Chase *v.* Curtis, 113 U. S. 452, 464; Boynton *v.* Ball, 121 U. S. 457, 466, disapproving Spencer *v.* Brockway, 1 Ohio, 259; Healey *v.* Root, 11 Pick. (Mass.) 389; Indiana *v.* Helmer, 21 Iowa, 370.

2. Nat'l Condensed Milk Co. *v.* Brandenburgh, 40 N. J. L. 111.

3. Where the agent fails to inform the

3. ATTACHMENT AND GARNISHMENT.—(*a*) *In General.*—While any arbitrary assumption of jurisdiction over foreign corporations is regarded as usurpation, it has frequently been held that attachments of their property or choses in action, if these are within the bounds of the court's jurisdiction, are valid.[1] It has been held, in *Massachusetts*, that a foreign corporation can be sued only by means of attachment of its property, unless jurisdiction otherwise is expressly given by statute.[2]

Foreign corporations are often involved in legal proceedings where the attempt is made to reach the stock or other property of third persons which may be in their hands. They are then summoned as garnishees in foreign attachment, or as trustees under the trustee process.[3]

It has been held, in *New York*, that shares of the stock of a foreign corporation, owned by a non-resident defendant, cannot be there attached in the hands of the corporation, although the officers of the corporation may be within the State.[4] Under a *Massachusetts* statute enacting that "all corporations may be summoned as trustees," a foreign railroad corporation cannot be charged by the trustee process, although in possession under leases of railroads in that State.[5] But a statute of that

foreign corporation of the commencement of the suit, and has no power himself to employ counsel to defend such action, the supreme court will not set aside the default and judgment entered against such negligent corporation. The granting or denying a motion to set aside a judgment by default rests very much in the discretion of the court below. Walker *v.* Continental Ins. Co., 2 Utah, 332; Bailey *v.* Taaffe, 29 Cal. 422; Coleman *v.* Rankin, 37 Cal. 247.

It may be proper ground for the court which granted judgment against a foreign corporation by default to let such foreign corporation to plead thereafter, because an honest defence was not interposed, owing to advice of foreign counsel, *bona fide* followed by the corporate officers. Nat'l Condensed Milk Co. *v.* Brandenburgh, 40 N. J. L. 112.

1. Latimer *v.* Union Pac. R. Co., 43 Mo. 105; Coffin *v.* Chicago, etc., Constr. Co., 67 Barb. (N. Y.) 337; Bawknight *v.* Liverpool, etc., Co., 55 Ga. 194; National Condensed Milk Co. *v.* Brandenburgh, 40 N. J. L. 111. See also Friezen *v.* Allemania Fire Ins. Co. (Wis.), 30 Fed. Rep. 349.

*Georgia* courts have no jurisdiction of suits *in personam* against the foreign corporation unless the contract sued on has been made in Georgia, or the Georgia agent is connected therewith, within his authority, as maker of such contract. The remedy on the foreign contract or judgment is *in rem*, by attachment or garnishment. Such remedy will reach all the property belonging to the foreign corporation in Georgia; and it would be unreasonable, by construction, to extend the statutes of Georgia to embrace suits *in personam* beyond contracts made by the agents in "our midst," and with which they are familiar, and which they know how to defend. Bawknight *v.* Liverpool & Lond., etc., Co., 55 Ga. 194.

2. Andrews *v.* Mich. Cent. R. Co., 99 Mass. 534. So that, though in this case the railroad company defendant had an office in the State, and service was on the treasurer, as no statute authorized such service, the action was dismissed, and, on appeal, the judgment was affirmed. Followed in Desper *v.* Continental Water-meter Co., 137 Mass. 252.

3. See ATTACHMENT; FOREIGN ATTACHMENT.

4. Plimpton *v.* Bigelow, 93 N. Y. 592; reversing s.c., 12 Abb. N. Cas.(N.Y.) 202. *Compare* Young *v.* Iron Co., 85 Tenn. 189 s. c., 3 Am. & Eng. Corp. Cas. 131. But where the company has a lien on shares for a debt due it by the owner, and the latter assigns the shares to an assignee, who sues the company in another State for conversion, etc., for not transferring the shares on the books, the company may defend, in such State, on the ground of the lien aforesaid. Bishop *v.* Globe Co., 135 Mass. 132.

5. In Gold *v.* Housatonic R. Co., 1 Gray (Mass.), 424, Shaw, C.J., said: "The very generality of the terms requires

State now provides that foreign corporations having a usual place of business in that State shall be liable to the trustee process.[1] In *Rhode Island*, it was held that the personal property of a debtor, in the possession of a Massachusetts manufacturing corporation, cannot be attached in Rhode Island by process of foreign attachment served upon its treasurer, although he is a resident of the latter State.[2] The same principle seems to have been applied in cases arising in *Alabama*[3] and *New Hampshire*.[4]

some qualification. It cannot be construed literally, 'all corporations,' in whatever part of the world established and transacting business. . . . It was intended, we think, to put corporations on the same ground as individuals. And it is well settled that an individual, an inhabitant of another State, is not chargeable by the trustee process although found in this Commonwealth and here served with process. Tingley *v.* Bateman, 10 Mass. 343; Nye *v.* Liscombe, 21 Pick. (Mass.) 263. In the case of corporations which have no local habitation, the principle is this: If established in this Commonwealth, by the laws thereof, they are inhabitants of this Commonwealth, within the meaning of the law; but if established only by the laws of another State, they are foreign corporations, and cannot be charged by the trustee process." See also Danforth *v.* Penny, 3 Metc. (Mass.) 564; Larkin *v.* Wilson, 106 Mass. 120.

1. Mass. Stats. 1870, ch. 194.

2. In Taft *v.* Mills, 5 R. I. 393, Ames, C.J., said: "The personal property of the debtor, in the hands of the Massachusetts manufacturing corporation, is certainly no more within the jurisdiction of the courts of this State, than real estate situated within that Commonwealth. . . . The residence of the treasurer of such a corporation in *Rhode Island* does not bring the corporation, or any property of another which may be in its hands, within our jurisdiction." See also Wright *v.* Chicago, etc., R. Co., 19 Neb. 175.

3. In Louisville, etc., R. Co. *v.* Dooley, 78 Ala. 524 (1885), Stone, C.J., said: "Garnishment, like attachment, is a species of proceeding *in rem*. It acquires jurisdiction of the person *pro hac vice*, by seizing his property, goods, or choses in action. If it cannot acquire jurisdiction or control of the *res*, it needs must fail to acquire, through such *res*, jurisdiction of the person; for jurisdiction of the person is acquired only through the *res*, or thing." Accordingly, a debt due by a *Kentucky* corporation to one of its employees at the place of its domicil, not being within the jurisdiction of the courts of *Alabama*, cannot be reached and subjected by a creditor in the latter State by attachment against the non-resident debtor and garnishment against the corporation. Under the principle above mentioned, it becomes indifferent, in the present case, whether the corporation did, or did not do business in Alabama. "The *situs* of a debt," the court say, "in the absence of stipulation to the contrary, is the domicil of the creditor."

But it was said, in *Iowa*, that the rule that the *situs* of a debt, as property, was determined by the residence of the creditor, could not be applied in that State in attachment proceedings against non-residents. Mooney *v.* U. P. R. Co., 60 Iowa, 346.

4. "The first objection to the liability of the trustees relied upon in the argument, that the trustees are a foreign corporation and not within or subject to the jurisdiction of our courts, if valid, would undoubtedly prevail to discharge them. For it is well settled by the authorities, cited by the counsel for the trustees, that a person domiciled in a foreign jurisdiction cannot be holden here as trustee, unless he has property of the principal defendant in his possession in this State, or owes a debt or duty to such defendant payable here. And a foreign corporation must occupy the same position." Smith *v.* Boston, C. & Montreal R., 33 N. H. 342. *Compare* Libbey *v.* Hodgdon, 9 N. H. 394.

**Attachment of Foreign Corporation's Debt to Non-resident in New York.**—A debt due by a foreign corporation having no agency in *New York*, to a non-resident of that State, service being made upon the New Jersey agent, while temporarily in New York City, was held not to be the subject of attachment as a provisional remedy under the code, in an action by third parties against the non-resident. Willet *v.* Equitable Ins. Co., 10 Abb. Pr. (N. Y.) 193. A similar decision on similar facts, was made in *Illinois*. Midland Pac. R. Co. *v.* McDermid, 91 Ill. 170.

**Attachment under Maryland Statute.**—By the Maryland act of 1868, a foreign corporation is subjected to a suit by a

In some States, under statutes regulating the appointment of agents for service of process, and other similar laws, the compliance with such provisions is held to so domesticate such foreign corporations as to render them liable to garnishment proceedings. Decisions to this effect have been rendered in *Missouri*,[1] *Pennsylvania*,[2] *Kansas*,[3] *Ohio*,[4] *Wisconsin*,[5] *Georgia*,[6] *Iowa*,[7] *Illinois*,[8] *Vermont*.[9]

non-resident only "when the cause of action has arisen, or the subject of the action is situated, in this State." The Maryland court said, on this: "It follows that this attachment cannot be maintained against the company, in respect to its liability on the policy of insurance the same not being a cause of action, upon which it can be sued in the courts of this State." Myer *v.* Liverpool, London & Globe Ins. Co., 40 Md. 601; Md. act, 1868, ch. 471, § 211.

**Bonds of Foreign Corporation Held by Garnishee in Connecticut.**—Service of garnishee process was made by attested copy of the writ left with a treasurer of a bank with which defendant had pledged certain bonds of foreign corporations, defendant being a non-resident, and no personal service being made on him. *Held*, that, as the officer did not take the property into his possession by way of direct attachment, and as bonds payable to bearer can be reached by trustee process only by service of the process on the maker, no jurisdiction was acquired. Tweedy *v.* Bogart (Conn.), 15 Atl. Rep. 374.

1. McAllister *v.* Pa. Ins. Co., 28 Mo. 214.

2. Barr *v.* King, 96 Pa. St. 485; Darlington *v.* Rogers, 13 Phila. (Pa.) 102. See also Bushel *v.* Commonwealth, 15 S. & R. (Pa.) 173.

3. In *Kansas*, it was held that a foreign corporation leasing property and doing business there, might be garnisheed for a debt due by it to one of its employees, although the employee was not a resident of Kansas, and although the debt was created without the State. Burlington, etc., R. Co. *v.* Thompson, 31 Kan. 180; s. c., 47 Am. Rep. 497.

4. Under *Ohio* act of 1869 (66 Ohio L. 32) providing that, "If any railroad company of another State shall lease a railroad the whole or a part of which is in this State, or make any arrangement for operating the same, as provided in this act, such part of said railroad as is within this State, . . . shall be subject to all regulations and provisions of law governing railroads in this State," such a foreign railroad company was held a domestic company for all purposes of proceedings in attachment and garnishment. Penn. R. Co. *v.* Peoples, 31 Ohio St. 537.

5. In *Wisconsin*, where the statutes allow foreign insurance companies to establish agencies and transact business on substantially the same basis and rights as are enjoyed by domestic insurance companies, a statute providing that a corporation might be summoned as garnishee by service upon president, cashier, treasurer, secretary, or other agent or officer on whom summons might be served, it was held that this embraced a foreign insurance company, which was thereby liable to garnishment by service of the legal notice on its agent. Brauser *v.* New Eng. Fire Ins. Co., 21 Wis. 506. And see Selma R. & D. R. Co. *v.* Tyson, 48 Ga. 351. In the latter case the court said: "It is not liable to garnishment except where suit could be brought on the debt it is charged to owe," citing Clark *v.* Chapman, 45 Ga. 486. The debt it owed was due in the State.

6. It was said, in *Georgia*, that under the Georgia Code, § 3281, a foreign corporation "doing business" there might be garnisheed, but that the fact that a French insurance company's agent for other States happened to reside in Georgia, and occasionally approved, gave checks, and paid claims for his principal, did not establish an agency in Georgia for such French corporation and charge it with the transaction of business there. Nor is an agent of the powers above indicated an "insurance agent" as described in the Ga. Code, § 2850, (*a*) to (*j*) inclusive. Schmidlapp *v.* La Confiance Ins. Co., 71 Ga. 246. See also Pyrolusite Co. *v.* Ward, 73 Ga. 491.

7. The *Iowa* Code, § 2618, provided for notice to foreign corporations having in that State property or debts owing to defendant. *Held*, that a railroad company could be garnisheed for a debt due by it, payable in *Nebraska*, that debts have not the *situs* of the creditor, in the garnishment laws. Mooney *v.* Union Pac. R. Co., 60 Iowa, 346, followed in Oberfelder *v.* Union Pac. R. Co., 60 Iowa, 755; Broadstreet *v.* Chicago, etc., R. Co., 65 Iowa, 670.

8. Hannibal & St. J. R. Co. *v.* Crane, 102 Ill. 249; and see Roche *v.* Rhode I. Ins. Assoc., 2 Bradw. (Ill.), 360, where the company was held as garnishee for insurance money due for loss in Wisconsin.

9. In *Vermont*, attachment or "trus-

(*b*) *Practice and Pleading.*—It is not necessary to state, in the affidavit for garnishment, that the corporation owns property in the State, or that the cause of action arose there; these are matters of defence to be stated and shown by answer.[1]

(*c*) *Consolidated Corporations.*—Where corporations are chartered in several States they are not foreign corporations in any of them, and may be charged as garnishees although their office and place of business is not in the State where they are garnisheed.[2]

(*d*) *Exemption Laws.*—It has been held that exemption by the law of the State where the defendant and garnishee reside will not avail in the jurisdiction of the attachment proceeding.[3] But, where there is the like exemption under the laws of the latter jurisdiction, it may be claimed.[4] A foreign creditor will not be allowed to subject certain property of the debtor to the satisfaction of his claim where the laws of the place of contract and of the joint residence of creditor, debtor, and garnishee deny such rights.[5]

tee" process is allowed by statute, § 1073, R. L., for debts due from persons, part or all of whom reside without the State, "having an authorized agent resident in the State." It was held that a foreign insurance corporation which had appointed an agent to receive legal process, under customary legislation, was subject to the trustee process. If the foreign corporation voluntarily appear, it is immaterial that it was not served with process. Weed Sewing-machine Co. *v.* Boutelle, 56 Vt. 570. But where plaintiff resided in New York, and the garnishee or "trustee" was a New York corporation operating a continuous line from Troy, N. Y., to Rutland, Vt., Composed of different railroads, and the debt due by the garnishee was wages for services upon the New York railroad and was payable in New York, it was held that the trustee must be discharged. Towle *v.* Wilder, 57 Vt. 622.

1. Brauser *v.* New Eng. F. Ins. Co., 21 Wis. 506.

2. Baltimore, etc., R. Co. *v.* Gallahene, 12 Gratt. (Va.) 655; Smith *v.* Boston C. & M. R., 33 N. H. 337; Drake on Attachment, (Ed. of 1885), § 479; Kneeland on Attachment, § 407. And see Sprague *v.* Hartford, P. & F. R. Co., 5 R. I. 233.

**Corporations Created by Congress.**—A railroad in *Iowa*, incorporated by Congress, is not "foreign" in that State under the garnishment laws. Mooney *v.* Union Pac. Co., 60 Iowa, 350.

A railroad corporation is a domestic corporation of a Territory where it does business, though organized under the laws of the United States: and a writ of garnishment served on it in the Territory will operate to hold the debt attached, though it were contracted in another Territory. Losee *v.* Ream (Utah, 1888), 17 Pac. Rep. 452, citing Morawetz Corp. (2d Ed.) § 984.

3. Burlington, etc., R. Co. *v.* Thompson, 31 Kan. 180; Broadstreet *v.* Clark, 65 Iowa, 670.

In one case in *Illinois*, the garnishee answered that it was indebted upon a policy of insurance upon the homestead of the debtor in *Wisconsin*, and that by the laws of that State such insurance was exempt from attachment and garnishment, and that since the commencement of garnishment proceedings it had been compelled, by judgment of a court of competent jurisdiction in that State, to pay the amount of such insurance to the debtor. *Held*, that the answer was insufficient; that the exemption law of Wisconsin could have no force without that State. Rocke *v.* Rhode Island Ins. Assoc., 2 Bradw. (Ill.) 360.

4. Missouri Pac. R. Co. *v.* Maltby, 34 Kan. 125; Wright *v.* Chicago, etc., R. Co., 19 Neb. 175.

5. Where an Illinois corporation had an office in *Missouri* for the transaction of business, and was summoned in Missouri as garnishee to answer a claim by an Illinois resident, it was held that the having the Missouri office, and an agent there on whom the statute authorized service of process, did not make the garnishee subject to the liabilities of a domestic corporation and so confer jurisdiction on the court. The debt, in the absence of proof to the contrary, would be presumed to have been contracted in

4. LIMITATION OF ACTIONS.—It is said that the true test of the running of statutes of limitation is the liability of the party invoking them in bar to the action to the service of process during the whole of the period prescribed.[1] Where, therefore, a foreign corporation has a known place of business in a State, and an authorized agent upon whom process can be served, as required by the State law, it may plead the statute of limitations, as might a domestic corporation or a resident citizen.[2] Foreign corporations doing business in a State are not "non-residents" thereof, within the terms of statutes of limitation, although they are incorporated elsewhere.[3]

In *New York*, however, it has been held that foreign corporations cannot avail themselves of the statutes of limitation of that State, even though the foreign corporation was the lessee of a railroad in that State and had property there, as well as a managing agent residing and keeping an office of the company within the State. Under these decisions, such corporations are within the proviso of such statutes saving actions in case of the absence of the person suable.[4] Although the doctrine conflicts with

Illinois, where both debtor and creditor resided, and to be exempt from attachment and garnishment, on the assumption that a law existed in that State similar to one so exempting in Missouri. Judgment for garnishee affirmed. Fielder *v.* Jessup, 24 Mo. App. 91.

1. Huss *v.* Central R., etc., Co., 66 Ala. 472; Pennsylvania Co. *v.* Sloan, 1 Bradw. (Ill.) 364.

2. See authorities cited in preceding note. See also Wall *v.* Chicago, etc., R. Co., 69 Iowa, 498; McCabe *v.* Ill. Cent. R. Co., 4 McCrary (U. S.), 492.

Where *Nebraska* Statute of Limitations enacted that a defendant's absence from the State would prevent its running, but that, "in the case of a foreign corporation, if it has a managing agent in the State, service of the writ may be made on him," on a question of fact arising in a suit brought more than five years after the cause of action had accrued, whether the defendant did or did not have a managing agent for the State prior to the time when the suit was brought, it was proper to charge that the time during which the plaintiff was disabled from suing, by reason of defendant having no managing agent in the State, is not to be counted as part of the five years' limitation period. Express Co. *v.* Ware, 20 Wall. (U. S.) 543.

A statute of limitations begins to run, as against a foreign corporation, from the time it has a person within the State upon whom process to commence a suit may be served. United States Exp. Co. *v.* Ware, 20 Wall. (U. S.) 543.

**Absence Because of War.**—Withdrawal of agent for process, and ceasing to do business, owing to the war, was held to a departing from the State, and the time of such absence was not to be computed. Abell *v.* Penn Mut. Life Ins. Co., 18 W. Va. 400.

3. King *v.* Nat. M. & E. Co., 4 Mont. 1.

An identical statute in *California* was similarly construed. Lawrence *v.* Ballow, 50 Cal. 258.

4. At first it was held, in *New York*, that the statute could be pleaded. In the proviso in the statute that as to persons absent from the State the time of absence should not be taken as part of the period of limitation, the word "person" was once regarded as meaning natural persons, since domestic corporations never could be absent, and foreign corporations cannot migrate. Faulkner *v.* Del. & Rar. Canal Co., 1 Den. (N. Y.) 441 (1845, N. Y. supreme court), followed in 1857 by one of the supreme courts, in the case of Olcott *v.* Tioga R. Co., 26 Barb. (N. Y.) 147, where the former case was approved on principle, as well as followed under *stare decisis*.

But a line of later New York cases have overthrown these earlier decisions. Olcott *v.* Tioga R. Co., 26 Barb. (N. Y.) 147, just cited, was reversed by the court of appeals. Olcott *v.* Tioga R. Co., 20 N. Y. 210 (1859). The latter court said, per Denio, J., that statutes of limitation must receive liberal interpretation, and that the proviso saving actions during the absence of persons was to be taken

earlier decisions in the State, such cases have been overruled, and the later authorities have been followed with reluctance by the United States supreme court, on appeal from the circuit court of that State.[1] The New York decisions have also been followed in *Nevada*.[2]

In *Vermont*, the Statute of Limitations, does not save a debt from its operation in case of absence, where the debtor has known property in the State, which, by the ordinary process of law, might be attached.[3] In *Connecticut*, it has been held that the statute does not bar suit against a foreign corporation that has never resided in the State, although the debt is more than six years old, and during that time the corporation had property in the State, subject to execution, the statute not beginning to run until the creditor has opportunity to obtain personal service upon the defendant, and a personal judgment.[4]

It is no defence, to an action in one State against a corporation of another, that the claim is barred by a statute of limitations of

broadly: so that, though 'persons' would seem to refer only to natural persons, yet it included foreign corporations; and, as they were resident in the State of their creation, they were to be regarded as persons absent, as to whom action was saved. Hence, they could not plead the statute. This case has been frequently followed. Thompson *v.* Tioga R. Co., 36 Barb. (N. Y.) 79; Mallory *v.* Tioga R. Co., 3 Keyes (N.Y.), 354 (court of appeals); Rathburn *v.* Northern Cent. R. Co. (court of appeals), 50 N. Y. 656; Boardman *v.* Lake Shore, etc., R. Co. (court of appeals), 84 N. Y. 157. And see People *v.* The Rector, 22 N. Y. 57.

In Rathburn *v.* Northern Cent. R. Co., 50 N.Y. 656 (court of appeals), the foreign railway company defendant, during the period of limitation prescribed by the statute, had continuously operated and carried on a railroad in *New York*, having during all that time a large amount of property in the State, and having a managing agent residing therein. But it was held it could not plead the statute. See, to same effect, Boardman *v.* Lake Shore, etc., R. Co., 84 N. Y. 157.

1. Tioga R. Co. *v.* Bloss., etc., R. Co., 20 Wall. (U. S.) 137 (1873). In the concurring opinion of Hunt and Field, JJ., language was used which would seem to favor the New York decision on principle. On the other hand, Miller and Strong, JJ., said, in an emphatic opinion, that "The liability to suit, where process can at all times be served, must in the nature of things be the test of the running of the statute;" and they dissented from the opinion of the court, contending that a different rule applied to an individual because he is a citizen or resident of another State was a violation of equal rights, under Fed. Const. art. IV, § 2.

2. Robinson *v.* Imperial Silver-mining Co., 5 Nev. 45. In that case it appeared that the company was incorporated in California in 1863, since which time it had been in possession of the premises in suit, and, it was claimed, had erected improvements thereon at a cost of a quarter million of dollars.

The court disapproved of Chollar Potosi Co. *v.* Kennedy, 3 Nev. 361, in so far as it expresses an opinion that a foreign corporation is entitled to avail itself of the bar in an action concerning real property, and declared that the court did not agree with the judge who delivered the opinion in that case upon the present point, that case not being decided upon the present question.

**Limitation in Kansas.**—A foreign company, being beyond the State, is unable to set up a statute of limitations providing that it shall not apply where the person sued is beyond the Territory; so that, where the pleading merely shows the foreign character of the corporation, and the evidence bears out this allegation, the statute of limitation cannot avail in its defence. No. Mo. R. Co. *v.* Akers, 4 Kan. 488.

3. In Hall *v.* Vt. & Mass. R. Co., 28 Vt. 402, it was held that the statute does not begin to run against a foreign corporation until it has attachable property in that State, although previous to that time there may be directors and stockholders of such corporation residing in the State.

4. Waterman *v.* Sprague Mfg. Co., 55 Conn. 554.

the latter State, where the cause of action arose, and where all the parties reside; statutes of limitations being local, and affecting only the remedy, and forming no part of the contract.[1]

When a statute of limitations extinguishes the debt or cause of action after the lapse of a certain period, such a statute may be pleaded in a foreign jurisdiction as a bar to the cause of action or debt when there sued upon, provided the parties continue to reside in the State where the law extinguishing the cause of action prevails, during the full period of limitation, so that it has actually operated on the parties and on the case.[2]

5. ACTIONS BY OR AGAINST NON-RESIDENTS.—It has been held, in *Massachusetts*, that a non-resident might maintain an action there, against a foreign corporation, upon a contract made, and the subject-matter of which is situated in another State, although the only service of process is upon the insurance commissioner of the State.[3] Under a *Michigan* statute permitting suits against foreign corporations, including cases where the plaintiff is a non-resident, it was held that the statute did not refer merely to non-resident natural persons, but that under it one foreign corporation might sue another.[4]

But cognizance of a case has been refused where the demand was by a non-resident against a foreign corporation, and the subject of the suit was not a present demand capable of enforcement and seeking satisfaction out of property or rights within the jurisdiction.[5]

1. Waterman *v.* Sprague Mfg. Co., 55 Conn. 554, 576.

2. Under *Kansas* Gen. Stat. 1868, ch. 80, art. 3, § 18, action for personal injuries must be brought in two years after cause of action accrues; and section 25 extinguishes the cause of action after that time. Plaintiff suffered such injury in Kansas, and immediately went to *Missouri*, where he resided, and he there resided until trial. His action was not brought till more than two years had elapsed. *Held*, the Kansas statutes would not bar an action given by the common law unless both parties resided in that State during the full period of limitation. Finnell *v.* Southern Kan. R. Co. (Mo.), 33 Fed. Rep. 427. See also Story Confl. of Laws (Ed. 1883), § 582, p. 801; Wood Lim. 22.

**Conflict of Laws as to Limitations.**—In Nouce *v.* Richmond & Danville R. Co. (N. Car.), 33 Fed. Rep. 429, a North Carolinian in the employ of defendant, was hurt in Virginia. After the *Virginia* limitation for his action had run out, viz., one year, but within the period according to the law of his own State, *North Carolina*, viz., 3 years, he brought suit in the United States court, as has been indicated. *Held*, that the law of the State of the action must govern, and that the suit was brought in time.

Where a judgment debtor of a bank removed from Alabama to *Mississippi* on the very day he was sued in the latter State, it was held that the law of Mississippi as to limitation must govern. That having expired, the bank failed in its suit. Bank of the State of Ala. *v.* Dalton, 9 How. (U. S.) 522.

3. Johnston *v.* Trade Ins. Co., 132 Mass. 432.

The more especially is it so held in view of the fact that the foreign insurance company could maintain action against the plaintiff for dues if he were found temporarily in *Massachusetts;* as was held in American Ins. Co. *v.* Owen, 15 Gray (Mass.), 491.

4. Emerson *v.* McCormick Harvesting, etc., Co., 51 Mich. 5.

5. In Smith *v.* Mutual L. Ins. Co., 14 Allen (Mass.), 336, it was held that the *Massachusetts* court would not entertain jurisdiction of a bill in equity brought by a citizen of Alabama, who had never lived there, against an incorporated mutual life-insurance company of New York, seeking to restore him to his rights under a policy issued by the defendants in New York

In *New York*, the legislature may restrict, as it has done,[1] the right of one corporation to sue another,[2] or that of a non-resident to sue a foreign corporation.[3] The right under this provision of the code depends upon the plaintiff's residence, not upon his citizenship.[4] No jurisdiction is conferred by this provision, of an action in which plaintiff is a non-resident, defendant is a foreign corporation, and the cause of action arose outside of the State and is not one of those enumerated in such section. A general appearance by the corporation does not give jurisdiction, since there is a want of jurisdiction of the subject-matter.[5]

It has been held, in *New York*, that, if a claim against a foreign corporation is assigned by a non-resident or other foreign corporation to a resident or a domestic corporation, the assignee may maintain a suit upon the claim.[6]

The *Vermont* statute respecting the appointment of agents for service of process in the case of foreign insurance companies has been held not to contemplate actions upon causes accruing without the State and brought by non-residents of the State, but to pro-

upon his life, he having failed to pay his premiums, although the defendants transacted business in Massachusetts, and had appointed an agent resident there upon whom all lawful processes against the company might be served, under Mass. Gen. Stat. ch. 58, § 68.

1. N. Y. Code Civ. Proc., § 1780.

2. Duquesne Club *v.* Penn Bank, 35 Hun (N. Y.), 390.

3. Adams *v.* Penn Bank, 35 Hun (N. Y.), 393.

4. Adams *v.* Penn Bank, 35 Hun (N. Y.), 393.

5. Galt *v.* Provident Sav. Bank, 18 Abb. N. Cas. (N. Y.) 431. Andrews, J., said that his own opinion would be the other way, as he thought that the construction given to section 427 of the old code which was similar, he said, to the present section 1780, should have been followed,—McCormick *v.* Pa. Cent. R. Co., 49 N. Y. 303, 308; Brooks *v.* N. Y. & Greenwood Lake R. Co., 30 Hun (N. Y.), 47;—but that Ervin *v.* Oregon R. & Nav. Co., 28 Hun (N. Y.), 269, and Brooks *v.* Mexican Construction Co., 49 Super. Ct. (N. Y.) 281, made him decide as he did. He was willing to grant stay of proceedings in case plaintiff wished to appeal.

The jurisdiction of *New York's* courts, of actions against foreign corporations, discussed; the distinction under the New York code between questions of jurisdiction of subject-matter and those of jurisdiction of the person, pointed out and commented on; and the decisions under the successive New York statutes as to jurisdiction, elaborately reviewed;—Galt *v.* Provident Saving Bank, 18 Abb. N. Cas. (N. Y.) 435, note.

6. Though a foreign corporation might perhaps not be able itself to attach property as plaintiff, owing to its being a foreign corporation, and the cause of action not arising in the State, yet its inability to maintain an action would not create inability to assign the demand, either to a resident or non-resident, and the assignment would transfer the entire cause of action; and, if the assignee were resident, he could sue. Fraud against the statute is not committed by such an assignment; and, even if it could be, the burden is on defendant to prove the fraud by showing assignor's knowledge of plaintiff's being a resident. And the objection, it seems, is waived by a general appearance. McBride *v.* Farmers' Bank, 26 N. Y. 450; N. Y. Code, § 427; 4 Abb. 72; s. c., 13 How. (N. Y.) 316. See also Ervin *v.* Oregon R., 28 Hun (N. Y.), 269; 35 Hun, 544; Petersen *v.* Cehmical Bk., 32 N. Y. 40, 48.

**Place of Cause of Action.**—Where a Wisconsin corporation sold harrows to *New York* customers, stipulating that on notice to them they would defend said customers in any suit against the latter for alleged infringement of patent in making sales in the latters' business, which stipulation the Wisconsin company failed to keep, it was held that the obligation was to be discharged wherever said customers —the plaintiffs—were vexed by litigation; and, as that occurred in New York, the breach of contract arose in New York. Childs *v.* Harris Mfg. Co., 104 N. Y. 477.

vide for suits in contracts of insurance made within the State, accruing to the people of the State, such as the courts had jurisdiction of before the passage of the statute.[1]

6. REMOVAL OF CAUSES.—Under the acts of Congress providing for the removal of causes to Federal courts where the parties litigant are citizens of different States, and to avoid local prejudices, etc., it is well settled that foreign corporations are entitled to so remove suits against themselves.[2] A State has no power to deprive a foreign corporation of this right by legislation.[3] Sometimes State statutes regulating the conditions upon which foreign corporations may transact business have annexed, as a condition precedent, that such companies shall agree not to remove causes to the Federal courts. These agreements are held to be void as unconstitutional and contrary to public policy;[4] but such a corporation's license may be revoked, the corporation may be entirely excluded, or it may be given the alternative of abstaining from the removal of causes or ceasing to do business.[5]

1. Sawyer *v.* North Am. Life Ins. Co., 46 Vt. 697.

2. Baltimore, etc., R. Co. *v.* Gray, 28 Ohio St. 208; Quigley *v.* Central R. Co., 11 Nev. 350; Shaft *v.* Phœnix Life Ins. Co., 67 N. Y. 544; Railroad Co. *v.* Harris, 12 Wall. (U. S.) 65; Marshall *v.* Baltimore, etc., R. Co., 16 How. (U. S.) 314; Louisville, etc., R. Co. *v.* Letson, 2 How. (U. S.) 497; Covington Drawbridge Co. *v.* Shepherd, 20 How. (U. S.) 232; Trust Co. *v* Maquillan, 3 Dill. (C. C.) 379; Minnett *v.* Milwaukee, etc., R. Co., 3 Dill. (U. S.) 460.

In Vinal *v.* Continental, etc., Co. (N. Y.), 35 Fed. Rep. 673, it was, where a citizen of Massachusetts filed his complaint in a State court of *New York* against corporations, citizens of New York, Connecticut, and Massachusetts, respectively, to obtain the restoration of certain stock in the possession of the Massachusetts company, that both the Massachusetts and Connecticut companies are necessary parties, and there is no separate controversy with the latter so as to entitle it to remove the cause to a Federal court. In Whelan *v.* New York, Lake Erie & Western R. Co. (Ohio), 35 Fed. Rep. 849, it was held that an action against three railroad companies of the same State as that of which plaintiff is a citizen and in which the action is brought, and a railroad company of another State, to enforce a joint statutory liability for personal injuries, is removable on the application of the latter company on the ground of local prejudice.

A foreign corporation will not be allowed to object to the jurisdiction of a Federal court because it was not "found" in the district, after it has itself removed the cause from State court. Friezen *v.* Allemania Fire Ins. Co. (Wis.), 30 Fed. Rep. 349.

3. Railway Co. *v.* Whitton, 13 Wall. (U. S.) 270. Nor is it affected by State legislation authorizing service of process on its agent. W. U. Tel. Co. *v.* Dickinson, 40 Ind. 444; Hobbs *v.* Manhattan Ins. Co., 56 Me. 417; Morton *v.* Mutual L. Ins. Co., 105 Mass. 141; Desty Federal Procedure (6th Ed.), § 639a.

4. Doyle *v.* Continental Insurance Co., 94 U. S. 537; Insurance Co. *v.* Morse, 20 Wall. (U. S.) 445; Railway, etc., Co. *v.* Pierce, 27 Ohio St. 155; Baltimore, etc., R. Co. *v.* Carey, 28 Ohio St. 208; Metropolitan Life Ins. Co. *v.* Harper, 3 Hughes (U. S.), 260. *Compare* New York, etc., Ins. Co. *v.* Best, 23 Ohio St. 105.

5. In Doyle *v.* Continental Ins. Co., 94 U. S. 537, it was held that an agreement to abstain in all cases from resorting to the courts of the United States is void as against public policy, and that a statute of the State of *Wisconsin* requiring such an agreement is in conflict with the Constitution of the United States, and void; but that such State has the right to revoke the licenses of and entirely exclude foreign corporations, and that the motives or reasons of such revocation or exclusion cannot be inquired into. The corporation could cease to do business or refrain from removal of causes. See also Insurance Co. *v.* Morse, 20 Wall. (U. S.) 445; State *v.* Doyle, 40 Wis. 175; Barney *v.* Globe Bank, 5 Blatchf. (U. S.) 107; Sands *v.* Smith, 1 Dill. (U. S.) 290; Doyle *v.* Wisconsin, 94 U. S. 50; Hartford Fire Ins. Co. *v.* Doyle, 6 Biss. (U. S.) 461.

Where a foreign corporation is, in effect, made a domestic corporation by the legislation of a State, it becomes, for purposes of jurisdiction, a citizen of that State, and cannot remove a cause brought in that State.[1]

7. INCIDENTS OF ACTIONS.—Various incidental matters in actions by and against foreign corporations, which depend upon the

At common law, an agreement not to sue in a court does not deprive it of jurisdiction or bar an action brought in breach of the agreement. Scott *v.* Avery, 5 H. L. C. 811.

In State, etc., *v.* Doyle, 40 Wis. 175, it was held that where a foreign corporation removed a cause to a Federal court, contrary to the provisions of the statute, a *mandamus* might issue to the secretary of state commanding a revocation of the license to do business. See also State, etc., *v.* Doyle, 40 Wis. 220. *Compare* Hartford Fire Ins. Co. *v.* Doyle, 6 Biss. (C. C.) 461; Doyle *v.* Wisconsin, 94 U. S. 50.

After the U. S. circuit court, in October, 1884, declared that *Minnesota* act of 1881 which attempted to give a domestic character to the foreign railroad company therein named, so as to disable it from removing cases to the Federal courts, was void: under the State constitution, which prohibited creation of companies by special statute; under the Federal Constitution, because the clear intent of the act of 1881 was to make the corporation a domestic one only as to suits, and not to make it a *bona fide* domestic company in all respects, differing thereby from the act in Stout *v.* Sioux City, etc., R. Co. (Neb.), 8 Fed. Rep. 794, where a general statute made any foreign corporation complying with its terms a legal corporation of the State and gave it all rights as such. After said act of 1881 was declared void, *Minnesota* act of 1885 was passed, the first section of which was manifestly meant to interfere with the right of removal. Section 6 provided: "No foreign corporation now or hereafter doing business in this State shall have, possess, or exercise any rights, privileges, or immunities not possessed by domestic corporations, but, unless otherwise provided by law, shall in all respects be deemed, if it remain in this State for sixty days next ensuing after the passage of this act, to be a domestic corporation, and entitled to all the rights, privileges, and immunities of domestic corporations, subject to all the laws of this State which are now in force or may hereafter be enacted." *Held*, that it was impossible to separate the two sections, and the sixth must be held void with the first. Chicago, M. & St. P. R. Co. *v.* Becker (Minn.), 32 Fed. Red. 849.

The statement in 2 Morawetz on Corporations, § 971, that a State law providing that no insurance company chartered by another State shall transact business in the State until a stipulation not to remove suits brought against it in the State courts to the United States courts is filed, and that, if a company should remove such suit in violation of its agreement, its license should be revoked, is not unconstitutional, is only true in the sense that the State has power to revoke the license for whatever cause it may see fit, but is unconstitutional as far as the agreement to abstain from resorting to the United States courts—a right guaranteed by the Constitution.

1. Desty Federal Procedure (6th Ed.), § 639a, citing Uphoff *v.* Chicago, etc., R. Co. (Ky.), 5 Fed. Rep. 545; Johnson *v.* Phila., etc., R. Co. (Pa.), 9 Fed. Rep. 6; and see Chicago, etc., R. Co. *v.* Lake Shore, etc., R. Co. (Ill.), 5 Fed. Rep. 19.

It is a citizen of that State although it transacts business in the State where suit is brought,—Stevens *v.* Phœnix Ins. Co., 41 N. Y. 149; Holden *v.* Putnam Ins. Co., 46 N. Y. 1; Kranshaar *v.* N. H. Steamboat Co., 7 Robt. (N.Y.) 357;—and although some of the stockholders are citizens of the State where suit is brought,—Wheedon *v.* Railroad Co., 1 Grant's Cas. (Pa.) 420; Stevens *v.* Phœnix Ins. Co., 41 N. Y. 149; see Northern Line Packet Co. *v.* Benninger, 70 Ill. 571; North River Steamboat Co. *v.* Hoffman, 5 Johns. Ch. (N. Y.) 300; see Arapahoe Co. *v.* Kansas P. R. Co., 4 Dill. (U.S.) 277;—as a foreign corporation and all its non-resident corporators may remove the cause,—Rosenfeld *v.* Adams Exp. Co., 21 La. Ann. 233; Desty Federal Procedure (6th Ed.), § 639a.

A foreign corporation leasing and operating a railroad, with the implied assent of the State which created it and of the State wherein the road is situate, does not thereby forfeit its right to remove from the courts of the latter State a suit by a citizen thereof into a United States court. Railroad Co. *v.* Koontz, 104 U. S. 5.

foreign character of the corporation involved for their doctrines, are cited in the notes.[1]

1. **Proof of Incorporation** —In Savage *v.* Russell & Co. (Ala. 1888), 20 Am. & Eng. Corp. Cas. 523, it was held that before a foreign corporation can recover in an action instituted by it, it must prove its corporate capacity unless defendant, by his contract or pleading, has estopped himself from denying it; and proof of incorporation is insufficient in the absence of the statute of the State authorizing it. See also McCrary *v.* State, 73 Ala. 480; Bank of Michigan *v.* Williams, 5 Wend. (N. Y.) 478; Silver Lake Bank *v.* North, 4 Johns. Ch. (N. Y.) 370; Ang. & A. Corp. § 632 *et seq.* *Compare* Bank of St. Charles *v.* De Bernales, 1 Car. & P. 569. British Am. Land Co. *v.* Ames, 6 Metc. (Mass.) 391.

It is well settled that, in an action based upon a contract made with a corporation chartered in another State, the court cannot take judicial notice of the laws under which the corporation was chartered; and they must be proved and its charter produced before the rights and liabilities of the parties can be determined. Failure to prove corporate character may be obviated by proof of dealings which recognize it; but such proof is not enough where the question is as to the corporate existence of powers and privileges which are not necessarily implied by corporate existence—which depend on the franchises actually conferred. Chapman *v.* Coldby Bros., 47 Mich. 46; Morawetz Corp. (2d Ed.) § 39; U. S. Bank *v.* Stearns, 15 Wend. (N. Y.) 314.

"In modern times, corporations have greatly increased, alike in their numbers and in the objects to be accomplished by them. The tax on legislative bodies created by this increased demand for chartered privileges and a desire to prescribe certain cardinal rules for the government of corporations organized for private emolument have caused many of the States to establish, by their constitutions and by general laws, a method for obtaining private charters, and of compelling applicants for them to conform to that method. And these systems or methods are different in the different States. Hence, what may be termed the charter, or act of incorporation, obtained under a general law is, if considered alone, very incomplete. It can neither be fully understood nor interpreted without the statute which authorized it. The proof of incorporation in this case was wholly insufficient in the absence of the *Ohio* statute authorizing it." 1 Greenl. Ev. 486 *et seq.*

In Hahnemannian Life Ins. Co. *v.* Beebe, 48 Ill. 87, an action by a foreign corporation for an alleged libel, it was held, on demurrer to the declaration, that the charter of the plaintiff should be set out at length in order that it might be seen whether the publication was false in stating the mode in which it authorized the business to be done and which was the subject of the criticism which constituted the alleged libel. Nor can the charter be treated as principal pleading when only brought before the court as part of the alleged libellous publication. See Society, etc., *v.* Young, 2 N. H. 310; State *v.* Carr, 5 N. H. 367.

In Dundee Mortgage, etc., Co. *v.* Cooper, 26 Fed. Rep. 665, it was held that proof of corporate existence cannot be required by plea in abatement by persons who have recognized the existence of the company by dealings with it. See also Oregonian R. Co. *v.* Oregon R., etc., Co., 10 Sawy. (U. S.) 470; s. c., 22 Fed. Rep. 245; Ang. & Ames on Corp. (9th Ed.) 640.

In Sprague *v.* Cutter, etc., Lumber Co. (Ind.), 6 N. E. Rep. 335, it was held that a complaint by a foreign corporation, upon a promissory note executed in *Indiana*, is not bad on demurrer for failing to show compliance with a statute regulating the corporation's transaction of business within that State. Where the foreign corporation is sued and appears and answers, proof of incorporation is deemed unnecessary. Root *v.* Great Western R. Co., 65 Barb. (N. Y.) 619; s. c., 55 N. Y. 636; Doris *v.* Sweeney, 64 Barb. (N. Y.) 636.

**Presumptions.**— Compliance with conditions is presumed on part of company actively engaged in the State and having its chief office there. Young *v.* Iron Co., 85 Tenn. 189.

In Cassaday *v.* American Ins. Co., 72 Ind. 95, it was held that, where the record was silent upon the point, compliance with the statute would be presumed, and no presumptions would be indulged against the foreign corporation as such. *Compare* British-American Land Co. *v.* Ames, 6 Metc. (Mass.) 391.

**Liability of Corporators as Partners.**— Defendants were sued as partners, and claimed to be a foreign corporation. It appeared, however, that the requirement of the statute of the foreign State as to filing the articles of association had not

**IX. Consolidation of Foreign Corporations.**—This whole subject will be found reviewed in the main title CORPORATIONS (PRIVATE).[1]

**X. Dissolution of Foreign Corporations.**—1. GENERALLY—No State will assume or can acquire the jurisdiction and power necessary to dissolve a foreign corporation.[2] A State statute giving jurisdiction over corporations does not thereby give power to dissolve

been complied with until after the accrual of plaintiff's right of action. *Held*, that the suit was rightly brought. Smith *v.* Warden, 86 Mo. 382.

**Venue.**—A foreign corporation doing business in a State does not have a residence therein, and hence the action against it may be tried in any county designated by plaintiff in his complaint. Thomas *v.* Placerville Gold Q. Min. Co., 65 Cal. 600.

Where *Indiana* statute required filing of papers in the county where the agency was established, it was held, in a case where the agent was an ambulatory one whose power extended over half the State, that pleadings in a case against sureties on such agent's bond were not defective because they failed to allege location of agency in any particular county. U. S. Life Ins. Co. *v.* Adams, 7 Biss. (U. S.) 30.

**Joinder of Parties.**—In suit on joint contract made by defendant and a foreign corporation not liable to process, it seems that it is not necessary that the foreign corporation should be named in the writ as co-defendant. Peckham *v.* North Parish, 16 Pick. (Mass.) 274.

**Exhibiting Corporation-books.** — Under N. Y. Laws 1842, ch. 65, a transfer agent of a foreign corporation is bound at all reasonable times to exhibit to any stockholder the transfer-book and list of stockholders. Kennedy *v.* Chi., R. I., etc., R. Co., 14 Abb. (N. Y.) N. Cas. 326.

Under the *New York* statutes, it is the absolute duty of the transfer agent in that State, of any moneyed or other corporation existing beyond the jurisdiction of the State, to exhibit the transfer-book and a list of the stockholders at all reasonable times during the usual business hours to any stockholder, without inquiring into the motives and purposes of the stockholder. New York Laws 1842, ch. 165; People *v.* Paton, 5 N. Y. 313.

Such transfer agent has no right to inquire whether a transfer of stock is merely colorable, or whether a consideration was paid therefor, or as to the occasion of the transfer. People *v.* Paton, 5 N. Y. 313. And see People *v.* Throop, 12 Wend. (N. Y.) 183.

Statutory authority to order a company to bring its books into the State does not embrace, by implication, the authority to order it to bring also all its papers and memoranda. Huylar *v.* Cragin Cattle Co., 42 N. J. Eq. 139.

1. See CORPORATIONS (PRIVATE), *Consolidation (Interstate Consolidation)*, 4 Am. & Eng. Encyc. of Law, p. 272.

2. Importing, etc., Co. *v.* Locke, 50 Ala. 335; Wilkins *v.* Thorne, 60 Md. 258; Merrick *v.* Van Santvoord, 34 N. Y. 208; Barclay *v.* Talmon, 4 Edw. Ch. (N. Y.) 123; Redmond *v.* Enfield Mfg. Co., 13 Abb. Pr. N. S. (N. Y.) 332; Howell *v.* Chicago, etc., R. Co., 51 Barb. (N. Y.) 379; Society for Propagation of Gospel *v.* New Haven, 8 Wheat. (U. S.) 464; Vermont *v.* Society for Propagation of Gospel, 1 Paine (U. S.), 653. See also Lea *v.* American, etc., Canal Co., 3 Abb. Pr. N. S. (N. Y.) 1; Hart *v.* Boston, etc., R. Co., 40 Conn. 539. *Compare* National Trust Co. *v.* Miller, 33 N. J. Eq. 155.

Neither a court of law nor a court of equity has jurisdiction to decree a forfeiture of the charter or dissolution of a corporation, at the suit of an individual. Boston Glass Mfg. Co. *v.* Langdon, 24 Pick. (Mass.) 52, 53; 2 Kent Com. 305, 313, 314; Folger *v.* Columbian Ins. Co., 99 Mass. 274.

A corporation which has been enjoined from the exercise of its corporate franchises and deprived of its property, and thus has ceased to exist for all practical purposes, is not thereby actually dissolved. It cannot be dissolved save by the judgment of a court of competent jurisdiction Kincaid *v.* Dwinelle, 59 N. Y. 548; Folger *v.* Columbian Ins. Co., 99 Mass. 267.

Equity will not compel a distribution of the assets of a foreign corporation among its stockholders. Redmond *v.* Enfeld Mfg. Co., 13 Abb. Pr. N. S. (N. Y.) 332.

**Corporation Chartered by Several States.**—A corporation which has received similar charters from different States may be dissolved and wound up in any one State without its franchise in the other States being affected. Wait on Insolvent Corp. (1888) § 341, citing Hart *v.* Boston, etc., R. Co., 40 Conn. 542. *Compare* Graham *v.* Boston, etc., R. Co., 118 U. S. 162; Covington, etc., Bridge Co. *v.* Mayer, 31 Ohio St. 325.

them; and such a statute will not sustain a decree of a court in that State dissolving a foreign corporation or cause the decree to be enforceable out of the State.[1] So, the courts of a State will not appoint a receiver of a foreign corporation for the purpose of winding up its affairs,[2] except under circumstances which are further explained herein.[3] The full faith and credit clause of the United States Constitution does not preclude examination by the courts of Massachusetts into a decree of a court of New York dissolving a corporation of the latter State where such decree seems to be erroneous.[4] A valid decree of dissolution in the State where the charter was granted will be valid everywhere, and determine the existence of the corporation everywhere, subject to the rights of the States in which it has been received by comity to retain it in existence in court, pending the settlement of its affairs.[5]

2. PROTECTION OF HOME CREDITORS.—Under the commonly accepted principle that personal property, as against creditors, has locality, and is governed by the *lex loci* instead of the law of the domicil, with reference to the rule of preferences in the case of insolvent's estates, foreign laws, which are only permitted to operate in a jurisdiction on principles of comity, cannot take effect where the State's own citizens would thereby suffer inconvenience.[6] In order that home creditors of a foreign corporation

1. Folger *v.* Columbian Ins. Co., 99 Mass. 267.

2. Day *v.* U. S. Car Spring Co., 2 Duer (N. Y.), 608; Hammond *v.* Co., 11 How. Pr. (N. Y.) 29.

3. See, *infra*, this title, APPOINTMENT OF RECEIVERS.

4. In Folger *v.* Columbian Ins. Co., 99 Mass. 267, it was held that the supreme court of *Massachusetts* had jurisdiction to examine into the decree of a New York court dissolving a New York corporation; to declare that decree erroneous because granted at the prayer of an individual, for which there seemed to be no provision in *New York* law; and, further, to hold that such decree was in excess of the jurisdiction of the court, and void, and its effects in Massachusetts were liable to attachment there. See also Hickey *v.* Stewart, 3 How. (U. S.) 762; D'Arcy *v.* Ketchum, 11 How. (U. S.) 165; Carleton *v.* Brickford, 13 Gray (Mass.), 591.

5. Remington *v.* Samana Bay Co., 5 N. E. Rep. 292.

6. 2 Kent. Com. *406; Hoyt *v.* Thompson Exr., 18 N. Y. 208; Hoyt *v.* Thompson, 5 N. Y. 320; Taylor *v.* Columbian Ins. Co., 14 Allen (Mass.), 353; Willitts *v.* Waite, 25 N. Y. 577; Hunt *v.* Columbian Ins. Co., 55 Me. 298. A prior assignment in bankruptcy under a foreign law will not be permitted to avail against a subsequent attachment, by an American creditor, of the bankrupt effects found here; and our courts will not subject our citizens to the inconvenience of seeking their dividends abroad when they have the means to satisfy them under their own control. Burke *v.* McClair, 1 Harr. & McHen. (Md.) 236; Wallace *v.* Patterson, 2 Harr. & McHen. (Md.) 463; Milne *v.* Moreton, 6 Binn. (Pa.) 353; Mulliken *v.* Aughinbaugh. 1 Penn. 117; Ogden *v.* Gillingham, Baldw. (U. S.) 38; Lowry *v.* Hall, 2 Watts & S. (Pa.) 129. The *Pennsylvania* court considered that an assignment abroad by act of law had no legal operation *extra-territorium* as against the claims of their own citizens. But the foreign assignee in bankruptcy may sue, in Pennsylvania, in the name of the bankrupt, for the assets of the estate, and recover them, except as against the rights of the American creditor. Merrick's Est., 2 Ashm. (Pa.) 485; s. c., 5 Watts & S. (Pa.) 20.

But as to voluntary general assignments for creditors, it has been held that. as the owner may sell his goods, he may equally of will assign them, though they are without the jurisdiction. Smith's Appeal, 104 Pa. St. 381. An assignment by law has no legal operation out of the State in which the act was passed, while a voluntary assignment, it being by the owner, is a personal right of the proprie-

may have proper protection, it has been settled that, although such corporation may have been dissolved in the State which created it, such dissolution will not prevent its recognition as a corporation *de facto* in another State for the purpose of enabling creditors to reach its effects in that State.[1] Where domestic corporations have been dissolved, they are still regarded as existing, for the purpose of settling up their affairs and having their property applied for the payment of their just debts; and the same doctrine is extended to foreign corporations, for the protection of home creditors.[2] These decisions have been based upon grounds of comity, and it is alleged that a State is privileged to apply to foreign corporations the same rules that are recognized in its home State.[3] Accordingly, the judgment of another State, decreeing a dissolution and appointing receivers to wind up the concerns of one of its corporations, will not prevent an action, commenced against such corporation in another State prior to such dissolution, from proceeding to judgment, unless it be shown that the corporation is utterly extinct.[4] It will not be sufficient to show that, by the law and usage of the State where such decree of dissolution is passed, such corporation is permanently dissolved if it still have a qualified existence and is capable of being a party to a judgment

tor to dispose of his effects for honest purposes. Burrill on Assignments (5th Ed.), p. 458, § 303.

In a *New York* case it has been held, reversing the lower court, that the contest is between the foreign assignee and the bankrupt, and not between the bankrupt and the creditors in the jurisdiction of the forum; and that, the bankrupt having gone to the foreign country and submitted himself to the bankruptcy court there, is bound by the latter's jurisdiction; and that comity requires the foreign assignee's title, under the foreign bankruptcy law, to be respected. *Re* Assignment of Haynes, 21 N. Y. Week. Dig. 461; reversed in the Matter of Accounting of Waite, 99 N. Y. 433; Burrill on Assignments (5th Ed.), ch. XXIII, p. 458.

1. Life Association, etc., *v.* Fassett, 102 Ill. 315.

Process of attachment will lie at the instigation of home creditors although a receiver has been appointed in another State. Dunlop *v.* Paterson, etc., Ins. Co., 12 Hun (N.Y.), 627; affirmed, 74 N. Y. 145; Taylor *v.* Columbian Ins. Co., 14 Allen (Mass.), 353; City Ins. Co. *v.* Commercial Bank, 68 Ill. 348.

2. Life Association, etc., *v.* Fassett, 102 Ill. 315.

3. Morawetz Corp. (2d Ed.) § 988.

"I think, however, that the better ground is that the sovereign who permits a foreign corporation to do business within his borders will, for the protection of his citizens and their interests, detain such corporation as a party to a suit properly brought by one of his citizens where jurisdiction is lawfully obtained, until the determination of such suit, independent of its dissolution in its own domicil. This is the reciprocal burden imposed on a foreign company availing itself of the comity of the sovereign. In other words, the question will be determined by the sovereign by his own law, independent of the *lex domicilii*. This view has never been clearly stated, but it is the principle underlying several decisions." Merritt Starr, in note to *In re* Commercial Bank of South Australia, L. R. 33 Ch. Div. 174; s. c., 14 Am. & Eng. Corp. Cas. 56.

4. Hunt *v.* Columbian Ins. Co., 55 Me. 290; Henry *v.* Stuart, 14 Phila. (Pa.) 110.

Where a decree against a corporation, in terms, declares it to be dissolved and appoints a receiver, but in other parts thereof authorizes suits to be brought and defended in the name of the corporation for the purpose of winding up its affairs and paying its debts, and it is also authorized, for the same purposes, to make, in its corporate name, all necessary conveyances of its property and effects, the corporation will not be treated as absolutely extinguished, but regarded as kept in existence to collect and apply its assets to the payment of its debts. Life Assoc. *v.* Fassett, 102 Ill. 315.

there.[1] Where a fund exists in a State, which its own citizens are entitled to have applied in payment of their debts, the courts will detain and appropriate the fund although the persons holding it may be accountable to a foreign jurisdiction in reference to it.[2] Where home creditors of a foreign corporation have acquired a lien upon property in the State by attachment, this will be protected against a foreign receiver.[3]

Legislation having for its object the providing a convenient remedy for those who are equitably entitled to the assets of a dissolved corporation, which continues the existence of such corporations, and its right to sue and liability to be sued for a limited period, applies to foreign corporations and is not unconstitutional.[4]

Where a corporation is absolutely extinct, no writ of error can be prosecuted in its name, but it must be in the name of a re-

1. In Hunt *v.* Columbian Ins. Co., 55 Me. 294, Barrows, J., observes: "Like the apocalyptic church in Sardis, when its existence was recognized and it was addressed in the language of reproof by the apostle, though in some sort it may be said to be dead, 'it has a name to live;' and, for the furtherance of justice, it is best to 'strengthen the things that remain that are ready to die.'" And, on page 294: "It is not merely a perpetual paralysis, but an unqualified dissolution alone, that can defeat the plaintiff's right to a judgment. If, by law or usage in the courts of the State of *New York*, where the judgment was rendered, the corporation may still be a party of record, and suits maintained and defended in its name, though its affairs there are under the guardianship of the servants of the court, it must be considered as having a qualified existence so long as judgments can be rendered for or against it in the courts of that State."

2. Tinkham *v.* Borst, 31 Barb. (N. Y.) 412. *Compare In re* Waite, 99 N. Y. 440; National Trust Co. *v.* Miller, 33 N. J. Eq. 159.

3. High on Receivers, § 47, citing Willitts *v.* Waite, 25 N. Y. 577; Taylor *v.* Columbian Ins. Co., 14 Allen (Mass.), 353; Hunt *v.* Columbian Ins. Co., 55 Me. 290; Life Assoc. of America *v.* Fassett, 102 Ill. 315.

Under *Connecticut* Gen. Stats. 1888, § 2914, providing that, "Where any State shall require insurance companies of other States to deposit, with some officer of such other State, securities in trust for policy-holders of such companies as a prerequisite to their transacting business in such State, the treasurer of this State may receive from any insurance company of this State the securities required by the laws of such other State on deposit, and hold the same in trust for the policy-holders of such company," upon the insolvency and dissolution of an insurance company, the State treasurer is entitled to such securities, as against the receivers of the insolvent company. Cooke *v.* Warner (Conn. 1888), 14 Atl. Rep. 798.

In a *Philadelphia* case, a Tennessee receiver of a Tennessee corporation was not allowed to maintain his claim upon funds in Philadelphia which were also attached by a creditor resident in Kentucky. The appointment of the receiver by the Tennessee court was on February 10, 1868, three days prior to the issuing of the foreign attachment in Philadelphia by the Kentuckian. Warren *v.* Union Nat. Bank (old District Court of Philadelphia), 7 Phila. 156.

4. Morawetz Corp. (2d Ed.) § 1076, citing McGoon *v.* Scales, 9 Wall. (U. S.) 31; Stetson *v.* City Bank, 2 Ohio St. 174; Lewis *v.* Bank of Kentucky, 12 Ohio, 132. *Compare* Bank of Galliopolis *v.* Trimble, 6 B. Mon. (Ky.) 599.

Statutory provision in a foreign State, that corporations there created, whose charters expired by their own limitation, should continue in existence for three years for prosecuting and defending suits, and that suits pending at time of dissolution should not be thereby abated but might be prosecuted by trustees, applies and saves a suit in another State, by such a corporation, from abatement. Michigan State Bk. *v.* Gardner, 15 Gray (Mass.), 362.

Legislation in favor of creditors of home debtors, enabling them to change or amend a suit at law to one in equity, seems to apply in actions to obtain payment from a foreign corporation which has been dissolved, out of property in the State. Folger *v.* Columbian Ins. Co., 99 Mass. 267.

ceiver; and this law cannot be suspended by decree of any court, foreign or domestic.[1]

The mode of continuing an action against a foreign corporation after its dissolution is a matter of practice governed by the law of the forum, and not by the law of the State creating the corporation.[2]

3. APPOINTMENT OF RECEIVERS OF FOREIGN CORPORATIONS.—A receiver of a foreign corporation may be appointed in a State, to preserve the property and effects of a foreign corporation for the benefit of creditors and shareholders.[3] So, wherever it is necessary, the courts may appoint an ancillary receiver, although the courts of the home State have already placed the affairs of the corporation in the hands of a receiver;[4] and he may properly be invested with the same powers, as far as they are necessary to the collection and recovery of its assets, that would be granted to the receiver of a domestic corporation.[5] The courts of one country may appoint an auxiliary receiver, in aid of the receiver of another country, and enjoin interference.[6] But where, on the record sent abroad, doubt arises as to whether the plaintiffs will succeed in the auxiliary proceeding, the application for a receiver there will be refused.[7] So, where neither the property nor the parties, as respects that property, are subject to the chancellor, he will not appoint a receiver.[8]

In *Rhode Island*, however, a foreign corporation is not a "resident" of that State within the meaning of the statute authorizing the appointment of a receiver of a resident debtor.[9]

It is good reason, for the appointment of a receiver of a foreign corporation, that the assets are endangered by reason of the insolvency of the officers;[10] or that the corporation is insolvent and has discontinued the exercise of its corporate franchises, and the corporation has appeared in the action by attorney.[11] But,

1. Life Assoc. *v.* Fassett, 102 Ill. 315, 330.

2. Sturges *v.* Vanderbilt, 73 N. Y. 384, 389.

3. De Bemer *v.* Drew, 57 Barb. (N. Y.) 438; National Trust Co. *v.* Miller, 33 N. J. Eq. 159; Hunt *v.* Columbian Ins. Co., 55 Me. 290.

Where a foreign corporation was in process of dissolution, and the officers controlling the foreign corporation were resident in New York, and refused to apply the funds of the corporation in accordance with the dissolution or to put the funds in a place of safety, it was held that the New York court would exercise jurisdiction over the resident corporation. Redmond *v.* Hoge, 3 Hun (N. Y.), 171, 176. But the court will not appoint a receiver on grounds which would be insufficient in the State, where a corporation has been dissolved, and is continued for certain purposes only. Hamilton *v.* Accessory Transit Co., 26 Barb. (N. Y.) 46. See also Murray *v.* Vanderbilt, 39 Barb. (N. Y.) 140.

4. National Trust Co. *v.* Miller, 33 N. J. Eq. 159; Hunt *v.* Columbian Ins. Co., 55 Me. 290; Williams *v.* Kintermeyer, 26 Fed. Rep. 889.

5. National Trust Co. *v.* Miller, 33 N. J. Eq. 159.

6. Houlditch *v.* Donegal, 8 Bligh N. S. 301, 350.

7. Houlditch *v.* Lord Donegal, Beatty's Irish Ch. 146.

8. Shaw *v.* Shore, 5 L. J. N. S. Eq. 79.

9. Stafford *v.* American Mills Co., 13 R. I. 310; Pub. Laws R. I. cap. 723, § 2; see Phillips *v.* Newton, 12 R. I. 489; Claflin *v.* Beach, 4 Metc. (Mass.) 392; Wait on Insolvent Corp. (1888) § 188.

10. Redmond *v.* Hoge, 3 Hun (N. Y.), 171.

11. Murray *v.* Vanderbilt, 39 Barb. (N. Y.) 140; DeBemer *v.* Drew, 57 Barb. (N.

generally, some fraud must be shown to induce equity to interfere.[1] The fact that a foreign corporation has property—as that of a railroad company—lying partly in another State, or that its corporate existence is derived in part from a charter of another State, is not an objection to the appointment of a receiver.[2]

4. RECOGNITION OF RECEIVERS OF FOREIGN CORPORATIONS.—It is settled that the receiver of a foreign corporation cannot of right sue outside of the jurisdiction where he was appointed.[3] The

Y.) 438; Redmond *v.* Hoge, 3 Hun (N. Y.), 171; Wait on Insolv. Corp. (1888) § 188.

1. Redmond *v.* Enfield Mfg. Co., 13 Abb. Pr. N. S. (N. Y.) 332.

2. As it is stated elsewhere in this article, such a corporation must, for the purposes of justice, be treated as a separate corporation by the courts of each State from which it derives its being; that is, as a domestic corporation to the extent of the State in which it acts, and as a foreign corporation as regards the other sources of its existence. So far, at least, as the limits of the State of the court, a receiver will be appointed. State *v.* Northern Central R. Co., 18 Md. 215, 216.

In Ellis *v.* Boston, etc., R. Co., 107 Mass. 1, 9, etc., an order for the appointment of a receiver of the entire line of the defendant company's road, which extended from Boston, Mass., to Fishkill, N. Y., was affirmed.

In Wilmer *v.* Atlanta & Rich. Air-line R. Co., 2 Woods (U. S.), 409, a receiver was appointed by a Federal court for the entire line of the road, within and without the State. See also McElrath *v.* Pittsburg, etc., R. Co., 55 Pa. St. 189; Atkins *v.* Wabash, etc., R. Co., 29 Fed. Rep. 161, the railroad being a consolidated company composed of corporations of different States.

In Muller *v.* Dows, 95 U. S. 444, it was held that suits between the same parties, asking for the same relief, commonly called "ancillary suits," may be instituted in the circuit court of the United States, for different districts; and, in case of property, e.g., a line of railway extending through both districts, the court in either of those jurisdictions would have authority to decree a sale of the mortgaged property as an entirety. In Farmers' Loan, etc., Co. *v.* Chicago, etc , R. Co., 27 Fed. Rep. 146, this principle was applied to suits by foreign corporations.

**English Decisions.**—The English chancery has frequently appointed receivers of property or estates in foreign countries, through its jurisdiction *in personam*. Houlditch *v.* Donegal, 8 Bligh N. S. 343; Hibbert *v.* Hibbert, 3 Meriv. 681; Roberdean *v.* Rous, 1 Atk. 544; Jackson *v.* Petrie, 10 Ves. 164; Langford *v.* Langford, 5 L. J. N. S. Eq. 60; Sheppard *v.* Oxenford, 1 Kay & J. 491; Davis *v.* Barrett, 13 L. J. N. S. Eq. 304; —— *v.* Lindsey, 15 Ves. 90; Cockburn *v.* Raphael, 2 Sim. & Stu. 453. See also Toller *v.* Carteret, 2 Vern. 494; Penn *v.* Ld. Baltimore, 1 Ves. Sr. 444. On suggestion of Sir Samuel Romelly, for petitioner, that some one within the jurisdiction should be receiver who could appoint his own agent in the foreign country, Lord Eldar approved that course as the better one. —— *v.* Lindsey, 15 Ves. 90. However, in Cockburn *v.* Raphael, 2 Sim. & Stu. 453, cited in 15 Ves. 91, note, the court appointed a receiver in India to collect a testator's assets, but required him to give sureties resident in England.

In the case of foreign companies, a provisional liquidator will be appointed for the purpose of taking possession of, collecting, and protecting the assets of a company in England. Emden Practice, etc., in Winding up Companies, p. 84, citing Commercial Bank of South Australia, 33 Ch. D. 174; Matheson Bros, Ld., 27 Ch. D. 225. It seems that, although a company has never transacted any business in *England*, and notwithstanding the fact that all its shareholders are foreign residents abroad, a winding-up order may be made if it has merely contemplated transacting some kind of business there and has been registered under the English act. Emden, p. 44, citing Princess of Reuss *v.* Bos, L. R. 5 H. L. 176; Tumacacori Mining Co., L. R. 17 Eq. 534. But there is no jurisdiction to wind up a foreign company which has carried on business in England by means of agents, but which has no branch office of its own there. Lloyd Générale Italiano, 29 Ch. D. 219. It was there held that the companies act is confined to English companies, and foreign companies with, so to speak, a residence—a branch office.

3. Booth *v.* Clark, 17 How. (U. S.) 322; Warren *v.* Union Nat. Bank, 7 Phila. 156; Hope Mut. L. Ins. Co. *v.* Taylor, 2 Rob. (N. Y.) 278; Brigham *v.* Luddington, 12

Federal courts, in their respective circuits, are local and limited, and a receiver appointed by one cannot sue before another.[1] A foreign receiver cannot interfere with attachment proceedings begun long before his appointment by the foreign court.[2] The legal authority of such receivers is coextensive with the jurisdiction of the court by which they were appointed.[3]

But, both upon principles of comity and for considerations of mutual utility and advantage, the courts of one State may recognize and enforce the acts of a receiver appointed in another State, when no detriment is thereby caused to the citizens of the State in which he undertakes to act.[4] The receiver of a foreign corpo-

Blatchf. (U. S.) 237; Hazard *v.* Durant, 19 Fed. Rep. 471; Farmers & Merchants' Ins. Co. *v.* Needles, 52 Mo. 17.

The full faith and credit clause of the national Constitution is without application in this respect. Booth *v.* Clark, 17 How. (U. S.) 322.

In Booth *v.* Clark, 17 How. (U. S.) 322, the supreme court of the United States held, very broadly, that a receiver appointed under the authority of a State court could not sue in the courts of another jurisdiction.

"The same principle was enunciated, although not so elaborately discussed, in Harrison *v.* Strong, 5 Cranch (U. S.), 289, and Ogden *v.* Saunders, 12 Wheat. (U. S.) 359. But it will be noticed that in all these cases there was a struggle, for the property of the estate, between the officers of a foreign court and creditors who had acquired liens by attachment or other proceedings, in the jurisdiction where the property was situated. In Booth *v.* Clark, 17 How. (U. S.) 322, the supreme court, after discussing the various English cases and tracing the history of the principle in question, in the English courts, comes to the conclusion that the rule of comity which authorized a receiver of a foreign court, or an assignee in bankruptcy appointed in a foreign jurisdiction, to prove a claim in an English court, has been repudiated and denied through a long series of years, but that, after the adoption of a general bankrupt law in *England*, and the adoption of the same policy in several of the commercial countries of Europe, the rule of comity required that the English courts should recognize the rights of assignees in bankruptcy appointed by foreign jurisdiction; and such has been the rule in England since that time. As the supreme court say 'Such is not the rule in this country' (that is, was not at the time of the decisions referred to) 'because we have no general bankrupt law;' plainly, as it seems to me, indicating that the rule in this country would be changed if the principles of the bankrupt law should be infused into its commercial law—an event which" did occur since Booth *v.* Clark; although now, again, our National Bankrupt Act has been repealed. Blodgett, J., in *Ex parte* Norwood, 3 Biss. (U. S.) 512. See also Parsons *v.* Charter Oak, etc., Ins. Co., 31 Fed. Rep. 308.

1. Brigham *v.* Luddington, 12 Blatchf. (U. S. C. C.) 242 (1874).

Receiver may sue in Federal court in another State. Wilkinson *v.* Culver, 23 Blatchf. (U. S.) 416; s. c., 25 Fed. Rep. 639.

2. Bartlett *v.* Wilbur, 53 Md. 495.

3. Hunt *v.* Columbian Ins. Co., 55 Me. 290.

In Day *v.* Postal Telegraph Co., 66 Md. 360, the court observed: "The receiver appointed by the court of *New York* had no extra-territorial power to institute proceedings in the courts of this State, in regard to property not subject to the jurisdiction of the court from which he received his appointment. His functions and powers for purposes of litigation are held to be limited to the courts of the State within which he was appointed; and the principle of comity between the States do not apply to a case like the present." See also Bartlett *v.* Wilbur, 53 Md. 485; Booth *v.* Clark, 17 How. (U. S.) 322; High on Receivers (5th Ed.), § 239.

4. Hoyt *v.* Thompson, 5 N. Y. 320, reversing s. c., 3 Sandf. (N. Y.) 416; Willitts *v.* Waite, 25 N. Y. 577; Runk *v.* St. John, 29 Barb. (N. Y.) 585; Lycoming Ins. Co. *v.* Wright, 55 Vt. 526; Taylor *v.* Columbian Ins. Co., 14 Allen (Mass.), 353; Ellis *v.* Boston, etc., R. Co., 107 Mass. 9; Hunt *v.* Columbian Ins. Co., 55 Me. 290; McAlpin *v.* Jones, 10 La. Ann. 552; Life Association, etc., *v.* Levy, 33 La. Ann. 1203; Metzner *v.* Bauer, 98 Ind. 427; Bagby *v.* Atlantic, etc., R. Co., 86 Pa. St. 291; Hurd v. Elizabeth City, 41 N. J. L. 1; and cases cited in succeeding notes.

See also Olney *v.* Tanner, 10 Fed. Rep. 105. But the receiver will not be aided in seeking a preference in contravention of the intent and policy of the Bankruptcy Act. Olney *v.* Tanner, 10 Fed. Rep. 105; Booth *v.* Clark, 17 How. (U. S.) 322.

In *Louisiana*, it was held that "Trustees, under a law of another State to take charge of the assets, collect the debts, etc., of a dissolved corporation, may sue a debtor of a corporation in this State." Planter's Bank *v.* Bass, 2 La. Ann. 431.

In Hoyt *v.* Thompson, 5 N. Y. 320, it was held that a receiver of an insolvent corporation, appointed under the laws of New Jersey, with power to take possession of all the effects of the corporation, and to convey or assign all its property, real and personal, may assign an indebtedness due to the corporation from a citizen of *New York;* and the courts of the latter State may recognize such assignment as giving to the purchaser an equitable right of action, which they will enforce as against the debtor, the rights of citizens of New York not intervening.

Bank *v.* McLeod, 38 Ohio St. 174, is one of the cases holding that, where the foreign receiver's right is not against the policy of the law of the State in which he claims, he may sue. In the opinion the court speak of Booth *v.* Clark, 17 How. (U. S.) 335, and say that it was correctly decided upon the facts before the United States court. The contention was in the District of Columbia between the assignee in bankruptcy of Clark, who became bankrupt in 1843, and the receiver appointed in 1851, in New York, in a suit against said Clark. The dispute had respect to a claim of Clark against Mexico, whereon award had been made to him in 1848. The United States supreme court held that the receiver's authority had no extra territorial force as against the assignee in bankruptcy, who represented all creditors alike, and who, by the adjudication in bankruptcy, became invested with the right to choses in action wherever found.

A receiver over a foreign corporation, appointed in the State of its creation, may be admitted to defend an action brought against the corporation in *New Jersey*, both as a matter of comity and under a statute subjecting foreign corporations to the provisions of the State law. Numerous other illustrations are given by Mr. High, whom we have just now been quoting, and who says: "It is thus apparent that the exceptions to the rule denying to receivers any extra-territorial right of action have become as well recognized as the rule itself, and the tendency of the courts is constantly toward an enlarged and more liberal policy in this regard; and it is believed that the doctrine will ultimately be established giving to receivers the same rights of action, in all States of the Union, with which they are invested in the State or jurisdiction in which they are appointed." High on Receivers, § 247; Wait on Insolvent Corp. (1888), § 189.

In National Trust Co. *v.* Miller, 23 N. J. Eq. 155, it was held that the court is bound to give a receiver, appointed by it as auxiliary to proceeding instituted in the State which created the corporation, the same remedies and aid, in the collection of the assets of the corporation he represents, that it would give to the receiver of a domestic corporation. See also Bidlack *v.* Mason, 26 N. J. Eq. 230. *Compare In re* Waite, 99 N. Y. 440; O'Dea *v.* O'Dea, 101 N. Y. 34.

In a case in the United States supreme court a similar ruling was made. Under the laws of *Missouri*, the superintendent of the State Insurance Department became vested with the property of insurance corporations on the dissolution of the company by decree of court. The court held that such Missouri superintendent could be admitted as a party to a suit against an insolvent Missouri insurance corporation in Louisiana, and, on being admitted, was entitled, by reason of his citizenship, to remove it into the United States circuit court. Relfe *v.* Rundle, 103 U. S. 222. Waite, C.J., said: "Relfe is not an officer of the *Missouri* State court, but the person designated by law to take the property of any dissolved life-insurance corporation of that State, and hold and dispose of it in trust for the use and benefit of creditors and other parties interested. . . .

"The law which clothed him with this trust was, in legal effect, part of the charter of the corporation. He was the statutory successor of the corporation for the purpose of winding up its affairs. As such, he represents the corporation at all times and places in all matters connected with his trust. He is the trustee of an express trust, with all the rights which properly belong to such a position. . . . His authority does not come from the decree of the court, but from the statute. He appeared in Louisiana, not by virtue of any appointment from the court, but as the statutory successor of a corporation which the court had in a legitimate way dissolved and put out of existence. He was, in fact,

ration may be permitted to remove corporate assets from the State when the creditors resident in such State have no fixed legal claim to the property.[1] He may also be recognized by comity in his suit for the recovery of unpaid subsciptions to stock.[2] A creditor of a foreign corporation, who resides in the State where the receiver was appointed, cannot, in an attachment execution in another State, recover assets of the corporation which are claimed by the receiver; foreign receivers will be aided when their claims do not conflict with those of the State's own citizens.[3] On principles of comity, aid will be extended to a foreign receiver seeking to obtain possession of property, as against the officers of the company who may be endeavoring, by fraud or subterfuge, to withhold it.[4] Such receiver may also, through the instrumentality of the courts, reclaim property which has been fraudulently or feloniously removed from the jurisdiction of the State appointing him.[5]

Where a foreign receiver, under an order of court, sends property into a State for sale, and it is there attached, he may maintain an action in his individual capacity for its recovery.[6] And where he has once obtained rightful possession of property, he will not be deprived of its possession, although he takes it, in the performance of his duty, into another jurisdiction.[7]

the corporation itself for all the purposes of winding up its affairs." "No State need allow the corporations of other States to do business within its jurisdiction unless it chooses, with perhaps the exception of commercial corporations; but if it does, without limitation, express or implied, the corporation comes in as it has been created. Every corporation necessarily carries its charter wherever it goes; for that is the law of its existence."

1. Patterson *v.* Lynde, 112 Ill. 207; Chicago, Mil. & St. P. R. Co. *v.* Packet Co., 108 Ill. 317.

2. Patterson *v.* Lynde, 112 Ill. 196.

A foreign receiver of an insolvent insurance company may sue, and sustain an action, to recover assessments on premium notes, no creditor having intervened to prevent the prosecution of the suit. Lycoming Fire Ins. Co. *v.* Wright, 55 Vt. 526.

In Cooke *v.* Town of Orange, 48 Conn. 401, it was held that a foreign receiver could maintain in that State a suit in his own name to recover moneys which are claimed to constitute a part of the corporate estate.

3. Bagby *v.* Atlantic, Miss. & Ohio R. Co., etc., 86 Pa. St. 291.

4. To such a suit, the corporation is not a necessary party. Bidlack *v.* Mason, 11 N. J. Eq. 230 (1875).

5. McAlpin *v.* Jones, 10 La. Ann. 552.

Property in relation to which an order of court of a sister-State of competent jurisdiction has been issued, and which has been fraudulently or forcibly withdrawn and brought to *Louisiana*, is not liable there to attachment by third persons, so as to defeat the rights acquired by virtue of the previous order. In such a case a decree will be entered ordering a prompt restitution of the property, or such decree as will prevent any right being acquired by those fraudulent attempts. Paradise *v.* Bank, 5 La. Ann. 719.

6. And the attaching creditors cannot avail themselves of irregularities in his appointment, e.g., his failure to qualify and give bond as receiver. Persons not parties to the original litigation cannot make complaint as to such irregularity. Cagill *v.* Wooldridge, 8 Baxt. (Tenn.) 530.

7. In this case the receiver of a packet company on the Mississippi chartered a barge to a steamboat, by which it was taken up the river into another State, where it was detained by ice, and the captain in charge of the same gave it up to the receiver, who took possession and placed a guard over the same; and it was there attached by a creditor of the insolvent company. It was held that there was no abandonment of the barge by the receiver, and that he had a right to interplead, under the statute, and insist upon his right to the same. Chicago, etc., R. Co. *v.* Keokuk, etc., Packet Co., 108 Ill. 317.

It has, however, been held, in a *Texas* case, that the courts of one State cannot make a decree ordering the conveyance of

When a citizen has recognized the foreign receiver, by incurring obligations to him in his official capacity, which are sufficient to create a right of action, it is probable the receiver may sue the citizen in the latter's domicil.[1]

It has been held that, since the *situs* of debts is where the creditor resides, notes by a citizen of one State to a foreign corporation pass to a receiver appointed in the home State of the corporation, even as against creditors who attach the notes in the State of the debtor.[2]

A foreign receiver may continue suits in the courts of a State,[3] and may be substituted as complainant.[4]

land situate in another State which will be recognized as valid by the courts of the State in which the land is located; and that the same principle applies to the assignment to a receiver by the holder of the legal title, by order of a bankrupt or chancery court in one State, of land situate in another State. The decision was in favor of non-resident attaching creditors who claimed in opposition to the foreign receiver. Moseby *v.* Burrow, 52 Tex. 404.

1. High on Receivers, § 243.

A bond and mortgage of lands in one State, to a receiver of an insolvent corporation appointed in another State, may be sued on by such foreign receiver in the State wherein lies the land; and, on the death of the receiver, his successor may sue as equitable assignee. Iglehart *v.* Bierce, 36 Ill. 133. See also Graydon *v.* Church, 7 Mich. 36, where the debtor had assigned, under order of foreign court, to its receiver, and it was held that the receiver could sue in *Michigan*, as assignee.

Where a mortgage was executed to a foreign receiver, he can sue thereon without making the corporation a party. Iglehart *v.* Bierce, 36 Ill. 133.

2. In an action brought, in *New York*, by the receiver of a New York insurance corporation, upon promissory notes which were part of the assets and came to his hand as such receiver, which notes were made by a resident of Massachusetts, but were payable in New York, defendant cannot plead in bar that after the appointment of plaintiff the debt due upon the notes was attached, in an action in Massachusetts brought by a creditor against the corporation. Osgood *v.* Maguire, 61 N. Y. 524.

**Presumption of Dissolution.**—In an action on a promissory note, brought in the foreign corporation's name, plaintiff proved the appointment of the receiver, and then introduced in evidence the statute of the foreign State authorizing the appointment of a receiver "when any corporation shall be dissolved." *Held*, in the absence of further evidence, the inference was, the corporation had been dissolved and was extinct, and was not therefore the real party in interest. Merchants' Loan & Trust Co. *v.* Clair (N. Y. court of appeals, Nov. 29, 1887), 14 Northeast. Rep. 414.

Where the title of the plaintiff, according to the petition, rests upon his appointment as receiver by a court of another State, and the jurisdiction of the State is specially denied, and no testimony is offered as to its jurisdiction and no record produced of its proceedings, and the court is one whose jurisdiction is not determined by the constitution of the State in which it exists, and there is nothing to show whether it was a court of general or limited jurisdiction, or in what manner or by what process it claimed to have acquired jurisdiction, or in what proceedings it made the appointment, *held*, that a finding of the local court against the plaintiff will not be reversed on writ of error. Kronberg *v.* Elder, 18 Kan. 150.

3. Farmers', etc., Ins. Co. *v.* Needles, 52 Mo. 17; Hope Mut., etc., Ins. Co. *v.* Taylor, 2 Robt. (N. Y.) 178; Warren *v.* Union Nat. Bank, 7 Phila. (Pa.) 156.

4. National Trust Co. *v.* Murphy, 30 N. J. Eq 408.

**Authorities for Foreign Corporations.**—Morawetz Corp. (2d Ed.); Taylor Corp.; Waterman Corp.; Wait on Insolvent Corp. (1888); note on Foreign Corporations (Merritt Starr), 14 Am. & Eng. Corp. Cas. 28, and 15 Am. & Eng. Corp. Cas. 438; Am. & Eng. R. R. Cas. and Am. & Eng. Corp. Cas., and notes to these series.

**FOREIGN EXECUTORS AND ADMINISTRATORS.**—(See also EXECUTORS AND ADMINISTRATORS.)


**I. Ancillary or Foreign Administration—Definition,** 414.
**II. When Appointment to be Made,** 414.
1. *Grant of Administration,* 415.
**III. Rights and Responsibilities,** 418.
1. *What Law Governs,* 419.
2. *Title to and Authority over Estates,* 420.
(*a*) *Bond—Liability On—Title,* 420.
**IV. Actions By and Against,** 421.
1. *Cannot Sue or be Sued Before Taking Out Ancillary Letters,* 423.
(*a*) *Practice—Pleading,* 424.
2. *What Payment Will Discharge Debtor,* 424.
3. *Their Assignees May Sue Upon Choses in Action,* 425.
4. *Goods in Itinere,* 425.
5. *Damages for Death of and Injury to Decedent,* 426.
**V. When Entitled to Ancillary Letters,** 427.
1. *No Privity Between Different Administrations,* 427.
2. *When Appointed Executors by Same Will,* 428.
**VI. Settlement and Distribution,** 428.
1. *Distribution of Assets in Different Jurisdictions,* 430.
2. *Original and Ancillary Administration—Conflict,* 431.
**VII. Courts of Equity—Jurisdiction of,** 433.
1. *Other Courts,* 434.


**I. Ancillary or Foreign Administration.**—1. DEFINITION.—Ancillary administration is so called because it is subordinate to the original administration, for collecting the assets of foreigners.[1] Ancillary administration is one subordinate to the original administration, taken out in the country where assets are locally situated.[2] The administration at the domicil of the decedent is the principal; and the foreign administration, by the laws of all civilized nations, is merely ancillary and subordinate to it. The foreign administrator, under these circumstances, may be called to account in the domestic jurisdiction, for assets received by him abroad, remaining after payment of expenses and the discharge of debts in due course in the foreign jurisdiction.[3]

**II. When Appointment to be Made.**—The rule for the distribution of personal property, where the place of the domicil of the intestate and the place of the *situs* of the property are not the same, is that the disposition, succession to, and distribution of personal property, wherever situated, must be governed by the law of the country of the owner's domicil at the time of his death. This doctrine has become the settled principle of international jurisprudence, founded on a comprehensive and enlightened sense of public policy and convenience. This rule avoids the conflict of laws of the various places where the personal property may be situated.[4] Succession to personal property is governed by the law of the actual domicil of the intestate at the time of his death, no matter what was the country of his birth, or his former domicil, or the actual *situs* of the property at the time of his death.[5] It is the settled law of all civilized countries that real property, as to its tenure, mode of enjoyment, transfer, and descent, is to be

1. Whart. L. Dict.
2. Webster Dict.
3. Ordronans *v.* Helie, 3 Sandf. Ch. (N. Y.) 512; Graham *v.* Public Administrator, 4 Bradf. (N. Y.) 127.
4. Ferraris *v.* Hertford, 3 Curt. 468; Stanley *v.* Bernes, 3 Hagg. Eccl. 373; Desesbats *v.* Berquier, 1 Binn. (Pa.) 336.
5. Story Confl. of Laws, § 481.

regulated by the *lex loci rei sitæ*.[1] The general usage of nations as to the succession and distribution of personal property, as stated above, is a part of the municipal jurisprudence of the United States.[2] So, the administration of the personal estate of a deceased person belongs to the court of the country where the deceased was domiciled at his death. The court of the domicil is the *forum concursus* to which the legatees under a will, or the parties entitled to the distribution of the estate of an intestate, are required to resort. The duty of administering personal estate in a country is to be discharged by its courts; though in the performance of that duty they will be guided by the law of the domicil.[3] As a general rule, a court has no jurisdiction to grant letters of administration unless the intestate leaves personal property in the country where the court is.[4] In the absence of statute regulation, administration must be in the country in which possession is taken, under lawful authority, of the property of the deceased, by foreign letters of administration, which is ancillary to the original or primary.[5]

1. GRANT OF ADMINISTRATION.—The distribution must be according to the laws of the country of the domicil of the deceased; yet his debts in a foreign country where he has assets must be collected and paid according to the laws of that country. Hence, administration must be granted where such debts and assets are; because an administrator has no authority beyond the jurisdiction in which his letters of administration are granted.[6] A grant of administration at the domicil of the decedent does not, at common law, confer on the administrator any title to or right to possession of the property of the intestate situate in another State or country. He has no authority over, nor is he responsible for, any assets of the estate that may lie beyond the original administration. In administering the estate, he has authority to act in reference to the effects within his jurisdiction, and the debts that may be there presented against the estate. If he wishes to reach property or to collect debts belonging to the estate, in a foreign jurisdiction, he must first obtain a grant of letters of administration and become

1. Story Confl. of Laws, §§ 426–428, 463, and cases cited.

2. U. S. *v.* Crosby, 7 Cranch (U. S.), 115; Blane *v.* Drummond, 1 Brock. (C. C.) 62; Stent *v.* McLeod, 2 McCord (S. Car.), 354; Leake *v.* Gilchrist, 2 Dev. (N. Car.) 73; Dawes *v.* Boylston, 9 Mass. 337.

3. Enohin *v.* Wylie, 10 H. L. Cas. 1.

4. Evans *v.* Burrell, 28 L. J. P. 82.

5. Reston *v.* Melville, 8 Cl. & Fin. 1; Burbank *v* Payne, 17 La. Ann. 15; Clark *v.* Clement, 33 N. H. 563; Banta *v.* Moore, 2 McCart. (N. J.) 97.

In regard to personal, or movable, property, the *lex domicilii* prevails. Smith *v.* Union Bank, 5 Pet. (U. S.) 519; Weese *v.* Keefe, 10 Ohio, 362; *In re* Roberts Will, 8 Paige (N. Y.), 519; Harrison *v.* Nixon, 9 Pet. (U. S.) 483; Turner *v.* Fenner, 19 Ala. 355; Moultrie *v.* Hunt, 23 N. Y. 394; Knox *v.* Jones, 47 N. Y. 389; Lawrence *v.* Kittridge, 21 Conn. 577; Perin *v.* McMicken, 15 La. Ann. 154; Fellows *v.* Miner, 119 Mass. 541; Nat *v.* Coons, 10 Mo. 543; Gilman *v.* Gilman, 52 Me. 165; Irving *v.* McLean, 4 Blackf. (Ind.) 53; Story Confl. of Laws, § 465.

6. Topham *v.* Chapman, 1 Const. (S. Car.) 292; Apple's Estate, 66 Cal. 432; Vroom *v.* Van Horn, 10 Paige (N. Y.), 549; Parsons *v.* Lyman, 20 N. Y. 103.

subject to the regulations of that country or State.[1] Every ancillary administration, governed by the principles of international law, is made subservient to the rights of creditors, legatees, and distributees in the jurisdiction where such administration is granted; although the distribution, as to legatees and distributees or heirs, is governed by the law of the place of the testator's or intestate's domicil.[2] An executor's title is good *jure gentium*, and binding where confirmed by the authority of the jurisdiction in which it is to operate. An administrator's title under grant from the authority of the decedent's domicil does not, *de jure*, extend or attach to the property in another country. A new title or a recognition of the authority must be derived from the foreign government; and then it is merely ancillary to the original power as to the collection and distribution of assets, and is made subservient to it.[3]

1. Story Confl. of Laws, § 513; Gordwin *v.* Jones, 3 Mass. 514; Leonard *v.* Putnam, 51 N. H. 247; Doolittle *v.* Lewis, 7 Johns. (N. Y.) 45; Vaughn *v.* Barrett, 5 Vt. 333; Stevens *v.* Gaylord, 11 Mass. 256; Judy *v.* Kelley, 11 Ill. 211; Sheldon *v.* Rice, 30 Mich. 296.

2. Story Eq. Juris. § 588.

3. Carmichael *v.* Ray, 1 Rich. (S. Car.) 116.

If a party goes into a foreign jurisdiction, and dies there, leaving assets where he died, administration must be taken out there, though the effects are to be distributed according to the law of the country of his domicil. Such administration will be ancillary; and that of his domicil, original or primary. Aspinwal *v.* The Queen, 2 Curt. 241.

In *Kentucky*, the law of the domicil of the deceased is not regarded as to the succession to movable property, so far as his creditors in that State are concerned. The administration for the benefit of creditors is regulated by the *lex loci rei sitæ*. Warren *v.* Hall, 6 Dana (Ky.), 455.

**International Grant.**—A court will not follow a foreign grant, which was made by the foreign court, to persons not entitled as of right, but were nominated by the widow and next of kin for the purpose, there being nothing on the face of the proceedings to show that she had secured the consent in their favor in respect of the administration of the English estate. Weaver, In Goods of, 36 L. J. P. 41.

The court follows the grant of the court of the testator's domicil as to the document which that court has admitted to probate, but not as to the person to whom the grant is made. Casnahan, In Goods of, 1 L. R. P. 183.

The court will make a grant to a provisional executor appointed by the proper court of the domicil of the deceased; but such grant will be limited for such time as the appointment by the court of domicil remains in force. Steigerwald, In Goods of, 10 Jur. (N. S.) 159.

A natural-born subject of Great Britain died in Russia, his domicil, possessed of property both real and personal. He made his will in *Russia*, and appointed Russian executors. The will was duty probated in the Russian courts. The deceased died possessed of a considerable amount in English funds, which were not distinctly described separably from his other property. Under these facts, the executors were clothed with authority of the court of the testator's domicil, and were entitled to probate all the funds. Enohin *v.* Wylie, 1 S. & T. 118.

In *England*, the courts will not follow the grant of the domicil when it would by so doing be acting in contradiction of English law. D'Orleans, In Goods of, 1 S. & T. 253.

When the deceased is domiciled in a foreign country, and an application is made either for an original or a *de bonis* grant of administration in England, it will be granted to the person recognized by the proper court of the country of his domicil. Hill, In Goods of, 2 L. R. P. 87.

A deceased had made two wills and was domiciled in England. One will related exclusively to property in Peru and the other to property in England, his domicil, and executors were appointed in both wills. The executor of the English will, who was one of the executors of the Peruvian will, was allowed to probate both instruments. Winter, In Goods of, 4 S. & T. 204.

A Sardinian settled in *Brazil*, and died intestate on a voyage from Bahia to Genoa. He was on his way to establish his domicil at Genoa. By an agreement, the Brazilian government gave up to the Italian government all claims to the administration of his estate, and also as to the appointment of guardians to his children. The court revoked a grant of administration, which had been made to a person entitled to it according to the Brazilian law. Bianchi, In Goods of, 3 S. & T. 16.

Where an executor is appointed by a foreign will, the nature and extent of the office conferred by the appointment are regulated by the law of the testator's domicil, and not by the English law, even as to property situated in England. If by the law of the domicil, the office of executor lasts only for a limited period, the court cannot, after that period has expired, grant probate to the executor. Lancuville *v.* Anderson, 2 S. & T. 24.

In 1856, the Prerogative court of England granted administration *de bonis non*, with the will annexed, of a domiciled Portuguese, to a substituted executor in the will, who, in conjunction with the widow, by the law of *Portugal*, is the legal representative. He, in conformity with Portuguese law, had since renounced the office of executor, and another party had been nominated executor for all legal purposes. The court refused to grant administration *de bonis non* to this last executor, on the ground that there was no authority for an executor's (who takes such a grant in an English court) renouncing; so that there was still a legal personal representative of the deceased in England. Veiga, In Goods of, 7 L. T. (N. S.) 644.

A testator domiciled in England left three next of kin, one of whom lived in Calcutta and another in New York. Those two nominated each an attorney in England for the purpose of taking a grant. The court, however, refused to make a joint grant to these attorneys. Shepherd, In Goods of, 26 L. T. (N. S.) 405.

A Persian subject was declared, by a court of his domicil, entitled to certain property in England. The decree, though founded partly upon a will, made no mention of it, and the court which had custody of the will refused to give a copy of it. The court of probate granted letters of administration limited to the property mentioned in a duly authenticated copy of the decree. The court allowed the law applicable to the case to be proved by a Persian ambassador. Dost Aly Khan, In Goods of, 6 L. R. P. Div. 6.

A member of the Russian imperial family died in *Russia*, and appointed his son as executor. The court, upon a certificate from the Russian ambassador in England, with the seal of the Russian embassy, reciting that the law of Russia is as stated, and that, under the "Acte Definitif," the son was the sole and entire owner of the railway shares named, made grant, to the attorney of the son, of letters of administration, with the "Acte Definitif" annexed, limited to the property of the deceased in England. Oldenberg, In Goods of, 9 L. R. P. Div. 234.

A person domiciled in Calcutta died there insolvent, and his will was probated according to the law of his domicil. An administrator was appointed in Massachusetts, into whose hands came assets sufficient to pay claims due citizens of the United States; but all the assets were wanted by the executor in Calcutta. The *Massachusetts* court held that the administration in that State was only ancillary to the executor in Calcutta, and that the assets ought to be remitted unless he was compelled by law to appropriate them there to pay debts. Dawes *v.* Head, 3 Pick. (Mass.) 128.

**Interstate Grant.**—United States bonds deposited, by a citizen of another State, in *Pennsylvania*, for safe keeping, upon special certificate of deposit, transferable by indorsement with approval of the company, and upon surrender of which bonds are to be returned to the depositor, do not constitute, upon the depositor's death, a part of his assets in Pennsylvania. Shakespeare *v.* Fidelity Trust Co., 97 Pa. St. 173.

Administration may be granted in the State where the deceased left property, although no administration has been taken out in the State where he was domiciled. Wood *v.* Matthews, 73 Mo. 477.

Bills, notes, and choses in action, whereon money is due, are "goods and chattels," within the meaning of the term in the statute authorizing administration on the estate of one dying out of the State. Epping *v.* Robinson, 21 Fla. 36.

In *Iowa*, ancillary administration may be granted after the lapse of five years from the death of the decedent. The restrictions in the statute apply only to original administration. Dolton *v.* Nelson, 3 Dill. (C. C.) 469.

A testatrix died in *France*, and appointed her husband "general and universal legatee," which, according to

**III. Rights and Responsibilities.**—Personal property, as to its succession, is controlled by the laws of the domicil of the deceased; yet each State is competent to regulate, within its own jurisdiction, succession in personalty and realty.[1] And administration must be according to the laws of the country where the executor takes possession under lawful authority.[2] The liability of the administrator is commensurate with the jurisdiction of the authority that appoints him; and the trust is in no way under foreign jurisdiction, but is regulated by the law of the *locus rei sitæ*.

The intestate's estate is to be administered under the authority of the local law in which the property was at the death of the deceased, with the provision of foreign creditors share in proportion to their debts, respect being had to the total amount of the estate and the debts whether foreign or domestic. If there be no domestic debts, or they be satisfied, then the local ancillary administrator should remit the assets, when collected, to the primary administrator at the place of the intestate's domicil, and to whom they legally belong, for administration. This is not the case as to executors, whose title, flowing from the will, extends to the assets wherever found.[3] The doctrine of many courts coincides with this rule: that the ancillary administration is made subservient to the rights of creditors, legatees, and distributees resident within the country, and that the balance of the estate be transmitted to the foreign or primary administrator only when the final account has been settled in the proper domestic tribunal, upon equitable principles adopted in its laws.[4] Some other authorities hold that domestic legatees and distributees are to resort to the primary administration abroad, where the residuary assets are to be transmitted.[5] Others hold that it appertains to the courts of the State where the ancillary administration is granted, within its jurisdiction, to adjust the accounts of the administrator touching the assets received in the State; and that it is discretionary in these courts to order distribution in the State or to remit the effects to the place of the primary administration for that pur-

the French law, constituted him an executor of the will; and therefore letters testamentary must be granted to him. *Re* Blancan, 4 Redf. (N. Y.) 151. Ancillary letters will not be granted when the only assets are moneys collected by a resident agent of the foreign decedent. Schley's Estate, 2 W. N. C. (Pa.) 684.

It is a general rule that simple contract debts—for example, unsealed insurance policies—are, for the purpose of founding administration, assets where debtor has his domicil, without regard to place where the policy, or evidence of debt, is found. So, administration may be granted in *Illinois* upon property of non-resident decedent which was within that State at the time of his death. Such property may be a life-insurance policy issued by a corporation which is suable in Illinois at date of owner's death, and, as such, is assets. N. E. Ins. Co. *v.* Woodworth, 111 U. S. 138.

By statutory regulation in Illinois, a husband domiciled in that State has a right to administer on property of deceased wife, which was in Illinois at the date of her death, although she died domiciled in another State. N. E. Ins. Co. *v.* Woodworth, 111 U. S. 138.

1. Story Confl. of Laws, §§ 23, 447; Jones *v.* Marable, 6 Humph. (Tenn.) 116

2. Clark *v.* Clement, 33 N. H. 563.

3. Mathland *v.* Wireman, 3 Pa. 185.

4. Miller's Estate, 3 Rawle (Pa.), 312.

5. Richards *v.* Dutch, 8 Mass. 506; Dawes *v.* Boylston, 9 Mass. 337; Stevens *v.* Gaylord, 11 Mass. 256.

pose; that it rests on courtesy and expediency alone, and it is the usual course to remit them. But this will not be done when it will endanger the rights of those entitled to the estate.[1]

1. WHAT LAW GOVERNS.—Although the law of the testator's domicil governs the foreign personal assets of his estate for the purpose of succession and enjoyment, yet those assets are for the purpose of legal representation, of collection, and of administration, as distinguished from distribution among the successors; governed by the law of their own locality, and not by that of the testator's domicil.[2] The locality of real estate is to be considered, as the law of its State or country governs the administration. A will of realty is generally governed by the *lex loci rei sitæ* and hence the place where such will happened to be made and the language in which it is written are wholly immaterial as effecting the execution of it.[3]

1. Porter *v.* Heydock, 6 Vt. 374; Dawes *v.* Head, 3 Pick. (Mass.) 128.

As to personal property, the rights of legatees, as well as the rights of next of kin, in a case of intestacy where an administrator has been appointed, depend upon the laws of the country of the domicil of the intestate, from whom the succession is claimed. This is the general American doctrine. Oliver *v.* Townes, 14 Martin (La.), 99; Ennis *v.* Smith, 14 How. (U. S.) 400; Atchison *v.* Lindsey, 6 B. Mon. (Ky.) 86; Schultz *v.* Pulver, 3 Paige (N. Y.), 182; Harvey *v.* Richards, 1 Mason (C. C.), 381; Potter *v.* Titcomb, 22 Me. 300; Dixon *v.* Ramsay, 3 Cranch (U. S.), 319; United States *v.* Crosby, 7 Cranch (U. S.), 115; Dorsey *v.* Dorsey, 5 J. J. Marsh. (Ky.) 280; Garland *v.* Rowan, 2 S. & M. (Miss.) 617; Bradley *v.* Lowry, 1 Spear Eq. (S. Car.) 1, 13; Hunter *v.* Bryson, 5 Gill & J. (Md.) 483; Richards *v.* Dutch, 8 Mass. 506; Kerr *v.* Moon, 9 Wheat. (U. S.) 565; Walton *v.* Grattan, 3 Story (C. C.), 755; Fay *v.* Haven, 3 Metc. (Mass.) 199; Goodall *v.* Marshall, 11 N. H. 88; Cambell *v.* Sheldon, 13 Pick. (Mass.) 8.

Where a foreign administrator administers upon property in *Illinois*, it lies with probate court to say whether he shall give additional security or not. A failure to give security will not invalidate a title made by such administrator or trustee. Ryan *v.* West, 115 Ill. 603.

A failure to give bond by an administrator or trustee does not invalidate a title made by them. Bradstreet *v.* Butterfield, 129 Mass. 342.

2. Blackwood *v.* Reg., 8 L. R. App. Cas. 82.

3. Eyre *v.* Storer, 37 N. H. 114; Knox *v.* Jones. 47 N. Y. 389.

That the administration of real estate is governed by the *lex loci rei sitæ* is the *American* rule, except where it is changed by statute. Kerr *v.* Moon, 9 Wheat. (U. S.) 565; Abell *v.* Douglas, 46 Den. (N. Y.) 305; Calloway *v.* Doe, 1 Blackf. (Ind.) 372; Potter *v.* Titcomb, 22 Me. 303; Bailey *v.* Bailey, 8 Ohio, 239; Darby *v.* Mayer, 10 Wheat. (U. S.) 465; Story Confl. of Laws, § 474; Robertson *v.* Barbour, 6 T. B. Mon. (Ky.) 527; Crofton *v.* Ilsley, 4 Greenl. (Me.) 138; Varner *v.* Bevil, 17 Ala. 286.

In many States, provisions have been made for allowing and recording wills made in other States, according to the law of the place where made. For instance, a will probated in New Jersey, and the letters issued thereon and recorded, entitle it to be filed for probate and administration in *Michigan*. Wilt *v.* Cutter, 38 Mich. 189. Under statute in *Massachusetts*, it was held a nuncupative will might be proved in that State, which would not be valid if made in Massachusetts. Slocomb *v.* Slocomb, 13 Allen (Mass.), 38. So, in many other States, foreign wills are allowed to be probated. Irwin's Appeal, 33 Conn. 128; State *v.* McGlynn, 20 Cal. 233.

A will in *Pennsylvania*, executed according to the California law, by a person domiciled in the latter State, may be proved in the former and letters testamentary granted. Flannery's Will, 24 Pa. St. 502.

No executor or administrator, as such, has any anthority out of the State in which he has qualified. Campbell *v.* Sheldon, 13 Pick. (Mass.) 8.

The administration of the assets of an estate is governed by the law where the personal property is situate; and the administrator acts, as to the creditors of a decedent, without regard to the domicil of the creditors. Jones *v.* Drewry, 72 Ala. 311.

2. TITLE TO AND AUTHORITY OVER ESTATES.—An administrator or executor has authority over the estate of the deceased within the jurisdiction of the State where he has qualified. He cannot extend his rights extra-territorially, and go beyond the government granting the letters testamentary.[1] If a foreign country acknowledges the title and authority at all of an executor or administrator of another jurisdiction, it is done *ex comitate*, and must be exercised according to the laws of the country of the *situs*.[2] The administrator of one State cannot control the assets of the deceased in another State; he has nothing to do with them.[3]

(*a*) *Bond—Liability on—Title.*—In the absence of any statute dispensing with probate anew and giving a will extra-territorial

In *Pennyslvania*, the *lex fori* governs the distribution of a decedent's estate. Pleasant's Appeal, 77 Pa. St. 356.

An agent loaned money for a non-resident in *Mississippi*, on land, and took notes. He also deposited his principal's money in a Mississippi bank. *Held*, under the Mississippi code of 1880, § 1270, they could not be administered upon in that State, it appearing that said certificate of deposit and notes were at the place of the domicil of the decedent, there being no debtors in Mississippi. Speed *v.* Kelly, 59 Miss. 47.

But if the notes remained with the agent in Mississippi, they are "personal property" and subject to administration in the State. Jahier *v.* Rascoe, 62 Miss. 99; Weaver *v.* Norwood, 59 Miss. 665.

1. Campbell *v.* Sheldon, 13 Pick. (Mass.) 8; Doolittle *v.* Lewis, 7 Johns. (N. Y.) 45.

2. Story Confl. of Law, § 512.

3. Rosenthal *v.* Renick, 44 Ill. 203.

A testator, who made his will and died in a foreign country, created trusts to be executed by the executors and trustees. It was held that, even though the trust fund was situated in *New York*, the New York courts would allow the trustees to control it, and not an ancillary administrator. Bovilla *v.* Mestre, 34 Hun (N. Y.), 551.

A foreign administrator has no right *ex officio* to grant a license to sell land in the State of the deceased's domicil. McAnulty *v.* McClay, 16 Neb. 418; Watkins *v.* Holman, 16 Pet. (U. S.) 26.

The power of an executor or administrator is circumscribed by the boundaries of the State in which he receives his letters. He cannot bring action nor collect a claim in another State without first taking out ancillary letters of administration. Stewart *v.* O'Donnell, 2 Den. (N. Y.) 17.

A foreign administrator can lawfully execute a power of sale contained in a real-estate mortgage, in New York, as this is purely a matter of contract, and not of jurisdiction. Averill *v.* Taylor, 5 How. Pr. (N. Y.) 476.

A citizen of New York made his will and died in that State. The executors were domiciled in *New Jersey*, but the will had never been recorded in the latter State, as required by the law. A residuary legatee claimed funds in the hands of the executors. *Held*, that the courts of New Jersey had no jurisdiction to aid him in procuring the funds. Van Gieson *v.* Banta, 40 N. J. Eq. 14.

In *Illinois*, a foreign executor, appointed by another State, may properly appear in a suit in the courts of Illinois and defend the interests of his estate, and is a proper party for that purpose. He may, under statute, appear in court in any form in which it may become necessary for him to properly prosecute or enforce any of the claims of the deceased. Decker *v.* Patton, 20 Ill. App. 210.

Pending a suit, in a *Spanish* court, as to which of two wills was genuine, the plaintiff was appointed judicial administrator of the estate. Under the order of the court, he afterwards appointed the defendant as his attorney to receive money due the estate in London. The defendant obtained letters of administration to be granted to him as the plaintiff's attorney, limited to the amount of the debt due the estate in London. The defendant received the debt. *Held*, that he might pay it over to the plaintiff, although he had not obtained administration to the deceased. De la Viesca *v.* Lubbock, 10 Sim. 629.

Under the *Iowa* code, §§ 2367, 2368, an administrator appointed in another State will presume to be regularly appointed, and he may be appointed ancillary after five years from decedant's death. Woodruff *v.* Schultz, 49 Iowa, 430.

force, a party cannot be held liable on his bond, as executor for his acts done in another State.[1] Non-residence of the sole surety in an administrator's bond does not vitiate a sale and conveyance of land for payment of debts, after the sale had been duly perfected and confirmed.[2]

**IV. Actions By and Against.**—As has been stated, a grant of administration in one country does not, at common law, authorize the administrator to exercise any right over the intestate's property beyond the jurisdiction of the country where the letters are issued.[3] He is bound by the law of his jurisdiction as to debts and credits of the estate. In his official capacity he can neither sue nor be sued outside of the jurisdiction of the State from which he derives his authority, to which he alone is responsible.[4] In order to reach property in another State, or to collect debts belonging to the estate by suit or otherwise, he must first obtain letters of administration and fulfil the requirements of that jurisdiction.[5] The administrator has no power conferred by which he can sue or be sued beyond the boundaries of the State, nor collect assets of his intestate in an extra-territorial jurisdiction, whether they consist of tangible property or choses in action.[6] And it has been held that the release and satisfaction of a mortgage by a foreign administrator cannot avail as a defence to a bill by the domestic administrator to foreclose.[7] It was held, however, that an administrator holding letters from the domiciliary court is invested with the title to the personalty of the deceased for the purpose of collecting the assets of the estate, paying debts, and making distribution of the residue. Thus, a payment of debts to such an administrator is good, as against the claim of an administrator duly appointed at the domicil of the debtor, in which latter place the debts were paid, there being no creditors of the intestate in this last place, nor any one there entitled to distribution.[8]

1. Cabanne *v.* Skinker, 56 Mo. 357.

2. Johnson *v.* Clark, 18 Kan. 157. When a foreign administrator administers upon an estate at the domicil of the deceased, it is in the discretion of the probate court to take additional security or not, as he sees best. A failure to give security will not invalidate a title made by such trustee. Regan *v.* West, 115 Ill. 603.

A failure to give bond in a foreign administration does not vitiate and make void a title made by the trustee. Bradstreet *v.* Butterfield, 129 Mass. 342.

3. Bonnell *v.* Halt, 89 Ill. 71; Fletcher *v.* Weir, 7 Dana (Ky.), 345.

4. Story Confl. Laws, § 513; Goodwin *v.* Jones, 3 Mass. 514; Riley *v.* Riley, 3 Day (Conn.), 74; Leonard *v.* Putnam, 51 N. H. 247.

5. Sheldon *v.* Rice, 30 Mich. 296; Morrell *v.* Dickey, 1 Johns. (N. Y.) 153; Vaughan *v.* Barret, 5 Vt. 333; s. c., 26 Am. Dec. 309, note; Stevens *v.* Gaylord, 11 Mass. 256.

6. Riley *v.* Mosely, 44 Miss. 37; Anderson *v.* Gregg, 44 Miss. 170; Goodwin *v.* Jones, 3 Mass. 514.

7. Stone *v.* Scripture, 4 Lans. (N. Y.) 186; Stevens *v.* Gaylord, 11 Mass. 256.

8. Wilkins *v.* Ellett, 9 Wall. (U. S.) 740.

**Interpleader.** — A widow commenced suit against an insurance company in *Pennsylvania*. The company brought the amount into court, and asked an interpleader between the widow and the administrator of the assured. The administrator was a resident of Ohio, where he was served with process and cited to appear. The *Ohio* court held, that the Pennsylvania court had no jurisdiction of his person, and the judgment would not be recognized in Ohio; also that the suit was *in rem*, and was untenable. Grass *v.* Armstrong, 44 Ohio St. 613.

A party domiciled in *Mississippi* appointed, as trustee, a person in the State of *Virginia*, for heirs resident of the latter State. *Held*, a suit could be maintained in Virginia against trustee's executor to hold responsible the estate of the trustee for a breach of trust in reference to the estate in Mississippi, and at the same time a suit was pending in the latter State, brought by another legatee, to recover a legacy, complainants in the Virginia suit and the executors of the trustee being parties to the Mississippi suit. Davis *v.* Morris, 76 Va. 21.

A testator died in England, and appointed an executrix, who was also domiciled in that country. The will was proved in England and in South Carolina. *Held*, a legatee could maintain a suit in the latter State to impeach an investment by the executrix, provided there were assets in *South Carolina* at the time the suit was commenced. Gravely *v.* Gravely, 20 S. Car. 93.

A party domiciled in *New York* died intestate, leaving notes against a citizen of Georgia. The administratrix exchanged the notes for real estate in Atlanta, Ga., with a party who acted in good faith. The administratrix was charged with the notes in her settlement with the New York court. Some of the distributees filed a bill in Georgia to set aside the deed on this account of tracing these notes to the exchange for the land. *Held*, that the court could administer the notes according to the New York law; that the record of that court was admissible; that, before the complainants could seek the *Georgia* courts, they must exhaust their remedy in the New York courts, that the party who had bought the land in good faith from the executrix should not be disturbed. McNamara *v.* McNamara, 62 Ga. 200.

**Making Administrator Party.**—In order to make an administrator or executor a party, it is necessary that he be appointed by the government within whose territory the action is to be brought; because a foreign administrator or executor is not properly answerable to the process of the courts of a domestic forum. And the assets received by him must be administered according to the laws of a foreign jurisdiction where he took out letters. In such a character, he is not the proper party to substantiate or to repel a demand affecting the personal assets of the deceased in another country where the suit is brought. Story Confl. Laws, § 513; Mitf. Eq. Pl. (by Jeremy) 177; Jauncy *v.* Sealey, 1 Vern. 397; Lowe *v.* Farlie, 2 Madd. 101; Logan *v.* Fairlie, 2 Sim. & Stu. 284. *Compare* Sandilands *v.* Innes, 3 Sim. 263; Anderson *v.* Caunter, 2 Myl. & K. 763.

A personal representative of the deceased, appointed in the country where the suit is brought, is a necessary and proper party. Taylor *v.* Bell, 2 Myl. & Cr. 89.

**Missouri Law.**—Under Missouri statute 115, § 24, permitting decedent's personal property to be disposed of according to the law of the State of which he was domiciled, an action will lie in Missouri, brought by an executrix and devisee in her own right after final settlement, or a claim due to the estate, by the defendant, although the estate, having no debts in Missouri, was not probated there. Morton *v.* Hatch, 54 Mo. 408.

**Georgia Law.**—Letters of administration granted in another State have no validity in Georgia except such as is imported by the statutes of this State. Therefore, all foreign administrators who bring suit here must bring themselves within the statutes. Turner *v.* Linam, 55 Ga. 253.

**Kansas Statute.**—An administrator appointed in another State or Territory may maintain an action in Kansas, under provisions of the code. Kansas Pac. R. Co. *v.* Cutler, 16 Kan. 568.

**In Patent Cases.**—An administrator to whom a patent has been issued for an invention owned by his intestate is not required to take out letters of administration within the State in which he sues, as a condition to suing for an infringement. Goodyear *v.* Hulliher, 3 Fish. Pat. Cas. 251.

**Wisconsin Doctrine.**—An administrator, as such, cannot maintain an action in the courts of Wisconsin by virtue of letters of administration granted in another State; but this objection will be waived unless taken at the proper time and in the proper manner. Johnson *v.* Wilson, 1 Pin. (Wis.) 65.

**Right to Widow's Allowance in Georgia.**—If a party domiciled in another State dies intestate and leaves property in Georgia, no debts being liens upon the estate, a non-resident widow may claim her annual allowance, according to the Georgia law. Mitchell *v.* Word, 64 Ga. 208.

**Widow's Allowance in North Carolina.**—A citizen of North Carolina, died in another State. *Held*, his widow was not entitled to an allowance, under the North Carolina statute. Medley *v.* Dunlap, 90 N. Car. 527.

A party who was a resident of *Maryland* was administratrix, *cum test. an.*

1. CANNOT SUE OR BE SUED BEFORE TAKING OUT ANCILLARY LETTERS.—The general rule in America and in England is that letters testamentary, or of administration, granted without the State or country, give no authority to sue or be sued in another jurisdiction, though they may be sufficient ground for new probate authority.[1] But an executor may sue upon a note belonging to the estate which he represents, without first taking out letters of administration in the State in which suit is brought.[2]

and received the estate of her testator, consisting of stocks and bonds of a Pennsylvania corporation, which she afterwards received as legatee under the will, by a Maryland court. She then died, an administrator *de bonis non* was appointed by the Maryland court. He did not take out any letters in *Pennsylvania*. Being temporarily in the latter State, suit was brought against him by a resident of Missouri, to charge him with said bonds and stocks, on the ground that they were assets left by the testator. *Held*, that in Pennsylvania he was not chargeable with the assets thus administered and distributed, and that the suit could not be maintained. Magraw *v.* Irwin, 87 Pa. St. 139.

The provisions of the *Kansas* General Statute, §§ 472, 203, for a foreign executor to be sued "in like manner" as a non-resident, allows suit to be by attachment and publication. Cady *v.* Bard, 21 Kan. 479.

**Illinois Law.**—Foreign administrators may collect debts in *Illinois* if domestic administration is not granted on the same estate. Hickox *v.* Frank, 102 Ill. 660.

1. Lee *v.* Bank, 8 Ves. 44; Taurton *v.* Flower, 3 P. W. 369; Dixon *v.* Ramsey, 3 Cranch (U. S.), 319; Doe *v.* McFarland, 9 Cranch (U. S.), 151; Kerr *v.* Moon, 9 Wheat. (U. S.) 565; Armstrong *v.* Lear, 12 Wheat. (U. S.) 169; Vaughan *v.* Northrup, 15 Pet. (U. S.) 1; Pond *v* Makepeace, 2 Metc. (Mass.) 114; Riley *v.* Riley, 3 Day (Conn.), 74; Dangerfield *v.* Thonston, 20 Mart. (La.) 232; Sabin *v.* Gillman, 1 N. H. 193; Swearingen *v.* Pendleton, 4 S. & R. (Pa.) 389; Noonan *v.* Bradley, 9 Wall. (U. S.) 394.

2. Giddings *v.* Green, 4 Hughes (C. C.), 446.

**In Florida,** the statute does not authorize a foreign executor to defend a suit in her courts, on agreement of the parties that he shall become a party defendant to a suit pending and an order therein making him a party. Sloan *v.* Sloan, 21 Fla 589.

**In California,** a foreign executor may sue individually on a judgment recovered in another State on a debt due the testator. If he owns his official capacity in the pleadings, the averment may be rejected as surplusage. Lewis *v.* Adams, 70 Cal. 403.

**Injunction.**—An injunction will not issue to prevent a foreign executor, not within the jurisdiction, from recovering assets from the jurisdiction, no special reasons existing for demanding such relief. Kanter *v.* Peyser, 51 N. Y. Super. Ct. 441.

*United States Revised Statutes*, § 955, saving personal suits from abatement where the cause of action survives by law, does not allow the suit of an alien who has died, to be committed to final judgment by his excutor or administrator in the State where the suit is brought. Kropff *v.* Poth (N. J.), 19 Fed. Rep. 200.

**Rights ex Comitate.**—When one domiciled in another State dies, leaving property in *Kansas*, his administratrix, appointed at his place of domicil, will, *ex comitate*, be protected in her possession of property by the Kansas courts, no local administrator or creditors opposing her action. Denny *v.* Faulkner, 22 Kan. 89.

**In South Carolina,** an executor, duly appointed in another State, cannot sue in her courts without first taking out letters testamentary; it is not enough to probate the will. Patterson *v.* Pagan, 18 S. Car. 584.

**In Georgia,** the fact that a foreign administrator had recovered a judgment as administrator will not authorize nor entitle him to sue in the courts of Georgia; to authorize him to sue, he must first comply with the statutory requirements of filing a copy of his letters of administration. Buck *v.* Johnson, 65 Ga. 82.

**The Widow** of an intestate whose administrator was given ancillary powers over property supposed to have been left in another State from that in which the deceased was domiciled when he died, has no interest in petitioning a probate court in a foreign jurisdiction to remove the administrator, and especially when she does not aver, in her petition, the

(*a*) *Practice—Pleading.*—The right of a plaintiff to sue in the assumed capacity of administrator must be questioned, by the defendant, by special plea of *ne unques administrator*. The general issue admits such right.[1]

2. WHAT PAYMENT WILL DISCHARGE THE DEBTOR.—Before a foreign administrator has taken out letters of administration, his acts outside of his jurisdiction are generally void. But a voluntary payment to him before he qualifies will discharge the debtor when there are no creditors or legatees and no conflicting grant of domestic letters to other parties.[2] But when there are creditors

existence of real estate. White *v.* Spaulding, 50 Mich. 22.

**Proceedings in Rem.**—Executors and administrators may intervene in proceedings *in rem* in another jurisdiction. The Boston, Bl. & How. (U. S.) 309.

**In Maine,** under Revised Statutes, ch. 63, § 6, it is the duty of an administrator to administer upon all property within his jurisdiction at the time of taking out letters, and upon all that afterwards comes within his jurisdiction. He could sue a non-resident debtor found within the State, and proceed to judgment. Saunders *v.* Weston, 74 Me. 85.

1. Breckenridge *v.* Ostron, 79 Ill. 71.

**In Illinois,** suits brought by a foreign administrator are alike subject to the same rules of pleading as in cases brought by domestic administrators. Collins *v.* Avers, 13 Ill. 358.

The power given a foreign administrator to sue in the courts of another jurisdiction includes the power to sue out an execution on a judgment rendered in favor of the intestate in his lifetime. Kufer *v.* Mason, 36 Ill. 406.

In Illinois, where an administration was granted upon the estate of a person who died intestate in Kentucky, where letters had been taken out, it is not sufficient for the foreign administrator to show that debts existed in that State only, to entitle him to order the sale of real estate. The creditors in Kentucky should have presented their claims to the domestic administrator, and had them allowed by the court. Better evidence of their existence than the certificate of the foreign administrator is necessary. Hobson *v.* Payne, 45 Ill. 158. See Lowe *v.* Bartlett, 8 Allen (Mass.). 259.

One suing, as an administrator of an estate of a deceased person, against a railway company, under Illinois statute, unless the representative capacity of the plaintiff is put in issue by a proper plea, it is not necessary to make proof of her letters of administration or appointment, or right to sue in such capacity. Union, etc., R. Co. *v.* Shacklet, 119 Ill. 232.

**Burden of Proof.**—Persons disputing validity of letters regular on their face have burden of proof. N. E. Ins. Co. *v.* Woodworth, 111 U. S. 138.

In *Illinois*, a foreign executor, appointed by the courts of another State, may appear in a suit in the courts and defend the interests of his estate, and is a proper party for that purpose. He can appear in any way in which it becomes necessary for him to properly prosecute or enforce any of the claims of the estate of his testator. Decker *v.* Patton, 20 Ill. App. 210.

The distribution of the estate is made according to the *lex domicilii;* and a decree in this regard against the primary administrator is conclusive upon the ancillary administrator. Churchill *v.* Pressott, 3 Bradf. (N. Y.) 233.

**Dismissing an Appeal.**—A foreign administrator cannot dismiss an appeal pending in a foreign jurisdiction. Warren *v.* Eddy, 13 Abb. Pr. (N. Y.) 28.

A foreign administrator cannot release or control single contract debts in primary jurisdiction. Chapman *v.* Fish, 6 Hill (N. Y.). 554.

2. Parsons *v.* Lyman, 20 N. Y. 103; Wilkins *v.* Ellett, 9 Wall. (U. S.) 740; Rily *v.* Mosely, 44 Miss. 37.

**New York Doctrine.**—It has been decided by the supreme court of New York, at a general term, in a late case, that a payment by a domestic debtor to a foreign administrator, even though voluntary, is valid in the absence of any intervening right or equity. The payment was made in New York, by a savings bank, to an administrator of the intestate depositor, appointed by the surrogate of Hudson county, New Jersey. The court say that the payment was made upon demand by a person authorized to receive it, and the defendant, the savings bank, would not have been justified in refusing to pay upon demand

and a domestic administrator, and the foreign administrator has not caused his letters, duly authenticated, to be recorded, payment to him is no protection.[1]

3. THEIR ASSIGNEES MAY SUE UPON CHOSES IN ACTION.—It has been held that the assignee of a foreign executor of a chose in action may sue upon it;[2] but the doctrine seems to be different as to administrators.[3]

4. GOODS IN ITINERE.—If a party die on his way from one domicil to another, his property *in itinere*, will be distributed according to the law of his former domicil.[4]

made, for the reason that no defence was apparent. In confirmation of this, the court cite, Parsons *v.* Lyman, 20 N. Y. 103, 112; and Wuesthoff *v.* Insurance Co., 107 N. Y. 580.

Judge Daniels, concurring, says: "At the common law, as it was held in this State prior to this act of 1882, a trust in personal property devolved upon the personal representative, on the decease of a sole trustee. De Peyster *v.* Ferrers, 11 Paige (N. Y.), 13. And, as the laws of the State of New Jersey have not been shown to be different, the presumption is that it was the same there at the time of the transaction presented in this case. In 1872 or 1873, the depositor and trustee of the money in suit went, with her husband and their infant daughter, the beneficiary named in the deposit account, to reside in the county of Hudson and State of New Jersey; and they all continued to reside there until the decease of the mother and trustee. The probate court of that county accordingly had jurisdiction over the estate of the deceased trustee, and, when letters of administration were issued by it to the surviving husband, that vested him with the same trust for the benefit of his infant daughter. And although, as a foreign administrator, he could not, in this State, sue for and collect the money from the defendant, a voluntary payment to him by the bank was lawful. The bank owed that sum of money to the trustee, and to the administrator after her decease; and his appointment, and the payment to him on the faith of his letters, have the sanction of the authorities in this State. Parsons *v.* Lyman, 20 N. Y. 103; Middlebrook *v.* Merchant's Bank, 3 Abb. Dec. (N. Y.) 295. And, as the letters of administration were in force at the time of that payment, it discharged the bank; and the judgment should be affirmed." Opinion filed June, 1888. Chi. L. News, Sept. 22, 1888.

The case of Parsons *v.* Lyman, 20 N. Y. 103, held that a debtor in New York may pay a foreign guardian; and the payment will be good if the guardian, by the law of the State from which he derives his appointment, is authorized to receive it. Parsons *v.* Lyman, 20 N. Y. 103.

1. Ferguson *v.* Morris, 67 Ala. 389.

A party purchased, of an administrator in another State, property belonging to the intestate, and gave his note therefor, which was deposited at a bank in *Indiana*. At maturity, he paid to an ancillary administrator in Indiana. *Held*, no defence to a suit on the note by the principal administrator. McCord *v.* Thompson, 92 Ind. 565.

Rightful executor, though without official authority, in *Connecticut* may lawfully receive into his possession assets in that State if voluntarily delivered to him; and he has authority to approve the payment of money by a savings bank to a party to whom the decedent had given an order therefor. Selleck *v.* Ruseo, 46 Conn. 370.

Where there are no creditors of an intestate, nor any person entitled as distributees at the domicil of the debtor, *held*, that a voluntary payment by a debtor to a foreign administrator was good against the claim of an administrator duly appointed the domicil. Wilkin *v.* Ellett, 9 Wall. (U. S.) 740

2. Petersen *v.* Bank, 32 N. Y. 24; Vanquelin *v.* Bouard, 15 C. B. N. S. 341; The Boston, Bl. & How. (U. S.) 309.

3. Dial *v.* Gary, 14 S. Car. 573.

In *Iowa*, an assignee of a foreign executor can sue and collect debts without any administration in that State. Campbell *v.* Brown, 64 Iowa, 425.

4. State *v.* Hallett, 8 Ala. 159; Story Confl. Law, § 481a, note; Monroe *v.* Douglass, 5 Madd. 379.

When a foreigner dies intestate in England *in itinere*, without any agent or relative in *England*, the custody of his property belongs to the crown; but by aid of 20 and 21 Vict. c. 77, § 73, the court, without a formal notice to the Queen's proctor,

5. DAMAGES FOR DEATH OF, AND INJURY TO, DECEDENT.—The right to sue for causing death of the decedent is a statutory regulation. If a statute gives the relatives of a passenger killed by the negligence of a railroad company the right to recover damages against the company by suit, by their administrator, the administrator of a person killed who was domiciled in another State may take out ancillary letters where the accident occurred, and then institute suit for damages for causing the death of the deceased.[1]

By statute of *Illinois*, a foreign administrator may maintain an action in that State to recover damages for injury to the person of his intestate.[2] In order, therefore, to sue in another State for damages for causing death of the deceased, the foreign administrator will be required, as a general rule, to take ancillary letters, and then bring himself within the provisions of the statutes.[3]

can grant administration to a responsible person, limited *ad collegendum bona defuncti*. Wyckoff, In Goods of, 3 S. & T. 20.

Where no administration has been taken out in a foreign jurisdiction, property of the decedent coming from such foreign jurisdiction into the hands of the domestic administrator makes him responsible.

There is no unbending rule in regard to property having no fixed *situs;* and the jurisdiction of the administrator is left to depend largely upon what may be required for the attainment of justice in each case as it arises. Wells *v.* Miller, 45 Ill. 382.

Property of a decedent, coming from a foreign jurisdiction into that of the domicil, immediately vests in the domestic administrator, and especially so when no letters of administration has been taken out in the foreign jurisdiction. Collins *v.* Bankhead, 1 Strobh. (S. Car.) 25.

**In Transitu.**—In regard to property *in transitu*, Story says, in his Conflict of Laws, section 520: "Indeed, according to the common course of commercial business, ships, cargoes, and the proceeds thereof locally situate in a foreign country at the time of the death of the owner always proceed on their voyage and return to the home port, without any suspicion that all the parties concerned are not legally entitled so to act; and they are taken possession of and administered by the administrator of the *forum domicilii*, with the constant persuasion that he may not only rightfully do so, but that he is bound to administer them as part of the funds appropriately in his hands. A different course of administration would be attended with almost inextricable difficulties, and would involve this extraordinary result: that all the personal property of the deceased must be deemed to have a fixed *situs* where it was at the moment of his death, and, if removed from it, must be returned thither for the purpose of a due administration."

1. Hartford, etc., R. Co. *v.* Andrews, 36 Conn. 213.

2. Wabash, etc., R. Co. *v.* Shaetelett, 10 Ill. App. 404.

3. Limekiller *v.* Railway Co., 33 Kan. 83; Vawter *v.* Railway Co., 84 Mo. 679.

**Comity.**—Some States, by comity, if the statutes are similar, will allow the administrator to sue for damages for death of the intestate without taking out ancillary letters of administration. Stockman *v.* R. Co., 15 Mo. App. 503; Leonard *v.* Steam Nav. Co., 84 N. Y. 48; South Car. R. Co. *v.* Aix, 68 Ga. 572; but this last case was under a law where a railroad company was allowed to extend its road into *Georgia*, provided that all the claims against the road might be prosecuted to settlement in the Georgia courts. Under a similar statute, an Alabama administrator can bring suit in Georgia. Central R. Co. *v.* Swint, 73 Ga. 651.

The right of action created by statute, in *Illinois*, in favor of the administrator of a person whose death was caused by the wrongful act or negligence of a railroad company in Illinois, cannot be regarded as property in the State of *Iowa*, in such sense as to confer jurisdiction in Iowa to grant letters of administration upon the estate of a deceased. It was held that the circuit court of Iowa did not have jurisdiction to grant letters of administration on the estate of the deceased, who was killed in Illinois by a railroad wholly located in the latter State. The cause of action in such case depends entirely upon the provisions of the statute. The railroad did not extend into Iowa; and the suit must be confined to the territorial ju-

**V. When Entitled to Ancillary Letters.**—There is no general law for the appointment of foreign administrators; but it seems that an appointment of executors, duly authenticated abroad, will entitle them to ancillary letters, even when letters have already been granted to others.[1] The general rule in England and in America is that letters testamentary, or of administration, granted abroad give no authority to sue or be sued in another jurisdiction; but these evidences of office, authenticated, are generally held sufficient ground to issue ancillary administration.[2]

1. NO PRIVITY BETWEEN DIFFERENT ADMINISTRATIONS.—There is no privity between different administrations. A judgment against an administrator in one jurisdiction does not estop one in another; and a judgment recovered against an administrator in one jurisdiction cannot be sued on in another State, the defendant being another administrator of the same estate but under a different jurisdiction.[3]

risdiction in which the railroad is situated. There is no right to recover damages in Iowa. The law creating this right of recovery is purely local to Illinois, although it may be otherwise in cases of actions under the statute, against individuals. But, corporations being local to the State which creates them, the right of action against them must be local to the same State. It then follows that, as the railroad company had no residence in Iowa, there was no cause of action in that State; and if so, there was in no sense property in Iowa which could authorize the court in Iowa to grant letters testamentary. Under this condition, the foreign letters will not be recognized by the Illinois courts. Ill. Cent. R. Co. *v.* Cragin, 71 Ill. 177.

1. Enohin *v.* Wylie, 10 H. L. Cas. 14.

2. Tourton *v.* Flower, 3 P. W. 369; Lee *v.* Bank, 8 Ves. 44; Dixon *v.* Ramsay, 3 Cranch (U. S.), 319; Vaughan *v.* Northrup, 15 Pet. (U. S.) 1.

3. Lowe *v.* Bartlett, 8 Allen (Mass.), 259; Taylor *v.* Barron, 35 N. H. 484; McLean *v.* Meek, 18 How. (U. S.) 16; Stacy *v.* Thrasher, 6 How. (U. S.) 44.

In the case of different administrations, each administrator is deemed so far independent of the others that property reclaimed under one cannot be sued for under another, though it may at any time be within the jurisdiction of the latter. Currie *v.* Bircham, 1 Dow & Ry. 35; Halcomb *v.* Phelps, 16 Conn. 127; Story Confl. of Laws, § 518.

Nor can a judgment against one furnish a right of action against the other, for, in contemplation of law, no privity exists between them. Brodie, Adm'r of Lightfoot, *v.* Bickly, 2 Rawle (Pa.), 431; Story Confl. of Laws, § 522.

Administration was granted on the estate of the deceased, who was domiciled in New York. The assets were removed to Connecticut by the administrator appointed in New York. In *Connecticut*, a new administration was appointed, and letters taken out by the new administrator. *Held*, the first administrator was not answerable in Connecticut for the assets, and that the authority from New York was his protection. Halcomb *v.* Phelps, 16 Conn. 127.

When there are different administrations in different States, a judgment against one will not affect the others so far as the assets are concerned which the latter have received. Merrill *v.* Ins. Co., 103 Mass. 245.

A party died domiciled in Indiana. Administration on the intestate's estates was granted in *Wisconsin* and in Indiana. A judgment against the Indiana administration cannot be used as evidence against the Wisconsin administration. Price *v.* Mace, 47 Wis. 23.

A testator domiciled in Wisconsin died, leaving, as part of his estate, land in *Minnesota*. Litigation was begun in Wisconsin to compel an election in behalf of the widow, who was insane; and the court elected that she take under the will. Before the election was had in Wisconsin, the Minnesota court elected for the widow to take against the will. An appeal was taken, but, before it was heard, the decision of the Wisconsin court was rendered. *Held*, the Wisconsin election for the widow was effectual everywhere, and precluded a different election in Minnesota. Washburn *v.* Van Steenwyk, 32 Minn. 336.

2. WHEN APPOINTED EXECUTORS BY SAME WILL.—When executors are appointed in different States by the same will, a judgment against one is *prima facie* evidence against the other.[1]

**VI. Settlement and Distribution.**—After the estate has been settled and the distributees of the personal property ascertained, the *situs* of the property becomes such as the new owner may give it. The creditors must then proceed to claim their debts according to the laws of the place where the property actually is located. The assets of a foreign decedent will not be remitted to an ancillary executor when there are creditors of the estate within the jurisdiction of the ancillary administration; and especially when it is shown that there are debts to be paid within the ancillary jurisdiction, and when no open accounts, as between the decedent and a distributee, making such remission necessary.[2] Whether the courts of a State in which ancillary administration has been granted will decree the distribution of assets there collected, or will order them remitted to the jurisdiction of the primary administrator, is a matter for the exercise of judicial discretion under the circumstances of each case.[3] Where the decedent resided in a State, and died testate there, administration in another jurisdiction is merely ancillary to the original in the place of the decedent's domicil, and any assets collected by the ancillary administrator would be payable to executor in the State of the domicil, and would be applicable to the payment of the expense of debts and to the legatees, provided there is no proof that the decedent owed any debts in the ancillary jurisdiction.[4] Ancillary administration upon any estate of a citizen of another State, dying intestate, does not depend upon domiciliary administration. Whether the courts of the ancillary jurisdiction should decree distribution or remit the assets to the original administrator is a matter, not of jurisdiction, but of sound judicial discretion, dependent upon the peculiar circumstances of each case.[5] After all the claims against the ancillary administration have been settled, the court may in its discretion direct the remainder of the assets to be remitted to the principal administrator for distribution.[6] But when the decedent's estate is insolvent, the question is more difficult. In such cases, foreign, as well as domestic, creditors have

1. Hill *v.* Tucker, 13 How. (U. S.) 458.

Executors or trustees personally within the jurisdiction of the court may be compelled to carry out the will or trust, even as to foreign property. Ewing *v.* Ewing, 9 App. Cas. 34.

If an administrator goes into a foreign jurisdiction, and collects debts and seizes property belonging to the decedent without first taking out ancillary letters, he becomes an executor *de son tort*, and must answer to the courts in that jurisdiction, —Taylor *v.* Benham, 5 How. (U. S.) 233; —or, if he carries such assets into his home jurisdiction, he will then be held to account for them at home,—Evans *v.* Tatem, 9 Serg. & R. (Pa.) 252.

2. Del Valle's Appeal (Pa.), 5 Atl. Rep. 441.

3. *In re* Hughes, 95 N. Y. 55.

4. Wright *v.* Gelbert, 51 Md. 146.

5. Fretwell *v.* McLemore, 52 Ala. 124.

6. U. S. *v.* Cox, 18 How. (U. S.) 100; Wilkin *v.* Ellett, 9 Wall. (U. S.) 740; Banta *v.* Moore, 2 McCart. (N. J.) 97; Lome *v.* Bartlett, 8 Allen (Mass.), 259; Williams *v.* Williams, 5 Md. 467.

a right to prove their claims and share in the distribution. The proper course would be to retain the funds by the ancillary administration and cause the assets to be distributed *pro rata*, according to the laws of the ancillary jurisdiction, among home citizens, "having regard to all the assets, and the whole aggregate amount of debt here and abroad, and then remit the surplus abroad to the principal administrator." This was thought the better way, than to send domestic citizens abroad to the primary administration for a *pro rata* division of the insolvent estate.[1]

The liability of the administrator to account and his title to the assets are commensurate with the jurisdiction of the authority that appointed him; and the trust is in exclusion of foreign interference, and is regulated by the law of the *locus rei sitæ*. The intestate's effects are to be collected and administered under the authority of the local jurisdiction, with the permission to foreign creditors to participate in proportion to their debts, taking into consideration the aggregate of the estate and debts, whether foreign or domestic. In case there are no domestic debts, or they be paid, then the ancillary administrator should remit the assets to the primary administrator at the place of the intestate's domicil, for administration. This is not the case as to executors, whose title, flowing from the will, extends to the assets wherever found.[2]

1. Dames *v.* Head, 3 Pick. (Mass.) 128.

2. Mothland *v.* Wireman, 3 P. & W. (Pa.) 185; Miller's Estate, 3 Rawle (Pa.), 312; Story Confl. of Laws, § 513.

In the case of the insolvency of two branches of the same firm, one in England and one in Newfoundland, the property in each country was exclusively divided among the creditors who trusted the branch where the property was situated. *Ex parte* Ryan, Newf. 113.

So, the court of *Louisiana* will transmit the assets of an intestate, when there are no debts to be paid, to France, the domicil of the decedent, for administration. Gravillon *v.* Richard, 13 La. 293.

**Insolvent Estate—Rule in Massachusetts.**—When the primary administration is in another State, and the ancillary in Massachusetts, and the estate insolvent, the Massachusetts creditors are only entitled to a *pro rata* dividend, though the assets in Massachusetts were sufficient to meet the demands of the ancillary jurisdiction. Davis *v.* Estey, 8 Pick. (Mass.) 475.

Some cases hold that the legatees and distributees are to resort to the original administration abroad, for their shares, where the residuary assets are transmitted. Richards *v.* Dutch, 8 Mass. 506; Dames *v.* Boylston, 9 Mass, 337; Stevens *v.* Gaylord, 11 Mass. 256.

**Rule in Vermont.**—It is the rule in Vermont, when the ancillary administration is granted there, to have the administrator settle and adjust the account of the decedent. Then it is discretionary with the courts having jurisdiction to order distribution in Vermont, or to remit the assets to the place of the primary administration for that purpose. It rests on courtesy and expediency alone, and it is the usual course to remit the assets. But this rule will not be adopted when the rights of home creditors and those entitled to the estate would be endangered by so doing. Porter *v.* Heydock, 6 Vt. 374.

**Rule in New York.**—A non-resident owned lands in New York and conveyed them to a trustee there to sell and to distribute the proceeds, and remit the balance for distribution at the domicil. *Held*, that the court would direct the assets to be remitted, or retained and distributed in New York, according to the circumstances of the case, in reference to the convenience of creditors and of the accounting parties. Slatter *v.* Carroll, 2 Sandf. (N. Y.) 573.

**In Pennsylvania**, after the administrator has paid all lawful claimants who reside in the State, he must remit the remainder to the primary administrator; and a creditor who is domiciled in the original jurisdiction cannot come in to the ancillary and make a claim out of the assets: he must resort to the primary administrator. Barry's Appeal, 88 Pa. St. 131.

1. DISTRIBUTION OF ASSETS IN DIFFERENT JURISDICTIONS. —Generally, the laws of the place under which an ancillary administration is taken out govern the distribution of the assets in the payment of debts; but the distribution of the estate to the heirs and legatees is to be made according to the laws of the domicil of the testator or intestate at his death. If a person who is domiciled in another jurisdiction dies, leaving personal property in another State, in which ancillary letters are taken out, and the estate proves insolvent, all the creditors of the decedent are entitled to prove their claims, and have the real, as well as the personal, estate duly applied in satisfaction of the indebtedness, and are entitled to pursue their claims in any jurisdiction where administration is taken, and to avail themselves of all the estate of the decedent until their claims are fully satisfied.[1]

**Assets, Which Jurisdiction Entitled to.** —A person domiciled in *Massachusetts* is appointed executor in another State. He takes out ancillary letters in Massachusetts. At the final settlement he shows that the assets in his hands are from the primary jurisdiction. *Held*, the Massachusetts court had no jurisdiction of a bill, praying the court to construe the will, to marshal the estate, and make distribution. Emery *v.* Batchelder, 132 Mass. 452.

**As to Mortgages.**—A party domiciled in another State has a mortgage upon real estate in *Michigan*. After his death, ancillary letters are taken out in Michigan, and the estate is being administered according to the Michigan law. *Held*, that said mortgage cannot be sold by a foreign administrator to strangers. The title is in the ancillary administrator for the purpose of administration, and he alone can sue on it, assign or discharge it of record. Reynolds *v.* McMullen, 55 Mich. 568.

An ancillary administrator was appointed in *Arkansas*. *Held*, the primary administrator could not then sue for a debt due his intestate in Arkansas. Gibson *v.* Ponder, 40 Ark. 195.

1. Goodall *v.* Marshall, 11 N. H. 88.

In *Massachusetts*, it was held that the assets received by a foreign executor or administrator, in the foreign jurisdiction of the testator's domicil, were to be administered in such State; that, under the ancillary administration in Massachusetts, the administrator was not to pay debts due to creditors in that State out of assets received abroad, though he had paid all the creditors elsewhere, and had a balance received from the assets in the State of the principal administration. The creditors must resort to the tribunal of the foreign State. Fay *v.* Haven, 3 Metc. (Mass.) 109.

A person was domiciled in *England*, and died intestate, leaving real estate in Scotland. The bond debts were paid by the heir out of the real estate, and it was held that the heir was entitled to relief out of the personal estate in England, because, by the law of the domicil, it was the primary fund for the payment of debts. Earl *v.* Garretty, 2 Keen, 293.

In order to prevent great confusion in the distribution of assets, the law of the domicil must be held the rule in the distribution, both in succession and in bankruptcy. Stair's Inst. I. n. a, 8.

A person was domiciled in England, where he died, leaving assets in England and in America, and letters testamentary were taken out in both countries. The claims of each administration were limited to the country from which the letters were granted. *Held*, that the American administrator could not legally transmit his assets to be distributed by the foreign jurisdiction, for that the suits were to be regarded as suits between different parties, and that the property in controversy was different, and the local laws different, and that the exercise of comity among different nations or States was little more than barren theory. The chief justice and Justice McLean dissented. Aspden *v.* Nixon, 4 How. (U. S.) 467. See criticism on the American cases as to conflict on this question, Story Confl. of Laws, § 5146.

A party died domiciled in Massachusetts, and named two executors, one in New York and one in Massachusetts. The surplus in New York was remitted to the executor in Massachusetts. The question as to whether one was a legatee under the *New York* law should be deter-

2. ORIGINAL AND ANCILLARY ADMINISTRATIONS—CONFLICT. —A testator may appoint different executors in different countries in which his effects are situate, or different executors as to different parts of his estate in the same country.[1] An administrator cannot collect assets of his intestate situated beyond his jurisdiction, whether they consist of tangible property or choses in action.[2] A debtor upon bond and mortgage, domiciled in the same State where the land lay, paid the debt to a foreign administrator, who was appointed at the domicil of the intestate, where the bond and mortgage were at the death of the decedent. A domestic administrator had been appointed and qualified previous to the satisfaction of the mortgage. Under these circumstances, the satisfaction of the mortgage by the foreign administrator was no defence to an action by the domestic administrator to foreclose the mortgage.[3] The copy of letters of foreign executors and administrators, to entitle them to credit in the courts of the different States, must be authenticated by the attestation of the clerk of the court granting them, and the seal of the court annexed, if there be a seal, together with a certificate of the judge, chief justice, or presiding magistrate, that said attestation is in due form.[4]

mined in New York. Clark *v.* Butler, 4 Den. (N. Y.) 378.

**Discharge.**—If a primary administrator is also appointed ancillary in another State, his discharge in the original jurisdiction has no effect whatever as to his liability in the foreign State. Duffy *v.* Smith, 1 Den. (N. Y.) 202.

A citizen of another State, where original administration has been granted, may come into this State and cause administration to be taken out here, a claim to be allowed, and real estate sold for its payment. In such case it is not necessary to show that the personal estate in the original jurisdiction has been exhausted. Rosenthal *v.* Renick, 44 Ill. 202.

1. Hunter *v.* Bryson, 5 Gill & J. (Md.) 483.

2. Riley *v.* Mosely, 44 Miss. 37.

3. Stone *v.* Scripture, 4 Lans. (N. Y.) 186.

4. United States Rev. Stat. (1874) tit. 13. ch. 17; Baker *v.* Brown, 18 Ill. 91.

**Rule in Arkansas.**—Where a will is made and probated in another State, and an ancillary administrator is appointed in Arkansas, lands situate in Arkansas are assets in the hands of the ancillary administrator for the payment of domestic debts, and the foreign executor or administrator cannot disturb his possession for the purpose of selling, until such debts and costs of administration are fully paid. Apperson *v.* Bolton, 29 Ark. 418.

**Authority to Sell Note.**—In the absence of evidence to the contrary, an administrator in another State will be presumed to have authority, by virtue of his office, to sell a note and mortgage belonging to the estate, and an averment, in the record of proceedings in the probate court of another State, that notice of such proceedings was given to all persons interested, will be at least *prima facie* evidence of such notice. Clark *v.* Blackington, 110 Mass. 369.

In *Maryland*, a foreign executor cannot collect and administer assets due the testator; but a foreign executor may enforce, in that State, the payment of a judgment already recovered by him in the State where his letters testamentary are granted. Barton *v.* Higgins, 41 Md. 539.

In *Michigan*, letters of administration taken out can give the administrator no control over *Illinois* lands. The courts of one sovereignty cannot make orders or confer appointments that, of their own force, can operate upon titles, or confer rights to exercise a trust in the disposition of property lying within a foreign jurisdiction. Sheldon *v.* Rice, 30 Mich. 296.

Letters testamentary were issued in *Pennsylvania*, on the estate of a party domiciled in New Jersey, having assets in Pennsylvania. By the settlement of the account in New Jersey, a balance of assets in that State was shown for distri-

bution. *Held*, that the Orphans' Court in Pennsylvania had no jurisdiction to compel distribution. Freeman's Appeal, 68 Pa. St. 151.

An executor, as such, can be compelled to disclose, in a court of another State than that in which he has taken out letters, showing with what funds he purchased property, and for what uses and trusts he holds the same. Clopton *v.* Booker, 27 Ark. 482.

In *Indiana*, if a foreign executor sells real estate upon the same terms as a domestic executor, it will be legal, provided he shows that sufficient surety for the application of the proceeds has been given in the State or county where his letters were granted, and a duly authenticated copy of such bond is filed in the court where the petition is made, no further bond being necessary. Rapp *v.* Matthias, 35 Ind. 332.

**Assigning Stock.**—A foreign executor can dispose of personal assets in *New York;* and one to whom he assigns stock in a corporation of that State may require a transfer thereof on the books of the corporation. Middlebrook *v.* Merchants Bank, 3 Abb. App. Dec. (N. Y.) 295.

*Pennsylvania* laws of 1836, § 3, permitting an executor, under letters testamentary in another State, to transfer stocks and the like in Pennsylvania, applies also to administrators; and the purpose of this, and also of the two acts of 1832 relating to distribution, was to prevent the estates of non-residents from being withdrawn from our jurisdiction to the prejudice of those interested in the distribution. Alfonso's Appeal, 70 Pa. St. 347.

A duly certified copy of the record of probate is sufficient to enable an executor qualifying in another State to maintain an action, in *North Carolina*, to recover property of the estate removed thither from such other State. He need not take out ancillary letters in North Carolina. Beckham *v.* Wittkowski, 64 N. Car. 464.

The executor of a deceased person who was domiciled in another State at the time of his death cannot, under letters testamentary granted in that State, maintain a suit in Pennsylvania for the recovery of a debt due the estate by a citizen of Pennsylvania. Sayre *v.* Helme, 61 Pa. St. 299.

**Taxation.**—A testator, domiciled in *New York*, at his death left personal property to his children, directing that if the children should die before attaining a certain age, then the property should go in trust to found a professorship. His wife was appointed executrix. On the settlement of her account, the surrogate of New York decreed that she should keep the balance invested and retain it on trust, to satisfy the trusts in the will. She afterwards went to *Pennsylvania*. *Held*, that she was taxable in Pennsylvania for such portion of the fund only as was invested in securities which the laws of Pennsylvania reached in her hands, such as loans secured by mortgage on lands in Pennsylvania; that the jurisdiction over the administration of the estate and the management of the trust property were in New York. The fact that the executrix was personally in Pennsylvania did not render her generally liable to taxation upon the entire fund. Lewis *v.* Chester County, 60 Pa. St. 325.

In the absence of ancillary administration or statutory prohibition, the domiciliary administrator appointed in another State, may sell and assign stock in a *New Hampshire* corporation; nor does the New Hampshire Gen. Laws, ch. 20, § 16, abridge this right. Luce *v.* R. Co., 63 N. H. 588.

A testator died in *North Carolina*, leaving claims against citizens of Virginia. Administration was granted in the latter State. *Held*, the North Carolina administrator, *de bonis non cum test. an.* and his sureties were not liable for his failure to inventory and collect these claims. Grant *v.* Reese, 94 N. Car. 720.

If assets in a foreign jurisdiction come into the possession of an administrator by voluntary delivery, he may be required to account for them in the home jurisdiction. Van Bokkelen *v.* Cook, 5 Sawy. (C. C.) 587.

**Void Proceedings.**—When an administrator is appointed, but has no authority to act on account of the non-residence of the decedent, the whole proceedings are void, and no title passes by any acts of the administration. Holyoke *v.* Haskins, 9 Pick. (Mass.) 259.

The House of Lords have held that an act of Parliament imposing a duty on legacies does not extend to parties domiciled at the time of his death out of Great Britain, whether the assets are locally situate in England or not. Thompson *v.* Advocate-general, 12 Cl. & Fin. 1. *Compare* Alvany *v.* Powell, 2 Jones Eq. (N. Car.) 51; Jones *v.* Gerock, 6 Jones Eq. (N. Car.) 190.

A party domiciled in New York died, and his will appointed executors resident of *New Jersey*. It was probated in New York, but not recorded in New Jersey. *Held*, one claiming as residuary legatee

**VII. Courts of Equity : Jurisdiction of.**—It is now generally conceded, by the authorities, that courts of equity of the jurisdiction where the ancillary administration is granted are competent to act upon the final distribution of the assets to and among the claimants having interests in the estate, whatever may be their domicil, whether foreign or domestic. The court will be guided by the equities of each case as it stands alone, and it will decree a distribution or a remittance of the assets to the forum of the domicil of the decedent. There is no universal rule on this subject. Every nation or State is in duty bound to aid, by its judicial tribunals, the enforcement of right of all persons having a title to a fund in the hands of an ancillary administration, when such interference will not be productive of injustice or inconvenience, or of conflicting equities.[1] The English courts of equity will restrain the representatives and legatees of an estate where the testator died domiciled in *England*, from taking proceedings in a foreign court to administer the personal property. They will not be allowed to take proceedings abroad in regard to the administration of real estate there situate if by so doing the administration of the personalty in the domestic forum will be embarrassed.[2] In all cases of double administration, a court of equity will interfere, so to marshal the

could not invoke the aid of the New Jersey courts. Van Gieson *v.* Banta, 40 N. J. Eq. 14.

The executor of a foreign will cannot be permitted to exercise his office in *Louisiana* by virtue of his foreign appointment. He must first obtain the authority of the court in that State, and give security, like an administrator. Butler's Succession, 30 L. Ann. 887

Sections 42, 43, under "Foreign Executors and Administrators," of the *Illinois* laws, taken together, seem to contemplate that there may be an executor in another State and administrator with will annexed in Illinois. Branch *v.* Rankin, 108 Ill. 444.

**Domiciliary Administrator's Right of Appeal from Appointment of Ancillary Administrator.**—A domiciliary administrator appointed in Maine, representing the general estate of the deceased, has an interest in ancillary administration, and can appeal from the appointment of an administrator in *Massachusetts*. Smith *v.* Sherman, 4 Cush. (Mass.) 408.

In the case of Martin *v.* Gage (Mass.), 17 N. East. Rep. 310, the intestate owned a yacht, which was in the State of Maine at the time of her death, she being a citizen of that State. This yacht was taken to Massachusetts before the appointment of the principal administrator, who, after appointment, went to the latter State, took possession, and sold the yacht before the appointment of the ancillary administrator. No other assets of the deceased were in Massachusetts. The court held that, as the yacht was in Maine at the time of her death, the appointment of the principal administrator related back and gave him a title and right of possession to it from that time, which will be recognized and enforced in other jurisdictions, citing, in confirmation, Bullock *v.* Rogers, 16 Vt. 294; Valentine *v.* Jackson, 9 Wend. (N. Y.) 302; Halcomb *v.* Phelps, 16 Conn. 127. And, even if the yacht had never been in the State of Maine, it seems that the taking possession, and sale, of it in Massachusetts by the domiciliary administrator would have been valid, as there were no creditors of the intestate in the latter State. The court cites the following cases in proof of the doctrine: Hutchins *v.* Bank, 12 Metc. (Mass.) 421; Luce *v.* Railroad Co., 63 N. H. 588; Petersen *v.* Bank, 32 N. Y. 21; Trecothick *v.* Austin, 4 Mason (C. C.), 16; Doolittle *v.* Lewis, 7 Johns. Ch. (N. Y.) 45.

The court say, under the facts of this case, there never were assets of the estate in Massachusetts. Martin *v.* Jage (Mass.), 17 N. E. Rep. 310 (1888).

1. Harvey *v.* Richards, 1 Mason (C. C.), 381; Dawes *v.* Head, 3 Pick. (Mass.) 128; Story Confl. of Laws, § 513.

2. Hope *v.* Carne, 12 Jur. (N. S.) 284.

different funds under administration as to produce equity among all claimants, whether foreign or domestic, and will transmit, if necessary, the residue of the assets left in the hands of the foreign administrator to the principal administrator, at the domicil of the deceased, there to be distributed among heirs and creditors.[1]

(1) OTHER COURTS.—Other courts exercising like powers as courts of equity have jurisdiction of final distribution.[2]

**FOREIGN GUARDIAN.**—See GUARDIAN AND WARD.

**FOREIGN JUDGMENTS.**—See JUDGMENTS.

1. McNamara *v.* Dwyer, 7 Paige (N. Y.), 239; Lawrence *v.* Elmandorf, 5 Barb. (N. Y.) 73. See note, 32 Am. Dec. 632.

In some cases, courts of equity will not entertain a bill in aid of the proceedings of a foreign tribunal. Bent *v.* Young, 9 Sim. 180.

Courts of equity will act, however, when it seems indispensable to restrain parties in the domestic forum from so dealing with subject-matter of controversy as to defeat the jurisdiction of the foreign court, that court having the appropriate control of the matter in controversy. Trans. Co. *v.* Pietroni, 6 Jur. (N. S.) 532.

Where an exeeutor proved a will in *England*, he may plead to a bill in equity in favor of the legatees for administration of the personal estate, that the testator was, at the date of the will, and also at the time of his death, domiciled in France, and that all the bequests of personal estate affected to be made by him are, by the laws of that country, null and void. And such plea, although it puts two facts in issue, is not double, since neither fact, taken alone, would be a complete bar to the suit. Campbell *v.* Beaufoy, Johns. (Eng. Ch.) 320.

An Englishman died intestate in *Belgium*, having both personal and real property there. His brother went from England to his domicil and obtained representation to him *per et simple*, which, by Belgian law, imposed upon him a personal obligation to pay all the debts of the intestate, independently of the amount of the assets. He then returned to England, but did not take possession of the estate there. A creditor of the intestate obtained letters of administration to him in England. *Held*, that he could not sue the intestate's brother in equity in respect of the personal liability which he had so incurred, but that his remedy to recover his debt was at law. Beavon *v.* Hastings, 2 Kay & J. 724.

An order of a *Tennessee* county court appointing an administrator of the estate of the decedent, domiciled in Arkansas, and assuming to determine in advance to whom he should make payment, and the subsequent approval of his settlement, do not protect him from an accounting prayed for by the distributees. In such a case the transfer of the surplus assets here, into the hands of a representative of the domicil for distribution there, is discretionary with the proper tribunal here, upon bill filed for that purpose making parties. Administration granted here upon the estate in this State of a non-resident stands upon the same footing as any other administration. There is no statutory provision for ancillary administration as a distinct species. Carr *v.* Lowe, 7 Heisk. (Tenn.) 84.

A party domiciled in *New Jersey* died, appointing an executor who lived in New York. He made provisions for his son, who also lived in the latter State. The son asked the New York courts to aid him in protecting certain rights. The other legatees of the will objected to proceedings in New York. Pending the decision of the New York court, the executors began proceedings in the New Jersey courts for instructions in the administration of the estate. *Held*, that the son should be enjoined from proceeding further in the New York court, and that the executors should cease payment on the son's legacy until the estate was investigated, to see whether the bequest to the son could be carried out. Hutton *v.* Hutton, 40 N. J. Eq. 461.

Parties interested in the settlement of an estate may file a bill to show fraud in the administration. It is immaterial that the suit is brought in the State of the principal administration, and the fraud perpetrated in a foreign jurisdiction where ancillary letters were taken out. Leach *v.* Buckner, 19 W. Va. 36.

In a chancery suit in *Illinois*, against a foreign administrator, final settlement by him in a court of a foreign State is conclusive in his favor, unless impeached for fraud. Fryseor *v.* Lawrence, 5 Gilm. (Ill.) 325.

2. Story's Eq. Jur. § 589.

**FOREIGN LAWS.**—(See also CONFLICT OF LAWS.)

Definition, 435. [435.
I. Extra-Territorial Effect of, etc.,
II. How Proven, 435.
1. Laws of which Judicial Notice will be Taken, 435.
2. Laws of which Judicial Notice will not be Taken, 436.
*a. Written Law*, 437.
*b. Unwritten Law*, 438.
3. Whether Judge or Jury must Decide, 438.
4. How Authenticated, 438.
5. Competency of Witnesses, 438.

**Definition.**—Foreign laws are the laws of a foreign country. They are laws other than those of the *lex fori*; and for this purpose the States of the United States are foreign to each other.[1].

**I. EXTRA-TERRITORIAL EFFECT OF.**—The laws of a country can have no intrinsic force *propria vigore*, except within the territorial limits and jurisdiction of that country, and can bind only its subjects and such others as are within its jurisdictional limits, and while they remain there.[2]

**II. HOW PROVEN.—1. Of what Laws Courts will take Judicial Notice.**—There are some laws of which, although they are foreign in many respects, the courts will take judicial notice. Courts will take judicial notice of the law of nations,[3] the law merchant,[4] the maritime law, so far at least as recognized by the law of nations,[5] the ecclesiastical law, for the purpose of determining how far it is a part of the common law.[6] The courts of a State which has been carved out of another State take judicial notice of the statutes of the latter State passed prior to the separation.[7]

The State courts take judicial notice of the Federal Constitution and its amendments,[8] as well as of the Federal statutes,[9] and the Federal courts take judicial notice of the laws of the several States.[10]

1. Hanley *v.* Donoghue, 116 U. S. 1.

2. As to the extra-territorial force of laws, see CONFLICT OF LAWS, 1 Am. & Eng. Encyc. of L. 508, where the subject is fully treated.

3. The Scotia, 14 Wall. (U. S.) 171–188.

4. Goldsmith *v.* Sawyer, 46 Cal. 209; Bradford *v.* Cooper, 1 La. Ann. 325; Jewell *v.* Center, 25 Ala. 498; Elie *v.* East India, 2 Burr. 1226.

5. Taylor on Ev. (Text-book Series). § 5; Wharton on Ev. (2d Ed.), § 208; Zugasti *v.* Lamer, 12 Moore P. C. 331; Maddox *v.* Fisher, 14 Moore P. C. 103; The Scotia, 14 Wall. (U. S.) 171.

6. Sims *v.* Marryatt, 17 Q. B. 292; Roll. Abr. 525; 6 Vin. Abr. 496.

7. Delano *v.* Jopling, 1 Litt. (Ky.) 417; Stokes *v.* Macken, 62 Barb. (N. Y.) 145; Doe *v.* Elsava, 11 Ala. 1028; Choteau *v.* Pierre, 9 Mo. 3; Ott *v.* Soulard, 9 Mo. 581; U. S. *v.* Turner, 11 Hun (N. Y.), 663; City of Brownsville *v.* Cavazos, 2 Woods (C. Ct.), 293.

The courts will take judicial notice of the laws of Mexico upon which the titles to lands in California depended prior to the cession of California to the United States. Bouldin *v.* Phelps, 30 Fed. Rep. (Cal.) 547.

8. Graves *v.* Keaton, 3 Cold. (Tenn.) 8.

9. Montgomery *v.* Deeley, 3 Wis. 709; U. S. *v.* De Coursey, 1 Pinn. (Wis.) 508; Semple *v.* Hagar, 27 Cal. 163; Jones *v.* Laney, 2 Tex. 342; Minn. *v.* Swartz, 37 Tex. 13; Bayly *v.* Chubb, 16 Gratt. (Va.) 284; Rice's Succession, 21 La. Ann. 614; Morris *v.* Davidson, 49 Ga. 361; Papin *v.* Ryan, 32 Mo. 21; Kessel *v.* Albetis, 56 Barb. (N. Y.) 362; Merrill *v.* Dawson, 1 Hempst. (U. S.) 563.

10. Junction R. Co. *v.* Bank of Ashland, 12 Wall. (U. S.) 226; Bennett *v.* Bennett, Deady (U. S.), 299; Merrill *v.* Dawson, 1 Hempst. (U. S.) 563; Smith *v.* Tallapoosa Co., 2 Woods (U. S.), 576; Owings *v.* Hull, 9 Pet. (U. S.) 607.

It can never be maintained in the courts of the United States that the laws

Whether or not the courts of one State will take judicial notice of the laws of another State is a question upon which there is considerable conflict of authority. In *Tennessee*[1] and *Rhode Island*[2] it was held that the court would take judicial notice of the laws of sister States, and in *Kansas*[3] it was held that judicial notice would be taken of the constitutions of other States.

The supreme court of the United States has held that when a State recognizes acts done in pursuance of the laws of another State, the courts of the first State should take judicial cognizance of said laws so far as may be necessary to judge of the acts alleged to be done under them.[4] But the decision in most of the States is that they cannot take judicial notice of the laws of their sister States.[5]

And the rule is, that the courts will not take judicial notice of foreign laws;[6] they must be proved.[7]

**2. Laws of which the Court will not take Judicial Notice.**—All laws of which the court will not take judicial notice must be proven like any other facts.[8] A distinction has been made in the evidence accepted to prove a written and an unwritten foreign law.

of any State of this Union are to be treated as the laws of a foreign nation. C. J. Taney in U. S. *v.* Turner. 11 How. (U. S.) 563, 668; Elwood *v.* Flannigan, 104 U.S. 562; Griffing *v.* Gibb, 2 Black. (U. S.), 519; Knower *v.* Haines, 31 Fed. Rep. (Vt.) 513.

The supreme court, and other courts of the U. S., when exercising their original jurisdiction, take notice without proof of the laws of the several States of the United States. But in the supreme court of the United States, when acting under its appellate jurisdiction, whatever was a matter of fact in the court whose judgment or decree is under review, is a matter of fact there. Chicago, etc., R. Co. *v.* Wiggins Ferry Co., 119 U. S. 615.

The circuit court of the United States and the supreme court on appeal or error take judicial notice of the laws of every State in the Union. Fourth Nat. Bank *v.* Francklyn, 120 U. S. 747.

1. Foster *v.* Taylor, 2 Overton (Tenn.), 191; Coffee *v.* Neeley, 2 Heisk. (Tenn.) 304, 311; Hobbs *v.* Railroad Co., 9 Heisk. (Tenn.) 873.

2. Paine *v.* Schenectady Ins. Co., 11 R. I. 411.

3. Butcher *v.* Bank, 2 Kan. 70; Dodge *v.* Coffin, 15 Kan. 277.

4. Carpenter *v.* Dexter, 8 Wall. (U.S.) 515.

5. Drake *v.* Glover, 30 Ala. 382; Forsyth *v.* Preer, 62 Ala. 443; Newton *v.* Cocke, 10 Ark. 169; Hempstead *v.* Reed. 6 Conn. 480; Dyer *v.* Smith. 12 Conn. 384; Bailey *v.* McDowell, 2 Harr. (Del.) 34; Stanford *v.* Pruet, 27 Ga. 243; Mason *v.* Wash, Breese (Ill.), 39; Irving *v.* McLean, 4 Blackf. (Ind.) 52; Johnson *v.* Chambers, 12 Ind. 112; Carey *v.* Cin., etc., R. Co., 5 Iowa, 357; Taylor *v.* Runyan, 9 Iowa, 522; Shed *v.* Augustine, 14 Kan. 282; Tyler *v.* Trabue, 8 B. Mon. (Ky.) 306; Syme *v.* Stewart, 17 La. Ann. 73; Legg *v.* Legg, 8 Mass. 99; Hoyt *v.* McNeil, 13 Minn. 390; Babcock *v.* Babcock, 46 Mo. 243; Ball *v.* Consolidated R., etc., 32 N. J. 102; Anderson *v.* Anderson, 23 Tex. 639.

6. McCraney *v.* Alden, 46 Barb. (N.Y.) 274; Hosford *v.* Nichols, 1 Paige (N. Y.), 220; Owen *v.* Boyle, 15 Me. 147; Bowditch *v.* Soltyk, 99 Mass. 138; Dainese *v.* Hale, 1 Otto (U. S.), 13; U. S. *v.* Wiggins, 14 Pet. (U. S.) 335; Armstrong *v.* Lear, 8 Pet. (U. S.) 52; Strother *v.* Lucas, 6 Pet. (U. S.) 763; Fremont *v.* Dedire, 1 P. Wms. 430; Freubert *v.* Trust, Prc. Ch. 207; Male *v.* Roberts, 3 Esp. 163; Smith *v.* Gould, 4 Moore P. C. 21; Leatherwood *v.* Sullivan, 81 Ala. 458; Bagwell *v.* McTighe, 85 Tenn. 616; Templeton *v.* Brown (Tenn. 1887), 5 S. W. Rep. 441.

7. Talbot *v.* Seeman, 1 Cranch (U. S.), 1; Church *v.* Hubbart, 2 Cranch (U. S.), 187; Strother *v.* Lucas, 8 Pet. (U. S.) 763; Dainese *v.* Hale, 91 U. S. 13; Ennis *v.* Smith, 14 How. (U. S.) 400; U. S. *v.* Wiggins, 14 Pet. (U. S.) 334.

8. Talbot *v.* Seeman, 1 Cranch (U. S.), 38; Wharton on Conflict of Laws (1st Ed.), § 771; Story on Conflict of Laws (6th Ed.), § 637; Taylor on Ev. (Text-book Series) 5, 9, 1214.

(*a*) *Written Law—How Proven.*—It has been held that the written law can only be proven by the production of the written law itself duly authenticated.[1] But the rule has been explicitly cast aside in *England*,[2] and has certainly received so many limitations in this country as to cause it to be much doubted, and a number of States have held that written foreign law may be proven by parol.[3] In most of the States provision has been made by statute, and books purporting to contain the laws of a sister State, and to be published by authority of such State, may be received as *prima facie* evidence of the laws of such State,[4] and such books have been received in the absence of any statute authorizing it.[5] And a volume of laws of a foreign government transmitted by that to

**1.** Zimmerman *v.* Helser, 32 Md. 274; Kermott *v.* Ayer, 11 Mich. 181; Woodbridge *v.* Austin, 2 Tyler (Vt.), 364; Danforth *v.* Reynolds, 1 Vt. 259, 265; Territt *v.* Woodruff, 19 Vt. 184; McNeill *v.* Arnold, 17 Ark. 159; Bowles *v.* Eddy, 33 Ark. 645; Emery *v.* Berry, 8 Foster (N. H.), 473; Comparet *v.* Jernegan, 5 Blackf. (Ind.) 375; Hoes *v.* Alstyne, 20 Ill. 202; McDeed *v.* McDeed, 67 Ill. 545; Lee *v.* Matthews, 10 Ala. 682; Ennis *v* Smith, 14 How. (U. S.) 400; Isabella *v.* Pecot, 2 La. Ann. 387; Byam *v.* Kelton, 1 Tex. 434.

**2.** In conformity with the general rule which admits in evidence the opinions of skilled witnesses on all subjects of science, the existence and meaning of the laws, as well written as unwritten, and of the usages and customs of foreign States, may, and indeed must, be proved by calling professional or official persons to give their opinions of the subject. Thus, in the great case of Dalrymple *v.* Dalrymple, where the point for the decision of the court turned on the state of the Scotch law, the depositions of eminent Scotch lawyers were given in evidence, and carefully sifted and compared by Sir Wm. Scott in his admirable judgment. It seems to have been thought at one time that all foreign written law must be proved by copy properly authenticated. But this doctrine is now distinctly exploded; the House of Lords having determined, in accordance with a decision of the queen's bench, that whenever foreign written laws are to be proved that proof cannot be taken from the book of the law, but must be derived from some skilled witness who describes the law. For instance, if any question were to arise in a British court of justice respecting the meaning or existence of a French law, it would not be sufficient to produce the Code Napoleon, because the court would not have organs to deal with and construe its provisions, but the assistance of foreign lawyers who know how to interpret it, must be of necessity prayed into aid. Still the witness may refresh and confirm his recollection of the law, or assist his own knowledge by referring to text-book decisions, statutes, codes, or other legal documents or authorities; and if he describes these works as truly stating the law, they may be used, not as evidence *per se*, but as part and parcel of his testimony. Taylor on Ev. (Text-book Series) 1216.

**3.** In Matter of Roberts Will, 8 Paige (N. Y.). 446; Am. Life Ins. Co. *v.* Rosenagle, 77 Pa. St. 507; Consolidated, etc., Ins. Co. *v.* Cashow, 41 Md. 59; Hooper *v.* Moore, 5 Jones (N. Car.), 130; Barkman *v.* Hopkins, 11 (Ark.) 157; Hall *v.* Costello, 48 N. H. 177.

There are many cases where the evidence of a professional person or one skilled, *virtute officii*, may be much more satisfactory evidence of what the law is than the mere exemplification of the exact words of the foreign statute, which the court may not have the necessary knowledge to construe. And it seems to us that the requiring an exemplified copy is pressing the rule of requiring the best evidence to an extent that would often defeat the ends of justice. Barrows *v.* Downs, 9 R. I. 446, 453.

**4.** See Inge *v.* Murphy, 10 Ala. 885; Hanrick *v.* Andrews, 9 Porter (Ala.), 9; Allen *v.* Watson, 2 Hill (S. Car.), 319; Sims *v.* Southern Ex. Co., etc., 38 Ga. 129; People *v.* Calder, 30 Mich. 85; Whitesides *v.* Poole, 9 Rich.(S. Car.) 68; McDeed *v.* McDeed, 67 Ill. 545; Taylor *v.* Bank of Ill., 7 T. B. Mon. (Ky.) 585; Taylor's Adm'r *v.* Bank of Alexandria, 5 Leigh (Va.), 471; Vaugh *v.* Griffith, 16 Ind. 353; Paine *v.* Lake Erie, etc., 31 Ind. 283; Merrifield *v.* Robbins, 8 Gray (Mass.), 150.

**5.** Thompson *v.* Musser, 1 Dall. (U. S.) 458.

the supreme court of the United States will be admitted as evidence of the laws of such government in the courts of the United States without further authentication.[1]

(*b*) *Unwritten Law.*—It is well settled that the unwritten or common law of other countries can be proved by expert testimony.[2]

And in the absence of evidence to the contrary, it will be presumed that the foreign law is unwritten, and that parol evidence will be received upon this assumption.[3]

**3. Whether Judge or Jury must Decide.**—As to the position that foreign laws are to be proved as facts to the jury, there is some difference of opinion. Judge Story is decided in the opinion that it is for the court to decide;[4] while some eminent authority say that it must be proven to the jury like any other fact.[5]

**4. How Authenticated.**—The usual method of authenticating foreign statutes is "by oath, or by an exemplification of a copy under the great seal of the State, or by copy proved to be a true copy by a witness who has examined and compared it with the original, or by a certificate of an officer properly authorized by law to give a copy, which certificate must be duly proved."[6]

**5. Competency of Witness.**—The law of a foreign country may be proved by any person who is, or has been, in a position to render it probable that he would make himself acquainted with it.[7]

1. Dauphin *v.* U. S., 6 Ct. of Claims, 221; De Rothschild *v.* U. S., 6 Ct. of Claims, 204.

2. Mowry *v.* Chase, 100 Mass. 79; Ennis *v.* Smith, 14 How. (U. S.) 400; *In re* Roberts' Will, 8 Paige (N. Y.), 446; Stephens' Dig. on Evi. (Chase's Ed.) 104.

3. Dougherty *v.* Snyder, 15 S. & R. (Pa.) 84; Livingston *v.* Maryland Ins. Co., 6 Cranch (U. S.), 274, 280.

4. Story on Conflict of Laws (6th Ed.), 638; Hall *v.* Costello, 48 N. H. 179; Munroe *v.* Douglass, 5 N. Y. 447.

5. Kline *v.* Baker, 99 Mass. 254; Judge Redfield, Story on Conflict of Laws (6th Ed.), 638a; Leavenworth *v.* Brockway, 2 Hill (N. Y.), 201; Robinson *v.* Dauchy, 3 Barb. (N. Y.) 20.

In regard to foreign laws, usages, and customs, which we have already seen cannot be judicially noticed, but must be proved as facts in each particular case, the distinction between the functions of the judge and jury does not yet appear to be very clearly defined. It would seem, however, that while the existence and abstract meaning of the law must, in general, be determined by the jury on the testimony of the skilled witnesses, it will be the duty of the court to decide, first, as to the competent knowledge of the witnesses called; next, as to the admissibility of documents, by which they seek to refresh their memory; and lastly, as to the special applicability of the law, when proved, to the particular matter in controversy. If, indeed, the admissibility or inadmissibility of certain evidence depends on the existence or interpretation of a foreign law, the proof should exclusively be addressed to the court, as in other cases where questions respecting the admissibility of evidence rests upon disputed facts. Perhaps also, as all matters of law are properly referable to the court, and as the object of the proof of foreign law is to enable the court to instruct the jury respecting its bearing on the case in hand, it will always be advisable for the judge to assist the jury in ascertaining what the law really is. Taylor on Evi. (Text Book Series) 67.

6. Wharton's Conflict of Laws (1st Ed.), § 777; Church *v.* Hubbart, 2 Cranch (U. S.), 238; Packard *v.* Hill, 2 Wend. (N. Y.) 411–475.

7. Taylor on Ev. (Text-book Series) § 1042.

In Barrons *v.* Downs, 9 R. I. 446 (1870), Judge Potter gave the following summary of the law on the point:

"The courts have for some time been relaxing the vigor of the ancient rule in relation to the proof of foreign statutes. In Ennis *v.* Smith, 14 How. (U. S.) 400, a copy of a foreign statute received

through the agency of the Vattemaire system of exchange was admitted.

"In Jones *v.* Maffet, 5 S. & R. (Pa.) 523, a copy of the Irish statutes, sworn to by a barrister as having been received from the king's printer, was received.

"The U. S. supreme court, in Talbot *v.* Seemen, 1 Cranch (U. S.), 19, lay down the rule that the laws of a foreign country, designed for the direction of its own affairs, are not to be noticed unless proved as facts; and in that case they admitted an edict of France, which had been promulgated in the U. S. government; and in Church *v.* Hubbart, 2 Cranch 187, they say that the sanction of an oath is required, unless verified by some high authority entitled to equal respect with an oath.

"In that case a Portuguese law and its translations were certified to by the U. S. consul at Lisbon. He did not testify to them on oath. The court say that they are not verified by oath, and that it was not a consular duty or function to certify to laws; and imply strongly, that if there had been testimony on oath it would have been admitted. It is impossible, says C. J. Marshall to suppose that this copy might not have been authenticated by the oath of the consul as well as by his certificate. That this was the ground of that decision is stated in the supreme court in Ennis *v.* Smith, 14 How. (U. S.) 400, 427, where the court say the copies would have been admitted in that case if sworn to.

"And in Ennis *v.* Smith, 14 How. (U. S.) 429, the court held that foreign written laws may be verified by an oath, or proved by exemplification, etc. . . . But such modes of proof as have been mentioned are not to be considered as exclusive of others, especially of codes of law and accepted histories of the laws of a country. And they say that a foreign law may be received when it is found in a statute-book, with proof that the book has been officially promulgated by the government which made the law.

"In Packard *v.* Hill, 2 Wend. (N. Y.) 411, the court rejected a copy of a statute establishing the court of consulado in Havana, produced by a witness who had purchased it in Havana, and who testified that he had practised in the court, and that the court was governed by that law. A book purchased in a book-store, purporting to contain the laws of a State, unless published by authority, would not be admitted anywhere, etc.

"In the case of Chanoine *v.* Fowler, 3 Wend. (N. Y.) 173, the edition of laws did not purport to be an official edition.

"In the case of Queen *v.* Dent, 1 Car. & K. 97, a witness, not of the legal profession, was admitted to prove the fact as to the law. But this decision is decidedly condemned. See Sussex Peerage, 11 Clark & Finnelly, 124–134.

"In the case of Lacon *v.* Higgins, 3 Starkie, 178, Abbott, C. J. (Ld. Tenterden), admitted a copy of the French code produced by the French consul, and sworn by him as the one used and acted on by him, and purporting to be printed at the royal French printing-office, where the laws were printed by authority. The decisions seem to have very much conflicted, sometimes (generally in *N. Y.*) the written law being rejected unless proved by exemplification. And see Richardson *v.* Anderson in note to 1 Campbell, 64.

"Chancellor Kent, in Brush *v.* Wilkins, 4 John. Ch. (N. Y.) 506, admitted the law of *Demerara*, as to succession and wills to be proved by a witness. The report does not, indeed, say that it was statute law.

"The decisions of the later date, however, have evidently tended to allow the statute laws of a foreign State to be verified, or to the effect and construction of such law to be proved, by the oath of a witness.

"In Sussex Peerage case (1844), 11 Clark & F. 85, Dr. Wiseman was called as a witness to prove the laws of marriage at Rome, and referred to a book containing the decrees of the Council of Trent as regulating them. The judges of the committee of the House of Lords expressed their opinions separately. Lord Brougham: 'The witness may refresh his recollection by referring to authorities, etc.' Lord Lyndhurst, Lord Chancellor: 'The witness may thus correct and confirm his recollection of the law, though he is the person to tell us what it is.' Lord Brougham agreed with the Lord Chancellor. 'The witness may refer to the sources of his knowledge, but the proper mode of proving a law is not by showing a book. The House requires the assistance of a lawyer who knows how to interpret it.' Lord C. J. Denman: 'There does not appear to be in fact any real difference of opinion. There is no question raised here as to any exclusive mode of getting at the evidence, for we have both materials of knowledge offered us. We have the witness, and he states the law, which he says is correctly laid down in these books. The books are produced, but the witness describes them as authoritative, and explains them by his knowledge of the actual practice of

the law. A skilful and scientific man must state what the law is, but may refer to books and statutes to assist him in so doing. This was decided after full argument on Friday last in the court of queen's bench (Baron de Bode's case). There was a difference of opinion; but the majority of the judges clearly held, on an examination of all the cases, and after a full discussion, that proof of the law itself, in the case of a foreign law, could not be taken from the book of the law, but from the witness who described the law. If the witness says: "I know the law, and this book truly states the law, then you have the authority of the witness and the book. You may have to open the question on the knowledge or means of knowledge of the witnesses, and other witnesses may give a different interpretation to the same matter, in which case you must decide as well as you can on the conflicting testimony; but you must take evidence from the witness."'

"Lord Campbell concurred in saying: 'The foreign law is matter of fact. . . . You ask the witness what the law is: he may from his recollection, or on his producing and referring to books, say what it is,' etc.

"Lord Langdale, M. R.: 'Foreign law is matter of fact. A witness, more or less skilled in it, is called to depose to it. He may state it from his own knowledge, or refer to text-books or books of decisions.'

"Dr. Wiseman went on to testify, that by virtue of his office as Roman Catholic bishop and coadjutor to the vicar apostolic in England, 'he had jurisdiction of the subject of Catholic marriages.'

"The Lord Chancellor: 'He comes within the description of a person *peritus virtute officii*.' Lord Langdale: 'His evidence is in the nature of that of a judge's.' It was admitted.

"Mr. Westlake (Conflict of Laws, § 414, note) seems to think that Lord Denman has overstated the result of the decision in Baron de Bode's case. It might well be supposed that the chief justice ought to know what his own court of king's bench had decided, and on looking at the case in 8 A. & E. N. S. 208, we find his statement supported. A witness was offered, who testified that the feudal system in Alsace had been abolished by decree of the French Assembly of 1789. The decree itself was produced. Lord Denman, C. J., said that the rule admitting testimony of persons of science applied not only to unwritten but to written law. The question was not only the contents, but the state and effect of the written law. The mere contents of the law might often mislead. He then criticised the decisions in 3 Esp. 58; 3 Campb. 166, 4 Camp. 155, and refers to Lacon *v.* Higgins, 3 Starkie, 178; Picton's case, 30 State Trials, 225 and 491; Middleton *v.* Janverin, 2 Hagg. Cons. 437, 442, and says he can perceive no distinction between proof from a copy of the law, as we find it now tendered.

"Justices Coleridge and Williams concurred, and gave their reasons at length. The written law itself, they say, would be of little use compared with the opinion of a scientific person, who could give the exact construction. Justice Patterson dissented, and held it necessary to produce the written law. The reasons given for his dissent go far to show the effect of the decision.

"It has thus been decided that an expert may state the written law without producing it. Lord Denman says that they decided that the proof of the law was to be not from the book, but from the witnesses; and the reasons given bear out his statement.

"And it is but one step farther to decide, as was held in the Sussex Peerage case, that the witness may refer to the book to refresh his memory, etc.

"And in the last edition of Phillips on Evidence (2428, ch. 584) the law is stated in substantially the words of that decision. See also Lord Nelson *v.* Bridport, 8 Beaver, 527, 535, 537, 539, etc. . . .

"In the Matter of Roberts' Will, 8 Paige (N. Y.) 446, Chancellor Kent relied on the evidence of an expert in relation to laws of Cuba, for the reasons we have stated above.

"In the case of Vander Donck *v.* Thellusson, 8 M. G. & S. 812 (1849), the court, after argument, admitted a person who was not a lawyer to prove the law of Belgium as to bills of exchange. In this case it was stated in the note that the old French Code of Commerce (without the subsequent French modifications) was in force in Belgium.

"The question before the court is not the existence of a particular law, but to ascertain the exact state of the law at a particular date, including its construction and effect.

"In this case the evidence offered is that of a person who testifies that he has practised law in Havana for twenty-four years; has been consulting lawyer of one of the tribunals and a judge; and that the book to which he refers, purporting to be the Spanish Code of Commerce of 1823, is the code of commercial law in force in that island."

**FOREIGN LIEN.**—See LIEN.

**FOREIGN WILLS.**—See WILLS.

**FOREIGNER.**—(See ALIENS.)—An alien; one born in another country, not a naturalized citizen.[1]

**FORESTALLING THE MARKET.**—Forestalling the market consists in buying victuals on their way to market, before they reach it, with intent to sell them again at an increased price.[2] Every device, practice, conspiracy, by act, words, or news, to enhance the market price of merchandise is a forestalling of the market.[3]

Forestalling the market was an offence at common law[4] and by the English statute;[5] but the offence was done away with by a subsequent statute.[6] In the *United States*, forestalling the market takes the form of "corners" or of "trusts," which are attempts by one person or a conspiracy or combination of persons to monopolize an article of trade or commerce, or to control or regulate to restrict the its manufacture or production in such a manner as supply, and so enhance the price. Such a combination is illegal, though probably not criminal, and any agreement in pursuance of its object is void.[7]

1. Lessee of Spratt *v.* Spratt, 1 Pet. (U. S.) 343.

2. Bouv. L. Dict. (15th Ed.) 677.

3. 3 Co. Inst. 196; 1 Russ. Cr. (5th Ed.) 349; 4 Bl. Com. 138; 13 Viner Abr. 430; 1 East, 132; King *v.* De Berenger, 3 Maule & S. 67.

4. 1 Hawk. P. C. 234.

5. **Under Early English Statute.**—Forstalling the market was defined by 5 & 6 Edw. VI., c. 14, to be "the buying or contracting for any merchandize or victual coming in the way to market; or dissuading persons from bringing their goods or provisions there; or pursuading them to enhance the price, when there; any of which practices make the market dearer to the fair trader."

6. 7 & 8 Vict., c. 24.

7. Wright *v.* Crabbs, 78 Ind. 487; India Bagging Assoc. *v.* Kock, 14 La. Ann. 164; Sampson *v.* Shaw, 101 Mass. 145; Arnot *v.* Pittston & E. Coal Co., 68 N. Y. 558; s. c., 23 Am. Rep. 190; Clancy *v.* Onondaga Fine Salt, etc., Co., 62 Barb. (N. Y.) 395; Central Ohio Salt Co. *v.* Guthrie, 33 Ohio St. 666; Kountz *v.* Citizens' Oil-Refining Co., 72 Pa. St. 392; Kountz *v.* Kirkpatrick, 72 Pa. St. 376; Morris Run Coal Co. *v.* Barclay Coal Co., 68 Pa. St. 173; Com. *v.* Tack, 1 Brews. (Pa.) 511. *Compare* Ontario Salt Co. *v.* Merchants' Salt Co., 18 Grant Ch. 540.

**Coal corner.**—An agreement between a number of coal corporations to divide two coal regions which they controlled; to appoint a committee to take charge of their interests, which was to decide all disputed questions and appoint a general agent, through whom all the coal mined was to be delivered, each corporation to deliver its proportion, at its own cost, in the different markets, at such time and to such persons as the committee might direct; the respective companies to sell their coal only to the extent of their proportions, and at prices adjusted by the committee; is against public policy, and void. Morris Run Coal Co. *v.* Barclay Coal Co., 68 Pa. St. 173.

**Salt combination.**—And so held as to a similar combination of salt manufacturers. McIlvaine, C. J., said: "The clear tendency of such an agreement is to establish a monopoly, and to destroy competition in trade, and for that reason, on grounds of public policy, courts will not aid in its enforcement. It is no answer to say that competition in the salt trade was not in fact destroyed, or that the price of the commodity was not unreasonably advanced. Courts will not stop to inquire as to the degree of injury inflicted upon the public; it is enough to know that the inevitable tendency of such contracts is injurious to the public. Nor is this agreement within the principle which permits a person to bind himself not to engage in trade at a particular place. Here the restraint was general. A member of this association, under this agreement, could not engage in the traffic at any place during the life of

**FORESTS.**—See WOODS AND FORESTS.

**FOREVER.**—See note 1.

the association, except only to retail to actual consumers, at the place of manufacture, and then only from salt in bulk and at the price named by the company." Central Ohio Salt Co. *v.* Guthrie, 35 Ohio St. 666.

**Canadian Doctrine.**—But such an agreement and combination was held valid and legal by a Canada court. Ontario Salt Co. *v.* Merchants' Salt Co., 18 Grant Ch. 540.

**Agreement not to sell.**—An agreement between several firms not to sell any India cotton-bagging for three months, except with the consent of a majority of them, was held illegal and invalid, as being in restraint of trade. India Bagging Assoc. *v.* Kock, 14 La. Ann. 164.

"**Trusts,**" "**Combinations,**" "**Syndicates.**"—It was recently held, in the case of Mallory *v.* Hanauer Oil Works (Tenn. 1888), 21 Am. & Eng. Corp. Cas. 478, that a contract whereby corporations, engaged in manufacturing cotton-seed oil, or any other commodity, forming thereby what is known as a "trust," "combination," or "syndicate," engage to turn over the property and machinery of the respective mills to a select committee composed of representatives from each corporation, to be managed and operated by this committee, through officers, agents, and employees selected by them, for the common benefit of all, the profits and losses of such operations, to be shared in proportion agreed upon, is *ultra vires* and invalid. Mr. McKinney, in a note appended to this case, says that "It is important, not from the fact that any new doctrine is enunciated or any well-settled rules disturbed, but because it was the first decision to apply certain principles of the law, well enough settled in themselves, to a method of doing business which, although novel, yet has come into vogue to a very considerable extent during the last two years. The failure of the court to pass upon the validity of the combination as one tending to create a monopoly, and opposed to public policy, leaves unsettled the great question, which must ultimately be decided when the validity of 'trust' is passed upon."

In a still more recent case decided at *nisi prius* by the Special Term of the New York Supreme Court on January 9, 1889, People *v.* North River Sugar Refining Co., Judge Barrett holds that the defendant corporation forfeited its charter and franchises by participating in a combination between the owners of certain sugar refineries; that the surrender by the stockholders of all the stock of the corporation to the trust board was the act of the corporation amounting to a partnership arrangement, and says: "In doing so they have plainly abused their powers and have exercised privileges not conferred on them by law. As legal conclusions, forfeiture of the defendant's franchise and dissolution justly follow." The combination is also held illegal on the ground that it creates a monopoly.

1. An oath that a defendant is about to leave the State permanently is a sufficient compliance with an act providing for attachments in such cases, requiring an oath that he is about to leave the State forever. Sawyer *v.* Arnold, 1 La. Ann. 315.

"Forever" in an act establishing a county seat means until changed by the legislature. Casey *v.* Harned, 5 Iowa, 1.

This word in conveyances is not equivalent to heirs, and does not import inheritable qualities. An estate to a man forever, or to him and his assigns forever, is a life estate. 2 Bl. Com. 107; Co. Litt. 1; 1 Washb. on R. P. (5th Ed.), 56; Dennis *v.* Wilson, 107 Mass. 593; William *v.* Woodard, 2 Wend. (N. Y.) 492; Ewan *v.* Cox, 4 Halst. (N. J.) 10. But see Vernon *v.* Wright, 7 H. L. Ca. at p. 52. The term "forever" following words that create an estate tail, does not enlarge it into a fee. Vernon *v.* Wright, 7 H. L. Ca. 35.

## FORFEIT—FORFEITURE.

1. Definition, 443.
2. By Alienation, 443.
3. By Attainder, 444.
4. Of the Body, 444.
5. Of Copyhold, 444.
6. Condition, 444.
7. In Contract, 444.
8. Covenants, 444.
9. Of Corporate Rights, 445.
10. Of Charter, 445.
11. For Crimes, 445.
12. In a Deed, 445,
13. Of Deposits, 446.
14. Enforcement of, 446.
15. Of Estate, 446.
16. Evidence, 446.
17. Injunction, 446.
18. Of Insurance Policy, 446.
19. Of Policy of Fire Insurance, 447.
20. Of Policy of Life Insurance, 447.
21. Of Lease, 447.
22. Of License, 447.
23. Of Marriage, 448.
24. Of Mortgage, 448.
25. Of Office, 448.
26. Of Patents, 448.
27. For Non-payment of Rent, 448.
28. For Violation of Revenue Laws, [449.
29. By Statute, 449.
30. Relief Against Forfeiture, 449.
31. Of Stock or Shares in Corporations, 450.
32. Of Ship, 451.
33. Of Tenancy, 451.
34. For Taxes, 451.
35. Of Wages, 451.
36. Waiver of, 451.
37. For Waste, 452.

**1. Definition.**—Forfeiture means the loss of something as a penalty for doing or omitting to do a certain required act;[1] the taking of some property, right, privilege, franchise, or benefit from one person, and transferring the same to another;[2] a punishment annexed by law to some illegal act or negligence in the owner of lands, tenements, or hereditaments, whereby he loses all his interest therein, and the same becomes vested in the party injured, as a recompense for the wrong which he alone, or the public together with himself, hath sustained.[3] The term includes the loss as a penalty, and the transfer of the thing to another without the owner's consent,[4] for the violation of some law, or duty, or obligation.[5]

**2. By Alienation.**—By the *English* law, an estate less than a fee is forfeited to the party entitled to the residuary interest by breach of duty in the owner of the particular estate; as when a tenant for life or for years conveys, by feoffment, fine, or recovery, a greater

1. Gosselink *v.* Campbell, 4 Iowa, 300.

2. Walter *v.* Smith, 5 B. & A. 439; 21 Ala. 672; 10 Gratt. (Va.) 700.

3. 2 Bl. Com. 267; 1 Bouv. Dict. 602; Hob. 242; 4 Bac. Abr. 337.

The common-law forfeiture does not exist in the *United States*. Const. U. S. art. III., § 3. By this provision, no attainder of treason shall work corruption of blood or forfeiture, except within the life of the person attainted; and by act of Congress, April 30, 1790, § 24, no conviction or judgment shall work corruption of blood or forfeiture of estate. 1 Story Laws (U. S.), 88; 1 Mason (U. S.), 174; and in the States, Fire Dept. *v.* Kip, 10 Wend. (N. Y.) 266.

**Forfeit,** to lose as a penalty, includes a loss and transfer to another. Forfeiture is different from confiscation; the former relates to the acts of the owner, and the latter to acts of the government. Confiscation is the appropriation of an enemy's property, and forfeiture is the appropriation of a citizen's property on account of the owner's violation of law. 1 Story (C. C.) 130; 13 Pet. (U. S.) 157; 1 Kent Com. 67; 3 Am. L. J. 46.

For the learning of forfeiture at common law, and forfeiture for treason and felony, see 4 Bac. Abr. 337; Co. Litt. 8; 3 Inst. 19; Stamf. P. C. 191; 2 Hawk. P. C. ch. 49, § 3.

4. U. S. *v.* Ulrici, 3 Dill. (U. S.) 532; Wakefield *v.* Johnson, 26 Ark. 506.

5. 1 Kent Com. 67; 1 Story (C. C.), 134; Bell Dict. Laws of Scot. 392: 1 Broom & Hadley Com. 703, 704. The loss of goods as a compensation for an office and injury to the person to whom they are forfeited, as well as a punishment for a misdemeanor. Merchants' Bank *v.* Bliss, 21 How. Pr. (N. Y.) 370, citing 2 Bl. Com. 420; 1 Robt. (N. Y.) 403.

estate than he is by law entitled to do, he forfeits his estate to the person next entitled in remainder or reversion.[1] Forfeiture also occurred when alienation was contrary to law; such as in mortmain, or to an alien.[2] In this country such forfeitures are unknown.[3] The conveyance by the tenant operates only on the interest he possessed, and does not affect the remainderman or reversioner.[4]

**3. By Attainder.**—Abolished.[5]

**4. Of the Body.**—Obsolete.[6]

**5. Of Copyhold.**—By a wrongful act to the prejudice of the lord, or by anything which amounts to a determination of the tenancy,[7]

**6. Condition.**—A lessor or grantor can annex any condition not illegal or repugnant, to the grant, upon the breach of which the grant or lease becomes forfeited.[8] Expressed or implied.[9]

**7. In Contract.**—By breach of.[10]

**8. Covenants.**—By breach of.[11] To insure and keep insured.[12] To repair.[13] Against waste.[14] Not to under-let.[15] Not to sell, dispose, or assign.[16] In restraint of alienation and of waste.[17] On breach of pre-emption.[18] Covenants are not broken by bank-

1. 2 Bl. Com. 274; Stump *v.* Findley, 2 Rawle (Pa.), 168; 1 Washb. Real Prop. 92, 197; Wms. Real Prop. 25; 2 Sharswood Bl. Com. 121, n.

2. 1 Broom & Hadley Com. 696; 8 & 9 Vict. c. 106, § 4.

3. 2 Kent Com. 281, 282; 4 Kent Com. 81, 82, 424; 1 Hill Abr. ch. 4; 3 Dall. (U. S.) 486; 5 Ohio, 30.

4. 4 Kent Com. 81, 82, 424; 5 Dane Ab. 6; Wms. Real Prop. 92, 197; 1 Washb. Real Prop. 92, 197; 22 N. H. 500.

5. 39 & 40 Geo. III. c. 88; 5 Geo. IV. c. 17; Const. U. S. art. III. § 3.

6. Hab. 270, 293.

7. Elt. Copyh. 200.

8. 2 Bl. Com. 281; Shattuck *v.* Lovejoy, 8 Gray (Mass.), 204.

9. O'Brien *v.* Doe, 6 Ala. 787; 2 Bl. Com. 281; Walker's Am. L. 299; 1 Washb. Real Prop. 454; Co. Litt. § 361; 1 Prest. Est. 578; Tudor Lead. Cas. 794.

Conditions should be construed liberally so as to secure the intent of the parties, and not with the strictness applicable to common-law conditions. Adams on Eject. 176.

10. Betts *v.* Burch, 4 Hurl. & N. 519; Taylor *v.* Marcella, 1 Woods (U. S.), 302; Esmond *v.* Van Benschoten, 12 Barb. (N. Y.) 366; Richards *v.* Edict, 17 Barb. (N. Y.) 260; Salers *v.* Rolph, 15 Abb. Pr. (N. Y.) 273; Stearns *v.* Barrett, 1 Pick. (Mass.) 443; s. c., 11 Am. Dec. 223.

11. Cro. Jac. 398; 3 Wait Act. 71; 2 Washb. Real Prop. 263.

12. Doe *v.* Shewin, 3 Camp. 134; Doe *v.* Peck, 1 Barn. & A. 428; Price *v.* Worwood, 4 H. & N. 512.

13. Minshall *v.* Oakes, 2 H. & N. 793; Martyn *v.* Clue, 18 Q. B. 661; Monk *v.* Noyes, 1 Carr. & P. 265; Goage *v.* Lockwood, 2 F. & F. 115; Doe *v.* Jackson, 2 Stark. 293; Stanley *v.* Towgood, 3 Scott, 313; Myers *v.* Burns, 35 N. Y. 269; Doe *v.* Bird, 6 Carr. & P. 195; Doe *v.* Jones, 4 Barn. & A. 126; Few *v.* Perkins, L. R. 2 Exch. 92; Doe *v.* Lewis, 5 Ad. & Ell. 277; 3 Wait Act. 71.

14. 2 Bl. Com. 283; Coke Inst. 299; Bacon Abr. Forfeiture; Comyns Dig. Cov.; Dane Ab. Cov.; 10 Viner Abr. 371; 2 Kent Com. 318; 1 Washb. Real Prop. 118; Goodright *v.* Vivian, 8 East, 190; Doe *v.* Bond, 5 Barn. & C. 858; Phillips *v.* Covert, 7 Johns. Ch. (N. Y.) 1; Jackson *v.* Brownson, 7 Johns. Ch. (N. Y.) 227; Schermerhorn *v.* Buell, 4 Den. (N. Y.) 422; Kidd *v.* Dennison, 6 Barb. (N. Y.) 9; Livingston *v.* Reynolds, 26 Wend. (N. Y.) 115; Co. Litt. 53, 54; Jackson *v.* Andrews *v.* 18 Johns. Ch. (N. Y.) 433.

15. Greenaway *v.* Adams, 12 Ves. 395; Roe *v.* Soles, 1 Maule & S. 297; Doe *v.* Laming, 4 Campb. 77; Waldroud *v.* Hawkins, 32 L. T. 119; Field *v.* Mills, 33 N. J. Law, 254; 3 Wait Act. & Def. 71.

16. Doe *v.* Bevan, 3 M. & S. 353; Doe *v.* Hogg, 4 Dow. & R. 226; Jackson *v.* Silvernail, 15 Johns. Ch. (N. Y.) 278; Jackson *v.* Harrison, 17 Johns. Ch. (N. Y.) 66; Jackson *v.* Corliss, 7 Johns. Ch. (N. Y.) 531.

17. Veiplanck *v.* Wright, 23 Wend. (N. Y.) 506.

18. Jackson *v.* Groat, 7 Cow. (N. Y.) 285; Jackson *v.* Schutz, 18 Johns. Ch. (N. Y.) 174; De Peyster *v.* Michael, 6

ruptcy, but are by voluntary assignment.[1] For non-payment of rent.[2]

**9. Of Corporate Rights.**[3]

**10. Of Charter.**—A corporation forfeits its charter by wilful nonfeasance or malfeasance, neglect of duty or abuse of corporate powers, or by assumption of authority not conferred. Forfeitable to the State or sovereignty which granted the charter, through court of competent jurisdiction, on judgment of ouster.[4]

**11. For Crimes.**—Forfeiture for crimes seldom occurs.[5] When it occurs, the State or government recovers only the title which the owner had.[6]

**12. In a Deed.**[7]

N. Y. 467; Livingston *v.* Stickles, 8 Paige (N. Y.), 398.

1. Roe *v.* Golliers, 2 Term R. 133; Holland *v.* Cole, 1 H. & C. 67; Doe *v.* Clark, 8 East, 185; Doe *v.* Carew, 2 Ad. & Ell. N. S. 316; 42 Eng. C. L. 692; Doe *v.* David, 6 C. & P. 614.

2. See, *post*, § 27.

3. City of Rochester *v.* Bronson, 41 How. (N. Y.) 78; Field on Corp. § 442.

4. Turnpike Co. *v.* State, 3 Wall. (U. S.) 210; People *v.* Society, etc., 1 Paine (U. S.), 660; State *v.* Bradford, 32 Vt. 50; State *v.* Cincin., 23 Ohio St. 445; Atty.-gen. *v.* Tudor Ice Co., 104 Mass. 239; State *v.* Merchants' Ins. Co., 8 Humph. (Tenn.) 235; State *v.* Com. Bank, 33 Miss. 474; State *v.* Favill, 24 N. J. Law, 370; People *v.* Hilsdale Turnp. Co., 33 Wend. (N. Y.) 254; Terret *v.* Taylor, 9 Cranch (U. S.), 43. By *scire facias* or *quo warranto*. Com. *v.* Ins. Co., 5 Mass. 230; Lehigh Bridge Co. *v.* Lehigh Coal & Nav. Co., 4 Rawle (Pa.), 9; Field on Corp. § 154.

Acts sufficient to cause a forfeiture do not *per se* produce a forfeiture. The corporation continues to exist until the sovereignty which created it shall, by proper proceedings in a proper court, procure an adjudication of forfeiture, and enforces it. Ormsby *v.* Copper-mining Co., 65 Barb. (N. Y.) 360; People *v.* Manhattan Co., 9 Wend. (N. Y.) 351; Bear Camp River Co. *v.* Woodman, 2 Me. 404; Michen *v.* Bank, 17 Paige (N. Y.), 118; Com. *v.* Com. Bank, 28 Pa. St. 383; Murphy *v.* Farmers' Bank, 20 Pa. St. 415; Field on Corp. § 154.

*Quo warranto* was originally the remedy, but the modern remedy is by information in the nature of *quo warranto*, or some statutory substitute. 3 Bl. Com. 263; Com. *v.* Burrell, 7 Pa. St. 34; State *v.* Gleason, 12 Fla. 190; State *v.* Johnson, 26 Ark. 281; State *v.* Stone, 25 Mo. 555; State *v.* Railroad, 34 Wis. 197; People *v.* Ins. Co., 15 Johns. Ch. (N. Y.) 386.

In the latter case, Spencer, J., said: "An information in the nature of a writ of *quo warranto* is a substitute for that ancient writ, which has fallen into disuse; and the information which has superseded the old writ is defined to be a criminal method of prosecution, as well to punish the usurpation of the franchise as to oust him and seize it for the crown. It has for a long time been applied to the mere purpose of trying the civil right of seizing the franchise or ousting the wrongful possessor, the fine being nominal only."

5. Steph. Cr. Dig. 39; Foster Crim. L. 95; 1 Washb. R. Prop. 92.

If a person solemnizes or assists at the marriage of any descendant of King George II. in contravention of the statute of 12 Geo. III. c. 2, his lands and goods are forfeited.

If a person is outlawed for treason, his lands are forfeited to the crown. If he is outlawed for felony, he forfeits to the crown all his goods and chattels, real and personal, and also the profits of his freeholds during his life; and after his death the crown is entitled to his freeholds for a year and a day, with the right of committing waste. Formerly, conviction for any kind of felony caused a forfeiture of goods and chattels, both real and personal; but this has been abolished. No such forfeiture in the *United States*. Steph. Dig. Cr. L. 39; 2 Bl. Com. 251; Wms. Real Prop. 126; Stat. 33 & 34 Vict. c. 23; 54 Geo. III. c. 145; 1 Story U. S. Laws, 88.

6. See 4 Mason C. C. 174; 1 Washb. Real Prop 92.

7. Co. Litt. 204; Gray *v.* Blanchard, 8 Pick. (Mass.) 284; Fonda *v.* Sage, 46 Barb. (N. Y.) 122; McKissick *v.* Pickle, 16 Pa. St. 140; Southard *v.* Railroad Co., 2 Dutch. (N. J.) 21; Hayden *v.* Stoughton, 5 Pick. (Mass.) 528; Brigham *v.* Shattuck, 10 Pick. (Mass.) 306; Harrington *v.* Donaldson, 31 Vt. 535.

**Disclaimer of Tenure.**—1 Broom & Hadley Com. 703, 704.

**13. Of Deposits.**—By non-performance of the contract when the party retaining the same has fulfilled his part of the contract, and has not done anything amounting to a waiver of the right.[1]

**14. Enforcement of.**—In courts of law, equity will not enforce a forfeiture or penalty[2] except when exclusively essential to do justice.[3] The enforcement of a forfeiture cannot be had when the law excuses the performance of the condition or covenant, or when the same is waived by the party entitled to enforce it.[4]

**15. Of Estate.**—Formerly the forfeiture of an estate was the result of the acts of the owner or tenant against the interest of the lord under the feudal law. Thus a feoffment of land by a tenant for life was a forfeiture of his estate, because it was an attempt to dispose of the reversion; but this has been abolished.[5] It now occurs only on condition broken,[6] where lessee denies title of lessor[7] by attorning to a stranger, refusal to pay rent, or paying rent to a stranger.[8]

**16. Evidence.**—Questions exposing witness to forfeiture need not be answered.[9]

**17. Injunction** to restrain forfeiture not grantable unless forfeiture excused or waived and an essential of equity jurisprudence intervenes.[10]

**18. Of Insurance Policy.**—By breach of condition.[11] By non-pay-

1. *Ex parte* Burrell, L. R. 10, ch. 512; Carpenter *v.* Blandford, 8 B. & C. 575; Cutts *v.* Thodey, 13 Sim. 206; Orme *v.* Brougham, 4 Moo. & Sc. 417; Roberts *v.* Massey, 13 Ves. 561; Lea *v.* Whitaker, L. R. 8 C. P. 70; Essex *v.* Daniel, L. R. 10 C. P. 538; Add. Cont. 406.

2. Paxton *v.* Douglass, 16 Ves. 239; 19 Ves. 225; Copper-mining Co. *v.* Ormsby, 47 Vt. 709; Harsburg *v.* Baker, 1 Pet. (U. S.) 232; Watts *v.* Watts, 11 Mo. 547; Roberts *v.* Wilkinson, 34 Mich. 138. Nor aid in divesting an estate for breach of a covenant or condition subsequent. Papham *v.* Bompfield, 1 Vern. 83; Warner *v.* Bennett, 31 Conn. 468; Livingston *v.* Tompkins, 4 Johns. Ch. (N. Y.) 431. Nor by bill of discovery. Story Eq. Pl. § 580; Green *v.* Weaver, 1 Sim. 404.

3. Story Eq. Pl. §§ 521, 525; Brown *v.* Vandergrift, 80 Pa. St. 142.

4. Bradstreet *v.* Clark, 21 Pick. (Mass.) 389; Paxton *v.* Douglass, 16 Ves. 239. A condition subsequent is excused when performance is impossible by act of God or act of the party for whose benefit it was created; but minority or coverture will not excuse. Bradstreet *v.* Clark, 21 Pick. (Mass.) 389; Garrett *v.* Scouten, 3 Denio (N. Y.), 334; Cross *v.* Carson, 8 Blackf. (Ind.) 138.

5. 2 Bl. Com. 275; by Stat. 8 & 9 Vict. c. 106.

6. 4 Kent Com. 106; White *v.* Sayre, 2 Ohio, 113; Carpenter *v.* Denoon, 29 Ohio St. 379; Boyd *v.* Talbert, 12 Ohio, 212; Smith *v.* Whitback, 13 Ohio St. 471; Chapmen *v.* Wright, 20 Ill. 120; Jewett *v.* Berry, 20 N. H. 36; Gray on Restraints on Alienation; Anderson *v.* Carey, 36 Ohio St. 506; Nichols *v.* Eaton, 91 U. S. 716; Broadway *v.* Adams, 133 Mass. 170.

7. Bac. Abr. Leases; Saunders *v.* Freeman, Dyer, 209.

8. Williams *v.* Watkins, 3 Pet. (U. S.) 49; Jackson *v.* Vincent, 4 Wend. (N. Y.) 633; Montgomery *v.* Craig, 3 Dana (Ky.), 101; Doe *v.* Pittman, 2 Nev. & Man. 673; Clark *v.* Everly, 8 W. & S. (Pa.) 232; Campbell *v.* Proctor, 6 Greenl. (Me.) 12.

9. Greenl. Ev.

10. Sinden *v.* Hepburn, 3 Sandf. (N.Y.) 668; Lambert *v.* Abbott, 12 How. (U. S.) 340; Nessle *v.* Reese, 29 How. (N. Y.) 382; Coe *v.* Railroad Co., 10 Ohio St. 372; Barret *v.* Blagrave, 5 Ves. 555; Woodruff *v.* Water-power Co., 2 Stockt. (N. J.) Ch. 489.

11. Titus *v.* Ins. Co., 81 N. Y. 410; Mueller *v.* Ins. Co., 87 Pa. St. 399; Donahue *v.* Ins. Co., 56 Vt. 374; Ins. Co. *v.* Griffin, 59 Tex. 509; 4 Wait Act. & Def. 80.

Waiver of forfeiture ensues by express language, acts intending to waive (but not inferrible from silence); such as transactions with assured after knowledge of forfeiture, recognizing continued validity of policy, or any act amounting to an estoppel,—Titus *v.* Ins. Co., 81 N. Y. 410;

ment of premium on the day due—time being of the essence of the contract;[1] against which equity will not grant relief,[2] unless facts exist which would establish an estoppel of the insurance company.[3]

**19. Of Policy of Fire Insurance.**[4]

**20. Of Policy of Life Insurance.**[5]

**21. Of Lease.**—The termination of the lease before the expiration of the term, by reason of the violation of some provision of the lease.[6]

**22. Of License.**—By some act of omission or commission in violation of the privilege or the condition upon which the privilege was granted.[7]

Brink *v.* Ins. Co., 80 N. Y. 108; Prentice *v.* Ins. Co., 77 N. Y. 483; Goodwin *v.* Ins. Co., 73 N. Y. 480; Oakes *v.* Ins. Co., 135 Mass. 248; Lewis *v.* Ins. Co., 63 Iowa, 193; Cannon *v.* Ins. Co., 53 Wis. 285; Ins. Co. *v.* Kittle, 39 Mich. 51;—such as denial of liability or grounds disconnected with proof of loss; or merely attacking the defects in the proof, without more,—Ins. Co. *v.* Sparks, 62 Ga. 187; Mosely *v.* Ins. Co., 55 Vt. 142; O'Brien *v.* Ins. Co., 52 Mich. 131; Ins. Co. *v.* Davidson, 67 Ga. 11; Ins. Co. *v.* Vining, 67 Ga. 661; Ins. Co. *v.* Shrimp, 16 Ill. App. 248;—or accepting proof without objection,—Keeney *v.* Ins. Co., 71 N. Y. 396; 27 Am. Rep. 60; 4 Wait Act. & Def. 81; Williams *v.* Ins. Co., 54 Cal. 440; Ins. Co. *v.* Flynn, 98 Pa. St. 627; Badger *v.* Ins. Co., 49 Wis. 389; Levy *v.* Ins. Co., 10 W. Va. 560; 27 Am. Rep. 598; Ins. Co. *v.* Archdeacon, 82 Ill. 236; s. c., 25 Am. Rep. 313; Rokes *v.* Ins. Co., 51 Md. 512; s. c., 34 Am. Rep. 323; Ins. Co. *v.* Morton, 96 U. S. 234;—or any act tending to execute the policy after knowledge of the forfeiture,—Robertson *v.* Ins. Co., 88 N. Y. 541; Couch *v.* Ins. Co., 25 Hun (N. Y.), 469; Haight *v.* Ins. Co., 92 N. Y. 51; Short *v.* Ins. Co., 90 N. Y. 16; s. c., 43 Am. Rep. 138; Bennett *v.* Ins. Co., 81 N. Y. 273; s. c., 37 Am. Rep. 501.

1. Giddings *v.* Ins. Co., 102 U. S. 108; 4 Wait Act. & Def. 103.

2. Klein *v.* Ins. Co., 104 U. S. 88; Ins. Co. *v.* Statham, 93 U. S. 24; Thompson *v.* Ins. Co., 104 U. S. 252; Atty.-gen. *v.* Ins. Co., 93 N. Y. 70; Ins. Co. *v.* Dietz, 52 Md. 16; Wheeler *v.* Ins. Co., 82 N. Y. 543; s. c., 37 Am. Rep. 594; Ins. Co. *v.* Lepert, 52 Tex. 504.

3. Appleton *v.* Ins. Co., 59 N. H. 541; s. c., 47 Am. Rep. 220; Ins. Co. *v.* Eggleston, 96 U. S. 572; Ins. Co. *v.* Pattker, 33 Ohio St. 459; s. c., 31 Am. Rep. 555; Meyers *v.* Ins. Co., 73 N. Y. 516; s. c., 29 Am. Rep. 200; Gerrard *v.* Ins. Co., 97 Pa. St. 15; Mandego *v.* Ins. Co., 64 Iowa, 134; Willcutts *v.* Ins. Co., 81 Ind. 300; People *v.* Ins. Co., 92 N. Y. 105.

4. Ins. Co. *v.* Smith, 73 Mo. 368; Wilson *v.* Ins. Co., 4 R. I. 159; Ins. Co. *v.* French, 39 Me. 522; Wood on Fire Insurance, ch. 20, 21.

5. Bliss on Life Ins. 272; May on Life Ins. ch. 15; Sansum Dig. Ins. § 900; Palmer *v.* Ins. Co., 84 N. Y. 63; Seamans *v.* Ins. Co., 3 Fed Rep. 325; Pritchard *v.* Ins. Co., 3 C. B. (N. S.) 642; 27 L. J. C. P. 169; Dimpson *v.* Ins. Co., 2 C. B. (N. S.) 295; Want *v.* Blunt, 12 East, 183; Ins. Co. *v.* Harding, 27 L. J. Q. B. 301.

6. Academy of Music *v.* Hacket, 2 Hilt. (N. Y.) 218; Clarke *v.* Jones, 1 Denio (N. Y.), 516; Clarke *v.* Cummings, 5 Barb. (N. Y.) 339; Delancy *v.* Ganong, 9 N. Y. 9. Such forfeiture may be waived by any act of the landlord affirming the existence of the lease and recognizing the lessee as tenant, after knowledge of the forfeiture. Crawford *v.* Waters, 46 How. (N. Y.) 210; Carroll *v.* Ins. Co., 10 Abb. N. S. (N. Y.) 166; Bleeker *v.* Smith, 13 Wend. (N. Y.) 530; Jackson *v.* Brownson, 7 Johns. (N. Y.) 227; Jackson *v.* Allen, 3 Cow. (N. Y.) 220; Ireland *v.* Nicholls, 46 N. Y. 413. In lease for years, a provision for re-entry upon forfeiture may be omitted, the lease becoming void upon breach of the condition without re-entry; but in lease for life, the lease is not void until lessor re-enters. Adams on Eject. 197; Penant's Case, 3 Coke, 64; Stuyvesant *v.* Davis, 9 Paige (N. Y.), 431; Arnsby *v.* Woodward, 6 Barn. & Cres. 519; Parmelee *v.* Railroad, 6 N. Y. 74. If a house is furnished to a hired man in addition to his wages, his ceasing to work forfeits his right to the house. McGee *v.* Gibson, 1 B. Mon. (Ky.) 165.

7. White *v.* Lee, 5 Bann. & Ard. 572; Dare *v.* Boyleston 6 Fed. Rep. 493; Wood *v.* Wells, 6 Fisher (U. S.), 383;

**23. Of Marriage.**—An ancient writ issuable against him who, holding by knight's service, being under age and unmarried, refused to marry the woman whom the lord offered him without disparagement, and married another.[1]

**24. Of Mortgage.**—Occurs upon breach of any or all of the conditions.[2]

**25. Of Office.**[3]

**26. Of Patents.**[4]

**27. For Non-payment of Rent.**—Depended upon the common-law demand for rent,[5] and re-entry.[6] Upon breach of the covenant to pay rent, demand therefor must be made, for the actual sum due, on the day due, shortly before sunset, at the most notorious place on the land—demand in fact, although no one there; and then re-entry is made, if no sufficient distress is found upon the premises, by going thereon, with witnesses, and declaring that, for want of sufficient distress and nonpayment demanded, mentioning the amount, he re-enters and repossesses himself of the premises.[7] This has been modified,[8] and, as modified, the rule generally prevails in this country.[9]

Steam Cutter Co. *v.* Sheldon, 10 Blatch. (U. S.) 1; Ins. Co. *v.* Eggleston, 96 U. S. 572. If the licensee continues to work under the license after forfeiture, the licensor can sue for infringement or for promised royalties. Woodworth *v.* Weed, 1 Blatch. (U.S.) 166; Cohn *v.* Rubber Co., 3 Bann. & Ard. (U. S.) 572; Union Mfg. Co. *v.* Lounsbury, 42 Barb. (N. Y.) 125; Woodworth *v.* Cook, 2 Blatch. (U. S.) 160; Burr *v.* Duryee, 2 Fisher (U. S.), 283; Wooster *v.* Mfg. Co., 23 Off. Gaz. 2513.

**Forfeiture for Lapse** of presentation.—1 Broom & Hadley, 705.

1. F. N. B. 141; Reg. Orig. 163; 2 Bl. Com. 70; Coke Litt. 78[b] 82[a]; 2 Inst. 92; 5 Coke, 126[b]; 6 Coke, 70[b].

2. Trimm *v.* Marsh, 54 N. Y. 599; 13 Am. Rep. 623; Smith *v.* Johns, 3 Gray (Mass.), 517; Stewart *v.* Crosby, 50 Me. 130; Simmons *v.* Brown, 7 R. I. 427; Swartz *v.* Leist, 13 Ohio St. 419; Power *v.* Lester, 23 N. Y. 527; 4 Kent Com. 133; Fletcher *v.* Holmes, 32 Ind. 497. And accepting payment after forfeiture is a waiver of the forfeiture. West *v.* Crary, 47 N. Y. 423; Phelps *v.* Hedrick, 105 Mass. 106. The civil law held the *thing* a pledge for a debt; and if not paid when due, the thing became the property of the debtor. During Constantine's reign, the law was enacted making the pledge merely security, which has continued to be the law of Europe. Mackeldey's Civil Law (by Kaufman), § 349; Domat Civ. L. 3, tit. 1, §§ 3, 11. Story on Bailm. § 311.

3. 1 Wait L. & Pr. 83, 87.

4. Pitts *v.* Hall, 2 Blatch. (U. S.) 238; McCormick *v.* Seymour, 2 Blatch. (U. S.) 256; Walker on Patents, § 108.

5. Co. Litt. 202; Jackson *v.* Harrison, 17 Johns. Ch. 66; Connor *v.* Bradley, 1 How. (U. S.) 211.

6. Rede *v.* Farr, 6 M. & S. 121; Reid *v.* Parsons, 2 Chitt. 247; Doe d. Freeman *v.* Bateman, 2 B. & Ald. 168.

7. Com. Dig. Rent, D, 3, 5. *a*; Bac. Ab. Rent, H; 18 Vin. Ab. 482; McCormick *v.* Connell, 6 S. & R. (Pa.) 151; Co. Litt. 203; 2 Rolle Ab. 428; 1 Saund. 287; Johnson *v.* Harrison, 17 Johns. Ch. (N. Y.) 66; Newman *v.* Rutter, 8 Watts (Pa.), 51; Lesley *v.* Randolph, 4 Rawle (Pa.), 123; Bedford *v.* McElherran, 2 S. & R. (Pa.) 50.

8. Roe *v.* Davis, 7 East, 363; Doe *v.* Paul, 3 Carr. & P. 613; Tenny *v.* Moody, 3 Bing. 3; 11 Eng. C. L. 12; 4 Geo. II. ch. 28; Jackson *v.* Kipp, 3 Wend. (N. Y.) 230; Front *v.* Roby, 15 Wall. (U. S.) 471; Gage *v.* Bates, 40 Cal. 284.

9. Bradley *v.* Connor, 5 Cranch (U. S.), 615; Boyd *v.* Talbert, 12 Ohio, 214; 3 Wait Act. & Def. 54. This modification has been accomplished by statute in some States, but mostly by the courts. 3 Wait Act. & Def. 54; Boyd *v.* Talbert, 12 Ohio, 214.

The forfeiture is saved by personal tender of rent, after demand made, but before midnight of the day when it became due; and in some of the States a tender at a later date will have that effect. Sush *v.* Druse, 4 Wend. (N. Y.) 313; Chapman *v.* Kirby, 49 Ill. 211; Blackman

**28. For Violation of Revenue Laws.**[1]

**29. By Statute.**[2]—When the statute declares that the doing or omitting to do a certain act shall be followed by forfeiture of the thing concerning which the act is to be done, but effective only by judicial proceedings.[3]

**30. Relief Against Forfeiture.**—At an early date, equity granted relief against forfeitures and penalties in cases where justice was grossly violated; as, where one bound in an obligation to pay money paid it, but took no acquittance or took an acquittance without seal.[4] This was extended to embrace forfeitures of bonds and mortgages, so as to permit redemption, notwithstanding a forfeiture at law.[5] And the rule has since been settled that relief is proper when the court can give, by way of compensation, all that was expected or desired;[6] in case of accident, mistake, fraud, or

*v.* Walsh, 44 Mo. 41; White *v.* McMurray, 2 Brewst. (Pa.) 485.

Such forfeiture may be waived by any act or word recognizing or acknowledging the tenancy—equivalent to an estoppel; such as receiving rent due at a subsequent quarter,—Collins *v.* Hasbrouck, 56 N. Y. 157; 15 Am. Rep. 407;—distraining for arrears, or giving a receipt therefor,—Jackson *v.* Sheldon, 5 Cow. 448; Coon *v.* Brickett, 2 N. H. 163; *contra*, Jackson *v.* Allen, 3 Cow. (N. Y.) 220;—but with knowledge of the forfeiture,—Jackson *v.* Brownson, 7 Johns. Ch. (N. Y.) 227.

The *English* cases hold that a bare acceptance of the rent after forfeiture is not a waiver unless attended by other circumstances showing intention to continue the tenancy, except in case of a lease for life, where the acceptance of such rent will affirm the lease. Adams on Eject. 173; Doe *v.* Birch, 1 Mees. & W. 402; Dendy *v.* Nicholl, 4 C. B. (N. S.) 376; 27 L. J. C. P. 220; Doe *v.* Johns, 1 Stark. 411; Grimwood *v.* Moss, 41 L. J. C. P. 239. But the American rule (founded on the doctrine of estoppel) is the best. Dermott *v.* Wallach, 11 Wall. (U. S.) 61; Collins *v.* Hasbrouck, 56 N. Y. 157; 15 Am. Rep. 407.

1. Cross *v.* U. S., 1 Gallis. (U. S.) 26; The Mars, 1 Gallis (U. S.), 192; The Ploughboy, 1 Gallis (U. S.), 41; The Salley, 8 Cranch (U. S.), 382; Gelston *v.* Hoyt, 3 Wheat. (U. S.) 246; The Josefa Segunda, 5 Wheat. (U. S.) 338; The Rochel *v.* U. S., 6 Cranch (U. S.), 29.

The U. S. district court has exclusive original jurisdiction in forfeitures, seizures, and penalties, under the *United States* laws. Act of Sept. 24, 1789; 8 Wheat. (U. S.) 395.

2. Walter *v.* Smith, 5 B. & A. 440; Van Diemans Land Co. *v.* Cockerell, 1 C. B. (N. S.) 744; Dimes *v.* Canal Co., 9 Q. B. 491; Day *v.* Frank, 127 Mass. 497; Lynde *v.* Thompson, 2 Allen (Mass.), 456; U. S. *v.* Distillery, 11 Blatchf. (U. S.) 255.

3; Fire Dept. *v.* Kip, 10 Wend. (N. Y.) 226. Such forfeiture is within the statute of fraudulent conveyancing. Twyne's Case, 3 Co. 80; s. c., Moore, 638.

4. 1 Spence Eq. Jur. 629; Underwood *v.* Swan, Car. 1; 1 Rep. Ch. 86.

5. Lennon *v.* Napper, 2 Sch. & Lefr. 684; Seton *v.* Slade, 7 Ves. 273; 1 Story Eq. Jur. § 89; Bostwick *v.* Stiles, 35 Conn. 195; Warner *v.* Bennett, 31 Conn. 468; Smith *v.* Jewitt, 40 N. H. 530.

6. Peachy *v.* Duke of Somerset, 1 Stra. 447; Stoman *v.* Walter, 1 Bro. Ch. 418; 2 White & Tud. Lead. Cas. 992; Snell Eq. 274. Extended by statute 22 & 23 Vict. c. 35. § 14; 23 & 24 Vict. c. 126, § 2, to forfeiture for breach of covenant to insure against fire. Wms. Real Prop. 384; Woodf. Land. & Ten. 297 *et seq.* The English conveyancing act of 1881, § 14, provides that forfeiture shall not be enforceable by action or otherwise unless and until lessor serves on lessee a notice specifying the breach and requiring him to remedy or compensate for the same, and lessee fails to comply within a reasonable time.

*Relief* from forfeiture is always proper when compensation in damages can be calculated with certainty. Giles *v.* Austin, 62 N. Y. 486; Rector *v.* Higgins, 48 N. Y. 533; Nelson *v.* Carrington, 4 Munf. (Va.) 332; Bracebridge *v.* Buckley, 2 Price (Exchequer), 200; Hill *v.* Barclay, 16 Ves. 402; Giles *v.* Austin, 46 How. (N. Y.) 269. For the failure of the precise performance. Walker *v.* Wheeler, 2 Conn. 299; Messersmith *v.* Messersmith, 22 Mo. 369; De Forest *v.* Bates, 1 Ed. Ch. (N. Y.) 394; Hagar *v.* Buck, 44 Vt. 285; 8 Am.

surprise, unmixed with laches;[1] when unjust for creditor to take advantage of forfeiture.[2] But equity will not interfere when the forfeiture is liquidated damages and proportionate, or when imposed by statute,[3] nor against the condition that, if interest is not paid when due, the whole amount would thereupon become due and payable.[4]

**31. Of Stock or Shares in Corporations.**[5]—For non-payment of principal or instalments, or any condition upon which the same was issued, if such power is expressly conferred by law or in the charter,[6] which must be strictly followed, without favor, collusion, or *mala fides*.[7] The power of forfeiture is a trust to be exercised in good faith for the benefit of the corporation and the general body of the members.[8] Forfeiture is the reclamation, by corpora-

Rep. 368; Voorhis *v.* Murphy, 26 N. J. Eq. 434; Malcolm *v.* Allen, 49 N. Y. 448; 2 Story Eq. Jur. § 1019.

1. Hancock *v.* Carlton, 6 Gray (Mass.), 39; Asher *v.* Pendleton, 6 Gratt. (Va.) 628.

2. Sanders *v.* Pope, 12 Ves. 289; Hill *v.* Barclay, 18 Ves. 60.

3. Powell *v.* Redfield, 4 Blatchf. (U. S.) 45; Reynolds *v.* Pitt, 19 Ves. 140; Green *v.* Bridges, 4 Sim. 96; Parker *v.* Butcher, L. R. 3 Eq. 762, 767; Nichols *v.* Maynard, 3 Atk. 519; Downey *v.* Beach, 78 Ill. 53; Capen *v.* Crowell, 66 Me. 282; Hubbard *v.* Callahan, 42 Conn. 524; s. c., 19 Am. Rep. 564; Herbert *v.* R. Co., L. R. 2 Eq. 221; Skinner *v.* White, 17 Johns. 369; Skinner *v.* Dayton, 2 Johns. Ch. (N. Y.) 535; Lowe *v.* Peers, 4 Burr. 22; 2 Poth. Ob. (by Evans) 85; Fonbl. Eq., B, 1, c. 3, § 3; Eden on Inj. 22; Hill *v.* Barclay, 16 Ves. 403; Eaton *v.* Lyon, 3 Ves. 692.

4. Ferris *v.* Ferris, 28 Barb. (N. Y.) 29; Reuben *v.* Prindle, 44 Barb. (N. Y.) 336; Voorhis *v.* Murphy, 26 N. J. Eq. 434; Sterne *v.* Beck, 1 De G. J. & S. 595.

5. Small *v.* Herkimer Mfg. Co., 2 Comst. (N. Y.) 330; Mills *v.* Stewart, 41 N. Y. 384; Stevens *v.* Hauser, 39 N. Y. 302; Bigg's Case, L. R. 1 Eq. 309; Woolaston's Case, 4 De G. & J. 445; Creyke's Case, L. R. 5 Ch. 63; *Ex parte* Barton, 28 L. J. Ch. 637; *Ex parte* Jones, 27 L. J. Ch. 668; Syster's Case, L. R. 4 Eq. 233; Snell's Case, L. R. 5 Ch. 22; Knights Case, 5 L. R. Ch. 707; 2 Add. Cont. 303.

6. Matter of Long Island R.. 19 Wend. (N. Y.) 37; Cotter *v.* Doty, 5 Ohio, 393; Small *v.* Herkimer Mfg. Co., 2 N. Y. 330; Plank Road Co. *v.* Vaughn, 20 Barb. (N. Y.) 155; Downing *v.* Patts, 23 N. J. 66; 2 Kyd on Corp. 109; Clark *v.* Tucket, 3 Lev. 281; Waltham *v.* Austin, 1 Bulstr. 11, 12; Kirk *v.* Nowill, 1 Term Rep. 118; 1 Waterman on Corp. 252; Perrin *v.* Granger, 30 Vt. 595; French *v.* Old South Soc., 106 Mass. 479; Rosenbach *v.* Salt Spgs. Nat. Bank, 53 Barb. (N. Y.) 495; Master Stevedors Assoc. 2 Daly (N. Y.), 14; Carton *v.* Father Mathew Assoc. 3 Daly (N. Y.), 20; Westcott *v.* Minn. Co., 23 Mich. 145; Pentz *v.* Citizens Co., 35 Md. 73; Barton's Case, 4 De G. & J. 46; Fletcher's Case, 37 L. J. Ch. 49; Clarke *v.* Hart, 6 H. L. 633; Lesseps *v.* Architects Co., 4 La. Ann. 316; Deitweiler *v.* Breckenkamp, 83 Mo. 45. The power to forfeit must be expressly conferred, because it is not inherent and does not exist at common law. Williams *v.* Lowe, 4 Neb. 382. If it is attempted to sell the stock for the payment of assessments, it is in the nature of a proceeding *in rem*, and the jurisdiction can only be exercised by having the thing in the custody of the law. Williams *v.* Lowe, 4 Neb. 382.

7. Green's Brice's *Ultra Vires* (2d Ed.), 186; R. Co. *v.* Fitler, 60 Pa. St. 124; R. R. *v.* Ritchie, 40 Mo. 425; Water Valley M. Co. *v.* Seaman, 53 Miss. 656; Klein *v.* R. Co., 13 Ill. 514; Mitchell *v.* Vermont C. M. Co., 40 N. Y. 406; Walker *v.* Ogden, 1 Biss. (U. S.) 287; Railroad *v.* Bolton, 48 Me. 441; Johnson *v.* Lyttle Iron Agency, 46 L. J. Eq. 786; Watson *v.* Eales, 23 Beav. 294; Eppes *v.* R. Co., 35 Ala. 33; Hughes *v.* Mfg. Co., 34 Md. 317; Heaston *v.* R. Co., 16 Ind. 275; Sands *v.* Sanders, 26 N. Y. 236; Turnpike Co. *v.* Meriwether, 5 B. Mon. (Ky.) 13; R. Co. *v.* Gaster, 20 Ark. 455. The following held that substantial compliance would be sufficient: Mining Co. *v.* McLister, L. R. 1 App. 39; Stokes *v.* Lebanon, etc., Co., 6 Humph. (Tenn.) 241.

8. Richmond's Case, 4 K. & J. 305; Sweney *v.* Smith, L. K. 7 Eq. 324; Green's Brice's *Ultra Vires*, 498;—and the capital stock is a trust fund for creditors,—Upton *v.* Tribilcock, 91 U. S. 45; Webster *v.* Upton, 91 U. S. 65;—and power of forfeiture must be exercised with justice and

tion, of the stock to its own use,[1]—another name for foreclosure.[2]

**32. Of Ship.**—By the *English* Shipping Act,[3] if any master or owner of a British ship conceals the British character of the ship or assumes a foreign character with intent to deceive any person entitled to inquire into the matter, the ship is forfeited to the crown.

**33. Of Tenancy.**—Takes place when the tenant does any act inconsistent with his tenancy; such as alienation, attorning to adverse claimant or stranger, accepting lease from stranger, wilfully disclaiming tenancy,[4] denial of landlord's title, or adverse claim of title,[5] illegal use,[6] or voluntary waste.[7]

**34. For Taxes.**—By non-payment. Without office found. Complete by legislative act, which must be strictly complied with and rigidly enforced. Common law does not apply.[8]

**35. Of Wages.**—By failure to perform contract.[9]

**36. Waiver Of.**—By any act or word amounting to an estoppel;[10] such as accepting rent,[11] receiving rent with knowledge of for-

in good faith,—Manisty's Case, 17 S. J. 745; Dixon *v.* Evans, L. R. 5 H. L. 606; Gower's Case, L. R. 6 Eq. 77; Stanhopes Case, L. R. 1 Ch. 161; Railroad *v.* Bowser, 48 Pa. St. 37; Mills *v.* Stewart, 41 N. Y. 386; Burke *v.* Smith, 16 Wall. (U. S.) 390; New Albany *v.* Burke, 11 Wall. (U. S.) 96; Putnam *v.* New Albany, 4 Biss. (U. S.) 365.

1. R. Co. *v.* Vason, 57 Ga. 314; Mason *v.* Caldwell, 5 Gilman (Ill.), 176; Richmond *v.* Caton, 24 Ill. 123; Carson *v.* Arctic Mining Co., 5 Mich. 288; Allen R. Co., 11 Ala. 437; R. Co. *v.* Pickens, 5 Ind. 247; R. Co. *v.* Inhab. of Prescot, 110 Mass. 213; R. Co. *v.* Fairclough, 2 Man. & Gr. 674; R. Co. *v.* Habetwhite, 2 M. & W. 715; R. Co. *v.* Kennedy, 4 Exch. 317.

2. Herkimer Co. *v.* Small, 21 Wend. (N. Y.) 273; Mills *v.* Stewart, 41 N. Y. 384; Danbury R. Co. *v.* Wilson, 22 Conn. 435; Mitchell *v.* R. Co., 17 Ga. 574. *Contra*, Ashton *v.* Burbank, 2 Dill. (U. S.) 435; Sparks *v.* Water-works Co., 13 Ves. Jr. 428; Smith *v.* Maine Boys Tunnel Co., 18 Cal. 111.

*Forfeiture* is a cumulative remedy, which may be deferred until the party has exhausted other remedies. Canal Co. *v.* Samson, 1 Binn. (Pa.) 70; Ferry Co. *v.* Jones, 39 N. H. 390; Conn. Co. *v.* Baily, 24 Vt. 465; Mechanics Co. *v.* Hall, 121 Mass. 272; R. Co. *v.* Wellington, 113 Mass. 79; N. O., etc., Co. *v.* Briggs, 27 La. Ann. 318; Spangler *v.* R. Co., 21 Ill. 270; Troy Co. *v.* McChesney, 21 Wend. (N.Y.) 296; R. Co. *v.* Thrall, 35 Vt. 536. It has been held that forfeiture of stock for non-payment of instalments is not relievable in equity. Sparks *v.* Liverpool Water-works, 13 Ves. 433.

3. Merch. Shipp. Act 1854, s. 103, § 2; The Amendale, 2 P. D. 179, 218.

4. Jackson *v.* Kingsley, 17 Johns. Ch. (N. Y.) 158; Sharpe *v.* Kelly, 5 Den. (N. Y.) 430; Jackson *v.* Vincent, 4 Wend. (N. Y.) 633; Bolton *v.* Landers, 27 Cal. 104; Brown *v.* Kellar, 32 Ill. 151.

5. Doe d. Cheeser *v.* Creed, 2 M. & P. 648; Landsell *v.* Gower, 17 Q. B. 589; Delancy *v.* Ganong, 9 N. Y. 9.

6. Machias Hotel Co. *v.* Fisher, 56 Me. 321.

7. London *v.* Greyne, Cro. Jac. 182; Jackson *v.* Tibbitts, 3 Wend. (N. Y.) 341.

8. 2 Desty on Tax. 782; Cooley on Tax. 461; Woodward *v.* Sloan, 27 Ohio St. 592; Magruder *v.* Esmay, 35 Ohio St. 221. Covenant to pay rent, taxes, and assessments, with right of re-entry upon default to pay rent, lessor can regain possession on lessee's failure to pay taxes. Byrane *v.* Rogers, 8 Minn. 281.

9. Decamp *v.* Stevens, 4 Blackf. (Ind.) 24; Boyle *v.* Parker, 46 Vt. 343; Patnote *v.* Saunders, 41 Vt. 66. If house is furnished to hired man in addition to a certain sum for wages for work, his ceasing to work forfeits his right to the house. McGee *v.* Gibson, 1 B. Mon. (Ky.) 105.

10. Hunter *v.* Osterhaudt, 11 Barb. (N. Y.) 33; Keeler *v.* Davis, 5 Duer (N. Y.), 507; Bowman *v.* Foot, 29 Conn. 331; Newman *v.* Rutter, 8 Watts (Pa.), 55; Ward *v.* Day, 33 L. J. Q. B. 254; Lash *v.* Druse, 4 Wend. (N. Y.) 313; Chapman *v.* Kirby, 49 Ill. 211.

11. McGlynn *v.* Moore, 25 Cal. 384.

feiture;[1] but receiving rent is not a waiver of breach of other covenant.[2]

**37. For Waste.**—For tenant for life, for years, in dower, by curtesy; to commit spoil or destruction voluntarily or permissively in houses, gardens, trees, or other corporeal hereditaments, to the disinherison of him who has the remainder or reversion in fee.[3]

**FORGE.**—See note 4.

**FORGERY.**


**I. Definition,** 453.
**II. Essentials of the Crime,** 457.
1. *False Making,* 458.
2. *Intent to Defraud,* 459.
3. *Must be Calculated to Deceive,* 461.
**III. How Accomplished,** 464.
1. *By False Making,* 465.
*a. By Use of Another's Name,* 465.
*b. By Falsely Procuring a Genuine Signature,* 467.
*c. By Fraudulent Alteration,* 468.
*d. By Use of Same Name,* 468.
*e. By Use of Fictitious Name,* 469.
*f. By Fraudulently Filling Blanks,* 471.
*g. By Fraudulently Using False Dates,* 472.
*h. By Making False Entries,* 472.
(1) *False Entries in Pass-books,* 472.
(2) *False Entries in Book of Original Entry,* 472.
(3) *False Entries in Book Settlements,* 473.
(4) *False Entries by Clerk in Books He is Employed to Keep,* 473.
2. *False Representations and Fraud,* 474.
3. *By False Alteration,* 475.
**IV. What Instruments May Be the Subject of Forgery,** 478.
1. *In General,* 478.
*a. General Rules,* 478.
*b. Instances,* 478.
**V. Who May Commit Forgery,** 489.
**VI. Uttering and Publishing,** 489.
1. *What is, Generally,* 489.
2. *Intent to Defraud,* 493.
3. *Possession with Intention to Utter,* 495.
4. *Distinction Between Uttering and Forging,* 496.
**VII. Matters of Defence,** 496.
**VIII. Venue and Jurisdiction,** 497.
**IX. Extradition,** 500.
**X. Indictment,** 500.
1. *Description of the Alleged Offence,* 500.
*a. Stating Offence in Alternative,* 503.
*b. Stating Offence in Different Phrases,* 504.
*c. Specifying Party to be Defrauded,* 504.
*d. Actual Damages Need Not be Averred,* 505.
*e. Variance,* 505.
2. *Averment of Guilty Knowledge,* 505.
3. *Averment of Intent to Defraud,* 506.
4. *Description of Instrument,* 510.
5. *Venue,* 522.
6. *Averment of Extrinsic Facts,* 523.
*a. Averment of Incorporation,* 525.
7. *Joinder,* 526.
**XI. Evidence,** 527.
1. *Competency of Witnesses,* 527.
2. *Proof of Guilty Knowledge and Fraudulent Intent,* 528.
*a. In General,* 528.
*b. Proof of Other Forgeries by Defendant,* 530.
*c. Proof of Uttering on Trial for Forging,* 531.
*d. Proof of Uttering on Trial for Uttering,* 531.
3. *Proof of Handwriting,* 534. (See HANDWRITING; see also EVIDENCE, EXPERT AND OPINION EVIDENCE.)


1. Ireland *v.* Nichols, 46 N. Y. 413; Watson *v.* Fletcher, 49 Ill. 498.

2. Bleeker *v.* Smith, 13 Wend. (N. Y.) 530; and see Doe *v.* Gladwin, 6 Q. B. 953; Jackson *v.* Allen, 3 Cow (N. Y.) 220; Dendy *v.* Nichols, 4 C. B. 376; Doe *v.* Miller, 2 Carr. & P. 348; Doe *v.* Bindley, 12 Moore, 37; Doe *v.* Meux, 4 Barn. & Cres. 606; Doe *v.* Watt, 1 Man. & Ry. 694.

3. 1 Hilly. Ab. §§ 34–48; 2 Bouv. Inst. 375; 2 Bl. Com. 281; Co. Litt. 53; Statute of Gloucester. In some States some of the provisions of this statute have been enacted. In others none of the provisions have been adopted.

4. A blacksmith's forge is not "a forge or furnace for the manufacture of iron. By a blacksmith's forge iron is not manufactured, but by it, from iron itself, machines or instruments of iron are manufactured." Rogers *v.* Danforth, 9 N. J. Eq. 289.

4. *Documents, and Secondary Evidence Thereof*, 534.
5. *Of Former Proceedings*, 536.
6. *Of Defendant's Pecuniary Condition*, 537.
7. *To Show the Forged Name Fictitious*, 537.
8. *To Show Capacity to Injure*, 537.
9. *Sufficiency*, 538.
10. *Question for Jury*, 541.
XII. Instructions, 541.
XIII. Verdict, 542.
XIV. Sentence, 543.
XV. Appeal, 543.
XVI. Punishment, 543.

## I. DEFINITION.—Forgery, at common law,[1] consists in falsely[2]

**1. At Common Law**, forgery seems more immediately confined to the falsification of records, and other instruments of a public nature, and also of private deeds and instruments under seal. By the decision in Ward's Case, 2 Ld. Raym. 1461, it was held, after solemn argument, that forgery might be in respect to any writing whatever by which another might be defrauded. People *v.* DeGraff, 1 Wheel. Cr. Cas. 203; 3 Chit. Cr. L. 760.

**2.** State *v.* Shurtliff, 18 Me. 368; Rex *v.* Webb, 3 Brod. & B. 228; s. c., Russ. & Ry. 405; cited, 6 Moore, 447; Reg. *v.* Inder, 1 Den. C. C. 325; Rex *v.* Aickles, 1 Leach (4th ed.), 438; s. c., 2 East P. C. 968; Rex *v.* Story, Russ & Ry. 81; Mead *v.* Young, 4 T. R. 28.

**Belief by Defendant that He Was Authorized to Sign.**—It has been said that it does not constitute forgery where one has fair ground to believe, and does believe, that he is authorized to sign another's name to an instrument, and does so sign it without any fraudulent design. Parmelee *v.* People, 8 Hun (N. Y.), 623; Reg. *v.* Parish, 8 Car. & P. 94; Rex *v.* Forbes, 7 Car. & P. 224. However, one who signs the name of a friend or relative, trusting that he will pay the debt and will not prosecute him, is guilty of forgery. Reg. *v.* Beard, 8 Car. & P. 143.

**Authority to Sign** may be inferred from failure to repudiate the signature when information of it is first brought to the party,—Reg. *v.* Smith, 3 Fost. & F. 504; —or from failure to repudiate previous forgeries by the same person,—Weed *v.* Carpenter, 4 Wend.(N.Y.) 219;—in some cases, from mere silence when called on to authorize the signing. Reg. *v.* Beardsall, 1 Fost. & F. 329.

**Acquiescence in Previous Forgeries.**—Where a person for a series of years forged the name of his friend as the indorser of his notes and bills, with the knowledge of his friend, who, although judgments were obtained and executions issued against him in suit on such forged indorsements, never disavowed such acts until the person committing the forgeries had absconded and fled from justice, it was held, in a case where indorser was sued and suffered a default, and at tempted no defence until after the escape of the maker of the notes, that proof of this fact was admissible in evidence, and that from it the jury might imply an authority from the indorser to the maker thus to use his name. Weed *v.* Carpenter, 4 Wend. (N. Y.) 219.

**Forgery of Deed—Signing as Attorney in Fact.**—Defendant W. was indicted for uttering a false deed, under a statute against forgery. It was shown that the deed was signed thus: "H., by W., his attorney in fact." *Held*, that this did not constitute the offence charged, although W. had no authority to act for H. Where one executes an instrument purporting on its face to be executed by him as the agent of a principal to execute the same, he is not guilty of forgery; the instrument is not a false or a forged deed, within the meaning of the statute. This is no false making of the instrument, but merely a false assumption of authority.

In State *v.* Young, 46 N. H. 266, the court say: "The term 'falsely' has reference, not to the contents or tenor of the writing, or to the fact stated in the writing, but implies that the paper is false, not genuine, fictitious, not a true writing, without regard to the truth or falsehood of the statement it contains." In Rex *v.* Arscott, 6 Car. & P. 408, the defendant had indorsed, on a bill of exchange, "Rec'd of R. Aikman, G. Arscott," Littledale, J., says: "To forge a receipt is writing the name of the person for whom it is received. But in this case the acts done by the prisoner were the receiving for another and signing his own name."

In Reg. *v.* White, 2 Car & K. 404; s. c., 2 Cox C. C. 210, a bill of exchange payable to the order of Thomas Tomlinson was indorsed by the prisoner, "Per procuration Thomas Tomlinson, Emanuel White." White had no authority whatever from Tomlinson. It was held, by a unanimous court of fifteen judges, that this was not forgery. In Heilbonn's Case, 1 Park. Cr. Cas. (N. Y.) 429, a bill of exchange had been made payable to the order of McIntosh & Co. It was indorsed by "Alex. Heilbonn." Heilbonn

making or materially altering[1] or uttering,[2] with intent to defraud,[3] a note or other instrument in writing,[4] which, if genuine,[5] might be

had no authority to take the indorsement. The court said: "It is the essence of forgery that one signs the name of another to pass it off as the signature of that other. This cannot be when the party openly and on the face of the paper declares that he signs it for another."

In Commonwealth *v.* Baldwin, 77 Mass. (11 Gray) 187, the prisoner made and delivered a note signed "Schouler, Baldwin & Co.," stating at the same time that he and Schouler composed the firm. There was no such partnership. It was held not to be forgery. The court say: "As a general rule, to constitute forgery the writing must purport to be the writing of another party than the person making it. The mere false statement or implication of a fact, not having reference to the person by whom the instrument is executed, will not constitute the crime." This case is referred to approvingly in Commonwealth *v.* Foster, 114 Mass. 311; and the court there say: "The distinction is plainly drawn between one who assumes to bind another, either jointly with himself or by procuration, however groundless and false may be the pretence of authority so to do, and one who signs in such a manner that the instrument may purport to be the actual signature of another party having the same name. To the same effect is Mann *v.* People, 15 Hun (N. Y.), 155; State *v.* Wilson, 28 Minn. 52; s. c., 24 Alb. L. J. 57.

1. United States *v.* Cameron, 3 Dak. 132; State *v.* Wooderd, 20 Iowa, 541; State *v.* Maas, 37 La. An. 292; State *v.* Robinson, 16 N. J. L. (1 Harr.) 507; Mann *v.* People, 15 Hun (N. Y.), 155; People *v.* Fitch, 1 Wend. (N. Y.) 198; s. c., 19 Am. Dec. 477; State *v.* Greenlee, 1 Dev. (N. C.) L. 523; State *v.* Gherkin, 7 Ired. (N. C.) L. 206; State *v.* Thornburg, 6 Ired. (N. C.) L. 79; s. c., 44 Am. Dec. 67; Com. *v.* Sankey, 22 Pa. St. 390; s. c., 60 Am. Dec. 91; State *v.* Rowe, 8 Rich. (S. C.) L. 20; State *v.* Floyd, 5 Strob. (S. C.) L. 58; s. c., 53 Am. Dec. 689; State *v.* Waters, 2 Tread. (S. C.) 669; Hill *v.* State, 1 Yerg. (Tenn.) 76; s. c., 24 Am. Dec. 441; State *v.* Phelps, 11 Vt. 116; s. c., 34 Am. Dec. 673; State *v.* McLeran, 1 Aik. (Vt.) 311; Reg. *v.* Blenkinsop, 1 Den. C. C. 276; Car. & K. 531; Rex *v.* Kinder, 2 East P. C. 855; Rex *v.* Treble, 2 Leach (4th ed.), 1040; s. c., 2 Taunt. 328; Russ. & Ry. 164; Rex *v.* Dawson, 1 Str. 19; s. c., 2 East P. C. 978; Rex *v.* Post, Russ. & Ry. 101.

2. United States *v.* Cameron, 3 Dak. 132; State *v.* Phelps, 11 Vt. 116; s. c., 34 Am. Dec. 672.

**Where Several Drafts are Uttered as One Individual Act,** the forgery of each is a separate offence. Barton *v.* State, 23 Wis. 587.

3. State *v.* Givens, 5 Ala. 747; Cohen *v.* People, 7 Colo. 274; s. c., 2 Denv. L. J. 136; Jackson *v.* Weisiger, 2 B. Mon. (Ky.) 214; State *v.* Maas, 37 La. An. 29; Grafton Bank *v.* Flanders, 4 N. H. 239, 242; People *v.* Peabody, 25 Wend. (N. Y.) 472; Com. *v.* Sankey, 22 Pa. St. 390; s. c., 60 Am. Dec. 91; Hill *v.* State, 1 Yerg. (Tenn.) 76; s. c., 24 Am. Dec. 441; State *v.* Odel, 3 Brev. (S. C.) 552; State *v.* Floyd, 5 Strobh. (S. C.) L. 58; s. c., 53 Am. Dec. 689; Reg. *v.* Beard, 8 Car. & P. 143; Reg. *v.* Page, 8 Car. & P. 122; Reg. *v.* Parish, 8 Car. & P. 94; Rex *v.* Forbes, 7 Car. & P. 224; Reg. *v.* Wilson, 2 Car. & K. 527; 1 Den. C. C. 284; Blake *v.* Allen, Sir F. Moore, 619; Rex *v.* Whiley, Russ & Ry. 90.

4. **Forgery of Artist's Signature to Picture.**—If a person knowingly sells, as an original, a copy of a picture, with the painter's name imitated upon it, and by means of the imitated name knowingly and fraudulently induces another to buy and pay for the picture as a genuine work of the artist, he may be indicted for a cheat at common law, by means of a false token; but he cannot be indicted for forging, or uttering the forged name of the painter, for the crime of forgery must be committed with some document in writing, and does not extend to the fraudulent imitation of a name put on a picture merely as a mark to identify it as a painter's work. Reg. *v.* Closs, Dears. & B. C. C. 460; s. c., 7 Cox C. C. 494; 27 L. J. M. C. 54; 3 Jur. N. S. 1309.

5. **Sufficiency to Effect Purpose Intended.**—It is perfectly immaterial whether the counterfeited instrument be such as, if real, would be effectual to the purpose it intends. If there is only a resemblance sufficient to impose upon those to whom it is uttered or to the public generally, it is sufficient. Whether the fraud be effected on the party to whom an instrument is addressed, or whose writing is counterfeited, or upon some third person who takes it upon the credit it assumes, is perfectiy immaterial. 3 Chit. Cr. L. 462.

But notwithstanding the validity of the instrument, if real, is immaterial, it must not appear on its face, so that no one of

of legal efficacy,[1] or might be the foundation of a legal liability.[2]

common understanding would give it credit. Thus, it will not be a forgery to fabricate a will of land, as attested by only two witnesses. 2 East P. C. 953.

1. People *v.* Galloway, 17 Wend. (N. Y.) 540, 542; People *v.* Fitch, 1 Wend. (N. Y.) 198; DeBow *v.* People, 1 Den. (N. Y.) 9; Com. *v.* Linton, 2 Va. Cas. 476; Rex *v.* McIntosh, 2 East P. C. 942; s. c. *sub nom.* Rex *v.* Teague, Russ. & Ry. 33, 2 East P. C. 969; Rex *v.* Mackintosh, 2 Leach (4th ed.), 883; Reg. *v.* Pike, 2 Moo. 70; Rex *v.* Deakins, 1 Sid. 142.

2. Van Horne *v.* State, 5 Pike (Ark.), 349; Ames's Case, 2 Me. (2 Greenl.) 365; Com. *v.* Chandler, Thatch. Cr. Cas. (Mass.) 187; Com. *v.* Ayer, 57 Mass. (3 Cush.) 150; Com. *v.* Mycall, 2 Mass. 136; State *v.* Van Hart, 17 N. J. L. (3 Harr.) 327; Harris *v.* People, 9 Barb. (N. Y.) 664; People *v.* Harrison, 8 Barb. (N. Y.) 560; People *v.* Shall, 9 Cow. (N. Y.) 778; People *v.* Cady, 6 Hill (N. Y.), 490; Barnum *v.* State, 15 Ohio, 717; s. c., 45 Am. Dec. 601; State *v.* Jones, 1 Bay (S. C.), 207; State *v.* Gutridge, 1 Bay (S. C.), 285; State *v.* Smith, 8 Yerg. (Tenn.) 150; Foulkes *v.* Com., 2 Rob. (Va.) 836; Rex *v.* Harris, 6 Car. & P. 129; Reg. *v.* Boult, 2 Car. & K. 604; Reg. *v.* Toshack, 1 Den. C. C. 492; Rex *v.* Wall, 2 East P. C. 953; Rex *v.* Jones, 2 East P. C. 991; Upfold *v.* Leit, 5 Esp. 100; Rex *v.* Gade, 2 Leach (4th ed.), 732; s. c., 2 East P. C. 874; Rex *v.* Ward, 2 Ld. Raym. 1461; s. c., 2 Str. 747; Rex *v.* O'Brian, 7 Mod. 378; Reg. *v.* King, 7 Mod. 150; Rex *v.* Harris, 1 Moo. C. C. 393; Rex *v.* Burke, Russ. & Ry. 496; Rex *v.* Knight, 1 Salk, 375; s. c., 1 Ld. Raym. 530; 1 Bish. Cr. L. § 572; 1 Horton Cr. L. § 563; 2 Russ. on Cr. (5th Eng. ed.) 618.

**Attempt to Imitate—New York Doctrine.**—Forgery is the attempted imitation of another's personal act, and by means of such imitation to cheat and defraud, and not the doing of something in the name of another, which does not profess to be the other's personal act, but that of the doer thereof; who claims and insists by and in the act itself, that he is authorized to obligate the individual whom he is assuming to obligate precisely as he undertakes to do. Mann *v.* People, 15 Hun (N. Y.), 155.

**Forgery is the Signing by One, Without Authority**, and falsely and with intent to defraud, the name of another to an instrument which, if genuine, might apparently be of legal efficacy or the foundation of a legal liability. State *v.* Thompson, 19 Iowa, 299; State *v.* Kimball, 50 Me. 409; Ames's Case, 2 Me. (2 Greenl.) 365; Com. *v.* Chandler, Thach. Cr. Cas. (Mass.) 187; Com. *v.* Ayer, 57 Mass. (3 Cush.) 150; People *v.* Krummer, 4 Park. Cr. Cas. (N. Y.) 217; Barnum *v.* State, 15 Ohio, 717; s. c., 45 Am. Dec. 601; Com. *v.* Searle, 2 Binn. (Pa.) 332; s. c., 4 Am. Dec. 446; State *v.* Holly, 2 Bay (S. C.) L. 252; State *v.* Smith, 8 Yerg. (Tenn.) 151.

**The Making or Alteration of an Instrument**, with a fraudulent intent, and without authority, completes the offence before any injury is sustained by any person. Nor is it necessary the whole instrument should be made fictitious; making an alteration or erasure in any material part of a true instrument, whereby another may be defrauded, is a forgery. A false signature to a true instrument, or a real signature to a false one, are forgeries. The alteration of the date of a bill of exchange after acceptance, by which payment may be accelerated, is a forgery. 4 T. R. 320. But the instrument must be false in itself; for if a man pass for another who is the maker or indorser of a true instrument, it is not a forgery, although he may be punished under the statute of false pretences. 3 Chitty Cr. L. 465. The instrument must bear a resemblance to that which it is intended to represent; but it is not necessary that it should be perfect, or even a correct copy. It is sufficient if it bears such a resemblance as to impose upon mankind, although an individual skilled in that kind of writing would detect its fallacy. 2 East P. C. 950; 1 Leach, 229.

**Intent to Damage or Defraud—Colorado Doctrine.**—The statute makes the offence of forgery to consist in forging or counterfeiting the handwriting of another, with intent to damage or defraud such person. Cohen *v.* People, 7 Colo. 274; s. c., 2 Denv. L. J. 156.

**Must be Without Legal Authority—Texas Doctrine.**—To sustain an indictment for forgery, within the meaning of Paschal Dig. 1093, the instrument charged to be forged must be alleged and proved to have been made without legal authority. A charge to the jury that the mere making of the forged instrument is sufficient, is erroneous; the gist of the offence is that it was made without lawful authority. Shanks *v.* State, 25 Tex. 326.

**Purporting to Be the Act of Another.**—Forgery is the false and fraudulent making, or uttering, or alteration of a written instrument, purporting to be the act of some other person, which it is not.

That any person should be actually injured[1] by the making of any[2] instrument with intent to defraud, without any uttering, amounts

United States *v.* Cameron, 3 Dak. 132; State *v.* Phelps, 11 Vt. 116; s. c.,34 Am. Dec. 672.

**Forgery of Order for Goods.**—It is not necessary, to constitute a forgery of an order for the delivery of goods, within the first section of the seventh division of the penal code of Georgia, that the person whose name is forged have goods in the hands of the drawee. Hoskins *v.* State, 11 Ga. 92.

H., without authority, drew an order upon A. for goods to a certain amount, and signed K.'s name to it with the fraudulent purpose of obtaining goods on K.'s credit. *Held*, that no acceptance of the order was necessary to constitute forgery. Hale *v.* State, 1 Coldw. (Tenn.) 167; s. c., 78 Am. Dec. 488.

**Forgery of a Seal.**—To constitute forgery of a seal, the instrument to which the seal is appended must be regular in form and apparently legal. Fadner *v.* People, 33 Hun (N. Y.), 240.

**A Species of Fraud.**—Forgery at common law was only a species of fraud, and punishable as a misdemeanor. It was often intermingled with false personating, to which it seems very closely allied. It was at one time doubted whether forgery could be of any other writings but those of a public kind. In Ward's Case, 2 Ld. Raym. 1461, it was decided that forgery at common law might be committed of any writing whatever by which another might be defrauded; and this case has been decided to be good law in this country.

**In England**, a great number of very penal statutes have been enacted by Parliament defining the crime and declaring the punishment; and prosecutions in that country are always brought under one of those statutes.. In New York there is a statute declaring what will be forgery, and also fixing the punishment. Rev. L. vol. 1, p. 404.

In the case of People *v.* Fitch, 1 Wend. (N. Y.) 198; s. c., 19 Am. Dec. 477, the court say that forgery has often been defined by learned jurists. By Mr. Justice Blackstone, "Forgery is the fraudulent making or alteration of a writing, to the prejudice of another's right;" by Buller, J., "the making of a false instrument with intent to deceive;" by Baron Eyre, "a false signature with intent to deceive." Again, "the false making an instrument which purports on the face of it to be good and valid for the purposes for which it was created, with a design to defraud;" by Grose, J., "the false making of a note or other instrument with intent to defraud;" by Mr. East, "the false making of any written instrument for the purpose of fraud and deceit" (2 East P. C. 852, 853); by Mr. Chitty, "the false making or alteration of such writings as either at common law or by statute are subject of forgery, with intent to defraud another. 3 Chit. Cr. L. 1022. This writer notices a distinction between forgery and fraud: that the latter must actually take effect, while the former is complete, though no one is actually injured if the tendency and intent to defraud be manifest. As to what false making is necessary to constitute the offence, it has been held that a party may make a false deed in his own name—by antedating, for instance, so as to prejudice a prior grantee. So by indorsing a bill of exchange in his own name, when he is not the real payee. East P. C. 855; 4 T. R. 28. "On this principle, we held Peacock guilty of forgery for indorsing the permit for the delivery of a quantity of coal with his own name, knowing that he was not the real consignee of the coal, though of the same name." People *v.* Peacock, 6 Cow. (N. Y.) 72. So making a fraudulent alteration or erasure in any material part of a true instrument, or any alteration which gives it a new operation,—as by altering the date of a bill of exchange after acceptance, whereby the payment was accelerated." 4 T. R. 320; 3 Chit. Cr. L. 1038; 2 East P. C. 855.

1. Williams *v.* State, 61 Ala. 33; Rembert *v.* State, 53 Ala. 467; s. c., 25 Am. Rep. 639; Jones *v.* State, 50 Ala. 161; State *v.* Wooderd, 20 Iowa, 541; Arnold *v.* Cost, 3 Gill & J. (Md.) 219; s. c., 22 Am. Dec. 302; Com. *v.* Ladd, 15 Mass. 526; State *v.* Jones, 9 N. J. L. (4 Halst.) 357; s. c., 17 Am. Dec. 453; People *v.* Fitch, 1 Wend. (N. Y.) 198; s. c., 19 Am. Dec. 477; State *v.* Washington, 1 Bay (S.C.), 120; s. c., 1 Am. Dec. 601; Reg. *v.* Nash, 2 Den. C. C. 493; Rex *v.* Ward, 2 East C. L. 851; s. c., 2 Ld. Raym. 1461; s. c., 2 Str. 747; King *v.* Crocker, 2 Leach, 987; Rex *v.* Goate, 1 Ld. Raym. 737.

If the person intended to be defrauded could not have been imposed upon, the crime could nevertheless have been complete. Williams *v.* State, 61 Ala. 33.

2. State *v.* Givens, 5 Ala. 747; People *v.* Peabody, 25 Wend. (N. Y.) 472; Com. *v.* Chandler, Thach. Cr. Cas. (Mass.) 187;

to the crime of forgery.[1] It is not necessary, to constitute the offence of forgery, that the person whose name is signed, and who purports to become liable under the writing, should be in existence at the time: it is sufficient where the name is a mere fictitious name;[2] for the act may be equally an attempt to defraud.

II. **Essentials of the Crime.**—The essential ingredients of forgery are: (1) The false making of some instrument in writing; (2) a fraudulent intent;[3] (3) the instrument must be apparently capable of effecting a fraud.

Rex *v.* Sheppard, 1 Leach (4th ed.), 226; Reg. *v.* Avery, 8 Car. & P. 596; Rex *v.* Sheppard, 2 East P. C. 967; s. c. *sub nom.* Rex *v.* Wilks, 2 East P. C. 957; Rex *v.* Lewis, 2 East P. C. 957; Fost. 116; Rex *v.* Parkes, 2 Leach (4th ed.), 775; 2 East P. C. 963, 992; Rex *v.* Bolland. 1 Leach (4th ed.), 83; East P. C. 958; Rex *v.* Dunn, 1 Leach (4th ed.), 57; Rex *v.* Taft, 1 Leach (4th ed.), 172; 2 East P. C. 959; Reg. *v.* Hill, 2 Moo. 30; Rex *v.* Peacock, Russ. & Ry. 278; Rex *v.* Bontien, Russ. & Ry. 260; Rex *v.* Francis, Russ. & Ry. 209; Rex *v.* Whiley, Russ. & Ry. 90; Rex *v.* Marshall, Russ. & Ry. 75.

1. Com. *v.* Stephens, 10 Mass. 526.

**Necessity of Uttering.**—The forged instrument need not have passed, and goods or money obtained on it, to warrant a conviction. Keeler *v.* State, 15 Tex. Ap. 111. In 2 Russell on Crimes (5th Eng. ed.), 618, it is said: "It should be observed that the offence of forgery, though there be no publication or uttering of the forged instrument. For the very making with a fraudulent intention, and without lawful authority, of any instrument which, at common law or by statute is the subject of forgery, is of itself a sufficient completion of the offence, before publication; and though the publication be the medium by which the intention is usually made manifest, yet it may be proved as plainly by other evidence. 2 East P. C. ch. 19, § 4, p. 855. Thus, in the case where a note, which the person was charged with having forged, was not published, but was found in his possession at the time he was apprehended, no objection was taken to the conviction, on the ground of the note not having been published, there being in the case circumstances sufficient to warrant the jury in finding a fraudulent intention. Elliott's Case, 1 Leach C. C. 175; 2 East P. C. ch. 19, § 44, p. 951; 2 New Rep. 93, note a; Crocker's Case, R. & R. 97; s. c., 2 Leach C. C. 987.

**Acceptance of Forged Order for Goods.**—In Hale *v.* State, 1 Coldw. (Tenn.) 167; s. c., 78 Am. Dec. 488, it is said that where the statute declares that "forgery is the fraudulent making or alteration of any writing to the prejudice of another's name," it is forgery to sign another's name to an order for goods without authority, and for the fraudulent purpose of obtaining goods on credit of the party whose name is forged. Acceptance of the forged order for the goods is unnecessary to make out the offence of forgery, the court say: "It is sufficient that the fraudulent intention existed, and that the forgery might have resulted if his object had been accomplished." Com. *v.* Ladd, 15 Mass. 526; State *v.* Humphreys, 10 Humph. (Tenn.) 442.

2. Reg. *v.* Nash, 2 Den. C. C. 493; 1 Whart. Cr. L. § 694. *Compare* 2 Bish. Cr. L. (6th ed.) § 599.

**Signing Fictitious Name.**—And it was decided, upon solemn argument, that a forgery in the name of a person who has no existence is a criminal, and as much a forgery within the statutes as if there was an intent to defraud the individual whose handwriting is counterfeited. Rex *v.* Bolland, 1 Leach C. C. 83. The cases are explicit and satisfactory upon this point. To put a false and fictitious name on a bill indorsed in blank, in order to circulate it with secrecy, is a forgery. 1 Leach C. C. 215. To counterfeit a power of attorney purporting to be by the administratrix and daughter of a seaman, who had no child at his death, is a capital forgery. The forgery of an instrument purporting to be the last will is taken as within the statutes, although the supposed testator is living. 1 Leach, 449. The fabrication of an order for payment of a sailor's prize-money is forgery, though it is invalid as wanting the requisites required by statute. 2 Leach C. C. 883. Forgery of a protection in the name of a member of Parliament, who was not so, is indictable. Sid. 142. So it has been adjudged a felony, within 5 Eliz. c. 14, to counterfeit a conveyance with a wrong name, although the conveyance would have been void if it were genuine. 1 Keb. 803; 3 Keb. 51.

3. 2 Russ.on Cr. (5th Eng. ed.), 618.

**1. False Making.**—It is of the essence of the crime of forgery that there should be a false making of an instrument apparently genuine;[1] but the mere false making, without the intent to defraud some one, does not constitute the crime of forgery.[2] The act done must be performed with the intent that it shall appear to be the act of another, or that it is other than that which it really is. Consequently, it is not forgery to sign one's own name, though with false pretence of authority to bind another person. Thus, it has been held that the mere indorsement of a bill with the party's own name, assuming to act for the owner of the bill, is not forgery;[3] because in such case there is no false making. The falsehood precedes the making, and the indorsement itself is precisely what it purports to be.[4] And it is not forgery for a person to make a false charge in his own books[5] or fraudulently to alter the date of a satisfied order.[6]

It has been said that every instrument which purports to be what it is not, whether executed by a person who is not the person purporting to execute it, or bearing a date which is not the true date, makes the instrument a false one, and is therefore forgery.[7] But this proposition is too broad a statement of the doctrine as recognized by the American courts; yet it is undoubtedly true that there may be a false making of an instrument in a person's own name, as where one signs his own name to an instrument with the intention to have it received as having been executed by another person of the same name.[8]

1. Barnum *v.* State, 15 Ohio, 717, 721; s. c., 45 Am. Dec. 601.

2. Fox *v.* People, 95 Ill. 71.

3. Reg. *v.* White, 1 Den. C. C. 208.

4. It is said by Lord Coke that, "To forge is metaphorically taken from the smith, who beateth upon his anvil and forgeth what fashion or shape he will." 3 Co. Inst. 168, 169.

5. State *v.* Young, 46 N. H. 266; s. c., 78 Am. Dec. 212.

**False Charge in Books.**—In State *v.* Young, *supra*, it is said that the rule seems to be that the "writing or instrument which may be the subject of forgery must generally be, or purport to be, the act of another, or it must at the time be the property of another, or it must be some writing or instrument under which others have acquired some rights or have become liable in a certain way, and where these rights or liabilities are sought to be affected or changed by the alteration without their consent."

6. People *v.* Fitch, 1 Wend. (N. Y.) 198; s. c., 19 Am. Dec. 477.

**Changing Date of Order.**—In the case of People *v.* Fitch, *supra*, an alteration of the date of an order for the delivery of goods, made by the defendant with the fraudulent purpose of using it in evidence as a defence to a note made by him, was held not to be forgery, because there was no false making. The court say: "There was no false making. The order purported to be drawn by the defendant, and it was so drawn; it purported to be dated the 14th of November, and was so dated."

7. Reg. *v.* Ritson, L. R. 1 C. C. 200; s. c., 39 L. J. M. C. 10.

8. See Mead *v.* Young, 4 T. R. 28. This was a case where a person, who came into possession of a bill payable to another person by the same name, fraudulently indorsed and passed it as his own.

**Making a False Deed in Own Name.**—In People *v.* Fitch, 1 Wend. (N. Y.) 198; s. c., 19 Am. Dec. 477, it is said that, "as to what false making is necessary to constitute the offence, it has been held that a party may make a false deed in his own name, so as to prejudice the prior grantee. So by indorsing a bill of exchange in his own name, when he is not the real payee. Mead *v.* Young, 4 T. R. 28; 2 East P. C. 855. On this principle, we held Peacock guilty of forgery for indorsing the permit for the delivery of a quantity of coal with his own name, knowing that he was not the real consignee of

**2. Intent to Defraud.**—Another of the elements of forgery, which is of the very essence of the offence, is the intent to defraud;[1] for if one signs the name of another to an instrument, in the honest belief that he has authority to do so, it negatives the intent to defraud.[2] But to constitute the offence, there must

the coal, though of the same name. People *v.* Peacock, 6 Cow. (N. Y.) 72. So of making a fraudulent alteration or erasure in any material part of a true instrument, or any alteration which gives it a new effect—as by altering the date of a bill of exchange after acceptance, whereby the payment was accelerated." See Masters *v.* Miller, 4 T. R. 320; 3 Chit. Cr. L. 1038; 2 East P. C. 855.

1. Phillips *v.* State, 17 Ga. 461; Fox *v.* People, 95 Ill. 71; State *v.* Pierce, 8 Iowa, 231; Arnold *v.* Cost, 3 Gill & J. (Md.) 219; s. c., 22 Am. Dec. 302; Com. *v.* Foster, 114 Mass. 311; s. c., 19 Am. Rep. 353; Com. *v.* Ladd, 15 Mass. 526; State *v.* Eades, 68 Mo. 150; s. c., 30 Am. Rep. 780; State *v.* Redstrake, 39 N. J. L. (10 Vr.) 365; People *v.* Stearns, 21 Wend. (N. Y.) 409; People *v.* Fitch, 1 Wend. (N. Y.) 198; s. c., 19 Am. Dec. 477; Barnum *v.* State, 15 Ohio, 717; s. c., 45 Am. Dec. 601; Hess *v.* State, 5 Ohio, 5; s. c., 22 Am. Dec. 767; State *v.* Washington, 1 Bay (S. C.), 120; s. c., 1 Am. Dec 601; State *v.* Floyd, 5 Strobh. (S. C.) L. 58; s. c., 53 Am. Dec. 689; Snell *v.* State, 2 Humph. (Tenn.) 347; Montgomery *v.* State, 12 Tex. App. 323; State *v.* Shelters, 51 Vt. 105; s. c., 31 Am. Rep. 679; Kerr *v.* Force, 3 Cr. C. C. 43; United States *v.* Moses, 4 Wash. C. C. 726; United States *v.* Houghton, 14 Fed. Rep. 544; s. c., 4 Cr. L. Mag. 243; Reg. *v.* Dunlop, 15 Up. Can. Q. B. 118; Reg. *v.* Craig, 7 Up. Can. C. P. 239; Rex *v.* Powell, W. Bl. 787; Rex *v.* Martin, 7 Car. & P. 549; Rex *v.* Holden, 2 Taunt. 334; Briggs's Case, 3 P. Wms. 119; 2 Bish. Cr. L. (6th ed.) §§ 506–601; 1 Whart. Cr. L. (8th ed.) § 653.

**The Very Essence of the Offence is the Intent to Defraud.**—But it is perfectly immaterial whether any person is actually defrauded or not. If the forgery appears to have been done with a view of gaining any advantages to the party himself, or prejudicing a third person, it is sufficient. And in Briggs's Case, 3 P. Wms. 119, it was held no objection that the forgery was found, by a special verdict, not to have been committed for the sake of lucre or to defraud the party. 1 Campb. 324; 2 Leach, 983; 1 New Rep. 92; Chitty C. L. vol. 1, p. 387; 2 Stra. 747; 2 Ld. Raym. 1461.

**Forgery at Common Law** was considered a species of fraud, and might have been committed of any writing by which another might be defrauded. The fraudulent intent was the essence of the offence, and must have been alleged and proved. Hess *v.* State, 5 Ohio, 5; s. c., 22 Am. Dec. 767.

**Belief that he had the Right.**—Where the evidence in support of an indictment for forgery fails to show criminal intent, and is consistent with the theory that defendant, in indorsing a check, did only what he believed he had a right to do, a verdict of conviction will not be sustained. Montgomery *v.* State, 12 Tex. App. 323.

**Incapacity to Execute Instrument.**—It is not essential to the crime of forgery that the person in whose name the instrument purports to be made shall have legal capacity to make it. It is sufficient, under Mo. Rev. Stat. (Wag. Stat. § 16, p. 470), if it is made with intent to defraud, and on its face would be likely to defraud. Thus, the making of a false municipal certificate of indebtedness, with intent to injure and defraud, is forgery, notwithstanding the municipality may have no power to issue such certificate. State *v.* Eades, 68 Mo. 150, s. c., 30 Am. Rep. 180.

**Forgery of Pay-roll.**—In order to a conviction under U. S. Rev. Stat. § 5418, the jury must be satisfied beyond a reasonable doubt: (1) That the time and pay-roll described in the indictment was a false, forged, and counterfeit writing; (2) that it was transmitted to the proper officer of the government by the defendant; and (3) that the falsity of the writing was known by the defendant at the time of sending it, and that it was sent with the intent to defraud the United States. Where one intends to do what he knows is forbidden by law, no other evil intent need be shown. The law infers the intent to defraud from such an act; and knowledge of the false character of the pay-roll, when transmitted, raises the inference of a fraudulent intent. United States *v.* Houghton, 14 Fed. Rep. 544; s. c., 4 Cr. L. Mag. 243.

2. See Com. *v.* Whitney, Thach. C. C. (Mass.) 588; Parmelee *v.* People, 8 Hun (N. Y.), 623; Reg. *v.* Beard, 8 Car. & P. 142; Reg. *v.* Parish, 8 Car. & P. 94; Rex *v.* Forbes, 7 Car. & P. 224.

**Authority to Sign.**—It is said, in the case of Parmelee *v.* People, 8 Hun (N. Y.),

be not only an intent to defraud and injure, but a possibility of defrauding some person.[1]

It has been held that intent to defraud a particular person is unnecessary to constitute forgery, a general intent to defraud being sufficient;[2] and it is not necessary that any person should be actually defrauded.[3] And it is of no consequence that the person actually intended to be defrauded could not have been imposed upon,[4] or that there is no person in existence in a condition or situation to be defrauded;[5]

623, that the proof that one indicted for forgery had reasonable grounds for believing that he had authority to sign the name of another entitles him to acquittal; citing Reg. *v.* Beard, 8 Car. & P. 143; Reg. *v.* Parish, 8 Car. & P. 94; Rex *v.* Forbes, 7 Car. & P. 224.

**1.** Com. *v.* Henry, 118 Mass 460

**2.** Arnold *v.* Cost, 3 Gill & J. (Md.) 219; s. c., 22 Am. Dec. 302; Tatlock *v.* Harris, 3 T. R. 176; 2 Chitt. Cr. L. 796, 1036. *Compare* Williams *v.* State, 51 Ga. 535; s. c., 1 Am. Cr. Rep. 227; State *v.* Harrison, 69 N. C. 143; s. c., 1 Green Cr. Rep. 537.

**Intention to Defraud Particular Person.**—Some of the States, however, hold that there must be an intent to defraud some particular person, and that the indictment must specify such person.

In Barnum *v.* State, 15 Ohio, 717; s. c., 45 Am. Dec. 601, the court say that, "to constitute forgery, there must be the fraudulent making or alteration of the instrument, with the intent to defraud some one. That intent must be laid, and the person on whom it was designed to operate; and the indictment must charge both duly. And the instrument must be such that it may have the tendency precisely which is averred." See Williams *v.* State, 51 Ga. 535.

**In England** since the statute of 15 Vict. c. 100, § 8, although there must be an intent to defraud a particular person, it need not be specifically alleged. Reg. *v.* Hodgson, 7 Cox C. C. 122; s. c., Dears. & B. C. C. 3. In the last case, the prisoner was indicted for forgery for counterfeiting a diploma of the College of Surgeons and hanging it up in his house, and exhibiting it to visitors as genuine. The court held that this was not forgery, because there was no intent to defraud any person in particular.

**3.** Williams *v.* State, 61 Ala. 33; Rembert *v.* State, 53 Ala. 467; s. c., 25 Am. Rep. 639; Jones *v.* State, 50 Ala. 161; Dunn *v.* People, 4 Colo, 126; State *v.* Pierce, 8 Iowa, 231; Arnold *v.* Cost, 2 Gill & J. (Md.) 219; s. c., 22 Am. Dec. 307; Com. *v.* Ladd, 15 Mass. 526; State *v.* Jones, 9 N. J. L. (4 Halst.) 357; s. c., 17 Am. Dec. 483; People *v.* Fitch, 1 Wend. (N. Y.) 198; s. c., 19 Am. Dec. 477; Hess *v.* State, 5 Ohio, 5; s. c., 22 Am. Dec. 767; State *v.* Lurch, 12 Oreg. 99; Pennsylvania *v.* Misner, Addis. (Pa.) 44; State *v.* Washington, 1 Bay (S. C.) 120; s. c., 1 Am. Dec. 601; Snell *v.* State, 2 Humph, (Tenn.) 347; Henderson *v.* State, 14 Tex. 503; Com. *v.* Goodenough, 1 Thach. C. C. (Mass.) 132; Reg. *v.* Hathaway, 8 Low. Can. J. 285; 2 Arch. C. Pr. 803; Rex *v.* Ward, 2 East C. L. 861; s. c., 2 Ld. Raym. 461; 2 Str. 747; King *v.* Crocker, 2 Leach, 987; Rex *v.* Goate, 1 Ld. Raym. 737; Rex *v.* Crooke, 2 Str. 901.

**Concurrence of Guilty Knowledge and Intent.**—The crime is complete when the act and guilty knowledge concur with the intent to defraud. So, where a forged check was passed in consideration of illicit intercourse, and of cigars and liquors sold without license at a house of prostitution, *held*, that the illegality of the consideration did not affect the criminal character of the act. Dunn *v.* People, 4 Colo. 126.

**4.** Williams *v.* State, 61 Ala. 33; Reg. *v.* Hoatson, 2 Car. & K. 777; Reg. *v.* Marcus, 2 Car. & K. 356; Rex *v.* Holden, Russ. & R. C. C. 154.

**5.** Billings *v.* State, 107 Ind. 54; s. c., 57 Am. Rep. 77; State *v.* Pierce, 8 Iowa, 231; Henderson *v.* State, 14 Tex. 503; Reg. *v.* Nash, 2 Den. C. C. 493; s. c., 12 Eng. L. & Eq. 578; 1 Whart. Cr. L. § 694; Rex *v.* Holden, Russ. & R. C. C. 154.

**No Person to be Defrauded.**—Mr. Bishop, however, maintains a contrary opinion. He says: "The English judges were divided upon the question whether, in the absence of evidence of some one existing on whom the fraud could operate, in the case of a forged will, a count charging an intent to defraud a person unknown could be supported. Reg. *v.* Tuffs, 1 Den. C. C. 319. And under Stat. 13 & 14 Vict. c. 100, § 8, which

it being enough if injury may possibly be inflicted in the future.[1]

**3. Must be Calculated to Deceive.**—To constitute forgery, the instrument when forged must be such as would tend to prejudice the rights of another,[2] and such in law as would be available to work the intended fraud or injury;[3] the distinguishing characteristic being the crafty fraud and deceit whereby it is designed to injure some one.[4] The resemblance of the forged to the genuine instrument must be such as might deceive a person of ordinary caution or observation[5] or a person of ordinary business capaci-

provided, that 'It shall be sufficient, in any indictment for forging, uttering, offering, disposing of, or putting off any instrument whatsoever, or for obtaining, or attempting to obtain, any property by false pretences, to allege that the defendant did the act with intent to defraud any particular person; and, on the trial of any of the offences in this section mentioned, it shall not be necessary to prove an intent on the part of the defendant to defraud any particular person, but it shall be sufficient to prove that the defendant did the act charged, with an intent to defraud.' (Re-enacted, slightly changed terms, 24 & 25 Vict. c. 98, § 44.) The opinion of the judges seemed to be, that the offence might be committed, though there were no person in existence on whom the fraud could operate. Reg. *v.* Nash, 2 Den. C. C. 493; s. c., 12 Eng. L. & Eq. 629. But afterward, on full consideration, they decided that this statute concerns only the form of the indictment, not the law relating to the offence, which stands now as it stood before; there being, it seems, a necessity for some person to exist who can be defrauded." Reg. *v.* Hodgson, Dears. & B. C. C. 493; s. c., 36 Eng. L. & Eq 626. In another place, he says: "If there is in existence no being or corporation to be injured by the cheat . . . ,—State *v.* Givens, 5 Ala. 747; People *v.* Peabody, 25 Wend. (N. Y.) 472; Reg. *v.* Tuffs, 1 Den. C. C. 319;—or, if the forged writing, were it genuine, would be neither apparently nor really valid in law,—People *v.* Harrison, 8 Barb. (N. Y.) 560; Rex *v.* Burke, Russ. & Ry. 496;—or if, for any other reason, it could not defraud any one,—Barnum *v.* State, 15 Ohio, 717; s. c., 45 Am. Dec. 601; Reg. *v.* Marcus, 2 Car. & K. 356; Reg. *v.* Nash, 2 Den. C. C. 493; s. c., 12 Eng. L. & Eq. 578; Rex *v.* Knight, 1 Salk, 375; s. c., 1 Ld. Raym. 527;—the transaction is not forgery." 1 Bish. Cr. L. § 748.

1. Rex *v.* Nash, 2 Den. C. C. 433; Rex *v.* Sterling, 1 Leach, 99. *Compare* Rex *v.* Hodgson, Dears. & B. C. C. 336; s. c., 7 Cox C. C. 122.

2. Barnum *v.* State, 15 Ohio, 717; s. c., 45 Am. Dec. 601. In this case the court held that evidence which tends to prove that the forged instrument could not under any state or circumstances prejudice the rights of any one, is competent to go to the jury.

3. People *v.* Tomlinson, 35 Cal. 507; Barnum *v.* State, 15 Ohio, 717; s. c., 45 Am. Dec. 601.

4. State *v.* Floyd, 5 Strobh. (S. C.) L. 58; s. c., 53 Am. Dec. 689.

5. Garmire *v.* State, 104 Ind. 444; Wilkinson *v.* State, 10 Ind. 372; State *v.* McKenzie, 42 Me. 392; Com. *v.* Stephenson, 65 Mass. (11 Cush.) 481; s. c., 59 Am. Dec. 154; Com. *v.* Smith, 24 Mass. (7 Pick.) 137; State *v.* Carr, 5 N. H. 367; State *v.* Van Hart, 17 N. J. L. (2 Harr.) 327; People *v.* Peabody, 25 Wend. (N. Y.) 472; State *v.* Covington, 94 N. C. 913; s. c., 55 Am. Rep. 650; Dement *v.* State, 2 Head (Tenn.), 595; s. c., 75 Am. Dec. 747; Buckland *v.* Com., 8 Leigh (Va.), 732; United States *v.* Turner, 32 U. S. (7 Pet.) 132; bk. 8, L. ed. 633; United States *v.* Sprague, 11 Biss. C. C. 376; United States *v.* Morrow, 4 Wash. C. C. 733; Reg. *v.* Smith, Dears. & B. C. C. 566; Rex *v.* Collicott, 2 Leach C. C. 1048; s. c., 4 Taunt. 300; Russ. & R. C. C. 212; 2 East P. C. 858.

**Resemblance of Instruments.**—A charge of forgery may be based upon an instrument which bears such a resemblance to the genuine instrument it is intended to represent as is calculated to deceive; and the person forging an instrument cannot escape punishment where there is such a resemblance, upon the ground that the forgery was such as would have deceived only stupid and careless persons. Garmire *v.* State, 104 Ind. 444.

**Unnecessary that Real Instrument Would Have Been Effectual.**—In forgery, it is of no consequence whether the counterfeit be of such as, if real, would be effectual to the purpose it intends, so long as

there is sufficient resemblance to impose on persons of ordinary observation, though persons of experience could not be deceived by it. Hess *v.* State, 5 Ohio, 5; s. c., 22 Am. Dec. 767; People *v.* Krummer, 4 Park. Cr. Cas. (N. Y.) 217.

**Forgery of Bond.**—To constitute the offence, it is not necessary that the fraudulent bond should purport to be an obligation of the United States, or that the similitude should be such as to deceive experts or cautious men; it is sufficient that it be calculated to deceive honest, sensible, and unsuspecting men of ordinary observation and care, dealing with a man supposed to be honest. United States *v.* Sprague, 11 Biss. C. C. 376.

**Name Misspelled.**—An indictment will lie for the forgery of an obligation for the payment of money although the signature is misspelled. State *v.* Covington, 94 N. C. 913; s. c., 55 Am. Rep. 650.

In Gooden *v.* State, 55 Ala. 178, the name attempted to be forged was Thweatt, but the forged instrument had it Threet. There was a conviction; and the appellate court approved the ruling of the lower court on that question. See also 3 Greenl. Ev. § 103.

**Forged Check.**—In those cases where the invalidity is to be made out by proof of some extrinsic fact, if the instrument is good on its face it may be capable of effecting fraud. See State *v.* Johnson, 26 Iowa, 207; State *v.* Pierce, 8 Iowa, 231. Thus, where a check is apparently a valid obligation, and would create a liability upon the party if genuine, it has a tendency to defraud, and is within the statute. State *v.* Coyle, 41 Wis. 267; s. c., 2 Am. Cr. Rep. 149. However, where a check is not made payable to the order of any one or to bearer, it is so imperfect that no one could be defrauded by it. Williams *v.* State, 51 Ga. 535; s. c., 1 Am. Cr. Rep. 237.

It is held, in the case of Com. *v.* Stephenson, 65 Mass. (11 Cush.) 481; s. c., 59 Am. Dec. 154, that a person may be guilty of forgery although the check drawn by him has so little resemblance to the genuine check of the person whose name was forged that it is not likely to deceive the officers of the bank on which it was drawn. The court say: "It is not necessary that there should be so perfect resemblance to the genuine handwriting of the party whose name is forged as would impose on persons having particular knowledge of the handwriting of such party; nor is it necessary that the officers of the bank upon which a check purported to be drawn would probably have been mislead and deceived by it. The intent to defraud the bank may exist, and may be found by the jury, though the officers of the bank, from their better acquaintance with the genuine handwriting of the drawer, would readily have detected the check as a counterfeit one. The authorities to this point may be found in 2 Hale P. C. 950; Rex *v.* Mazagora, Russ. & R. C. C. 291; Rex *v.* Sheppard, Russ. & R. C. C. 169."

**Awkward Forgery.**—In a case reported in the Vienna *Juristische Blaetter*, one Caroline J., a waiter in the service of Colonel P., took a blank check from his check-book, and had her son fill it for an amount of 200 florins, date it, sign Colonel P.'s name to it, and present it to S. M. Rothschild for payment. The filling of the blank was so awkwardly done, the signature not resembling in the least that of Colonel P., that the forgery was discovered by the cashier, and payment refused. The lower court directed a verdict of acquittal, on the ground that the false check was not at all adapted to deceive. On appeal, the court of cassation reversed the judgment below, saying: "The punishment of an attempt is based upon this: that it manifests the intention to commit an offence in a manner endangering the order of law. Such danger, as is generally recognized in the Austrian decisions and doctrine, can only be denied where the attempt is made with means completely and unqualifiedly (*in abstracto*) unfit to attain the object. If the cause of failure was only in the manner of execution or in the concrete quality or operation of the object used (as in fraud of him whose deceit was planned), then a punishable attempt is to be assumed. The aquittal was erroneous. A forged instrument is adapted to deceive." This is the doctrine of Mazagora's Case, Russ. & R. C. C. 291. See Com. *v.* Stephenson, 65 Mass. (11 Cush.) 481; s. c., 59 Am. Dec. 154; Reg. *v.* Coulson, 1 Den. C. C. 592; s. c., 24 Alb. L. J. 83.

**Defective Instrument.**—Where a forged instrument is so defectively executed as not to deceive anybody, it does not amount to the crime of forgery. See Rembert *v.* State, 53 Ala. 467; s. c., 25 Am. Rep. 639; Williams *v.* State, 51 Ga. 525; s. c., 1 Am. Cr. Rep. 237; People *v.* Galloway, 17 Wend. (N. Y.) 540.

**The Omission of Important Words** renders an instrument fatally defective; and such an instrument is so imperfect as to be incapable of sustaining a charge of forgery. Thus an indictment charging one of the forgery of a bank check payable "to the order of ——," such instrument is

fatally defective and too imperfect to defraud any one. Williams *v.* State, 51 Ga. 535; s. c., 1 Am. Cr. Rep. 237, following People *v.* Galloway, 17 Wend. (N. Y.) 540. The latter case was an indictment for obtaining the signature of a person to a written instrument by false pretences. The written instrument was a deed of lands by a wife, conveying real estate belonging to her in her own right, executed by her with her husband, at the solicitation of the husband, under the pretence that it was a deed of lands belonging to him. There not being an acknowledgment of the instrument by the wife in the mode prescribed by law for passing the estate of a *feme covert*, it was held not to be such an instrument as is contemplated by the statute; and the conviction was reversed.

**Words Necessarily Implied.**—In Booth *v.* Wallace, 2 Root (Conn.), 247, where a promissory note was for "thirty-two, twelve shillings and five pence," the court said that the word "pounds" after the word "thirty-two" is necessarily implied, and that the omission, it is clear, was owing to the mistake of the scribe who drew the note, and that the implication is so clear and strong that it is not necessary it should be averred in the declaration more fully.

**Omission of the Dollar-mark.**—The dollar-mark ($) comes from the letters U and S, which, after the adoption of the Federal Constitution, were prefixed to the Federal currency, and afterwards were run into one another, the U being made first and the S over it. Gleanings for the Curious, 230. This mark being used simply as the emblem of the nationality of the currency, its omission will be supplied and will not affect the instrument. This question first arose in the case of Northrop *v.* Sanborn, 22 Vt. 433; s. c., 54 Am. Dec. 83, on an order requesting the drawee to pay the bearer "37.89," without anything else on the face of the order to denote that dollars and cents were intended. The court said, Judge Redfield delivering the opinion: "We think it not necessary to say that the order expressed for 37.89 is so far unintelligible that it is void. The law of the United States Congress establishing our national currency having declared that it shall consist of the dollar as a unit and the decimal parts as dimes and cents, it would seem the necessary intendment that a contract expressed in figures should be in the currency of the country. If prefixed by the usual sign ($), no one could entertain doubt; and that is nothing but a mark to signify that the national currency is intended. Without that, we think the legal intendment is the same. Murrill *v.* Handy, 17 Mo. 406, was an action on a promissory note wherein the makers promised to pay the payee 'the sum of fifty-two 25-100, for value received.' 'The word dollars, as well as the dollar-mark, were entirely omitted. It was held that the note, on its face, was for fifty-two dollars and twenty-five cents. Some stress was laid upon the words 'the sum' in the instrument, but we think the word 'pay' is equally significant. Other cases to the same effect are cited by the attorney-general, although perhaps they are not so directly in point as those above referred to." Baysinger *v.* State, 77 Ala. 63; s. c., 54 Am. Rep. 46.

In the case of State *v.* Schwartz, 64 Wis. 432, an instrument in the form of a promissory note for the payment of "25.00, as per deed. 10 per cent till paid" was held to be a note for twenty-five dollars upon its face. The court said: "The controlling question is, therefore: Does the forged instrument purport to be, on its face, a promise by Braggs, the maker, to pay the defendant twenty-five dollars, although it contains neither the dollar-mark nor the word 'dollars'? If this question be answered in the affirmative, it is entirely clear that such forged instrument was properly admitted in evidence; that such alteration constituted the crime of forgery; and that the information is sufficient, without an averment therein that the figures 25.00 meant twenty-five dollars. On principle and authority, we think the question should be answered affirmatively."

In Rembert *v.* State, 53 Ala. 467; s. c., 25 Am. Rep. 639, the entire instrument charged to have been forged was in the following language: "Due 8.25 Askew Brothers." There was a conviction; and after an elaborate consideration of authorities, the judgment of conviction was affirmed. Speaking of the general rule, that if the instrument is void on its face it cannot be the subject of a forgery, the court said it must be taken with this limitation: "When the instrument does not appear to have any legal validity, nor show that another might be injured by it, but extrinsic facts exist by which the holder of the paper be enabled to defraud another, then the offence is complete, and an indictment averring the extrinsic facts, disclosing its capacity to deceive and defraud, will be supported. The fact that the paper is incomplete or imperfect in itself, and that without the knowledge of extrinsic facts it does not appear that it has the vicious capacity, only renders

ty,[1] although persons of experience could not be deceived by it.[2] If there is a bare possibility that another may be imposed upon, an instrument will be sufficient to support an indictment for forgery;[3] and it is of no significance that the forgery might have been detected on close inspection.[4]

III. **How Accomplished.**—Every forgery is the false making of an instrument, and may be accomplished: (1) By signing another man's name; (2) by procuring a genuine signature by fraud; (3) by use of a similar name; (4) by use of a fictitious name, or the name of a non-existent person; (5) by alteration; (6) by insertion, erasure, manipulation; (7) by making false entries; (8) by filling blanks; and (9) by using false dates.

A writing has been held to include anything done with a pen,[5] by engraving,[6] by printing,[7] by photographic process,[8] and by pasting a name over another's.[9] And it has even been held that, where a person makes a mark in the name of another, it is forgery;[10] although the writing may be in the hand of another, under the defendant's direction.[11]

it necessary that the indictment should aver the extrinsic facts."

1. Peete *v.* State, 2 Lea (Tenn.), 514.

2. People *v.* Krumner, 4 Park. Cr. Cas. (N. Y.) 217; Hess *v.* State, 5 Ohio, 5; s. c., 22 Am Dec. 767.

3. State *v.* Bennett, 19 La. An. 395; Com. *v.* Meiner, Addis. (Pa.) 44.

4. State *v.* Robinson, 16 N. J. L. (1 Harr.) 510.

5. **Under Federal Statute.**—Under the Revised Statutes of the United States, section 5418, formerly act of Apr. 5, 1866, ch. 24, § 1 (14 Stat. at L. 12), which punishes any person who "shall falsely make, alter, forge, or counterfeit . . . any bond, bid, proposal, guaranty, security, official bond, public record, affidavit, or other writing, for the purpose of defrauding the United States," etc., the false making refers, not to perjury, but to forgery. What is the false making of a bond or bid? Certainly not taking a false oath; because the execution of a bond or bid requires no oath. To falsely make an affidavit is one thing; to make a false affidavit is another. A person may falsely make an affidavit every sentence of which may be true in fact; or he may actually make an affidavit every sentence of which shall be false. It is the "false making" which the statute makes an offence; and this is forgery as described in all the elementary books. United States *v.* Wentworth, 11 Fed. Rep. 52; Hawk. P. C. ch. 70; 3 Chitt. Cr. L. 1022; 4 Bl. Com. 245; 2 Russ. Cr. 318; 2 Whart. Cr. L. (9th ed.) § 1418: Roscoe Cr. Ev. 487.

6. People *v.* Rohner, 4 Park. Cr. Cas. (N. Y.) 166; Reg. *v.* Closs, 7 Cox C. C. 494; Reg. *v.* Dade, 1 Moo. C. C. 307.

7. Com. *v.* Ray, 69 Mass. (3 Gray) 441; Henshaw *v.* Foster, 26 Mass. (9 Pick.) 312; Reg. *v.* Smith, 8 Cox C. C. 32.

**Printed Signature.**—B. was in the habit of selling baking-powders, wrapped in printed papers entitled "B.'s Baking-powders," and having his printed signature at the end. The prisoner got printed a quantity of wrappers in imitation of those of B., only leaving out B.'s signature, and sold spurious powders wrapped up in those labels as B.'s powders. *Held*, that the prisoner was not guilty of forging the wrappers or uttering forged wrappers, though he might be indictable for the fraud on a charge of obtaining money by false pretences. Reg. *v.* Smith, Dears & B. C. C. 566; s. c., 8 Cox C. C. 32; 27 L. J. M. C. 225; 4 Jur. N. S. 1003.

8. Reg. *v.* Rinaldi, Leigh & C. 330.

9. State *v.* Robinson, 16 N. J. L. (1 Harr.) 507.

10. Rex. *v.* Dunn, 1 Leach C. C. 57.

11. Com. *v.* Foster, 114 Mass. 311; s. c., 19 Am. Rep. 353.

**Signing Through Innocent Party.**—In Gregory *v.* State, 26 Ohio St. 510; s. c., 20 Am. Rep. 774; 2 Am. Cr. Rep. 146, A, for purpose of defrauding B, procured C, an innocent party, to sign the name of B to a promissory note by falsely representing that C was authorized by D to do so. It was held that A was guilty of forgery. The court say: "In this case, the agency of the daughter for her father extended to the signing of his name to the contract in duplicate and

**1. By False Making.**—One of the essential elements of forgery is that the instrument shall be false. As seen above, a false making may be constituted: (1) By using another's name; (2) by fraudulently procuring a genuine signature to an instrument; (3) by fraudulent alteration; (4) by use of same name; (5) by use of fictitious name; (6) by filling blanks; (7) by using false dates; and (8) by making false entries.

*a.* BY USE OF ANOTHER'S NAME.—At common law, the signing of another person's name without authority is forgery.[1] In

no further; when, therefore, these two papers were signed, her agency for her father ceased. The evidence in this case tends to show that this was the extent of her authority as such agent, and that she was induced to sign the promissory note by the representation of the plaintiff in error, and at his request, believing at the time that the representations were true. In signing her father's name to the promissory note, Rebecca was therefore the innocent agent of the plaintiff in error, and hence her act was the act of the plaintiff in error, and was a forgery. Reg. *v.* Clifford, 2 Car. & K. 202."

1. See Billings *v.* State, 107 Ind. 54; s. c., 57 Am. Rep. 77; Rudicel *v.* State, 111 Ind. 595; Lemasters *v.* State, 95 Ind. 367; State *v.* Lee, 32 Kan. 360; Com. *v.* Henry, 118 Mass. 460; State *v.* Willson, 28 Minn. 52; People *v.* Mann, 75 N. Y. 484; s. c., 31 Am. Rep. 482; affirming Mann *v.* People, 15 Hun (N. Y.), 155; *Ex parte* Hibbs, 26 Fed. Rep. 421; s. c., 7 Cr. L. Mag. 690; Pennsylvania *v.* Misner, Addis. (Pa.) 44; Hale *v.* State, 1 Coldw. (Tenn.) 167; s. c., 78 Am. Dec. 488; Fonville *v.* State, 17 Tex. App. 368; Reg. *v.* Hill, 8 Car. & P. 274; Rex *v.* Forbes, 7 Car. & P. 224; Dickson's Case, 2 Lew. C. C. 178.

**Neccessity of Intent to Defraud—Actual Defrauding Not Necessary.**—In Com. *v.* Henry, 118 Mass. 460, on the trial of an indictment for making and uttering a forged promissory note, the judge instructed the jury that, to constitute the offence of forgery, there must be an intent to defraud; that it is not essential that any person was actually defrauded, but that there must be a possibility of some one being actually defrauded; that if the defendant signed the name of A (the person purporting to be the maker), without his authority, and passed it as the note of A expecting to be able to meet it when due, it would be forgery. *Held*, that these instructions were to be taken together, and that the defendant had no ground of exception.

**What False Writing is Forgery.**—The defendant wrote in a promissory note the signature "Bill Stevens," and offered the instrument for sale as the promissory note of William R. Stephens, falsely representing that the latter had executed it. *Held*, that the note signed "Bill Stephens" did not indicate on its face that it was not intended as the note of William R. Stephens, and that the defendant was guilty of forgery. Rudicel *v.* State, 111 Ind. 595.

**Signing Promissory Note—Use of Mark.**—A note signed, "John $\overset{\text{his}}{\underset{\text{mark}}{}}$ Jones," though the place for the mark was blank, *held*, to support an indictment for forgery. Lemasters *v.* State, 95 Ind. 367.

**Signing Another Name to Receipt.**—If A, who has received from B money to reimburse A for a payment alleged by A to have been made by him to C for B, afterwards signs C's name to a pretended receipt for the amount, and delivers this receipt to B, A is guilty of forgery. Fonville *v.* State, 17 Tex. App. 368.

**Order for Money on Grain.**—An order in printed form, "Louisburg, Kan., Jan. 24, 1883. M. Reed: Pay L. Johnson, for corn, gross ——, tare ——, net ——, bu. —— at —— cts., $35.75. M. Reed, per J. H. R., Weigher," with "Jan. 2–3, L. Johnson, for corn, 35.75—J. H. R.," in writing by defendant, *held*, a forgery. State *v.* Lee, 32 Kan. 360.

**Forgery by County Treasurer — New York Doctrine.**—Forgery in the third degree (2 N. Y. Rev. Stat. 673, § 33) consists in falsely making an instrument purporting to be the act of another. A county treasurer who makes an instrument signed with his own name and title, but falsely purporting in the body of the instrument to bind the county, is not within the statute. His wrong consists in the false assumption of authority—not in forgery, by making a counterfeit or false paper. People *v.* Mann, 75 N. Y. 484; s. c., 31 Am. Rep. 482; aff'g Mann *v.* People, 15 Hun (N. Y.), 155. *Compare* State *v.* Willson, 28 Minn. 52.

**Signing by Attorney.**—Where a person, without authority, signs his name as the attorney for another, claiming that he has

those cases where something like deceptive similitude is attempted,[1] but where there is authority for such signing, there is no forgery.[2]

Where one has a reasonable ground for believing, however, that he is authorized to sign the name of another to a written instrument, and does so sign it, without any fraudulent design, it is not forgery.[3] But it is forgery to falsely put the name of a

authority so to sign, it will not be forgery, but false pretences. See State *v.* Wilson, 28 Minn. 52; Com. *v.* Foster, 114 Mass. 311; s. c., 19 Am. Rep. 353; Com. *v.* Baldwin, 77 Mass. (11 Gray) 197; s. c., 71 Am. Dec. 703; State *v.* Young, 46 N. H. 266; Mann *v.* People, 15 Hun (N. Y.), 155; Heilborn's Case, 1 Park. Cr. Cas. (N. Y.) 249; Rex *v.* Arscott, 6 Car. & P. 408; Reg. *v.* White, 2 Cox C. C. 210; s. c., 2 Car. & K. 404. But where no claim to such authority is made, the signing of another's name to a negotiable instrument is forgery. Phipp's Case, 8 Ont. App. 477; s. c., 4 Cr. L. Mag. 865.

**Signing Name to Order for Goods.**—In Hale *v.* State, 1 Coldw. (Tenn.) 168; s. c., 78 Am. Dec. 488, it was held forgery, under the Code of Tennessee, 1858, §4718, to sign another's name to an order for goods, without authority and for the fraudulent purpose of obtaining the goods on the credit of the party whose name is forged.

**By Photographing.**—Under the statute 24 & 25 Vict. c. 98, § 19, it was held forgery to take a positive photographic impression of a note on glass, although the note could not be printed from such an impression. Reg. *v.* Rinaldi, 9 Cox C. C. 391; s. c., Leigh & C. 330.

**Forging Name of Deceased Person.**—In the case of Billings *v.* State, 107 Ind. 54; s. c., 57 Am. Rep. 77, it was held that the name of a deceased person is a subject of forgery. The court say: "The objection urged against the information is that it does not aver that the forgery was committed with the intention to defraud any person. The reason advanced in support of this proposition is that the law does not regard the estate of a decedent as a person. This contention cannot prevail. The estate of a decedent is a person, in legal contemplation. 'The word person,' says Mr. Abbott, 'in its legal signification, is a generic term, and includes artificial as well as natural persons.' Planters' & Merchants' Bank *v.* Andrews, 8 Port. (Ala.) 404; Douglass *v.* Pacific Steamship Co., 4 Cal. 304; 2 Abb. L. Dict. 275. It is said in another work that 'Persons are of two kinds, natural and artificial. A natural person is a human being. Artificial persons include (1) a collection or succession of natural persons forming a corporation; (2) a collection of property to which the law attributes the capacity of having rights and duties. The latter class of artificial persons is only recognized to a limited extent in our law; examples are, the estates of a bankrupt or deceased person. 2 Rapalje & Lawrence L. Dict. 954. See Ginn *v.* Collins, 43 Ind. 271."

1. Abbott *v.* State, 59 Ind. 79; Dobb's Case, 6 City Hall Rec. (N. Y.) 61; Perdue *v.* State, 2 Humph. (Tenn.) 494; Reg. *v.* Geach, 9 Car. & P. 582; Reg. *v.* Cooke, 8 Car. & P. 582; Reg. *v.* Beard, 8 Car. & P. 143; Rex *v.* Forbes, 7 Car. & P. 224.

**Resemblance.**—To constitute forgery, it is not essential that the handwriting should resemble his whose name is forged. Dobb's Case, 6 City Hall Rec. (N. Y.) 61.

It is also forgery for a person to procure an innocent agent to sign the name of another by pretending that he is authorized by such other person to sign his name. Gregory *v.* State, 26 Ohio St. 510; s. c., 2 Am. Cr. Rep. 146.

2. State *v.* Lurch, 12 Oreg. 95.

3. Parmelee *v.* People, 8 Hun (N. Y.), 623; Shanks *v.* State, 25 Tex. 326; Rex *v.* Watts, 3 B. & B. 197; s. c., Russ. & R. C. C. 436; Reg. *v.* Parish, 8 Car. & P. 94; Reg. *v.* Forbes, 7 Car. & P. 224; Reg. *v.* Clifford, 2 Car. & K. 202.

**Acquiescence in Use of Names.**—It has been said that evidence showing the fact that where a person whose name was used by another was informed of it at the time and failed to repudiate it, is sufficient evidence to go to the jury as tending to show authority to use such name. Reg. *v.* Smith, 3 F. & F. 504. See Weed *v.* Carpenter, 4 Wend. (N. Y.) 219. And an unanswered letter has also been admitted to be produced for the purpose of showing the intent. Reg. *v.* Beardsall, 1 F. & F. 529.

**Checks or Drafts Drawn by an Agent** and signed with the name of the principal, and by the agent, "per procuration," are not forgeries, whether the agent has

witness to a bond not requiring to be attested by a subscribing witness.[1]

*b.* By Falsely Procuring a Genuine Signature.—Where one with fraudulent intent procures another to sign an instrument with his real name, and, by false addition or otherwise, subsequently passes it as the signature of another person having the same name, he is guilty of forgery, whether the person actually signing is a party to the fraud or not.[2]

or has not authority to draw them, since in either case they are nothing different from what they purport to be. *In re* Tully, 20 Fed. Rep. 812.

**What False Signing is Not Forgery.**—Where one signs a deed as attorney in fact, or agent, for another, and it so appears on the face of the instrument, and such attorney or agent has in fact no authority to execute such instrument, it is not a forgery. State *v.* Wilson, 28 Minn. 52; s. c., 15 West. Jur. 424.

1. State *v.* Gherkin, 7 Ired. (N. C.) L. 206.

2. Barfield *v.* State, 29 Ga. 127; s. c., 74 Am. Dec 49; Com. *v.* Foster, 114 Mass. 317; s. c , 19 Am. Rep. 353; United States *v.* Turner, 32 U. S. (7 Pet.) 132; bk. 8, L. ed. 633; Reg. *v.* Mitchell, 1 Den. C. C. 282; Reg. *v.* Blenkinsop, 1 Den. C. C. 276; Reg. *v.* Epps, 4 F. & F. 81; Rex. *v.* Webb, Russ. & R. C. C. 405.

**Procuring Signature to Note Fraudulently.**—In the case of Com. *v.* Foster, *supra*, it is held that one with intent fraudulently to utter a promissory note as the note of a person other than the signor, procures to it the signature of an innocent party who does not thereby intend to bind himself, is guilty of forgery. The court say: "It matters not by whom the signature is attached, if it be not attached as his own. If the note is prepared for the purpose of being fraudulently used as the note of another person, it is falsely made. The question of forgery does not depend upon the presence upon the note itself of the *indica* of falsity. If extrinsic circumstances are such as to facilitate the accomplishment of the cheat without the aid of any device in the note itself, the preparation of a note with intent to take advantage of those circumstances and use it falsely is 'making a false instrument.' If Little & Co., 'a large firm doing business on Franklin Street, Boston,' and having 'a large manufactory in Charlestown,' were well known and in undoubted credit, and the Little & Co. of George P. Little were of no credit and entirely unknown, and George P. Little made and signed the note, not as his own or as the note of his firm, but solely with a view to its use as the defendant in this case used it, all the elements, both of effect and intent, necessary to constitute the offence of forgery would exist. The position of the case is the same if the party defrauded knew nothing of either firm except from the representations of the defendant, and the supposed maker of the note did not in fact exist at all. United States *v.* Turner, 32 U. S. (7 Pet.) 132; bk. 8, L. ed. 633. The distinction is plainly drawn in Com. *v.* Baldwin, 77 Mass. (11 Gray) 197; s. c., 71 Am. Dec. 703, between one who assumes to bind another, either jointly with himself or by procuration, however groundless and false may be his pretence of authority to do so, and one who signs in such a manner that the instrument may purport to bear the actual signature of another party having the same name, and intending that it shall be so received. It purports to be the instrument of such other party, among those not familiar with his handwriting, by bearing his name; and it is a false instrument, and falsely made, if it was so intended. Com. *v.* Stephenson, 65 Mass. (11 Cush.) 481; s. c., 59 Am. Dec. 154.

**Acceptance of Bill.**—In Reg. *v.* Epps, 4 F. & F. 81, the defendant procured one George Beard, who was in his employ, to write an acceptance on a blank bill, and afterwards filed it at the bank without Beard's knowledge or consent, and addressed it to George Beard, Rottingdean, and procured it to be discounted by representing that Beard was a seedman at that place, there being no such man at that place and no seedman by the name of Beard. The defendant was held guilty of forgery.

It is forgery to procure an acceptance, by one person, of a bill addressed to another of the same name. Rex *v.* Webb, Russ. & R. C. C. 405.

Thus, in Reg. *v.* Blenkinsop. 1 Den. C. C. 277, the defendant procured his servant, William Wilkinson, to write his name as acceptor of a blank bill, and then filled it out as a bill drawn by William Wilkinson, Halifax, who was a different person. He was held to be guilty of forgery.

But the weight of authority seems to be to the effect that it is not forgery to procure the signing of an instrument, by a party purporting to be bound by it, by fraudulent representations as to its contents, or by falsely reading it in his hearing, though he is illiterate.[1]

*c.* By Fraudulent Alteration.—The fraudulent alteration of an instrument, with intention to defraud or prejudice another, is such a false making as to constitute forgery.[2] However, altering by the mere addition of surplusage to an instrument is not forgery.[3]

An alteration of an unsigned memorandum of a payment of a note written by the payee is not forgery.[4] And where the payee fraudulently strikes out an indorsement of payment made by himself, he is guilty of forgery.[5] But the alteration of an instrument after it has served its purpose, and no longer has any vitality, is not forgery, because an action will not lie on such fraudulently altered paper, by means of such alteration, against a person intended directly or indirectly to be defrauded or injuriously affected by such alteration.[6]

*d.* By Use of Same Name.—It is not forgery for a person to sign a paper in his own name, though it be of a false affirmation or procuration, unless the name written is used in such a way as to place the burden of the obligation upon another person bearing the same name.[7] But where there are two persons of the same name, and one of them signs his own name to notes with the intention that they may be used in trade as the notes of another, the act is forgery.[8] Falsely personating another and signing his

1. Hill *v.* State, 1 Yerg. (Tenn.) 76; s. c., 24 Am. Dec. 441; Reg. *v.* Chadwick, 2 R. & Moo. 545; Reg. *v.* Collins, 2 R. & Moo. 461. *Compare* State *v.* Shurtleff, 18 Me. 368.

2. State *v.* Maxwell, 47 Iowa, 454; State *v.* Stratton, 27 Iowa, 420; s. c., 1 Am. Rep. 382; State *v.* Wooderd, 20 Iowa, 541; Com. *v.* Woods, 76 Mass. (10 Gray) 477; Com. *v.* Mycall, 2 Mass. 136; State *v.* Kattlemann, 35 Mo. 103; State *v.* Robinson, 16 N. J. L. (1 Harr.) 507; People *v.* Graham, 6 Park. Cr. Cas. (N. Y.) 135; Barnum *v.* State, 15 Ohio, 717; s. c., 45 Am. Dec. 601; Kegg *v.* State, 10 Ohio, 75; Haynes *v.* State, 15 Ohio St. 455; State *v.* Floyd, 5 Strobh. (S. C.) L. 58; State *v.* Waters, 3 Brev. (S. C.) L. 507; Rex *v.* Atkinson, 7 Car. & P. 669; Elsworth's Case, 2 East C. L. 986; Teague's Case, 2 East C. L. 979; s. c., Russ. & R. C. C. 33; Rex *v.* Treble, 2 Leach C. C. 1040; s. c., 2 Taunt. 328; Russ. & R. C. C. 164; Rex *v.* Post, Russ. & R. C. C. 101; Reg. *v.* Teague, Russ. & R. C. C. 38; 2 Russ. on Cr. (5th Eng. ed.) 619.

A person employed to draw a legal instrument, who fraudulently alters a provision in such instrument, is guilty of fraud. See Wilson *v.* Commissioners, 70 Ill. 46; State *v.* Maxwell, 47 Iowa, 454; Combe's Case, Noy, 101; s. c., Moore 760.

**Fraudulent Alteration of Book Account.**—In Barnum *v.* State, 15 Ohio, 717; s. c., 45 Am. Dec. 601, it was held that the fraudulent alteration of a book account, with the intent to defraud A by including thus falsely within the terms of the settlement a claim of A against B which accrued after the settlement was in fact made, is forgery.

3. State *v.* Gherkin, 7 Ired. (N. C.) L. 206.

4. State *v.* Davis, 53 Iowa, 252.

5. State *v.* McLeran, 1 Aik. (Vt.) 311.

6. Reed *v.* State, 28 Ind. 396; People *v.* Cady, 6 Hill (N. Y.), 490; People *v* Fitch, 1 Wend. (N. Y.) 198; s. c., 19 Am. Dec. 477; Clarke *v.* State, 8 Ohio St. 630; State *v.* Corley, 4 Baxt. (Tenn.) 410; Brittain *v.* Bank of London, 3 F. & F. 465; s. c., 11 W. R. 569.

7. Rex *v.* White, 2 Car. & K. 413; s. c., 1 Den. C. C. 208; 2 Cox C. C. 210.

8. Barfield *v.* State, 29 Ga. 127; s. c., 74 Am. Dec. 1; Com. *v.* Foster, 114 Mass. 311; s. c., 19 Am. Rep. 353; Graves

name as such other is forgery;[1] as, where one presents a money-order to the paying official in a post-office, and signs it as if he were the person for whom it is intended.[2] And where one not the true consignee, but of the same name, knowingly and with fraudulent intent received and indorsed a permit of delivery, but without imitating the true consignee's handwriting, he was held guilty of forgery.[3] And the same is true where one of two persons having the same name obtains possession of a bill or check payable to another, and indorses it, knowing that he is not the person to whom the bill or check is payable.[4] The name should be identical;[5] and, even when the names are not precisely identical, a conviction may be sustained.[6]

*e.* BY USE OF FICTITIOUS NAMES.—Signing fictitious names, or the names of non-existing firms or persons, to an instrument, with an intention to defraud, is a false making and constitutes a forgery;[7]

*v.* American Exchange Bank, 17 N. Y. 205; People *v.* Peacock, 6 Cow. (N. Y.) 73; United States *v.* Long, 30 Fed. Rep; 678. Reg. *v.* Mitchell, 4 Fost. & F. 81; Rex *v.* Aickles, 1 Leach C. C. 438; Rex *v.* Webb, Russ. & R. C. C. 405; Rex *v.* Bontien, Russ. & R. C. C. 260; Mead *v.* Young, 4 T. R. 28.

**Executing Mortgage on Lands of Another Not.**—If A. B. obtain money by executing a mortgage of land belonging to another person by the name of A. B., he is guilty of obtaining money by false pretences, but is not guilty of forgery. Hoge *v.* Chicago Bank, 18 Ill. App. 501.

1. Barfield *v.* State, 29 Ga. 127; s. c., 74 Am. Dec. 1; Reg. *v.* Blenkinsop, 2 Car. & K. 531; Reg. *v.* Mitchell, 1 Den. C. C. 282; Reg. *v.* Epps, 4 Fost. & F. 81; Rex *v.* Watts, Russ. & R. C. C. 436; Rex *v.* Story, Russ. & R. C. C. 81; Mead *v.* Young, 4 T. R. 28.

2. United States *v.* Long, 30 Fed. Rep. 678.

3. Graves *v.* American Exchange Bank, 17 N. Y. 205; People *v.* Peacock, 6 Cow. (N. Y.) 72.

4. Rex *v.* Aickles, 2 East P. C. 798; s. c., 1 Leach C. C. 438; Rex *v.* Bontien, Russ. & R. C. C. 260. See Com. *v.* Foster, 114 Mass. 311; s. c., 19 Am. Rep. 353; Reg. *v.* Mitchell, 1 Den. C. C. 282; Reg. *v.* Epps, 4 Fost. & F. 81; Reg. *v.* Webb, 6 Moore, 447; s. c., Russ. & R. C. C. 405; Mead *v.* Young, 4 T. R. 28.

5. Rex *v.* Story, Russ. & R. C. C. 81.

6. Reg. *v.* Mahoney, 6 Cox C. C. 487. In this case a person undertook to secure his mother-in-law, "C. W.'s", name to two promissory notes. He took the notes to his wife and induced her to sign them in her maiden name, "A. W.," and took them to the party, saying, "Here are the notes." A conviction was sustained on the ground that, when the defendant secured his wife's name to the notes, it was his intention to use them as the notes of his mother-in-law.

7. State *v.* Givens, 5 Ala. 747; State *v.* Hahn, 38 La. An. 169; Com. *v.* Chandler, Thach. C. C. (Mass.) 187; Com. *v.* Costello, 120 Mass. 358; State *v.* Hayden, 15 N. H. 355; Brown *v.* People, 8 Hun (N. Y.), 562, aff'd 72 N. Y. 571; s. c., 28 Am. Rep. 183; Gotobed's Case, 6 City Hall Rec. (N. Y.) 25; Riley's Case, 5 City Hall Rec. (N. Y.) 87; Grant's Case, 3 City Hall. Rec. (N. Y.) 142; Sasser *v.* State, 13 Ohio, 453; *Ex parte* Hibbs, 26 Fed. Rep. 421; s. c., 7 Cr. L. Mag. 690; White *v.* Com., 4 Binn. (Pa.) 418; s. c., 6 Am. Dec. 443; Com. *v.* Smith, 6 Serg. & R. (Pa.) 569; Luttrell *v.* State, 85 Tenn. 232; Henderson *v.* State, 14 Tex. 503; Buckland *v.* Com., 8 Leigh (Va.), 732; United States *v.* Turner, 32 U. S. (7 Pet.) 132; bk. 8, L. ed. 633; United States *v.* Mitchell, Bald. C. C. 366; Rex *v.* Webb, 3 B. & B. 228; Reg. *v.* Rogers, 8 Car. & P. 629; Reg. *v.* Smith, 9 Cox C. C. 162; Rex *v.* Shepherd 2 East C. L. 967; s. c., *sub nom.* Rex *v.* Shepherd, 1 Leach C. C. 226; Wilk's Case, 2 East C. L. 957; Rex *v.* Bolland, 2 East P. C. 957, Rex *v.* Wilks, 2 East P. C. 957; Lewis's Case, Fost. 116; Reg. *v.* Ashby, 2 Fost. & F. 560; Rex *v.* Whiley, 2 Leach C. C. 983; s. c., Russ. & R. C. C. 99; Rex *v.* Parkes, 2 Leach C. C. 775; s. c., 2 East P. C. 963; Rex *v.* Taft, 1 Leach C. C. 172; Rex *v.* Lockett, 1 Leach C. C. 94; Rex *v.* Bolland, 1 Leach C. C. 83; Rex *v.* Dunn 2 Leach C. C. 57; Rex *v.* Watts, Russ. & R. C. C. 436; Rex *v.* Froud, Russ. & R. C. C. 389; Rex *v.* Chisholm, Russ. & R. C. C. 297; Rex *v.* Peacock, Russ. & R. C. C. 278; Rex *v.* Bontien, Russ. &

because it is of no consequence whether the name wrongfully applied be a real or a fictitious one.[1]

It seems, however, that it is not forgery to sign a promissory note in the name of a fictitious firm, with the intent to defraud and falsely representing that the firm consists of the debtor and another

R. C. C. 260; Rex *v.* Lyon, Russ. & R. C. C. 255; Rex *v.* Francis, Russ. & R. C. C. 209. *Compare* Com. *v.* Baldwin, 77 Mass. (11 Gray) 197; Rex *v.* Aickles, 2 East C. L. 968; s. c., 1 Leach C. C. 438.

Thus, in Lewis's Case, Fost. 116, where the person signed the name of Elizabeth Tingle, as administratrix of her father, Richard Tingle, to a power of attorney for the collection of money due the intestate, with intent to defraud the heirs, it appearing that the intestate never had a daughter, it was held to be forgery.

**Signing of Fictitious Name—Forgery When.**—The forgery of the name of even a fictitious person may complete the crime if the instrument appears upon its face to be valid. State *v.* Hahn, 38 La. An. 169. Thus, where one indorsed a note with a fictitious name, and negotiated it, representing the pretended indorser to be a person of credit, and afterwards denied all knowledge of the instrument when it was presented to him, on the failure to find the supposed indorser, he was held guilty of forgery. Bolland's Case, 1 Leach C. C. 83; s. c., 2 East C. L. 958. It makes no difference that the assumed name and the real name of the party were alike unknown to the person on whom the instrument was passed, and who would have trusted the prisoner just as readily by the one as the other, it appearing that the fictitious name was assumed for the purpose of fraud. Rex *v.* Francis, Russ. & R. C. C. 209; Reg. *v.* Whiley, Russ. & R. C. C. 90; Rex *v.* Marshall, Russ. & R. C. C. 75.

**Making Note in Name of Fictitious Person.**—Forgery may be committed by making the note in the name of a fictitious person; in an assumed name; or in the name of a bank that does uot exist. It is not necessary to the offence that the note should be one which, if gennine, would be a binding obligation. It is sufficient that the instrument purports to be good. The want of validity must appear on the face of the paper, to relieve from the character of forgery. United States *v.* Turner, 32 U. S. (7 Pet.) 132; bk. 8, L. ed. 633; United States *v.* Mitchell, Baldw. C. C. 366.

Thus it has been held that, under the act of 1816 establishing the bank of the United States, it is a forgery to make or attempt to pass a paper writing in imitation of and purporting to be issued and signed by the proper officers to sign its genuine bills, although the persons named were not so in fact. It is wholly immaterial whether the bill attempted to be passed or signed in the name of real or fictitious persons, or whether, if genuine, it would bind the bank. It is sufficient that it is "in imitation of," or "purporting to be" a bill of the Bank. United States *v.* Turner, 32 U. S. (7 Pet.) 132; bk. 8, L. ed. 633.

**Making Note in Fictitious Name of Bank.**—It is forgery to make a note purporting to be one of a bank which has no existence. State *v.* Hayden, 15 N. H. 355.

**Issuing Money-order in Fictitious Name.**—The postmaster at Lewiston, Idaho, issued a postal money-order on the application of a fictitious person, without consideration therefor, payable to a certain bank, to which he at the same time wrote in the name of such person, directing that the amount of the order be collected and remitted to him at Pierce City, in a registered package, which he intercepted as it passed through his office, and converted the contents to his own use. *Held*, that the act of the postmaster constituted forgery, both at common law and under the statute of the United States. *Ex parte* Hibbs, 26 Fed. Rep. 421; s. c., 7 Cr. L. Mag. 690.

**Fictitious Case before Justice of Peace.**—A justice of the peace who makes up a bill of costs against the county in a fictitious case, and sells it to a third party, who presents it for payment to the said county, is guilty of the crime of forgery, as defined by § 5492, Code Tenn. Luttrell *v.* State, 85 Tenn. 232.

In the case of Rex *v.* Froud, 1 Brod. & B. 300; s. c., 1 Russ. & R. C. C. 389, it was held forgery, under 38 Geo. III. c. 35, to sign the name of a fictitious magistrate to an order for the reimbursement for funeral expenses for the burial of a body cast on shore by the sea.

1. State *v.* Givens, 5 Ala. 747; United States *v.* Mitchell, Bald. C. C. 368; United States *v.* Peacock, 1 Cr. C. C. 215; Reg. *v.* Rogers, 8 Car. & P. 629; Lewis's Case, Fost. 116; Rex *v.* Moffatt, 1 Leach C. C. 431; Rex *v.* Taft, 1 Leach C. C. 172; Rex *v.* Taylor, 1 Leach C. C. 214; Rex *v.* Lockett, 1 Leach C. C. 94; Rex *v.* Bolland, 1 Leach C. C. 83; Rex *v.* Marshall, Russ. & R. C. C. 75

person.[1] Particularly is this true where the fictitious firm name is one which the defendant had been accustomed to employ, and under which he has done business.[2] Neither is the signing of a fictitious name forgery when the offence is not the assumption of the name of a supposed third person, but is merely the adoption of an alternative name of the party charged.[3] And where one subscribes a fictitious name to a check, and passes it as his own, if the credit is given to the person, and not to the name, it will not be forgery.[4]

*f.* By Fraudulently Filling Blanks.—It is forgery for an agent, or other person intrusted with authority, to fill, with a particular sum, a blank in a paper signed by his principal, where such blank is filled with a larger amount,[5] or words of a different import,[6] than those authorized to be inserted, even though the writer honestly believed a larger sum than that authorized to be inserted, and equal to the amount actually inserted, to be legally due him.[7] Thus, it is held forgery to fill a blank check with a larger sum than was intended, and to use such check for a purpose different from that which was authorized.[8]

1. Com. *v.* Baldwin, 77 Mass. (11 Gray) 497; s. c., 71 Am. Dec. 703.

2. Rex *v.* Ackles, 1 Leach, C. C. 438; s. c., 2 East C. L. 968; Rex *v.* Bontien, Russ. & R. C. C. 260.

3. Com. *v.* Baldwin, 77 Mass. (11 Gray) 197; Reg. *v.* Martin, 14 Cox C. C. 375; Dunn's Case, 1 Leach, C. C. 57.

4. Reg. *v.* Martin, 1 L. R. C. C. 244; s. c., 41 L. T. (N. S.) 531; 21 Alb. L. J. 91 4 Va. L. J. 415; 1 Cr. L. Mag. 266.

**When Signing Fictitious Name Not Forgery.**—The prisoner, in payment for a pony and cart purchased by him from the prosecutor, drew a check, in the presence of the prosecutor, upon a bank in which he, the prisoner, had no account, in the name of William Martin, his real name being Robert Martin, and gave it to the prosecutor as his, the prisoner's, own check, drawn in his own name. The prosecutor received it in the belief that it was drawn in the prisoner's own name. *Held*, that, as the prisoner gave the check entirely as his own, his subscribing it by a fictitious name did not make it a forgery; the credit having been given wholly to himself, without any regard to the name or any relation to a third person. Queen *v.* Martin, 49 L. R. C. C. R. 214; s. c., 41 L. T. (N. S.) 531; 21 Alb. L. J. 91; 4 Va. L. J. 115.

In this case, Cockburn, C. J., speaking for the court says: "The conviction must be quashed. This case is concluded by authority in Dunn's Case, 1 Leach C. C. 57. The judges agreed that, inall foreries, the instrument supposed to be forged must be a false instrument in itself; and that, if a person give a note entirely as his own, is subscribing it by a fictitious name will not make it a forgery, the credit there being given to himself, without any regard to the name or of any relation to a third person. That exactly applies in this case.

5. **Filling Blank with Larger Sum.**—Where a person has authority to fill up a blank acceptance for one sum, and he fills it up for a larger sum, it is forgery. Rex *v.* Hart, 7 Car. & P. 652. And where a person employs another to fill up a blank with a larger sum than was authorized, he will be guilty of forgery. Biles *v.* Com., 32 Pa. St. 529; s. c., 75 Am. Dec. 568; Rex *v.* Hart, 7 Car. & P. 652.

**Filling Blanks in Deed** was held to be forgery, in Wilson *v.* South Park Comrs., 70 Ill. 46.

6. State *v.* Kroeger, 47 Mo. 552; State *v.* Flanders, 38 N. H. 324; Reg. *v.* Wilson, 2 Car. & K. 527; s. c., 2 Cox C. C. 426; Rex *v.* Hart, 1 Moo. C. C. 486. See Wilson *v.* Comrs., 70 Ill. 46; State *v.* Maxwell, 47 Iowa, 454.

7. State *v.* Kroeger, 47 Mo. 552; State *v.* Flanders, 38 N. H. 334; Reg. *v.* Wilson, 2 Cox C. C. 426; s. c., 2 Car. & K. 527; s. c., 1 Den. C. C. 284; Rex *v.* Hart, 1 Moo. C. C. 486; s. c., 7 Car. & P. 632. See Frazer *v.* McKennon, L. R. 4 C. P. 704; Thoroughgoods' Case, 2 Co. Rep. 9b; Swan *v.* Land Co., 2 Hurl. & C. 175. See Alteration of Instruments.

8. State *v.* Kroeger, 42 Mo. 552; Fowler *v.* Shaw, 2 Car. & K. 703; Reg. *v.*

*g.* FRAUDULENTLY USING FALSE DATES.—Falsely altering one's own executed deed, to the prejudice of another, is forgery;[1] and it may also be forgery for a person fraudulently to execute a deed with a false date;[2] and the use of a false date, where the date is material, is forgery.[3]

*h.* BY MAKING FALSE ENTRIES.—While it is true, as a general proposition, that a person cannot be punished for forgery for making false entries in his own books,[4] yet it has been held that it is forgery (1) to make false entries in pass-books, (2) to make false entries in books of original entry, (3) to make false entries in book settlements, and (4) for a clerk to make false entries in books he is employed to keep.

(1) *False Entries in Pass-books.*—It is held to be forgery to make false entries in a pass-book, because they are, in one sense of the word, the common property of the bank and of the depositor, and the entries therein are evidence between them;[5] and where either party fraudulently alters a prior entry, it will be forgery.[6]

(2) *False Entries in Book of Original Entry.*—It is forgery to make false entries in books of original entry when such books are legal evidence against the party.[7]

Wilson, 2 Cox C. C. 426; s. c., 1 Den. C. C. 284; Rex *v.* Wright, 1 Lew. C. C. 135; Rex *v.* Hart, 1 Moo. C. C. 486; s. c., 7 Car. & P. 632. *Compare* Putnam *v.* Sullivan, 4 Mass. 45; s. c., 3 Am. Dec. 206.

**Filling Blank in Check.**—It is held to be forgery to insert in a check the words "cash or bearer" instead of "order of," and draw the money thereon. State *v.* Kroeger, 47 Mo. 552.

**Filling Blanks in Instrument.**—It was held, by the supreme court of Maine, in the case of Abbott *v.* Rose, 62 Me. 194; s. c., 16 Am. Rep. 427, that fraudulently filling of blanks in an instrument, which were intended to be filled by the party, is not a forgery, but a mere breach of trust, and that the possession of such a paper with a genuine signature would be at least *prima facie* evidence of authority to fill up the blanks. See South Brunswick *v.* Huntress, 53 Me. 89; Fearing *v.* Clark, 82 Mass. (16 Gray), 74; s. c., 77 Am. Dec. 294; Story on Prom. Notes, § 37.

**1. Filling Blank in Executed Agreement.**—However, it is not forgery for a party, after the agreement is executed, to enter *bona fide* the terms agreed to by the other party. Pauli *v.* Com., 89 Pa. St. 432.

**2.** See Reg. *v.* Ritson, 39 L. J. M. C. 10; s. c., L. R. 1 C. C. 200; 3 Coke Inst. 169. *Compare* Com. *v.* Baldwin, 77 Mass. (11 Gray) 197; s. c., 71 Am. Dec. 703.

**Antedating One's Own Deed.**—A, by deed bearing date on the 7th of May, 1868, conveyed on that date certain lands to B in fee. Subsequently, on the 26th of April, 1869, C produced a deed, bearing date the 12th of March, 1868, purporting to be a demise of the same land for a long term of years, as from the 25th of March, 1868, from A to C. It was found by the jury that the alleged lease was executed after A's conveyance to B, and antedated for the purpose of defrauding B. *Held*, that A and C were guilty of forgery. Reg. *v.* Ritson, 39 L. J. M. C. 10.

**3.** Reg. *v.* Ritson, L. R. 1 C. C. 200.

**False Acknowledgment.**—A false certificate of acknowledgment to a deed is also forgery. State *v.* Dufour, 63 Ind. 567. But a certificate of acknowledgment of a deed, which does not state that the grantor acknowledged the execution of the conveyance, is not a subject of forgery. People *v.* Harrison, 8 Barb. (N. Y.) 560.

**4.** State *v.* Young, 46 N. H. 266; s. c., 88 Am. Dec. 212.

**5.** See Reg. *v.* Moody, Leigh & C. 173; s. c., 9 Cox C. C. 166; Reg. *v.* Smith, 9 Cox C. C. 162; s. c., Leigh & C. 168; Harrison's Case, 1 Leach C. C. 180.

**6.** See Barnum *v.* State, 15 Ohio, 717; s. c., 45 Am. Dec. 601; Biles *v.* Com., 32 Pa. St. 529; s. c., 75 Am. Dec. 568; Reg. *v.* Moody, 9 Cox C. C. 166; Reg. *v.* Smith, 9 Cox C. C. 162; s. c., Leigh & C. 168.

**7.** People *v.* Phelps, 49 How. (N. Y.) Pr. 462; Biles *v.* Com., 32 Pa. St. 529; s. c., 75 Am. Dec. 568. *Compare* State *v.* Young, 46 N. H. 266.

**False Entries in One's Own Book.**—Dr. Wharton says that this doctrine "was apparently denied in New Hampshire in

(3) *False Entries in Book Settlements.*—It is forgery to fraudulently alter a settlement of a book account by the introduction of false items subsequent to the settlement, for the purpose of injuring the party charged.[1]

(4) *False Entries by Clerk in Books He is Employed to Keep.*—False entries and false additions made by clerks, cashiers, and tellers in a book of their employers, whether made in aid of the perpetration of future frauds or to cover up past transactions, are forgery.[2]

1865, in a case where it was held not forgery for a man to make a false entry in his own book account—a proposition which is correct in those cases where the accountant, in accounting, acts exclusively in his own behalf, and where his entries did not bind another. But the rule is not law in respect to an accountant who acts as agent for another, whom he thus binds; nor is it law in those States in which a forged book account may be legal evidence in support of a plaintiff's claim. Perhaps, however, we may trace the decision of the court in this case to the peculiar structure of the New Hampshire statute. 'In examining our statute,' said Sargent, J., who gives the opinion of the court, 'it will be seen that almost every form of writing or instrument known to the law is specifically enumerated as a subject of forgery, but no mention is made of accounts or books of accounts. Is it not probable that, if the law was intended to apply to so common a thing as accounts, they would all have to be mentioned with the other things specified?'" 1 Whart. Cr. L. (3d ed.) § 666.

1. Barnum *v.* State, 15 Ohio, 717; s. c., 45 Am. Dec. 601.

**Altering Book Account After Settlement.**—In Barnum *v.* State, *supra*, the indictment averred that the defendant had in his possession an account against Pearly Ayer, charged on his book previous to March 1, 1841, across which on that day was written an acquittance and discharge of the account and all demands in these words: "This account is settled in full this date, and all demands. March 1, 1841. D. Barnum; Pearly Ayer;" that afterwards, on April 30, 1845, the plaintiff in error altered the 1 at the close into a figure four (4), so as to read 1844, Ayer then "holding and having an unsettled account against the plaintiff in error, with the intent to defraud Ayer," etc. The court held this to be forgery.

2. People *v.* Phelps, 49 How. (N. Y.) Pr. 462; Biles *v.* Com., 32 Pa. St. 529; s. c., 75 Am. Dec. 568.

**False Entry by Paying-teller.**—It was held, in *Ex parte* Windsor, 10 Cox C. C. 118; s. c., 6 Best & S. 522, that it is not forgery for a paying-teller of a bank to make false entries, in the books of the bank, as to the amount of cash and securities on hand for the purpose of facilitating embezzlement. In the course of the opinion, Cockburn, C.J., said: "We must take the term 'forgery,' in the Extradition Act, to mean that which by universal acceptance it is understood to mean—namely, the making or altering of a writing so as to make the writing or alteration purport to be the act of some other person, which it is not."

**False Entry in Ledger.**—A prisoner will be convicted of forgery where the evidence shows that he made a false entry in a ledger, under his control as cashier or clerk in a public office, for the purpose of deceiving and defrauding. People *v.* Phelps, 49 How. (N. Y.) Pr 462.

**A Simple Lie,** reduced to writing, is not necessarily forgery. Consequently, where a bank clerk made certain false entries in the bank-books under his control, for the purpose of enabling him to obtain money of the bank improperly, *held*, that he was not guilty of forgery. Reg. *v.* Blackstone (L. R. Q. B. Div.), 9 Cr. L. Mag. 488.

**False Entries on Memorandum Slips.**—In the case of *In re* Tully, 20 Fed. Rep. 812, decided by the United States circuit court for the southern district of New York, June 18, 1884, it was held that false entries made in the usual books of account, or memoranda on slips directing such entries by others, made by an officer or employee of a bank for the purpose of concealing his embezzlements, do not constitute forgery as defined and recognized by the courts of *England*. The fact appears to be that Tully was sub-manager of the Preston Banking Company (Limited), and authorized to draw checks upon its agents in reducing their balances. The practice in the bank was to fill out a printed memorandum, termed a blue-slip, showing the amount drawn, and from whom, and how the proceeds were disposed of. Tully signed these slips with the letter "P," which stood for his signature in the books or memorandum.

**2. False Representations and Fraud.**—Forgery may be committed by deceitfully and fraudulently obtaining the signature of a party to an instrument which he has no intention of signing.[1] Thus one who, with intent fraudulently to utter a promissory note as the note of a person other than the signer, procures to it the signature of an innocent party who does not intend thereby to bind himself, is guilty of forgery.[2]

It is not forgery to procure a genuine signature to an instrument by fraudulently representing its contents to be other than

The blue-slips were then handed to the accountant's desk, and the proper entries were made in the books of the bank, the slips being retained as vouchers. Tully drew checks in this manner for various sums of money, appropriated the same to his own use, and returned the blue-slips to the accountant's desk, and then absconded. In the course of the opinion, it is said: "As respects the blue-slips, if I were at liberty to consider the question presented as an original one, in connection with the law of evidence prevailing in this State, I should be inclined to hold that they might possibly constitute forgery at common law, on the ground that, under the usage of the bank and the course of dealing, these blue-slips, as between Tulley and the bank, when supplemented by his own oath, as correct entries made at the time of the transaction and in the course of his official duty, might, in the absence of his own recollection, become evidence in his favor, admissible under rules of evidence, to show an investment by him of the moneys he had received as stated in the slips, and hence tending to show an acquittance to him therefor as against the bank; that these slips were precisely equivalent to entries in the books of the bank by Tully, and of the same effect as if it had been the practice for Tully to make entries in the books of the bank, instead of rendering the blue-slips for the purpose of such entries by others. Such entries in the books of the bank in the course of his daily duties would, in connection with his own oath, I think, afford some corroborative evidence in themselves, as against the bank, in favor of the person making them as parts of the *res gestæ*. Burke *v.* Wolfe, 38 N. Y. Super. Ct. 263; Bank of Monroe *v.* Culver, 2 Hill (N. Y.), 531; Conklin *v.* Stamler, 2 Hilt. (N. Y.) 423; Biles *v.* Com., 32 Pa. St. 529; s. c., 75 Am. Dec. 568; Chaffee *v.* United States, 85 U. S. (18 Wall.) 516; bk. 21, L. ed. 908; McGoldrick *v.* Traphagen, 88 N. Y. 334; 1 Greenl. Ev. § 118m; 1 Tayl. Ev. §§ 679, 712; Whart. Cr. Law, §§ 663, 668. When such entries are made falsely and fraudulently in order to conceal embezzlements, they might well, I think, under our law, be held to be forgeries at common law, as papers falsely made to the prejudice of the bank, because capable of being made use of, in connection with his own oath, as evidence against it; and the false manufacture of written evidence against another is clearly forgery."

1. State *v.* Shurtleff, 18 Me. 468; Gregory *v.* State, 26 Ohio St. 510; s. c., 20 Am. Rep. 774.

**Fraudulently Procuring Signature to Deed.**—Where the grantee procured a draft of a deed correctly describing one acre of land, the premises to be conveyed, which was examined by the grantor, but the execution of it was deferred and the draft retained by the grantee, who afterwards fraudulently procured a new draft, including in the description the grantor's whole farm, and presented it for execution as the deed before examined, and the grantor executed and delivered the same without examining it, *held*, that this was a forgery. State *v.* Shurtleff, 18 Me. 468.

2. Com. *v.* Foster, 114 Mass. 311; s. c., 19 Am. Rep. 353.

**Fraudulently Procuring Signature to Note.**—Where A, for the purpose of defrauding B, procured C, an innocent party, to sign the name of B to a promissory note by falsely representing that C was authorized by B so to do, *held*, that A was guilty of forgery. Gregory *v.* State, 26 Ohio St. 510; s. c., 20 Am. Rep. 774.

**Clerk of County Commissioners—Filling up County Bonds—Appropriation of Proceeds.**—A clerk of county commissioners, authorized by them to fill up county bonds with dates and numbers, affix the county seal and his attest, and negotiate the same for the county, after filling up, sealing, and attesting the bonds, appropriated the proceeds thereof to his own use. *Held*, a case of forgery. **Com. *v.* Work, 3 Pittsb. (Pa.) 493.**

that which they are, by falsely reading it in the hearing of the party who signs, where such party is illiterate.[1]

**3. By False Alteration, Addition, and Erasure.**—In any instrument in writing, any material falsification,[2] alteration,[3] addi-

1. State *v.* Flanders, 38 N. H. 334; Com. *v.* Sankey, 22 Pa. St. 390; s. c., 60 Am. Dec. 91; Hill *v.* State, 1 Yerg. (Tenn.) 76; s. c., 24 Am. Dec. 441.

**Fraudulent Representation as to Fact.**—It is not forgery to procure the assent of the signer of a bond to a material alteration, made without his authority after he had executed it, by fraudulently representing to him that facts existed which would render the alteration of no importance to him, although at the time of giving assent he qualified it by saying that he assented on condition that the representations were true. State *v.* Flanders, 38 N. H. 324.

**Procuring Signature by Falsely Reading.**—Writing a note for a person and inserting a larger sum than the real amount due, and falsely and fraudulently reading it over to him as for the latter amount, with a view to defraud and injure him, is not forgery. Hill *v.* State, 1 Yerg. (Tenn.) 76; s. c., 24 Am. Dec. 441.

In an indictment for forgery, the proof was that the defendant wrote a promissory note for $141.26, and read to another, who was unable to read the note, $41.26, and induced him to sign it as a maker. *Held*, that this did not constitute a forgery. Com. *v.* Sankey, 22 Pa. St. 390; s. c., 69 Am. Dec. 91.

**Pre-emption.—Stating False Matters in Final Proof,** under United States Rev. Stat. § 5479. See United States *v.* Cameron, 3 Dak. 132.

2. See, *ante*, tit. "Falsification."

Making a false charge in one's own book of account is not forgery. State *v.* Young, 46 N. H. 266.

**Falsification of Written Evidence** against another is forgery at common law; and where, by the law of the place, a clerk's or paying-teller's daily entries in the course of his duty, supplemented by his own oath, in the absence of his recollection on the subject, are admissible in evidence in his own discharge, in respect to moneys received by him, *semble*, that the falsification of such entries for the fraudulent purpose of concealing embezzlements should be deemed forgery. *In re* Tully, 20 Fed. Rep. 812.

3. People *v.* Brotherton, 47 Cal. 388; State *v.* Hitchens, 2 Harr. (Del.) 527; State *v.* Stratton, 27 Iowa, 420; s. c., 1 Am. Rep. 282; State *v.* Wooderd, 20 Iowa, 541; Com. *v.* Ladd, 15 Mass. 526; Wait *v.* Pomeroy, 20 Mich. 425; s. c., 4 Am. Rep. 395; State *v.* Riebe, 27 Minn. 315; State *v.* Kroeger, 47 Mo. 552; State *v.* Kattleman, 35 Mo. 105; Goodman *v.* Eastman, 4 N. H. 455; State *v.* Robinson, 16 N. J. L. (1 Harr.) 507; Benedict *v.* Cowden, 49 N. Y. 396; s. c., 10 Am. Rep. 382; People *v.* Graham, 6 Park. Cr. Cas. (N. Y.) 135; Barnum *v.* State, 15 Ohio, 717; s. c., 45 Am. Dec. 601; Haynes *v.* State, 15 Ohio St. 455; Biles *v.* Com., 32 Pa. St. 529; s. c., 75 Am. Dec. 568; Miller *v.* Gilleland, 19 Pa. St. 119; Com. *v.* Biles, 3 Phila. (Pa.) 350; Ream *v.* Com., 3 Serg. & R. (Pa.) 207; United States *v.* Russel, 3 Yeates (Pa.), 391; State *v.* Waters, 3 Brev. (S. C.) L. 507; State *v.* Floyd, 5 Strobh. (S. C.) L. 58; s. c., 53 Am. Dec. 669; State *v.* Schwartz, 64 Wis. 432; United States *v.* Wood, 2 Cr. C. C. 164; Rex *v.* Atkinson, 7 Car. & P. 669; Reg. *v.* Keith, Dears. C. C. 486; Reg. *v.* Blenkinsop, 1 Den. C. C. 276; Powell *v.* Divett, 15 East, 29; Henfree *v.* Bromley, 6 East, 309; Rex *v.* Elsworth, 2 East P. C. 986; Rex *v.* Teague, 2 East P. C. 979; s. c., Russ. & R. C. C. 33; Upfold *v.* Leit, 5 Esp. 100; Rex *v.* Birkett, Russ. & R. C. C. 86; Rex *v.* Post, Russ. & R. C. C. 101; Rex *v.* Treble, 2 Taunt. 328; Masters *v.* Miller, 4 T. R. 320; s. c. *sub nom.* Master *v.* Miller, 2 H. Bl. 140.

It is forgery fraudulently to erase one signature or indorsement and insert another,—State *v.* Hitchens, 2 Harr. (Del.) 527; Com. *v.* Ladd, 15 Mass. 526; State *v.* Robinson, 16 N. J. L. (1 Harr.) 507; State *v.* Waters, 3 Brev. (S. C.) L. 507; Rex *v.* Birkett, Russ. & R. C. C. 86;—to alter the sum of a note,—State *v.* Wooderd, 20 Iowa, 541; Goodman *v.* Eastman, 4 N. H. 455; Haynes *v.* State, 15 Ohio St. 455; Rex *v.* Atkinson, 7 Car. & P. 669; Rex *v.* Teague, 2 East P. C. 979; s. c., Russ. & R. C. C. 33; Rex *v.* Elsworth, 2 East P. C. 986; Rex *v.* Post, Russ. & R. C. C. 101;—to alter the date of a promissory note or order,—State *v.* Kattlemann, 35 Mo. 105; People *v.* Graham, 6 Park. Cr. Cas. (N. Y.) 135; Miller *v.* Gilleland, 19 Pa. St. 119; United States *v.* Russel, 3 Yeates (Pa.), 391; Masters *v.* Miller, 4 T. R. 320; s. c. *sub nom.* Master *v.* Miller, 2 H. Bl. 140; Rex *v.* Atkinson, 7 Car. & P. 669; Powell *v.* Divett, 15 East, 29; Henfree *v.* Bromley, 6 East, 309;—to insert a false address after a party's name,—Barfield *v.* State, 29 Ga. 127; s. c., 74 Am. Dec. 49; Com. *v.* Fos-

ter, 114 Mass. 311; s. c., 19 Am. Rep. 353; State *v.* Robinson, 16 N. J. L. (1 Harr.) 507; Rex *v.* Webb, Bayl. Bills, 603; Rex *v.* Blenkinsop, 1 Den. C. C. 206;—to alter the date of a deed so as to affect established rights,—1 Whart. Cr. L. (9th ed.) § 663;—to change the vignettes or marginal emblems of a bank-note when the effect of such change is to defraud,—Reg. *v.* Keith, Dears. C. C. 486; s. c., 6 Cox C. C. 533; 29 Eng. L. & Eq. 538. *Compare* State *v.* Waters, 3 Brev. (S. C.) L. 507;—to add to the original words of a lost receipt,—State *v.* Floyd, 5 Strobh. (S. C.) L. 58; s. c., 53 Am. Dec. 689; Upfold *v.* Leit, 5 Esp. 100; —to alter the receipt of a note, although such receipt be without signature,—Kegg *v.* State, 10 Ohio, 75;—and the like, are forgery,—State *v.* Riebe, 27 Minn. 315;—where made with intent to defraud another,—People *v.* Brotherton, 47 Cal. 388; s. c., 2 Greene Cr. Rep. 444.

**A Harmless Alteration of an Order** does not constitute forgery. Jackson *v.* State, 72 Ga. 28.

**The Correction of Errors in a Deed** is not forgery. Bouhg *v.* People (Sup. Ct. 1875), 1 N. Y. Week. Dig. 182.

**Altering Book Account.**—Altering, with intent to defraud, a book account, so as to make it include a claim that accrued after the settlement was signed, is forgery; and existence of such claim may be proved, although there was no book of original entry, or book of account, in which the items thereof were charged. Barnum *v.* State, 15 Ohio, 717; s. c., 45 Am. Dec. 601.

**Altering Figures in Journal-entries.**—It is forgery for a clerk or bookkeeper to alter figures in "journal entries" so as to conceal his defalcation or abstraction of funds in his charge belonging to his employer. State *v.* Biles, 3 Phila. (Pa.) 350; Biles *v.* Com., 32 Pa. St. 529; s. c., 75 Am. Dec. 568.

**The Alteration of Promissory Note** by erasing the dollar-mark and inserting in lieu thereof the figure "2," so that the amount appeared to be "25.00," is forgery. State *v.* Schwartz, 64 Wis. 432.

Falsely altering a promissory note in a material part, with intent to defraud any person, is a forgery within the meaning of the Virginia statutes of December 19, 1792, and December 8, 1794. United States *v.* Wood, 2 Cr. C. C. 164.

**Alteration of Receipt.**—A fraudulent alteration of a genuine receipt by the person to whom it was given, in such manner as to make it appear that the moneys receipted for were to be applied in payment of the notes of a third person, is forgery. State *v.* Wooderd, 20 Iowa, 541. See State *v.* Kattlemann, 35 Mo. 105.

A gave a receipt to B, acknowledging the receipt of money "in part" payment, and such receipt was subsequently altered so as to read in "full up to date." *Held*, that such alteration was a forgery, as forgery consists in altering the paper in a material part, to the jury of another, as well in the whole as in part. State *v.* Floyd, 5 Strobh. (S. C.) L. 58.

**Detaching Condition.**—The detachment of a written condition made at the same time and upon the same paper, from a promissory note, if altering its character and done fraudulently, is forgery. State *v.* Stratton, 27 Iowa, 420; s. c., 1 Am. Rep. 282. See Wait *v.* Pomeroy, 20 Mich. 425; s.c., 4 Am. Rep. 395; Benedict *v.* Cowden, 49 N. Y. 396; s. c., 10 Am. Rep 382.

**Altering Public Record.**—Under the Pennsylvania act of 1700, an indictment for forgery lies against one who alters and defaces the public records of the surveyor-general's office. Ream *v.* Com., 3 Serg. & R. (Pa.) 207.

**Alteration of Memoradum Indorsed by Holder of Note.**—On the back of promissory note made by L., defendant, who held the note, had indorsed, "Received from S. Lloyd the sum of $120. 24-8-74." This was not signed by any one. Afterward he altered the indorsement by changing the $120 to $20 and adding the words "as interest." *Held*, that in the absence of any allegation that the indorsement was intended as a receipt for the benefit of the maker of the note, an indictment for forgery would not lie. This does not conflict with Kegg *v.* State, 10 Ohio, 75. In that case one Patterson owed a note of $100. Patterson made a payment of $33.25, and in the presence, and with the concurrence, and by the direction of Kegg, Patterson made this indorsement on the note: "Rec'd May 4, 1839, on the within note, thirty-three dollars and 25 cents." Kegg retained the note, and when presented for final adjustment the indorsement had been altered so as to read "thirteen" instead of "thirty-three" dollars. Kegg was held guilty of forgery because the words were indorsed on the note by Patterson by his direction, and the court say that "It is unnecessary to determine what would have been the effect of the indorsement if made by the payee without the privity and knowledge of the maker." In the case at bar, the indorsement may have been no more than a mere private memorandum made by the payee, never delivered as a receipt; and, not being

tion,[1] or erasure,[2] made with fraudulent intent, is a forgery.

signed, he had the right to alter it. In the case cited, it was the concurrent act of the parties, and was the means employed by them to preserve the evidence of payment. The distinction is apparent. State *v.* Davis, 53 Iowa, 252; s.c., 22 Alb. L. J. 98.

1. Wilson *v.* South Park Commissioners, 73 Ill. 46; Caulkins *v.* Whisler, 29 Iowa, 495; s. c., 4 Am. Rep. 236; Com. *v.* Boutwell, 129 Mass. 124; Com. *v.* Ladd, 15 Mass. 526; People *v.* Graham, 6 Park. Cr. Cas. (N. Y.) 135; Martin's Case, 6 City Hall Rec. (N. Y.) 97; State *v.* Floyd, 5 Strobh. (S. C.) L. 58; s. c., 53 Am. Dec. 689.

But it is not forgery to add to an instrument words which the law would supply (Hunt *v.* Adams, 6 Mass. 619), or attach the name of a witness to an instrument which the law does not require to be attested. State *v.* Gherkin, 7 Ired. (N. C.) L. 206.

**An Interlineation of Words in a Lease**, to make it conform to the understanding of the parties at the time of its execution, is not a fraudulent alteration or forgery. Pauli *v.* Com., 89 Pa. St. 432; s. c., 7 Week. N. C. 396.

**Addition to Receipt.**—An indictment charging forgery of an accountable receipt for money is sustained by proof of the insertion of additional words and figures in a genuine receipt for money, by which the amount originally named therein was increased. Com. *v.* Boutwell, 129 Mass. 124.

**Addition to a Bill of Parcels.**—To a bill of parcels of this tenor, viz., "Mr. J. L. bo't of E. and C. . . . the above charged to G. C.," the purchaser, J. L., added these words: "by order, E. C." *Held*, that this addition amounted to an acquittance or discharge, and was a forgery within the statute. Com. *v.* Ladd, 15 Mass. 526.

**Indorsement on Note.**—Where an indictment for forgery of a promissory note charges the defendant with having, with fraudulent intent, written on the back of the note these words: "Received the sum of forty-six dollars. Louisville, 21st January, 1860," *held*, that such act did not amount to forgery. State *v.* Monnier, 8 Minn. 212.

**Filling up Blank Deed.**—The filling up of the blanks of a deed signed by the grantor, with the name of a grantee and a description of land, without authority, is a criminal act, and makes the party so offending liable to a prosecution for forgery. Wilson *v.* South Park Commissioners, 70 Ill. 46.

**Filling Blanks in Policy of Insurance—Issuing Ticket not Paid for.**—Under 2 N. Y. R. S. 673, forgery may be committed by making a material addition in a true instrument. Thus, the act of an agent of a travellers' insurance company, after an accident to a traveller, in inserting a prior date in a blank ticket or policy such as were intrusted to him by the company, and which were made complete by the insertion of the date of issue, is forgery within the statute if done with intent to defraud the company. People *v.* Graham, 6 Park. Cr. Cas. (N. Y.) 135.

**To Write an Instrument Fraudulently over Another's Signature**, which, if true, would be to his prejudice, without his knowledge, is a forgery. Martine's Case, 6 City Hall Rec. (N. Y.) 27.

**Writing Note Over Signature.** — A wrote his name on a piece of blank paper at the request of B, who afterwards, without the knowledge or consent of A, wrote a promissory note over the signature. *Held*, that the instrument was a forgery. Caulkins *v.* Whisler, 29 Iowa, 495; s. c., 4 Am. Rep. 256.

If a merchant writes his name on blank pieces of paper, and intrusts them to his clerk for the purpose of having promissory notes filled out, and a person by false pretences obtains possession of one of them and fills out a note for his own use, he does not thereby commit the offence of forgery. Putnam *v.* Sullivan, 4 Mass. 45.

2. State *v.* Stratton, 27 Iowa, 420; s. c., 1 Am. Rep. 282; Com. *v.* Hayward, 10 Mass. 34; State *v.* Kroeger, 47 Mo. 552; State *v.* Robinson, 16 N. J. L. (1 Harr.) 507; State *v.* Floyd, 5 Strobh. (S. C.) 58; s. c., 53 Am. Dec. 689; Garner *v.* State, 5 Lea (Tenn.), 213.

**Erasing Name of Bank.**—If there be a bank of the same name in two different cities one of which is insolvent, and the other is sound, erasing the name of the city on a note of the former bank and inserting the name of the other city is a material alteration, and forgery. State *v.* Robinson, 16 N. J. L. (1 Harr.) 507.

**Erasure of Indorsement from County Warrant.**—The erasure of the special indorsement of the payee upon a county warrant so as to make the indorsement a general indorsement, and passing it thus altered, for value, is forgery. Garner *v.* State, 5 Lea (Tenn.), 213.

It has been held not to be forgery for the maker of a bond to erase a word and substitute another in its place, where there was no design to cheat. Blake

**IV. What Instruments May be the Subject of Forgery.—1. In General.**—At common law, to constitute forgery, the instrument need not be such as, if genuine, would be legally valid. If it is calculated to deceive, and was intended to be used for a fraudulent purpose, this is enough.[1] Forgery may be committed of any instrument in writing which, if genuine, would or might appear as the foundation of another man's liability, or the evidence of his right.[2]

*a.* General Rules.—It is a general rule that any writing in such form as to be the means of defrauding another may be the subject of forgery, or alterations in the nature of forgery.[3] But

*v.* Allen, Sir F. Moore, 619. Also that it is not forgery to erase, from the back of a bond, an indorsement thereon of a payment made. Dennis *v.* Ryan, 5 Lans. (N. Y.) 350. And it is held, in North Carolina, not to be forgery for one falsely, wittingly, corruptly, and with intent to defraud, to rub out, erase, and obliterate an acquittance which has been indorsed upon a bond. State *v.* Thornburg, 6 Ired. (N. C.) L. 79; s. c., 44 Am. Dec. 67. And, in Arkansas, such an offence is merely a misdemeanor. State *v.* McLeran, 1 Ark. 311. And it may be laid down as a general proposition that it is not forgery of the original to obliterate or erase from a bond or a note any receipt or indorsement written thereon; because such indorsement or receipt is an independent obligation or assurance which in no way affects the qualities of the original instrument alleged to be forged. See State *v.* Davis, 53 Iowa, 252; State *v.* Thornburg, 6 Ired. (N. C.) L. 79; s. c., 44 Am. Dec. 67; State *v.* McLeran, 1 Aik. (Vt.) 311.

1. Hopper's Case, 3 City H. Rec. (N. Y.) 142.

2. Garmire *v.* State, 104 Ind. 444; Reed *v.* State, 28 Ind. 396; Shannon *v.* State, 109 Ind. 407; Com. *v.* Ray, 69 Mass. (3 Gray) 441.

3. Berrisford *v.* State, 66 Ga. 53; Arnold *v.* Cost, 3 Gill & J. (Md.) 219; s. c., 22 Am. Dec. 302; Barnum *v.* State, 15 Ohio, 717; s. c., 45 Am. Dec. 601; State *v.* Briggs, 34 Vt. 501.

In the case of Rollins *v.* State, 22 Tex. App. 548; s. c. 58 Am. Rep. 659, the court say: "When the law to which an instrument is subject makes it absolutely and everywhere inoperative without certain formalities, then falsely to make it without such formalities is not forgery. Thus, if certain witnesses are necessary to make a will or deed, falsely making a deed or will without such witnesses is not forgery. Whart. Cr. L. (9th ed.) § 697. 'But, to further illustrate, if the law forbids the circulation of notes below a certain denomination, this does not release a person from forgery; for the banker may be made liable on such notes, the prohibition going only to a circulation, and there is also a possibility of defrauding third persons.' 1 Whart. Cr. L. (9th ed.) § 699.

"'If the instrument is *prima facie* incapable of legal use, it is not forgery.' 1 Whart. Cr. L. (9th ed.) § 965. 'That the instrument, in order to make it *prima facie* proof, must appear upon the face of it to have been made to resemble a true instrument, so as to be capable of deceiving persons using ordinary observation, although those not scientifically acquainted with such instruments may not be deceived." Whart. Cr. L. (9th ed.) § 700. "Whether a particular writing is sufficient on its face, may be a question of difficulty. If a writing is so incomplete in form as to have an apparent uncertainty in law, whether it is valid or not, it does no follow that it may be a subject of forgery. In such a case, the indictment must allege such extrinsic facts as will enable the court to see that, if it were genuine, it would be valid." 2 Bish. Cr. L. (3d ed.) § 545.

"Hence, we may conclude that, if the instrument appears upon its face to be absolutely void, it cannot be the subject of forgery. But if the legality be doubtful, and by proper allegations its legality is capable of being shown to the court, it is a subject of forgery.

"In People *v.* Harrison, 3 Barb. (N. Y.) 560, Mr. Justice Hubbard states the rule thus: 'The rule seems therefore firmly established that a written instrument, to be the subject of an indictment for forgery, must be valid, if genuine, for the purpose intended. If void or invalid on its face, and cannot be made good by averment, the crime of forgery cannot be predicated upon it.'"

**Personal Injury.**—There need be no personal injury to any one; it is enough

such instrument, to be the subject of indictment for forgery, must be valid, if genuine, for the purpose intended; and if void or invalid on its face, and it cannot be made good by averment, the crime of forgery cannot be predicated upon it.[1] The general rule that the false making of an instrument, void on its face, is not forgery has the limitation that, where the instrument does not appear to have any legal validity or show that another might have been injured by it, but that extrinsic facts exist by which the holder of the paper might be enabled to defraud another, then the offence is complete, and an indictment averring the existence of the extrinsic facts will be supported.[2]

if the party on whom the forgery is executed should be exposed to apparent risk. Langdale *v.* State, 100 Ill. 263; Lemasters *v.* State, 95 Ind. 367; Harding *v.* State, 54 Ind. 359; State *v.* Ferguson, 35 La. An. 1042; Bishop *v.* State, 55 Md. 138; Com. *v.* Costello, 120 Mass. 358; State *v.* Fisher, 65 Mo. 437; Peete *v.* State, 2 Lea (Tenn.), 513; United States *v.* Turner, 32 U. S. (7 Pet.) 132; bk. 8, L. ed. 633; Reg. *v.* Pike, 2 Moo. C. C. 70. See Rembert *v.* State, 53 Ala. 467; People *v.* Fadner, 33 Hun (N. Y.), 240.

**Existence of Person Capable of Being Injured.**—It is not even necessary that there should be any person capable of being immediately defrauded by the forgery, if there is a mere possibility that he may suffer loss because of it in the future. Reg. *v.* Nash, 2 Den. C. C. 493; Reg. *v.* Sterling, 1 Leach C. C. 99. *Compare* Reg. *v.* Hodgson, Dears. & B. C. C. 3; s. c., 7 Cox C. C. 122.

**Fraud on General Public.**—Where the fraud is directed against the public at large, an indictment may be maintained for forgery,—State *v.* Wooderd, 20 Iowa, 541; McClure *v.* Com., 86 Pa. St. 353; Reg. *v.* Beard, 8 Car. & P. 143;—such as the forgery of an order from a magistrate for the discharge of a prisoner,—Rex *v.* Fawcetts, 2 East P. C. 862;—a judicial writ,—Com. *v.* Mycall, 2 Mass. 136; Reg. *v.* Collier, 5 Moo. C. C. 160; Rex *v.* Harris, 1 Moo. C. C. 893, s. c. 6 Car. & P. 129;—see People *v.* Cady, 6 Hill (N. Y.), 490;—the seal of a court,—People *v.* Fadner, 33 Hun (N. Y.), 240;—s. c., 10 Abb (N. Y.) N. C. 462;—a deposition to be used in the trial of a cause,—State *v.* Kimball, 50 Me. 409;—of naturalization papers,—United States *v.* Randolph, 1 Pittsb. (Pa.) 24;—a certificate of the forgery of a deed;—see State *v.* Tompkins, 71 Mo. 613;—fraudulently altering a marriage registry,—Reg. *v.* Dudley, 2 Sid. 71;—the forgery of an entry in a tax duplicate,—Com. *v.* Beamish, 81 Pa. St. 289.

**Political Documents.**—It has been held that the false making of political documents having no possible legal effect is not forgery. State *v.* Anderson, 30 La. An. 557; s. c., 1 South. L. J. 183.

1. People *v.* Heed, 1 Idaho, 531; State *v.* Pierce, 8 Iowa, 231; Abbott *v.* Rose, 62 Me. 194; State *v.* Wheeler, 19 Minn. 98; s. c., 1 Cr. L. Rep. 541; People *v.* Harrison, 8 Barb. (N. Y.) 560; People *v.* Shall, 9 Cow. (N. Y.) 778; Fadner *v.* People, 33 Hun (N. Y.), 240; s. c., 19 N. Y. Week. Dig. 433; Cunningham *v.* People, 4 Hun (N. Y.), 455; People *v.* Galloway, 17 Wend. (N. Y.) 540; People *v.* Fitch, 1 Wend. (N. Y.) 198; s. c. 19 Am. Dec. 477; Howell *v.* State, 37 Tex. 591; Rollins *v.* State, 22 Tex. App. 548; s. c., 58 Am. Rep. 659.

2. Rembert *v.* State, 53 Ala. 467; s. c., 25 Am. Rep. 639.

**Invalid Instrument.** — In those cases where the instrument is so palpable and absolutely invalid that under no circumstances would it be proof in legal procedure, it is false making, if not forgery. People *v.* Tomlinson, 35 Cal. 503; Downing *v.* Brown, 3 Colo. 571; People *v.* Head, 1 Idaho, 531; Brown *v.* People, 86 Ill. 239; Waterman *v.* People, 67 Ill. 91; Abbott *v.* State, 59 Ind. 70; State *v.* Davis, 53 Iowa, 252; Com. *v.* Dallinger, 118 Mass. 439; State *v.* Wheeler, 19 Minn. 98; Abbott *v.* Rose, 62 Mo. 194; People *v.* Harrison, 8 Barb. (N. Y.) 560; People *v.* Shall, 9 Cow. (N. Y.) 578; Roode *v.* State, 5 Neb. 174; s. c., 25 Am. Rep. 475; Henry *v.* State, 35 Ohio St. 128; State *v.* Humphreys, 10 Humph. (Tenn.) 442; Howell *v.* State, 37 Tex. 561; Hunter *v.* State, 14 Tex. 503; Keller *v.* State, 15 Tex. App. 112; John *v.* State, 23 Wis. 504; Reg. *v.* Harper, 44 L. T. N. S. 615; s. c., L. R. 7 Q. B. Div. 78; Rex *v.* Burke, Russ. & R. C. C. 496; Rex *v.* Pateman, Russ. & R. C. C. 455; Rex *v.* Randall, Russ. & R. C. C. 195; Rex *v.* Richards, Russ. & R. C. C. 193.

An instrument falsely made with intent to defraud is a forgery, although, if it had been genuine, other steps must have been taken before the instrument would have been perfected, and these steps are not taken.[1] But where the statute authorizes an instrument not known to the common law, and so prescribes its form as to render any other form null, forgery cannot be committed by making an instrument in any form not provided by such statute, even though it is so like the genuine as to deceive most persons.[2]

*b.* INSTANCES.—The false writing of any instrument calculated to deceive, and which, if genuine, might subject the person signing it to damages, is forgery;[3] such as: (1) Acquittance for a specific sum of money;[4] (2) book entries, such as (*a*) false entries in a journal,[5] (*b*) false entries made by the treasurer of a society in his banker's pass-book of deposit purporting to have been made for such society,[6] (*c*) false entries in books by original entries

Thus it has been held that the following papers are not subjects of indictment: A signature to a writing on its face so absurd as to show that it is not intended to deceive (Abbott *v.* State, 59 Ind. 79); a false statement to a meaningless paper (People *v.* Tomlinson, 35 Cal. 503; State *v.* Humphreys, 10 Humph. (Tenn.) 442; Henderson *v.* State, 14 Tex. 503); a bill payable to a bank or order (Rex *v.* Burke, Russ. & R. C. C. 496); an instrument incapable of enforcement because of its incompleteness (Waterman *v.* People, 67 Ill. 61; Abbott *v.* Rose, 62 Me. 194; State *v.* Wheeler, 19 Minn. 98; People *v.* Shall, 9 Cow. (N. Y.) 778; Howell *v.* State, 37 Tex. 591); such as a promissory note which has no signature (Rex *v.* Pateman, Russ. & R. C. C. 445; Rex *v.* Randall, Russ. & R. C. C. 195; Rex *v.* Richards, Russ. & R. C. C. 193); or a certificate of acknowledgment which does not state that the grantor made such acknowledgment (People *v.* Harrison, 8 Barb. (N. Y.) 500).

1. Com. *v.* Costello, 120 Mass. 358; Castley *v.* State, 14 Tex. App. 156.

**Extrinsic Testimony.**—An instrument forged, to fall within the statute, must be such that an action might be sustained thereon without recurring to extrinsic testimony. And an instrument upon which an indictment is predicated, if created by statute, must be conformable to its provisions. People *v.* Kesler, 3 Wheel. Cr. Cas. 59, 65.

2 Cunningham *v.* People, 4 Hun (N. Y.), 455.

**Style of Instrument Not Determine Character.**—In Evans *v.* State, 8 Ohio St. 196; s. c., 70 Am. Dec. 98, the court held that the style of an instrument alone does not determine its legal character. In this case the court held that an instrument in the following form, save the mere spelling, will be regarded as a statutory "order" for the payment of money, and not as a mere request: "Wen. 19th. Mr. Davis, please let the boy have $6.00 dolers for me. B. W. Earle."

To sustain an indictment for forgery, the act must be brought within the statute. The making or altering of an instrument not named in the statute is indictable as a misdemeanor at common law, but not punishable by sentence to the state prison according to the statute against forgery. State *v.* Morton, 27 Vt. 310; s. c., 65 Am. Dec. 201.

3. Dixon *v.* State, 81 Ala. 61; Reed *v.* State, 28 Ind. 396; Arnold *v.* Cost, 3 Gill. & J. (Md.) 219; s. c., 22 Am. Dec. 302; Clarke *v.* State, 8 Ohio St. 630; State *v.* Corley, 4 Baxt. (Tenn.) 410; Reg. *v.* Harper, 44 L. T. N. S. 416; s. c., L. R. 7 Q. B. Div. 78.

An instrument as follows:—

"April 28, 1885.

"Dear Sir: I have nothing to do with the Venie Dixon patch cotton, they are welcome to it, and do what they please with it. W. W. ROBERTS.

"And all so Mary Ann the same.

"W. W. ROBERTS"

—may be the subject of forgery. Dixon *v.* State, 81 Ala. 61.

4. United States *v.* Green, 2 Cr. C. C. 521; Rex *v.* Ferris, 1 Sid. 278.

5. People *v.* Phelps, 49 How. (N. Y.) Pr. 442; Biles *v.* Com., 32 Pa. St. 529; s. c., 75 Am. Dec. 316.

6. Reg. *v.* Moody, 9 Cox C. C. 166;

where they are legal evidence against the vendee,[1] (*d*) to falsely alter accounts after a joint settlement;[2] (3) certificate of acknowledgment;[3] (4) false certificate, such as (*a*) certificate of negotiable paper where it takes the form of an indorsement,[4] (*b*) of character with intent to defraud and with a capacity for defrauding;[5] as a certificate of character of a seaman to secure him an appointment to act as mate;[6] as a parish schoolmaster;[7] a police constable;[8] or a certificate that a liberated convict is obtaining his living honestly in order to secure an allowance for his support;[9] (5) to deed of lands,[10] although the pretended grantor is dead or has no title,[11] or the land is situated in another State;[12] (6) a diploma, where it is to be used as a certificate of character;[13] (7) of an artist's name to a picture;[14] (8) evidence of debt[15],

s. c., Leigh & C. 173; Reg. *v.* Smith, 9 Cox C. C. 162; s. c., Leigh & C. 168; Reg. *v.* Dodd, 18 L. T. N. S. 89; Harrison's Case, 1 Leach C. C. 180.

1. State *v.* Young, 46 N. H. 266; s. c., 88 Am. Dec. 212; Biles *v.* Com., 32 Pa. St. 529; s. c., 75 Am. Dec. 316.

2. Barnum *v.* State, 15 Ohio, 717; s. c., 45 Am. Dec. 601.

3. State *v.* Dufour, 63 Ind. 567.

**Acknowledgment to Deed.**—A certificate of acknowledgment to a deed is not a subject of forgery when such certificate does not state that the grantor acknowledged the execution of the conveyance. People *v.* Harrison, 8 Barb. (N. Y.) 560.

4. Poage *v.* State, 3 Ohio St. 229; Pennsylvania *v.* Misner, Addis. (Pa.) 44; Rex *v.* Lewis, Fost. 116. Where the instrument is one which would sustain *prima facie* a suit. Com. *v.* Dillinger, 114 Mass. 439.

5. Reg. *v.* Moah, 7 Cox C. C. 503; Reg. *v.* Sharman, 6 Cox C. C. 312; Reg. *v.* Toshack, 4 Cox C. C. 38; Reg. *v.* Mitchell, 2 F. & F. 44.

**Letters of Recommendation.**—Particularly where there is anything in the letter of recommendation on which, if it were genuine, a suit could be founded. Waterman *v.* People, 67 Ill. 91. Such as letters of recommendation for the purpose of securing specific bounties or favors, where the alleged writer would be liable for any damages which ensued if the letter had been genuine. But a mere complimentary letter of introduction does not fall within this rule, as will be seen hereafter. See Mitchell *v.* State, 56 Ga. 171; United States *v.* Green, 2 Cr. C. C. 521.

6. Reg. *v.* Toshack, 4 Cox C. C. 38.

7. Reg. *v.* Sharman, Dears. C. C. 285.

8. Reg. *v.* Moah, 7 Cox C. C. 503.

9. Reg. *v.* Mitchell, 2 F. & F. 44.

**Certificate of Character—Massachusetts Doctrine.**—It has been held, however, in Com. *v.* Chandler, Thach. C. C. (Mass.) 187, that the forgery of a certificate of character to enable a servant to obtain remunerative employment is not indictable unless the defendant had the further unlawful design of defrauding his employer of his money or goods; for the reason that he might have adopted this course to get into the service of a good master. And it is not impossible—although the act was extremely indiscreet—that he may have intended to be a faithful servant.

10. State *v.* Shurtleff, 18 Mo. 368; State *v.* Fisher, 65 Mo. 437; People *v.* Flanders, 18 Johns. (N. Y.) 163; Henderson *v.* State, 14 Tex. 503; Reg. *v.* Gould, 20 Up. Can. C. P. 159; Reg. *v.* Ritson, L. R., 1 C. C. 200.

**Mortgage.**—Forgery may be committed with respect to a mortgage. People *v.* Sharp, 53 Mich. 523.

11. Henderson *v.* State, 14 Tex. 503.

12. People *v.* Flanders, 18 Johns. (N. Y.) 163.

**But Where a Forged Deed is Valid on Its Face,** it is indictable, though the reputed grantor be dead; and it is not necessary to prove that the reputed grantor had any title or claim to the land. Henderson *v.* State, 14 Tex. 503.

13. McClure *v.* Com., 86 Pa. St. 353.

14. Reg. *v.* Closs, Dears. & B. C. C. 460; s. c., 7 Cox C. C. 494. The ground on which this decision was placed is the fact that the false name thus painted need not, under any circumstances, be the basis of a suit against the artist who bore the name.

15. Van Horne *v.* State, 5 Ark. 349; Ames' Case, 2 Me. (2 Greenl.) 365; Com. *v.* Henry, 118 Mass. 460; Com. *v.* Dallinger, 118 Mass. 439; Com. *v.* Ward, 2 Mass. 397; Butler *v.* Com., 12 Serg. &

such as (*a*) bank notes,[1] (*b*) bank checks,[2] (*c*) bills of exchange,[3] (*d*) bonds,[4] (*e*) county warrants,[5] (*f*) federal securities,[6] (*g*) promissory notes;[7] (*h*) receipts,[8] such as a receipt

R. (Pa.) 237; s. c., 14 Am. Dec. 679; Rex *v.* Morton, 2 East P. C. 955; Reg. *v.* Kinnear, 2 Rob. & M. 117.

1. State *v.* Van Hart, 17 N. J. L. (2 Harr.) 327; Thompson *v.* State, 9 Ohio St. 354; Butler *v.* Com., 12 Serg. & R. (Pa.) 237; s. c., 14 Am. Dec. 679; Twitchell *v.* Com., 9 Pa. St. 211; Clary *v.* Com., 4 Pa. St. 210; White *v.* Com., 4 Binn. (Pa.) 418; Buckland *v.* Com., 8 Leigh (Va.), 732; Hendrick *v.* Com., 5 Leigh (Va.), 707.

**An Instrument which Shows on its Face** that it was "issued with intent to circulate as money," though prohibited under heavy penalties, civil and criminal, is not void, but may be the subject of forgery. Nelson *v.* State, 82 Ala. 44.

**Notes of Non-existent Bank.**—The notes of a non-existent bank may be the subject of forgery under a statute providing for the punishment of forgery by counterfeiting notes "purporting" to be issued by a bank. State *v.* Hayden, 15 N. H. 355.

**Private Bank.**—The notes of a private unauthorized banker are subjects of forgery in those cases where the statute does not positively forbid the circulation of such notes. Butler *v.* Com., 12 Serg. & R. (Pa.) 237; s. c., 14 Am. Dec. 679; United States *v.* Winslow, 2 Cr. C. C. 47.

**Notes of Expired Bank.**—The notes of a bank whose charter has expired, which purport to have been issued prior to such expiry, may be the subject of forgery. White *v.* Com., 4 Binn. (Pa.) 418; Buckland *v.* Com., 8 Leigh (Va.), 732.

**Tickets Issued by a Corporation** circulating as money in violation of law are subjects of forgery. Van Horne *v.* State, 5 Ark. 349.

**Certificates of Municipal Indebtedness** purporting to be issued by a municipality which has no power to issue such certificates may be subjects of forgery. State *v.* Eades, 68 Mo. 150; s. c., 30 Am. Rep. 780.

2. Hawthorn *v.* State, 56 Md. 530; State *v.* Coyle, 41 Wis. 267.

3. Reg. *v.* Harper, L. R. 7 Q. B. Div. 78. s. c., 44 L. T. N. S 615.

4. Bowles *v.* State, 37 Ohio St. 35; Pennsylvania *v.* Misner, Addis. (Pa.) 44; Com. *v.* Linton, 2 Va. Cas. 205. See Bishop *v.* State, 55 Md. 138; Costlev *v.* State, 14 Tex. App. 158.

**A Bond** purporting to be issued under a statute, in anticipation of a tax authorized to be levied, to pay for an improvement, is the subject of forgery, although the statute, under certain conditions which may or may not exist, would have an operation in conflict with the constitution. Bowles *v.* State, 37 Ohio St. 35.

5. State *v.* Fenly, 18 Mo. 445.

6. People *v.* Heed, 1 Idaho, 531; Bletz *v.* Columbia Nat. Bank, 87 Pa. St. 87; Com. *v.* Schaffer, 4 U. S. (4 Dall.) App. xxvi; bk. 1, L. ed. 926. See White *v.* Com., 4 Binn. (Pa.) 418.

**County Warrant.**—But where the defendant was indicted for forging and counterfeiting a county warrant, and the instrument imitated was a nullity, it was held that the indictment would not lie. People *v.* Heed, 1 Idaho N. S. 531.

7. See People *v.* Frank, 28 Cal. 507; Cross *v.* People, 47 Ill. 152; s. c., 95 Am. Dec. 474; State *v.* McMackin, 70 Iowa, 281; Abbott *v.* Rose, 62 Me. 194; s. c., 16 Am. Rep. 427; State *v.* Mott, 16 Minn. 473; s. c., 10 Am. Rep. 152; State *v.* Young, 47 N. H. 402; People *v* Shall, 9 Cow. (N. Y.) 778; State *v.* Haynes, 6 Coldw. (Tenn.) 550; Norton *v.* State, 32 Tex. 79; State *v.* Hill, 30 Wis. 416. overruling John *v.* State, 23 Wis. 504; Hawkewood's Case, 2 East P. C. 955; s. c., 1 Leach C. C. 257; Rex *v.* Morton, 2 East C. L. 955.

**Under the English Statute**, 24 & 25 Vict. c. 98, sec. 19, it is held to be forgery to take a positive photographic impression of a note on glass, although a note could not be printed from such an impression. Reg. *v.* Rinaldi, Leigh & C. 330; s. c., 9 Cox. C. C. 391.

**Affirmation of Solvency of Maker of Note.**—A mere affirmation of solvency of the parties to a note indorsed on the instrument, being a simple expression of opinion, is therefore not a subject of forgery. State *v.* Givens, 7 Ala. 747.

**A Premium Note**, forwarded by an insurance agent to his company, with an application for insurance, may be the subject of forgery, although containing a provision that it shall not be valid unless the policy is issued, notwithstanding no policy is issued. State *v.* McMackin, 70 Iowa, 281.

8. State *v.* Riebe, 27 Minn. 315; Barnum *v.* State, 15 Ohio, 717; s. c., 45 Am. Dec. 601; State *v.* Shelters. 51 Vt. 102; s. c., 31 Am. Rep. 679; Rex *v.* Gade, 2 Leach C. C. 732; s. c., 2 East P. C. 487.

for money,[1] (*i*) or any writing purporting to contain promises to pay,[2] even though the promise, without consideration, be to pay in labor and the like;[3] (9) instruments defective because of a lack of legal formalities, e.g., because of want of seals, stamps, or due attestation;[4]

See State *v.* Maxwell, 47 Iowa, 454; Com. *v.* Lawless, 101 Mass. 32; State *v.* Foster, 3 McC. (S. C.) 442; Reg. *v.* French, L. R. 1 C. C. 217.

**Pawnbroker's Ticket.**—It is held in Reg *v.* Fitchie, Dears & B. C. C. 175; s. c., 3 Jur. N. S. 419; 26 L. J. M. C. 90; 40 Eng. L. & Eq. 598, that a person who utters a forged pawnbroker's duplicate may be indicted for uttering a forged receipt.

1. Com. *v.* Talbot, 84 Mass. (2 Allen) 161; Com. *v.* Ladd, 15 Mass. 526; State *v.* Shelters, 51 Vt. 102; s. c., 31 Am. Rep. 679; Reg *v.* Atkinson, 1 Car. & M. 325; Reg. *v.* Houseman, 8 Car. & P. 180; Rex *v.* Martin, 7 Car. & P. 549; Reg. *v.* Carson, 14 Up. Can. C. P. 309.

**Clearance Card.**—But it is held that a clearance card from a secret society or social lodge is not a receipt or other instrument in writing which is a subject of forgery. Reg. *v.* French, L. R. 1 C. C. 217.

**An Accountable Receipt for Money** may be forged by fraudulently increasing the amount named therein. Com. *v.* Boutwell, 129 Mass. 124; Com. *v.* Butterick, 100 Mass. 12.

2. **Due Bills.**—A written instrument in these words, "Due 8 50 c. J. D.," may be the subject of forgery when the explanatory averments are added as meaning that the sum of $8.50 was due the bearer, as change, from the firm of M. Bros. at their store, as certified by one J. D., a clerk in their employment, who had authority to make such certificate in the regular course of business. Nelson *v.* State, 82 Ala. 44.

**Alteration of a Mere Memorandum.**—"2 hides, $4.00. Sitman,"—which, upon its face, is evidence of no pecuniary obligation, and its alteration, by simply changing the figures, could neither increase nor diminish any pecuniary obligation, cannot be considered forgery under the statute of Texas. Howell *v.* State, 37 Tex. 591. If there was any understanding between other persons and Sitman that they would pay the amount of such a memorandum, and if defendant by altering the figures of the memorandum and availing himself of the understanding has obtained more money on the faith of it than was due, he is punishable for swinling, not for forgery. Howell *v.* State, 37 Tex. 591.

3. People *v.* Shall, 9 Cow. (N. Y.) 778.

4. People *v.* Frank, 28 Cal. 507; Cross *v.* People, 47 Ill. 152; s. c., 95 Am. Dec. 474; Laird *v.* State, 61 Md. 309; State *v.* Young, 47 N. H. 402; John *v.* State, 23 Wis. 504.

**Unstamped Instrument.**—But the established rule that to simulate an instrument which upon its face has no validity or force does not constitute the crime of forgery, applies to a case of writing a false indorsement upon a draft, which, as set out in the indictment, appears not to have been stamped in accordance with the internal-revenue law. John *v.* State, 23 Wis. 504.

**Legal Formalities.**—Where the law simply provides that without certain formalities an instrument shall not be the foundation of a suit, falsely making or altering such instrument, though it be without the due legal formalities, is forgery. People *v.* Frank, 28 Cal. 507; Cross *v.* People, 47 Ill. 152; s. c., 95 Am. Dec. 474; Carpenter *v.* Snelling, 97 Mass. 452; State *v.* Mott, 16 Minn. 472; s. c., 10 Am. Rep. 152; State *v.* Young, 47 N. H. 402, 488; State *v.* Greenlee, 1 Dev. (N. C.) L. 523; Pennsylvania *v.* Misner, Addis. (Pa.) 44; Com. *v.* Searle, 2 Binn. (Pa.) 332; State *v.* Haynes, 6 Cold. (Tenn.) 550; Horton *v.* State, 32 Tex. 79; State *v.* Hill, 30 Wis. 416; John *v* State, 23 Wis. 504; Rex *v.* Morton, 2 East P. C. 955; Reg *v.* Pipe, 2 Moo. C. C. 70; Rex *v.* Teaque, Russ. & R. C. C. 33; Rex *v.* Hawkeswood, 6 T. R. 606*n*.

**Prescribed Formalities.** — In those cases where the law provides that unless certain instruments are executed with designated formalities or else they shall be absolutely and therewith inoperative, a false making of such instrument without such said formalities is not forgery. Roode *v.* State, 5 Neb. 174; s. c., 25 Am. Rep. 475; Cunningham *v.* People, 4 Hun (N. Y.). 455; Henderson *v.* State, 14 Tex. 503.

**A Married Woman's Deed** being void without acknowledgment under the laws of the State where it was executed, an indictment for forgery of such an instrument cannot be sustained in another State. Roode *v.* State, 5 Neb. 174; s. c., 25 Am. Rep. 475.

**Unattested Deed.**—Thus where a deed is required to be attested by a certain number of witnesses, an instrument pur-

(10) any judicial writ or record;[1] (11) letters of credit;[2] (12) letters of recommendation;[3] (13) official stamp on a cor-

porting to be a deed, but not attested, as required by law, will be void on its face, and will not sustain an indictment of forgery. People *v.* Harrison, 8 Barb. (N. Y.) 560; State *v.* Smith, 8 Yerg. (Tenn.) 150; Rex. *v.* Wall, 2 East P. C. 953; Rex *v.* Burke, Russ. & Ry. C. C. 496; Rex *v.* Rushworth, Russ & R. C. C. 317.

**Certificate to Deed.**—An indictment will not lie for forging a certificate of the acknowledgment of a deed, which certificate does not state that the grantor acknowledged the execution of the conveyance. People *v.* Harrison, 8 Barb. (N. Y.) 560.

**A Certificate of Record** falsely purporting to be made by the recorder is a forgery, although it does not name the year in which the deed was deposited for record. State *v.* Tompkins, 71 Mo. 613.

Thus, a writing indorsed upon a conveyance of land, and purporting to be the certificate of a commissioner of deeds, but not stating that the grantor acknowledged the execution of the conveyance, would be invalid if genuine, and is not a criminal forgery. People *v.* Harrison, 8 Barb. (N. Y.) 560.

1. Jacobs *v.* State, 61 Ala. 448; *Ex parte* Finley, 66 Cal. 263; s. c., 19 Rep. 236; State *v.* Johnson, 26 Iowa, 407; s. c., 96 Am. Dec. 158; State *v.* Hilton, 35 Kan. 338; State *v.* Basso, 38 La. An. 202; State *v.* Kimball, 50 Me. 409; Com. *v.* Mycall, 2 Mass. 136; State *v.* Tompkins, 71 Mo. 613; People *v.* Cady, 6 Hill (N. Y.), 490; Fadner *v.* People, 33 Hun (N. Y.), 240; s. c., 10 Abb. (N. Y.) N. C. 462; Com. *v.* Luberg, 94 Pa. St. 85; Com. *v.* Beamish, 81 Pa. St. 389; United States *v.* Randolph, 1 Pittsb. (Pa.) 24; Costley *v.* State, 14 Tex. App. 156; Com. *v.* Linton, 2 Va. Cas. 476; United States *v.* Irwin, 5 McL. C. C. 178; Rex *v.* Fawcett, 2 East P. C. 862; Rex *v.* Harris, 1 Moo. C. C. 393; s. c., 6 Car. & P. 129; Rex *v.* Collier, 5 Car. & P. 160; Rex *v.* Dudley, 2 Sid. 71.

**Bail-bonds.**—Being an instrument in writing which creates a pecuniary obligation, a bail-bond is, like any other written instrument creating such an obligation, a subject of forgery. Costley *v.* State, 14 Tex. App. 156.

A bail-bond which has been altered in the material part may be the subject of a prosecution for forgery, although some doubts may be raised as to the validity of the bond, arising from the recitals in the condition. Com. *v.* Linton, 2 Va. Cas. 476.

**An Affidavit of Ownership in Detinue** may be a subject of legal forgery; though purely cautionary, it is material to the point of inquiry when made, and, if false, tends to the abuse of the administration of justice. Jacobs *v.* State, 61 Ala. 448.

**Substitution of Name of County in Writ.**—Where a justice of the peace, after the service, and before the return day of a writ issued by himself, substituted the name of another county in his caption, so as to legalize the service in this latter county by the officer who had made it, *held*, that the offence, if any, was forgery, and must be strictly charged as such. Com. *v.* Mycall, 2 Mass. 136.

**Change in Date of Writ.**—It is not forgery in an attorney to alter the figures indicating the day appointed for executing a writ of inquiry served upon him, in order to make the notice served upon him apparently irregular, and with intent to defraud. People *v.* Cady, 6 Hill (N. Y.), 490.

**Copy of Decree of Divorce.**—A certified copy of a decree of divorce, with the seal of the court attached, is a subject of forgery, and it is not necessary to allege in the information that the parties mentioned were married. *Ex parte* Finley, 66 Cal. 262; s. c., 19 Rep. 236.

**The Certificate of the Justice of the Peace** authorizing a board of supervisors to count and destroy gopher scalps produced before him, authenticating such counting and destruction, and which is received and taken by the board as legal proof of the counting for the purpose of issuing warrants to pay the bounties awarded in such cases, is a subject of indictment. State *v.* Johnson, 26 Iowa, 407.

**False Proofs of the Death** of one who was not dead were fraudulently furnished to the company which had insured his life. Among these proofs were two papers purporting to be, one, the undertaker's, the other the clergyman's certificate. *Held*, that the defendant, who prepared these papers, was properly convicted of forgery. State *v.* Hilton, 35 Kan. 338.

2. United States *v.* Green, 2 Cr. C. C. 521; Rex *v.* Savage, Styles, 12.

3. Mitchell *v.* State, 56 Ga. 171; United States *v.* Green, 2 Cr. C. C. 521; Reg. *v.* Moah, 7 Cox C. C. 503; s. c., Dears. & B. C. C. 550; 4 Up. Can. L. J. 240; Reg. *v.* Yarrington, 1 Salk. 406.

porate instrument;[1] (14) an order for the delivery of goods;[1] (15) orders for the payment of money;[3] (16) a petition to the

1. **Corporate Stamp.**—Such stamp, if true, would be the proper assurance that the instrument had been duly issued and was binding on the corporation. People *v.* Graham, 1 Park. Cr. Cas. (N. Y.) 141.

2. Hobbs *v.* State, 75 Ala. 1; Allen *v.* State, 74 Ala. 557; People *v.* Way, 10 Cal. 336; Burke *v.* State, 66 Ga. 157; Stewart *v.* State, 111 Ind. 544; State *v.* Ferguson, 35 La. An. 1042; State *v.* Morgan, 35 La. An. 293; Harris *v.* People, 9 Barb. (N. Y.) 664; People *v.* Fitch, 1 Wend. (N. Y.) 198; Dobb's Case, 6 City Hall Rec. (N. Y.) 61; State *v.* Keeter, 80 N. C. 472; State *v.* Lane, 80 N. C. 407; State *v.* Holly, 2 Bay (S. C.), 262; Peete *v.* State, 2 Lea (Tenn.), 513; Rollins *v.* State, 22 Tex. App. 548; Anderson *v.* State, 20 Tex. App. 595; United States *v.* Brown, 3 Cr. C. C. 268; United States *v.* Book, 2 Cr. C. C. 294; Reg. *v.* Autey, 7 Cox C. C. 329.

**An Order for Goods, which has been Satisfied** by the delivery of the goods, and is in the hands of the drawer, is in legal acceptation no instrument; an alteration of the date will not be forgery. People *v.* Fitch, 1 Wend. (N. Y.) 198; s. c , 19 Am. Dec. 477.

**Acceptance for Delivery of Goods.**—In the case of Com. *v.* Ayer, 57 Mass. (3 Cush.) 150, it is held that a false making of an acceptance of a conditional order for the delivery of goods is forgery at common law.

**What Considered an Order for the Delivery of Goods**—An indictment for forgery lies for making and issuing a false instrument in the name of another, requesting persons to whom goods have been sent by the owner to deliver them to the bearer, the latter having induced the owner so to send the goods, by falsely representing that he was directed by those to whom the goods were sent to buy the same for them. Harris *v.* People, 9 Barb. (N. Y.) 664.

Thus it has been held to be forgery to falsely write the following orders: "Please let George have $16 worth, and charge the same to Mr. G. Garrett"—State *v.* Ferguson, 35 La. An. 1042; "Let A., the bearer, have what articles he wants and present bill to be paid first of month at my office"—Allen *v.* State, 74 Ala. 557; "Halls & Davis: Please let this boy have soot of clothes—Mrs. Wilson"—Stewart *v.* State, 111 Ind. 544; "Sir: let the bearer have a pair of boots. Yours, etc."—United States *v.* Book, 2 Cr. C. B. 294; United States *v.* Brown, 3 Cr. C. C. 268; "George Woods: Martin Baysinger let Wiley Anderson have $10 worth of goods and he will stand for it"—Anderson *v.* State, 20 Tex. App. 595; "Dec. 23, 1882. Bleas let James Johnson have $10 worth of dry goods, $10, and send the bill to J. Dillinger"—State *v.* Morgan, 32 La. An. 293; "George let the boy have $2 worth of what he wants"—Burke *v.* State, 66 Ga. 167; "May let R. have $19 in goods and charge to me"—Peete *v.* State, 2 Lea (Tenn.), 513; "Please send me word how long you will give Stephen to pay for the boots, and if you will allow him time enough to pay for it, let him have a cheap bureau, as cheap as possible, and I will see that you get so much a week, and oblige."—Hobbs *v.* State, 75 Ala. 1; "Dulks and Helker: You will please pay to the boy $3 in merchandise and oblige, J. B. Punkins"—State *v.* Lane, 80 N. C. 407. In a case where the indictment described the instrument as follows: "July 3, 1885. Apolas (meaning Appollas) & (meaning and) Halsal. please let Mr. G. B. Rollins (meaning Mr. G. B. Rollins) have 4$ood (meaning four dollars) in goods and oblige; charge to me. Joel E3ler (meaning Joel Eller)," *held*, sufficient, under the rule announced above to support the assignment of forgery. Rollins *v.* State, 22 Tex. App. 548.

**Want of Addressee.** — An order for merchandise may be the subject of forgery, though addressed to no one. Peete *v.* State, 2 Lea (Tenn.), 513.

The person whose name to an order for delivery of goods is forged should have a right to order their delivery, for it should appear that the drawer has right of control over articles ordered. There should be a direction to the person to whom the order is to be presented, and the article should be specified. Dobb's Case, 6 City Hall Rec. (N. Y.) 61.

3. Wright *v.* State, 79 Ala. 262; Anderson *v.* State, 65 Ala. 553; Williams *v.* State, 61 Ala. 33; Burke *v.* State, 66 Ga. 157; Thomas *v.* State, 59 Ga. 784; Powers *v.* State, 87 Ind. 97: State *v.* Baumon, 52 Iowa, 68; State *v.* Jefferson (La. An.), 1 So. Rep. 669; Com. *v.* Ayer, 74 Mass. (8 Cush.) 280; Harris *v.* People, 9 Barb. (N. Y.) 264; People *v.* Krummer, 4 Park. Cr. Cas. (N. Y.) 217; State *v.* Keeter, 80 N. C. 472; State *v.* Lane, 80 N. C. 407; State *v.* Leak, 80 N. C. 403; United States

legislature;[1] (17) a power of attorney;[2] (18) physician's certificate of sickness, forged in order to secure weekly allowance of money provided by a secret society;[3] (19) written request for the loan of money;[4] (20) railway or other ticket;[5] (21) railway pass;[6] (22) a statement where the writing, if true, would expose the party purporting to execute the instrument to an action of assumpsit;[7] (23) telegraphic message;[8] (24) trade-mark or label where it can be made the basis of an action for deceit or warranty against the

*v.* Green, 2 Cr. C. C. 520; Rex *v.* Ward, 2 East P. C. 861.

**"Order" and "Request" to Pay Money.**—Regarding the meaning of an "order" or "request" for the payment of money, see Noakes *v.* People, 25 N. Y. 380; Carberry *v.* State, 11 Ohio St. 410; Evans *v.* State, 8 Ohio St. 196; s. c., 70 Am. Dec. 98; Reg. *v.* McConnell, 1 Car. & K. 371; s. c., 2 Moo. C. C. 298; Rex *v.* Harris, 6 Car. & P. 129; s. c., 1 Moo. C. C. 393; Reg. *v.* Lonsdale, 2 Cox C. C. 222; Reg. *v.* Illidge, 1 Den. C. C. 407; s. c., T. & M. 127; 3 Cox C. C. 552.

An order to "pay this man" a certain sum is, in effect, an order to pay to bearer, and may be the subject of forgery. That it is not dated makes no difference. Thomas *v.* State, 59 Ga. 784.

The following written instrument may be the subject of forgery: "Uniontown. August, 23, 1878. Mr. Cohen—Please send me ten dollars, and I will sell some cotton next weak, and pay you the money back. Henry Goldmon." Williams *v.* State, 61 Ala. 33.

To falsely make and utter the following order, viz.: "Dear Sir:—Please let the bearer of this have five dollars on my charge. John Singleton,"—*held* to constitute a forgery, although "John T. Singleton" was intended as the drawer, and the payee and drawee were not named. State *v.* Baumon, 52 Iowa, 68.

A youth in service made a false letter, as from a third person to himself, desiring he would ask his employers for $7 for a certain purpose, presented the letter, and obtained the money. *Held* forgery. The facts that the third person had not a legal right to draw the money, and the employers might have declined to furnish it, even had the letter been genuine, made no difference. People *v.* Krummer, Sheld. (N. Y.) 549.

A written acknowledgment that J. has picked so many pounds of cotton, purporting to be signed by the proper party, amounts to a note or order for the payment of money; and under a charge of forgery it can serve as a basis for the indictment. State *v.* Jefferson (La. An.), 1 So. Rep. 669.

**When Order Contains No Name of Drawee**—An indictment can be maintained for the forgery of a written order to pay money, though the order contain the name of no drawee. Powers *v.* State, 87 Ind. 97.

1. Alexander *v.* Alexander, 9 Wend. (N. Y.) 141.

2. **Power of Attorney**, authorizing a receipt of a pension due from the government to a wounded seaman, not under seal, though forged, is not an instrument upon which an indictment for forgery, under the statute, can be predicated. 3 Wheel. Cr. Cas. 163.

3. Com. *v.* Ayer. 57 Mass. (3 Cush.) 153.

4. State *v.* Williams, 61 Ala. 33; Jones *v.* State, 50 Ala. 161; United States *v.* Green, 2 Cr. C. C. 520.

**Request for Loan of Money.**—In the case of Jones *v.* State, *supra*, the court say: "We cannot doubt that the forgery of a writing purporting to be an order on request from a son to a father for money is criminal and punishable. It may be that the payment of the money by the parent on the order, if genuine, would be gratuitous as mere matter of affection and favor; yet it is as criminal morally and legally to cheat and defraud him by practising upon his affection for a favor to a child as by the pretence that he was being discharged from the liability or acquiring a legal right.

5. Com. *v.* Ray, 69 Mass. (3 Gray) 441; Reg. *v.* Boult, 2 Car. & K. 604; Reg. *v.* Fitch, 9 Cox C. C. 160; s. c., 12 Alb. L. J. 147.

6. Com. *v.* Ray, 69 Mass. (3 Gray) 441; Reg. *v.* Boult, 2 Car. & K. 604.

7. Ames' Case, 2 Me. 365. See State *v.* Givens, 5 Ala. 747. But in such a case the instrument must be of such a nature as to be in some way calculated to expose the party whose name is forged to a statute at law. Jackson *v.* State, 2 B. Mon. (Ky.) 214.

8. Reg. *v.* Stewart, 25 Up. Can. C. P. 440.

alleged issuer;[1] (25) transfer of land;[2] (26) letters[3] (27) and other writings.[4] It has been held that the following instruments are not subjects of forgery: (1) the acknowledgement of money received, where not an actionable receipt;[5] (2) certificates imposing no duty and conferring no right;[6] such as certificates of good character,[7] (3) a demit or withdrawal card from a secret organization, or clearance card from a social lodge;[8] (4) a deed void on its face;[9]

1. Reg. *v.* Smith, 8 Cox C. C. 32; s. c., Dears. & B. C. C. 566.

**Imitation of Wrappers.**—Sir Fitz-James Stephens says in his Digest of Criminal Law (art. 357, p. 299) that where "A prints a number of wrappers imitating advertisements, in which egg powders were wrapped for sale by B, their maker. He encloses spurious egg powders in the wrappers, and sells them. This is not forgery, though it is obtaining money by false pretences. Reg. *v.* Smith, Dears & B. 566. It would seem as if in this case the element wanting to complete the offence was the intent to defraud by means of the document, rather than the absence of a document capable of being forged; the offence lay in selling spurious as real powders. The wrappers without the powders could have no effect whatever. The essence of forgery is that the document itself should be made the instrument of fraud."

2. Phillips *v.* State, 6 Tex. App. 364.

3; Reg. *v.* Tylney, 1 Den. C. C. 319; Rex *v.* Coogan, 1 Leach C. C. 449; Rex *v.* Sterling, 1 Leach C. C. 99; s. c., 2 East, 950.

4. United States *v.* Lawrence, 13 Blatchf. C. C. 210.

5. Com. *v.* Lawless, 101 Mass. 32; Com. *v.* Talbot, 84 Mass. (2 Allen) 161; Reg. *v.* Moody, Leigh. & C. 123.

6. Rembert *v.* State, 53 Ala. 467; Com. *v.* Hinds, 101 Mass. 299; Com. *v.* Chandler, Thach. C. C. (Mass.) 187; State *v.* Smith, 8 Yerg. (Tenn.) 150. Thus where an indictment alleged that the defendant, contriving and intending to deceive one S. G. P., and to induce him to employ the defendant, and to pay him a large sum of money as wages, exhibited and delivered to said S. G. P. a certain certificate of good character, *held*, that this did not constitute forgery. Com. *v.* Chandler, Thach. C. C. (Mass.) 187.

7. Com. *v.* Hinds, 101 Mass. 209; Com. *v.* Chandler, Thach. C. C. (Mass.) 187.

8. Reg. *v.* French, L. R. I. C. C. 217.

9. Perdue *v.* Aldridge, 19 Ind. 290; Roode *v.* State, 5 Neb. 174; s. c., 25 Am. Rep. 475; People *v.* Galloway, 17 Wend. (N. Y.) 501; Carney *v.* Hopple's Heirs, 17 Ohio St. 39; Smith *v.* Hunt, 13 Ohio, 260, 268; Henderson *v.* State, 14 Tex. 503.

In People *v.* Galloway, *supra*, it is said of the statute in relation to forgery that "it was made to protect men in the enjoyment of their property, and if the instrument can by no possibility prejudice any one in relation to his estate, it will not be an offence within the statute. . . In prosecuting for forgery it is material that the instrument should not upon its face appear to be illegal and void." Rex *v.* Moffatt, 1 Leach C. C. 431. And Baron Eyre said in Jones & Palmer's Case, 1 Leach C. C. 366, that the instrument, to be the subject of forgery, must "purport on the face of it to be good and valid for the purpose for which it was created." Roode *v.* State, 5 Neb. 174; s. c. 25 Am. Rep. 477; 2 Bish. Cr. L. (7th ed.) § 506.

**Letters of Order by Bishop.**—In Reg. *v.* Morton, 12 Cox C. C. 456; s. c., L. R. 2 C. C. 22; 1 Greene Cr. Rep. 135, it was held that the forging of letters of orders issued by a bishop, certifying that on a day and at a place mentioned thereon A. B. was admitted into the holy order of deacons according to the manner prescribed by Church of England, and rightly and canonically ordained deacon, in testimony whereof the bishop had caused his episcopal seal to be affixed thereunto, is not a felonious forgery within the statute.

Bovill, C. J., speaking for the court, says: "Generally speaking, a deed, as described in various authorities, is something in the nature of a contract between the parties to it, but it is clearly not confined to cases of contract only. There may be a deed of feoffment. A deed may effectuate a gift, or grant, or obligation, or a mere authority, as a power of attorney (Rex *v.* Fauntleroy, 2 Bing. 413; Rex *v.* Lyon, Russ. & R. C. C. 255), and there also may be deeds of release and disclaimer. It seems to me that the meaning of the legal definition of a deed, to be gathered from the authorities, is a document under seal and delivered as a deed which confers a right, or passes an interest; or in the case of a feoffment as a document authenticating the transfer of the land."

(5) diplomas or pictures;[1] (6) letters of introduction;[2] (7) a writing stating that a certain note is perfectly good;[3] or that certain parties are solvent and able to pay their notes;[4] (8) receipts to a surgeon-general acknowledging a discharge, and a check for $100;[5] (9) a writing containing no obligation,[6] or (10) writings which are void in form.[7]

1. Reg. *v.* Hodgson, 7 Cox C. C. 122; s. c., Dears. & B. C. C. 3. In this case it was held that, as a diploma had been had without the intent of committing any particular or specific wrong to any individual, a conviction could not be sustained.

2. Mitchell *v.* State, 56 Ga. 171; Waterman *v.* People, 67 Ill. 91; s. c., 1 Am. Cr. Rep. 225; Foulke's Case, 2 Rob. (Va.) 836; United States *v.* Green, 2 C. R. C. C. 521.

**Letter of Introduction.**—The supreme court of Illinois say in the case of Waterman *v.* People, *supra*, which was indictment for forgery of a letter of introduction bespeaking the showing of courtesies to the bearer by railroad officials, and promising to reciprocate the same, and purported to be signed by the superintendent of a railroad and canal company, "That the writing, if genuine, has no legal validity, as it affects no legal rights; it is a mere attempt to receive courtesies without a promise, of no legal obligation, to reciprocate them;" that it can by no possibility subject the supposed writer to any pecuniary loss or legal liability; that courtesies are not the subject of legal fraud.

**Forging a Letter**, representing that the publisher, and he whose act it imports to be, are partners, not with the design of depriving the latter of his property, is not a criminal offence, Jackson *v.* Weisiger, 2 B. Mon. (Ky.) 214.

In Foulke's Case, 2 Rob. (Va.) 836, the following letter was held not to be a subject of forgery, to wit: "Nottaway 24, 1841 Gent.,—Agreeable to Mr. Wm. I. Watkins' request, I take pleasure in making you acquainted with his name, and I would say to you that he is very extensively engaged in the manufacturing of tobacco, and has made some large purchases, and says that he wishes to patronize you (on my recommendation). You may be assured, that whatever he engages to do he will certainly perform. He says that it is probable that he will want $1000 by the first of May, to meet his engagements; and, if he applied for the amount, I have no doubt that you will accommodate him. The roads are in such a condition that it is impossible to get any produce to market. Write me a few lines by Mr. Watkins, and say what the chance is for a rise in tobacco. Your compliance with the above request will very much oblige your ob't servant, Jos. M. Foulke. P.S. Mr. Watkins prefers giving a negotiable note payable in Petersburg Exchange Bank, where he can always have an opportunity to send at the shortest notice and draw. He is not a gentleman (of Ingraham's standing or character) of a low, mean degree, but one, I am happy to inform you, that is a perfect gentleman, in every sense of the term. I am confident, as I have observed to him, that you will either let him have the money or indorse for him. J. M. F."

3. State *v.* Givens, 5 Ala. 747.

In Sanabria *v.* People, 24 Hun (N. Y.), 270, it was held that an indictment will not lie for forging an instrument purporting to be a pecuniary obligation of Brazil to pay "twenty milreis;" and the objection may be taken after verdict and judgment.

4. State *v.* Givens, 5 Ala. 747.

5. Com. *v.* Lawless, 101 Mass. 32.

6. Waterman *v.* People, 67 Ill. 91; 1 Am. Cr. Rep. 225.

7. Abbott *v.* Rose, 62 Me. 194; s. c., 16 Am. Rep. 427; Com. *v.* Hinds, 101 Mass. 209; People *v.* Shall, 9 Cow. (N. Y.) 778; Roode *v.* State, 5 Neb. 174; s. c. 25 Am. Rep. 477.

**Promise to Pay in Labor.**—In People *v.* Shall, *supra*, in the trial of an indictment for forgery on a promise to pay a certain sum in labor, but where no consideration was expressed in the instrument and none averred in the indictment, it was held that such an instrument was of no validity and therefore could not be the subject of forgery. The court said another "defect renders it utterly void of itself as a common-law contract: it expresses no value received or any consideration whatever; and no action could be maintained upon it, for, if genuine, is a special agreement to perform labor without averring and proving a consideration *dehors* the instrument. Lansing *v.* McKillop, 3 Cai. (N. Y.) 287; Carlos *v.* Fancourt, 5 T. R. 482. The indictment avers no extrinsic fact by which it might have been made operative, nor is it conceivable how such a matter could exist." The court further said it could not be made the foundation of liability like the letter of credit (see Ames' Case, 2 Me. (2

**V. Who May Commit Forgery.**—All persons responsible for their acts may commit the crime of forgery. The offence may be committed by agent, the principal himself being present,[1] as well as by the party's own hand. He is the principal who directs the forgery of an instrument, and utters the same, and receives the proceeds thereof, though the writing be by another under his direction.[2] But a partner cannot be indicted for forgery of an instrument or writing with intent to defraud the copartnership.[3] And where an officer of a corporation, that is incapable of acting except through its officers, executes an instrument by himself as the officer of the corporation, he is not guilty of forgery, either at common law or under statute, although he has in fact no authority from the corporation to execute the instrument.

**VI. Uttering and Publishing.**—The uttering of a forged instrument is an independent offence,[5] to constitute which it is not necessary to show that the defendant was implicated in the forgery.[6]

The offence is complete on the passing of the forged instrument from the possessor to a person other than the wrong-doer, his agent, or servant.[7] It makes no difference on the character of the offence whether the passing is by the party in person or by an agent.[8]

**1. What is, Generally.**—Uttering and publishing of a forged instrument consists in the delivery of such instrument to another for value,[9] with an intention that the same shall be put in circu-

Greenl.) 265; Savage's Case, Styles, 12). It appears to be directly within the cases cited holding that an instrument purporting to be void on its face, and not shown to be operative by averment, if genuine, is not the subject of forgery. How is it possible, in the nature of things, that it could be otherwise? 'Void things are no things.' Was it ever heard of, that the forgery of a *nudum pactum*, a thing which could not be declared on or enforced in any way, is yet indictable? It is the forgery of a shadow

1. Com. *v.* Stevens, 10 Mass. 181; People *v.* Bassford, 3 N. Y. Crim. Rep. 219.

**Where One was Present,** knowing of and assenting to the commission of a forgery, of which he was to derive the benefit, *held*, that the jury might infer that is was done by his procurement. Com. *v.* Stevens, 10 Mass. 181.

**A Conviction as a Principal in a Forgery** may be sustained by evidence that the defendant was constructively present "on guard" and acting in concert or aiding and abetting the person committing the act. People *v.* Bassford, 3 N. Y. Crim. Rep. 219.

2. Territory *v.* Barth (Ariz.), 15 Pac. Rep. 673.

**Presence of Person.**—At common law, actual presence at the time of the uttering of instrument is not essential.—See Rex *v.* Soares, 2 East P. C. 974; s. c., Russ. & Ry. C. C. 25; Rex *v.* Stewart, Russ. & Ry. C. C. 363; Rex *v.* Badcock, Russ. & Ry. C. C. 294;—a constructive presence at the time of the uttering being sufficient. 2 Russ. on Cr. (5th Eng. ed.) 690.

3. Com. *v.* Brown, 10 Phila. (Pa.) 184.

4. Mann *v.* People, 15 Hun (N.Y.), 155.

5. Com. *v.* Houghton, 8 Mass. 107; Brown *v.* Com., 8 Mass. 59.

6. State *v.* Bassow, 30 La. An. 202. Conversely, under an indictment for forgery, there can be no conviction of uttering. See State *v.* Burgson, 53 Iowa, 318; State *v.* Snow, 30 La. An. (pt. 1) 401.

It is improper to join in one indictment the offence of forgery and that of uttering forged paper. See State *v.* McCormack, 56 Iowa, 585. *Compare* Whart. Cr. Pl. & Pr. § 285.

7. People *v.* Rathbun, 21 Wend. (N. Y.) 509.

8. United States *v.* Morrow, 4 Wash. C. C. 733.

9. People *v.* Ah Woo, 28 Cal. 205; Com. *v.* Searle, 2 Binn. (Pa.) 332; s. c., 4 Am. Dec. 446; United States *v.* Nelson, 1 Abb. C. C. 135.

lation,[1] and an intention thereby to defraud[2] by using it in some way so as to get money or credit thereon or by means thereof.[3] To constitute the uttering and publishing of an instrument alleged to have been forged, there must be a declaration or assertion directly or indirectly, by words or actions, that the instrument is good.[4]

To constitute uttering and publishing a forged instrument, it is

1. State *v.* Wilkins, 17 Vt. 151; United States *v.* Nelson, 1 Abb. C. C. 137.

2. State *v.* Redstrake, 39 N. J. L. (10 Vr.) 365; Com. *v.* Goodenough, Thach, C. C. (Mass.) 132; Reg. *v.* Craig, 7 Up. Can. C. P. 241; Rex *v.* Holden, 2 Taunt. 334; Rex *v.* Powell, 2 W. Bl. 787.

3. Reg. *v.* Ion, 21 L. J. M. C. 166; s. c., 6 Cox C. C. 1.

**Uttering Spurious Notes.**—Under a statute which punishes one who shall "utter" or "pass" spurious notes, knowing them to be such, with intent to defraud, and which does not in terms require that they be uttered as true or genuine (act of June 30, 1864; 13 Stat. at L. 221, § 10), a defendant may be convicted of uttering or passing, upon proof that he sold and delivered the notes as spurious notes to another person, with intent that they should be passed upon the public as genuine. United States *v.* Nelson, 1 Abb. C. C. 135.

4. State *v.* Calkins (Iowa), 34 N. W. Rep. 777; People *v.* Brigham, 2 Mich. 550; Falden *v.* State (Neb.), 14 N. W. Rep. 412; Smith *v.* State, 20 Neb. 284; State *v.* Redstrake, 39 N. J. L. (10 Vr.) 365; Leonard *v.* State, 29 Ohio St. 468; Com. *v.* Searle, 2 Binn. (Pa.) 332; s. c., 4 Am. Dec. 446; Mathews *v.* State, 33 Tex. 102; Chahoon *v.* Com., 20 Gratt. (Va.) 733; United States *v.* Mitchell, 1 Bald. C. C. 366; Reg. *v.* Green, Jebb C. C. 281.

**Bringing of a Suit Upon a Forged Paper, as Counsel,** for the purpose of recovering the moneys purporting to be due by such paper, amounts in law to an uttering or attempting to employ such a paper as true; and if the act be done with knowledge of the forgery and intent to defraud, it constitutes an offence within the meaning of the Virginia Code, ch. 193, § 5, which punishes "an attempt to employ as true such forged writing, knowing it to be forged. Chahoon *v.* Com., 20 Gratt. (Va.) 733.

**Forged Check—Swindling Advice.**—One B. a stranger in Omaha, met one T., who professed to have a large farm near St. Louis, and desired to employ B. to superintend it. While they were conversing, a pretended freight agent appeared, who was introduced by T. to B. as such, and who demanded of T. the payment of a pretended freight bill of $65. T., pretending he had not sufficient change to pay the bill, presented to B. a forged check on an Omaha bank for $250, saying he could get the money on presentation, and asked him to cash it. *Held*, an uttering of the check, although it was not actually transferred to B. Smith *v.* State, 20 Neb. 285.

**Forged Order for Goods—What Constitutes the Offence.**—Upon trial of an indictment for swindling, it appeared that the defendant applied to purchase goods on credit from a merchant, stating that she lived with a planter, and had cotton in his possession, out of which she would pay for the goods. The merchant refused to sell her the goods except on an order from the planter, whereupon she went out and soon returned with an order purporting to have been signed by the planter, but alleged to be a forgery. On presentation of the order, the goods were wrapped up and placed on the counter for her, but before they passed into her manual possession the fraud was discovered, and the merchant replaced the goods on his shelves. The sale was agreed to by the merchant solely upon the credit of the supposed order, and in no degree upon the representations of the appellant. *Held*, that the indictment should not have been for swindling, but for attempting to pass a forged instrument, knowing it to be a forgery. Mathews *v.* State, 33 Tex. 102.

**Presentation of a Draft or Order for Money,** to the person to whom it purports to be directed, for payment thereof, by one knowing it to be forged, although payment is refused and the draft is returned to the presenter, is an uttering and publishing within the meaning of the statute. People *v.* Brigham, 2 Mich. 550.

**When Several Acts Constitute One Offense.**—The defendant delivered, at the same time and by the same act, to the teller of a bank, four forged checks, which purported to have been drawn by four different parties. *Held*, that this constituted but one offence of uttering forged checks, and that a conviction for uttering one of the checks was a bar to a conviction for uttering the others. State *v.* Egglesht, 41 Iowa, 574; s. c., 20 Am. Rep. 612.

necessary that there should be a knowledge on the part of the defendant that the document is false and fraudulent.[1] This is in itself implied in an intent to defraud.[2] Where a person is charged with uttering and publishing forged notes or other instruments, knowledge of the character of the writing may be shown by proving the possessing or uttering of other similar forged instruments,[3] even though such offences occurred subsequently to the offence under trial, or have been the subject of other indictments,[4] where it appears that such offences were part of a common system.[5]

Various acts have been held to constitute uttering, such as depositing with a bank for collection notes with forged indorsements,

1. See Com. *v.* Searle, 2 Binn. (Pa.) 332; s. c., 4 Am. Dec. 446; Sands *v.* Com., 20 Gratt. (Va.) 800; Chahoon *v.* Com., 20 Gratt. (Va.) 733; United States *v.* Mitchell, Bald. C. C. 367; United States *v.* Carter, 2 Cr. C. C. 243; Reg. *v.* Welch, 2 Den. C. C. 78; Rex *v.* Morris, 2 Leach C. C. 1096; Rex *v.* Badcock, Russ. & Ry. C. C. 249; Rex *v.* Collicott, Russ. & Ry. C. C. 212; Rex *v.* Shukard, Russ. & Ry. C. C. 200; Rex *v.* Soares, Russ. & Ry. C. C. 25.

2. 1 Whart. Cr. L. (9th Ed.) 703.

3. Mason *v.* State, 42 Ala. 532; People *v.* Frank, 28 Cal. 507; Steele *v.* State, 45 Ill. 152; McCartney *v.* State, 3 Ind. 333; s. c., 56 Am. Dec. 510; Com. *v.* Stearns, 51 Mass. (10 Metc.) 256; State *v.* McAllister, 21 Me. 139; Com. *v.* Edgerly, 92 Mass. (10 Allen) 184; Com. *v.* Hall, 86 Mass. (4 Allen) 305; State *v.* Twitty, 2 Hawks (N. C.), 248; s. c., 11 Am. Dec. 779; Reed *v.* State, 15 Ohio 217; State *v.* Odel, 3 Brev. (S. C.) 552; State *v.* Williams, 2 Rich. (S. C.) 418; s. c., 45 Am. Dec. 741; Peek *v.* State, 2 Humph. (Tenn.) 78; Wash *v.* Com., 16 Gratt (Va.) 530; Hendrick *v.* Com., 5 Leigh (Va.), 708; Spencer *v.* Com., 2 Leigh (Va.), 751; United States *v.* Doebler, Bald. C. C. 519; United States *v.* Ninman, Bald. C. C. 292; United States *v.* Craig, 4 Wash. C. C. 729; Reg. *v.* Salt, 3 F. & F. 834; Reg. *v.* Moore, 1 F. & F. 73; Rex *v.* Fuller, Russ. & Ry. C. C. 308; Reg. *v.* Wylie, 1 New Rep. 92; s. c., 2 Bennett & H. Lead. C. C. 26; Rex *v.* Ball, Russ. & Ry. C. C. 132; s. c., 1 Moo. C. C. 470; Rex *v.* Hough, Russ. & Ry. C. C. 120.

**Uttering a Promissory Note** with forged indorsements is within the statute of New York against forgery, although the passing of the note is accompanied with the words which would exonerate the indorser if the indorsements were genuine. If, by possibility, the indorsers may be injured, the crime is perpetrated. People *v.* Rathbun, 21 Wend. (N. Y.) 509.

**Uttering Forged Letter.**—A person, knowing the contents of a forged letter, and with intent to obtain money thereon, delivered it, sealed, to the clerk of the person to whom it was addressed, and whom he supposed as authorized to open it. *Held*, evidence of uttering it. United States *v.* Carter, 2 Cr. C. C. 243.

4. Hoskins *v.* State, 11 Ga. 92; Com. *v.* Stearns, 51 Mass. (10 Metc.) 256; Reg. *v.* Forster, Dears. C. C. 456; s. c., 6 Cox C. C. 521. *Compare* Rex *v.* Smith, 4 Car. & P. 411; Rex *v.* Smith, 2 Car. & P. 633.

5. Com. *v.* Price, 76 Mass. (10 Gray) 472; s. c., 71 Am. Dec. 668; Reg. *v.* Forster, Dears. C. C. 456; s. c., 6 Cox C. C. 521.

**Possession of Counterfeit Bills.**—In the case of Com. *v.* Price, *supra*, it was held that an indictment for having a counterfeit bill at Boston, "with intent then and there to utter and pass the same," is supported by evidence of possession, with intent to utter and pass at a time and place out of the State; for possession of counterfeit bills of a bank in Massachusetts with intent to pass them in another State being within the statute,—Mass. Rev. Stat. c. 107, s. 8; Com. *v.* Cone, 2 Mass. 132;—and that evidence that the defendant subsequently had in his possession other and different counterfeit bank bills, is admissible to show guilty knowledge and intent. See McKenney *v.* Dingley, 4 Me. (4 Greenl.) 172; Bridge *v.* Eggleston, 14 Mass. 245; Com. *v.* Turner, 44 Mass. (3 Metc.) 19; Bottomley *v.* United States, 1 Story C. C. 143; Rex *v.* Ball, Campb. 324; Rex *v.* Roberts, Campb. 399; Rex *v.* Smith, 4 Car. & P. 411; Robinson's Case, 2 East P. C. 1110, 1112; Rickman's Case, 2 East P. C. 1035; Rex *v.* Northampton, 2 Maule & S. 262; Rex *v.* Wylie, 1 New

with intent to defraud, in a case where both the holder and the maker know of the existence and character of the forged indorsement;[1] or passing the forged note of an expired bank;[2] offering, whether the offer be accepted or not, *lucri causa*, with knowledge of the forgery;[3] recording a forged mortgage, whether the instrument itself was produced at the time of payment or not;[4] and the signing of a true name on the false writing of another.[5]

But uttering counterfeit bills with the name of a fictitious cash-

Rep. 92, 94; s. c., 2 Bennett & H. Lead. C. C. 26; Reg. *v.* Hough, Russ. & Ry. C. C. 120.

1. State *v.* Redstrake, 39 N. J. L. (10 Vr.) 365; People *v.* Rathbun, 21 Wend. (N. Y.) 509; Poage *v.* State, 3 Ohio St. 229.

2. White *v.* Com., 4 Binn. (Pa.) 418.

3. See Smith *v.* State, 20 Neb. 284; s. c., 57 Am. Rep. 832; Com. *v.* Searle, 2 Binn. (Pa.) 332; s. c., 4 Am. Dec. 446; Sands *v.* Com., 20 Gratt. (Va.) 800; Chahoon *v.* Com., 20 Gratt. (Va.) 733; United States *v.* Mitchell, Bald C. C. 367; Reg. *v.* Hodgson, 7 Cox C. C. 122; Reg. *v.* Welch, 4 Cox C. C. 430; s. c., 2 Den. C. C. 78; Rex *v.* Morris, 2 Leach C. C. 1096; Rex *v.* Franks, 2 Leach C. C. 644; Rex *v.* Collicott, Russ. & Ry. C. C. 212; Rex *v.* Shukard, Russ. & Ry. C. C. 200; Rex *v.* Badcock, Russ. & Ry. C. C. 249; Rex *v.* Soares, Russ. & Ry. C. C. 25. Such as presenting a forged check or draft at a bank, although payment be refused. Rex *v.* Crowther, 5 Car. & P. 316.

**Uttering Forged Bank Notes.**—Uttering forged bank notes is indictable at common law. Lewis *v.* Com., 2 Serg. & R. (Pa.) 551; State *v.* Stroll, 1 Rich. (S. C.) L. 244; Com. *v.* Speer, 2 Va. Cas. 65. And under statute, passing a counterfeit note in the name of a fictitious person, or under an assumed name, or on a bank which has no existence,—see State *v.* Givens, 5 Ala. 747; Com. *v.* Costello, 119 Mass. 214; State *v.* Hayden, 15 N. H. 355; Sasser *v.* State, 13 Ohio, 453; Com. *v.* Smith, 6 Serg. & R. (Pa.) 569; Henderson *v.* State, 14 Tex. 503; United States *v.* Turner, 32 U. S. (7 Pet.) 132; bk. 8, L. ed. 633; Rex *v.* Webb, 3 B. & B. 228; Rex *v.* Froud, 1 B. & B. 300; s. c,, Russ. & Ry. C. C. 389; Reg. *v.* Rogers, 8 Car. & P. 629; Rex *v.* Wilks, 2 East P. C. 957; Rex *v.* Bolland, 2 East P. C. 958; Rex *v.* Lewis, Fost. 617; Reg. *v.* Ashby, 2 F. & F. 560; Rex *v.* Whiley, 2 Leach C. C. 983; s. c., Russ. & Ry. C. C. 90; Rex *v.* Parkes, 2 Leach C. C. 775; s. c., East P. C. 963; Rex. *v.* Francis, 2 Leach C. C. 209; s. c., Russ. & Ry. C. C. 209; Rex *v.* Sheppard, 1 Leach C. C. 236; Rex *v.* Lockett, 1 Leach C. C. 94; Rex *v.* Watts, Russ. & Ry. C. C. 436,—is indictable, even though the note, if genuine, would not be of value if on its face it purports to be good. Butler *v.* Com., 12 Serg. & R. (Pa.) 237; s. c., 14 Am. Dec. 679; United States *v.* Mitchell, 1 Bald. C. C. 367. See State *v.* McKenzie, 42 Me. 392; Dement *v.* State, 2 Head (Tenn.), 505; United States *v.* Morrow, 4 Wash. C. C. 70; Rex *v.* Collicott, 2 Leach C. C. 1048; s. c. 4 Taunt. 300; Russ. & Ry. C. C. 212, 219; Rex *v.* Jones, 1 Leach C. C. 204.

**Offering Forged Check.**—Defendant showed a forged check purporting to be payable to order but not indorsed, and A., on the strength of the showing, let defendant have money. *Held*, an "uttering" of the check. Smith *v.* State, 20 Neb. 284; s. c., 57 Am. Rep. 832.

**"Uttering and Publishing" Forged Notes.**—Offering for sale and selling forged promissory notes, knowing that the purchaser buys relying upon their genuineness, constitute a sufficient representation of their genuineness to constitute an "uttering and publishing." State *v.* Calkins (Iowa), 34 N. W. Rep. 777.

4. Perkins *v.* People, 27 Mich. 386; s. c., 2 Green Cr. Rep. 567; Paige *v.* People, 3 Abb. App. Dec. (N. Y.) 441; United States *v.* Brooks, 3 MacAr. D. C. 315.

**Putting a Forged Deed on Record, or Averring it in Pleading,** as a genuine deed, is uttering and publishing it, within the meaning of the statute. Paige *v.* People, 3 Abb. App. Dec. (N. Y.) 439; United States *v.* Brooks, 3 MacAr. D. C. 315;—and collecting money upon it and indorsing the payments is also a sufficient uttering, whether the instrument itself was produced at the time of payment or not. Perkins *v.* People, 27 Mich. 386.

5. But if the party represents or utters a genuine instrument as his own, it is fraud or false pretences, and not forgery. See 2 East P. C. 963.

ier is said not to be an offence under the statute.[1] Neither is the uttering of a deed purporting on its face to be executed by such person as the agent of the principal named therein, even though he has no authority for such making;[2] nor the giving of a forged engraving to another as a specimen of skill, in the absence of any intention that it should be put in circulation;[3] nor by leaving forged notes sealed up as a deposit;[4] nor by exhibiting forged notes or checks to another, simply for the purpose of creating a false idea of wealth or professional standing;[5] because it is of the essence of forgery that there be a fraudulent intent.[6]

Offering with intent to defraud constitutes an uttering, although there be no acceptance.[7] But the exhibition of a forged note to another, or even passing it to such other, not *lucri causa* or with intent to defraud, is not an uttering.[8]

**2. Intent to Defraud.**—To constitute the offence of uttering and publishing a forged writing there must be an intent to defraud and a knowledge of the falsity of the instrument.[9] But it is not es-

1. Com. *v.* Boynton, 2 Mass. 77.
2. State *v.* Willson, 28 Minn. 52.
3. Rex *v.* Harris, 7 Car. & P. 428.
4. Rex *v.* Shukard, Russ. & Ry. C. C. 200.
5. Rex *v.* Shukard, Russ. & Ry. C. C. 200.
6. Montgomery *v.* State, 12 Tex. App. 323. See, *supra*, II. 1, and *infra*, next division, INTENT TO DEFRAUD.
7. People *v.* Caton, 25 Mich. 388; State *v.* Horner, 48 Mo. 520; Rex *v.* Welch, 4 Cox C. C. 430; s. c., 2 Den. C. C. 28.
8. Reg. *v.* Page, 8 Car. & P. 122; Reg. *v.* Hodgson, Dears. & B. C. C. 3; s. c., 7 Cox C. C. 122; 36 Eng. L. & Eq. 626. The doctrine of Reg. *v.* Page is seriously doubted. See Reg. *v.* Heywood, 2 Car. & K. 352; Anon., 1 Cox C. C. 250; Reg. *v.* Ion, 2 Den. C. C. 484.
9. Elsey *v.* State, 47 Ark. 572; *Ex parte* Finley, 66 Cal. 262; Barfield *v.* State, 29 Ga. 127; s. c., 74 Am. Dec. 49; Couch *v.* State, 28 Ga. 367; Holcombe *v.* State, 28 Ga. 66; State *v.* Williams, 66 Iowa, 573; State *v.* Hahn, 38 La. An. 169; Com. *v.* Goodenough, Thach. C. C. (Mass.) 132; People *v.* Caton, 25 Mich. 388; State *v.* Redstrake, 39 N. J. L. (10 Vr.) 345; Leonard *v.* State, 29 Ohio St. 408; Com. *v.* Searle, 2 Binn. (Pa.) 332; s. c., 4 Am. Dec. 446; State *v.* Wilkins, 17 Vt. 151; United States *v.* Nelson, 1 Abb. D. C. 137; United States *v.* Mitchell, Bald. C. C. 366; Reg. *v.* Craig, 7 Up. Can. C. P. 241; Reg. *v.* Sharman, Dears. C. C. 285; s. c., 6 Cox C. C. 312; 24 Eng. L. & Eq. 553; Rex *v.* Green, Jebb's C. C. 281; Rex *v.* Holden, 2 Taunt. 334; Rex *v.* Powell, 2 Wm. Bl. 787.

**Uttering Knowing to be Forged.**—A conviction for uttering a forged note, knowing it to be forged, may be sustained on evidence that defendant, in negotiating the note, falsely represented that he was the payee. State *v.* Williams, 66 Iowa, 573.

In the case of State *v.* Redstrake, 28 N. J. L. (10 Vr.) 365, the defendant was indicted for forging and also for uttering, as forged, five promissory notes. He was acquitted upon the charge of forging, but convicted upon that of uttering. The circumstances were these: The notes in question contained the forged indorsement of one Clement Hall, which, it was claimed, had been placed upon them by a son of said Hall. They had been passed to defendant before maturity, and he, knowing them to be forged, had placed them in the bank where they were made payable, with direction to have them presented, and if not paid, protested, which was done. At that time the person whose name was forged knew of the existence of the forged notes. The court, on appeal, held that the intent to defraud is a material element in the crime of uttering forged paper, and that the act of defendant did not constitute the offence. See, as supporting the same doctrine, Rex *v.* Powell, 2 Wm. Bl. 787; Rex *v.* Holden, 2 Taunt. 333, where it is held that as it would be essential under an indictment for obtaining the property of another by the use of a false and forged paper as true, so under an indictment for forging and uttering, either the same should be shown, or else an intent to do the same. So also East (5 P. C. 854) says: "The deceitful and fraudulent intent appears to be the essence of

sential that a fraud shall have been expressly perpetrated by it, the intent being sufficient;[1] for although intent to defraud is essential to the completion of the offence,[2] yet it is not necessary to show either that the prosecutor was actually defrauded[3] or that there was an intent to defraud any particular person,[4] a general intent to defraud being sufficient.

The intent to defraud may be inferred from the circumstances,[5] as where there is an apparent possibility of fraud.[6] Thus if a person passes a note as genuine, knowing it to be forged, the law infers that the intent was to defraud, because it is the natural consequence of the act.[7]

There must be a capacity to injure, however, to constitute an uttering within the meaning of the statute, because it is not an indictable offence to utter a paper which could in no case be the subject of a suit.[8]

this offence, and this is indeed particularly expressed in the statute, 5 Eliza. ch. 14, and in most if not all the other acts. See also 1 Hawk. P. C. 335; 2 Arch. Cr. Pl 546; Blake *v.* Allen, Morris' Rep. 619; Bacon's Abridgment, "Forgery," A. Whether, if the indorser had not known of the forged character of the paper, the causing of a notice of presentment and protest to be sent to him would have been such an assertion or declaration that the paper was good as would amount to an uttering, is not a matter of express authority, though the reasoning, in some cases, goes far toward supporting such a doctrine. See Com. *v.* Searle, 2 Binn. (Pa.) 332; s. c., 4 Am. Dec. 446; United States *v.* Mitchell, 1 Bald. C. C. 366; The Queen *v.* Green, Jebb's Cr. Cas. 281. In the last case the paper was not exhibited, but its contents stated, and the court held it an uttering. 16 Alb. L. J. 214.

**California Doctrine.**—It was held by the supreme court of California in *Ex parte* Finley, 66 Cal. 262; s. c., 19 Rep. 236, that the offence of uttering a forged indorsement includes the case of one who shall utter, with intent to defraud, a writing such as can be the subject of forgery, although not genuine but purporting to be so, even though there is no intent to defraud, when the writing is fabricated.

1. State *v.* Hahn, 38 La. An. 169; People *v.* Caton, 25 Mich. 388.

2. Stephens *v.* State, 56 Ga. 604; Couch *v.* State, 28 Ga. 367; State *v.* Redstrake, 39 N. J. L. (10 Vr.) 365; McClure *v.* Com., 86 Pa. St. 353; Reg. *v.* Hodgson, 7 Cox C. C. 122; s. c., 36 Eng. L. & Eq. 626; Rex *v.* Holden, 2 Taunt. 334; Rex *v.* Powell, 2 W. Bl. 787.

3. See Rembert *v.* State; 53 Ala. 467; s. c., 25 Am. Rep. 639; Langdale *v.* State, 100 Ill. 263; Lemasters *v.* State, 95 Ind. 367; Harding *v.* State, 54 Ind. 359; State *v.* Ferguson, 35 La. An. 1042; Bishop *v.* State, 55 Md. 138; Com. *v.* Costello, 120 Mass. 358; Com. *v.* Ladd, 15 Mass. 526; Com. *v.* Goodenough, Thach. C. C. (Mass.) 132; State *v.* Fisher, 65 Mo. 437; Fadner *v.* People, 40 Hun (N. Y.), 695; Hess *v.* State, 5 Ohio, 12; s. c., 22 Am. Dec. 767; Pennsylvania *v.* Misner, Addis. (Pa.) 44; Snell *v.* State, 2 Humph. (Tenn.) 347; Peete *v.* State, 2 Lea (Tenn.), 513; Rex *v.* Goate, 1 Ld. Raym. 737; Reg. *v.* Pike, 2 Moo. C. C. 70; Rex *v.* Crook, 2 Str. 191.

4. McClure *v.* Com., 86 Pa. St. 353.

5. State *v.* Kenestor, 59 N. H. 36; Rex *v.* Crowther, 5 Car. & P. 316; Reg. *v.* Hodgson, 7 Cox C. C. 714; s. c., Dears. & B. C. C. 3; Reg. *v.* Nash, 2 Den. C. C. 493; Reg. *v.* Tylney, 1 Den. C. C. 319; Reg. *v.* Todd, 18 L. T. N. S. 89.

6. Schroeder *v.* Harvey, 75 Ill. 638; Miller *v.* State, 51 Ind. 405; United States *v.* Moses, 4 Wash. C. C. 726; Reg. *v.* Geach, 9 Car. & P. 499; Reg. *v.* Cooke, 8 Car. & P. 582; Reg. *v.* Vaughan, 8 Car. & P. 276; Reg. *v.* Hill, 8 Car. & P. 274; Rex *v.* Jones, 12 East P. C. 991.

7. Com. *v.* Whitney, Thach. (Mass.) C. C. 588.

8. State *v.* Snow, 30 La. An. pt. 1, 401. See People *v.* Tomlinson, 35 Cal. 503; Downing *v.* Brown, 3 Colo. 571; People *v.* Head, 1 Idaho, 531; Brown *v.* People, 86 Ill. 259; s. c., 29 Am. Rep. 25; Waterman *v.* People, 67 Ill. 91; Abbott *v.* State, 59 Ind. 70; State *v.* Davis, 53 Iowa, 252; Abbott *v.* Rose, 62 Me. 194; s. c., 16 Am. Rep. 427; Com. *v.* Dallinger, 118 Mass. 439; State *v.* Wheeler, 19 Minn. 98; Roode *v.* State, 5 Neb. 174; s. c., 25 Am. Rep. 475; People *v.* Harri-

**3. Possession with Intent to Utter.**—It seems that at common law the mere possession of bank notes with intent to utter them as true is not indictable,[1] although in most if not all of the States in this country it is by statute made an offence to have counterfeit money in possession with intent to pass the same; and some courts hold it an offence at common law.[2]

son, 8 Barb. (N. Y.) 560; People *v.* Shall, 9 Cow. (N. Y.) 778; Henry *v.* State, 35 Ohio St. 128; State *v.* Humphreys, 10 Humph. (Tenn.) 462; Howell *v.* State, 37 Tex. 591; Henderson *v.* State, 14 Tex. 503; Keeler *v.* State, 15 Tex. App. 112; Reg. *v.* Harper, L. R. 7 C. B. 78; s. c., 44 L. T. N. S. 615; Rex *v.* Burke, Russ. & Ry. C. C. 496; Rex *v.* Pateman, Russ. & Ry. C. C. 455; Rex *v.* Randall, Russ. & Ry. C. C. 195; Rex *v.* Richards, Russ. & Ry. C. C. 193.

1. Com. *v.* Morse, 2 Mass. 138; United States *v.* Wright, 2 Cr. C. C. 68; United States *v.* Williams, 14 Fed. Rep. 550; Dugdale *v.* Reg., 1 El. & Bl. 435; s. c., Dears C. C. 64; Rex *v.* Stewart, Russ. & Ry. C. C. 288.

**Possession of Forged Coupon with Intent to Utter.**—In a case where the appellant was indicted for having in his possession, with intent to utter, a forged coupon annexed to an unsigned bond, and the court was asked to charge that if he was merely keeping the bond for another person, with knowledge of its character, intending to return it when requested, would not be guilty, which was refused,—*held*, error; for the *imperfection* of the bond gave notice of the invalidity of the annexed coupon and *non constat* the bond would not be signed. People *v.* Martin, 36 Hun (N. Y.), 462.

2. People *v.* Ah Sam, 41 Cal. 654; State *v.* Benham, 7 Conn. 414; Com. *v.* Price, 76 Mass. (10 Gray) 472; s. c., 71 Am. Dec. 668; Stone *v.* State, 20 N. J. L. (1 Spen.) 404; Sasser *v.* State, 13 Ohio, 453; Reg. *v.* Willis, Jeb. 48, note; Rex *v.* Sutton, 2 Str. 1074; s. c., 1 East P. C. 170.

**To Constitute the Offence,** it is not usually necessary that the prosecution should prove that the intention in keeping the counterfeit notes or coin was to pass them as genuine, it being sufficient if it is made to appear that the ultimate object is fraud, although the immediate object be to supply a co-conspirator. See People *v.* Ah Sam, 41 Cal. 645; Hopkins *v.* Com., 44 Mass. (3 Metc.) 410; State *v.* Harris, 5 Ired. (N. C.) L. 287; Bevington *v.* State, 2 Ohio St. 160. See also tit. "Counterfeiting," 4 Am. & Eng. Encyc. of L. 333.

"**As true.**"—When the statute provides that it shall be an offence to have counterfeit coins with the intention of passing them "as true," the intent to utter and pass as true must be averred in the indictment and proven on the trial. People *v.* Stewart, 4 Mich. 655.

**The Federal Statute,** which requires that counterfeit money shall be after the "similitude" of an obligation of the United States, extends to the signature. United States *v.* Williams, 14 Fed. Rep. 550. See United States *v.* Bicksler, 1 Mackey (U. S. D. C.) 341.

In United States *v.* Williams, *supra*, the defendant was convicted, under § 534 of the United States Rev. Stat., of the offence of having in his possession an instrument, engraved or printed after the similitude of an obligation, issued under the authority of the United States, with the intent to sell or otherwise use the same, the alleged fraudulent instrument, although in the similitude of the United States bond was not nor did it purport to be signed. The court held, in granting a new trial, that the words of the statute, "any obligation or other security," must be construed to mean an executed instrument, or one which on its face purports to be executed, and that, it appearing that the alleged fraudulent obligation or security is not an obligation or security at all within the meaning of the statute, a conviction cannot be sustained though the paper in its body and general form be made after the similitude of a United States bond. It was further held that it was for the court to determine whether the case made was within the statute. See United States *v.* Morrow, 4 Wash. C. C. 733.

**The Similitude** required by the federal statute need not be perfect, it is sufficient if the deception of persons who are non-experts is probable. United States *v.* Sprague, 11 Biss. C. C. 376. See Rembert *v.* State, 53 Ala. 467; s. c., 25 Am. Rep. 639; Longdale *v.* State, 100 Ill. 263; Harding *v.* State, 54 Ind. 359; Lemasters *v.* State, 95 Ind. 367; State *v.* Ferguson, 35 La. An. 1042; Bishop *v.* State, 55 Md. 138; Com. *v.* Costello, 120 Mass. 358; State *v.* Fisher, 65 Mo. 437; Fadner *v.* People, 40 Hun (N. Y.), 695; Peete *v.* State, 2 Lea (Tenn.), 513; Reg. *v.* Pike, 2 Moo. C. C. 70.

In such cases knowledge of the character of the instrument is material, and, independently of the statute, should be alleged in the indictment and proved on the trial;[1] for it is always a good defence that the money was received innocently, in the usual course of business.[2]

**4. Distinction between Uttering and Forging.**—Under the statute the crime of uttering forged paper is not included in the crime of forging it, each being distinct and substantive offences.[3]

**VII. MATTERS OF DEFENCE** —It is no defence to an indictment for forging or uttering and publishing forged paper, that there is no person, at the time, legally in a situation to be defrauded by the act,[4] it being sufficient if there is a possibility of such fraud; the intent to defraud persons unknown, or any person on whom the forged paper may be passed, or the public generally, being sufficient to warrant a conviction.[5] Neither is it a valid defence that the object for which the forged instrument was passed was in violation of law;[6] or the fact that the drawer of a forged check is a fictitious person; or that he had no funds in the bank at the time the check was drawn;[7] or the belief of the accused in the truth of the statement in a forged paper;[8] or a mistake in wrongly dating the forged instrument so that from the face of the instrument an indictment would appear to be barred by the statute of limitations;[9] or the belief of the defendant that the amount was coming to him from the party attempted to be injured;[10] or that the instrument was usurious, even though usurious on its face;[11] or that the forg-

**For Unexecuted Bonds** which do not fall within the statute, see United States *v.* Sprague, 11 Biss. C. C. 376.

1. Powers *v.* State, 87 Ind. 97; Owen *v.* State, 5 Sneed (Tenn.), 494.

2. United States *v.* Kenneally, 5 Biss. C. C. 122.

**Mere Possession** of a counterfeit coin or a forged instrument as a curiosity without any intention of using or passing the same is not an offence either at common law or under the statute, and will not sustain a conviction. Fox *v.* People, 95 Ill. 71; Rex *v.* Haines, 7 Car. & P. 429.

**The Intent.—Fraudulent Selling** is evidence of fraudulent possession. United States *v.* Biebusch, 1 McCr. C. C. 42. An intent generally may be inferred and proved in the same way as the intent in cases of uttering generally. See Miller *v.* State, 51 Ind. 405; Hopkins *v.* Com., 44 Mass. (3 Metc.) 460; Hutchins *v.* State, 13 Ohio, 198; Perdue *v.* State, 2 Humph. (Tenn.) 494.

3 *Ex parte* Finley, 66 Cal. 262; Barfield *v.* State, 29 Ga. 127; s. c., 74 Am. Dec. 49; State *v.* Boasso, 38 La An. 202; State *v.* Hahn, 38 La. An. 169; State *v.* Anderson, 30 La. An. pt. 1, 557; Buren *v.* State, 16 Lea (Tenn.), 61; Hatch *v.* State, 8 Tex. App. 416, s. c., 34 Am. Rep. 751; Cal. Pen. Code, sec. 470; Ga. Pen. Code, div. 7, sec. 14; Tex. Crim. Code art. 439.

4. Rex *v.* Crowther, 5 Car. & P. 337; Reg. *v.* Nash, 2 Den. C. C. 493; Reg. *v.* Dodd, 18 L. T. N. S. 89. See Reg. *v.* Tylney, 1 Den. C. C. 319.

5. State *v.* Keneston, 59 N. H. 36.

6. Thus it has been held that the fact that the law was violated by the sale of liquors without a license, for which the forged instrument was passed will not affect the criminal character of the act. Dunn *v.* People, 4 Colo. 196.

7. Thompson *v.* State, 49 Ala. 16.

8. **Forged Deposition to Secure Divorce.**—As in a forged deposition made by the defendant to secure a divorce, his object in forging such deposition being to procure a divorce to which he pleaded himself legally entitled. State *v.* Kimball, 50 Me. 409.

9. Garmire *v.* State, 104 Ind. 444.

10. **Raising on Order.**—Thus under an indictment for forgery in raising an order it is held immaterial that the drawer owed defendant more than the amount to which the order was raised. Bush *v.* State, 77 Ala. 83.

11. People *v.* Fadner, 10 Abb. (N. Y.) N. C. 462.

ery was discovered and no injury resulted;[1] or that the forged instrument was obtained from the defendant by a trap.[2]

An acquittal of forging and uttering a particular forged paper will not preclude the State from proving the fact of the possession or the uttering of such forged paper in another prosecution against the same person for a crime of the same character.[3]

**VIII. VENUE AND JURISDICTION.**—The venue must be laid in the jurisdiction where the offence is committed. The crime of uttering and publishing is not complete until the paper is transferred and comes to the hands of some person other than the felon, his agent or servant.[4] Thus where a note with forged indorsements is sent by the accused per mail from one county to an individual in another county, for the purpose of obtaining money or credit upon it, the crime is not committed until received by the person to whom it is sent, and the proper place of trial is the county to which the note was sent.[5]

1. **Where an Insurance Agent Forged an Application for Insurance** and notes for the premium, and sent them to his company for the purpose of fraudulently securing his commission, it was held that he could not escape conviction on the ground that the forgery was discovered and no policy issued, and the notes never became valid obligation for the payment of money. State *v.* McMackin, 70 Iowa, 281.

2. See Thompson *v.* State, 18 Ind. 386; s. c., 81 Am. Dec. 364; State *v.* Covington, 2 Bail. (S. C.) L. 569; Rex *v.* Adey, 7 Car. & P. 140; Rex *v.* Holden, Russ. & R. C. C. 154. As where a detective appealed to the defendant to purchase forged notes. Rex *v.* Holden, Russ. & R. C. C. 154.

3. Bell *v.* State, 57 Md. 108.

**Former Acquittal—Proof of Uttering.**—Thus an indictment, trial, and acquittal for forging a certificate of deposit on one bank cannot be set up as a defence to a subsequent indictment for obtaining money from another bank by means of a forged letter inclosing the same certificate. People *v.* Ward, 15 Wend. (N. Y.) 231. In this case the court say: "The two defences were distinct; the counterfeit letter and use made of it did not constitute a material ingredient in the crime of forgery. That depended upon the alteration of the certificate with the intent to defraud some person, which of itself constituted a crime. The offence alleged in this indictment was committed to carry into effect more successfully the other defence; but has no more necessary connection with it than the setting fire to a dwelling-house for the purpose of the more effectually concealing the perpetration of a larceny has to the larceny itself."

4. Com. *v.* Searle, 2 Binn. (Pa.) 332; s. c., 4 Am. Dec. 446; Perkin's Case, 2 Lew. C. C. 150.

**Mailing** as evidence of uttering. Perkins' Case, 2 Lew. C. C. 150. In the case of the United States *v.* Bickford, 4 Blatchf. C. C. 337; s. c., 12 Law Rep. N. S. 273, it was held that the transmitting of false papers to the pension office at Washington in support of applications for bounty lands is an offence committed at the place from which such papers were sent, and not at Washington, where received. But it is held that the inclosing of a false instrument directed to a person at W., and depositing it in a post-office box at B. to be forwarded, is not an uttering at W. United States *v.* Plympton, 4 Cr. C. C. 309; United States *v.* Wright, 2 Cr. C. C. 296.

5. People *v.* Rathbun, 21 Wend. (N.Y.) 509,

**Uttering in a Particular County**, it has been held, does not justify a conviction of forgery in such county. Com. *v.* Parmenter, 22 Mass. (5 Pick.) 279; Rex *v.* Parks, 2 East P. C. 993. In Com. *v.* Parmenter, the court say: "It was not sufficiently proved that the offence was committed in the county of Worcester: the evidence was only that the note was here uttered. It is clear from authority that the offence of forging in the county cannot be inferred from the fact of uttering and publishing in the county." See Spencer *v.* Com., 2 Leigh (Va ), 751; United States *v.* Britton, 2 Mason C. C. 464; 1 Chitt. Cr. L. (3d Am. ed.) 190; 3 Id. 1039 and notes.

**Naked Utterance in a County.**—While the mere naked utterance in a particular county is not *per se* proof of forgery in such county, yet it has been said that where "there are inculpatory incidents, which so

Under the laws of the United States forgeries must be tried in the district where the crime is committed.[1] The courts of the States and territories have jurisdiction to punish the forgery of bank notes of the United States, although Congress has passed an act for the punishment of such offences;[2] because in this act

strongly intensify in such case the presumption of guilt as to compel a conviction of forgery, and when so the conviction may be had for forgery, as committed in the venue of the uttering." See Cohen *v.* People, 7 Colo. 274; Lindsey *v.* State, 38 Ohio St. 369; State *v.* Poindexter, 23 W. Va. 815.

**The Possession of a Forged Instrument, or the Uttering of it** by one in the county where the indictment is found, is strong evidence to show that the forgery of the instrument was committed by him in the same county. State *v.* Yerger, 86 Mo. 33. Thus it has been held that the fact that forged notes are found in possession of one in a certain county tends to show that he committed the forgery in that county. State *v.* Poindexter, 23 W. Va. 805. And proof that the defendant forged a note and attempted to pass it in S. county is evidence that he forged it in that county in the absence of proof where it was forged. Bland *v.* People, 4 Ill. (3 Scam.) 364.

**Date of Forged Checks is Sufficient Evidence of the Place** where it was made, if it be shown that the defendant was in that place at the date of the check and had it in his possession. State *v.* Jones, 1 McMull. (S. C.) L. 276; s. c., 36 Am. Dec. 257.

A check drawn in Philadelphia on Boston, in favor of the prisoner, who was then in Philadelphia, and who produces the check altered in Boston, if there be no evidence that it was altered elsewhere, it is *prima facie* evidence that it was altered in Massachusetts, that being the first State where it is known to be altered. United States *v.* Britton, 2 Mason C. C. 464.

**The Forgery in Another State of Titles to Lands** in Texas, or of any instrument affecting the titles to lands in this State, is an offence against the laws of the latter State, and subject to the jurisdiction conferred by article 454 of its penal code. Hanks *v.* State, 13 Tex. App. 289.

1. United States *v.* Barney, 5 Blatchf. C. C. 294; s. c., 3 Int. Rev. Rec. 46; United States *v.* Bickford, 4 Blatchf. C. C. 337; s. c., 12 Law Rep. N. S. 273; United States *v.* Britton, 2 Mason C. C. 464.

The act of March 3, 1825, sec. 3 (4 Stat. 115), being confined to offences committed in places the sites whereof had been ceded to and were under the jurisdiction of the United States at the time of its enactment, does not embrace uttering a false paper within the precincts of a custom-house. United States *v.* Barney, 5 Blatchf. C. C. 294; s. c., 3 Int. Rev. Rec. 46.

**Transmitting False Papers** to the pension office at Washington in support of an application for bounty lands is held to be an offence committed at the place from which such papers were sent, and not at Washington, where they were received. United States *v.* Bickford, 4 Blatchf. C. C. 337; s. c., 12 Law Rep. N. S. 273.

2. Hoke *v.* People (Ill.), 10 Cr. L. Mag. 274; Territory *v.* Ross, 1 Mart. (La.) 79; s. c., 5 Am. Dec. 705; Com. *v.* Luberg, 94 Pa. St. 85; State *v.* Pitman, 1 Brev. (S. C.) L. 32; s. c., 2 Am. Dec. 645. See People *v.* Kelly, 28 Cal. 423; Rouse *v.* State, 4 Ga. 136; Chess *v.* State, 1 Blackf. (Ind.) 198; State *v.* McPherson, 9 Iowa, 53; Com. *v.* Fuller, 25 Mass. (8 Metc.) 313; s. c., 41 Am. Dec. 509; Harlan *v.* People, 1 Doug. (Mich.) 207; Manley *v.* People, 7 N. Y. 295, 302, 303; Sutton *v.* State, 9 Ohio, 133; State *v.* Brown, 2 Oreg. 221; State *v.* Tutt, 2 Bail. (S. C.) L. 44; s. c., 21 Am. Dec. 508; State *v.* Antonio, 3 Brev. (S. C.) L. 562; s. c., 2 Tread. (S. C.) L. 776; State *v.* Pitman, 1 Brev. (S. C.) L. 32; s. c., 2 Am. Dec. 645; Sizemore *v.* State, 3 Head (Tenn.), 26; Jett *v.* Com., 18 Gratt. (Va.) 933; Hendrick *v.* Com., 5 Leigh (Va.), 707; Moore *v.* Illinois, 55 U. S. (14 How.) 13; bk. 14 L. ed. 306; Fox *v.* Ohio, 46 U. S. (5 How.) 410; bk. 12 L. ed. 213.

**Jurisdiction of State Court.**—A State court has jurisdiction to try an indictment against the cashier of a national bank for fraudulently making false entries in its books with intention to injure the bank, such acts being forgery at common law. Luberg *v.* Com., 94 Pa. St. 85; s. c., 1 Cr. L. Mag. 779.

Upon trial of defendant for forgery, it appeared that a draft was drawn by one national bank upon another; that defendant was bookkeeper in the bank, and without authority filled a draft signed in blank by the assistant cashier, issued it, and fraudulently changed his book entries to cover the crime. *Held*, that the punishment of the crime was within the jurisdiction of the State courts, notwithstanding the provision of U. S. Rev. Stat. sec.

Congress has not attempted to restrict the power of the States.[1]

On the charge of uttering and publishing a forged instrument, with intent to defraud, the place where the instrument was uttered and published and not where the forgery was committed determines the jurisdiction of the court over the accused.[2]

5209, that every president, clerk, or agent of any national bank who, without authority from the directors, draws any order or bill of exchange, shall be deemed guilty of a misdemeanor, and the act of Congress, March 3, 1875, which provides that the circuit courts of the United States shall have exclusive cognizance of all causes and offences cognizable under the authority of the United States except as otherwise provided by law. Hoke *v.* People (Ill.), 10 Crim. L. Mag. 274.

**Double Allegiance.**—The reason for this is that every citizen of the United States owes a double allegiance; one to his own State and another to the general government. Snoddy *v.* Howard, 51 Ind. 411; s. c., 19 Am. Rep. 738; Moore *v.* Illinois, 55 U. S. (14 How.) 13; bk. 14 L. ed. 306. In Moore *v.* Illinois, *supra*, Justice Grier says: "Every citizen of the United States is also a citizen of a State or a Territory. He may be said to owe allegiance to two sovereigns and may be liable to punishment for an infraction of the laws of either. The same act may be an offence or transgression of the laws of both. Thus an assault upon a marshal of the United States and hindering him in the execution of legal process is a high offence against the United States for which the perpetrator is liable to punishment, and the same act may be also a gross breach of the peace of the State, a riot, assault, or a murder, and subject the same person to a punishment under the State laws for a misdemeanor or felony. That either or both may (if they see fit) punish such an offender cannot be doubted. Yet it cannot be truly averred that the offender has been twice punished for the same offence; but only that by one act he has committed two offences, for each of which he is justly punishable. He could not plead the punishment to be one in bar to a conviction by the other; consequently this court has decided, in the case of Fox *v.* Ohio, 46 U. S. (5 How.) 432; bk. 12, L. ed. 213, that a state may punish the offence of uttering or passing false coin, as a cheat or fraud practised on its citizens; and in the case of United States *v.* Marigold, 50 U. S. (9 How.) 560; bk. 13, L. ed. 257, that Congress, in the proper exercise of its authority, may punish the same act as an offence against the United States."

1. People *v.* White, 34 Cal. 183; State *v.* Adams, 4 Blackf. (Ind.) 146; State *v.* McPherson, 9 Iowa, 53; Harlan *v.* People, 1 Doug. (Mich.) 207; Fox *v.* Ohio, 46 U. S. (5 How.) 410; bk. 12. L. ed. 213.

2. McGuire *v.* State, 37 Ala. 161. See Bishop *v.* State, 30 Ala. 34; Gotobed's Case, 6 City Hall Rec. (N. Y.) 25; Lindsey *v.* State, 38 Ohio St. 507; United States *v.* Plympton, 4 Cr. C. C. 309; United States *v.* Wright, 2 Cr. C. C. 296; *In re* Carr, 14 Cent. L. J. 495.

**Uttering and Publishing.**—A person may be guilty of a forgery, though he did not write the instrument forged in the county in which the indictment was found, if he uttered and published it there. McGuire *v.* State, 37 Ala. 161.

If the forged instrument has been uttered and published in the state with intent to defraud, by means of an innocent agent there, it is no defence to the indictment, in the proper county in such state, to show that the accused was never within the state, or that he owes allegiance to another state or government. Lindsey *v.* State, 58 Ohio St. 507.

**Uttering Through Innocent Agent.**—A person being at the time in one county may, through the hands of an innocent agent in another county, utter and publish, as true, a forged instrument, in the latter county, so as to be there guilty of forgery Bishop *v.* State, 30 Ala. 34.

**Inclosing a False Instrument Directed to a Person** at W., and depositing it in the post-office at B. to be forwarded, is not an uttering at W. United States *v.* Plympton, 4 Cr. C. C. 309; United States *v.* Wright, 2 Cr. C. C. 296.

**Representing Instrument to be Valid.**—Though the forged instrument was first delivered by the prisoner out of the jurisdiction of the court, yet his subsequent assertion that it is good, and thereby obtaining more money on the security of it, within the jurisdiction, is a sufficient passing. Gotobed's Case, 6 City H. Rec. (N. Y.) 25.

**Forgery of Time Check.**—Where a person forges and utters, at Kansas City, Missouri, a time check upon a railroad

**IX. EXTRADITION.**—The subject of extradition of persons for crimes has been heretofore fully treated under the title EXTRADITION.[1] In this article will be found a full treatment of the law of the extradition of persons charged with forgery.[2]

**X. INDICTMENT.—1. Description of the Alleged Offence.**—The elements of forgery to be charged are: (1) writing; (2) an evil intent; and (3) a false making of such writing.[3] But it is not necessary to set out in what particular acts[4] the forgery consisted.[5]

company having its treasurer and treasury within the State of Kansas, and such check is paid off by the agent of the company at Kansas City having authority to pay the valid obligations of the company, upon the supposition that the check is a true and valid instrument, the forgery is wholly consummated in Missouri, although afterwards the agent sends the check to the treasurer of the company at Topeka, Kansas, and is given credit therefor on his accounts as so much cash. *In re* Carr, 28 Kan. 1; s. c., 14 Cent. L. J. 495.

**Binding Over for Forgery and Indicted for Uttering.**—Where a person is examined in the county court on the charge of forging an order, and committed by that court for trial in the superior court for the forgery only, he cannot be tried there for publishing and uttering the order. Mowbray's Case, 11 Leigh (Va.), 643.

Therefore, if the indictment against the prisoner counts for the forgery and for the uttering and publishing, the superior court will quash the latter counts. Mowbray's case, 11 Leigh (Va.), 643.

If the examing court remand to the superior court for trial, a prisoner charged with the forgery, the prisoner may be indicted in the superior court, not only for the forgery, but also for the instrument to be forged, and for acting and assisting in the forgery. Huffman *v.* Com., 6 Rand. (Va.) 685.

1. See *ante*, 7 Am. & Eng. Encycl. of L. 598.

2. **For Forgery—Ashburton Treaty.**—False entries made in the usual books of account, or memoranda on slips directing such entries by others, made by an officer or employee of a bank for the purpose of concealing his embezzlements, do not constitute forgery, as defined and recognized by the courts of England; and where a person is held for extradition to England for forgery on such proofs only of acts committed in England, he should be discharged on *habeas corpus*. *In re* Tully, 20 Fed. Rep. 812; s. c., 18 Rep. 263.

**A Warrant of Extradition Allowed by the Dominion Government, under the Tenth Article of the Treaty of 1842 with Great Britain**, recited that the party was accused of the crime of forgery, and had been committed for extradition thereon, without saying what forgery. *Held*, that resort might be had to the proceedings before the committing magistrate, and his report, on which the warrant issued, to ascertain what and how many forgeries the extradition was intended to apply to or include. *Ex parte* Hibbs, 26 Fed. Rep. 421; s. c., 7 Cr. L. Mag. 690.

**The Prisoner was Superintendent of an Almshouse** in Philadelphia, supported by the city. Goods were furnished to the almshouse by certain persons, who were entitled to receive warrants for the price. Such warrants prepared and signed were in the hands of W., the secretary of the almshouse, to be delivered to the proper parties on their signing the counterfoils. The prisoner falsely represented to W. that he was authorized to sign the names of the parties entitled, and upon signing their names obtained possession of the warrants, and they were cashed at the city treasury. The district attorney of Philadelphia swore that, according to the Pennsylvania criminal code and at common law, as interpreted there, the facts proved made out the crime of forgery. *Held*, the crime was forgery under the Ashburton treaty. *In re* Phipps (Ont. Q. B. Div.), 4 Cr. L. Mag. 865.

3. State *v.* Ford, 30 La. An. 797.

4. But where the prosecutor undertakes to set out in what the forgery consisted, he is bound to state it truly, so as not to mislead the defendant, and to prove it as stated. People *v.* Marion, 28 Mich. 255; s. c., 2 Green Cr. L. Rep. 572.

**An Indictment for Forgery Must Allege the Acts Constituting the Forgery,**—that defendant signed the name of another person without authority, or procured some one to do so, or the like. Alleging that the accused forged a certain writing, etc., is only a legal conclusion, and is not sufficient. So a count for uttering must allege acts showing how the uttering was done. Com. *v.* Williams, 13 Bush (Ky.), 267.

5. State *v.* Maas, 37 La. An. 992; People *v.* Van Alstine, 57 Mich. 69; s. c., 6

But all the ingredients of the offence must be set out with certainty and precision.[1] Where an indictment is defective, how-

Cr. L. Mag. 715; People *v.* Parker (Mich.), 34 N. W. Rep. 720; People *v.* Marion, 28 Mich. 255; s. c., 2 Green Cr. L. Rep. 572.

While, according to the precedents and authorities, it is not absolutely necessary in an information for uttering and publishing as true a forged instrument, etc., to set out particularly in what the forgery consisted, yet it is usual to do so in at least one count; and as an instrument may be forged in a great variety of ways, fairness to the accused would seem to require it, and the practice of omitting such statement is not to be commended. People *v.* Marion, 28 Mich. 255; s. c., 2 Am. Cr. L. Rep. 572.

1. State *v.* Jackson, 90 Mo. 156; United States *v.* Corbin, 11 Fed. Rep. 238. See Harrison *v.* State, 36 Ala. 248; People *v.* Tomlinson, 35 Cal. 503; Cohen *v.* People, 7 Colo. 274; s. c., 2 Denv. L. J. 156; State *v.* Cook, 52 Ind. 574; State *v.* Burgson, 53 Iowa, 318; s. c., 14 West. Jur. 224; State *v.* Dark, 8 Blackf. (Ind.) 526; State *v.* Foster, 30 Kan. 365; Lockard *v.* Com. (Ky.), 8 S. W. Rep. 266; Com. *v.* Williams, 13 Bush (Ky.), 267; Stowers *v.* Com., 12 Bush (Ky.), 342; Mount *v.* Com., 1 Duv. (Ky.) 90; State *v.* Anderson, 30 La. An. pt. 1, 557; State *v.* Watson, 65 Mo. 115; State *v.* McKiernan, 17 Nev. 244; People *v.* Clements, 26 N. Y. 193, reversing Clements *v.* People, 5 Park. Cr. Cas. (N. Y.) 337; Rosenkrans *v.* People, 5 T. & C. (N. Y.) 467; s. c., 3 Hun (N. Y.), 287; State *v.* Davis, 69 N. C. 313; s. c., 1 Am. Cr. L. Rep. 538; State *v.* Dalton, 2 Murph. (N. C.) 379; State *v.* Houseal, 2 Brev. (S. C.) L. 219; State *v.* Luttrell, 85 Tenn. 232; s. c., State *v.* Knippa, 29 Tex. 295; Morris *v.* State, 17 Tex. App. 360; State *v.* Phelps, 11 Vt. 116; s. c., 34 Am. Dec. 672; Huffman *v.* Com., 6 Rand. (Va.) 685.

**Certainty and Precision—False Affidavit and False Statement.**—An indictment for an offence against the statute of March 3, 1823 (3 Stat. 771, § 1), for sending a false writing and affidavit to the pension-office, must set out all the ingredients of the offence with certainty and precision, and with sufficient particularity, that the court may know from the indictment whether he is to be tried for sending a writing and affidavit not genuine in its execution, or one genuine in its execution but false in its statement, and the particular statements which are false, and that they are material, or judgment will be arrested on motion. United States *v.* Corbin, 11 Fed. Rep. 238.

**Allegation—Setting Out Instrument in Hæc Verba.**—An indictment which alleges that the defendant falsely made, forged, and counterfeited an instrument within the statute, with intent to defraud, setting forth the instrument in *hæc verba*, is a sufficient description of the circumstances to constitute the offence. Rosekrans *v.* People, 5 T. & C. (N. Y.) 467; s. c., 3 Hun (N. Y.), 287.

**Forgery of Promissory Note—Allegations.**—An indictment drawn in conformity with the statute, and alleging substantially that defendant wilfully, feloniously, and with intent to cheat and defraud, did falsely make and forge a certain instrument of writing, to wit, a promissory note, purporting to be the act of one C. W. Johnston, a fictitious name and fictitious person, by which a pecuniary demand and obligation was created for the payment of $125 by the said Johnston to the order of the Continental Insurance Company of New York, a corporation organized under the laws of New York, which said false instrument and note is of the tenor following (and then follows a copy of the note), is not lacking in any averment necessary to prefer the charge of forgery in the third degree, and is sufficient. State *v.* Jackson, 90 Mo. 156.

**Degree of Certainty.**—Where an indictment for forgery charges the offence with a degree of certainty sufficient to enable the court to pronounce a proper judgement in case of conviction, an offenc is sufficiently charged thereby. Luttrell *v.* State, 85 Tenn. 232.

An indictment for forgery is sufficient, if the offence is substantially set forth, though not in the precise words of the statute. State *v.* McKiernan, 17 Nev. 224.

An indictment for uttering and publishing as true a certain false and forged promissory note charged that "B. then and there, knowing the same to be false, forged . . . with intent to defraud, alter, and publish the said false and forged promissory note," etc., *held* sufficient. State *v.* Burgson, 53 Iowa, 318; s. c., 14 West. Jur. 224.

**Receipt Against "Book Account."**—An indictment charging the defendant with forging a receipt against a "book account" is too indefinite. State *v.* Dalton, 2 Murph. (N. C.) 379.

**Setting Out Character—Allegation.**—Where an indictment charged that the defendant "did feloniously tender in payment to B. an altered bank bill of the

Dayton Bank, a bank created by the law of the State of Ohio, he (said defendant) then and there well knowing the same to be altered with felonious intent," *held* defective, as vague and uncertain with respect to character of the alleged alterations. Mount *v.* Com., 1 Duv. (Ky.) 90.

An indictment for forging a receipt for money, charged that the defendant feloniously, etc., altered, obliterated, and defaced the receipt, without otherwise averring the acts done by the defendant. *Held* bad for uncertainty. State *v.* Knippa, 29 Tex. 295.

**Procuring to be Forged.**—Where an indictment in one count charged the prisoner with forging and assisting in forging, and causing and procuring to be forged, it was adjudged well enough, being conformable to the act of the assembly and the precedents. State *v.* Houseal, 2 Brev. (S. C.) L. 219.

Where a false writing is sufficiently stated in the charge, and it was alleged that the accused knew it to be false, it was immaterial when, where, how, or by whom it was forged. Lockard *v.* Com. (Ky.), 8 S. W. Rep. 266.

In an indictment for forgery in Virginia, it is not necessary to set forth in the count the persons whom the prisoner procured to forge the instrument, or with whom he acted or assisted in the forgery. A general description in the words of the statute is sufficient. Huffman *v.* Com., 6 Rand. (Va.) 685.

**"Unlawfully and Feloniously Destroy."**—A statute enacted "that every person who shall falsely make, deface, destroy, etc., any record, etc., shall be deemed guilty of forgery. *Held*, that an indictment on that statute, charging that the defendant did unlawfully and feloniously destroy, etc., was objectionable for omitting the word 'falsely.'" State *v.* Dark, 8 Blackf. (Ind.) 526.

**Charging Destruction of Forged Instrument—"Disposed of."**—In an indictment for forgery, if it appears that the instrument is kept out of the possession and knowledge of the jury by the action of the prisoner himself, the act is equivalent to the destruction of the instrument. And such destruction is sufficiently alleged, under the circumstances, when it is charged in the indictment that the prisoner has "disposed of" the instrument. State *v.* Davis, 69 N. C. 313; s. c., 1 Am. Cr. L. Rep. 538.

**"Passed, Uttered, and Published."**—An information under Kansas Crimes Act, § 134, charged that defendant "passed, uttered, and published" the forged instrument. *Held*, that this was a statement of fact, and not a conclusion of law, and was sufficient. State *v.* Foster, 30 Kan. 365.

An indictment for forgery should state that the accused signed another's name to the forged paper, or procured some one else to do so, with intent to defraud. An allegation that the accused "did forge the name of B." with such intent, is an allegation of a conclusion of law, and is insufficient. Stowers *v.* Com., 12 Bush (Ky.), 342.

**"Did Feloniously Utter and Publish as True."**—An indictment charging that the defendant did feloniously utter and publish as true, and with intent to defraud, a certain forged instrument, etc., knowing the same to be forged, is sufficient. Harrison *v.* State, 36 Ala. 248.

An indictment charging that the defendant did falsely and feloniously, "utter, publish, and pass or attempt to pass," a forged instrument, is bad on demurrer, although it follows the language of the statute creating the offence. The averment should be in the conjunctive form. People *v.* Tomlinson, 35 Cal. 503.

Under a statute which prohibits the passing, uttering, and publishing of forged paper, an indictment is good which charges the falsely, etc., selling, exchanging, and delivering as true a forged draft, knowing, etc. State *v.* Watson, 65 Mo. 115.

An indictment for uttering a forged writing, which charges the accused with having the writing, knowing it to be false, presenting it to the party defrauded, representing it as genuine, and thereby obtaining property of value, is sufficient; the falsity of the writing being sufficiently stated in the charge that the accused knew it to be false, it being immaterial when, where, how, or by whom it was forged. Lockard *v.* Com. (Ky.), 8 S. W. Rep. 266.

Where the defendant was found guilty of uttering and publishing the false instrument, although the caption of the indictment and the indorsement thereon designated the crime as "forgery," and the jury returned the verdict in the same form, *held*, under the evidence and instruction of the court, the jury found the verdict in accordance with the facts, the use of the word "forgery" was an informal one, and no prejudice resulted from its use. State *v.* Burgson, 53 Iowa, 318; s. c., 14 West. Jur. 224.

**Artificial Persons—Description of.**—In prosecution for forgery under statute "the president, directors, and co." is a good description of an artificial person. State *v.* Phelps, 11 Vt. 116; s. c., 34 Am. Dec. 672.

An indictment charging the forging of

ever, under the statute, a conviction will be sustained if the offence charged amounts to a crime punishable at common law.[1]

*a.* STATING OFFENCE IN ALTERNATIVE.—An indictment for forging or uttering a forged paper, setting forth the offence in the alternative or disjunctive, and not in the conjunctive, form, is bad.[2]

"an instrument, purporting to be a bank bill for fifty dollars, purporting to be issued by the Georgia Railroad and Banking Company, an incorporated bank of the State of Georgia," follows the Code, and is good. Johnson *v.* State, 35 Ala. 370.

An indictment for the forgery of a note, "payable to the order of the People's Savings Bank," sufficiently charges a banking institution. State *v.* Pullens, 81 Mo. 387.

**Charging Forgery in Official Capacity.**—Where prejudice would arise only from the utterance of a forged writing by the accused in an official capacity, an information failing to charge the utterance by him in such capacity is fatally defective. State *v.* Anderson, 30 La. An. pt. 1, 557.

**"Purporting to be" genuine** where omitted from an indictment has been held to be fatal. See Rex *v.* Carter, 2 East P. C. 985. But this rule is now changed, and where these words are omitted the court will now assume them to have been meant, and will intend it if the question of repugnancy is raised. See State *v.* Gardiner, 1 Ired. (N. C.) L. 27; Rex *v.* Birch, 1 Leach C. C. 79; s. c., 2 W. Bl. 790.

**"Tenor,"** as used in an indictment, means words, and binds the pleader to the severest accuracy. Com. *v.* Parmenter, 22 Mass. (5 Pick.) 279; State *v.* Weaver, 13 Ired. (N. C.) L. 203; State *v.* Morton, 27 Vt. 310; Rex *v.* Powell, 2 East P. C. 976. However, mere clerical variations, where the sound is retained, do not vitiate the indictment. See Whart. Crim. Ev. § 114; Whart. Cr. Pl. & Pr. §§ 1067, 1073.

**The word "knowingly"** is not used in the definition of forgery in Texas Pen. Code, art. 431. It need not, therefore, be used in an indictment. Morris *v.* State, 17 Tex. App. 660.

The term "feloniously" need not be used in indictments for forgery in Colorado. Cohen *v.* People, 7 Colo. 274; s. c., 2 Denv. L. J. 156.

**The use of the word "falsely"** is not essential. The word "forged," as used in the indictment, necessarily implies that the writing was falsely made. State *v.* McKiernan, 17 Nev. 224.

**A Defect in an Information** for forgery, by using the word "affiant" for words "prosecuting attorney," if the charge was preferred by proper officer, will not be available to reverse judgment. Billings *v.* State, 107 Ind. 54; s. c., 57 Am. Rep. 77.

**Inconsistent Statements in Indictment.**—An allegation in an indictment, that the defendant forged a certain instrument, is inconsistent with a subsequent allegation that he then and there knew said instrument was then and there false, forged, etc. State *v.* Cook, 52 Ind. 574.

**Allegations of Venue.**—An affidavit and information for forgery, under a statute providing that whoever forges or counterfeits any order for the payment of money or property, or any other instrument of writing, with intent to defraud any person, shall be imprisoned, the value of the property thus sought to be obtained is not the essence of the offence, and need not be stated, under a section of the statute providing that no indictment or information shall be invalid for failure to state the value, where the same is not "of the essence of the offence." Stewart *v.* State, 111 Ind. 554.

1. State *v.* Leak, 80 N. C. 403; State *v.* Lamb, 65 N. C. 419; State *v.* Walker, 2 Tayl. (N. C.) 229.

**Order for Goods—Defective Allegation under Statute.**—An indictment for forging an "order for delivery of goods," under a statute which fails to allege that the order was drawn by one having the power to dispose of the goods upon a person under obligation to obey, is defective. But in such case a conviction will be sustained for the offence at common law. State *v.* Leak, 80 N. C. 403.

**Offence Charged Not Crime Under Statute.**—When an indictment for forgery sets out the forged instrument in full, and it appears that the forgery is one that is punishable at common law, though not under the statute under which the prisoner is indicted, judgment may be pronounced, after conviction, for the common-law offence; the conclusion "against the statute," etc., being rejected as surplusage. State *v.* Lamb, 65 N. C. 419.

**Arrest of Judgment—Refused When.**—If an indictment for forgery contains such a charge as amounts to that crime at common law, judgment will not be arrested, although the prisoner be indicted under a statute. State *v.* Walker, 2 Tayl. (N. C.) 229.

2. State *v.* Green, 3 Heisk. (Tenn.) 130; State *v.* Woodward, 25 Vt. 616; Rex *v.*

*b.* STATING OFFENCE IN DIFFERENT PHRASES.—It is not duplicity to state the offence in different phrases in the indictment; such as the prisoner did "falsely make, forge, and counterfeit," or charging him with "causing and procuring to be falsely made, forged, and counterfeited," and with "willingly acting and assisting in the said false making, forging, and counterfeiting," when the indictment follows the words of the statute.[1]

*c.* SPECIFYING PARTY TO BE DEFRAUDED.—Although it is true that it is sufficient if the intention be laid to defraud persons unknown, or any person on whom the counterfeit forged instrument is passed,[2] yet, in the absence of statutory regulations, indictments for forging or uttering forged instruments should charge the offence as being done with intent to defraud some particular person or corporation, when this is practicable.[3] When the party

Stocker, 1 Salk, 342, 871; s. c., 5 Mod. 137. See People *v.* Tomlinson, 35 Cal. 503; People *v.* Hood, 6 Cal. 236; Jackson *v.* State, 4 Ind. 560; Iseley *v.* State, 8 Blackf. (Ind.) 403; Com. *v.* Perrigo, 3 Met. (Ky.) 5; Com. *v.* Livermore, 40 Mass. (4 Gray) 18; State *v.* Drake, 30 N. J. L. (1 Vr.) 422, 427; Com. *v.* France, 2 Brewst. (Pa.) 568; Reg. *v.* Craig, 21 Up. Can. Q. B. 552; Rex *v.* Middlehurst, 1 Burr. 399; Rex *v.* Flint, Case *temp.* Hardw. 370; Rex *v.* Brereton, 8 Mod. 328, 330; Rex *v.* Stoughton, 2 Str. 900; Rex *v.* Ward, 2 Str. 747. *Compare* State *v.* Obannon, 1 Barb. (N. Y.) 144; State *v.* Colwell, 3 R. I. 284; Reg. *v.* Patterson, 27 Up. Can. Q. B. 142.

**The General Rule,** as laid down by Bishop (1 Bish. Cr. Proc. § 585), is as follows: "Whenever the conjunction 'or' would leave it uncertain which of two things is meant, it is inadmissible; and in its stead 'and' may be employed if it makes the required sense." Chitty says (1 Chit. Cr. L. 231) that "An indictment stating that the defendant murdered or caused to be murdered, or that he wounded or caused to be wounded, is bad because uncertain. So, to say that the defendant forged or caused to be forged an instrument, that he erected or caused to be erected a nuisance, that he carried and conveyed or caused to be carried and conveyed two persons having the small-pox so as to burden the parish of Chelmsford, is not sufficiently positive."

**"Forged or counterfeited."**—Where the statutory words are "forged, counterfeited, or falsely altered instrument in writing," the indictment should describe the writing as forged and counterfeited. Hobbs *v.* State, 9 Mo. 855.

**Statutory Words.**—In some of the States, by statute, the common-law rule has been changed and the use of the word "or" is sanctioned. See Horton *v.* State, 53 Ala. 458; Johnson *v.* State, 50 Ala. 456; Ward *v.* State, 50 Ala. 120; Johnson *v.* State, 55 Ala. 370; State *v.* Owens, 22 Minn. 238. See also Morgan *v.* Com., 7 Gratt. (Va.) 592; Cunningham *v.* State, 5 W. Va. 508.

1. See Hoskins *v.* State, 11 Ga. 92; Com. *v.* Thomas, 76 Mass. (10 Gray) 483; State *v.* Hastings, 53 N. H. 452; State *v.* Henry, 2 Dev. & Bat. (N. C.) L. 381, 390; State *v.* Morton, 27 Vt. 310; s. c., 65 Am. Dec. 201; Rasnick *v.* Com., 2 Va. Cas. 356; Perkins *v.* Com., 7 Gratt. (Va.) 651; s. c., 56 Am. Dec. 123; Rex *v.* Middlehurst, 1 Burr. 391.

**"False, forged, and counterfeited."**—It is held that the words "false, forged, and counterfeited" are not repugnant. See Mackey *v.* State, 3 Ohio St. 362, following Stoughton *v.* State, 2 Ohio St. 562, reversing Kirby *v.* State, 1 Ohio St. 185.

Where the several terms used are such as may each severally describe the instrument, they do not vitiate the indictment. See State *v.* Jones, 1 McMull. (S. C.) L. 236; s. c., 36 Am. Dec. 257; Rex *v.* Dunnett, 2 East P. C. 985. But where two distinct offences, separate as to their operation, and requiring different punishments, are charged in the same count, the indictment will be bad; and on conviction thereunder, the judgment will be arrested. People *v.* Wright, 9 Wend. (N. Y.) 193; Page *v.* Com., 1 Lea (Tenn.), 683.

And it has been held that an indictment charging in one count the forgery of a check, and of the indorsement thereon, is not open to the objection of duplicity. Sprouse *v.* Com., 10 Va. L. J. 181.

2. State *v.* Keneston, 59 N. H. 36.

3. See Buckley *v.* State, 2 G. Greene (Iowa), 162; Cunningham *v.* State, 49 Miss. 685; West *v.* State, 22 N. J. L. (2 Zab.) 212; People *v.* Peabody, 25

actually defrauded is a firm, it is enough to aver an intent to defraud a member of the firm.[1]

*d.* ACTUAL DAMAGES NEED NOT BE AVERRED. — Actual damages need not be averred or proved;[2] it being enough simply to aver that the instrument was calculated to defraud.[3]

*e.* VARIANCE.—A variance between an indictment and the evidence, either as to the instrument or the name of the person whom it was intended to defraud, will be fatal.[4]

**2. Averment of Guilty Knowledge.**—In indictments for uttering and publishing, *scienter* or guilty knowledge must be averred; but it is sufficient if this averment be in general terms.[5] Thus an in-

Wend. (N. Y.) 472; People *v.* Davis, 21 Wend. (N. Y.) 309; State *v.* Harrison, 69 N. C. 143; State *v.* Greenlee, 1 Dev. (N. C.) L. 523; Com. *v.* Smith, 6 Serg. & R. (Pa.) 568; State *v.* Odell, 3 Brev. (S. C.) L. 552; s. c., 2 Tr. Con. Rep. (S. C.) 758; State *v.* Jones, 1 McMull. (S. C.) L. 236; s. c., 36 Am. Dec. 257.

1. People *v.* Curling, 1 Johns. (N. Y.) 320; Reg. *v.* Hanson, Car. & M. 334.

**Notes of Fictitious Bank.**—Where the notes forged are on a fictitious or extinct bank, the indictment should aver the person on whom the attempt is made to pass the notes as being the person whom it is intended to defraud. Com. *v.* Carey, 19 Mass. (2 Pick.) 47; People *v.* Curling, 1 Johns. (N. Y.) 320; United States *v.* Shellmire, Bald. C. C. 370.

2. Com. *v.* Ladd, 15 Mass. 256; Com. *v.* Goodenough, Thach. C. C. (Mass.) 132; Hess *v.* State, 5 Ohio, 5; s. c., 22 Am. Dec. 767; Pennsylvania *v.* Misner, Addis. (Pa.) 44; State *v.* Washington, 1 Bay (S. C.) L. 120; s. c., 1 Am. Dec. 601; Snell *v.* State, 2 Humph. (Tenn.) 347; Rex *v.* Goate, 1 Ld. Raym. 737; Rex *v.* Crook, 2 Str. 901.

3. Schroeder *v.* Harvey, 75 Ill. 638; Miller *v.* State, 51 Ind. 401; Com. *v.* Ladd, 15 Mass. 526; West *v.* State, 22 N. J. L. (2 Zab.) 292; People *v.* Stearns, 21 Wend. (N. Y.) 409; s. c., 23 Wend. (N. Y.) 634; People *v.* Rynders, 12 Wend. (N. Y.) 425; Hess *v.* State, 5 Ohio, 5; s. c., 22 Am. Dec. 767; Snell *v.* State, 2 Humph. (Tenn.) 347; United States *v.* Moses, 4 Wash. C. C. 726; Reg. *v.* Geach, 9 Car. & P. 499; Reg. *v.* Cooke, 8 Car. & P. 582, 586; Reg. *v.* Vaugh, 8 Car. & P. 276; Reg. *v.* Hill, 8 Car. & P. 274; Rex *v.* Jones, 2 East, 991; Rex *v.* Goate, 1 Ld. Raym. 737; Rex *v.* Holden, Russ. & R. C. C. 154; Rex *v.* Crook, 2 Str. 901.

4. Powers *v.* State, 87 Ind. 97; Abbott *v.* State, 59 Ind. 70; People *v.* Martin, 29 Mich. 31; State *v.* Maupin, 57 Mo. 205; Hart *v.* State, 20 Ohio, 49; United States *v.* Hinman, Bald. C. C. 292; Rex *v.* Thomas, 2 East P. C. 934; Rex *v.* Hornwell, 1 Moo. C. C. 405; s. c., *sub nom.* Rex *v.* Horwell, 6 Car. & P. 148.

Thus where the indictment declares the instrument to be of a particular class, and the evidence shows it to be of a different class, the variation is fatal. Hart *v.* State, 20 Ohio, 49.

But where the indictment designates the instrument forged as an order on the cashier of a particular bank, it will be supported by evidence of an order on the cashier of the corporation of the bank. United States *v.* Hinman, Bald. C. C. 292.

**A Charge of Uttering a Forged Bill of Exchange** will not be sustained by evidence that the acceptance only is forged. In such a case the indictment should be for uttering the forged acceptance, and not for the forgery of the instrument itself. Rex *v.* Hornwell, 1 Moo. C. C. 405; s. c., *sub nom.* Rex *v.* Horwell, 6 Car. & P. 148.

**Evidence—Variance.**—A judgment of conviction will not be reversed where the indictment charges that the name of the payee was forged on the back of the check, while the only proof of forgery in the bill of evidence shows that the name of the drawer was forged, and there is no evidence that any one, except defendant, ever saw the payee, so as to be able to judge of his handwriting. Powell *v.* Com. (Ky.), 9 S. W. Rep. 245.

5. People *v.* Page, 1 Idaho, 189; Powers *v.* State, 87 Ind. 97; State *v.* Burgson, 53 Iowa, 318; United States *v.* Carll, 105 U. S. (15 Otto) 611; bk. 26, L. ed. 1135; s. c., 4 Am. Cr. Rep. 246.

**As to the Description of the Offence in the Indictment,** in addition to the above authorities, see United States *v.* Northway, 120 U. S. 334; bk. 30, L. ed. 664, 666; Cannon *v.* United States, 116 U. S. 55, 78; bk. 29, L. ed. 561, 569; United States *v.* Britton, 107 U. S. (17 Otto) 661; bk. 27, L. ed. 522; United States *v.* Seaman, 23 Blatchf. C. C. 221; United States

dictment alleging in the words of the statute[1] that the defendant feloniously and with intent to defraud did pass, utter and publish a falsely made, forged, counterfeited, and altered obligation of the United States, must further allege that the defendant knew it to be false, forged, counterfeited, and altered, or it is insufficient even after verdict.[2]

An indictment for uttering should allege the name of the person to whom the instrument was passed, or excuse the omission so to allege.[3]

3. **Averment of Intent to Defraud.**—In every forgery intent to defraud is of the essence of the crime,[4] fraud and the intent to deceive being the chief ingredients.[5] The intent to defraud must be averred even in indictments under statutes which do not prescribe such requisite.[6] But it is not necessary to allege that the person whose name was forged was actually defrauded thereby;

*v.* Campbell, 9 Sawy. C. C. 23; s. c., 16 Fed. Rep. 235; United States *v.* Haynes, 29 Fed. Rep. 698; Jones *v.* United States, 27 Fed. Rep. 449, 450.

**Charging the Offence.**—In an indictment against one for fraudulently keeping in his possession a fictitious instrument purporting to be a bank note, it is necessary to aver an intent to utter or pass it as and for a genuine bill. Gabe *v.* State, 6 Ark. 519.

Where the information charges that the defendant uttered, published, and passed the forged order, it will be bad on motion to quash if it fail to allege that he so uttered, published, and passed such order, "knowing the same to be false, forged, and counterfeited." Powers *v.* State, 87 Ind. 97.

Where the indictment charged the defendant with having a note in his possession, knowing it to be false and forged, the court *held* that it was not necessary to charge that he also knew it to be false and forged at the time of uttering and publishing. State *v.* Burgson, 53 Iowa, 318.

1. U. S. Rev. Stat. 5431.

2. United States *v.* Carll, 105 U. S. (15 Otto) 661; bk. 26, L. ed. 1135; s. c., 4 Am. Cr. Rep. 246.

3. McClellan *v.* State, 32 Ark. 609. See State *v.* Seran, 28 N. J. L. (4 Dutch.) 519; Williams *v.* State, 9 Humph. (Tenn.) 80; Hooper *v.* State, 8 Humph. (Tenn.) 93.

**The Name must be Correctly Alleged.**—See Shinn *v* State. 57 Ind. 144.

**Uttering—Setting Out Name of Party.**—It has been said, however, that unless otherwise required by statutory construction, where the party intended to be defrauded is in existence, it is sufficient to aver that the defendant uttered or forged the instrument as true, without setting out to whom the uttering was made. See United States *v.* Bejandio, 1 Woods C. C. 294; Reg. *v.* Trenfield, 1 Fost. & F. 43. Thus it has been held in Louisiana that in an information for uttering a forged order for the payment of money, by the express terms of La. Rev. Stat. § 1052, it is not necessary to state the name of the person on whom the order was passed, or that of the person whom the accused intended to defraud. State *v.* Adams, 39 La. An. 39.

4. Phillips *v.* State, 17 Ga. 459; Com. *v.* Ladd, 15 Mass. 526; State *v.* Redstrake, 39 N. J. L. (10 Vr.) 365; People *v.* Stearns, 21 Wend. (N. Y.) 409; Snell *v.* State, 2 Humph. (Tenn.) 347; State *v.* Shelters, 51 Vt. 105; Kerr *v.* Force, 3 Cr. C. C. 43; United States *v.* Moses, 4 Wash. C. C. 726; Reg. *v.* Craig. 7 Up. Can. C. P. 239; Reg. *v.* Dunlop, 15 Up. Can. Q. B. 119; Rex *v.* Powell, W. Bl. 787; Rex *v.* Martin, 7 Car. & P. 549; Rex *v.* Holden, 2 Taunt. 334.

5. 2 Russ. on Crimes (5th Eng. ed.), 618 *et seq.*

6. See Reg. *v.* Powner, 12 Cox C. C. 235.

Wharton says that "at common law to constitute forgery, the intent to defraud must either be apparent from the false making, or become so from the extrinsic facts. Therefore the indictment which charged the false making to have been in the alteration of an order given by the defendant, without charging that the alteration was made after it was circulated and had been taken up by him, has been held to be fatally defective." 1 Whart. Cr. L. (9th ed.) § 743. See State *v.* Greenlee, 1 Dev. (N. C.) L. 523.

it is sufficient to show that the intention was to defraud him, and that he might have been defrauded had the forgery succeeded.[1] It is sufficient to allege that the defendant did the act with intent to defraud, without alleging the intent to defraud any particular person.[2] In those cases where the effect of the forgery will not

1. State *v.* Jones, 9 N. J. L. (4 Halst.) 357; s. c., 17 Am. Dec. 483.

2. Garmire *v.* State, 104 Ind. 444; s. c., 5 Am. Cr. Rep. 238; State *v.* Hart, 67 Iowa, 142; State *v.* Maxwell, 47 Iowa, 454; State *v.* Foster, 32 La. An. 34; Hawthorn *v.* State, 7 Md. L. Rec. No. 1; Pepole *v.* Parker (Mich.), 34 N. W. Rep. 720; People *v.* Van Alstine, 57 Mich. 69; s. c., 6 Am. Cr. Rep. 272; 6 Cr. L. Mag. 715; State *v.* Rucker, 93 Mo. 88; State *v.* Phillips, 78 Mo. 49; People *v.* Stearns, 21 Wend. (N. Y.) 409; State *v.* Lurch, 12 Oreg. 104; State *v.* Phelps, 11 Vt. 116; s. c., 34 Am. Dec. 672.

**Under State Statute.**—As to indictment for forgery under State statutes, and the necessary averments, see Gibson *v.* State (Ga.), 5 S. E. Rep. 76; Phillips *v.* State, 17 Ga. 459; Ga. Code, §§ 4442, 4453; State *v.* Gavigan, 36 Kan. 322; Kan. Crimes Act, § 139; People *v.* D'Argencour, 95 N. Y. 624; s. c., 2 N. Y. Cr. Rep. 267; aff'g 32 Hun (N.Y.), 178; State *v.* Houseal, 2 Brev. (S. C.) L. 219.

**Intent to Defraud.**—An indictment for forgery must charge that the defendant committed the forgery to injure or defraud. State *v.* Jackson, 89 Mo. 561.

An indictment for forgery, which does not allege who was intended to be defrauded by the forged instrument, is bad on demurrer. Williams *v.* State, 51 Ga. 535; s. c., 1 Am. Cr. Rep. 227.

**The General Rule** applicable to offences of forgery and counterfeiting, that the indictment must allege the offence to have been committed with the intention of defrauding some person or corporation, and that the allegation must be proved as laid, admits of a qualification where the person in whose name a forged note, etc., is drawn, or the drawee, would, if it were genuine, be required to pay the same. In such case, the intention to defraud and injure is by the law inferred and taken as proved from the act of forging such paper. Hence an indictment for passing a counterfeit order, purporting to be drawn upon the cashier of the Bank of the United States, may charge the passing such order to be with intent to defraud the bank, or the person to whom it is passed, or both. United States *v.* Shellmire, Baldw. C. C. 370.

A prisoner was committed for examination, was examined, and remanded by the examining court for trial for felony, in forging and passing a promissory note, purporting to be drawn by A. D. (no intention to defraud A. D. or any other person being charged). *Held*, that the examination was sufficient to warrant an indictment for forging and uttering the note "with intention to defraud A. D." Bogart's Case, 10 Leigh (Va.), 693.

**Belief in Genuineness of Paper.**—The question whether defendant believed the paper to be genuine, is presented by an indictment for uttering, but not for forging, the paper. State *v.* Grant, 74 Mo. 33.

**It is Unnecessary to Allege the Details** by which the intent to defraud is to be established. It is enough to allege an intent to defraud persons named, who are shown to have been liable to be prejudiced by giving credit to the instrument. Paige *v.* People, 3 Abb. App. Dec. (N. Y.) 439; s. c., 6 Park Cr. Cas. (N. Y.) 684.

**An Indictment for Forging an Order on a Savings Bank** may aver the intent to be to defraud the person whose name was forged; and if the first count alleges the intent to be to defraud the bank, and other counts allege the intent to be to defraud such person, and after verdict a *nol. pros.* is entered as to the first count, the record is not thereby rendered erroneous. The offence is the same under each count. Rounds *v.* State, 78 Me. 42.

In an indictment for forging an order on a bank several counts alleged the intent to have been to defraud the person whose name was forged, while the last count alleged it as an intent to defraud the bank. After a general verdict of guilty, a *nolle prosequi* was entered upon the last count. *Held*, that there was no inconsistency between the counts, as the intent to defraud the pretended drawer of the order and to defraud the bank might both exist; and the record was not rendered erroneous by the *nolle prosequi* of the last count. Rounds *v.* State, 78 Me. 42.

**Intent to Defraud Township Board.**—In an indictment charging the plaintiff in error with having as township treasurer, in his annual settlement with the township board of education, unlawfully, etc.,

uttered and published to them as true and genuine a certain forged and altered order purporting to be drawn on him as such treasurer by the township clerk, in favor of a teacher in a sub-district, for the sum of $38, payable out of the teachers fund, knowing it to be so forged and altered, the act is properly charged as having been done with intent to defraud the township board of education. Gregory *v.* State, 11 Ohio St. 329.

**Intent to Defraud—An Indictment Charged the Forgery of the Name of a Firm** with intent to defraud two persons whose names were stated; but it was not alleged nor proved that they composed the firm. *Held*, that the charge was not proved. State *v.* Harrison, 69 N. C. 143.

To designate such a party as the "Meriden Cutlery Company" is a sufficient designation of the body, partnership, or persons intended to be defrauded. Noakes *v.* People, 25 N. Y. 380.

**Person or Corporation not in Existence.**—There can be no conviction upon a count charging an intent to defraud a person or corporation not in existence. State *v.* Givens, 5 Ala. 747.

**Intent to Defraud Estate of Deceased Person.**—An information charging a forgery for the purpose of defrauding the estate of one deceased sufficiently charges an intent to defraud a person. Billings *v.* State, 107 Ind. 54; s. c., 57 Am. Rep. 77.

Where the forgery is committed after the death of the man whose name purports to be signed to the instrument, it is proper to charge that the intent was to defraud his estate, as the estate of a decedent is in law regarded as a person. Billings *v.* State, 107 Ind. 54; s. c., 57 Am. Rep. 77.

In Billings *v.* State, 107 Ind. 54; s. c., 57 Am. Rep. 77, it is held that the name of a deceased person is subject of forgery. In the course of opinion the court say: "The objection urged against this information is, that it does not aver that the forgery was committed with the intent to defraud any person. The reason advanced in support of this proposition is that the law does not regard the estate of decedent as a person. This contention cannot prevail. The estate of a decedent is a person, in legal contemplation. "The word person," says Mr. Abbott, "in its legal signification, is a generic term, and includes artificial as well as natural persons." 2 Abb. Law Dict. 271. See Planters', etc., Bank *v.* Andrews, 8 Port. (Ala.) 404; Douglass *v.* Pacific, etc., Co., 4 Cal. 304. It is said in another work that "Persons are of two kinds, natural and artificial. A natural person is a human being; artificial persons include (1) a collection or succession of natural persons, forming a corporation; (2) a collection of property, to which the law attributes the capacity of having rights and duties. The latter class of artificial persons is only recognized to a limited extent in our law; examples are, the estate of a bankrupt or deceased person." 2 Rapalje & Lawrence Law Dict. 954. See Rollins *v.* State, 22 Tex. App. 548; s. c., 58 Am. Rep. 659.

"Our own case inferentially recognize the correctness of the definition given by the authors from whom we have quoted; for they declare that it is sufficient, in pleading a claim against a decedent's estate, to designate the defendant as the estate of the deceased person naming him. Ginn *v.* Collins, 43 Ind. 271. Unless we accept this definition as correct, there would be a failure of justice in cases where, as here, the forgery is committed after the death of the person whose name is forged; and this is a result to be avoided, if it can be done consistent with principle. We precieved no difficulty in avoiding such a result; for to our minds it seems reasonable that the estate of a decedent should be regarded as an artificial person. It is the creation of law for the purpose of enabling a disposition of assets to be properly made; and although natural persons, as heirs, devisees, or creditors, have an interest in the property, the artificial creature is a distinct legal entity. The interest which natural persons have in it is not complete until there has been due administration; and one who forges the name of the decedent to an instrument purporting to be a promissory note must be regarded as having intended to defraud the estate of the decedent, and not the natural persons having diverse interests in it, since he cannot be presumed to have known who those persons were, or what was the nature of their respective interests. The fraudulent intent is against the artificial person,—the estate,—and not the natural persons who have direct or contingent interest in it." See Rollins *v.* State, 22 Tex. App. 548; s. c., 58 Am. Rep. 659.

**Describing Person Whose Name is Forged.**—It is sufficient to describe the party intended to be defrauded, with reasonable certainty. 2 Russ. on Cr. 367; 1 Leach. C. C. 248; 2 East P. C. 990, § 60. Noakes *v.* People, 25 N. Y. 380.

In cases of forgery, there are usually two persons who may be defrauded—the one whose name is forged, and the one to whom the forged instrument is to be

necessarily be to defraud any particular person, but will defraud some one, a general allegation of intent to defraud must be made.[1]

passed; and the indictment may lay the intent to defraud either of them. Proof of an intent to defraud either, and to pass the instrument as good, though there be shown no actual intent to defraud the particular person, will sustain the allegation. State *v.* Cleaveland, 6 Nev. 181.

In an indictment for forgery, the person intended to be defrauded was described in the designation of the offence as one J. L., and afterwards, in the body of the indictment, as J. B. L.; and the charge was that the indorsement of J. B. L. was forged by the defendant on a bill of exchange, with intent to defraud the said J. B. L., etc. *Held*, that the omission of the initial of the middle name of J. B. L., in the designation of the offence, was immaterial. People *v.* Ferris, 56 Cal. 442.

In an indictment for forgery by alteration of an instrument alleged to have been intended to defraud the Travelers Insurance Company, of Hartford, Conn.. *held*, that the designation of the company as resident of that place did not amount to a misnomer. People *v.* Graham, 6 Park. Cr. Cas. (N. Y.) 135.

On an indictment for forging a check drawn in the name of a copartnership firm, on a banking company, it is not necessary to set out the names of all the persons who compose the copartnership; it is enough that any one person intended to have been defrauded is designated. People *v.* Curling, 1 Johns. (N. Y.) 320. *Compare* Harris *v.* People, 9 Barb. (N. Y.) 664.

Where, in an indictment against A for forging an assignment of a promissory note made by B to C, or bearer, the second count charged that the assignment was forged with intent to defraud C, *held*, that this count was valid. State *v.* Crawford, 2 Ind. 23.

1. State *v.* Gavigan, 36 Kan. 322.

**Intent to Defraud Particular Person.**—It is not necessary to allege or prove an intent to defraud any particular person; it will suffice to prove generally an intent to defraud. So it need not appear that the prisoner had any intention ultimately to defraud the person whose signature he had forged, he having defrauded the person to whom he uttered the instrument. Reg. *v.* Trenfield, 1 F. & F. 43. But it is not necessary that any person should be actually defrauded, or that any person should be in a situation to be defrauded, by the act. State *v.* Pierce, 8 Iowa, 231; Henderson *v.* State, 14 Tex. 503; Reg. *v.* Nash, 21 L. J. M. C. 147. It has been said, the intent to defraud is an intent that the false instrument shall be taken as genuine. Hence, the criminal intent exists though he who utters a false note or bill intends himself to protect it or take it up at maturity,—Reg. *v.* Beard, 8 Car. & P. 143; Reg. *v.* Geach, 9 Car. & P. 499; Rex *v.* Forbes, 7 Car. & P. 224;—or although he agrees, while uttering the paper, to take it back if it proves not to be genuine,—Perdue *v.* State, 2 Humph. (Tenn.) 494;—or, in case of manufacturing a deposition, he believes the statements therein to be substantially true, and he believes he should obtain the judgment sought, —State *v.* Kimball, 50 Me. 409.

**Same—English Doctrine.**—By 24 & 25 Vict. c. 98, § 44, it is provided that "It shall be sufficient, on any indictment for forging, altering, uttering, offering, disposing of, or putting off any instrument whatsoever, where it shall be necessary to allege any intent to defraud, to allege that the party accused did the act with intent to defraud, without alleging an intent to defraud any particular person. And on the trial of any such offence, it shall not be necessary to prove an intent to defraud any particular person; but it shall be sufficient to prove that the party accused did the act charged, with an intent to defraud." Under this statute, it is no longer necessary to specify in the indictment the particular person whom the prisoner intended to defraud, or even to prove an intent to defraud any particular person; yet the general intent to defraud, which it is necessary to prove, cannot exist unless the circumstances of the case are such that the natural consequence of the prisoner's act would be to defraud some one or other. Thus, in Reg. *v.* Hodgson, Dears. & B. C. C. 3; s. c., 25 L. J. M. C. 78, where the prisoner forged a diploma of the College of Surgeons with intent to induce people to believe that he was a member of the college, the conviction was quashed, because it appeared that he had no intent, in forging, to commit any fraud or specific wrong to any person. This was held on the 14 & 15 Vict. c. 100, § 8, which is in similar terms to the 24 & 25 Vict. c. 98, § 44.

**4. Description of Instrument.**—The name of the forged instrument should be correctly set out,[1] though probably the better practice

**1. Setting Out Name of Instrument.**—Thus it has been held that one indicted for forging an instrument cannot be convicted of forging an acceptance. Morrill *v.* State, 47 Ga. 17. And where the indictment described the forged instrument as a certain bond "placed as a prosecution bond in the suit in the court," etc., the indictment is not sustained by proof that the bond was placed (meaning written) on the paper containing the affidavit instituting the suit, no "process having been prepared." State *v.* Lytle, 64 N. C. 255. But it has been held that an averment in the indictment that an instrument was forged with intent to defraud an incorporate bank is not rendered defective by the fact that the instrument, as set out in words and figures in the indictment, appears to be a check drawn upon the "cashier" of such bank. State *v.* Jones, 1 McMull. (S. C.) L. 236; s. c., 36 Am. Dec. 257.

**Averment of Description in Indictment.**—An indictment charging the forging of "a certain bond," instead of a certain paper writing purporting to be a bond, is proper. State *v.* McGardiner, 1 Ired. (N. C.) L. 27.

While, at the common law, an indictment for forgery, which described the spurious instrument as being a note "executed and signed by," etc., would be bad for repugnancy, such an indictment is cured by the Missouri statute (§ 1821, revision 1879). State *v.* Chamberlain, 89 Mo. 129.

**Certainty Required.**—The degree of certainty required in an indictment for forgery is certainty to a common and general intent only, and not certainty in every particular and they need not aver that which is apparent to the court and appears from a necessary implication. State *v.* Brown, 1 Dev. (N. C.) L. 137; s. c., 17 Am. Dec. 562; Sherban *v.* Com., 8 Watts (Pa.), 212; s. c., 34 Am. Dec. 460; State *v.* Crank, 2 Bail. (S. C.) L. 66; s. c., 23 Am. Dec. 117.

**At Common Law,** forgery is the false making of any written instrument for the purpose of fraud or deceit; and the offence is sufficiently alleged in the indictment when the forgery and the allegation of fraudulent intent fully appear, although no person is set forth as intended to be defrauded. Hill *v.* State, 1 Yerg. (Tenn.) 76; s. c., 24 Am. Dec. 441; State *v.* Phelps, 11 Vt. 116; s. c., 34 Am. Dec. 672. See Arnold *v.* Cost, 3 Gill & J. (Md.) 219; s. c., 22 Am. Dec. 202; Hess *v.* State, 5 Ohio, 5; s. c., 22 Am. Dec. 767.

**Mistake in Naming.**—But it has been held in some States that where an instrument is set forth, a mere mistake in naming it will not vitiate the indictment. Garmire *v.* State, 104 Ind. 444; s. c., 5 Am. Cr. Rep. 238; Powers *v.* State, 87 Ind. 97.

**The Term "Receipt,"** when used in an indictment for forgery, imports a written instrument. State *v.* Bibb, 68 Mo. 286.

**Averring Under Seal.**—Averring in an indictment the forgery of a "deed" sufficiently imports that the false instrument made was under seal. Paige *v.* People, 3 Abb. App. Dec. (N. Y.) 439.

**"Indorsed" held to be Tantamount to "Written Upon"** in an indictment for forgery. Com. *v.* Butterick, 100 Mass. 12.

**Mortgage.**—An indictment charging the forgery of "a certain instrument in writing, commonly called a mortgage, for payment of money," sufficiently imports the forgery of a sealed instrument. People *v.* Dewey, 35 Hun (N. Y.), 308.

**An Information for Uttering a Forged Power of Attorney,** alleging the forgery only of the certificate of acknowledgment, and the annexed clerk's certificate of authentication, but sets out the uttering as of a forged power of attorney, is good; the appended certificates so far constituting a part of the completed power as to be included in the term used to designate the instrument as a whole. People *v.* Marion, 29 Mich. 31.

**Forging and Uttering Bank Bills.**—In an indictment for forging bank bills, it may be charged that, at a specified time and place, the defendant falsely and feloniously did forge and counterfeit a bank note of a designated bank, setting out a forged paper in *hæc verba*, and alleging that the act was done with intent to defraud a particular person or the specified bank. See State *v.* McLeran, 1 Aik. (Vt.) 311.

Indictment for forgery will not be quashed on the ground that it does not charge that the forged bank bill, alleged to have been passed, was passed as a true one, when it does charge the bill to have been uttered and paid as true. McCartney *v.* State, 3 Ind. 353; s. c., 56 Am. Dec. 510.

**Forging Bank Check.**—In an indictment for forging a bank check, it is sufficient to allege that the defendant falsely made, forged, and counterfeited a check, etc.

is to set out the instrument alleged to be forged in full without naming it, for then the name becomes purely a question of law for the court, even in those cases where the statute creates the offence of forging such instrument by name.[1]

In those cases where, in the statute, several names are disjunctively connected, it is permissible in an indictment to use them conjunctively,[2] although it is held in some cases that their use in the disjunctive form will not render the indictment vicious for uncertainty or duplicity.[3]

Though these offences differ from each other and vary in punishment, they may be included in the same indictment. People *v.* Rynders, 12 Wend. (N. Y.) 425.

**A Bank Check may be Described** as an order for money or as a subject of exchange in an indictment for forgery. State *v.* Morton, 27 Vt. 310; s. c., 65 Am. Dec. 201.

An indictment charged a prisoner with falsely making, forging, and counterfeiting; of causing and procuring to be falsely made, forged, and counterfeited; and of willingly acting and assisting in the said false making, forging, and counterfeiting. *Held*, that as the indictment followed the words of the statute, it was good, though all these charges were contained in a single count. Rasnick *v.* Com., 2 Va. Cas. 356.

An indictment charging defendant with having in his possession a forged check, with intent to pass it as true and genuine, knowing it to be false, need not allege that he indorsed the check, which is described as payable to his order. State *v.* Vincent, 91 Mo. 662.

**A Certified Check** on a bank is an instrument which, as entirety, comes within the statute of forgery; and where evidence, received without objection, shows that any material part of it—e.g., the certificate—was forged, it is immaterial that the indictment does not specify that the forgery was of the certification, and not of the signature of the check itself. (Distinguishing 6 Car. & P. 148.) People *v.* Clements, 26 N. Y. 193, reviewing Clements *v.* People, 5 Park. Cr. Cas. (N. Y.) 337.

**Forging Bond.**—An indictment for forging a bond against one of the obligors therein may allege the forgery of the whole instrument by him. State *v.* McGardiner, 1 Ired. (N. C.) L. 27.

**Forging Deed.**—An indictment for forging a deed need not set forth the interest of the person alleged to be defrauded in the lands conveyed; it is sufficient that by possibility the party may be defrauded. West *v.* State, 22 N. J. L. (2 Zab.) 212.

An information for forging a deed need not set forth whose title was to be disturbed, nor of what the forgery consists, nor what interest the apparent grantor has in the land, the land being definitely located, and the deed on its face appearing to be operative. People *v.* Van Alstine, 57 Mich. 69.

**Forgery of Order** —Indictment for forgery of order upon a firm need not give the style under which the firm business was transacted; it is enough that the names of the members of the firm are recited. Durham *v.* People, 5 Ill. (4 Scam.) 172; s. c., 39 Am. Dec. 407.

**Same — Alteration.** — An indictment which charges a forgery to have been the alteration of an order given by the defendant, without charging that the alteration was made after it was circulated and had been taken up by him, is defective. State *v.* Greenlee, 1 Dev. (N. C.) L. 523.

**Forgery of Receipt.**—In an indictment for forgery in altering a receipt for money, paid as part of the purchase-money of a farm, allegations of transactions of dealings between the parties, and that the original receipt was delivered to the defendant as acquittance or discharge, are unnecessary. State *v.* Shelters, 51 Vt. 102; s. c., 31 Am. Rep. 679.

1. 2 Bish. Cr. Proc. (3d ed.) 439.

A count in an indictment, charging that the defendant did forge and counterfeit a certain forged and counterfeited paper writing, instead of alleging the forging and counterfeiting of a certain paper writing merely, is sufficient according to the precedents, and is good. Duffin *v.* People, 107 Ill. 113; s. c., 47 Am. Rep. 431.

2. See Stone *v.* State, 20 N. J. L. (1 Spen.) 404; State *v.* Holly, 1 Brev. (S. C.) L. 35; State *v.* Jones, 1 McMull. (S. C.) L. 236; s. c., 36 Am. Dec. 257.

3. An indictment which describes the forged instrument as a "school voucher or check," is not uncertain. It is apparent that both are the same thing. Thomas *v.* State, 18 Tex. App. 213.

An indictment charging that the defendant did feloniously forge a certain check

The indictment must show that the instrument, if genuine, is capable of being used in a legal process, and therefore potent to work injury.[1]

or bill of exchange is not vicious for duplicity. A check may be described in an indictment for forgery as a check or bill of exchange. The object of the statute in permitting the forged instrument to be described by its ordinary designation was to exclude the need of designating it by its exact legal name. State *v.* Maas, 37 La. An. 292.

1. People *v.* Tomlinson, 35 Cal. 503; Moore *v.* State, 33 Ga. 225; Garmire *v.* State, 104 Ind. 444; s. c., 5 Am. Cr. Rep. 238; State *v.* Dufour, 63 Ind. 567; State *v.* Cook, 52 Ind. 574; Reed *v.* State, 28 Ind. 398; Com. *v.* Spilman, 124 Mass. 327; s. c., 26 Am. Rep. 668; Com. *v.* Ray, 69 Mass. (3 Gray) 441; State *v.* Riebe, 27 Minn. 315; State *v.* Fisher, 65 Mo. 437; State *v.* Horan (N. H.), 15 Atl. Rep. 20; Vincent *v.* People, 15 Abb. (N. Y.) Pr. 234; s. c., 5 Park. Cr. Cas. (N. Y.) 88; People *v.* Shall, 9 Cow. (N. Y.) 778; People *v.* Stearns, 21 Wend. (N. Y.) 409; State *v.* Covington, 94 N. C. 913; s. c., 55 Am. Rep. 650; Morris *v.* State, 17 Tex. App. 660; Snow *v.* State, 14 Wis. 479; Rex *v.* Wilcox, Russ. & R. C. C. 50.

**Alleging Instrument calculated to do Harm.**—Thus if an indictment for forgery sets out in *hæc verba* the instrument alleged to have been forged, and it is of such a character that, if genuine, it would have created, increased, diminished, discharged, or defeated any pecuniary obligation, it need not be alleged that such would have been its effect had it been genuine. Morris *v.* State, 17 Tex. App. 660.

Where the tendency to prejudice the rights of persons appears upon the face of the instrument, it is only necessary to aver its fraudulent nature, and set forth a copy of it. State *v.* Covington, 94 N. C. 913; s. c., 55 Am. Rep. 650.

**Capacity to be Used as Proof.—It is Not Requisite to the Validity of the Indictment** that the forged instrument should appear to be one which can be used as legal proof at once, because if it is capable of being used at any time in the future it will expose the party on whom the forgery is executed to apparent risk. See Rembert *v.* State, 53 Ala. 467; s. c., 25 Am. Rep. 639; Langdale *v.* State, 100 Ill. 263; Lemasters *v.* State, 95 Ind. 367; Harding *v.* State, 54 Ind. 359; State *v.* Ferguson, 35 La. An. 1043; Bishop *v.* State, 55 Md. 138; Com. *v.* Costello, 120 Mass. 358; State *v.* Fisher, 65 Mo. 437; Fadner *v.* People, 33 Hun (N. Y.), 240; Peete *v.* State, 5 Lea (Tenn.), 513; Reg. *v.* Pike, 2 Moo. C. C. 70.

**Manner of Use.**—It need not appear from the indictment that the instrument was capable of being used in an ordinary suit at common law against the party whose name is forged, it being sufficient that it may be used either in equity or as a defence. See Biles *v.* Com., 32 Pa. St. 529.

**Forgery of Affidavit.**—An indictment for forgery of an affidavit in detinue must set out enough of the proceedings to show that the oath was administered by proper authority and lawfully taken. Jacobs *v.* State, 61 Ala. 448.

**An Indictment for Forgery of a Bank Bill** need not allege that the bill was for the payment of money. Townsend *v.* People, 4 Ill. (3 Scam.) 326.

**Forgery of Deed—Averments.**—An indictment for forging a deed need not state that the instrument, if genuine, would have conveyed the land; it is sufficient to say that it purported to convey it. Nor need it charge that the deed was executed or acknowledged. The word "deed" of itself imports a complete instrument. State *v.* Fisher, 65 Mo. 437.

An indictment for forgery of a certificate of acknowledgment to a deed, but setting forth a certificate without venue, and not averring that the commissioner of deeds, whose name was forged, had authority to take such an acknowledgment, is fatally defective. The objection may be raised after verdict. Vincent *v.* People, 15 Abb. (N. Y.) Pr. 234; s. c., 5 Park. Cr. Cas. (N. Y.) 88.

**Same — Acknowledgment.**—An indictment predicated upon the forging and uttering of a certificate of acknowledgment of the execution of a deed of land with intent to defraud the owner or his heirs, *held* to assume the validity of the conveyance itself, as between the grantor and grantee, and to be sufficient. State *v.* Dufour, 63 Ind. 567.

**Draft or Order—Forging Indorsement.**—Where a party is charged with forging an indorsement on the back of an order or draft, purporting to have been drawn by one bank upon another, proof of the existence is not required, nor is it necessary to aver the genuineness or validity of the instrument forged. State *v.* Pierce, 8 Iowa, 231.

**Forging School Order — Averments.**—An indictment charged the uttering of a

In an indictment for forgery, the instrument alleged to be forged must be accurately set forth,[1] or the omission to do so

forged school order of a certain school district, must aver that the order purports to be one of a corporation duly authorized to issue it. Snow *v.* State, 14 Wis. 497.

**Forged Application for Insurance.**—Under New Hampshire Gen. Laws, ch. 276, § 1, making it a crime to counterfeit any warrant, order, or request for the payment of money, or the delivery of any property or writing of value, an indictment for forging an application for an insurance policy is bad, which does not aver in the language of the statute that the policy was a writing of value. State *v.* Horan (N. H.). 15 Atl. Rep. 20.

**An Indictment for Altering an Accountable Receipt for Money,** so as to give it the form of a promissory note, is not good, unless it shows what was the obligation of the receipt. State *v.* Riebe, 27 Minn. 315.

**Promissory Note—Forgery of Indorsement.**—In an indictment for the forgery of an indorsement upon a promissory note, the necessity of an averment that the words alleged to have been forged bore such a relation to the note as to be the subject of forgery, is not obviated by an allegation that the note is lost. Com. *v.* Spilman, 124 Mass. 327; s. c., 26 Am. Rep. 668.

An instrument purporting to be signed by M., and payable to his order, is not a promissory note until indorsed. But an allegation that D. forged an indorsement upon a promissory note may be sustained, although the writing became a promissory note only by means of such indorsement. Com. *v.* Dallinger, 118 Mass. 439.

Where an indictment charges a defendant with forging a bank note, "purporting to have been issued and promising to pay," it must be understood as descriptive of a bill purporting to promise as well as to have been issued. State *v.* Twitty, 2 Hawks (N. C.) L. 449; s. c., 11 Am. Dec. 779.

**Form of Averment.**—An indictment for forgery need not aver in the words of the statute that the forged paper is "an order for the payment of money, or any instrument by which a pecuniary demand is created." People *v.* Clements, 26 N. Y. 193.

**Imperfect Instrument.**—The indictment must show that the instrument is one having some legal effect, but it is not necessary that it should be shown to be a perfect instrument. Garmire *v.* State, 104 Ind. 444; s. c., 5 Am. Cr. Rep. 238.

1. McGuire *v.* State, 37 Ala. 161; s. c., 1 Ala. Sel. Cas. 69; Armitage *v.* State, 13 Ind. 441; Hampton *v.* State, 8 Ind. 333; State *v.* Ruby, 61 Iowa, 87; State *v.* Callendine, 8 Iowa, 288; Com. *v.* Wilson, 68 Mass. (2 Gray) 70; Com. *v.* Taylor, 59 Mass. (5 Cush.) 605; Com. *v.* Stow, 1 Mass. 64; Com. *v.* Bailey, 1 Mass. 62; s. c., 2 Am. Dec. 3; State *v.* Bibb, 68 Mo. 286; State *v.* Carr; 5 N. H. 367; State *v.* Potts, 8 N. J. L. (4 Halst.) 26; s. c., 17 Am. Dec. 449; People *v.* Kingsley, 2 Cow. (N.Y.) 522; s. c., 14 Am. Dec. 520; People *v.* Franklin, 3 Johns. Cas. (N. Y.) 299; State *v.* Twitty, 2 Hawks (N. C.) L. 248; State *v.* Street, Tayl. (N. C.) 158; s. c., 1 Am. Dec. 589; Griffin *v.* State, 14 Ohio St. 55; Dana *v.* State, 2 Ohio St. 91; McMillen *v.* State, 5 Ohio, 269; Hess *v.* State, 5 Ohio, 5; s. c., 22 Am. Dec. 767; Murphy *v.* State, 6 Tex. App. 554; Labaite *v.* State, 6 Tex. App. 257; Ham. *v.* State, 4 Tex. App. 645; State *v.* Briggs, 34 Vt. 501; State *v.* Morton, 37 Vt. 310; State *v.* Parker, 1 D. Chip. (Vt.) 298; s. c., 6 Am. Dec. 735; Coleman *v.* Com., 25 Gratt. (Va.) 865; Perkins *v.* Com., 7 Gratt. (Va.) 651; s. c., 56 Am. 123; United States *v.* Fisler, 4 Biss. C. C. 59; United States *v.* Schoyer, 2 Blatchf. C. C. 59; United States *v.* Corbin, 11 Fed. Rep. 238.

**Setting Forth Figures.**—In an indictment for forgery, the words and figures of the instrument supposed to be forged must be fully and accurately set out in order to enable the court to judge from the record whether it is such an instrument as is a subject of forgery. Brown *v.* People, 66 Ill. 344; Sharley *v.* State, 54 Ind. 168; s. c., 2 Am. Cr. Rep. 138; State *v.* Cook, 52 Ind. 574; State *v.* Baumon, 52 Iowa, 68; Haslip *v.* State, 10 Neb. 590; State *v.* Jones, 1 McMull. (S. C.) L. 236; Burress *v.* Com., 27 Gratt. (Va.) 934; United States *v.* Fisher, 4 Biss. C. C. 59.

**Indecipherable Istruments.**—Regarding indecipherable instruments and inscriptions, see United States *v.* Mason, 12 Blatchf. C. C. 497.

**Describing the Instrument Forged.**—When an instrument alleged to have been forged purports to be the act of partners, the partnership should be alleged. Labbaite *v.* State, 3 Tex. L. J. 122.

It is a sufficient description, in an indictment for forgery of the instrument forged, if it is mentioned as an instrument of writing, purporting to be an order drawn on A by B for $9 with intent

excused by proper averments.[1] An indictment for forgery should set forth the instrument charged to be forged *in hæc verba*, unless it is in the hands of the accused, or has been lost or destroyed.[2]

to defraud. McGuire *v.* State, 39 Ala. 161; s. c., 1 Ala. Sel. Cas. 69.

Where, in an indictment for forgery, the document alleged to have been forged is described in such a manner as would sustain an indictment for stealing it, supposing it to be the subject of larceny, the indictment is sufficient. Coleman *v.* Com., 25 Gratt. (Va.) 865; s. c., 23 Am. Dec. 711.

**Same—Indorsement.** — Indictment forgery of promissory note need not set out the indorsements or any other matter written upon the same paper constituting any part of the note itself and not entering into the essential description of the instrument. Perkins *v.* Com., 7 Gratt. (Va.) 651; s. c., 56 Am. Dec. 123.

1. State *v.* Potts, 8 N. J. L. (4 Halst.) 26; s. c., 17 Am. Dec. 449.

While it is true that the want of a more full description must be excused by proper averments, yet this is a rule of pleading, not of evidence, to prevent an exception to the indictment, not to legitimate secondary or inferior evidence. Com. *v.* Houghton, 8 Mass. 107; State *v.* Potts, 9 N. J. L. (4 Halst.) 26; s. c., 14 Am. Dec. 449; People *v.* Kingsley, 2 Cow. (N. Y.) 522; s. c., 14 Am. Dec. 520.

**Uncertain or Equivocal Description.**—Where the indictment describes the lost note as purporting to be signed by "one Henry Wintrode or Henry R. Wintrode," such description is not uncertain or equivocal. Hess *v.* State, 73 Ind. 537.

**Where the Document is Lost or Destroyed, or Remains in the Defendant's Hands,** it is sufficient to aver special facts as an excuse for not setting it out, giving the purport of the instrument as nearly as possible. Du Bois *v.* State, 50 Ala. 139; People *v.* Bogart, 36 Cal. 245; Wallace *v.* People, 27 Ill. 45; Hart *v.* State, 55 Ind. 599; State *v.* Bonney, 34 Me. 223; Com. *v.* Sawtelle, 65 Mass. (11 Cush.) 142; State *v.* Davis, 69 N. C. 313; Pendleton *v.* Com., 4 Leigh (Va.), 694; s. c., 26 Am. Dec. 342; United States *v.* Britton, 2 Mason C. C. 468; Rex *v.* Haworth, 4 Car. & P. 254.

**Paper Partly Burned.**—In an indictment for forgery, where the forged paper had been partly burned and blotted, *held*, that the substance only need be stated, although parol evidence could have supplied the missing part. Munson *v.* State, 79 Ind. 541.

**Lost Instrument—Showing Search.**—It is not necessary, in an indictment for forgery where the instrument forged is alleged to be lost, to show that search therefor had been made by the parties to whom it was uttered. Hess *v.* State, 73 Ind. 537.

**Lost Note.**—On an indictment for forging a promissory note, if the note be lost or destroyed, it is sufficient to set forth the substance of it, averring the loss or destruction. People *v.* Badgley, 15 Wend. (N. Y.) 53; People *v.* Kingsley, 2 Cow. (N. Y.) 522.

An indictment for forgery setting forth the counterfeit note according to its tenor, need not aver the loss or destruction of such note; and upon proof of its mutilation or destruction by defendant, other proof of its contents may be admitted in evidence. State *v.* Potts, 9 N. J. L. (4 Halst.) 26; s. c., 17 Am. Dec. 450.

**Forged Certificates.**—An indictment for forgery alleging that the defendant "did make, forge, and counterfeit certain certificates purporting to be a certificate issued by B as justice of the peace," etc., which said false certificate is of the purport and effect following, to wit, etc., and then setting forth a copy of the certificate, is not insufficient as alleging only the purport and effect of the forged instrument. State *v.* Johnson, 26 Iowa, 407.

**An Indictment for Possessing Forged Treasury Notes** and postal currency, with intent to pass them, must profess to give, and must actually give, exact copies of them, or allege a reasonable excuse for not doing so. United States *v.* Fisler, 4 Biss. C. C. 59.

2. State *v.* Parker, 1 D. Chip. (Vt.) 298; s. c., 6 Am. Dec. 735. However, under statute in some States the instrument need not be set out in the indictment. Cohen *v* People, 7 Colo. 274; State *v.* Boasse, 38 La. An. 202; State *v.* Henderson, 29 W. Va. 147.

**Setting Out Note.**—If the counterfeit note, which it is charged the prisoner had in his possession, is set forth in *hæc verba*, it is unnecessary to allege, in addition, that the note purported to be the act of another. Wilson *v.* People, 5 Park. Cr. Cas. (N. Y.) 178.

**Forged Mortgage—Allegation of Sealing.**—Whether an indictment for forgery which sets out the forged instrument, e. g., a mortgage in *hæc verba*, but omits

Where the instrument is set out in the indictment, a technical designation of its character at common law may be dispensed with.[1] But where a statute provides that the false making of an instrument shall be indictable as forgery, the indictment, to bring the case within the statute, must aver that the instrument is such an instrument as is designated by the statute.[2]

In some states it is necessary to set out the tenor of the instrument, and it must be proved as set forth;[3] while in other states

to allege that the instrument was a sealed instrument, is sufficient to sustain an indictment for forgery of a mortgage upon lands, is questioned in People *v.* Dewey, 35 Hun (N. Y.), 308. The court cited Phelps *v.* People, 72 N. Y. 334; People *v.* Harrison, 8 Barb. N. Y.) 560. 562; Stanton *v.* Camp, 4 Barb. (N. Y.) 274; Cunningham *v.* People, 4 Hun (N. Y.), 455; Macomb *v.* Thompson, 14 Johns. (N. Y.) 207; Van Santwood *v.* Sandford, 12 Johns. N. Y. 197; Paige *v.* People, 6 Park. Cr. Cas. (N. Y.) 422; People *v.* Galloway, 17 Wend. (N. Y.) 542.

**Annexing Notes to Indictment.**—In an indictment for the forgery of bank notes, if the notes are annexed to the indictment instead of being set forth in it, the irregularity is cured, after verdict against the prisoner, by the Statute of Jeofails. Com. *v.* Ervin, 2 Va. Cas. 337.

**Alleging Name.**—In an indictment for forgery it is not necessary to expressly allege that the name charged to have been forged was affixed to the forged instrument, when the latter was set forth acccording to its tenor, and shows such to be the fact. State *v.* Yerger, 86 Mo. 33.

**Setting Out in Verbis Ipsis.**—An indictment which alleges that defendant falsely made, forged, and counterfeited an instrument, within the description of the statute, and in which the instrument so alleged to be forged is set out in *verbis ipsis*, contains a sufficient description of the circumstances within the statute. So held where the instrument was a deed purporting to be signed by defendant and his wife. Holmes *v.* People, 15 Abb. (N. Y.) Pr. 154.

**Indictment for Forgery of School Order—Fulness and Certainty Required.**—While it is not necessary, in an indictment for passing a fictitious school order, after setting out the order in substance, to give it in *hæc verba*, yet, if the pleader attempts to do so, he will be bound to set out each and every part of the instrument which constitutes any part of the written contract. Anything appearing on the paper constituting the order, which is no part of the contract, may be omitted in setting out the instrument in *hæc verba*. So, the number of the bill alleged to have been forged, and the figures on its margin, and the dollar-mark and figures indicating the amount of dollars on the margin of an order need not be given. Com. *v.* Bailey, 1 Mass. 62; s. c., 2 Am. Dec. 63, is an authority in point. There, in an indictment for forgery, alleging an instrument to be in the words and figures following, it was held that a strict recital was necessary; but the number of a bill need not be set out in the indictment. The same rule is announced in Com. *v.* Stevens, 1 Mass. 203, and in Griffin *v.* State, 14 Ohio St. 54. See also Com. *v.* Wilson, 68 Mass. (2 Gray) 70; Com. *v.* Taylor, 59 Mass. (5 Cush.) 605; State *v.* Carr, 5 N. H. 367. Where the words used in the body of a note or order for the payment of money are ambiguous, so that there is uncertainty in regard to the true amount that was intended, resort may be had to the figures in the margin of the instrument for the purpose of determining the true amount agreed to be paid, as held in Riley *v.* Dickens, 19 Ill. 29, and Corgan *v.* Frew, 39 Ill. 31; but the figures in the margin of an instrument are not strictly a part of the contract. They cannot be reverted to impeach the amount named in the body of the paper, and are never resorted to for any purpose, unless there is uncertainty in regard to the amount written in the body of the instrument. Langdale *v.* State, 100 Ill. 263; s. c., 25 Alb. L. J. 159.

1. People *v.* Ah Woo, 28 Cal. 205.

**Technical Designation—Several Names.**—Where the instrument is designated by several names, one of which is correct, those which are incorrect may be rejected as surplusage. See State *v.* Crawford, 13 La. An. 300; Reg. *v* Charretie, 3 Cox C. C. 503; Reg. *v.* Willliams, 2 Den. C. C. 61; s. c., 1 T. & M. C. C. 381; 4 Cox C. C. 356; 2 Eng. L. & Eq. 533; Reg. *v.* Newton, 2 Moo. C. C. 59.

2. United States *v.* Trout, 4 Biss. C. C. 105; Reg. *v.* Hunter, Russ. & R. C. C. 511; Reg. *v.* Birkett, Russ. & R. 251.

3. Wallace *v.* People, 27 Ill. 45; Swain *v.* People 5 Ill. (4 Scam.) 178; State *v.*

this is dispensed with by statute.[1] Where an indictment for forgery purports to set out the forged instrument according to its tenor and *in hæc verba*, any material variance between the instrument forged and the copy set out in the indictment is fatal.[2]

Cook, 52 Ind. 574; State *v.* Witham, 47 Me. 165; State *v.* Bonney, 34 Me. 383; Com. *v.* Castles, 75 Mass. (9 Gray) 123; s. c., 69 Am. Dec. 278; State *v.* Potts, 9 N. J. L. (4 Halst.) 26; s. c., 17 Am. Dec. 449; People *v.* Badgley, 16 Wend. (N. Y.) 53; State *v.* Twitty, 2 Hawks (N. C.) L. 248; State *v.* Harris, 5 Ired. (N. C.) L. 287; McMillen *v.* State, 5 Ohio, 268; Stephens *v.* State, Wright (Ohio), 73; United States *v.* Britton, 2 Mason C. C. 464.

It is not enough, in an indictment for forgery, to set out the forged instrument in substance and effect, when it can be set out in *hæc verba* equally well. Thomas *v.* State, 18 Tex. App. 213; Smith *v.* State, 8 Tex. App. 399.

1. Brown *v.* People, 66 Ill. 344; State *v.* Nelson, 28 La. An. 46; State *v.* Pons, 28 La. An. 43.

2. Thomas *v.* State, 103 Ind. 219; Powers *v.* State, 87 Ind. 97; State *v.* Pease, 74 Ind. 263; Plunket *v.* State, 69 Ind. 70; Rooker *v.* State, 65 Ind. 86; Sharley *v.* State, 54 Ind. 168; s. c., 2 Am. Crim. Rep. 138; Smith *v.* State, 33 Ind. 159; Porter *v.* State, 15 Ind. 433; Zellers *v.* State, 7 Ind. 659; Com. *v.* Clancy, 89 Mass. (7 Allen) 537; Com. *v.* Wilson, 68 Mass. (2 Gray) 70; People *v.* Marion, 29 Mich. 31; s. c., 28 Mich. 255; State *v.* Maupin, 57 Mo. 205; Haslip *v.* State, 10 Neb. 590; State *v.* Horan (N. H.), 15 Atl. Rep. 20; State *v.* Farrand, 8 N. J. L. (3 Halst.) 333; Wilson *v.* People, 5 Park. Cr. Cas. (N. Y.) 178; State *v.* Street, Tayl. (N. C.) 158; s. c., 1 Am. Dec 589; Hart *v.* State, 20 Ohio, 49; State *v.* Houseal, 3 Brev. (S. C.) L. 219; State *v.* Jones, 1 McMull. (S. C.) L. 236; s. c., 36 Am. Dec. 257; Luttrell *v.* State, 85 Tenn. 232; State *v.* Shawley, 5 Hayw. (Tenn.) 256; Westbrook *v.* State, 23 Tex. App. 401; *Ex parte* Rogers, 10 Tex. App. 655; Murphy *v.* State, 6 Tex. App. 554; Roberts *v.* State. 2 Tex. App. 41; State *v.* Bean, 19 Vt. 530; Burress *v.* Com., 27 Gratt. (Va.) 934; United States *v.* Britton, 2 Mason C. C. 464.

Thus, where the indictment charges the defendant with forging an instrument purporting to be signed A., and sets out an instrument purporting to be signed by B., it is bad on demurrer for repugnancy. State *v.* Horan (N. H.), 15 Atl. Rep. 20. But where an indictment charged that A did feloniously and fraudulently forge and make a certain note obligatory in the name of B, the tenor of which writing obligatory is as follows: that is to say, etc. The instrument set out purported on its face to be executed by B and A, the defendant. *Held*, that there was no repugnance in the charge in the indictment. Fogg *v.* State, 9 Yerg. (Tenn.) 392. And where an indictment alleges the forged instrument to have been a check on a city bank of Dallas, but sets it out as a check on the city bank, it is fatally defective. See Roberts *v.* State, 2 Tex. App. 4. An indictment for forging a writing described the same by saying "purporting to be signed by the president and directors," and set out the forged writing *verbatim*, upon the face of which it did not appear to have been by order of the president and directors, is held fatally defective. State *v.* Shawley, 5 Hayw. (Tenn.) 256.

**Variance in Name.**—An indictment was for forgery of a bill of a bank incorporated as "The President and Directors of the Bank of South Carolina." The bill produced in evidence was of "The Bank of South Carolina." *Held*, that the evidence did not support the indictment. State *v.* Waters, 1 Treadw. (S. C.) Const. 669; s. c., 3 Brev. (S. C.) L. 507.

An indictment charging forgery of an order, set out in *hæc verba*, and signed "Candle Oulal," *held* not to be sustained by proof that the property belonged to Daniel Aerl. Potter *v.* State, 9 Tex. App. 55.

**Same in Spelling of Name.**—Variance between the order as alleged in an indictment for forging an order for goods, and the other as produced on the trial, in the spelling of the name alleged to have been forged as the signature, *held* fatal. McClellan *v.* State, 32 Ark. 609.

**Same—Transposing Initials.**—An allegation in an indictment for forgery that the suit was against "C. A. Cobbs," *held* not to be supported by evidence that the suit was against "C. A. Cobb." The proceedings must be accurately identified. Jacobs *v.* State, 61 Ala. 448.

**Reversing Order of Names.**—But on a trial of an indictment for forging an order, "Dulks & Helker—You will please pay to the bov $3.00 in merchandise, and oblige J. B. Runkins," it was proved that the true name of the alleged was J. B.

Rankin, and of the drawee firm Helker & Duts; that defendant could not write; and that he had obtained merchandise from Helker & Duts on faith of the forged order. *Held*, that the variations in the spelling of the names of the drawer and drawees fell within the principle of *idem sonans*, and the reversed order in which the names of the drawee firm were put was not a material and fatal variance. State *v.* Lane, 80 N. C. 407.

**Same—Misspelling Name.**—In an indictment for forgery in uttering and putting away counterfeit bank-notes, the notes were described as payable to "E. lymour, or bearer," while those offered in evidence were payable to "E. Lymour, or bearer." *Held* that the variance was fatal. Porter *v.* State, 15 Ind. 433.

An indictment for forging a note purported to set forth the note according to its tenor. The signature to the note, as stated in the indictment, was Otha $\overset{\text{his}}{\underset{\text{mark}}{\times}}$ Carr. The note offered in evidence was signed Oatha $\overset{\text{his}}{\underset{\text{mark}}{\times}}$ Carr. *Held*, a fatal variance, and the note inadmissible. Brown *v.* People, 66 Ill. 344.

The "purport" clause of an indictment alleged the name of the injured party to be "C. J. Chapman," whereas the tenor clause alleged the name to be "C. J. Chatman." *Held*, that the repugnancy was fatal to the indorsement. Westbrook *v.* State, 23 Tex. App. 401.

**Same—Misuse of Initials.**—Where an indictment set forth that the note forged purported to have been forged by one Nathaniel Durkie, and then set forth the tenor of the note, from which it did not appear that the note was made by Nathaniel Durkie, but by N. Durkie, this repugnancy was held fatal to the indictment. State *v.* Houseal, 2 Brev. (S. C.) L. 219.

An indictment set forth that paper writing alleged to be forged purported to have been signed by one Tristram Tupper. It then set out the instrument in *hæc verba*, from which it appeared that it was signed T. Tupper, and averred that the prisoner made it with the intention to defraud Tristram Tupper. *Held*, that there was no variance. State *v.* Jones, 1 McMull. (S. C.) L. 236; s. c., 36 Am. Dec. 257.

An indictment charging that a forged instrument was signed "Pat Whelan" *held* not to be supported by proof that it was signed "P. Whelan," or "D. Whelan." Murphy *v.* State, 6 Tex. App. 554.

An indictment charged the defendant with the forgery of a promissory note, "with intent to defraud one Emily J. Schweitzer," while such note appeared, by copies thereof and of the indorsement thereon set out in the indictment, to have been payable to, and indorsed by, one "E. J. Schweitzer." *Held*, that the indictment was insufficient. Yount *v.* State, 64 Ind. 443.

An indictment charged forgery of a note for $60, signed with the name of James C. Orr. The instrument offered in evidence was a note for $60, bearing interest at ten per cent from date, and signed by J. C. Orr. *Held*, a fatal variance, both as to the name of the supposed maker and the liability which the instrument purported to create. State *v.* Fay, 65 Mo. 490.

A draft signed Joseph Johnson *held* not admissible under a count in an indictment stating it to be signed Jos. Johnson, president. United States *v.* Keen, 1 McL. C. C. 429.

An indictment charged the forgery of a receipt, purporting to be the receipt of "Charles W. Jeffries;" the receipt set out in the indictment was signed "C. W. Jeffries." *Held*, no variance. State *v.* Bibb, 68 Mo. 286.

In an indictment for forgery of "a certain order purporting to have been made and executed by one Vincent T. West," followed by the instrument set out *ipsissimis verbis*, showing that it was signed "Dr. West," *held*, that the purporting clause would be rejected as surplusage. Myers *v.* State, 101 Ind. 379.

**Promissory Notes.**—Upon the trial of an indictment for uttering a forged note, a note was offered in evidence in all respects similar to the note set forth in the indictment, except that "annually" was used instead of "semi-annually," and on the back of the note was written, "Wm. B. Haslip." "Oct. 21st, $47.60." "Nov. 10, 1.20." *Held*, that this note was inadmissible. Haslip *v.* State, 10 Neb. 590.

It is no variance between the note offered in evidence and the one set out in the indictment that in the latter the letter "s" is added to the word "promise." May *v.* State, 14 Ohio, 461; s. c., 45 Am. Dec. 548.

**Same—Variance.**—The indictment was for forging a promissory note which, as set forth in the indictment, contained these words: "The drawers and indorsers severally waive presentment for payment, protest, and notice of protest," etc. The note offered in evidence did not contain the words "and notice of

protest." *Held*, a fatal variance, and that the note was not admissible in evidence. Sharley *v.* State, 54 Ind. 168; s. c., 2 Am. Cr. Rep. 138.

In an indictment for forgery or counterfeiting, the omission to state, in setting forth the note, matter upon the face of the note which would not be essential to the validity and binding force of such note as against the ostensible maker,—e.g., the countersigning by public officers, in case of a bank-note,—is not a material variance. Wilson *v.* People, 5 Park. Cr. Cas. (N. Y.) 178.

On a trial for forgery of the indorsement of a promissory note the state introduced the original note and indorsement, which corresponded with the copies set out in the indictment, except that owing to an erasure which had been made in the figures indicating the date of the note, such date appeared to be a day earlier than it did in the copies set out in the indictment. *Held*, a fatal variance. Rooker *v.* State, 65 Ind. 86.

Where certain signatures of the note had been erased after payment by the indorser, but could be read under the erasure marks, it cannot be objected to its admission that it does not correspond with the indictment. People *v.* DeKroft, 1 N. Y. Supp. 692.

**Same—Setting Out Indorsements.**—The indorsements upon a promissory note need not be set out in an indictment charging that the note was forged. Hess *v.* State, 5 Ohio, 5; s. c., 22 Am. Dec. 767; Perkins *v.* Com., 7 Gratt. (Va.) 651; s. c., 56 Am. Dec. 123. Neither need the indictment set out any other matter written upon the same paper constituting no part of the paper itself, and not entering into the essential description of the instrument. Perkins *v.* Com., 7 Gratt. (Va.) 651; s. c., 56 Am. Dec. 123.

In an indictment for forging and uttering a check it is not necessary to set forth indorsements appearing upon the check, or a revenue stamp attached thereto Neither of these form part of the check. Miller *v.* People, 52 N. Y. 304; s. c., 11 Am. Rep. 706.

Indictment for forgery set out the face of the forged note, ignoring any indorsement; whereas, upon the note offered on evidence the defendant's name was indorsed, and he objected to its admissibility on the ground of variance. *Held*, that the indorsement was but an extrinsic and irrelevant writing, creating no variance. Labaite *v.* State, 6 Tex. App. 257.

A name written upon a note to show in whose hands it was placed for collection need not be set up in describing the note in an indictment for the forgery thereof, and such difference between the description of the note in the indictment and the note offered in evidence does not amount to a variance. State *v.* Jackson, 90 Mo. 156.

An indictment for forgery set forth a note, calling it a negotiable promissory note in its exact words; but no counts of the indictment set forth in any indorsements. A note with indorsements was offered in evidence. The words of promise were "I promised," and it was proven that a certain bank, to which the note was offered, would not, if it had been genuine, have discounted it, on account of its defective form. *Held*, that it was no variance between the charge and the proof, that no indorsements were set forth in the indictment, and that the note offered sustained the charge; nor was it any objection that the word "promised" was in the past tense, and that the bank would not discount the note on account of defect of form. Perkins *v.* Com., 7 Gratt. (Va.) 651; s. c., 56 Am. Dec. 123.

**Bank Bill—Omitting Names of President and Cashier.**—An indictment for uttering and passing as true an uncurrent and worthless bank bill is insufficient if in setting forth a copy of the bill the names of the president and cashier are omitted; and the effect is not cured by an averment in the indictment that the jurors cannot give a more particular description of it. Com. *v.* Glancy, 89 Mass. (7 Allen) 537.

**Bill of Costs.**—In an indictment for forgery, the bill of costs alleged to have been forged contained the names of seven witnesses, while the instrument proved contained the names of ten witnesses; and the names of two of them, as set out in the indictment, were "Jas. Pratt" and "Jno. Burnett," while the names of the corresponding witnesses in the bill of costs offered in evidence were "Joseph Pratt" and "John Bennett." *Held*, that the variance was fatal. Luttrell *v.* State, 85 Tenn. 232.

**Variance in Amount.**—A variance of two cents in the amount was held to entitle the accused to an acquittal, in Burress *v.* Com., 27 Gratt. (Va.) 934

**Omission of Figures in Describing Instrument.**—In an indictment for forgery, the omission of a figure in the description of the instrument forged is fatal State *v.* Street, Tayl. (N. C.) 158; s. c., 1 Am. Dec. 589.

**Same—Omission of Part of.**—The note offered in evidence, on trial of an indictment for forgery, contained a clause that

the indorsers severally "waive presentment, protest, and notice of protest and non-payment;" but the copy given in the indictment omitted the words here italicized. *Held*, that the variance was fatal. Sharley *v.* State, 54 Ind. 168.

**Omission of Name.**—It is a fatal variance, in an indictment for uttering and publishing as true a forged bank bill, to omit the name of the state in the upper margin of the bill if not repeated in the body thereof. Com. *v.* Wilson, 68 Mass. (2 Gray) 70.

**Variance in Deed.**—A distinct variance between the attestation clause of a deed alleged to be forged, and the instrument as described *hæc verba* in the indictment, disqualifies it as evidence. *Ex parte* Rogers, 10 Tex. App. 655.

**Date of Instrument.**—Where a forged instrument purported to be dated January 7, 1885, but the copy set out in the indictment showed it to be dated January 7, 1884, it was proper to charge that such variance was not material. State *v.* Blanchard (Iowa), 38 N. W. Rep. 519.

Where an indictment explicitly charges an instrument forged and uttered on a certain date, the objection that the date appears to be at a different time is without merit. Garmire *v.* State, 104 Ind. 444; s. c., 5 Am. Cr. Rep. 238.

**Erroneous Dates—Transposing Figures.**—In a indictment for forging a receipt, the latter was described as bearing date "this 24th December, 1869," instead of "this 24th of December, 1869," and the indorsement of a witness was omitted. *Held*, not to constitute a material variance. State *v.* Henderson, 29 W. Va. 147.

**Variance in Date in Different Counts—Nolle of One Count.**—In a trial on indictment for forgery, *held*, that variance and repugnancy between the dates of the instrument as alleged in the two counts became immaterial in view of the *nolle prosequi* entered by the state as to the second count, and the subsequent proceedings on the trial, which were conducted alone upon the first count. Chester *v.* State, 23 Tex. App. 577.

**Omission or Insertion of a Word.**—In a prosecution for uttering and passing a forged promissory note, where the information purports to set forth the instrument alleged to have been forged in *hæc verba*, and a word found in the instrument proved is omitted from the instrument as recited, or a word inserted in the instrument as recited is not in the instrument proved, the variance is immaterial, if the change in no manner or for any purpose alters the signification. People *v.* Phillips, 70 Cal. 61.

**A Variance of a Letter in a Word**, between a paper alleged to be forged and the indictment, will not exclude the paper as evidence. It is admissible unless the variance makes another word, or one differing in sense or grammar (2 Salk, 660; 1 East, 180; Cowp. 229; Doug. 289). United States *v.* Hinman, Baldw. C. C. 292. And see United States *v.* Burroughs, 3 McL. C. C. 405; s. c., 2 West. L. J. 119. *Compare* United States *v.* Lakeman, 2 Mason C. C. 229.

Where the variance between the paper alleged to be forged and the indictment, is plain, the court will exclude the evidence; where the variance is doubtful, it will be left to the jury, whose decision is conclusive. United States *v.* Hinman, Baldw. C. C. 292.

**Idem Sonons.**—In an indictment for forgery, a variance, between the count and the forged instrument, in the spelling of a name is unimportant if the same sound is preserved. State *v.* Bean, 19 Vt. 530; State *v.* Wheeler, 35 Vt. 261.

**Omission of Unimportant Descriptive Words.**—An indictment alleged that the instrument purported to be the act of M. and A., as trustees of "Pleasant Grove Free School Community, No. 83, Fannin County," while the instrument was addressed to "Pleasant Grove School Community, No. 83," and was signed by M. and A., "Trustees of School Community 83, Fannin County." *Held*, that there was no variance. Mee *v.* State 23 Tex. App. 566.

The description of a forged check, in an indictment for an attempt to pass the same, omitted certain letters appearing on the face thereof but having no connection with the import of the instrument. *Held*, that the variance was not material, and the check was properly admitted in evidence. Burks *v.* State (Tex. App.), 6 S. W. Rep. 300; Williams *v.* State (Tex. App.), 6 S. W. Rep. 303.

**In an Indictment for Forging a School Order**, the word "modern" was copied "mordern." The words "school order" constituting no part of the order, but being a part of the trademark of the paper-maker, were omitted from the copy. *Held*, immaterial. Langdale *v.* People, 10 Ill. App. 263.

**Attesting Witnesses.**—A contract is complete as such without subscribing witnesses; and in setting out its purport in an information, the names of the witnesses need not be given. People *v.* Sharp, 53 Mich. 523.

In an indictment for uttering a forged

The date of an instrument supposed to be forged is an important part of it, and must be especially alleged,[1] and must be proved as laid.[2] And the figures of an instrument supposed to be forged, which are essential, must also be set out;[3] but the number of a bank bill, and the marginal figures indicating its amount, not being part of the bill, need not be set out in the indictment.[4]

receipt, where the receipt described in the indictment agrees with that offered in evidence except that the indorsement thereon "Witness: Susan M. Armstrong" is omitted in the former, the variance is immaterial. State *v.* Henderson, 29 W. Va. 147.

**Supplying Omitted Name.**—Where a prosecution for forgery is predicated upon a written order or request for the payment of money, which order or request omits the name of the person to whom it was intended to be addressed, the information will be sufficient to withstand a motion to quash if the omitted name be supplied therein by a proper averment. Powers *v.* State, 87 Ind. 97.

**Variance in Using Abbreviations** in indictment, for words which appeared in full in the instrument forged, *held*, immaterial. Burress *v.* Com., 27 Gratt. (Va.) 934.

**Marginal Figures.**—An attempt was made to set out a school order in *hæc verba*. The amount stated in the margin was omitted from the copy. *Held*, that as the amount was stated in the body of the order, which was copied, this was enough. Langdale *v.* People, 10 Ill. App. 263.

In an indictment for forging a bank check, the check was set out in *hæc verba*, with the omission of figures denoting the number of the check, and also of the letter "C" written under the signature. *Held*, that there was no variance. Cross *v.* People, 47 Ill. 152.

**Number of Bill and Marginal Figures Need Not Be Set Out.**—In an indictment for forgery alleging an instrument to be "in the words and figures following," a strict recital is necessary; but the number of a bank bill, and the marginal figures indicating its amount, not being parts of the bill, need not be set out in the indictment. Com. *v.* Bailey, 1 Mass. 62; s. c., 2 Am. Dec. 3.

In an indictment for forging a bill of exchange, or bank bill, it is not necessary to insert letters or marks appearing in the margin of the bill. They make no part of the bill. People *v.* Franklin, 3 Johns. Cas. (N. Y.) 299.

**Omission of Word "to."**—The information alleged the forgery of a promissory note described as payable "to H. C. Phillips, or order." The note given in evidence did not contain the word "to" immediately before the words "H. C. Phillips, or order." *Held*, that the variance was immaterial. People *v.* Phillips, 70 Cal. 61.

An indictment for forgery alleged that the account the alteration of which was alleged to be forgery was proved by "H. Knittel, chairman of the committee on contingent expenses of the senate." The instrument was signed, "H. Knittel, Chairman on Com. Contg. Exp." *Held*, that the discrepancy was not a variance; and it was a question of fact whether the signature was an approval of the account, as was alleged by the indictment. Hennessey *v.* State, 23 Tex. App. 340.

**Omission, from Name Forged, of Initial of Middle Name** is immaterial. Gen. Sess. 1821; Gotobed's Case, 6 City H. Rec. (N. Y.) 25.

**Mere Misplacement of the Dot Belonging to the Letter "i,"** in setting out a proper name plainly written, in an indictment for forgery does not constitute a variance. Hennessey *v.* State, 23 Tex. App. 340.

**Writing Upon Forged Instrument.**—An indictment for forgery need not, in setting out the forged instrument, take any notice of writing put upon the instrument subsequent to the forgery. Such writing is no part of the instrument, nor of its description. Hennessey *v.* State, 23 Tex. App. 340.

**Instrument Partly Printed and Partly Written.**—No material variance exists between indictment for forgery, and the proof adduced in support of it, where the indictment describes the forged instrument as a "paper writing" and the proof show it to have been partly printed and partly written. State *v.* Jones, 1 McMull. (S.C.) L. 236; s. c., 36 Am. Dec. 257.

1. Bitting *v.* State, 56 Ind. 101; State *v.* Flye, 26 Me. 312; Com. *v.* Boutwell, 129 Mass. 124; Com. *v.* Butterick, 100 Mass. 12; State *v.* Fisher, 58 Mo. 256; State *v.* Bryant, 17 N. H. 323; Com. *v.* Shissler, 9 Phila. (Pa.) 587; Coleman *v.* Com., 25 Gratt. (Va.) 865; s. c., 23 Am. Rep. 711; Rex *v.* Birkett, Russ. & R. C. C. 251.

2. Rex *v.* Birkett, Russ. & R. C. C. 251.

3. State *v.* Street, Tayl. (N. C.) 158; s. c., 1 Am. Dec. 589.

4. Com. *v.* Stevens, 1 Mass. 203; Com.

Where a genuine instrument is altered so as to give it a different effect, the forgery may be specially alleged as construed by the alterations, or forgery of the entire instrument may be charged;[1] but where the forgery is charged to consist in the alteration of the instrument or the insertion of words, the indictment must distinctly set forth such alteration[2] and give the position of the inserted words, so that their effect upon the original meaning of the instrument may appear.[3]

Those parts of a forged instrument which are not essential to it need not be set forth, such as vignettes, mottoes, devices, and marginal figures of notes, bank bills, or checks.[4] Where stamps are required by the local government to be affixed, they need not, it is thought, be copied into the indictment when their omission does not destroy the legal capacity of the instrument.[5]

Irrelevant and extrinsic matter need not be set forth in the indictment, such as an indorsement of a counterfeit bank note made after the note was issued,[6] or an irrelevant indorsement of a promissory note;[7] because such indorsements form no part of the

*v.* Bailey, 1 Mass. 62; s. c., 2 Am. Dec. 3.

**1.** State *v.* Weaver, 13 Ired. (N. C.) L. 491.

**An Indictment for Uttering an "Altered" Instrument** must clearly set out the alteration alleged, with the proper averments showing an alteration of a material part thereof. Such an indictment cannot be predicated upon the uttering of an instrument altered in an immaterial part. Bittings *v.* State, 56 Ind. 101.

**2.** State *v.* Fisher, 58 Mo. 256.

**3.** See Bittings *v.* State, 56 Ind. 101; State *v.* Flye, 26 Me. 312; Com. *v.* Boutwell, 129 Mass. 124; Com. *v.* Butterick, 100 Mass. 12; State *v.* Fisher, 58 Mo. 256; State *v.* Bryant, 17 N. H. 323; Com. *v.* Shissler, 9 Phila. (Pa.) 587; Coleman *v.* Com., 25 Gratt. (Va.) 865; Rex *v.* Birkett, Russ. & R. C. C. 251.

In those cases where the pleader charges the forgery of the whole document or the alteration of the original instrument, the same particularity is not required. See Kahn *v.* State, 58 Ind. 168; State *v.* Flye, 26 Me. 312; Com. *v.* Boutwell, 129 Mass. 124; Com. *v.* Butterick, 100 Mass. 12; State *v.* Greenlee, 1 Dev. (N. C.) L. 523; State *v.* Weaver, 13 Ired. (N. C.) L. 491; State *v.* Rowley, Brayton (Vt.), 76.

**4.** Butler *v.* State, 22 Ala. 43; State *v.* Flye, 26 Me. 312; Com. *v.* Stevens, 1 Mass. 203; Com. *v.* Bailey, 1 Mass. 62; s. c., 2 Am. Dec. 3; Com. *v.* Taylor, 59 Mass. (5 Cush.) 605; State *v.* Carr, 5 N. H. 371; State *v.* Van Hart, 17 N. J. L. (2 Harr.) 327; People *v.* Franklin, 3 Johns. Cas. (N. Y.) 299; Griffin *v.* State, 14 Ohio St. 55; Com. *v.* Surley, 2 Binn. (Pa.) 332; State *v.* Wheeler, 35 Vt. 261; United States *v.* Bennett, 17 Blatchf. C. C. 357.

**Bank Bills—Name of State in Margin.**—But an indictment setting forth a copy of a bank bill alleged to be forged, must give the name of the State on the margin of the bill. Com. *v.* Wilson, 68 Mass. (2 Gray) 70. And where descriptive devices are given, a variance is fatal. Griffin *v.* State, 14 Ohio St. 55; Buckland's Case, 8 Leigh (Va.), 732.

**5.** Com. *v.* McKehan, 98 Mass. 9; Miller *v.* People, 52 N. Y. 304; s. c., 8 Alb. L. J. 284.

**Indorsements and Revenue Stamps Need Not be Set Out.**—Plaintiff in error was indicted for forging and altering a check, which was set forth in the indictment. Upon the check, as given in evidence upon the trial, was the indorsement of the payees named therein, and a revenue stamp, neither of which were set forth in the description of the check contained in the indictment. The counsel for the prisoner requested the court to direct the jury to acquit the prisoner on the ground of a variance between the indictment and the proof. The court refused the request, and counsel excepted. *Held*, that the omission did not constitute a variance. Neither the indorsement nor the revenue stamp formed a part of the check, which is a complete instrument of itself. Miller *v.* People, 52 N. Y. 304; s. c., 8 Alb. L. J. 284.

**6.** Com. *v.* Ward, 2 Mass. 297; Buckland *v.* Com., 8 Leigh (Va.), 732.

**7.** See Com. *v.* Adams, 48 Mass. (7

instrument and are mere surplusage, and surplusage is never required to be set out.[1]

Where the instrument forged is in a foreign language, it should be set out in the indictment in that language in which it was forged, with a complete and accurate translation.[2]

**5. Venue.**—In an indictment for forgery, the venue should be properly laid.[3] It has been held that where a forged writing is mailed in one jurisdiction, to be published in another jurisdiction, while the offence may be punished in the jurisdiction where delivered,[4] yet a concurrent jurisdiction exists in the place where the instrument was mailed,[5] and that the crime may be prosecuted both in the jurisdiction of uttering and in the jurisdiction in which the document was received by the person to whom it was sent.[6]

Metc.) 40; Com. *v.* Ward, 2 Mass. 97; Hess *v.* State, 5 Ohio, 5; s. c., 22 Am. Dec. 767; Cocke *v.* Com., 13 Gratt. (Va.) 750; Perkins *v.* Com., 7 Gratt. (Va.) 651; s. c., 51 Am. Dec. 123; Buckland *v.* Com., 8 Leigh (Va.), 732.

1. See State *v.* Gardiner, 1 Ired. (N. C.) L. 27; State *v.* Ballard, 2 Murph. (N. C.) 186.

2. See Rex *v.* Szudurskie, 1 Moo. C. C. 419; Rex *v.* Warshaner, 1 Moo. C. C. 566; Rex *v.* Goldstein, 7 Moore, 1.

**Forgery in Chinese.**—An indictment for forging an order written in the Chinese language need not contain a copy of the order if it sets forth a translation of it. People *v.* Ah Woo, 28 Cal. 205.

**Signature in German.**—Where a person's name is forged to a note in German, or Gothic, characters, it is not necessary to allege in the indictment that the signature is in German and give a translation. The rule of law that a document in a foreign language, forged, must be translated and explained by averments, has no application where the obligation is in the English language and the name of the maker is written in the German script, when the name is written the same in both languages. Duffin *v.* People, 107 Ill. 113; s. c., 47 Am. Rep. 431.

3. As to where the venue should be laid see tit. CRIMINAL PROCEDURE, 4 Am. & Eng. Encyc. of L. 736.

4. See Com. *v.* Blanding, 20 Mass. (3 Pick.) 304; s. c., 15 Am. Dec. 214; People *v.* Griffin, 2 Barb. (N. Y.) 427; People *v.* Rathbun, 21 Wend. (N. Y.) 533; Com. *v.* Gillespie, 7 Serg. & R. (Pa.) 469; Rex *v.* Johnson, 7 East, 65; Rex *v.* Girdwood, 1 Leach C. C. 169. *Compare* Com. *v.* Parmenter, 22 Mass. (5 Pick.) 279; Rex *v.* Parks, 2 East P. C. 992.

It is said (1 Whart. Cr. L. (9th ed.) § 747) that a mere naked uttering in a particular county or jurisdiction is not *per se* proof of forgery in such county or jurisdiction, but that there are usually inculpatory incidents accompanying such cases which so strongly intensify the presumption of guilt as to compel a conviction of forgery; and that consequently a conviction may be had for forgery as committed in the venue of the uttering. Cohen *v.* People, 7 Colo. 274; Lindsey *v.* State, 38 Ohio St. 507; State *v.* Poindexter, 23 W. Va. 805. See State *v.* Outs, 30 La. An. pt. 2, 1155; State *v.* Morgan, 2 Dev. & B. (N. C.) L. 348; Spencer *v.* Com., 2 Leigh (Va.), 757; United States *v.* Britton, 2 Mason C. C. 464.

5. See Green *v.* State, 66 Ala. 40; s. c., 41 Am. Dec. 744; State *v.* Chapin, 17 Ark. 561; s. c., 65 Am. Dec. 452; Johns *v.* State, 19 Ind. 421; s. c., 81 Am. Dec. 408; United States *v.* Worrall, 2 U. S. (Dall.) 388; bk. 1, L. ed. 426; Whart. St. Tr. 189; Rex *v.* Burdett, 4 B. & A. 95; Reg. *v.* Jones, 4 Cox C. C. 198; s. c., 1 Den. C. C. 551; Perkins's Case, 2 Lew. C. C. 150; s. c., 2 East P. C. 1120.

6. 1 Whart. Cr. L. (9th ed.) 711.

**Doctrine Questioned.**—It is thought to to be doubtful whether the doctrine, as thus laid down is sustained by the decided cases. Dr. Wharton cites, in support of the last proposition, People *v.* Rathbun, 21 Wend. (N. Y.) 509; but this case seems to hold simply that "The crime of uttering or publishing is not completed until the paper is transferred and comes to the hands or possession of some person other than the felon, his agent or servant. Thus, where a note with forged indorsements is sent by the felon *per* mail from one county to an individual in another county, for the purpose of obtaining credit upon it, the crime is not consummated until the note is received by the person to whom it was sent; and the proper place of trial is, the county to which the note was sent."

**6. Averments of Extrinsic Facts.**—An indictment for forgery must set forth an instrument which, on being described, on its face must appear to be naturally calculated to have some effect.[1] If this be not so, extrinsic facts must be averred in order that the court may see its fraudulent tendency.[2] But in those cases where

**Crime Committed in Two Counties.**—While there may be some difference of opinion as to the constitutionality of a law which provides for the punishment of a crime in a county where no material part of such crime was committed, yet the very decided weight of authority is that the legislature may provide for the punishment of a crime in either of two counties where any part of such crime is committed. See State *v.* Johnson, 38 Ark. 568; Tippins *v.* State, 14 Ga. 422; Archer *v.* State, 106 Ind. 426; Com. *v.* Macloon, 101 Mass. 1; Com. *v.* Parker, 19 Mass. (2 Pick.) 258; Tyler *v.* People, 8 Mich. 320; Steerman *v.* State, 10 Mo. 503; Adams *v.* People, 1 N. Y. 173; *Ex parte* Rogers, 10 Tex. App. 655; Hanks *v.* State, 4 Tex. App. 645; State *v.* Pauley, 12 Wis. 537.

1. State *v.* Cook, 52 Ind. 574; State *v.* Wheeler, 19 Minn. 98; s. c., 1 Green Cr. L. Rep. 541; Com. *v.* Mulholland, 12 Phila. (Pa.) 608.

2. Dixon *v.* State, 81 Ala. 61; Baysinger *v.* State, 77 Ala. 63; s. c., 54 Am. Rep. 46; Shannon *v.* State, 109 Ind. 407; State *v.* Cook, 52 Ind. 574; Com. *v.* Hinds, 101 Mass 209; State *v.* Wheeler, 19 Minn. 98; s. c., 1 Green Cr. L. Rep. 541; Fenton *v.* People, 4 Hill (N. Y.), 128; Sanabria *v.* People, 24 Hun (N. Y.), 270; People *v.* Stearns, 21 Wend. (N. Y.) 409; People *v.* Wright, 9 Wend. (N. Y.) 193; State *v.* Weaver, 94 N. C. 836; s. c., 55 Am. Rep. 647; Henry *v.* State, 35 Ohio St. 128; s. c., 20 Alb. L. J. 377; Com. *v.* Mulholland, 12 Phila. (Pa.) 608; State *v.* Humphreys, 10 Humph. (Tenn.) 442; United States *v.* Schoyer, 2 Blatchf. C. C. 59.

**Averment by Innuendo.**—If the averment of extrinsic facts is necessary to the interpretation of the writing, these facts must be averred otherwise than by innuendo. Dixon *v.* State, 81 Ala. 61.

Where, in an indictment for forgery, the instrument on which the forgery is predicated is set out, without the averment of extrinsic facts explaining it, and it is so uncertain in its terms that it is impossible to tell whether it would or would not, if genuine, operate as the foundation of another's liability or right or have any legal effect whatever, the indictment is bad, on motion to quash, for not stating the offence with sufficient certainty. Shannon *v.* State, 109 Ind. 407.

Where an indictment charged that A did feloniously and fraudulently forge a certain writing as follows: "Mr. Bostick, charge A's account to us. B & C" with intent to defraud B & C, *held*, that the indictment was not valid without charging that A was indebted to Bostick, as there could be no fraud unless a debt existed. State *v.* Humphreys, 10 Humph. (Tenn.) 442.

An indictment charged that the obligor paid $5 on a single bill to the obligee, and that the obligee indorsed on the single bill a credit in the following words: "Received, 23d, October 1841, five dollars." and that the defendant obliterated the same with intent to prejudice the rights of the obligor. *Held*, that this indictment did not make out a valid charge of forgery, there being no averment that such indorsements by the agreement of the parties was to have the force and effect of a formal receipt or acquittance for the purpose of making it evidence of payment. State *v.* Martin, 9 Humph. (Tenn.) 55.

**Acknowledgment of Card in Hotel.**—An indictment for forging a writing in the following words: "I hereby certify that H. & Co. have placed in my hotel a card of advertisements as per their agreement by contract. S., proprietor." without any averment of extrinsic matter to show that the instrument was adapted to be used for purpose of fraud otherwise than appeared on its face, *held*, to be bad at common law. Com. *v.* Hinds, 101 Mass. 209.

**Certificate of Release.**—Under Alabama Code, § 4340, forgery in second degree consists in the forgery of an instrument "by which any right or interest in property is in any way changed or affected." An indictment under this section charged that defendant "did forge a written instrument as follows:

"'APRIL the 28th, 1885.

"'DEAR SIR: I have nothing to do with Venie Dixon "patch" cotton, they are welcome to it and do what they please with it. W. W. ROBERTS.

"' & all so Mary Ann the same.

"'W. W. ROBERTS.'"

"meaning thereby that W. W. Rob-

erts, the landlord, waived his lien on the 'patch cotton' of one Venie Dixon." *Held*, insufficient to sustain a prosecution, because it failed to indicate that Roberts, whose name was alleged to have been forged, had any interest whatever in the "patch cotton" mentioned, the words "meaning thereby that W. W. Roberts, the landlord, waived his lien on the 'patch cotton'" being only an innuendo whose office is not to supply omitted words, but to give point and direction to ambiguous language. Dixon *v.* State, 81 Ala. 61.

**Indorsements.**— In an indictment for forging an indorsement, such indorsement must be averred to have been put on a document in such a way as to have a *prima facie* binding effect. Com. *v.* Spilman, 124 Mass. 327; s. c., 26 Am. Rep. 668.

**Forgery by Officer Not Acting in Line of Duty—Extrinsic Averments.**—An indictment for forgery by the alteration of an instrument issued by an officer acting not in the line of his proper office, but in that of another office the duties of which he had been designated to perform during a vacancy, should aver the facts necessary to show that such officer had been duly designated to act in the vacancy, and was competent to make the instrument alleged to have been altered. Averring that he issued it *ex officio* is not enough. United States *v.* Schoyer, 2 Blatchf. C. C. 59.

**Mortgage.**—Indictment for forging a mortgage in the name of S., with intent to defraud S. & M., *held*, insufficient because it did not aver that there was any such land as the alleged mortgage described, or that S. had any title to it. People *v.* Wright, 9 Wend. 193; explained in Fenton *v.* People, 4 Hill (N. Y.), 128; and questioned in People *v.* Stearns, 21 Wend. (N. Y.) 409.

**Order for Goods.**—An indictment for forgery set forth the alleged forged order as follows: "Mr. T. Hemphill—Please let Charles Shannon have one dress pattern, and oblige Theodore Points." *Held*, that the instrument was so uncertain that, there being no extrinsic facts averred to show its fraudulent tendency or to explain or remove the apparent uncertainties therein, a motion to quash the indictment should be granted. Shannon *v.* State, 109 Ind. 407.

**Order for Money.**—An order dimly written in pencil, directing the sending of "$450 cents" and signed, apparently, "G. W. McGowe," may support an indictment for forgery, with the additional averments that the amount was intended for four and one-half dollars and that the named signed meant G.W. McGowen. Baysinger *v.* State, 77 Ala. 63; s. c., 54 Am. Rep. 46.

**Railroad Pass.**—A description of the forged instrument as a "railroad pass," merely, is insufficient. The circumstances showing authority of the officer whose name is forged, and the obligation of the company to honor it, must be set out in the indictment. State *v.* Weaver, 94 N. C. 836; s. c., 55 Am. Rep. 647. See Com. *v.* Ray, 69 Mass. (3 Gray) 441; Clark *v.* State, 8 Ohio St. 630.

**Forging Receipt—Pleading—Extrinsic Facts.**—Where, in an indictment for uttering a forged receipt, the instrument set out is not *prima facie* a receipt, such extrinsic facts must be averred as are necessary to show that the instrument would, if genuine, have the operation and effect of a receipt. An averment that the instrument set out was a receipt does not have the effect to change its *prima facie* character. Nor will the character of the instrument be changed by an averment that, by the rules of the bank where the instrument was used, it was upon its face a receipt. It should be shown how or in what way the instrument, if genuine, would, under the rules of the bank, have, the operation and effect of a receipt. Henry *v.* State, 35 Ohio St. 128; s. c., 20 Alb. L. J. 377.

**An Indictment for the Forgery of an "accountable receipt for personal property,** viz., an elevator ticket for wheat," alleged that the defendant "did falsely make, forge, alter, and counterfeit a certain false, forged, altered, and counterfeited accountable receipt for personal property, viz.: an elevator ticket for wheat, is of the tenor following, that is to say: 'St. Paul & Sioux City Elevator Co., St. Peter, . . . Received of J. S., load No. 20, ticket No. 2402, account of W. B. N. or bearer, No. 1 Wheat, 84 5-60 bushels. M. Good, Inspector,' with intent thereby then and there to injure and defraud, contrary to the form of the statute," etc., etc. *Held*, that, inasmuch as no connection between the subscriber of the instrument and said elevator company appeared on the face thereof; as it cannot be contended in support of the indictment that "M. Good, Inspector," was an agent of the company;—the indictment presents the case of an accountable receipt not purporting to be signed by any authorized agent of the company and not on its face of any apparent legal effect; and, there being no averment in the indictment of any connection between said subscriber and said company which would give it such effect, the indictment was insufficient. State *v.*

the meaning of the transaction can be sufficiently obtained from the instrument set out, it is not necessary to set out extrinsic facts.[1]

*a.* AVERMENTS OF INCORPORATION.—In an indictment for forging an order for the payment of money with the intention to defraud a manufacturing company, it has been held that the failure of the indictment to allege the incorporation of such company is immaterial;[2] but an indictment for forging a school warrant need not allege that the district is incorporated, for school districts are corporations by statute, and it is not necessary, in pleading, to aver a legal conclusion.[3]

In an indictment for the forgery of a bank note, it is not necessary to aver that the bank whose note is alleged to have been forged is incorporated;[4] but in those cases where the prosecution

Wheeler, 19 Minn. 98; s. c., 1 Green Cr. L. Rep. 541.

1. Bell *v.* State, 48 Ark. 94; s. c., 17 Am. Rep. 40; Com. *v.* White, 145 Mass. 392; Com. *v.* Ladd, 15 Mass. 526; State *v.* Shaw, 92 N. C. 768; Hess *v.* State, 5 Ohio 5; s. c., 22 Am. Dec. 767; Cocke *v.* Com., 13 Gratt. (Va.) 750; Brown *v.* Com., 2 Leigh, (Va.), 769; Snell *v.* State, 2 Humph. (Tenn.) 347; State *v.* Schwartz, 64 Wis. 432; United States *v.* Trout, 4 Biss. C. C. 105.

Thus, in an indictment under the United States Revised Statute (14 Stat. at L.; Rev. Stat. § 5418) for forging papers to be used in making entry of goods at a custom-house, need not in terms allege the existence of such goods. United States *v.* Lawrence, 13 Blatchf. C. C. 211. In an indictment for forging an indorsement, it is not necessary to set out the original quality of the note or the maker's name. Cocke *v.* Com., 13 Gratt. (Va.) 750. *Compare* Com. *v.* Spilman, 124 Mass. 327; s. c., 26 Am. Rep. 668.

**Forged Bank Note.**—An indictment for the felonious possession of a forged national bank note need not aver that the forged instrument purported to be a note of any designated national bank if the instrument be copied into the indictment, and, if by the terms of such copy, it purports to be such a note. United States *v.* Williams, 4 Biss C. C. 302.

**An Instrument in the Form of a Promissory Note** for the payment of "25.00 as per deed, 10 per cent, till paid" is a note for twenty-five dollars; and, in an information for the forgery thereof, no averment of extrinsic facts is necessary to show that such is its character. State *v.* Schwartz, 64 Wis. 432.

**Forged Receipt—Averments.**—In an indictment for forging a receipt, it is not necessary to aver a liability on the part of the person charged with the offence, to the individual against whom the receipt is forged, in order to show that the latter stands in a situation to be defrauded by the former. Snell *v.* State, 2 Humph. (Tenn.) 347.

**Receipted Bill for Goods.**—On indictment for forging and utteriug a receipted bill for goods, *held*, that the instrument being set out, and purporting on its face to be the thing prohibited by statute to be forged, there was no need of further allegations to show how it was that thing, or how it could be used as an instrument of fraud, or that it was so used in fact. Com. *v.* White, 145 Mass. 392.

**Treasury Note.**—In an indictment for forging a treasury note, it is not necessary to aver that it was made in the resembance of the genuine notes. United States *v.* Trout, 4 Biss. C. C. 105.

2. State *v.* Shaw, 97 N. C. 678.

3. Bell *v.* State, 48 Ark. 94; s. c., 17 Am. Rep. 40.

4. Com. *v.* Cary, 19 Mass. (2 Pick.) 47; Com. *v.* Houghton, 8 Mass. 107; Com. *v.* Whitmarsh, 4 Mass. 233; Brown *v.* Com., 8 Mass. 59; Com. *v.* Ross, 2 Mass. 373; Com. *v.* Cone, 2 Mass. 132; State *v.* Van Hart, 17 N. J. L. (2 Harr.) 327; People *v.* Stearns, 21 Wend. (N. Y.) 409; s. c., 23 Wend. (N. Y.) 634; State *v.* McKiernan, 17 Nev. 224; State *v.* Ward, 2 Hawks (N. C.) L. 443; State *v.* Jones, 1 McMull. (S. C.) L. 236; s. c., 36 Am. Dec. 257; Murry's Case, 5 Leigh (Va.), 720; United States *v.* Williams, 4 Biss. C. C. 302.

**The National Courts** will judicially take notice of the existence of all national banks. United States *v.* Williams, 4 Biss. C. C. 302.

When the indictment charges the for

is under a statute which covers only banks duly incorporated, the indictment must aver that the bank whose notes are alleged to have been forged is an incorporated bank.[1] But where such statute does not make incorporation a requisite, such allegation is immaterial.[2]

7. **Joinder.**—The crime of forgery and that of uttering forged paper are distinct and separate offences, and cannot be both charged in one indictment.[3] However, it is held that the utter-

gery to have been committed by forging the signature of a person on the back of a draft with intent to defraud such person, it is unnecessary to allege that the bank upon which the draft was drawn was incorporated. State *v.* McKiernan, 17 Nev. 224.

In an indictment for forging, etc., to the injury of a foreign bank, it is not necessary to aver that such bank was a corporation duly created; it is enough to allege that the instrument set forth was falsely made with the intent to injure and defraud the bank. Under such an allegation, an exemplification of the act of incorporation is admissible. People *v.* Stearns, 21 Wend. (N. Y.) 409; s. c., 23 Wend. (N. Y.) 634.

Indictment need not set forth that the bank was incorporated under the laws of the state or of the United States by a specific allegation; but if it be averred that a forgery was committed with intent to defraud a certain bank, describing it by its corporate name, and it appears that there is such a corporation incorporated by a public statute, the court will take judicial notice of such act of incorporation, and the indictment is sufficient without any further designation of the bank by its name. State *v.* Jones, 1 McMull. (S. C.) L. 236; s. c., 36 Am. Dec. 257.

1. See Com. *v.* Simonds, 77 Mass. (11 Gray.) 306; State *v.* Van Hart, 17 N. J. L. (2 Harr.) 327; People *v.* Stearns, 21 Wend. (N. Y.) 409; State *v.* Ward, 2 Hawks (N. C.) L. 443; Owen *v.* State, 5 Sneed (Tenn.), 493; Jones *v.* State, 5 Sneed (Tenn.), 346; State *v.* Wilkins, 17 Vt. 151; Cady *v.* Com., 10 Gratt. (Va.) 776; Murry's Case, 5 Leigh (Va.), 720.

2. See State *v.* Van Hart, 17 N. J. L. (2 Harr.) 327; Owen *v.* State, 5 Sneed (Tenn.), 493; Jones *v.* State, 5 Sneed (Tenn.), 346.

3. Bell *v.* State, 48 Ark. 94; s. c., 17 Am. Rep. 40; State *v.* Henry, 59 Iowa, 391; State *v* McCormack, 56 Iowa, 585, overruling State *v.* Nichols, 38 Iowa, 110; People *v.* Van Alstine, 57 Mich. 69; People *v.* McMillan, 52 Mich. 627; People *v.* Parham (Mich.), 34 N. W. Rep. 720; State *v.* Wood, 13 Minn. 121.

A charge of forging a document in an indictment or information does not include a charge of uttering it. State *v.* Snow, 30 La. An. pt. 1, 401.

An indictment for forgery which charges the defendant with forging an indorsement on a draft, and then uttering it after it had in the meanwhile been accepted by the drawee and indorsed by other parties, does not charge two offences. People *v.* Frank, 28 Cal. 507.

Where the first count of an indictment charged defendant with forging a certain instrument, the second count charged another person with uttering the instrument, and the indictment then proceeded to charge the defendant with being an accessory before the fact to such uttering, *held*, that the indictment contained but two counts. Pettes *v.* Com., 126 Mass. 242. Also that the offence charged against the defendant in the first count is a different offence from that charged against him in the second count; and a verdict of acquittal on the first count and of conviction on the second count is not repugnant. Pettes *v.* Com., 126 Mass. 242.

Where an indictment for forgery contained a count for forging and counterfeiting a note and a count for feloniously using and employing as true a counterfeit note, the verdict found the prisoner guilty of "forgery," as alleged in the indictment. *Held*, that an acquittal must be entered on the second count. Page's Case, 9 Leigh (Va.), 683.

**The Forgery and Uttering of a Bond or Note, and of the Mortgage** which secures it, are connected transactions, and can be joined in the same information. People *v.* Sharp, 53 Mich. 523.

But it has been held that a count charging the prisoner with the forging of two distinct instruments, e. g., a mortgage and a receipt,—requiring different degrees of punishment,—is bad. People *v.* Wright, 9 Wend. (N. Y.) 193.

**Charging Forging and Uttering Deeds.**—A count in an indictment or information that charges the forgery of a deed, and also the utterance of a forged deed, is bad for duplicity. People *v.* Parker (Mich.), 34 N. W. Rep. 720.

ance of a forged instrument, knowing it to be forged, may be charged in the same indictment, if alleged in separate counts.[1]

**XI. EVIDENCE.—1. Competency of Witness.**—In prosecutions for the forgery of an instrument, such forgery may be shown by the person whose name purports to be signed to the instrument as taking an acknowledgment though he did not sign the paper;[2] and

There is duplicity in charging forgery, and the utterance thereof, in the same count, but not in charging joint respondents with forging a deed, and one of them with causing it to be recorded; the act of recording bears upon the intent, and is not of itself an utterance. People *v.* Van Alstine, 57 Mich. 69.

**Election Between Counts.**—An indictment contains two counts—one for forgery and one for uttering a forged instrument. *Held*, that the state should not have been forced to elect upon which count it would prosecute. Williams *v.* State, 24 (Tex. App.) 342, 6 S. W. Rep. 531.

After the evidence was concluded, the state elected to claim a conviction under the second count, and abandoned the first ouly so far as to disclaim a conviction under it, and it was not stricken out. Objection is made that thereby the second count was rendered insufficient of itself, and did not charge any offence, and could be made sufficient only by reference to and supplying its defects from the allegations in the abandoned first count. *Held*, that, not having been stricken out or abandoned for any other purpose than that stated, the first count was still for all other purposes a part of the indictment, and was competent, if it could, to supply the deficiencies if any in the second count. Boles *v.* State, 13 Tex. App. 650.

But where an indictment charged defendants in one count with forgery, and in another count charged them with uttering the forged instrument as genuine, knowing it to be false and forged, *held*, that it charged two distinct and separate offences; and the State would be required, on motion, to elect on which count it would proceed. Bell *v.* State, 48 Ark. 94; s. c., 17 Am. Rep. 40.

**Same—Discretion.**—On the trial of an indictment containing two counts, one of which alleges the forging of a draft and the other the uttering and publishing of the forged draft as true, it is not error for the court to refuse to require the prosecutor to elect on which count he will proceed on trial. This is a matter in the discretion of the trial court. Miller *v.* State, 51 Ind. 405; s. c., 1 Am. Cr. Rep. 230.

1. Chester *v.* State, 23 Tex. App. 577. See Parker *v.* People, 97 Ill. 32; Boles *v.* State, 13 Tex. App. 650; Sprouse *v.* Com., 81 Va. 374; s. c., 21 Rep. 702.

**Duplicity.** — An indictment which in separate counts charges forgery, and the utterance of a forged instrument knowing it to be forged, is not vulnerable to a motion to quash upon the ground that it is duplicitous and charges two offences; nor is it obnoxious to the objection that two distinct and separate felonies are charged in the same indictment. Boles *v.* State, 13 Tex. App. 650.

**Charging Forgery of Check and Indorsement.**—An indictment which charges the forgery of a check and the indorsement in one count, and the uttering of both in a second count, is not obnoxious to the objection of duplicity. Sprouse *v.* Com., 81 Va. 374; s. c., 21 Rep. 702.

2. The person whose name is forged is a competent witness for the state in the prosecution of forgery. Hess *v.* State, 5 Ohio, 5; s. c., 22 Am. Dec. 767; State *v.* Bateman, 3 Ired. (N. C.) L. 474; Pope *v.* Nance, 1 Stew. (Ala.) 354; s. c., 18 Am. Dec. 60; People *v.* Sharp, 53 Mich. 523; State *v.* Phelps, 11 Vt. 116; s. c., 34 Am. Dec. 762.

A judgment was obtained against A and his surety, B. B paid a part of the judgment, and took the constable's receipt, which he fraudulently altered so as to make the sum larger. Afterwards A settled with B, and repaid him what appeared by the receipt to have been paid by B. *Held*, on an indictment against B for forgery, that A was a competent witness. State *v.* Bateman, 3 Ired. (N. C.) L. 474.

**English Rule.**—According to the rule in England, a person whose name appeared on forged paper, who was interested in setting the instrument aside, was not permitted to give evidence to prove the forgery, although he was competent to prove all collateral matters; and this rule was adopted, and at one time prevailed, in several of the states of the Union, notably in Massachusetts, New Hampshire, Vermont, Pennsylvania, North Carolina, and Connecticut. This rule, however, was never extended to those cases where the witness had no real interest in the conviction; as where he is cashier or other agent of a bank, the note

the same may be shown by a person purporting to be a subscribing witness, even though he be not named in the information.[1] In some states, where the prosecution is conducted at the instance of the state, the bias of the witness whose name was forged is material even though the witness be indebted to the party whose name was forged.[2]

**2. Proof of Guilty Knowledge and Fraudulent Intent.** — *a.* IN GENERAL.—The principal element in forgery consists in the fraudulent purpose ;[3] and evidence of such surrounding circumstances as

of which had been forged. Com. *v.* Hutchinson. 1 Mass. 7; s. c., 2 Am. Dec. 1; State *v.* Hamilton, 2 Hayw. (N. C.) L. 288; Hess *v.* State, 5 Ohio, 5; s. c., 22 Am. Dec. 667; Resp. *v.* Ross, 2 Yeates (Pa.), 8; Resp. *v.* Ross, 2 U. S. (2 Dall.) 239; bk. 1, L. ed. 364; State *v.* A. W., 1 Tyler (Vt.), 260; Rex *v.* Crocker, 2 Bos. & Pul. 88.

The English rule was adopted in New York in 1794; but in 1809, in the case of People *v.* Howell, 4 Johns. (N. Y.) 296, Kent, C.J., says that since that time the question of English interest of witness has been investigated and defined with more precision both in England and New York, though the resolution of the party in case of forgery has become an anomaly in the line of evidence; and it would seem to be, if proper, that the rule should be no longer applied. See Hess *v.* State, 5 Ohio, 5, 8; s. c., 22 Am. Dec. 767, 770.

The English rule excluding persons having an interest in the forged instrument was abolished in England by express statute, 9 Geo. IV. c. 32; and in this country it was considered by Mr. Greenleaf as having been changed by more recent decisions. He says (1 Greenl. on Ev. § 414) that "In America, though in some of the earlier cases the English rule of exclusion was followed, yet the weight of authority excluding the latter decision is quite the other way, and the witness is now almost universally held admissible," citing Com. *v.* Waite, 5 Mass. 261; Com. *v.* Frost, 5 Mass. 58; People *v.* Dean, 6 Cow. (N. Y.) 27; People *v.* Howell, 4 Johns. (N. Y.) 296, 302; State *v.* Stanton, 1 Ired. (N. C.) L. 424; Simmons *v.* State, 7 Ohio, 116; Pennsylvania *v.* Farrell, Addis. (Pa.) 246; Resp. *v.* Keating, 1 U. S. (1 Dall.) 110; bk. 1, L. ed. 59.

**Admissibility of Confessions.** — In the prosecution for forgery, as in other cases, the confession should never be admitted in evidence when the defendant was influenced thereto by any threats or promises. State *v.* Walker, 34 Vt. 301; State *v.* Phelps, 11 Vt. 116; s. c., 34 Am. Dec. 672. See State *v.* Guild, 10 N. J. L. (5 Halst.) 163; s. c., 18 Am. Dec. 404; Com. *v.* Knapp, 26 Mass. (9 Pick.) 496; s. c., 20 Am. Dec. 491; Hector *v.* State, 2 Mo. 166; s. c., 22 Am. Dec. 454; State *v.* Crank, 2 Bail. (S. C.) L. 66; s. c., 23 Am. Dec. 117.

**Confession of Accomplice.**—But in Com. *v.* Knapp, *supra*, it was decided that the confession of an accomplice may be in writing, on the promise of exclusion from punishment if he would turn state's evidence, are admissible against himself should he refuse to testify on behalf of the government on the trial of his principal.

1. People *v.* Sharp, 53 Mich. 523.

2. Rounds *v.* State, 78 Me. 42; 6 Am. Cr. Rep. 266; State *v.* Henderson, 29 W. Va. 147.

In the case of Rounds *v.* State, 78 Me. 42; s. c., 6 Am. Cr. Rep. 266, the question by defendant's counsel, whether witnesses were indebted to the person whose name was alleged to be forged, was held to be properly excluded.

3. Allen *v.* State, 79 Ala. 34; People *v.* Marion, 29 Mich. 31; Montgomery *v.* State, 12 Tex. App. 323.

**Criminal Intent** is a necessary and essential constituent of the crime of forgery, and, like every other issue in the case, must be conclusively established by the evidence. Montgomery *v.* State, 12 Tex. App. 323.

Parol proofs as to the manner in which the prisoner read the note to the witness, to whom he offered it, is admissible, to show the *quo animo* with which it was made and uttered,—Butler *v.* State, 22 Ala. 43;—and evidence of transactions had between the defendant and the person alleged to have been defrauded, after the delivery of the note, is admissible, if it it tends to show that the note was used with a fraudulent intent, and to secure a valuable benefit from the person to whom it was delivered. People *v.* Phillips, 70 Cal. 61.

**The Law Presumes the Intent to be to Defraud** any person who may suffer a loss by receiving such paper as genuine.

have a bearing upon the question of fraud are pertinent. The proofs of fraud may be substantially the same in criminal as in civil cases.[1]

United States *v.* Shellmire, 1 Baldw. C. C. 370. In an indictment for forgery, the intent to defraud the person whose name is forged may be alleged; and if the criminal act is proved, such intent will be conclusively presumed, although the respondent in fact intended to defraud another. Rounds *v.* State, 78 Me. 42; s. c., 6 Am. Cr. Rep. 266.

**Promissory Note — Alteration.**— Thus, whether a material alteration in a promissory note, made with the knowledge or consent of the maker of the note, amounts to a forgery, depends upon the intention when the alteration was made; and in such a case a fraudulent or felonious intent will not be presumed, but must be proved. Flint *v.* Craig, 59 Barb. (N. Y.) 319.

1. People *v.* Marion, 28 Mich. 31.

It has been said that on a trial of an indictment for forgery, only a general intent to defraud need be proved. So held where one was accused of forging a diploma of a veterinary college. McClure *v.* Com., 86 Pa. St. 353.

**There is no Presumption of Law of an Intent to Defraud** from proof that the accused has actually forged a note on another person when he has not uttered the same; but this is a question of fact for the jury to find from the evidence, as his possession of the same and surrounding circumstances. The possession of the forged paper, while evidence tending to prove a fraudulent intent, is not conclusive. The circumstances may clearly repel any presumption of guilt. Fox *v.* People, 95 Ill. 71.

**Possession of Forged Paper.**—Mere proof of possession of forged paper is not conclusive of a fraudulent intent. Fox *v.* People, 95 Ill. 71.

**Forged Deposition — Presumption.**—On the trial of an indictment for making and uttering a forged deposition to procure a divorce by the respondent from his wife, the jury are authorized to infer an intent to defraud. from the character of the instrument, if they find it to be forged; and a refusal to instruct the jury that "Intent to defraud, cannot be presumed from the simple fact of manufacturing or forging such deposition" is not erroneous. State *v.* Kimball, 50 Me. 409.

Evidence that a man on trial for forging several receipts, fabricated a deposition to prove the authenticity of one of them, is admissible as an admission of their falsity. State *v.* Williams, 27 Vt. 724.

**Other Transactions.**—It is competent to prove that defendant was on other occasions connected with the other persons indicted, in the same business as that in which the alleged forgery was committed. People *v.* Bassford, 21 N. Y. Week. Dig. 348.

**Forging Deed.**—In a prosecution for forging a deed, it is admissible to show that, shortly before the uttering, the defendant claimed title to the land through a different instrument from the one forged, before the uttering of it, and was informed that no such document was in existence. West *v.* State, 22 N. J. L. (2 Zab.) 212.

**Evidence that the Accused Falsely Represented Himself to be the Payee** of the note, *held*, a circumstance tending to impeach the good faith of the transaction, and to justify the inference that he knew that one of the makers' names was forged. State *v.* Williams, 66 Iowa, 573.

**Forged Draft—Indorsement.**—In a trial for forgery of a draft, the fact that the draft was forged and was made payable to defendant, who indorsed it, is sufficient evidence of defendant's intention to defraud by his indorsement, the person on whom the draft was drawn. Timmons *v.* State (Ga.) 4 S. E. Rep. 766.

**Making a False Entry in the State Comptroller's Books,** "with intent to defraud," intent to obtain money or cause the loss of money directly by means of the false entry need not be shown. A false entry to conceal previous defalcation is enough. The words "with intent to defraud" are used as synonymous with "fraudulent intent" or "for a fraudulent purpose," to distinguish from errors through mistake or fictitious entries innocently made for bookeeping purposes. Phelps *v.* People, 72 N. Y. 365, aff'g 6 Hun (N. Y.), 428, which affirms People *v.* Phelps, 49 How. (N. Y.) Pr. 462; Continental Nat. Bank *v.* National Bank of the Commonwealth, 50 N. Y. 575.

**Evidence of Guilty Knowledge.**—Under a count in an indictment for passing a forged note as genuine, knowing it to be forged, strict proof of the knowledge of the accused as to the genuineness or falsity of the note, like all other material facts constituting the crime, is required. The knowledge that the note was not genuine need not be proved by direct

In order to sustain a conviction for uttering a forged instrument, it need not be proved that fraud was thereby actually perpetrated; the intent to defraud may be inferentially proved.[1]

In a prosecution for forgery, evidence that defendant's intemperate habits had so far impaired his mind as to render him incapable of distinguishing between right and wrong, is admissible.[2]

*b.* PROOF OF OTHER FORGERIES BY DEFENDANT.—In an indictment for forgery, evidence of other similar forgeries is admissible;[3] thus, evidence that the defendant has forged the same signature to a chattel mortgage given to secure the note is admissible, it being material as to the question of guilt.[4] On an indictment against one for forging a check on a certain bank, and others as to his accomplices, evidence of concert to defraud banks generally is admissible to show conspiracy.[5]

But in a proceeding for uttering forged notes, evidence tending to show that defendant had had a questionable connection with another note was improperly admitted, when there was no evi-

and positive evidence, but may be inferred from circumstances, but nevertheless it must be satisfactory to the jury. Parker *v.* People, 97 Ill. 32.

**Guilty Knowledge.**—The rule admitting facts to show guilty knowledge or intent, although they may be merely collateral, or may themselves constitute a distinct offence, applied in a trial for forgery of a transfer from S. to B., and *held*, that the state might introduce a conveyance from T. to S., and prove that it and the certificate of acknowledgment thereto were forgeries. Francis *v.* State, 7 Tex. App. 501.

The jury should be instructed to guard against treating such evidence as proof of the *corpus delicti*. Francis *v.* State, 7 Tex. App. 501.

**Forged Grant—Other Forged Grants.**—Neither the existence of a genuine grant, nor the public record of it, is evidence that the utterer of a forged grant bearing a different date, and purporting to convey the same tract of land from the state to a person other than the utterer, knew that the forged grant was a forgery, it not appearing that he had any knowledge, information, or belief touching the genuine grant or its record. Constructive notice by a public record is no substitute for actual notice in establishing the *scienter* requisite to criminal intention. Pearson *v.* State, 55 Ga. 659.

1. State *v.* Hahn, 38 La. An. 169.

2. People *v.* Blake, 65 Cal. 275. See 4 Am. & Eng. Encyc. of L. 707 *et seq.*, 802 *et seq.*

3. People *v.* De Kroft (N. Y. Supr. Ct.) 1 N. Y. Supplement, 692; Hennessey *v.* State, 23 Tex. App. 340; State *v.* Martin, 27 Vt. 310.

**Admission of Commission of Other Forgeries.**—The defendant in error was indicted for forgery in signing the name of one V. as indorser on a promissory note. Upon the trial, it was conceded that the prisoner signed the name of V., but it was claimed that he was authorized by V. to do so. Evidence was given, on the part of the people, that the prisoner had admitted the commission of other forgeries. *Held*, that the evidence was inadmissible, and could not be considered by the jury in determining the question of criminal intent. People *v.* Corbin, 56 N. Y. 363; s. c., 15 Am. Rep. 427; 11 Alb. L. J. 23.

In a trial for forgery by alteration of an account against the state for postage stamps, etc., the prosecution was permitted, over objection, to put in evidence certain post-office receipts for disbursements made by the defendant for stamps, etc., about the time of the alleged forgery, and was also permitted to adduce evidence that the amounts of said receipts had been altered. The jury was instructed that they could not consider this evidence as any proof that the alleged alteration was made by the defendant, but only with reference to his intent, if, in fact, the alteration was made by him. *Held*, that the post-office receipts were properly admitted as evidence on the question of intent and for the purpose expounded to the jury. Hennessey *v.* State, 23 Tex. App. 340.

4. People *v.* De Kroft (N. Y. Supr. Ct.), 1 N. Y. Supplement, 692.

5. State *v.* Martin, 27 Vt. 310.

dence that such other note was forged, and when the note referred to was not produced, or its absence accounted for.[1]

*c.* PROOF OF UTTERING ON TRIAL FOR FORGING.—On an indictment charging forging but not the uttering or offering to utter of an instrument, it is error to admit proof that the defendant sold and transferred the paper alleged to have been forged,[2] except as tending to show the purpose or intent with which the handwriting was forged.[3]

*d.* PROOF OF UTTERING ON TRIAL FOR UTTERING.—On the trial on an indictment for the uttering of forged paper for the purpose of establishing the defendant's knowledge of the vicious character of a forged paper he is charged with uttering, it is competent for the state to show that, about the time of the offence charged, the accused possessed or uttered other forged instruments of the same description.[4] Such evidence is admissible, notwithstanding the party may have been indicted for such other acts;[5] for an acquittal under an indictment for forging or uttering

1. State *v.* Saunders, 68 Iowa, 370.

2. Morris *v.* State, 16 Miss. (8 Smed. & M.) 762; Luttrell *v.* State, 85 Tenn. 232.

On the trial of a party for forging a bank note of the Bank of the state of North Carolina, the circuit court permitted evidence to go to the jury of a supposed attempt of the defendant, three years previously, to utter some forged notes on the Northern Bank of Kentucky. *Held*, that the evidence was manifestly illegel. Morris *v.* State, 16 Miss. (8 Smed. & M.) 762.

The statements of a defendant on trial for forgery, as to other instruments of the same kind supposed to have been uttered by him, are inadmissible to prove the charge upon which he is being tried. His flight is evidence of guilt in such a case; but it is not necessary for him to explain such flight consistently with the hypothesis of innocence. Fox *v.* People, 95 Ill. 71.

3. Cohen *v.* People, 7 Colo. 274.

But it has been said that after alteration of an instrument so as to change its value, evidence of its sale is admissible to show fraudulent intent. Berrisford *v.* State, 66 Ga. 53.

On an indictment for forging a deed, evidence of fraudulent intent in executing the deed is to be inferred from the fact that money was borrowed upon it. United States *v.* Brooks, 3 McAr. (D. C.) 315.

The intent to defraud the person whose name is forged in the deed is to be inferred from the fact that the deed assumes to convey away his property, and that the defendant has uttered it with knowledge of its character. United States *v.* Brooks, 3 McAr. (D. C.) 315.

**Forgery of Order for Goods.**—In a prosecution for forging an order of goods, evidence is admissible to show that the accused was in possession of the instrument on the day of its date, and that she presented it in payment of goods purchased by her. State *v.* Outs, 30 La. An. pt. 2, 1155.

4. Bishop *v.* State, 55 Md. 138; Carver *v.* People, 39 Mich. 786; People *v.* Everhardt, 104 N. Y. 591; Coffey's Case, 4 City Hall Rec. (N. Y.) 52; Heard *v.* State, 9 Tex. App. 1; Ham *v.* State, 4 Tex. App. 645; State *v.* Williams, 2 Rich. (S. C.) L. 418; s. c., 45 Am. Dec. 741; Foute *v.* State, 15 Lea (Tenn.), 712; People *v.* De Graff, 1 Wheel. Cr. Cas. 203.

5. McDonald *v.* State, 81 Ala. 279; s. c., 60 Am. Rep. 158; State *v.* McAllister, 24 Me. 139; Bell *v.* State, 57 Md. 108; s. c., 2 Cr. L. Mag 264; Bloomer *v.* State, 48 Md. 529; Com. *v.* Price, 76 Mass. (10 Gray) 476; s. c., 71 Am. Dec. 668; Com. *v.* White, 145 Mass. 392; Com. *v.* Percival, Thach. C. C. (Mass.) 293; Van Houten's Case, 2 City Hall Rec. (N. Y.) 73; Lindsey *v.* State, 38 Ohio St. 507; State *v.* Williams, 2 Rich (S. C) L. 418; s. c., 45 Am. Dec. 741; Garner *v.* State, 5 Lea (Tenn.), 213; Hendrick *v.* Com., 5 Leigh (Va.), 707; United States *v.* Doebler, Bald. C. C. 519, 527; United States *v.* Roudenbush, Bald. C. C. 514; United States *v.* Hinman, Bald. C. C. 292; United States *v.* Noble, 5 Cr. C. C. 371; Reg. *v.* Francis, 12 Cox C. C. 612; Whiley's Case, 2 Leach C. C. 985.

**Passing Similar Forged Paper.**—Thus, upon a trial for forgery, evidence of the pas-

sage of similar forged paper by the defendant is admissible to prove the *scienter*, and proof of erasure, on the paper thus passed, like the erasure on the instrument set out in the indictment, and the production of such paper, or tracing it back to the hands of the defendant, would make out a *prima facie* case of the forgery thereof. Garner *v.* State, 5 Lea (Tenn.), 213.

Under an indictment for forgery of a written order, which the defendant presented to the person on whom it was drawn and on which he obtained goods, it is permissible to prove his possession at or about the same time, of another forged order in his favor, purporting to be the act of the same person, as tending to show his guilty intent to the first. McDonald *v.* State, 81 Ala. 279.

On indictment in fifty-four counts for forging and uttering certain receipted bills for merchandise, defendant's motion to quash was, by his consent, deferred until the close of the government's case, when all but six of the counts were quashed by consent. Defendant then asked the court to strike out certain evidence which had been introduced under the quashed counts tending to show that he had fabricated other unreceipted bills of a like character, and uttered them to the same parties by a continuous series of transactions extending some months later than the latest forgery alleged in said six counts. *Held*, that the evidence in question was admissible, under the said six counts, as forming a part of a single scheme or fraud, and as tending to prove knowledge. Com. *v.* White, 145 Mass. 392.

But where an indictment charged the defendant with having in his possession, with intent to pass the same as true, an altered and forged bank note, and the government attempted to show that, soon after the arrest, the wife of the defendant was searched, and there were found in her pockets portions of bank notes prepared apparently for similar alterations; there was no evidence of any concert of action between husband and wife in the business of altering bank notes, or that either had knowledge of the facts proved against the other, *held*, that the evidence was inadmissible. People *v.* Thoms, 3 Park. Cr. Cas. (N. Y.) 256.

In a trial for forgery in uttering and publishing a false and forged note, knowing it to be such, it is error to admit evidence tending to show that the defendant, at or about the time the crime charged was committed, had in his possession another forged note similar to the one set out in the indictment, without the production in court of such other note. State *v.* Breckenridge, 67 Iowa 204; s. c., 7 Cr. L. Mag. 70.

And on a trial for attempting to pass a forged instrument, the prosecution showed that the defendant had attempted, on the same day but at a different time and place, to pass the said instrument to another person, *held*, admissible to show defendant's fraudulent intent, but the failure of the court to restrict the evidence to that purpose by an instruction was a reversible error. Burks *v.* State, 24 Tex. App. 326; Williams *v.* State (Tex. App.), 6 S. W. Rep. 303.

**Possession of Other Forged Paper.**—On the trial of an indictment for uttering forged paper, evidence that the defendant, about the same time, uttered other forged paper, is admissible to prove criminal intent. Such evidence is not rendered incompetent by the fact that the defendant has been tried and acquitted for having uttered the forged paper offered in evidence. The record of the acquittal in such case is admissible in evidence only to affect the weight of the evidence. Although the jury are judges of law as well as of fact in criminal cases, the court has the right to instruct the jury as to the legal effect of evidence; and counsel will not be permitted to ask the jury to disregard the instruction of the court. The constitutional right to judge of the law in criminal cases does not confer any powers upon counsel. Bell *v.* State, 57 Md. 108; s. c., 2 Cr. L. Mag. 664.

If it can be shown that a party indicted for uttering forged paper upon a bank has, within a short period of time, passed other forged paper on the same bank, it is plain that such repeated utterings show a plan to defraud the bank; and, in such case, each uttering is admissible in evidence, as tending to prove the intent with which each uttering is committed. Reg. *v.* Francis, 12 Cox C. C. 612. It is not often possible to prove, by positive and direct evidence, that a party who utters a forged paper has a knowledge that it is forged. When it has been proved that the party charged has done the act for which he is indicted, the question still remains, whether he committed it with guilty knowledge, or whether he acted under a mistake; and evidence which tends to prove that he was pursuing a course of similar acts raises a presumption that he was not acting under a mistake, but with a guilty knowledge and intent, and is admissible for that purpose. Bloomer *v.* State, 48 Md. 529; Reg. *v.* Francis, 2 Cox C. C. 131, 132; Whiley's Case, 2 Leach C. C. 985; Roscoe on Crim. Ev. (7th Am. ed.) 93.

a particular forged paper will not preclude the state from proving the fact of the possession or uttering of such forged paper in another prosecution against the same party for a crime of the same character.[1]

**Forged Indorsement.**—Where the appellants were indicted not only for forging the indorsement of K. on the bond set out in the indictment, but also for uttering the same knowing it to be forged, to prove guilty knowledge it was competent for the state to show that on or about the time of the forgery charged in the indictment the appellants held and uttered similar forged instruments. Bishop *v.* State, 55 Md. 138.

In a prosecution for uttering and publishing a forged order with intent to defraud, evidence showing that the accused were engaged in a scheme of fraud, and that they had already committed specific acts similar to the one for which they are on trial, is admissible to show the *scienter* under proper instructions, etc. Carver *v.* People, 39 Mich. 786.

**Forged Checks.**—On the trial of a charge of uttering a forged check, it may be shown, on the question of guilty knowledge, that defendant uttered other forged checks on other occasions. People *v.* Everhardt, 104 N. Y. 591.

In Coffey's Case, 4 City Hall Rec. (N. Y.) 752, on trial for forging and uttering a counterfeit check, the intent was permitted to be shown by evidence that the person had previously passed a check, not laid in the indictment, acknowledged to be conterfeit. People *v.* De Graff, 1 Wheel. Cr. Cas. 203. note.

On an indictment for passing a forged check, defendant's knowledge may be proved by showing possession of other counterfeit paper by him or a confederate at that time. United States *v.* Hinman, Baldw. C. C. 292.

**Forged Promissory Note.**—After evidence that a note of the description laid in the indictment was forged and passed, evidence may be given of the delivery and passing other counterfeit notes of the same bank before or after the passing of the one in question. The time between the two acts is not material as a matter of law, but affects the inference as to the *scienter*, the presumption being weaker from the length of time. United States *v.* Doebler, Baldw. C. C. 519, 527; United States *v.* Roundenbush, Baldw. C. C. 514.

Upon an indictment for uttering forged bank notes, evidence may be given on the part of the United States that a parcel of counterfeit checks and drafts on other banks, and others printed on bank paper not filled up, were found in the defendant's possession. United States *v.* Roudenbush, Baldw. C. C. 514; United States *v.* Noble, 5 Cr. C. C. 371.

**Forged Conveyance of Land.**—The rule that one's knowledge of the vicious character of the paper he is charged with uttering may be shown by his contemporaneous connection with other papers of like vicious character applied on a trial for uttering a forged conveyance of land: Heard *v.* State, 9 Tex. App. 1.

On the trial of a person accused of uttering and publishing a forged deed for the conveyance of real estate, with intent to defraud, other forged deeds for the conveyence of real estate, including deeds of trust made to a trustee to secure the payment of promissory notes or bonds, found in his possession or proved to have been uttered and published by him, are competent testimony to show the guilty knowledge of the accused. Lindsey *v.* State, 38 Ohio St. 507.

**Money in Trunk.**—In Houten's Case, 2 City Hall Rec. (N. Y.) 73, the court decided that evidence of a large sum of money being found in the trunk of the prisoner was proper to go to the jury to show that he knew the bills charged in the indictment to be forgeries. People *v.* De Graff, 1 Wheel. Cr. C. 203, note.

1. People *v.* Frank, 28 Cal. 515; McCartney *v.* State, 3 Ind. 354; s. c., 56 Am. Dec. 510; State *v.* Robinson, 16 N. J. L. (1 Harr.) 508, 509, 513, 514; Smith and Dougherty Cases, 4 City Hall Rec. (N. Y.) 167; State *v.* Jesse, 3 Dev. & B. (N. C.) L. 103, 108, 109; State *v.* Houston, 1 Bail. (S. C.) L. 300; United States *v.* Roudenbush, 33 U. S. (8 Pet.) 289, 290; bk. 8, L. ed. 948; Vandercomb's Case, 2 Leach C. C. 720.

**Other Utterings—Acquittal on Charge of.**—The rule has not always been recognized. It not only appears to be an exception to the general principle that evidence of the prisoner's having committed one offence is inadmissible to show that he committed another, but it would also seem to contradict the doctrine that, where a prisoner has been tried for a certain crime and acquitted, the state is afterwards estopped to say that he was nevertheless guilty. It has long been held that, on an indictment for passing counterfeit coin or forged paper, evidence of other utterings of counterfeits or forgeries is admissible to show

**3. Proof of Handwriting.**—The authorship of an instrument or signature alleged to be forged may be shown in either of four ways—(1) by the opinion of witnesses, (2) by a comparison of handwriting, (3) by expert testimony, and (4) by an inspection of the forged instrument.[1]

**4. Documents, and Secondary Evidence Thereof.**—In a prosecution for forgery, the instrument alleged to be forged must be produced at the trial or its absence satisfactorily accounted for;[2] because a conviction for forgery cannot be sustained where the order alleged to have been forged, although identified by a witness, was not put in evidence.[3]

guilty knowledge; and this because, in general, such criminal intent can only be shown by the circumstantial evidence. But when the second uttering has been itself made the subject of a distinct indictment, it was held, in Rex *v.* Smith, 2 Car. & P. 633, that such uttering could not be given in evidence, to show a guilty knowledge, on the trial for the former uttering. In Hodgson's Case, 2 Lewin 103, tried in the same year, another judge had great doubts as to the admissibility of such evidence, and reserved the point. Three years later, in Kirkwood's Case, such evidence was admitted. The English decisions have not subsequently gone further than to admit evidence of other utterings when themselves the subject of distinct indictments.

The first American case on the subject is that of the Smith and Dougherty Cases, 4 City Hall Rec. (N. Y.) 167, in which evidence of other utterings, of which the prisoner had been acquitted, was admitted; but no reason or authority was given for the decision. The next case was that of State *v.* Houston, 1 Bail. (S. C.) L. 300, in 1829, in which it was held that, such evidence being generally competent, the fact of the prisoner's having been tried and acquitted on the note which was produced in evidence cannot affect the principle. The court said that, "It does not follow that, because a man is acquitted, he is innocent; the legal consequence is that he cannot be tried again. But still he may have been guilty, and this guilt may be shown in a collateral matter."

The same ruling was made in State *v.* Robinson, 16 N. J. L. (1 Harr.) 507; but the court cited no authority, placing the decision upon the ground that the admission of such evidence did not put the defendant in jeopardy again for the same offence, and did not contradict the record of acquittal.

In People *v.* Frank, 28 Cal. 507, it was held that such evidence was admissible, provided it did not appear from the evidence offered in support of the estoppel that the jury by their verdict decided that the defendant did not commit any of the several acts charged as constituting the forgery.

In State *v.* Jesse, 3 Dev. & B. (N. C.) L. 103, it is said that: "This rule of criminal evidence may now be regarded, in the absence of any decision to the contrary, as settled law. The result may be, and in this case it was, that when a defendant is indicted for two felonious utterings of forged paper he may be found guilty upon the trial of one indictment upon the same evidence on which he received his acquittal on the trial of the other. This follows from the circumstance that the guilt or innocence of the defendant in uttering one forgery, although given in evidence, is not really in controversy upon the trial for passing the other. The two offences are so connected with one another that the existence of one may be inferred from the existence of the other, while in law they are so distinct that an acquittal or conviction of one cannot bar a prosecution for the other. The only way in which a prisoner can avail himself of a former acquittal or conviction can only be pleaded in bar of another indictment for the same offence. It cannot otherwise operate as an estoppel."

1. See this whole subject reviewed and authorities collected under the title HANDWRITING. See also the titles EVIDENCE and EXPERT AND OPINION EVIDENCE.

2. Manaway *v.* State, 44 Ala. 375.

3. Dovalina *v.* State, 14 Tex. App. 312.

On an indictment for forgery, the alleged forged instrument was admitted in evidence before proof that accused had written it; but that proof was subsequently made. *Held*, not sufficient ground for reversal. Williams *v.* State (Tex. App.), 6 S. W. Rep. 531.

**Illegible Instrument.**—On the trial of an indictment for forgery, the instrument is properly admitted in evidence,

however badly written, if it is decipherable. Hagar *v.* State, 71 Ga. 164.

Where an indictment charged the defendant with forgery of a receipt for $20, and the receipt, when produced, showed that the amount was in figures which were not clearly written so as to render it certain what the amount was, but were written so as to disguise the act, and the appearance presented by such figures was that of a figure 2 followed by two 0's and two short vertical strokes of the pen like two 1's, the one above the other, there was no error in admitting the receipt in evidence, subject to the charge thereon; nor was there error in charging that, if there was ambiguity, the jury might determine from all the evidence whether the forger meant $20 or not; and that, if there was no ambiguity, and the receipt plainly was not for $20, they could not find the defendant guilty. McGarr *v.* State, 75 Ga. 155.

**Genuine Papers of the Same Kind as the One Alleged to be Forged,** which were presented with it, and taken from the accused at the same time, are admissible in evidence as part of the *res gestæ*. Manaway *v.* State, 44 Ala. 375.

**Secondary Evidence Where Instrument Lost.**—On the trial of an indictment for forgery, if it appear that the instrument is lost, destroyed, or in the possession of the accused, secondary evidence may be given of its contents. People *v.* Kingsley, 2 Cow. (N.Y.) 522; s. c., 14 Am. Dec. 520.

If, in an indictment for forgery, the instrument be destroyed or suppressed by the prisoner, or to be torn and mutilated, the tenor may be proved by parol evidence. The next best evidence is the rule; therefore if there can be a copy that can be sworn to, that is the next best evidence. United States *v.* Britton, 2 Mass. 464; Thompson *v.* State, 30 Ala. 28; State *v.* Blodget, 1 Root (Conn.), 534; State *v.* Ford, 2 Root (Conn.), 93; Ross *v.* Bruce, 1 Day (Conn.), 100; Com. *v.* Snell, 3 Mass. 82; Com. *v.* Hutchinson, 1 Mass. 7; Pendleton's Case, 4 Leigh (Va.), 694.

**Same.—A Photographed Copy of a Forged Note** is admissible in evidence where the original has so faded as to become illegible, on proof that it is an exact copy of the words of the original, when it is not offered to prove the handwriting of the signatures, but merely the words of the note. If material to show it is an exact similitude with the orginal in respect to form, shading, and coloring, the testimony of an artist or expert might be required. Duffin *v.* People, 107 Ill. 113.

**Same—Instrument in Possession of Defendant, or Destroyed.**—The indictment alleged that the instrument "is in the possession of the defendant, or is lost or destroyed, and access to the same cannot be had" by the grand jury. To the parol evidence offered, the defence objected that, before the state could resort to secondary evidence, the defendant should have been notified to produce the instrument. *Held*, that the objection was well taken. Rollins *v.* State, 21 Tex. App. 148.

Secondary evidence of the contents of the instrument charged to have been forged, which is alleged in the indictment to have been destroyed or withheld by the defendants, cannot be received, on proof that it was last seen, on trial of the *habeas corpus* at the suit of another one of the defendants, in the possession of his attorney, who is not called to answer as to his possession. Morton *v.* State, 30 Ala. 527.

**Same.—A Copy of a Forged Bill,** with the disposition of the person in whose hands the bill is, are not admissible in evidence where the bill itself is not produced. Smith *v.* Holebrook, 2 Root (Conn.), 45.

On an indictment for forging and delivering bank notes, after proof of the fact of forging a large quantity and of the delivery of one note, parol evidence of the contents of a letter from the defendant to an accomplice on the subject of counterfeit notes, for the loss of which the accomplice could not account, and had not searched, but believed he had lost, is admissible. If the letter to which it is an answer is in the hands of the defendant, it need not be produced or notice given to the defendant to produce it, before evidence of the contents of the answer is given. United States *v.* Doebler, Baldw. C. C. 519.

**Counterfeit Bank Bill.**—For the purpose of showing that the defendant, in an indictment for uttering and passing as true a counterfeit bank bill, has made contradictory statements as to the person from whom he received it, an affidavit is admissible, made by him at a previous term setting forth that an absent witness would testify, if he were present, that he lent the bill to the defendant, and that so far as he knew the defendant was ignorant of the fact that it was counterfeit. Com. *v.* Starr, 86 Mass. (4 Allen) 301.

**Forged Deed.**—In order to the admission of a copy of the deed in evidence on a trial for uttering a forged certificate of acknowledgment, the provisions of the statute, as to affidavit, filing, and notice, must be complied with. Johnson *v.* State, 9 Tex. App. 249.

**5. Of Former Proceedings.**—Upon the trial of an indictment for forgery, or for the felonious uttering of a forged instrument, the records of a former proceeding in which such forgery was the subject of litigation are admissible in evidence.[1]

**Same—Proof of Title of Person Whose Name is Forged to Conveyance.**—On trial of an information for forgery, in order to show that the person whose name was alleged to have been forged to a deed had title to the land, it is proper to admit evidence of the record of a deed of the land to such person, and the testimony of the register of deeds showing that a careful examination of the records fails to show any subsequent transfer except the alleged forged instrument. People *v.* Parker (Mich.), 34 N. W. Rep. 720.

**Same—Evidence in Defence.**—On trial of an information for forgery, the defendant, testifying in his own behalf, said the alleged forged deed was genuine, and was made on the same day that a certain other deed was executed. The latter was admitted in evidence to allow the jury to draw conclusions as to the time the former deed was made. Two witnesses testified that the two deeds were each a part of a double blank, and that they matched perfectly at the top, where they had been torn apart. *Held*, that the deed was properly admitted, but that the court erred in permitting defendant to prove that it was genuine, and so treated by the person whose name appears as grantor in her lifetime. People *v.* Parker (Mich.), 34 N. W. Rep. 720.

Defendant on trial for the forgery of a deed purporting to have been made by his wife, had control of the deed and refused to produce it until he made his defence; then he produced it with another one purporting to have been signed by both. *Held*, that the state could inquire into the genuineness of the signatures of the other deed. People *v.* Van Alstine, 57 Mich. 69.

**Same.—A Genuine Deed,** made at a time different from that at which the forged deed purports to have been executed, and in no way connected with, it is inadmissible in evidence. People *v.* Parker (Mich.), 34 N. W. Rep. 720.

**Same—Name of Deceased Person.**—On trial of an information for forging the name of a deceased person to a deed, all the papers and proceedings in probating the estate of such person were admitted in evidence. *Held*, that they should have been excluded as immaterial and irrelevant. People *v.* Parker (Mich.), 34 N. W. Rep. 720.

**A Note** which purports to have been paid by money, of the payment of which the alleged forged receipt is evidence, is competent evidence upon a trial for uttering such forged receipt. State *v.* Henderson, 29 W. Va., 147.

In an indictment for the forgery of a note, the letter of the cashier of a bank, to whom the note was sent for collection, making suggestions as to the residence of the parties to the note, is not admissible in evidence. Nor is the protest of a notary, offered for the same purpose. Farrington *v.* State, 10 Ohio, 354.

**On a Trial for Forgery of a Receipt** upon presentation of which defendant procured certain money belonging to A, from B, who was bailee of it, *held*, that letters of A to B, written under instructions of the defendant, and tending to prove that the defendant knew that the money belonged to A, and was not to be paid over except upon presentation of a genuine receipt, were properly admissible in evidence. People *v.* Cummings, 57 Cal. 88.

It being shown that the altered receipt was introduced as evidence by the defendant on the trial of an action on an attachment bond, which he had instituted against the person whose name was signed to the receipt, and who had sued out an attachment against him, the action at law being collateral to the issue, it is not necessary that the records thereof should be produced before a witness can be allowed to testify in regard to them. Allen *v.* State, 79 Ala. 34.

**Recorder's Certificate.**—To sustain an indictment for forging a recorder's certificate of record upon a deed of trust, the deed must be produced in evidence in order to show that it is such an instrument as by law may be recorded. So the notes secured by the deed and negotiated on the faith of the deed, and the alleged forged certificates, are properly introduced for the purpose of showing that the forgery was committed with intent to defraud. State *v.* Thompkins, 71 Mo. 613.

1. State *v.* Calkins (Iowa), 34 N. W. Rep. 777; Perkins *v.* People, 27 Mich. 386; s. c., 2 Green Cr. L. Rep. 567; State *v.* Henderson, 29 W. Va. 147.

Thus, upon the trial of an indictment for "feloniously uttering and attempting to employ as true" a forged receipt, the record of a former suit between the prisoner and the person whose signature was alleged to be forged was introduced by

**6. Of Defendant's Pecuniary Condition.**—On an indictment for uttering a forged receipt, evidence of the pecuniary condition of the accused at or about the date of the alleged forged receipt is admissible as tending to show that the receipt has been forged.[1]

**7. To Show the Forged Name Fictitious.**—Evidence is admissible to show that the forged name is fictitious.[2]

**8. To Show Capacity to Injure.**—In the trial of an indictment for forgery or the uttering of a forged instrument, evidence tending to show that the instrument forged could not prejudice the rights of any one is competent to go to the jury.[3]

the state, in which was contained the deposition of a sister of the prisoner, taken at his instance, that the said receipt was genuine. *Held*, admissible, as tending to prove the offence. State *v.* Henderson, 29 W. Va. 147.

And in a case where it was sought to introduce a hotel register to prove handwriting, evidence that the defendant, upon the preliminary examination, denied ever being in the town where he was supposed to have registered, but at a specified date after the date of such registry, the defendant, being aware that the forgery was sought to be proved by comparison with the handwriting of his signature on such hotel register, claimed to have been during a previous visit, *held*, admissible. State *v.* Calkins (Iowa), 34 N. W. Rep. 777.

On a trial on the charge of the forgery, by raising it in amount of a mortgage given on a purchase of land, and of uttering the same as genuine, evidence that the prisoner produced, in a chancery cause relating to this mortgage, a quitclaim deed which he had proposed to give on the sale of the lands, but which had been rejected by the purchaser and one with covenants substituted for it, and testified relative to a pen used to write it, and endeavored to account, on a comparison of the deed with the mortgage, for some suspicious appearances in the writing as to the consideration and sum to be paid by the mortgagee, is not so far foreign to the issue at bar as to preclude the prosecution, who have put it in, from showing that, instead of the facts being as the prisoner had explained, the draft of the quitclaim deed had been altered also, as to the consideration, so as to make it correspond with the altered mortgage. Such evidence of the falsity of the explanation is both pertinent and material. Perkins *v.* People, 27 Mich. 386; s. c., 2 Green Cr. L. Rep. 567.

1. Rounds *v.* State, 78 Me. 42; State *v.* Henderson, 29 W. Va. 147.

2. Where the name forged is supposed to be fictitious, it is proper to call police officers and others acquainted in the place where the person is supposed to live, to show non-existence of such person. State *v.* Hahn, 38 La. An. 169.

And evidence of a sheriff's inability to find or hear of any such person as witnessed an instrument is admissible to show that a name is fictitious; and the extent of his search and his opportunities go to the weight, but not to the competency, of his evidence. People *v.* Sharp, 53 Mich. 523.

On trial of an indictment charging that C. procured the forgery of the names J. and S. upon a bond to dissolve an attachment, the government having offered evidence that J. and S. were fictitious names, and that no such persons could be found, *held*, that C. ought to have been permitted to prove that the prosecuting officer had openly threatened to prosecute J. and S. for perjury, and that they had fled the State, and he, C., had tried in vain to procure their attendance. Com. *v.* Costello, 119 Mass. 214.

**Promissory Notes—Fictitious Makers and Indorsers.**—In a prosecution for forgery, the defendant having signed the names of fictitious persons as the maker and indorser of a promissory note, evidence of the acts done by the prosecuting witness in the course of his inquiries for such persons, and the results of his inspection of the assessment rolls of towns in which they were alleged to have lived, were held admissible. People *v.* Jones, 27 N. Y. Week. Dig. 222.

3. Barnum *v.* State, 15 Ohio, 717; s. c., 45 Am. Dec. 601.

It is a well-established principle that in cases of forgery the indictment must show that the instrument in question could be made available in law to work the intended fraud or injury. People *v.* Tomlinson, 35 Cal. 507; Barnum *v.* State, 15 Ohio, 717; s. c., 45 Am. Dec. 601.

In a prosecution for forgery, in having feloniously, etc., uttered, published, and passed to one E. a counterfeit paper, in

**9. Sufficiency.**—Any evidence which, unexplained or rebutted, tends to show that the defendant is guilty of the forgery charged, or of the uttering of the false instrument, will be sufficient to sustain a conviction.[1] Thus, an indictment for having in possession,

writing, as a genuine promissory note of one F., with the intent to prejudice, defraud, and damage the said E., evidence is admissible that, by reason of the passing of the paper, E. was damaged by being induced to make a journey, and was put to expense thereby. People *v.* Phillips, 70 Cal. 61.

1. Walker *v.* Logan, 75 Ga. 759; Aholtz *v.* People (Ill.), 13 N. E. Rep. 524; Com. *v.* Boutwell, 129 Mass. 124; People *v.* Sharp, 53 Mich. 153; State *v.* Chamberlain, 89 Mo. 125; People *v.* D'Argencour, 19 N. Y. Week. Dig. 135; People *v.* Chadwick, 2 Park. Cr. Cas. (N. Y.) 163; Dennis *v.* People, 1 Park. Cr. Cas. (N. Y.) 469; People *v.* Peabody, 25 Wend. (N. Y.) 472; People *v.* Davis, 21 Wend. (N. Y.) 309; State *v.* Davis, 69 N. C. 313; s. c., 1 Green Cr. L. Rep. 538; Reed *v.* State, 15 Ohio St. 217; Sasser *v.* Com., 13 Ohio St. 453; Com. *v.* Smith, 6 Serg. & R. (Pa.) 568; Henderson *v.* State, 14 Tex. 503; Cady *v.* Com., 10 Gratt. (Va.) 776. *Compare* Mitchell *v.* State, 64 Ga. 448; Duffin *v.* People, 107 Ill. 113; Schroeder *v.* Harvey, 75 Ill. 638; State *v.* Dennett, 19 La. An. 395; State *v.* Rucker, 93 Mo. 88; People *v.* Rathbun, 21 Wend. (N. Y.) 509; State *v.* Lane, 80 N. C. 407; State *v.* Morgan, 2 Dev. & B. (N. C.) L. 448; Jones *v.* State, 5 Sneed (Tenn.), 346; Spencer's Case, 2 Leigh (Va.), 751; United States *v.* Foye, 1 Curt. C. C. 364; Reg. *v.* Bannerman, 43 Up. Can. Q. B. 547.

**Forged Letter of Attorney.**—The information in this case was for uttering, etc., a forged letter of attorney, which is described as purporting to be executed by certain persons named, and to be acknowledged before one Castello, a notary public, etc., and to have his signature attested by certificate of one Smith, clerk of the district court, etc.; and it sets forth specifically that the signatures of Castello and Smith were false, forged, and counterfeited, but does not allege that the other signatures were forged; and it is held that these allegations must be considered as so far descriptive of the instrument that the prosecutor was bound to prove the forgery of at least one, if not both, of the names alleged to be forged; and a conviction had in the absence of such proof, and upon evidence only of the forgery of the signatures, is set aside. People *v.* Marion, 28 Mich. 255; s. c., 2 Cr. Rep. 572.

**Forgery of Bill of Costs—Failure of Evidence—Variance.**—Where, on a trial for the forgery of a fictitious bill of costs by a justice of the peace, there was no proof in what county the forgery was committed, or that the defendant made or signed the bill of costs, or authorized any one to make or sign it, and the instrument set out in the indictment contained the names of seven witnesses, while the instrument shown in the proof contained the names of ten witnesses, and the names of two witnesses were written in the latter instrument differently from the way they were in the indictment, *held*, that there was such a failure of evidence, and such a fatal variance, as to require a new trial to be had. Luttrell *v.* State, 85 Tenn. 232.

**Indictment for Forging a Bond** or other instrument is sustained by proof of the forgery of the name of one of the obligators in the bond. State *v.* Davis, 69 N. C. 313; s. c., 1 Green Cr. L. Rep. 538.

**Forged Deed.**—A verdict that a deed was a forgery, *held*, sustained by evidence that it was not recorded for fifty years after the time of its apparent execution; that the alleged grantor could not write, while the deed purported to be signed by him; and that the alleged subscribing witnesses were dead. Walker *v.* Logan, 75 Ga. 759.

A witness's recollection of trivial circumstances connected with the signing of a deed will not, after twenty-seven years, show it to have been forged, there being strong evidence to the contrary. Hutcheson *v.* Meazell, 64 Tex. 604.

In the trial of an indictment against A for forging a deed in the name of B, dated in 1854, proof that B resided in G., six or eight years before the date of the deed where he had a family, being then about sixty years old; that about that time a general rumor prevailed there that he had recently died in the city of New Orleans, that his death was published in the newspapers, that his family went into mourning, and that an obituary notice of him was published in New Orleans at the time, where a rumor to the same effect also prevailed;—*held*, competent and sufficient to warrant the jury in finding that the nominal grantor was dead at the date of the deed. Henderson *v.* State, 14 Tex. 503.

**Injunction Bond—Forgery of Name to.**—Defendant was indicted for forging the

with intent to pass the same, bank notes purporting to have been issued by a foreign banking corporation, proof of the most general character of the existence of such bank is sufficient.[1] Evidence that the prisoner uttered as genuine what purported on its face to be a bank note is competent to show that it is a bank note, although it is not otherwise shown that such a bank exists.[2] It is sufficient, to establish the forgery of a check and the signature thereto, to show a similarity between the spurious check and the genuine, such as to create a possibility of fraud.[3] Evidence that a forged note

name of S. to an injunction bond; and upon the question whether S. authorized the signature, testified that to the best of his recollection, S. said, "I could use his name on the bond." D. testified to an alleged admission by S. that he did at one time authorize defendant to sign his name. S. contradicted the testimony, and denied that he ever gave such authority to defendant or to any one else. *Held*, that the evidence warranted a verdict of guilty. Aholtz *v.* People (Ill.), 13 N. E. Rep. 524.

**On a Prosecution for the Forgery of a Mortgage** with the purpose of defrauding, everything tending to explain the fraud, and its extent and character, can be shown, such as matters relating to the ownership and value of the premises which the mortgage purported to cover, and respondent's representation, to the persons defrauded, that he was the owner of the mortgaged property, together with the preparation of the papers, their retention for signature, and return signed, and constitute a sufficient chain of facts to prove forgery, as well as uttering. People *v.* Sharp, 53 Mich. 523.

**Accountable Receipt.**—Where, in an indictment under statute, the defendant is charged with the forgery of an accountable receipt for money, proof that he inserted additional words and figures in a genuine receipt, by which the original amount was increased, is sufficient. Com. *v.* Boutwell, 129 Mass. 124.

1. People *v.* Peabody, 25 Wend. (N. Y.) 472; People *v.* Davis, 21 Wend. (N. Y.) 309.

In such a prosecution, the incorporation of the foreign bank can be legally proved for the purpose of the trial by a witness who knows the fact, or even by general reputation; and it is not necessary to produce the law under which the bank was incorporated. People *v.* D'Argencour, 18 N. Y. Week. Dig. 532.

On a trial for forging bank notes, parol evidence showing the existence of the bank *de facto* is sufficient, without putting the original charter,—and this, whether the intent charged be to defraud the bank of a third person. People *v.* Chadwick, 2 Park. Cr. Cas. (N. Y.) 163. See also, to nearly same effect, Dennis *v.* People, 1 Park. Cr. Cas. (N. Y.) 469; Reed *v.* State, 15 Ohio St. 217; Sasser *v.* State, 13 Ohio, 453; Com. *v.* Smith, 6 Serg. & R. (Pa.) 568; Cady *v.* Com., 10 Gratt. (Va.) 776. *Compare* Jones *v.* State, 5 Sneed (Tenn.), 346. But where the intent is charged to have been intent to defraud the bank purporting to have issued the notes, the bank must be shown to be a real body, capable of being defrauded. People *v.* Peabody, 25 Wend. (N. Y.) 473.

**Testimony of the Engraver** of the American Bank Note Co., that said company engraved the plates from which the genuine notes were printed, and that such plates were in the vaults of the company, is sufficient to show that defendant had no authority to make the plate alleged to be forged. People *v.* D'Argencour, 19 N. Y. Week. Dig. 135.

2. United States *v.* Foye, 1 Curt. C. C. 364.

3. State *v.* Dennett, 19 La. An. 395.

**Forged Check—Presentation in Payment.**—On a trial for forgery, it was proved by the person whose name was signed to the check that it was a forgery; also that defendant presented the check in payment for goods, and obtained a balance in money for it, and that the defendant had been seen with the check. Defendant testified that he never saw the check until arrested, and that he could not read or write. *Held*, that a demurrer to the evidence by defendant was properly overruled. State *v.* Rucker, 93 Mo. 88.

**Same—Forged Indorsement of Payee's Name.**—When it is proved that the indorsement of a payee's name upon a bank check is not in his handwriting, this is *prima facie* sufficient to establish the fact that the indorsement is a forgery. While the signature need not be in the handwriting of the indorser, yet, if it is not, there must be proof that he authorized it to be made. Schroeder *v.* Harvey, 75 Ill. 638.

has been seen in the hands of the prisoner at the place where the crime was laid, has been held to be sufficient to sustain a conviction, in the absence of proof of the place where or the person by whom the note was forged;[1] and the possession of a forged order upon which merchandise was obtained has been held to constitute complete proof that the defendant had either forged or assented in the forgery, and that the fact that the defendant cannot write will not rebut the legal presumption of his guilt.[2]

It has been said that, although there may be no direct evidence that forged paper was uttered, yet that where the defendant passed under an assumed name, and there was some evidence tending to show that he destroyed the notes after his arrest, or that he concealed them so that they have never been seen since, there is sufficient circumstantial evidence to enable the jury to arrive at a result;[3] but in all instances there should be stronger evidence than mere suspicion to warrant a conviction.[4]

1. State *v.* Morgan, 2 Dev. & B. (N. C.) L. 348.

**Promissory Note—Forging of Names of Makers.**—A conviction may be had, under an indictmenf for the forgery of the names of three persons to a note, on proof of the forgery of the signature of either one of them. Duffin *v.* People, 107 Ill. 113.

Court may instruct jury that if they are satisfied that note described in an indictment for forgery in passing it was forged and false, no proof is necessary of the bank upon which it purported to be. McCartney *v.* State, 3 Ind. 353; s. c., 56 Am. Dec. 510.

**Same—Forged Indorsements.**—Under an indictment for uttering a promissory note with the names of several persons upon it as indorsers, all which indorsements are alleged to be forged, it is not necessary to prove all the indorsements to be forgeries. People *v.* Rathbun, 21 Wend. (N. Y.) 509.

On an indictment for forgery of the prosecutor's name as indorser of a promissory note, the prosecutor swore that he had not indorsed the note; that it was not his writing; that he had never authorized the prisoner to sign his name to the note; and that he was himself unable to write hisname, being a marksman. And a son of his also swore that his father was unable to write his name, and was a marksman. The prosecutor also swore that on other occasions he had indorsed for the prisoner, making his mark, and had sometimes authorized the prisoner to write his name. *Held*, that a sufficient *prima-facie* case was thus made out, and that the burden was on the prisoner to show that he was authorized to use or write the prosecutor's name. Reg. *v.* Bannerman, 43 Up. Can. Q. B. 547.

**Same.—The Possession by the Prisoner,** of the forged notes mentioned in the indictment, with other forged notes of the like kind, and the plates, implements, and materials for forging such notes, are *prima facie* evidence that the prisoner was the forger. Spencer's Case, 2 Leigh (Va.), 751.

**Negotiable Instruments—Erroneous Instruction.**—On a prosecution under statute "for countersigning a paper," etc., "issued without authority of law for purposes of money, or for general circulation," a charge that the defendant could not be convicted "unless there was proof by an eye-witness to the signature, or proof that defendant admitted the signature to be his, or that the signature was in his handwriting" is erroneous. Jordan *v.* State, 52 Ala. 188.

2. State *v.* Lane, 80 N. C. 407.

**An Order** for one dollar, payable to the prisoner, and written in pencil, the amount being expressed in a figure one with two o's, thus, $1.00, was delivered to him in payment of a debt for that sum, which was all that the drawer owed him. He presented it to the drawee for payment, and it then had a figure eight in place of the figure one, and he received payment accordingly. *Held*, (1) that with these facts and the order before them, the jury were justified in finding that the one had been altered to an eight, though a witness using a microscope, testified that he could discern no trace of any alteration; (2) that the jury cannot infer that the alteration was made by the prisoner, there being evidence that he could write, and no evidence to implicate any other person. Mitchell *v.* State, 64 Ga. 448.

3. State *v.* Chamberlain, 89 Mo. 125.

4. Thus, it has been held that, to warrant

**10. Question for Jury.**—Whether the instrument in question is a forgery is a matter to be determined by the jury, and for that reason may be given to them without previously being shown to be such.[1]

**XII. Instructions.**—On a trial for forgery or the passing of a forged writing, the judge, in his charge to the jury, should explain the legal constituents of the offence,[2] and that there must be an

the court to pronounce a grant of land a forgery the execution of which is sworn to by witnesses, there should be stronger ground than mere suspicion founded on appearance of signatures, loss of collateral papers from the official files, and the like. Pico *v.* United States, Hoffm. L. C. 188; United States *v.* Rico, Hoffm. L. C. 161.

1. Mosher *v.* State, 14 Ind. 261; State *v.* Jefferson, 39 La. An. 331; Hess *v.* State, 5 Ohio 5; s. c., 22 Am. Dec. 767; State *v.* Shelton, 7 Humph. (Tenn.) 31.

Thus, whether bank notes circulate as currency is a question of fact, which the court cannot judicially know. State *v.* Shelton, 7 Humph. (Tenn.) 31. Whether a bank note offered in evidence on an indictment for forgery be subscribed H. or N. Biddle is a question of fact, and the decision of the jury cannot be raised on error; certainly not unless the note accompanies the record. Hess *v.* State, 5 Ohio, 5; s. c., 22 Am. Dec. 767. And whether a forged order was or was not used for the purpose of drawing money is a matter of fact within the province of the jury. State *v.* Jefferson, 39 La. An. 33.

2. Ham *v.* State, 4 Tex. App. 645.

But it is unnecessary, after explaining to the jury the offence of forgery, to define the words "knowingly" and "pass." Peterson *v.* State (Tex.), 7 S. W. Rep. 530.

**Forging and Uttering Forged Check.**—While forging a check and uttering it when forged are separate and distinct offences, yet where an indictment has but one count and charges one with forging a check, and then adds that the same person uttered it, it is to be regarded as charging him with but the one offence of forgery; and the evidence being sufficient to support a conviction for forgery, the defendant is not prejudiced by the alternative form of an instruction to the jury,—to find him guilty if they believe he forged or uttered the forged check—the punishment under the statute being the same for forging a check as for uttering a forged check. Rawlins *v* Com., Ky., 1886.

**On Indictment for Making and Uttering Forged Note.**—On the trial of an indictment for making and uttering a forged promissory note, the judge instructed the jury that, to constitute the offence of forgery, there must be an intent to defraud; that it was not essential that any person was actually defrauded, but there must be a possibility of some person being actually defrauded; that if any person signed the name of A (the person purporting to be the maker) without his authority, and passed it as the note of A, expecting to be able to meet it when due, it would be forgery. *Held*, that these instructions were to be taken together, and that the defendant had no ground of exception. Com. *v.* Henry, 13 Alb. L. J. 405.

An instruction to the jury, stating the facts necessary to be proved to sustain a charge of uttering and publishing a forged promissory note, which does not expressly state that knowledge by the defendant of the forgery is a necessary element of said crime, is not ground for reversal if the charge, taken as a whole, correctly states the law, and where no prejudice could have resulted to the defendant. State *v.* Calkins (Iowa), 34 N. W. Rep. 777.

**On the Trial of One for the Forgery of a Note,** the defendant testified that the signatures to the note were genuine, but that he procured them by artifice, fraud, and deception, while the alleged makers denied that they ever signed the same. The defendant asked this instruction, which was refused: "If the jury, having heard this testimony, and weighing it with the other evidence in the case, have a reasonable doubt that the statement of the defendant in regard to the making and signing of the note in controversy is or is not true, they must acquit him." *Held*, properly refused, as calculated to mislead. Duffin *v.* People, 107 Ill. 113.

**Defendant Not Present at Forgery.**—On the trial of a defendant charged in an indictment with having forged an instrument, where evidence has been given tending to show that the defendant was present when the forged instrument was made, it is error for the court to refuse to instruct the jury that, if it be found by them that the defendant was not so present, he cannot be convicted of the offence charged in the indictment; or to instruct the jury that, if it be found that the forged instrument was made by another person, by the procurement of the defendant, al-

intention to damage or defraud on the part of the defendant.[1] And on the trial of an indictment for attempting to pass a forged instrument, it is proper for the court to instruct the jury that the said instrument, had it been genuine, would have created a pecuniary obligation.[2]

Where the instrument which it was alleged was forged is ambiguous, it is proper to charge that, if the instrument is other than that set forth in the indictment, the jury must acquit.[3]

**XIII. VERDICT.**—The verdict of the jury must be definite and certain; and when the indictment contains more than one count, on one or more of which the defendant is acquitted, and convicted on another or others, the verdict must distinctly state on which counts he is acquitted and on which convicted.[4] The jury must find that the paper was forged or published as true, with intent to defraud and damage, or the verdict will be a nullity.[5] Thus, it has

though he was not present at the forgery, he might be convicted of the offence charged in the indictment. Chidester *v.* State, 25 Ohio St. 433; s. c., 2 Am. Cr. Rep. 153.

An instruction by the court, on a trial for forgery, that, in order to find defendant guilty, they must find, without a reasonable doubt, that he forged the check himself, or procured it to be forged, or was present aiding in the forgery, *held*, correct. State *v.* Rucker, 93 Mo. 88.

An instruction that the jury must acquit the defendant of the crime of forgery unless they found that he forged the check, but ignoring the principle that he was alike guilty if he aided or abetted some one else in committing the forgery, *held*, properly refused. State *v.* Rucker, 93 Mo. 88.

**Setting Out Crime—Reference to Indictment.**—On the trial of one for forgery and passing of a forged note, it is not erroneous to refer to the indictment, in the people's instructions, for a description of those crimes, instead of setting them out in the language of the statute. If the accused desires to have a more specific definition of the several offences, he should ask an instruction for that purpose. Parker *v.* People, 97 Ill. 32.

1. Cohen *v.* People, 7 Colo. 274.

On an indictment for forgery, the evidence tended to show that the defendant had been authorized to write the alleged forged instrument by the person in whose name it had been drawn. *Held*, that the court should have charged that, if the jury believed from the evidence that the defendant had such authority to write and sign the instrument, or if they entertained a reasonable doubt of such authority, they should acquit. Williams *v.* State (Tex. App.), 6 S. W. Rep. 531.

**Reason to Believe Instrument Forged.**—Under a statute punishing the offence of uttering and publishing forged instruments and knowing them to be forged, it is error to charge that the accused should be convicted if it was found that he uttered the instrument having reasonable cause to believe it was forged. Carver *v.* People, 39 Mich. 786.

2. Williams *v.* State (Tex. App.), 6 S. W. Rep. 363.

3. McGarr *v.* State, 75 Ga. 155.

**Order—Doubt as to Genuineness of.**—Where the forgery alleged consisted in the alteration of an order for $3.90 into an order for $13.90, and from the evidence it was doubtful whether the drawer of the order had not by mistake written the order as it appeared, *held*, that, in failing to instruct the jury, in substance, that if they believed from the evidence that the appellant did not himself alter the order, then he could not be convicted under either count of the indictment, the trial court failed to charge sufficiently the law applicable to the facts of the case. Bell *v.* State, 21 Tex. App. 270.

4. Thus, in the case of Cocke *v.* Com., 13 Gratt. (Va.) 750, the defendant was indicted in two counts, one for forging a note and the other for forging an indorsement of a note, and the jury returned a verdict of not guilty on the first count, and "on the second count—namely, that of uttering a negotiable note knowing it to be forged—we find the prisoner guilty and affix the term of imprisonment," etc., was held too uncertain to warrant a sentence.

5. Anderson *v.* State, 65 Ala. 553; Couch *v.* State, 28 Ga. 367.

Where each count in the indictment charges forgery in the second degree, a general verdict of guilty, not specifying

been held that a verdict of "guilty of passing a paper knowing it to be a forgery" is insufficient.[1]

**XIV. SENTENCE.**—In a sentence for forgery, the conviction should be correctly recited; and where it is not, it may be corrected on appeal.[2]

**XV. APPEAL.**—The question of appeal, on trials for forgery or the uttering of forged instruments, is governed by the rules applicable to appeals in criminal cases generally.[3]

**XVI. PUNISHMENT.**[4]—At common law, one convicted of forgery was subject to corporal punishment;[5] in this country, imprisonment in the penitentiary or in the county jail is substituted in lieu thereof.[6]

the degree, is sufficient. Wright *v.* State, 79 Ala. 262.

1. Couch *v.* State, 28 Ga. 367.

But it is held, in State *v.* Fuller, 1 Bay (S. C.) L. 245; s. c., 1 Am. Dec. 610, where a special verdict stated the passing of a forged note, knowing of the forgery, though he did not find it was done with fraudulent intention, it was held sufficient to warrant a judgment of conviction, as the fraudulent intention was necessarily inferred from knowingly making or passing the forged instrument. See Page *v.* Com., 9 Leigh (Va.), 683.

2. Thus, where it was recited in the sentence that the conviction was for forgery, and the defendant was only convicted for knowingly passing as true a forged instrument, the error was corrected on appeal, so as to make the sentence conform to the conviction. Peterson *v.* State (Tex. App.), 7 S. W. Rep. 530.

3. See, *ante*, tit. CRIMINAL PROCEDURE, XXIII, "Error and Appeal," vol. 4, Am. & Eng. Encyc. of L. pp. 882–886.

An indictment contained two counts, to the first of which not guilty was pleaded; the second was quashed. The cause was submitted to the court and judgment rendered for the defendant. *Held*, that a writ of error for the state could be brought only on the judgment quashing the second count. State *v.* Dark, 8 Blackf. (Ind.) 526.

Where the question was whether the signature to the note in suit was the genuine signature of the defendant, or a forgery, and the instructions presented that question fairly to the jury, and there was evidence tending to support the verdict, it will not be disturbed on appeal. Griffith *v.* Hanks, 91 Mo. 109.

4. As to punishment in criminal cases, see, *ante*, tit. CRIMINAL LAW, XIV, "Punishment," vol. 4, Am. & Eng. Encyc. of L. pp. 721–728.

5. **Forging Notes Payable, Not in Money,** but in corporation bills, is merely a misdemeanor at common law. Atherton's Case, 1 City H. Rec. (N. Y.) 159.

A statute making fine and imprisonment the punishment for forgery is an amelioration of the common-law punishment. Martin *v.* State, 24 Tex. 61.

**Corporal Punishment.**—It is said, in State *v.* Williams, 2 Rich. (S. C.) L. 418; s. c., 45 Am. Dec. 741, that, under the South Carolina statute in force in 1846, a person convicted of the crime of forgery must be punished by fine and imprisonment, although at the time of conviction the penalty was death, where, after the conviction, a statute was passed providing such punishment for persons convicted of that offence.

6. See Johnson *v.* State, 2 Ind. 652; People *v.* Brigham, 2 Mich. 550; State *v.* Williams, 86 N. C. 741; Martin *v.* State, 24 Tex. 61; United States *v.* McCarthy, 4 Cr. C. C. 304; United States *v.* Irwin, 5 McL. C. C. 178.

The act of April 30, 1790, providing that the forgery of any "certificate, indent, or other public security" shall be punished by death, was repealed by the Crimes Act, of March 3, 1825, § 17, which declares that the punishment of the same offences on conviction shall be fine and imprisonment. United States *v.* Irwin, 5 McL. C. C. 178.

The act of March 2, 1831, usually called the Penitentiary Act of the District of Columbia, was not intended to change the description of the offence of forgery as defined in the common law or statute laws of Maryland, but to designate its punishment. Hence, certain kinds of forgery made felony by the latter statute are punishable under § 11 of the Penitentiary Act, which makes the same offence a misdemeanor. United States *v.* McCarthy, 4 Cr. C. C. 504.

**Discretion of Court.**—Defendant was convicted of the crime of forgery in the first degree, charged as a second offence, the first offence being shown to have been for-

## FORMA PAUPERIS.

I. Definition, 544.
II. At Law and in Equity, 544.
III. Who may Sue or Defend in Forma Pauperis, 545.
1. *General Rule*, 545.
2. *Infants*, 545.
3. *Married Women*, 546.
4. *Executors, etc.*, 546.
5. *Non-residents*, 546.
IV. Liability for Interlocutory Costs, 546.
V. Liability for Costs Made Before Admitted to Plead as a Pauper, 547.
VI. Can Recover Costs Against an Executor, 547.
VII. Sufficient Affidavit, 547.
VIII. When Application Can be Made, 547.
IX. When Can be Dispaupered, 548.

**I. Definition.**—In the character or form of a poor man. When a person is so poor that he cannot bear the charges of suing at law or in equity, upon making an oath that he is not worth $5, and bringing a certificate from a counsellor at law that he believes him to have a just cause, he is permitted to sue *in forma pauperis*; that is, he is allowed to have original writs and subpœnas gratis and counsel assigned him without fee.[1]

**II. At Law and in Equity.**—The right to sue or defend in the form of a pauper does not exist at common law, and exists in actions at law only by virtue of statutory enactment.[2] And it

gery in the third degree. *Held*, that, as the subsequent crime was such that upon a first conviction the offender might have been, in the discretion of the court, punishable by imprisonment for life, it being the second conviction, the life penalty was no longer discretionary, but imperative. People *v.* Raymond, 32 Hun (N. Y.), 123.

To bring a case within the provisions of § 688, Code Crim. Proc., it is not necessary that the second offence shall be of the same character or grade as the first. People *v.* Raymond, 19 N. Y. Week. Dig. 137.

1. Bouv Dic., "*In Forma Pauperis.*"

And paupers—that is, such as will swear themselves not worth £5—are, by Statute 11 Hen. VII. c. 12, to have original writs and subpœnas gratis and counsel and attorney assigned them without fee, and are excused from paying costs when plaintiffs by Statute of Hen. VII. c. 15; but shall suffer other punishment at the discretion of the judges. And it was formerly usual to give such paupers, if nonsuited, their election either to be whipped or pay the costs, though that practice is now disused. It seems, however, agreed that a pauper may recover costs, though he pays none. 3 Bl. Com. 400.

This subject has lost a good deal of its former interest, in the United States, from the fact that many States, like that of *Ohio*, permit any one who resides within the jurisdiction of the court to bring a suit originally, on cross-petition or by interpleading, without question as to costs. But it never was the practice, so far as the decisions show, to assign counsel for the plaintiff or defendant.

2. In Campbell *v.* Chic. & N. W. R. R., 23 Wis. 490, where the statute of *Wisconsin* provided that a justice of the peace, in all civil actions where the plaintiff is a nonresident of the county, either before or after the process shall issue, shall require the plaintiff to give security for the costs, and may, at his discretion, require a like security of all other plaintiffs; and if the plaintiff refuse or neglect to give such security, the action shall be dismissed. In this case, on the return day of the summons, after the parties had appeared and put in their pleadings, the defendant demanded that the plaintiff give security for costs. The cause was adjourned a week from the 19th day of of February, 1868, to the 26th. On the 26th it was again adjourned, to the 27th, when, on the hour of adjourment, the plaintiff, failing to give security for costs, the action was dismissed. The court says: "The statute above quoted would seem to give the justice discretion in the matter. If in any case we could review the exercise of that discretion, and reverse his action, it is clear that this could only be done when there was some abuse in its exercise. Nothing of this kind appears upon this record. The plaintiff had ample time to give the security; but he could not give it. He, however, made an affidavit, in which he stated that, although

has been doubted whether the original English statute permitted the right to any one except a plaintiff.[1] But in equity, when the matter of costs rests with the judge, it may exist without a legislature enactment; for it has been said that it is a general rule that there is no sort or condition of persons who may not sue in the court of chancery: and this rule extends to the most distressed pauper,[2] and that without his being required to give security for costs.[3]

**III. Who May Sue or Defend in Forma Pauperis.**—1. *General Rule.*—It was in consequence of the provision of Stat. 11 Hen. VII. c. 12, the practice of the courts at law, adopted by the equity courts, to admit all persons to sue *in forma pauperis* who could swear that they were not worth £5, except their wearing apparel; and this practice has been adopted in equity.[4] All persons may sue as paupers in admiralty.[5]

2. *Infants.*—In a proper case, an infant will be permitted to sue by a next friend *in forma pauperis*, in an *ex parte* motion, supported by affidavit that the infant cannot obtain a substantial person to act as next friend.[6]

a resident of the city of Oshkosh, he was a stranger there, and utterly unable, on account of his poverty, to give security. We have no statute which authorizes a person to sue *in forma pauperis*. It seems like a hardship that a poor person should not be able to litigate; but this is a matter for the legislature to regulate. . . We are unable to say that the justice acted unwisely."

As will be seen upon noticing the quotation from Blackstone in the preceding section, the application for the right was first recognized by statute.

And wherever it does exist at law in the United States, it is upon a statute of the State in which the action is being tried. The decisions upon the subject in the higher courts are very meagre.

1. It is at least doubtful whether a party is to be permitted to defend as a pauper in any case. In *England*, the right to sue and defend in chancery, *in forma pauperis*, depends upon the rules of the court. The Statute of 11 Hen. VII. c. 12, only extends to suits prosecuted in the common-law courts. And it has there been held that a party is not entitled to defend as a pauper, except in the particular cases provided for in a subsequent act of Parliament (Barnes' Notes, 328; 5 Brac. Abr. tit. "Pauperis," B., p. 299). The statute of this State (*New York*) (1 Rev. Laws, 524) provides for the prosecutions of suits by poor persons in chancery as well as at common law, but makes no defence of a suit *in forma pauperis*. In order to obtain that privilege, the defendant would be compelled to swear he was not worth, and had not within his possession or within his power or control, property or other means to the amount of $5, and he would not, as the case of a complainant, be permitted to except to the subject-matter of the litigation. In Spencer *v.* Bryant (11 Ves. 49), Lord Eldon decided that an affidavit of the defendant that he was not worth $5 except the matter in question, was not sufficient to authorize him to defend *in forma pauperis*. Chan. Walworth, in Brown *v.* Story, 1 Paige (N. Y.), 588, 589.

The right is equally extended to defendants. 1 Dan. Ch. Pl. 37–154.

2. 1 Dan. Ch. Pl. 5.

3. Feneley *v.* Mahoney, 21 Pick. (Mass.) 212; 1 Dan. Ch. Pl. 37.

Indeed, under peculiar circumstances, courts of equity, which are said to delight in justice and mercy, will permit poor persons to sue *in forma pauperis*, where they are unable to carry on such suits from want of pecuniary means; and then counsel will be assigned them by the court, and they are exempted from the payment of ordinary fees. Story Eq. Pl. 57; 1 Harris Ch. Pr. 389; Cooper Eq. Pl. 24.

4. Story Eq. Pl. § 50; 1 Harr. Ch. Pr. 389, 390; Isnard *v.* Cazeaux, 1 Paige (N. Y.), 39.

5. Wheatley *v.* Hotchkiss, 1 Sprague (U. S.), 225.

6. 1 Dan. Ch. Pl. (4th Ed.) 39; Lindsey *v.* Tyrell, 2 De G. & J. 7; 24 Beav. 124; 3 Jur. (N. S.) 1014.

3. *Married Women.*—It is held that a *feme covert*, by her next friend, cannot sue *in forma pauperis.*[1] But a husband and wife may obtain an order, of course, to sue *in forma pauperis* in respect to the wife's reversionary interest.[2] And where a woman was ordered to be examined *pro interesse suo*, respecting a claim set up by her to some lands taken under sequestration, but was unable from poverty to make out or support her right, liberty was given her to do so *in forma pauperis.*[3] And if she is unable to procure any substantial person to act as her next friend, she can be permitted to sue as a pauper.[4]

4. *Executors, etc.*—An executor or administrator cannot sue or be sued *in forma pauperis*,[5] unless the person sustains the mixed character of executor and beneficiary.[6] An exception has been made by allowing an executor to proceed *in forma pauperis* for the single purpose of clearing a contempt incurred in the cause.[7]

5. *Non-residents.*—It has been decided in several cases that non-residents cannot sue or defend *in forma pauperis.*[8]

**IV. Liability for Interlocutory Costs.**—A party suing as a poor person is chargeable with the costs of setting aside his proceedings for irregularity, or for contempt or of expunging impertinent or scandalous matter, in the same manner as other suitors,[9] unless

Indeed, any other rule would amount to a denial of justice to the children of poor persons, who might become entitled to property, and yet be precluded from asserting their right because their father, who is the proper person to be their next friend, by reason of his circumstances could not be so without giving security for costs, which he might not be able to procure. St. John *v.* Earl of Besborough, 1 Hogan, 41; Crandall *v.* Slaid, 11 Metc. (Mass.) 288. *Contrary*, Fulton *v.* Roosevelt, 1 Paige (N. Y.), 178.

1. Pennington *v.* Alvin, 1 S. & S. 264; Jones *v.* Faucett, 2 Phil. 218; Stevens *v.* Williams, 1 Sim. (N. S.) 545; Wilton *v.* Hill, 2 De G. M. & G. 807; 1 Dan. Ch. Pl. 37.

2. Pitt *v.* Pitt, 1 Sim. & G. App. 14; 17 Jur. 571.

Upon a proper application, a wife may be permitted to file a bill against her husband for a separation, *in forma pauperis*. But this will not be done until the court has ascertained, by the report of a master, that she has probable cause for filing such bill. Robertson *v.* Robertson, 3 Paige (N. Y.), 387.

3. James *v.* Dore, 2 Dick. 788.

Under the enabling statutes, a *feme covert* would be placed in the same position as a man.

4. Robertson *v.* Robertson, 3 Paige (N. Y.), 387; Page *v.* Page, 16 Beav. 588; Coulsting *v.* Coulsting, 8 Beav. 463; Ward *v.* Ward, 2 Dev. Ch. (N. Cas.) 553; 1 Dan. Ch. Pr. 38.

5. Paradici *v.* Shepherd, 1 Dick. 136; Beames on Costs, 79; Appendix. No. 21; Oldfield *v.* Cobbett, 1 Phil. 613; Fowler *v.* Davies, 16 Sim. 182; St. Victor *v.* Hevereax, 6 Beav. 584.

6. Thompson *v.* Thompson, H. T. 1824; Rogers *v.* Hooper. 1 W. R. 474; Everson *v.* Matthews, 3 W. R. 159; Parkinson *v.* Chambers, 3 W. R. 34.

7. Oldfield *v.* Cobbett, 1 Coll. 139.

8. Christian *v.* Gouge, 10 Abb. N. C. (N. Y.) 82; anon., 10 Abb. N. C. (N. Y.) 80. See Porter *v.* Jones, 68 N. Car. 320; 1 Dan. Ch. Pl. 37.

9. The counsel for the complainant, upon the argument asked that his client might not only be excused from the payment of the costs of the application, but also from the payment of the costs of the further answer, which she is bound to pay by the terms of the order allowing the amendment. Although a party duly admitted to prosecute his suit as a poor person cannot be charged with the general costs of the cause in favor of the adverse party, he may be charged with the interlocutory costs for any irregularity in the proceedings on his part, or for the expense of expunging scandalous or impertinent matter from any of his proceedings, or for the costs of his contempts. 1 Newl. Chan. Pr. 603; Murphy *v.* Oldis, 2 Moll. R. 475. "If he were exempt from the payment of

he makes a new application to the court.[1] It has long ago been held that a pauper must pay the costs of scandal in his answer.[2]

**V. Liability for Costs Accrued Before He is Permitted to Defend as a Pauper.**—When a party, pending the suit, is admitted to prosecute a defence *in forma pauperis*, he is not excused from the payment of the costs which accrued before he was admitted to defend in that manner.[3]

**VI. Can Recover Actual Costs in Suit Against an Executor.**—A plaintiff suing *in forma pauperis*, and recovering a legacy against executors, is entitled to his actual costs out of the assets.[4]

**VII. Sufficient Affidavit.**—An affidavit of plaintiff, stating that he is unable to give security for, or to make a deposit sufficient to cover, all the costs, but that he cannot swear that he is unable to pay the costs as they accrue, that he has paid all the accrued costs except a small balance to cover which he has made a deposit with the clerk, has been held sufficient.[5] And where the oath has been administered beyond the jurisdiction of the court, it was held sufficient.[6] The affidavit must be sworn to by the pauper himself.[7]

such costs, the adverse party would have no protection against his irregularities in practice. And it is sufficiently burdensome to the defendants to be compelled to litigate their rights with those who are not chargeable with the ordinary costs of the suit, although such suit turns out to be wholly unfounded. Neither can I relieve the complainant from the payment of the costs of answering these amendments, of which she has assumed the payment, by the order, of entered by her solicitor as a condition of the amendment. Before the complainant can be admitted to prosecute as a poor person, he must, upon oath, present a *prima facie* case of right against the defendant. And it would be unreasonable to permit him, after the defendant has put in a proper answer to the original bill, to amend as a matter of course, and to insert any new matter which he might think fit, without paying the extra costs of a further answer. In such a case, if he thinks proper to amend under a common order, it must be upon the payment of the costs of the further answer. . . ." Chan. Walworth, in Richardson *v.* Richardson, 5 Paige (N.Y.), 58. See Bolton *v.* Gardner, 3 Paige (N. Y.), 279.

1. Richardson *v.* Richardson, 5 Paige (N. Y.), 59.

2. Ld. Eldon, in Rattray *v.* George, 16 Ves. 234.

3. "I have already had occasion to say that applications of this kind ought not to be encouraged in this country, where, if a party has a just claim or a valid defence, solicitors and counsel are always ready to assist him on receiving the trifling disbursements which must be paid to other officers of the court. A claim to be excused from paying costs already accrued has never been allowed. Mosel. Rep. 68; Wilkinson *v.* Belcher. 2 Brown Ch. Cas. 272. Even if the party is admitted to prosecute as a pauper, he is liable for the costs of any irregular proceedings on his part. Howe *v.* Ailoff, Tothill, 139." Walworth, Chan., in Brown *v.* Story, 1 Paige (N. Y.), 588.

4. The chancellor said the cases had been reviewed in Rattray *v.* George, 16 Ves. 232; and there was found to be a great variety of contradictory decisions upon the subjects of pauper costs, and the result was that the court had a discretion in each case. Williams *v.* Wilkins, 3 Johns. Ch. (N. Y.) 65.

5. Long *v.* McCauley (Tex. 1887), 3 S. W. Rep. 690.

6. It is assigned for error that the court erred in refusing to dismiss the suit in Knox county, the oath *in forma pauperis* having been administered in Greene county. The form of the oath prescribed is: "I, A B, do solemnly swear that, owing to my poverty, I am not able to bear the expenses of the action I am about to commence. . . ." T. & S. Code, § 3192. But there was no error in the court refusing to dismiss. Knoxville Iron Co. *v.* Smith (Tenn. 1887), 5 S. W. Rep. 438.

7. Wilkinson *v.* Belshire, 2 Bro. C. C. 272.

**VIII. When Application Can be Made.**—An application can be made at any time. A stay of proceedings granted when an order was first made will not deprive the court of making a second order.[1] It may be filed at any time after the bill has been filed or summons issued;[2] but the person applying will be liable for all costs incurred before application.[3] And it is doubtful if, after a dismissal of a former suit, a plaintiff will be permitted to sue again in the same matter, *in forma pauperis*, without paying the costs of the first suit.[4]

**IX. When May be Dispaupered.**—As a party may be admitted to sue *in forma pauperis* at any time during the suit, so if at any time it is made to appear to the court that he is of such ability that he ought not to be allowed to sue or continue to sue *in forma pauperis*, the court will dispauper him.[5] Likewise, if he is guilty of vexatious conduct in the suit,[6] or delay vexatiously made;[7] although the court always proceeds very tenderly in such points.[8] But the fact that the pauper has been supplied with money by a charitable subscription, for the purpose of assisting him in the conduct of the suit, is not sufficient.[9] The application to dispauper is made by special motion on notice,[10] and should be made without delay.[11]

**FORMER ACQUITTAL.**—See JEOPARDY.

**FORMER ADJUDICATION.**—See RES ADJUDICATA.

**FORMER CONVICTION.**—See JEOPARDY.

**FORMER JEOPARDY.**—See JEOPARDY.

**FORMER RECOVERY.**—See RES ADJUDICATA.

1. The trial court granted an order requiring plaintiff to give security for costs and staying proceedings until it was given. It was held that the court did not lose jurisdiction by such stay to make an order permitting plaintiff to sue as a poor person, and that such order was a disposition of a motion pending to dismiss for failure to give the required security. Sherman *v.* Pope (N. Y. 1887), 12 N. E. Rep. 715.

2. Parkinson *v.* Chambers, 3 W. R. 34; Wellesley *v.* Mornington, 18 Jur. 552.

3. Smith *v.* Payson, 2 Dels. & S. 490; Church *v.* Marsh, 2 Hare, 652; Ballard *v.* Catling, 2 Keen, 606.

4. Corbert *v.* Corbert, 16 Ves. 407; Brook *v.* Alcock, 20 (March, 1884) V. C. E.; 1 Smith Ch. Pr. 555; Chitty Arch. 1292.

5. Romilly *v.* Grint, 2 Beav. 186; Mather *v.* Shelmerdine, 7 Beav. 267; Butler *v.* Gardiner, 12 Beav. 525; Perry *v.* Walker, 1 Coll. 229; Goldsmith *v.* Goldsmith, 5 Hare, 125.

6. 2 Chitty Arch. Pr. 1280.

7. Wagner *v.* Mears, 3 Sim. 127; Perry *v.* Walker, 1 Coll. 229.

8. Whitlocke *v.* Baker, 13 Ves. 511; Daintree *v.* Haynes, 12 Jur. 564; Steele *v.* Mott, 20 Wend. (N. Y.) 679.

9. Corbett *v.* Corbett, 16 Ves. 407.

10. 3 Den. Ch. (N. Y.) 225.

11. St. Victor *v.* Devereux, 9 Jur. 519; Parkinson *v.* Hanbury, 4 De G. M. & G. 508. Authorities for *Forma pauperis:* Dan. Ch. Pl. (4th Ed.); Story Eq. Pl.

## FORMER SUIT PENDING.

1. General Rule, etc., 549.
2. The Action Must be Prior, 550.
3. It Must be Still Pending, 551.
4. It Must be in a Competent Court, 551.
5. It Must be Capable of Being Made Effective, 551.
6. It Must be Between the Same Parties, 552.
7. It Must be for the Same Cause and Relief, 552. [Courts, 553.
8. Suits in State and National
9. Suit in Another State, 554.
10. Suit in Foreign State, 554.
11. Actions at Law and Equity, 554.
12. Pendency of an Appeal, 555.
13. Pendency Writ of Error, 555.
14. How Proven, 555.

**1. General Rule, etc.**—The general rule is that the pendency of an action commenced between the same parties, and for the same cause of action and relief, is ground for abatement of a subsequent suit.[1] And it is a good plea, in abatement of an action of *assumpsit*, that the defendant had previously commenced a suit against the plaintiff, in which the matters mentioned in the plaintiff's declaration might be set off.[2] But the fact that another action is pending between the parties, although founded on the same indebtedness or liability, does not abate an action of common-law cognizance, unless the prior action is also a common-law action of the same nature as the second one. While a double satisfaction is never allowed, concurrent and cumulative remedies are not forbidden.[3] Thus, proceedings *in rem* and *in personam* to collect the same demand do not necessarily interfere until satisfaction is obtained in one.[4] Nor do actions on a joint liability, and on a several liability, in respect to the same debt.[5] Nor do proceedings

1. Humphries *v.* Dawson, 38 Ala. 199; Prosser *v.* Chapman, 29 Conn. 515; Rogers *v.* Haskins, 15 Ga. 276; McKinsey *v.* Anderson, 4 Dana (Ky.), 62; Tracy *v.* Reed, 4 Blackf. (Ind.) 56.

The courts are of the opinion that, where it appears by inspection that the cause of action in the second suit is, in a material and substantial part, the same as in the first, although other causes of action are inserted in the second, it is, within the meaning of the rule of law of practice, an action instituted for the same cause of action, and is a good cause of abatement. Buffum *v.* Tilton, 17 Pick. (Mass.) 511.

The ground upon which courts proceed, in abating a subsequent suit upon the ground of a pendency of a former suit between the same parties and for the same cause, is that the subsequent suit is unnecessary, and is therefore vexatious. But the modern practice is, not to infer this from the mere pendency of the prior suit, but to inquire into the actual circumstances of the two cases, and then determine as matter of fact whether the second suit is unnecessary. State *v.* Dougherty, 45 Mo. 294.

If, at the commencement of an action, there was another action pending and undecided, brought by the same plaintiff against the same defendant, and for the same cause of action, the former must abate pending the latter. Fisk *v.* Atkinson (Cal. 1886), 10 Pac. Rep. 374.

2. Schenck *v.* Schenck, 10 N. J. Law, 276. But see New England Screw Co. *v.* Bliven, 3 Blatchf. (U. S.) 240.

The pendency of another action in which the parties to the one at bar are defendants, and in which the plaintiff in the suit at bar might, by cross-petition, obtain the relief sought in his suit, is not a ground for abatement of the latter suit. Osborn *v.* Cloud, 23 Iowa, 104.

Where two or more tribunals have concurrent jurisdiction over the same subject-matter and the parties, a suit commenced in any one of them may be pleaded in abatement to an action for the same cause in any other. Shelby *v.* Bacon, 10 How. (U. S.) 56.

3. People *v* Judge, etc., 27 Mich. 406.

4. Toby *v.* Brown, 6 Eng. 308; The Bengal, Swab., 469; The John & Mary, 6 Eng. 471; Nelson *v.* Couch, 15 C. B. N. S. 99.

5. Sowter *v.* Dumston, 1 Man. & Ry.

to forfeit shares, and actions for calls.[1] Nor do proceedings in bankruptcy,[2] or on a judge's order for payment,[3] warrant staying a common-law action for the debt. Nor will proceedings other than in common-law courts,[4] unless they are identical in scope with the common-law suit,[5] warrant a common-law suit in staying a pending action.[6]

**2. The Action Must be Prior.**—The fact that another action has been subsequently commenced, although between the same parties and for the same cause, is not a ground for abatement.[7] When two suits are commenced at the same time, each one abates the other.[8]

508; Wise *v.* Prowse, 9 Price, 393; Henry *v.* Nash, 1 Exch. 826; Giles *v.* Tooth, 3 C. B. 665; Newton *v.* Belcher, 9 Q. B. 612; Newton *v.* Liddiard, 9 Q. B. 616.

1. Great Northern R. Co. *v.* Kennedy, 4 Exch. 417.

2. Covington *v.* Hogarth, 7 M. & G. 1013.

3. Wade *v.* Simeon, 1 C. B. 610.

4. Ostell *v.* Le Page, 21 Eng. L. & Eq. 640; Miles *v.* Inhabitants of Bristol, 3 B. & A. 945.

5. Dicas *v.* Jay, 6 Bing. 519; Foreman *v.* Jeyes, 5 B. & A. 835; Smidt *v.* Ogle, 6 Taunt. 74; Laughton *v.* Taylor, 6 M. & W. 695.

6. The Ann & Mary, 2 W. Rob. 189; Genl. Steam Navigation Co. *v.* Tonkin, 4 Moore, 341. See Granger *v.* Judge, etc., 27 Mich. 411, where these cases are all reviewed. Hence, a common-law action to recover for services in fitting out a vessel for sea, and for wages as master of the voyage, is not abated by, nor should it be stayed on motion on account of the pendency of an action *in rem* in the district court of the United States, to enforce the payment of the same demand against the vessel. Granger *v.* Judge, etc., 27 Mich. 411.

7. Renner *v.* Marshall, 1 Wheat. (U. S.) 215; Buffum *v.* Tilton, 17 Pick. (Mass.) 510; Webster *v.* Randall, 19 Pick. (Mass.) 13; Wood *v.* Lake, 13 Wis. 84; Nicholl *v.* Mason, 21 Wend. (N. Y.) 339.

To defeat a plea in abatement resting on the pendency of another action of the same cause, commenced at the same time, the plaintiff may show that it was commenced on a subsequent day, notwithstanding both writs bear date the same day. Davis *v.* Dunklee, 9 N. H. 545.

8. Beach *v.* Norton, 8 Conn. 71; Davis *v.* Dunklee, 9 N. H. 545; Haight *v.* Halsey, 3 Wend. (N. Y.) 258; Morton *v.* Webb, 7 Vt. 124.

It is immaterial whether the first suit is pending at the time of the defendant's pleading in abatement of the second. If the first was pending when the second was commenced, the latter may be abated, as being *vexatus ab initio*. And, on principle, it seems that this plea can never prevail, except in cases where the latter suit is vexatious. Hence, where it appears that the first action must have been ineffectual, the courts of *Connecticut* have often determined that its pendency shall not abate the second, because in such case the latter is not vexatious. This appears to be the sound and reasonable doctrine upon the subject, and will perhaps reconcile the apparent diversity of decisions in the courts of the different States and in England. When the plaintiff at the same time commences two suits in the same form, for the same cause of action, and causes the defendent to be arrested and held to bail in both, or his goods to be attached in both, it is at once apparent that his conduct is vexatious and oppressive, and a palpable abuse of process of the court, and justice forbids that he should derive any benefit from either of his suits. But where the record shows apparent good faith in the commencement of the second suit, and that the first was discontinued before the defendant is called upon to plead in the second, so that he is not unnecessarily harassed by the defence of the two suits for the same cause at the same time, the second suit cannot be deemed vexatious, and cannot therefore be abated by the pendency of the prior suit when it was commenced. On the contrary, to hold the second suit abatable for that cause, would be to make the law favor, rather than abhor, a multiplicity of suits, inasmuch as it would render another action necessary, when the plaintiff's claim was a meritorious one. In the present case it appears from the record, that on the same day the plaintiff commenced an action against the defendant by declaration, under the statute, and also sued out an attachment against his goods and chat-

**3. Suit Must be Still Pending.**—A second action will not be abated on the ground that a previous action has been brought for the same cause, where the first suit has been dismissed before the plea to the second was filed.[1]

But the fact that the first suit is dismissed after the plea of abatement has been interposed, will not prevent the abatement of the second suit, the first having been pending when the second was commenced.[2]

To maintain the defence of the pendency of another suit for the same cause of action, it must be affirmatively proved that the suit is still pending,[3] and in the same State.[4]

**4. The Suit Must be in a Competent Court.**—The pendency of a suit for the same cause of action in a court having no jurisdiction is not sufficient to abate a subsequent suit in a court that has rightful jurisdiction.[5]

**5. The Suit Must be Capable of Being Made Effective.**—The general rule that the pendency of a former suit between the same parties, for the same thing, will abate a suit subsequently brought,

tels; and that the declaration and attachment were both served on the same day. It being deemed impossible, and indeed, not being averred that both suits were commenced actually at the same time precisely, we cannot presume that the attachment suit was actually commenced first, but, nothing appearing in the record to the contrary, we may fairly infer that the suit by declaration was commenced first. Wales *v.* Jones, 1 Mich. 253.

The pendency of two suits brought by one plaintiff against one defendant, for one cause at the same time, is cause for abating the second suit, without inquiry into the fact of actual vexatiousness and oppression; and notwithstanding the plaintiff, before commencing the second, gave the defendant a written notice that he had discontinued the first. Gramsby *v.* Ray, 52 N. H. 513.

1. Adams *v.* Gardner, 13 B. Mon. (Ky.) 197; Rogers *v.* Hoskins, 15 Ga. 270; Clifford *v.* Cony, 1 Mass. 495; Toland *v.* Tichenor, 3 Rawl. (Pa.) 326; Harris *v.* Johnson, 65 N. Car. 478; Leavitt *v.* Mowe, 54 Md. 613.

2. Frog *v.* Long, 3 Dana (Ky.), 151. To same effect, see Parker *v.* Colcord. 2 N. H. 36; Hope *v.* Alley, 11 Tex. 259.

A brought a suit in a justice's court against B, in which the latter was required under a statute to set off a certain claim or be forever precluded from maintaining an action therefor. B afterwards brought suit against A for said claim; but before an answer was filed in it, the suit instituted by A was erroneously dismissed, against his remonstrance. *Held*, that the latter suit was not a bar to the suit brought by B. Lord *v.* Ostrander, 43 Barb. (N. Y.) 337.

The defendant, in a suit which has been dismissed at his own instance, cannot, by a motion to set aside the judgment, etc., keep the suit pending, so as to be an impediment in the way of a new suit in the same cause of action. Bailey *v.* Beemond, 7 Tex. 537.

A plea in abatement, alleging the pendency of the prior proceedings for the same cause to a complaint made before a justice of the peace, charging defendant with being the father of an unborn child, will be disallowed as being too late after the defendant has made his defence before the justice and entered into the required recognizance. People *v.* Smith (March, 1887), 31 N. W. Rep. 354.

3. Phelps *v.* Winona, etc. (Minn. 1887), 35 N. W. Rep. 273; Craig *v.* Smith (Col. 1887), 15 Pac. Rep. 337.

4. Hadden *v.* St. Louis, etc., 57 How. Pr. (N. Y.) 390.

5. Rood *v.* Eslava, 17 Ala. 430. For the purpose of a plea of "another action pending," the fact that the court where the first action has been commenced has authority to try and determine actions of that character or class is sufficient to warrant the action being considered as depending therein, notwithstanding the existence of a question as to whether such court has acquired jurisdiction of the parties or not, or of the particular case, until there is a decision that it has not jurisdiction. Merriam *v.* Baker, 9 Minn. 40.

does not prevail where it appears that the first suit must be ineffectual,[1] or where the former suit is so defective that no judgment could be properly rendered thereon.[2]

**6. The Suit Must be Between the Same Parties.**—To be a good ground for abatement of the suit upon the ground that there is a prior suit pending for the same cause, the parties to the two suits must be the same.[3] But the fact that a suit is pending against a common carrier, for the value of property consumed in a warehouse, is no bar to a recovery from the warehousemen, in a suit previously commenced, of insurance money which they have received for the property.[4] In an action against one obligor, pendency of a prior action against all the obligors is a good plea in abatement.[5]

**7. The Suit Must be for the Same Cause and Relief.**—To sustain a plea in abatement for the pendency of a prior action, the two suits must be of the same character, and the plaintiff must be the same.[6] That the subject-matter is the same must appear of record. If the first action has not yet been entered, or if there is yet no declaration, and the writ does not show the cause of action, the ground of abatement is not made out;[7] and a second

1. Therefore, where a writ of error was brought to reverse a judgment in which the errors assigned appeared in a bill of exceptions, and it was afterwards discovered that the court below had omitted to allow and sign the bill of exceptions, to reverse the same judgment, as stated in such writ of error, but, having materially altered it, had then allowed and signed; and therefore a recent writ of error was brought, the first being abandoned, including a transcript of such altered bill of exceptions to reverse the same judgment. It was held that these facts did not constitute a sufficient ground of abatement. Quinnebaug Bank *v.* Tarbox, 20 Conn. 510.

2. Reynolds *v.* Harris, 9 Cal. 338; Durand *v.* Carrington, 1 Root (Conn.), 353; Lougham *v.* Thomason, 5 Tex. 127. A plea in abatement, setting up the pendency of a suit for the same cause of action, will not be sustained if such suit was a nullity. Phillips *v.* Quick, 68 Ill. 324.

3. Adams *v.* Gardiner, 13 B. Mon. (Ky.) 197; Bennett *v.* Chase, 21 N. H. 576; Longham *v.* Thomason, 5 Tex. 127.

4. Clark *v.* Wilder, 25 Pa. St. 314.

An action on a sheriff's bond is not abated by the pendency of other suits on the same bond, brought on behalf of different parties and for distinct defaults. Treasurers *v.* Bates, 2 Bailey (S. C.), 362.

Where an action is brought by one party on an official bond, pending an action on the same bond by another party, the former action may be pleaded in abatement of the latter, if pleaded in proper time, but not after a plea of *non est factum*. Hartz *v.* Com., 1 Grant Cases (Pa.), 359; Com. *v.* Cope, 45 Pa. St. 161.

5. Graves *v.* Dale, 1 T. B. Mon. (Ky.) 191.

The fact that the plaintiffs in two suits are different, is presumptively an objection to a plea of the pendency of the suit previously commenced. Smith *v.* Blatchford, 2 Ind. 184.

A plea of prior action pending, in order to suspend or abate the action to which it is pleaded, must show that the action pending is between the same parties and for the same cause as that involved in the action which is sought to be abated. Bryon *v.* School (Ind. 1887). 10 N. E. Rep. 107; Board *v.* R. R., 50 Ind. 85–117; Merritt *v.* Richey, 100 Ind. 416.

In *Oregon*, it has been held that it is not necessary that the parties be identical. Crane *v.* Larsen (Oreg. 1887), 15 Pac. Rep. 326.

The plea of pendency of a former action cannot be sustained where in the one case the action is against the firm on their joint indorsement, and in the other against a member, on a several liability, involving the firm in no liability. Blackburn *v.* Watson, 85 Pa. St. 241.

6. Logs of Mahogany, 2 Sumn. (U. S.) 589; Davis *v.* Hunt, 2 Bailey (S. Car.), 412.

7. Parker *v.* Colcord, 2 N. H. 36; Coales *v.* McCamm, 2 Browne (Pa.),

suit, for some of the same things sued for in a former action still pending, will not abate the other in whole or in part.[1] A proceeding *in rem*, to enforce a mechanic's lien, cannot be pleaded in abatement of an action for the labor and materials.[2]

**8. Suits in State and National Courts.**—Where a State court has jurisdiction, a suit pending therein between the same parties and for the same cause will be a good plea in abatement for the same action in the United States courts[3] and the *District of*

175; McCarney *v.* McCamp, 1 Ashm. (Pa.) 4; Com. *v.* Churchill, 5 Mass. 174.

1. Ballow *v.* Ballow, 26 Vt. 673.

2. Delahey *v.* Clement, 4 Ill. 201.

Where an administrator sued as the representative of the wrong party, and was consequently compelled to bring a new action, the plea of the pendency of the prior action, pleaded in abatement of the new action, was not sustained. Cornelius *v.* Vanarsdellen, 3 Pa. St. 434.

Where an action was brought by the plaintiff at common law, to recover damages occasioned by a dam belonging to the defendants, and subsequently a statutory proceeding was instituted by him against the same defendants to abate the dam, by indictment, a conviction therein, in which no demages were given by the jury, will not preclude further pursuit of the first action. Gould *v.* Langdon, 43 Pa. St. 365.

Where two suits are pending against a defendant, for the same cause of action, he may, on the trial of the second suit, plead in abatement the first, and prove by oral testimony that it was for the same cause of action as that set forth in the second. Damon *v.* Denny (Conn. 1887), 7 Atl. Rep. 409.

3. *Ex parte* Balch, 3 McLean (U. S.), 221; White *v.* Whitman, 1 Curt. (U. S.) 494; Greenwood *v.* Rector, 1 Hempst. (U. S.) 708; Smith *v.* Atlantic, etc., 22 N. H. 21.

The courts of the United States have uniformly held, under the Constitution and acts of Congress, the judgments of the State courts as domestic judgments, and, consequently, as purporting upon their face absolute verity. In this respect, the same effect is given to them, or should be given to them, in every other State as in the one where the judgment was rendered. It is true an execution cannot be issued on the judgment of a sister State; but in every other respect the effect is the same. Where a court is called to act on a judgment in the State where it was originally entered, or in any other State, it will see if the court had jurisdiction of the matter, and also whether due notice was given to the party against whom judgment was rendered.

Different views were entertained by some of the State courts, especially those of *New York;* but for some years past, the decisions of the supreme court of the United States in this respect has been generally followed by the State courts.

That the pendency of a former suit, in a court having jurisdiction of the same, may be pleaded in abatement, is a principle well established. It is so held to prevent a multiplicity of suits being brought for the same cause. To tolerate the pendency of several suits at the same time, for the same cause, would be a reproach on the administration of justice: courts of justice were instituted to afford speedy and effectual remedies for the redress of wrongs, and not to afford a litigious person the means of oppression.

The recovery of a judgment for the same cause of action in the State court closes the controversy and merges in the judgment the cause of action. And in this respect, the same doctrine is held in the courts of the United States, in regard to the judgment of a State court, as a judgment given by a United States court. The courts of the United States are not foreign to the States. They administer the laws of the State, following the established construction of its statutes by its own courts. And if this effect be given to the judgment of a State court, it would follow that the pendency of a suit in such court may be pleaded in an action for the same cause in the courts of the United States. There is no other mode by which a conflict of jurisdiction can be avoided. It may be laid down as a general rule of action for the Federal and State courts that, whichever shall first take jurisdiction of a case, the jurisdiction of the other may be defeated by a plea in abatement.

Earl *v.* Raymond, 4 McLean (U. S.), 233. The doctrine in this case is, perhaps, a little shaken by Gordon *v.* Gilford, 99 U. S. 168.

It has, however, been held that the pendency of a suit in the circuit court of

*Columbia* courts. But a creditor's suit in a United States district court, to set aside a debtor's assignment for the benefit of creditors, does not necessarily defeat proceedings in a State court to enjoin the payment of dividends under the assignment.[1] An equity suit in another State cannot abate an action at law in a circuit court of the United States.[2]

**9. Suit in Another State.**—The pendency of another action in the courts of another State in not a ground of abatement.[3]

**10. Suits in a Foreign Country.**—The pendency of a suit in a foreign country or State is not a ground of abatement.[4]

**11. Actions at Law and Equity.**—It has been held that the fact that a bill in chancery is pending for the same matter for which the complainant institutes an action at law, is not a ground to abate the action at law.[5]

Likewise, the pendency of a suit at law is not a ground for abating a suit in chancery for collecting the same debt by attachment.[6]

But the plea of a suit pending in equity in a foreign jurisdiction will not abate a suit at law in a domestic tribunal.[7]

The general rule of courts of equity with regard to pleas is the same as in courts of law, but exercised with a more liberal discretion.[8]

the United States for one, is not a good ground of abatement of an action in the courts of another State. Welsh *v.* Durgin, 12 Johns. Ch. (N. Y.) 99. See Wadleigh *v.* Veazie, 3 Sumn. (U. S.) 165; Loyd *v.* Reynolds, 29 Ind. 299; Lawrence *v.* Remington, 6 Biss. (U. S.) 44; Nelson *v.* Foster, 5 Biss. (U. S.) 44; U. S. *v.* Dewey, 6 Biss. (U. S.) 501; Loring *v.* Marsh, 2 Cliff (U. S.) 311; Stanton *v.* Embry, 93 U. S. 548; Sloan *v.* McDowell, 75 N. Car. 29.

1. Wuutz *v.* Hart, 13 Iowa, 515.

But the pendency of a suit in the United States circuit court, involving the constitutionality and illegality of a city ordinance, is not a bar to the right of a State court to entertain jurisdiction of a controversy involving a subsequent ordinance of the same council, on the same subject, passed at a date posterior to the institution of the suit in the Federal court. Villavaso *v.* Barthet (La. 1887), 1 South. Rep. 599.

2. Insurance Co. *v.* Brune, 96 U. S. 588.

The attachment of a debt by the process of a State court will not abate a suit founded upon the same cause of action previously commenced in a court of the United States, of which the latter has acquired jurisdiction. Wallace *v.* McConnell, 13 Pet. (U. S.) 136.

3. Humphries *v.* Dawson, 38 Ala. 199; McJilton *v.* Love, 13 Ill. 486; De Armond *v.* Bohn, 12 Ind. 607; Davis *v.* Morton, 4 Bush (Ky.), 442; Yelverton *v.* Conant, 18 N. H. 123; Bonne *v.* Jay, 9 Johns Ch. (N. Y.) 221; Drake *v.* Brander, 8 Tex. 351; Allen *v.* Watt, 69 Ill. 655; Grider *v.* Apperson, 32 Ark. 332; Cole *v.* Flitcraft, 47 Md. 312; Renner *v.* Marshall, 1 Wheat. (U. S.) 215; Stanton *v.* Embry, 92 U. S. 548.

4. Lyman *v.* Bunn, 2 Curt. (U. S.) 559; Eaton *v.* Hunt, 20 Ind. 457; Bradley *v.* Bank, 20 Ind. 528; Williams *v.* Ayrault, 31 Barb. (N. Y.) 364.

5. Blanchard *v.* Stone, 16 Vt. 234.

6. Peak *v.* Bull, 8 B. Mon. (Ky.) 428; See Bolton *v.* Landers, 27 Cal. 104; Stewart's Appeal, 56 Pa. St. 413.

7. Insurance Co. *v.* Brune, 96 U. S. 593; Hatch *v.* Spefford, 22 Conn. 485; Stanton *v.* Embry, 93 U. S. 548.

8. Ld. Hardwicke, in Foster *v.* Vassall, 3 Atk. 587; Mut. Life Ins. Co. *v.* Brune, 96 U. S. 588.

Where, in defence to a bill to enjoin foreclosure of a mortgage, the pendency of another suit in another jurisdiction, to foreclose another mortgage securing the same debt, is pleaded, but plaintiff could not, by defending the latter suit, have the relief obtainable in the former, the pendency of the latter is no bar to the former. Carpenter *v.* Talbot (1888), 33 Fed. Rep. 537.

**12. Pendency of an Appeal.**—Where the suit is pending an appeal the same rules will apply as where it was pending in the original court.[1]

**13. Pending on Writ of Error.**—The pendency of a writ of error may be pleaded in abatement of an action on a judgment, if the writ was sued out before the action was commenced, and the requisite steps have been taken to under it a *supersedeas*;[2] but not unless the writ of error acts as a *supersedeas*.[3]

**14. How Proven.**—The pendency of a suit in a court of record can only be proven by record evidence.[4]

## FORNICATION. (See also ADULTERY.)

I. Definition, 555.
II. Distinguished from other Offences, 556.
III. Essentials of the Crime, 556.
IV. Miscegenation, 558.
V. Conviction of Fornication under Indictment for Other Offences, 559.
VI. Indictment and Information, 560.
1. *Joint Indictment*, 561.
VII. Evidence, 561.
VIII. Punishment, 563.

**I. Definition.**—Fornication is unlawful carnal knowledge by an unmarried person of another, whether the latter be married or unmarried.[5]

1. Boswell *v.* Tunnell, 10 Ala. 958.

If an appeal from an order of nonsuit be dismissed, the pendency of the appeal cannot be pleaded in abatement of a new action for the same cause, brought after such order and before such dismissal. Trimmier *v.* Trail, 2 Bailey (S. Car.), 480.

Where, in an action against several defendants, the plaintiff recovered judgment against some of the defendants, while the other defendants recovered judgment against the plaintiff of dismissal of the complaint on the merits, an appeal was taken by the defendants against whom judgment was recovered (no other appeal being taken), and the judgment was reversed,—a subsequent action for the same cause, and similar relief (not being an action in the nature of a bill of review), cannot be sustained by the same plaintiff against the same defendant. Gregory *v.* Gregory, 33 N. Y. Super. Ct. 1.

The first action is still pending as to the appealing defendants, and can be pleaded by them in abatement of the second. Gregory *v.* Gregory, 33 N. Y. Super. Ct 1.

An appeal from a justice of the peace to the circuit court being dismissed, the party appealing filed his bill in chancery to reinstate his appeal, pending which the opposite party instituted suit upon an appeal bond given on the appeal from the justice. The defendant in the suit at law pleaded the pending suit in chancery in abatement. *Held*, the pendency of the bill to reinstate the appeal, there having been no injunction allowed or obtained thereon, could not operate to abate the suit on the appeal bond. Evans *v.* Lingle, 55 Ill. 455.

2. Jenkins *v.* Pepoon, 2 Johns. Cas. (N. Y.) 312.

3. McJilton *v.* Love, 13 Ill. 486; Hailwan *v.* Buckmaster, 8 Ill. 498.

A filed a bill in chancery against B, and died. On motion of B's counsel, the court dismissed the bill. His administrator then filed another bill, and afterward brought a writ of error to reverse the judgment dismissing the first bill. *Held*, that the second bill was still pending and the writ should be abated. Carr *v.* Casey, 20 Ill. 637.

4. Smiley *v.* Dewey, 17 Ohio, 156. See, however, Damon *v.* Denny (Conn. 1887), 7 Atl. Rep. 409, where it is held that it can be shown by oral testimony.

5. 1 Bouv. Dict. (15th ed.) 682. See Miner *v.* People, 58 Ill. 59; Buchanan *v.* State, 55 Ala. 154; Smitherman *v.* State, 27 Ala. 3; Hood *v.* State, 56 Ind. 263; s. c., 2 Am. Cr. Rep. 165; Rodebaugh *v.* Hollingsworth, 6 Ind. 339; State *v.* Gooch, 7 Blackf. (Ind.) 468; Montana *v.* Whitcomb, 1 Mont. Tr. 359; s. c., 2 Am. Cr. Rep. 159; Wolff *v.* State, 6 Tex. App. 195.

**Married Man and Unmarried Female.**—The offence may be committed by a married man with an unmarried female. Hood *v.* State, 56 Ind. 263; Com. *v.*

**II. Distinguished from Other Offences.**—Fornication, being simply illicit carnal intercourse, is included in all other offences arising from such intercourse. The offence is called by different names according to the circumstances which attend it. Unaccompanied with any facts which tend to aggravate it, it is simple fornication. When it causes the birth of an illegitimate child, it is fornication and bastardy. When the man who commits it is married, it is adultery. When the parties by whom it is done are related to one another within certain degrees of consanguinity or affinity, it becomes incest. Where it is preceded by fraudulent acts, including a promise of marriage, to gain the consent of the female, who is under twenty-one years of age, and of good repute, it assumes another name, and is called seduction. But the body of all these offences is the illicit connection. In each case the essential fact which constitutes the crime is fornication.[1]

It may be laid down as a general proposition that fornication becomes adultery where the guilty party is married,[2] and bastardy when it results in illegitimate offspring.[3] It is incest when the relationship within the prohibited degree exists,[4] and rape when committed forcibly and against the will of the female.[5] It is seduction when the consent of a virtuous female is obtained by flattery or fraud.[6]

**III. Essentials of the Crime.**—To constitute the offence of fornication the act must partake of the nature of public and offensive

Calef, 10 Mass. 153; State *v.* Armstrong, 4 Minn. 335; Com *v.* Lafferty, 6 Gratt. (Va.) 627; Resp. *v.* Roberts, 2 U. S. (2 Dall.) 124; bk. 1. L. ed. 316. *Compare* State *v.* Lash, 16 N. J. L. (1 Harr.) 380; s. c., 32 Am. Dec. 397.

1. Dinkey *v.* Com., 17 Pa. St. 126; s. c., 55 Am. Dec. 542.

2. Buchanan *v.* State, 55 Ala. 154; State *v.* Hinton, 6 Ala. 564; Wasden *v.* State, 18 Ga. 264; Miner *v.* People, 58 Ill. 59; Com. *v.* Call, 38 Mass. (21 Pick.) 509; Territory *v.* Whitcomb, 1 Mont. Tr. 359; s. c., 2 Am. Cr. Rep. 159; State *v.* Wallace, 9 N. H. 515; Dinkey *v.* Com., 17 Pa. St. 126; s. c., 55 Am. Dec. 542; Hunter *v.* United States, 1 Pinn. (Wis.) 91. *Contra*, Com. *v.* Wentz, 1 Ashm. (Pa.) 269; Resp. *v.* Roberts, 2 U. S. (2 Dall.) 124; bk. 1, L ed. 316.

**Offence Under Statute.**—In some of the States, if only one of the parties be married, it is adultery in that party, and fornication in the other. Buchanan *v.* State, 55 Ala. 154; State *v.* Hinton, 6 Ala. 564; Wasden *v.* State, 18 Ga. 264; Miner *v.* People, 58 Ill. 59; Com. *v.* Call, 38 Mass. (21 Pick.) 509; State *v.* Wallace, 9 N. H. 515; Hunter *v.* United States, 1 Pinn. (Wis.) 91. *Contra*, Com. *v.* Wentz, 1 Ashm. (Pa.) 269; Resp. *v.* Roberts, 2 U. S. (2 Dall.) 124; bk. 1, L. ed. 316. And in other jurisdictions, where one of the parties is married, it is adultery in both. Territory *v.* Whitcomb, 1 Mont. Tr. 359; s. c., 2 Am. Cr. Rep. 159. In this case the court say: "The meaning of the term 'fornication' is the carnal and illicit intercourse of an unmarried person with the opposite sex. It is impossible for a married man and married woman to commit fornication. Unlawful sexual intercourse, and open and unlawful living together, of a married man and a married woman, or where either are married, and thus have intercourse or live together, is adultery; and the same state of facts existing between unmarried persons is fornication."

**An Agreement to Commit Fornication** is not a conspiracy. Miles *v.* State, 58 Ala. 390. *Compare* Shannon *v.* Com., 14 Pa. St. 226.

3. Dinkey *v.* Com., 17 Pa. St. 126; s. c., 55 Am. Dec. 542.

4. Degroat *v.* People, 39 Mich. 124; Dinkey *v.* Com., 17 Pa. St. 126; s. c., 55 Am. Dec. 542.

5. Degroat *v.* People, 39 Mich. 124.

6. Dinkey *v.* Com., 17 Pa. St. 126; s. c., 55 Am. Dec. 542.

lewdness,[1] and the parties must cohabit openly and notoriously.[2]

1. Crouse *v.* State, 16 Ark. 566; Smith *v.* Minor, 1 N. J. L. (Coxe) 16; State *v.* Cox, N. C. Term Rep. 165; State *v.* Brunson and Miller, 2 Bail. (S. C.) 149; State *v.* Moore, 1 Swan (Tenn.), 136; Brooks *v.* State, 2 Yerg. (Tenn.) 482; State *v.* Smith, 32 Tex. 167; State *v.* Cooper, 16 Vt. 551; Com. *v.* Jones, 2 Gratt. (Va.) 555; Com. *v.* Isaacs, 5 Rand. (Va.) 634; Anderson *v.* Com. 5 Rand. (Va.) 627.

2. Searls *v.* People, 13 Ill. 597; Com. *v.* Catlin, 1 Mass. 8; Delany *v.* People, 10 Mich. 241. See Bush *v.* State, 37 Ark. 215; s. c., 3 Cr. L. Mag. 748; Taylor *v.* State, 36 Ark. 84; Lyerly *v.* State, 36 Ark. 39; s. c., 3 Cr. L. Mag. 265; Hood *v.* State, 56 Ind. 263; State *v.* Marvin, 12 Iowa, 499; Com. *v.* Calef, 10 Mass. 153; State *v.* Jolly, 3 Dev. & Bat. (N. C.) L. 110; s. c., 32 Am. Dec. 656; Ledbetter *v.* State, 21 Tex. App. 344; Pruner *v.* Com., 82 Va. 115; s. c., 10 Va. L. J. 520.

**The Offence at Common Law.**—An information for lewd and lascivious cohabitation charges no offence at common law unless it be charged to have been openly, publicly, and notoriously committed. Delany *v.* People, 10 Mich. 241.

**In Alabama.**—The Alabama statute requires more than occasional acts of illicit intercourse to constitute the crime of unlawful cohabitation. The parties must "live together in adultery or fornication," and if they live at different places they are not guilty. Quartemas *v.* State, 48 Ala. 269.

**In Arkansas** sexual intercourse between persons not married, though living in the same house, is not sufficient, alone, to constitute the offence of cohabiting together as husband and wife without being married. Taylor *v.* State, 36 Ark. 84.

To constitute the offence of cohabiting as husband and wife, the parties must live together, in the same house, as husband and wife, without being married; and whether they so live must be determined by the jury, from the testimony in the case, as to their bed and board, and the intercourse and apparent relationship in which they live and bear themselves toward each other. Bush *v.* State, 37 Ark. 215; s. c., 3 Cr. L. Mag. 748.

**Same—What Constitutes the Offence.**—To constitute the offence by unmarried persons, of cohabiting as husband and wife, it is not necessary that the parties claim to be husband and wife. If they live together in the same house, in like manner in respect to bed and board, as marks the intercourse between husband and wife, they, in the sense and meaning of the statute, cohabit as man and wife. Lyerly *v.* State, 36 Ark. 39; s. c., 3 Cr. L. Mag. 265.

**In Illinois.**—In order to constitute the crime of fornication under the State of Illinois, the parties must dwell together openly and notoriously, in illicit intimacy. Searls *v.* People, 13 Ill. 597.

**In Indiana.**—An indictment under the Indiana statute for living in open and notorious fornication is sustained by proof that defendant during the lifetime of his wife, she being undivorced, married and cohabited with another woman. And the fact that prior to the second marriage defendant obtained a divorce in a State where neither he nor his wife was a resident forms no defence; for such divorce is void. To give jurisdiction to grant a divorce which will be respected in other States, the petitioner must be a resident of the State where he sues. Hood *v.* State, 56 Ind. 263.

**In Iowa.**—An indictment for lewd and lascivious conduct under the Iowa Rev. Stat. 1860, sec. 4321, is not sustained by proof of two acts of private illicit intercourse. State *v.* Marvin, 12 Iowa, 499.

**In Kansas.**—Kan. Comp. L. 1879, ch. 61, sec. 12, declares that persons living together as man and wife, without being married, shall be deemed guilty of a misdemeanor. *Held*, to embrace the case of a man and woman who lived together under what they called a contract of "autonomistic marriage," the observance of the usual forms of marriage being by them deemed a monstrosity, and an interference with their sacred liberty and personal rights. State *v.* Walker, 36 Kan. 297.

**In Massachusetts.**—By "cohabiting," in Mass. Stat. of 1874, ch. 40, sec. 6, must be understood a dwelling or living together and not a single act of criminal intercourse; the design of the statute in this provision being to prevent evil and indecent examples, tending to corrupt the public morals. Com. *v.* Calef, 10 Mass. 153.

**Same — Marriage - solemnization — "Lewd and Lascivious" Cohabitation.**—The statutes of Massachusetts provide, except in the case of Friends or Quakers, that magistrates or ministers may celebrate marriages, and also provide that marriage thus celebrated shall be valid although the magistrate or minister shall have exceeded his authority or jurisdiction; and do not enact that marriages thus celebrated shall not be valid. *Held*, that a ceremony of marriage, performed

It would seem, however, that a single act of sexual intercourse between a married female and a male person not her husband, or between an unmarried female and a male person, is sufficient to constitute the offence.[1]

**IV. Miscegenation.**—Miscegenation is a mixture of the white and the black races in sexual intercourse, and consists in cohabitation, by marriage or otherwise, of a white person of either sex with a negro.[2] In many of the States intermarriage between such races is forbidden, and in such States persons of the different races assuming to live together in marriage are guilty of fornication.[3]

in good faith by a man and a woman at a public religious meeting, no third person participating, and no magistrate nor clergyman nor any person supposed to be such being present, and neither party being a Friend or Quaker, is not a valid marriage under the law of Massachusetts, but the cohabitation of the parties thereunder is not "lewd and lascivious" within the statute. Commonwealth *v.* Munson, 127 Mass. 459; s. c., 34 Am. Rep. 411.

Where a husband obtained a divorce from the bonds of matrimony for the cause of utter and wilful desertion by the wife for the term of five years consecutively, without his consent, and the wife afterwards went into another State and was there married to another man, with whom she returned to this State, and here lived in cohabition—*held*, that if the wife was guilty of any offence under the Mass. Rev. Stat. ch. 130, she was indictable under the second section for unlawful cohabitation and not under the fourth section for lewd and lascivious behavior. Commonwealth *v.* Hunt, 58 Mass. 4 Cush. 49.

**In North Carolina.**—Under the North Carolina statute the charge of "bedding and cohabiting together" is sustained by showing an habitual surrender of the person of one for the gratification of the other. State *v.* Jolly, 3 Dev. & Bat. (N. C.) L. 110; s. c., 32 Am. Dec. 656.

**In South Carolina** an indictment for "living in open lewdness, whoredom, and adultery" will not be sustained by evidence proving adultery. State *v.* Brunson and Miller, 2 Bail. (S. C.) 149.

**In Texas.**—Fornication, not having been expressly defined, was not an offence under the former penal code of Texas. State *v.* Smith, 32 Tex. 167; State *v.* Foster, 31 Tex. 578; Wolff *v.* State, 6 Tex. App. 195; s. c., 3 Tex. L. J. 43; 1 Cr. L. Mag. 126.

In order for a conviction for fornication under Tex. Rev. Penal Code, art. 337, both the male and female must be proved to have been unmarried at the time of the offence. Wells *v.* State, 9 Tex. App. 160.

An indictment charged that defendant "did live together with and carnally know" one A. *Held*, that a conviction for habitual carnal intercourse could not be sustained upon the charge, they being separate offences under the statute. Powell *v.* State, 12 Tex. App. 238.

Under an indictment charging fornication by living together, a conviction cannot be sustained where the evidence, while tending to show habitual carnal intercourse, falls short of showing that the parties lived together. Ledbetter *v.* State, 21 Tex. App. 344.

**In Virginia.**—The offence of fornication in Virginia cannot be punished by information as a common-law offence, unless accompanied with other circumstances which, *per se*, constitute a misdemeanor, such as the public commission of the act. Com. *v.* Isaacs, 5 Rand. (Va.) 634.

To constitute the offence of lewd and lascivious cohabitation, within the meaning of the Virginia statute (Acts 1877–78, p. 302, sec. 7), it must be shown that the parties lived together openly and notoriously, as though the marriage relation existed between them; occasional acts of incontinence are not sufficient. Pruner *v.* Commonwealth, 10 Va. L. J. 520.

**In the Ecclesiastical Courts.**—Although acts of simple incontinence were not offences at common law, yet they were punishable by the English ecclesiastical court. Wheatley *v.* Fowler, 2 Lee Ecc. 376.

1. Rodebaugh *v.* Hollingsworth, 6 Ind. 339. *Compare* Com. *v.* Calef, 10 Mass. 153.

2. 2 Bouv. Law Dict. (15th ed.) 240.

3. Green *v.* State, 58 Ala. 190; s. c., 29 Am. Rep. 730, overruling Burns *v.* State, 48 Ala. 195; s. c., 17 Am Rep. 34; Ford *v.* State, 53 Ala. 150; Ellis *v.* State, 42 Ala. 525; State *v.* Bell, 7 Baxt. (Tenn.) 9;

Marriage and cohabitation between the black and the white races is fornication, even though the marriage occurred in another State where such marriage is legal.[1] Such statutes are not in conflict with the Federal constitution nor with the Civil-rights Bill.[2]

**V. Conviction of Fornication under Indictments for Other Offences.**—Fornication is the essential fact constituting crimes arising out of illicit carnal connection, and is included within them.[3] As a general rule, therefore, a conviction of fornication may be had under charge of any of such crimes.[4] Thus, on the trial of an indictment for adultery a person may be convicted of fornication,[5] and the same is true in the trial of an indictment for incest,[6] or for seduction.[7] But an acquittal under an indictment for seduction

s. c., 32 Am. Rep. 549; Kinney *v.* Com., 30 Gratt. (Va.) 859; s. c., 32 Am. Rep. 690. See State *v.* Gibson, 36 Ind. 389; s. c., 10 Am. Rep. 42; Frasher *v.* State, 3 Tex. App. 263; s. c., 30 Am. Rep. 131.

**Marriage of White and Black Persons—Rule in Alabama.**—Marriage of a white person with a black person being forbidden by the Ala. Code, § 4189, no white person can be treated as married to a black one, and their sexual cohabitation is fornication. That the probate judge counselled them that the marriage was lawful *held* to be immaterial on the question of guilt of fornication, although rendering it a case for executive clemency, upon cessation of the offence. Hoover *v.* State, 59 Ala. 57; Green *v.* State, 59 Ala. 68.

1. Williams *v.* Oates, 5 Ired. (N. C.) L. 535; State *v.* Bell, 7 Baxt. (Tenn.) 9; s. c., 32 Am. Rep. 549; Com. *v.* Kinney, 30 Gratt. (Va.) 858; s. c., 32 Am. Rep. 690. *Compare* Dupre *v.* Boulard's Ex'r, 10 La. An. 411; State *v.* Ross, 76 N. C. 242; s. c., 22 Am. Rep. 678.

**In Tennessee.**—A white man and a colored woman married according to the forms of law in Mississippi, may be indicted for living together as man and wife, under the laws of Tennessee. State *v.* Bell, 7 Baxt. (Tenn.) 9; s. c., 32 Am. Rep. 549.

**Marrying Out of State to Avoid Law.**—Where the parties are married out of the State in order to avoid the law, and intending to return, the marriage is void within the State, and the parties guilty of fornication, although it would be upheld had it been without intent to avoid the statute. State *v.* Kennedy, 76 N. C. 251; s. c., 22 Am. Rep. 683. *Compare* Medway *v.* Needham, 16 Mass. 157.

**In Virginia.**—K., a negro man, and M., a white woman, domiciled in Virginia, went to the District of Columbia, and were there legally married, and after remaining there ten days returned to their home in Virginia, and continued to reside there as husband and wife. The law of Virginia prohibits marriages between white persons and negroes. *Held*, that the parties were liable to indictment in Virginia for lewdness and cohabitation. Kinney *v.* Com., 30 Gratt. (Va.) 858; s. c., 32 Am. Rep. 690.

2. Green *v.* State, 58 Ala. 190; s. c., 29 Am. Rep. 739; Ellis *v.* State, 42 Ala. 525; Scott *v.* State, 39 Ga. 321; State *v.* Gibson, 36 Ind. 389; s. c., 10 Am. Rep. 42; Frasher *v.* State, 3 Tex. App. 263; s. c., 30 Am. Rep. 131; Pace *v.* Alabama, 106 U. S. (16 Otto) 583; bk. 27, L. ed. 207; s. c., 69 Ala. 239; 1 Ala. L. J. 132; 14 Bost. Rep. 110; 6 Va. L. J. 509.

3. Dinkey *v.* Com., 17 Pa. St. 126; s. c., 55 Am. Dec. 542.

4. In Dinkey *v.* Com., 17 Pa. St. 126; s. c., 55 Am. Dec. 542, the court say: "We cannot doubt that on an indictment for any offence below the grade of felony, which includes illicit connection, and of which that illicit connection forms an essential part, the defendant may be found guilty of fornication."

**In Pennsylvania—"Fornication and Bastardy."**—Under the Pennsylvania statute defendant charged with fornication and bastardy may be convicted of fornication alone. Dinkey *v.* Com., 17 Pa. St. 126; s. c., 55 Am. Dec. 542. Or he may be convicted for bastardy although there was no verdict on the charge of fornication. Com. *v.* Lehr, 2 Pa. Co. Ct. 341.

5. State *v.* Cowell, 4 Ired. (N. C.) L. 231; Resp. *v.* Roberts, 2 U. S. (2 Dall.) 124; bk. 1, L. ed. 316. *Compare* State *v.* Lash, 16 N. J. L. (1 Harr.) 380; s. c., 32 Am. Dec. 397.

6. Dinkey *v.* Com., 17 Pa. St. 126; s. c., 55 Am. Dec. 542.

7. Rice *v.* Com., 102 Pa. St. 408; s. c., 4 Am. Cr. Rep. 562; Dinkey *v.* Com., 17 Pa. St. 126; s. c., 55 Am. Dec. 542.

is a bar to a subsequent prosecution for fornication and bastardy, founded upon the same act.[1] Such is not the case, however, under an indictment for rape, which is a felony and contains no element of mutual consent.[2]

**VI. Indictment and Information.**—An indictment for fornication and unlawful cohabitation may charge the crime generally, or in the words of the statute, without stating the facts which enter into the composition of the offence.[3] The indictment should allege that the parties are male and female, and that one of them is unmarried; but the language may be sufficient to clearly imply

1. Nicholson *v.* Com., 91 Pa. St. 392.

2. **Under the Wisconsin Statutes,** fornication and rape are not related to each other as a smaller offence included in a greater; and an information charging the latter will not sustain a conviction of the former. So held where the information did not charge that the rape was committed upon a single woman. State *v.* Shear, 51 Wis. 460; s. c., 3 Cr. L. Mag. 14; 8 N. W. Rep. 287.

3. Pace *v.* State, 69 Ala. 239; s.c., 1 Ala. L. J. 132; 14 Bost. Rep. 110; 6 Va. L. J. 509; Lawson *v.* State, 20 Ala. 65; s. c., 56 Am. Dec. 182; State *v.* Wilhight, 20 Mo. 422; State *v.* Bess, 20 Mo. 419; State *v.* Jolly, 3 Dev. & Bat. (N. C.) 110; s. c., 32 Am. Dec. 656; People *v.* Colton, 2 Utah Tr. 457. *Compare* Dameron *v.* State, 8 Mo. 494.

"**Living Together in Fornication.**"—Indictment for "living together in fornication" found against a man and a woman is sufficient. Lawson *v.* State, 20 Ala. 65; s. c., 56 Am. Dec. 182.

**Single Act of Fornication.**—In the case of Lawson *v.* State, *supra*, the court say: "If a single act of fornication was indictable, it might perhaps be necessary to allege the constituents which make up the offence, although even then, upon the reasoning of the case of State *v.* Hinton, 6 Ala. 365, it would be sufficient to charge the offence in the terms of this indictment. But entertaining some doubts as to the correctness of the reasoning in the case cited, we prefer to rest our decision on different grounds. The offence contemplated by the statute, Clay's Dig. 431, § 3, was not a single act, but the living together in fornication; and the facts which enter into the composition of this offence are necessarily so complicated that it is impossible to state them so that the legal conclusion of guilt will result with certainty and precision, and for this reason it is unnecessary to allege them"

"**Unlawful Bedding and Cohabiting.**"—The offence is sufficiently described by charging an unlawful "bedding and cohabiting together." State *v.* Jolly, 3 Dev. & Bat. (N. C.) 110; s. c., 32 Am. Dec. 656.

**Exact Words of Statute Unnecessary.**—The statute punishing lascivious cohabitation provided "That if any man or woman, not being married to each other, lewdly and lasciviously associate and cohabit together," etc., and the indictment charged "that defendant and one J. S. did unlawfully, openly, and publicly live, dwell, and cohabit together in lewdness and lasciviousness, they being unmarried to and with each other," etc.—*held*, on appeal, that the indictment was sufficiently certain, and that it was not necessary that the exact words of the statute should be used. People *v.* Colton, 2 Utah Tr. 457.

**Open Lewdness.**—An indictment against a man and a woman charging that they were guilty of open, gross lewdness and lascivious behavior, by publicly, lewdly, and lasciviously abiding and cohabiting with each other, etc., in the words of the statute, is good. State *v.* Bess, 20 Mo. 419; State *v.* Wilhight, 20 Mo. 422. *Compare* Dameron *v.* State, 8 Mo. 494.

**Averment of Time.**—Under the *Missouri* statute against "lewdly and lasciviously" abiding and cohabiting, it is sufficient to charge the offence as having been committed on a certain day, without a *continuendo*. Hinson *v.* State, 7 Mo. 244.

**Separate Indictment against Man.**—A statute of Missouri imposes a penalty on a man or a woman, either being married, who lewdly and lasciviously abide and cohabit with each other. A, being a married man, was indicted for lewdly and lasciviously abiding and cohabiting with one B,—not saying they cohabited with each other. For this omission the indictment was held bad. State *v.* Byron, 20 Mo. 210.

**Unmarried Woman with Married Man—Charge in Indictment.**—Where the fornication was between a married man and an unmarried woman, an indictment of the woman should charge adultery and fornication. Bigby *v.* State, 44 Ga. 344.

that such is the case, without a specific averment to that effect.[1] Where there is a difference of race, that fact should be set out in the indictment.[2]

The indictment must allege that the act of fornication was open and notorious.[3]

1. *Joint Indictment.*—Where the offence of both participants is the same, they may be jointly indicted.[4]

**VII. Evidence.**—Illicit intercourse cannot, from its nature, often be directly proven; and it must, in the great majority of cases, be inferred from circumstances, the weight and conclusiveness of which vary according to the situation and character of the parties,

1. Crouse *v.* State, 16 Ark. 566; State *v.* Stephens, 63 Ind. 542; State *v.* Clinch, 8 Iowa, 401; State *v.* Fore, 1 Ired. (N. C.) L. 378; People *v.* Colton, 2 Utah Tr. 457. See State *v.* Lashley, 84 N. C. 754. *Compare* Heckman *v.* Swartz, 64 Wis. 48.

**Difference of Sex Presumed.**—An indictment charging that J. F. did "take into his house one S. C., and they did then and there have one or more children without parting or an entire separation, they, the said J. F. and S. C., never having been lawfully married," is sufficiently certain. The court must intend from these expressions that the parties were of different sexes. State *v.* Fore, 1 Ired. (N. C.) L. 378.

**Allegation as to Marriage—Implied by Word "Fornication."**—An indictment under 2 Ind. Rev. Stat. 466, § 21, for fornication, need not, if this word be used, allege that the parties were not married to each other. State *v.* Stephens, 63 Ind. 542

"**Lewdness.**"—To render a defendant liable for lewdness, the indictment should charge that the parties were not married to each other. Crouse *v.* State, 16 Ark. 566; State *v.* Clinch, 8 Iowa, 401.

**Against Unmarried Man—Need Not Allege that Woman is Unmarried.**—An indictment against an unmarried man for living in open and notorious fornication with a certain woman need not aver that she is unmarried. State *v.* Gooch, 7 Blackf. (Ind.) 468.

2. Pace *v.* State, 69 Ala. 239; s. c., 1 Ala. L. J. 132; 14 Bost. Rep. 110; 6 Va. L. J. 509. See Ashworth *v.* State, 9 Tex. 490. *Compare* Mulling *v.* State, 74 Ga. 10.

**Adultery between Negroes and White Persons—Alabama Rule.**—It is sufficient in an indictment against a negro man and a white woman, for living in adultery or fornication with each other, to allege that "A B, a negro, or the descendant of a negro to the third generation inclusive, a man, and C D, a white woman, did live together in a state of adultery or fornication." Pace *v.* State, 69 Ala. 239; s. c., 1 Ala. L. J. 132; 14 Bost. Rep. 110; 6 Va. L. J. 509.

**Same—In Georgia.** — An indictment need not set forth the race of defendants. Mulling *v.* State, 74 Ga. 10.

**Descent of Female.** — An indictment charging that a free person of color of African descent lived together in fornication with S, spinstress, is good without stating the descent of the woman. Ashworth *v.* State, 9 Tex. 490.

3. State *v.* Johnson, 69 Ind. 85. *Compare* State *v.* Cagle, 2 Humph. (Tenn.) 414.

**In Indiana.**—Under 2 Ind. Rev. Stat. 1876, p. 466, § 21, an indictment charging the defendant with living in fornication with a certain person named is insufficient if it does not allege that such fornication was open and notorious. State *v.* Johnson, 69 Ind. 85.

**In Tennessee** an indictment against persons for living and cohabiting together in lewdness need not charge that it was notorious. State *v.* Cagle, 2 Humph. (Tenn.) 414.

4. Maul *v.* State, 37 Ala. 160; King *v.* People, 7 Colo. 224; State *v.* Bartlett, 53 Me. 446; Com. *v.* Thompson, 99 Mass. 444; Com. *v.* Elwell, 43 Mass. (2 Metc.) 190; Spencer *v.* State, 31 Tex. 64.

**In Georgia.**—The offence of incestuous fornication is not made, by the Georgia Revised Code, § 4459, a joint offence; but a single person may be indicted and convicted therefor, Powers *v.* State, 44 Ga. 209.

**In North Carolina** a man may be separately indicted for the crime of fornication. State *v.* Cox, 2 Tayl. (N. C.) 165.

**Acquittal of One—Effect on Other.**—The acquittal of one defendant charged with fornication will not operate, *per se*, as an acquittal of the paramour, notwithstanding the offence is one which can be committed only by two persons. Ledbetter *v.* State, 21 Tex. App. 344.

the habits of society, and other incidental circumstances.[1] But unlawful cohabitation cannot be shown by evidence of general reputation to that effect.[2] Proof of certain acts committed anterior to the period of limitation is admissible to explain similar acts committed within that period;[3] and evidence of acts subsequent to the finding of the indictment may be admitted for the same purpose.[4]

1. Lawson *v.* State, 20 Ala. 65; s. c., 56 Am. Dec. 182.

**Living in Different Rooms of Same House.**—Proof that parties lived together in the same house, but in different rooms, is not sufficient to warrant a conviction of fornication. Smelser *v.* State, 31 Tex. 95.

**Woman Visiting Apartments of Man.**—Proof that a young woman was almost daily at apartments occupied by a man as his residence and place of business, and sometimes in the evenings; that she occasionally did his housework in the absence of the persons employed therefor; that they went to places of amusement together; that she was believed by the neighbors to be his wife, and was twice addressed as such, but without her knowing it,—*held*, to be insufficient to sustain a charge of sexual intercourse between them; there being also evidence that she had been in his family from an early age, and assisted him in his business of photographing, but no proof of improper familiarties between them. Pollock *v.* Pollock, 71 N. Y. 137.

**Together in House at Night with Third Person.**—The fact that a single woman is seen at night-time at the house of a single man, who is sick at the time, in company with her mother, by itself and unconnected with any other fact, proves nothing; but when offered in connection with other evidences proving illicit intercourse between them, becomes relevant, on their joint indictment for living "together in adultery." Lawson *v.* State, 20 Ala. 65; s. c., 56 Am. Rep, 182.

**In Same Room Early in Morning.**—It was held to be sufficient evidence on an indictment for fornication and adultery, as it was not necessary to prove the actual bedding and cohabitation of the parties, to show that early one morning a person knocking at the door of defendant's house was let in by the female inhabitant, whose dress was not fastened, and that the male defendant was lying in the only bed in the room, which was much tumbled, and that the woman's shoes were lying at the head of the bed. State *v.* Poteet, 8 Ired. (N. C.) L. 23.

**Same—Disparity of Age.**—Proof that a man twenty-three years old was, at 4 o'clock in the morning, in the sleeping apartment of a female fifty years old, in whose family he had resided for many years, and that he was dressed, but she was in one bed, and the other bed was not tumbled, *held*, insufficient to support a conviction of fornication or adultery. State *v.* Waller, 80 N. C. 401.

2. Overstreet *v.* State, 4 Miss. (3 How.) 328.

3. Lawson *v.* State, 20 Ala. 65; s. c., 56 Am. Dec. 182; State *v.* Pippin, 88 N. C. 646; State *v.* Potter, 52 Vt. 33.

**Anterior Acts.**—In Lawson *v.* State, *supra*, the court say: "We entertain no doubt that in all cases, whether civil or criminal, involving a charge of illicit intercourse within a limited period, evidence of acts anterior to such period may be adduced, in explanation of acts of a similar character within that period; although such former acts, if treated as the offence, would be barred by the statute of limitations. 2 Greenl. Ev. 36. Evidence of this character would not, however, be admissible as independent testimony, and if so offered should be excluded, but should be received when proposed in connection with or subsequently to the introduction of evidence tending to establish an improper intercourse between the parties during the period to which the charge is confined or in the present case to the time covered by the indictment."

4. Stewart *v.* State, 64 Miss. 626. See, Lawson *v.* State, 20 Ala. 65; s. c., 56 Am. Dec. 182.

**Subsequent Acts.**—In Lawson *v.* State, *supra*, the court say: "As to the admissibility of evidence tending to show the criminal intercourse of the parties at a period subsequent to the indictment there is more difficulty, and after a careful examination we have been unable to find a case in which this point has been directly decided. The proposition, as a general rule, that acts of indecent familiarity may be explained by proof of the subsequent adultery of the parties, we should doubt, and we think we can see

The prosecution need not prove that the parties are unmarried; it will be presumed that such is the case until the defence offers evidence to the contrary.[1] It is said in a recent case that the omission to prove that the complaining witness in an indictment for fornication was a single woman is not error; the single state, being the natural state, will be presumed until testimony to the contrary is offered.[2]

**VIII. Punishment.**—Fornication or unlawful cohabitation is usually a misdemeanor, punishable by fine or imprisonment, or both.[3]

In many of the States, the violation of the statutes against miscegenation is punished with greater severity than mere fornication or cohabitation between persons of the same race,[4] and statutes imposing a heavier punishment therefor, if laying it upon the guilty parties with equal severity, have been repeatedly upheld, as

valid objections against it; but that subsequent acts of criminal intercourse can, under no circumstances, be received in explanations of such familiarities is, we think, equally erroneous. When we concede the correctness of the rule that previous acts may explain subsequent familiarities, it follows that what is but an inference in the mind of the jury, created by the evidence of improper familiarities, explained by the fact of prior intercourse, may be corroborated by proof of subsequent illicit connection, which then becomes confirmatory or cumulative evidence. It will be observed that upon the principle on which we have placed evidence of this character, it is *prima facie* irrelevant; and that when offered, its relevancy should be shown by its connection with acts already in evidence, or its proposal with facts subsequently to be established. There is also another principle upon which evidence of this character may be received in cases like the present. The fact to be established by the evidence is that the parties lived together in a certain condition; and if this particular condition of life was proved to exist both anterior and subsequently to the time alleged in or covered by the indictment, an inference might often be correctly drawn as to the existence of this condition during the intermediate period. We should not be understood to say that this inference would exist in every supposable case in which such proof could be made; in some instances the two periods at which the particular condition was proved to exist might be so far apart as to afford no reasonable inference as to the intermediate time; and in that case the evidence would be inadmissible. In every case, also, much would depend upon the character of the condition; but when the intermediate period was not so long as to be inconsistent with the nature of the condition proved, or when such evidence is offered in explanation of the facts already established indicative of such condition, it is then relevant, and may in many cases be conclusive."

1. Gaunt *v.* State (N. J.), 14 Atl. Rep. 600; People *v.* Colton, 2 Utah Tr. 457. *Compare* Wells *v.* State, 9 Tex. App. 160.

2 Gaunt *v.* State (N. J.), 14 Atl. Rep. 600.

**In Texas.**—In a trial for fornication as defined by the Revised Penal Code, art. 337, it is incumbent on the State to prove that the male and female fornicators were both unmarried when they committed the offence. Wells *v.* State, 9 Tex. App. 160.

3. Hunt *v.* State (Ga.), 7 S. E. Rep. 142; Hood *v.* State, 56 Ind. 263; s. c., 2 Am. Cr. Rep. 165. See Buchanan *v.* State, 55 Ala. 154; Smitherman *v.* State, 27 Ala. 23; Miner *v.* People, 58 Ill. 59; State *v.* Gooch, 6 Blackf (Ind.) 468; Montana *v.* Whitcomb, 1 Mont. Ter. 359; s. c., 2 Am. Cr. Rep. 159; Wolff *v.* State, 6 Tex. App. 195.

**Excessive Punishment.**—One hundred dollars fine or the alternative of five months' work is not excessive punishment for an act of fornication by a young woman whose condition, pecuniary or physical, is not shown to be special or peculiar. Hunt *v.* State (Ga.), 7 S. E. Rep. 142.

4. Green *v.* State, 58 Ala 190; s. c., 29 Am. Rep. 730; Ford *v.* State, 53 Ala. 150; s. c., 2 Am. Cr. Rep. 161; Ellis *v.* State, 42 Ala. 525; Frasher *v.* State, 3 Tex. App. 263; s. c., 30 Am. Rep. 131. See State *v.* Gibson, 36 Ind. 389; s. c., 10 Am. Rep 42.

not in violation of the Fourteenth Amendment to the Federal constitution, nor in conflict with the Civil-rights Bill.[1]

**FORSWEAR.**—To swear falsely.[2]

**1.** Green *v.* State, 58 Ala. 190; s. c., 29 Am. Rep. 739; Ford *v.* State, 53 Ala. 150; s. c., 2 Am. Cr. Rep, 161; Ellis *v.* State, 42 Ala. 525. See Frasher *v.* State, 3 Tex. App. 263; s. c., 30 Am. Rep. 131.

**Fornication Laws and the Civil-rights Act.**—In Green *v.* State, *supra*, the court say: "The question this record presents is whether or not the State may make the marriage of a white person with a person of the negro race a punishable offence. The statute is as follows: 'If any white person and any negro, or the descendant of any negro to the third generation inclusive, though one ancestor of each generation was a white person, intermarry, or live in adultery or fornication, with each other, each of them must, on conviction, be imprisoned in the penitentary, or sentenced to hard labor for the county, for not less than two years nor more than seven years.' Sec. 4189 (3602) of the code of 1876. This statute was assailed, so far as it concerned the living 'in adultery or fornication' of a man and woman of the different races, in Ellis *v.* State, 42 Ala. 525, and Ford *v.* State, 53 Ala. 150. For the like offence between a man and woman of the same race, a penalty less severe was denounced. Sec. 4184 (3598). And this inequality of punishment was supposed to bring the section first quoted above into conflict with the 'Civil-rights Act' of Congress, enacted to prevent certain discriminations against persons of African descent, on account of race, color, or previous condition of servitude. But this court, in both the cases, held the law in question to be valid.

"In Burns *v.* State, 48 Ala. 195; s. c., 17 Am. Rep. 34, according to the fourth head-note, the decision in Ellis *v.* State, *supra*, was overruled. Burns, a justice of the peace, had, as such, performed the rites of matrimony between a white person and a negro, contrary to a statute; and having been convicted of and fined for the offence, our immediate predecessors reversed the judgment, holding that the section first above cited and that under which the conviction was had were in conflict with the act of Congress referred to, and therefore void. The argument in support of this decision was as follows: 'Marriage is a civil contract, and in that character alone is dealt with by the municipal law. The same right to make a contract as is enjoyed by white citizens means the right to make any contract which a white citizen may make. The law intended to destroy the distinction of race and color, in the respect of the rights secured by it.' And, again: 'One of the rights secured by citizenship, therefore, is that of suing any other citizen. The Civil-rights Act now confers this right upon a negro in express terms, as also the right to make and enforce contracts (neither of which was ever denied to a free person of any color, in the courts of this State), amongst which is that of marriage with any citizen capable of entering into that relation.'

"This seems to us a very narrow and illogical view of the subject. And it might perhaps be a sufficient answer to it to say: 'What the law declares to be a punishable offence is marriage between a white person and a negro. And it no more tolerates it in one of the parties than the other—in a white person than in a negro or mulatto; and each of them is punishable for the offence prohibited, in precisely the same manner and to the same extent. There is no discrimination made in favor of the white person, either in the capacity to enter into such a relation, or in the penalty. Moreover, at the time of the passage of the so-called 'Civil-rights Act,' similar laws to those of Alabama existed against such intermarriages in several, perhaps in nearly all, of the Northern States whose representatives in Congress voted for that act; and as no mention was made in the act, or in any other act of Congress, of such intermarriages, the presumption is that it was not intended to secure to persons of the negro race any greater rights in those Northern States, or consequently in any other, than they already enjoyed in them. It is apparent, therefore, that the statute of Alabama is not in conflict with the act of Congress, if that be consistent, to the extent supposed, with the Constitution of the United States.

**2.** To forswear is not necessarily to commit perjury, for the oath may have been an extrajudicial one, or some other of the necessary elements of perjury may be wanting. To say, therefore, that another is forsworn is not actionable. To make the word, or its equivalents, "swear falsely," "swear a lie," etc., actionable, it must be introduced by an averment and

**FORTH.**[1]

**FORTHCOMING BOND.**—(See also ATTACHMENT; BOND; EXECUTION; INDEMNITY BONDS; INTERPLEADER; RECEIPTOR.)

1. Definition, 565.
2. Object of the Bond, 565.
3. Form of the Bond, 565.
4. Forfeiture of the Bond, 569.

1. **Definition.**—A bond given to the sheriff who has seized property, conditioned that the obligor will have it ready to be delivered up to the sheriff when required by law, upon which the sheriff intrusts the property to the obligor's custody.[2]

"The practice of leaving the property seized in execution in the hands of the defendant pending the necessary legal delays is very common in the American States, and in this respect differs from the *English* custom, which is either to remove the goods bodily or leave them in charge of a sheriff's officer, who remains with them; hence the usual English expression, 'an execution in the house.' The American practice, being generally a convenience to all parties concerned, has been regulated by law in many of the States; and 'delivery bonds,' 'forthcoming bonds,' and the like undertakings by the debtor and his friends, to keep safely and deliver punctually the property seized, have been prescribed by statute. In other States the practice is to commit the custody of property levied on to persons who execute a receipt for such property, and who are called 'receiptors.'"[3]

2. **Object of the Bond.**—The object of the bond is to relieve the sheriff of the care of the property during the time between seizure and sale, to permit the defendant to retain the possession of the property levied on till the day of sale, and to secure its forthcoming when needed for the satisfaction of the writ.[4]

3. **Form of Bond.**—The form differs in different States. In some it is given to the sheriff, in others to the plaintiff; but even if the form be not in conformity with the statute prescribing it, it may often be enforced as a common-law obligation.[5]

colloquium connecting the charge with some judicial proceedings. Starkie on Libel and Slander, 21; Townsend on Slander and Libel, 205, 229 n, 244 (3d Ed.); Brooke *v.* Doughty, Cro. Eliz. 135; Lee *v.* Secombe, Cro. Eliz. 297; Anonymous, Cro. Eliz. 398; Stanhope *v.* Blith, 4 Co. 15; Holt *v.* Scholefield, 6 T. R. 691; Hall *v.* Weedon, 8 D. & R. 140; Gibberd *v.* Ridd, 3 Bulst. 304; Fowle *v.* Robbins, 12 Mass. 498; Tebbetts *v.* Goding, 9 Gray (Mass.), 254; Sheely *v.* Bigg, 2 Harr. & J. (Md.); Hopkins *v.* Beedle, 1 Cai. (N. Y.) 347; Ward *v.* Clark, 2 Johns. (N. Y.) 10; Watson *v.* Hampton, 2 Bibb (Ky.), 319; McAnnally *v.* Williams, 5 Sneed (Tenn.), 26; Edgerly *v.* Swain, 32 N. H. 478; Wright *v.* Lindsay, 20 Ala. 428; Wyant *v.* Smith, 5 Blackf. (Ind.) 293; Schmidt *v.* Witherick, 29 Minn. 156; Zimmermann *v.* McMackin, 22 S. Car. 372; Shaffer *v.* Kintzer, 1 Binn. (Pa.) 537; Barger *v.* Barger, 18 Pa. St. 489.

1. "Show forth in evidence," in an act against forgery of private instruments, is not equivalent to "utter and publish" in statutes against counterfeiting. State *v.* Britt, 3 Dev. (N. Car.) 122.

2. Rapalje Law Dict.

3. Murfree on Sheriffs, § 643. See RECEIPTORS.

4. Skinner *v.* Jayne, 24 Miss. 567; Murfree on Sheriffs, § 644; Freeman on Executions, § 264.

It is the duty of the sheriff or other officer to take such bond when offered. Cheaires *v.* Alderson, 7 Humph. (Tenn.) 273.

5. Meredith *v.* Richardson, 10 Ala. 828.

A bond given under statute, but not following the words of the statute, is valid, unless the statute prescribes a form, and declares that all bonds not taken in the prescribed form shall be void. Grant *v.* Brotherton, 7 Md. 458.

A delivery bond, although given by a party other than the defendant, and made payable to the officer instead of the plaintiff, or the plaintiff instead of the officer, is good as a common-law bond; although, not being in conformity with the statute, it would not authorize the statutory proceedings, and its forfeiture does not operate as a judgment. Waterman *v.* Ryan, 21 Mo. 108; Selmes *v.* Smith, 21 Mo. 526; Butler *v.* O'Brien, 5 Ala. 316; Goodrum *v.* Carroll, 2 Humph. (Tenn.) 490; s. c., 37 Am. Dec. 564; Carroll *v.* Field, 6 Yerg. (Tenn.) 305; Brum *v.* McDonald, 8 Yerg. (Tenn.) 158; s. c., 29 Am. Dec. 112; Thompson *v.* Wilson, 1 Blackf. (Ind.) 358; Parkinson *v.* Waldron, 7 Smed. & M. (Miss.) 187.

A forthcoming bond taken by the sheriff, without sureties thereto, if received by the plaintiff in the execution, is a good bond. Walker *v.* McDowell, 4 Smed. & M. (Miss.) 118.

And, as a rule, bonds which, because of any deficiency, fail to meet the requirements prescribed by the statutes, may be good common-law bonds if they embody the essentials required by the common law. Murfree on Sheriffs, § 649; Palmer *v.* Vance, 13 Cal. 553; Branch Bank at Mobile *v.* Darrington, 14 Ala. 192; Butler *v.* O'Brien, 5 Ala. 316; Meredith *v.* Richardson, 10 Ala. 826; Munter *v.* Reese, 61 Ala. 395.

**Statutory Provisions—When Authorized in Ohio.**—In Ohio, the taking of a delivery bond is authorized only for the security of the sheriff, when goods and chattels remain upon his hands unsold for want of bidders, or for want of time to advertise and sell, or "for any other reasonable cause." Murfree on Sheriffs, § 647; Rev. Stat. Ohio (1880), § 5384. And where, upon a *fi. fa.*, the sheriff levies upon chattels, and leaves them with the debtor, taking bond for their delivery, and the goods are not delivered, a return of the facts does not excuse the sheriff from liability to the plaintiff upon amercement for the whole debt. Wadsworth *v.* Parsons, 6 Ohio, 450.

Where the statute prescribes that "If the debtor shall give sufficient security to the officer to have the goods . . . forthcoming at the day and place of sale, it shall be the duty of the officer to take a bond payable to the creditor," etc., it is not necessary that the debtor execute the bond. Love *v.* Smith, 4 Yerg. (Tenn.) 117. But where the statute only authorizes the party whose property is levied on, to execute a forthcoming or delivery bond, it is only to bonds so executed by such a party that it gives the force and effect of a judgment. Nabours *v.* Cocke, 24 Miss. 44.

The same general principles run through the statutes of the different States, in reference to delivery bonds; and the decisions construing the statutes of one State, are generally applicable to those of many other States. Murfree on Sheriffs, § 648.

**Essentials to the Validity of Forthcoming Bonds—Recitals—Execution.**—The service of the execution must be recited in the bond, which ought to show the names of the parties and the amount of the execution, and that the goods were permitted to remain in the possession of the owner or debtor. Lewis *v.* Thompson, 2 Hen. & M. (Va.) 100.

**Practice.**—An execution issued on a forthcoming bond, which does not recite the parties against whom judgment was rendered, will be quashed. Moffitt *v.* Branch Bank of Mobile, 7 Ala. 593; Hubbard *v.* Taylor, 1 Wash. (Va.) 259. But it is not a fatal objection that it recites the execution as against two persons, when, in fact, it was against one alone,—Walker *v.* Shotwell, 13 Smed. & M. (Miss.), 544;—or that it fails to recite, where the execution is against more than one defendant, whose property was taken in execution,—Harpers *v.* Patton, 1 Leigh (Va.), 306. See also Jayne *v.* Dillon, 28 Miss. 283; Pugh *v.* Calloway, 10 Ohio St. 488; Roebuck *v.* Thornton, 19 Ga. 149. It need not contain the names of the parties at whose instance the executions levied on the property have issued,—Grady *v.* Threadgill, 13 Ired. (N. Car.) 228; Baker *v.* Planters Bank, 5 How. (Miss). 566;—nor the return of the execution, nor the certificate of service, nor the name of the person by whom it was served. Ambler *v.* McMechen, 1 Cranch (U. S.), 320.

In *Mississippi*, where the plaintiff in the execution dies after the issuance of the execution, and after his death the defendant executes a forthcoming bond in favor of the deceased plaintiff, such bond is void. Smith *v.* Montgomery, 11 Smed. & M. (Miss.) 284. But in *Virginia*, the bond is valid, and will support a judgment on motion by the administrator of the creditor. Entwistle *v.* Bussard, 2 Cranch (U. S.), 331. Upon principle, it would seem that if, as required in many of the States, the bond had been taken payable to the sheriff, it

would be valid notwithstanding the death of the plaintiff before its execution. Murfree on Sheriffs, § 648.

In *Tennessee*, the defendant need not join in the execution of the bond. Love *v.* Smith, 4 Yerg. (Tenn.) 117. But, in *Mississippi*, unless he join in it, it is not in conformity to the statute; and no execution emanating on it can bind the property of the obligors to the bond. Nabours *v.* Cocke, 24 Miss. 45.

In *Louisiana*, an interviewer, in whose possession, other than as owner, pledgee, or assignee, property has been judicially sequestered, has not the right in law to release said property on a forthcoming bond. Hardy *v.* Lemons, 36 La. Ann. 107.

In an attachment proceeding against property in the hands of a third person, who gives a forthcoming bond therefor, such person cannot, after final judgment and a return of *nulla bona* on the execution, interplead, and claim the property as his. McAlfatrick *v.* Macauley, 18 Mo. App. 102.

In *Indiana*, the statute contemplates the insertion in the delivery bond of a stipulation that the execution defendant may dispose of the property at private sale; but as the stipulation is for his benefit, if he execute the instrument without inserting it, it will be presumed that he waived it, and the bond will be valid without it. Paul *v.* Arnold, 12 Ind. 197; Patterson *v.* Brown, 1 Ind. 567.

**Validity of the Bond.**—But the bond must conform to the execution; and if it does not, it will be quashed. Lumford *v.* Richardson, 5 Ala. 618. But a small and unimportant variance will be disregarded. Anderson *v.* Rhea, 7 Ala. 104.

The validity of a forthcoming bond depends upon there having been a substantial levy made upon actual, tangible property of the defendant in the execution; and a surety on the bond is not liable when the property levied on and described in the bond is not liable to the execution. Long *v.* United States Bank, 1 Freem. Ch. (Miss.) 375. If it be signed in blank, and afterwards filled up by the sheriff without authority, it is void. Patterson *v.* Denton, 1 S. & M. Ch. (Miss.) 592; Long *v.* United States Bank, 1 Freem. Ch. (Miss.) 375. And a forthcoming bond signed by one surety, and delivered to the principal as an escrow until another surety signs, is void unless signed by the other surety. Sessions *v.* Jones, 6 How. (Miss.) 173. If the judgment upon which a forthcoming bond purports to be founded is void by reason of the want of jurisdiction of the court over the subject-matter, or over the parties, the forthcoming bond, and the judgment consequent upon its forfeiture, are likewise void. Buckingham *v.* Bailey, 4 S. & M. (Miss.) 538; *Ex parte* Cheatham, 6 Ark. 531. It must not have been satisfied by a prior levy. Milier *v.* Ashton, 7 Blackf. (Ind.) 29. If the bond be taken for more than the sum due, if the plaintiff release the excess the bond will support a judgment. Scott *v.* Hornsby, 1 Call (Va.), 41; Beel *v.* Marr, 1 Call (Va.). 47.

**Effects of the Bond—Estoppel of Defendant.**—A defendant is estopped from denying the admissions made in the condition of the bond, or of controverting their existence. Crisman *v.* Matthews, 1 Scam. (Ill.) 151; Mead *v.* Figh, 4 Ala. 279; Portis *v.* Parker, 8 Tex. 23. Nor can he dispute the sheriff's return. Love *v.* Smith, 4 Yerg. (Tenn.) 117.

A third party executing a forthcoming bond for property levied on, reciting it being the property of the execution defendant, cannot, without proof of fraud or mistake, assert ownership and claim to such property by executing a claimant's bond, and thereby prevent judgment against him on his forthcoming bond. Sparks *v.* Shropshire, 4 Bush (Ky.), 550.

The taking of a delivery bond is equivalent to a seizure. Pugh *v.* Calloway, 10 Ohio St. 488; Roebuck *v.* Thornton, 19 Ga. 149. And will preclude the officer, in an action of trespass, from contesting the fact of seizure. Portis *v.* Parker, 8 Tex. 23.

**Bond Made for Benefit of Third Party Void.**—Where the statute provides that the sheriff shall take a bond from the debtor and sureties payable to the creditor, a bond made payable to a third party is void, though the *fi. fa.* contain an indorsement that the judgment is for the benefit of said third party. Meze *v.* Hower, 1 Leigh (Va.), 442.

**What it Does Not Waive.**—Entering into bond for the forthcoming of property levied on in execution is not a waiver of previous irregularities in the execution. Page *v.* Coleman, 9 Port. (Ala.) 275; Van Clean *v.* Heaworth, 5 Ala. 188. Nor of the right to claim that the property is exempt from execution; and a bond exacted by a sheriff to compel the delivery of property levied on but so exempt is void. Robards *v.* Samuel, 17 Mo. 555; Perry *v.* Hensley, 14 B. Mon. (Ky.) 474. Nor does the giving of it take away the trial of the right of property when it is claimed by another. Waterman *v.* Frank, 21 Mo. 108.

**On the Original Judgment.**—In *Mississippi*, a forthcoming bond, whilst the execution remains unquashed, is a complete satisfaction of the judgment, as if the estate had been sold to the full amount of the debt; and the party is left to pursue his remedy upon the judgment upon the forthcoming bond. Stewart *v.* Fugue, 1 Walk. (Miss.) 175; Connell *v.* Lewis, 1 Walk. (Miss.) 251; Sampson *v.* Breed, 1 Walk. (Miss.) 267.

But in *Texas*, it is held that the original judgment is not satisfied, and that the implied judgment on the forfeited bond is an additional security growing out of and dependent on the original judgment, designed for the protection of the plaintiff's rights. Cole, Adm'r, *v.* Robertson, 6 Tex. 356.

**As to Lien on the Property.**—The execution of the bond removes the lien from the property attached, and leaves it under the debtor's control, subject to his debts or to other liens. The sheriff has no title to it of any sort, and the levy is released. Jones *v.* Pearsly, 3 Greene (Iowa), 52; Biscoe *v.* Sandefur, 14 Ark. 569; Brum *v.* Clarke, 4 How. (U. S.) 4; King *v.* Terry, 6 How. (Miss.) 513; Witherspoon *v.* Spring, 3 How. (Miss.) 60; Bank of U. S. *v.* Patton, 5 How. (Miss.) 200; Parker *v.* Dean, 45 Miss. 408; Malone *v.* Abbott, 3 Humph. (Tenn.) 532.

But in *Illinois*, it has been held that property levied on is not discharged from the power of the execution because a forthcoming bond has been given. Brush *v.* Seguin, 24 Ill. 254.

In *Pennsylvania*, where, after a levy on personal property under an execution, the judgment is opened by the court to let the defendant into a defence, "all proceedings to be stayed, the sheriff to be secure in his levy," and a bond is given by defendant to the sheriff, conditioned for the delivery of the property on demand, or for the payment of the amount of the execution, the lien of said levy is preserved as against a subsequent levy on the same property under another execution. In such a case, the condition of the bond is not fulfilled by a compulsory delivery of the property to the sheriff under the second execution. Slutter *v.* Kirkendall, 100 Pa. St. 307; 12 W. N. C. 245. To continue the lien of the execution, it is not necessary that the property levied on should be taken into actual possession; it is not affected by taking a forthcoming bond. McGinnis *v.* Prieson, 85 Pa. St. 14; Lewis *v.* Smith, 2 S. & R. (Pa.) 142; Hastings *v.* Quigley, 2 Clark (Pa.), 431; Gratt's App., 14 Pitts. Law Jour. (Pa.) 241; Coar *v.* Green, 5 Luz. Leg. Reg. (Pa.) 77.

**Description of the Property.**—It must describe the property accurately, not vaguely as "a lot of dry-goods," or it will be voidable. Murfree on Sheriffs, § 648; Packinson *v.* Waldron, 7 S. & M. (Miss.) 189.

A forthcoming bond which recites the levy (under a *fi. fa.*), and that the property was appraised according to law, is void when in fact the appraisement was under the *vend. ex.* and stated a gross sum as the valuation, no schedule being annexed, as required by the statute. Frisch *v.* Miller, 5 Pa. St. 310.

Where there is a material variance between a forthcoming bond and the execution, the bond should be quashed. Holt *v.* Lynch, 18 W. Va. 567.

**Fraud in Executing.**—A fraud committed in the execution of the bond, by the principal, will not vitiate it unless he is implicated in it. Walker *v.* Shotwell, 13 S. & M. (Miss.) 544; Gordon *v.* Jeffery, 2 Leigh (Va.), 410.

A forthcoming bond without security, or with fictitious security, is absolutely void, and does not affect the lien of the judgment creditor; he may treat it as a nullity. Carleton *v.* Osgood, 6 How. (Miss.) 285. But if received by him, it is a good bond; no one else can object to its validity for that cause. Walker *v.* McDowell, 4 S. & M. (Miss.) 118; s. c., 43 Am. Dec. 476.

**Party Benefited.**—The delivery bond, though taken to the sheriff, constable, or other officer, is not for his personal benefit, but for the sole benefit of the judgment creditor, and it inures in law accordingly. If suit be brought upon the bond, the officer's name is merely used for the benefit of the creditor. The officer, as such, can only bring an action on the bond when he has been made liable for the judgment, and actually satisfied it. Walker *v.* Howell, 1 Coldw (Tenn.) 240; Smith *v.* Alexander, 4 Sneed (Tenn.), 482; Lintz *v.* Thompson, 1 Head (Tenn.), 457.

A forthcoming bond, with condition to deliver property taken in execution on a day of sale occurring after the return day, is valid. Ballard *v.* Whitlock, 18 Gratt. (Va.) 235; Dix *v.* Evans, 3 Munf. (Va.) 308.

**Care Required of Custodian of the Property.**—It seems that, where property is in litigation, the party who has given bond for its forthcoming at the termination of the suit is only bound to use such care and vigilance as a sheriff would be bound to exercise over it. Trotter *v.* White, 26

**4. Forfeiture of the Bond.**—A forthcoming or delivery bond is forfeited if *all* the property is not delivered at the time and place stipulated.[1]

Miss. 88; Browning *v.* Hanford, 5 Hill (N. Y.), 588.

**Duty of Officer Taking the Bond.**—The officer who takes the bond is not an insurer of the solvency of the surety—People *v.* Robinson, 89 Ill. 159;—but must use due diligence in ascertaining all the facts bearing upon the question, and his best judgment in deciding upon them—Murfree on Sheriffs, § 653. Where an execution is indorsed "No security of any kind to be taken," the officer has no authority to take a forthcoming bond; and if he does, it will not be valid as a statutory bond, although it may be good as a common-law bond, as a protection to the officer. Poston *v.* Southern, 7 B. Mon. (Ky.) 289.

In *Delaware*, a forthcoming bond is not an official one in any proper sense, and the creditor has no legal interest in it. It is wholly voluntary, and for the private benefit of the officer. Staats *v.* Herbert, 4 Del. Ch. 509.

There are almost infinite combinations of circumstances which may affect favorably or otherwise the validity of forthcoming and delivery bonds. Murfree on Sheriffs, § 652. The following cases show the extent of these, and the distinctions drawn by the various courts in determining them. Jones *v.* Miles, 1 How. (Miss.) 50; Coffee *v.* Planters' Bank, 11 Smed. & M. (Miss.) 458; Winston *v.* Com., 2 Call (Va.), 290; Washington *v.* Smith, 3 Call (Va.), 13; Wilkinson *v.* McLaughlin, 1 Call (Va.), 49; Worsham *v.* Egleston, 1 Call (Va.), 48; Brooks *v.* Roane, 1 Call (Va.), 205; Pleasants *v.* Lewis, 1 Wash. (Va.) 273; Cole *v.* Fenwick, Gilm. (Va.) 134; Lusk *v.* Ramsey, 3 Munf. (Va.) 426; Buske *v.* Levy, 1 Rand. (Va.) 1; Scott *v.* Hornsby, 1 Call (Va.), 41; Couch *v.* Miller, 2 Leigh (Va.), 545; Jett *v.* Walker, 1 Rand. (Va.) 211; Burroughs *v.* Freeman, 2 Munf. (Va.) 266; Beall *v.* Wilson, 4 Munf. (Va.) 380; Wilkinson *v.* Hendrick, 5 Call (Va.). 12; Randolph *v.* Randolph, 3 Rand. (Va.) 490; Packer *v.* Pitts, 1 1 Hen. & M. (Va.) 4; Eppes *v.* Colby, 2 Munf. (Va.) 523; Lemoigne *v.* Montgomery, 5 Call (Va.). 528; Glassel *v.* Delinca, 2 Call (Va.), 368; Wilson *v.* Stephenson, 2 Call (Va ), 213; Glascock *v.* Dawson, 1 Munf. (Va ) 605; Dix *v.* Evans, 3 Munf. (Va.) 308; Downman *v.* Downman, 2 Call (Va.), 507; Barnard *v.* Scott, 3 Rand. (Va.) 522; McKinster *v.* Garrott, 3 Rand. (Va.) 554; Anderson *v.* Leitch, 1 Leigh (Va.), 462; Cunningham *v.* Mitchell, 4 Rand. (Va.) 189; Johnston *v.* Meriwether, 3 Call (Va.), 523; Hewlett *v.* Chamberlayne, 1 Wash. (Va.) 367; Bunwell *v.* Court, 1 Wash. (Va.) 254; Hairston *v.* Woods, 9 Leigh (Va.) 308; Spencer *v.* Pitcher, 10 Leigh (Va.) 490; Lackey *v.* Mige, 75 Ga. 692; Stewart *v.* Ball, 35 Mo. 209; King *v.* Smith, 2 Leigh (Va.), 157; Williams *v.* Crutcher, 6 Miss. 71; Jones *v.* Mississippi, etc., R. Co., 6 Miss. 407; Lunsford *v.* Richardson, 5 Ala. 618; Weathersby *v.* Proby, 2 Miss. 98; Clow *v.* Thorpe, 11 Miss. 64; Fellins *v.* Griffin, 17 Miss. 362; Dowd *v.* Hunt, 10 Smed. & M. (Miss.) 414; Moody *v.* Harper, 28 Miss. 615; Finney *v.* Harris, 30 Miss. 36; Jones *v.* Stanton, 8 Miss. 601; Sessions *v.* Jones, 7 Miss. 123; Carleton *v.* Osgood, 7 Miss. 285; Baldwin *v.* Dillon, 30 Mo. 429; Conaway *v.* Odbert, 2 W. Va. 25; Smith *v.* Basinger, 12 Tex. 227; Brumby *v.* Barnard, 60 Ga. 292; Hagan *v.* Tobin, 5 Dana (Ky.), 264; McLain *v.* Irwin, 6 Ark. 71; Hardesty *v.* Price, 3 Colo. 556.

1. Murfree on Sheriffs, § 654; Hill *v.* Robinson, 44 Pa. St. 380; Cole *v.* Fenwick, Gilm. (Va.) 134. But the death of a slave or animal, after the giving of the bond, discharges the liability of the defendant and his sureties, provided they did not, by neglect, contribute to such death. Freeman on Executions, § 264; Falls *v.* Weisenger, 11 Ala. 801; Phillipi *v.* Capell, 38 Ala. 575; Haralson *v.* Walker, 23 Ark. 415; Poteet *v.* Bryson, 7 Ired. (N. Car.) 337; Mapp *v.* Thompson, 9 Ga. 42.

A partial delivery of the goods mentioned in the condition is not a performance, and the penalty becomes forfeited. Pleasants *v.* Lewis, 1 Wash. (Va.) 273; Munter *v.* Leinkauff, 78 Ala. 546; Hart *v.* Thomas, 75 Ga. 529.

Three several writs of *fi. fa.* were levied on the same property. The obligors, in a bond executed to the plaintiffs in one of them, were held bound to deliver only so much of it as was sufficient in value to satisfy the proportion of the execution of the obligees to which they would be entitled, as against the plaintiffs in the other executions. Kercheval *v.* Harney, Meigs (Tenn.), 403.

And if the property be at the place at the proper time, but not delivered to the officer until after that time, the bond will

be forfeited. McKinster *v.* Garrott, 3 Rand. (Va.) 554; Wright *v.* Lepper, 2 Ohio, 298; Mapp *v.* Thompson, 9 Ga. 42. So if the sheriff's commission be not paid. Bernard *v.* Scott, 3 Rand. (Va.) 522. It has the effect of a judgment from that time, and execution may issue against the obligors. Minor *v.* Lancashire, 4 How. (Miss.) 347; Kelly *v.* Lank, 7 B. Mon. (Ky.) 220; Brooks *v.* Harrison, 2 Ala. 209; Pelham *v.* Page, 6 Ark. 148; McKisick *v.* Brodie, 6 Ark. 375; Matter of Reardon, 9 Ark. 450; Gibbs *v.* Frost, 4 Ala. 720; Memphis Water Co. *v.* Magens, 15 Lea. (Tenn.) 37.

But it has the force of a judgment, so as to create a lien upon the lands of the obligors, only from the time the bond is returned to the clerk's office. Jones *v.* Myrick, 8 Gratt. (Va.) 179.

But though not delivered at the precise moment appointed for delivery, if delivered in time to be sold with equal advantage to the creditor, it should be regarded as a compliance with the bond. Chancellor *v.* Van Hook, 2 B. Mon. (Ky.) 449. Failure to deliver on day of sale will not cause a forfeiture, if before that day an injunction is obtained against the enforcement of the execution. Hull *v.* Bloss, 27 W. Va. 654.

If the property be subsequently taken into custody by the sheriff, it is not necessarily a discharge of the bond; but damages may be recovered for any expense which has been incurred by reason of said failure, as well as the depreciation in the price or value of the property between the first and second days of sale. Giddens *v.* Dismukes, 29 Ga. 110.

**When Forfeiture of Bond Operates as a Judgment.**—In some States, a forthcoming bond, when forfeited, becomes, by operation of law, a judgment, which extingushes the original judgment and also all liens created by that judgment. Chillen *v.* Cox, 7 S. & M. (Miss.) 791; Bell *v.* Tombigbee, 4 S. & M. (Miss.) 549; Stennet *v.* Fúqua, 1 Walk. (Miss.) 175; Connell *v.* Lewis, 1 Walk. (Miss.) 251; Witherspoon *v.* Spring, 3 How. (Miss.) 60; Joyce *v.* Farquhar, 1 A. K. Marsh. (Ky.) 20; Douglass *v.* Twombly, 25 Ark. 124; Chitty *v.* Gleen, 3 T. B. Mon. (Ky.) 424. And see Rowe *v.* Williams, 7 B. Mon. (Ky.) 202; Trotter *v.* Hannegan, 2 A. K. Marsh. (Ky.) 319; Bank of Kentucky *v.* Lacy, 1 T. B. Mon. (Ky.) 7; Tompkins *v.* Roberts, Litt. Sel. Cas. (Ky.) 12; Younge *v.* McElroy, Litt. Sel. Cas. (Ky.) 19; Poston *v.* Southern, 7 B. Mon. (Ky.) 209; Richardson *v.* Bartley, 2 B. Mon. (Ky.) 328; Sadlee *v.* Glover, 5 Dana (Ky.), 551; Hagan *v.* Tobin, 5 Dana (Ky.), 266; Laughlin *v.* Ferguson, 6 Dana (Ky.), 112; Price *v.* Honaker, 5 T. B. Mon. (Ky.) 562; Griffin *v.* Com., 5 J. J. Marsh. (Ky.) 318; Ditto *v.* Geoghegan, 1 Metc (Ky.) 170; Donnmaer *v.* Chisnor, 2 Wash. (Va.) 189.

In others, it is regarded merely as an additional security, and execution may issue on either judgment until one becomes, in fact, satisfied. Notwithstanding the summary remedy afforded by the statute, a forthcoming or delivery bond may be enforced by an action of debt thereon. The statutory remedy is cumulative. It does not deprive the obligee of his right of action under the form pursued at common law. Fassett *v.* Turnage, 6 Humph (Tenn.) 68; McLain *v.* Taylor, 9 Ark. 358; English *v.* Finicy, 5 Blackf. (Ind.) 298; Cole *v.* Robertson, 6 Tex. 356; Leach *v.* Williams, 8 Ala. 759; Crawford *v.* Bank of Mobile, 5 Ala. 55; Branch Bank of Mongomery *v.* Curry, 13 Ala. 304; Young *v.* Peery, 6 Blackf. (Ind.) 399.

In *Indiana*, the bond, when forfeited, must be returned with the execution; and the obligors have a right to have the damages assessed by a jury. McKay *v.* Craig, 6 Blackf. (Ind.) 168; Campbell *v.* Woolen, 5 Blackf. (Ind.) 80. If the original judgment be reversed on writ of error, the forthcoming bond, and judgment thereon, are void. Hoy *v.* Curch, 5 How. (Miss.) 188.

**Damages.**—In *Missouri*, where the defendant fails to comply with the condition of the bond, if the value of the property be less than the debt, the judgment against him and his securities should be for the value of the property and 10 per cent interest. If the value is greater than the debt, the judgment should be for the debt and 10 per cent interest. See *et al. v.* Moore, 12 Mo. 458.

So in *Indiana:* McCoy *v.* Elder, 2 Blackf. (Ind.) 103; Chinn *v.* Perry, 2 Blackf. (Ind.) 268; Mitchell *v.* Porter, 3 Blackf. (Ind.) 499; Patterson *v.* Brown, 1 Ind. 567; Hunter *v.* Brown, 68 Ind. 225.

In *Georgia*, where personal property has been levied on in the possession of the defendant, who has given a forthcoming bond for its delivery on the day of the sale, and is subsequently claimed, the sheriff is not bound, under the law, to transfer the possession of the property from the defendant to the claimant. Phillips *v.* Saunders, 15 Ga. 518.

When the property is not more than sufficient to satisfy liens upon it prior to the execution to relieve which the bond is given, the obligors are liable only for nominal damages on failure to produce the

**FORTHWITH.**—Immediately; within a reasonable time; with all reasonable celerity.[1]

property. Hayman *v.* Hallam, 79 Ky. 389.

In *Illinois*, in case of a forthcoming bond given to an attaching officer, such officer, when suing upon such bond, is entitled to recover so much as is necessary to satisfy his execution, unless the property was worth less than the amount due; in which case, the value of the property would be the measure of damages. Turner *v.* Armstrong, 9 Ill. App. 25.

**Burden of Proof.**—Upon a motion for judgment on a forthcoming bond, the plaintiff is not bound to show a breach of the conditions; the defendant must prove a performance. Nicolas *v.* Fletcher, 1 Wash. (Va.) 330; Gorden *v.* Atkinson, 1 Morr. (Iowa) 195.

**Right of Sureties.**—Mere delay to levy an execution emanating from a forthcoming bond will not discharge the security in the judgment on the bond. Melton *v.* Howard, 7 How. (Miss.) 103. He may be relieved where the non-delivery was occasioned by unavoidable or unforeseen accident. Freeman on Executions, § 264; Chancellor *v.* Van Hook, 2 B. Mon. (Ky.) 447. The surety of a joint debtor in a forthcoming bond becomes, upon the forfeiture thereof, surety for the debt; and where he has discharged it, is entitled to be substituted to all the rights of the creditor against the original debtors subsisting at the time he became so bound for the debt. Robinson *v.* Sherman, 2 Gratt. (Va.) 178; Leake *v.* Ferguson, 2 Gratt. (Va.) 419; Hill *v.* Manser, 11 Gratt. (Va.) 522. A surety cannot go into equity apart from his principal, to reinvestigate the original judgment; he cannot seek relief in his own name, on the ground that the original judgment was founded on an usurious consideration. Baim *v.* Williams, 10 Smed. & M. (Miss.) 113. But if the property levied on was not subject to the execution, he may be relieved. Long *v.* U. S. Bank, 1 Freem. Ch. (Miss.) 375. Where the property is surrendered the sureties are discharged. Meyer *v.* Fletcher, 35 La. Ann. 878.

In *Alabama*, a bond returned "forfeited" has the force and effect of a judgment, and execution may issue against the obligors; but one whose name has been forged as a surety may restrain execution by injunction. Brooks *v.* Harrison, 7 Ala. 209. See also Patterson *v.* Denton, 1 S. & M. Ch. (Miss.) 592.

So, in *Mississippi*, the court acting as a court of chancery will try the validity of a forthcoming bond upon grounds arising anterior to its forfeiture. Long *v.* United States Bank, 1 Freem. Ch. (Miss.) 375.

Where a debtor in execution executed a forthcoming bond to the creditor, and a third person and the obligee executed the bond with the debtor as his sureties, the bond having been forfeited, on a motion for award of execution on the bond, it was held that the bond was a valid bond to bind the other surety, but that he was only liable as a cosurety with the obligee, and that, if the principal creditor proved insolvent, the surety would be relieved to the extent of one moiety of the debt. Borth *v.* Kinsay, 8 Gratt. (Va.) 560. See, generally, Mead *v.* Figh, 4 Ala. 279; Dugan *v.* Fowler, 14 Ark. 132; King *v.* Baker, 7 La. Ann. 570; Winston *v.* Whitlocke, 5 Call (Va.), 435; Lyme *v.* Montague, 4 Hen. & M. (Va.) 180; Jennison *v.* Cozens, 3 Ala. 636; Gordon *v.* Jeffery, 2 Leigh (Va.), 410; Kerringham *v.* Scaland, 7 Miss. 540; Stewart *v.* Lacourne, 30 La. Ann. (Part I.) 157.

**Officer's Return.**—The sheriff's or other officer's return upon a forthcoming bond is only *prima facie* evidence of its truth. Adler *v.* Green, 18 W. Va. 201. The facts may be shown, and that the return is not correct. Evans *v.* Matson, 51 Pa. St. 366.

1. Jones *v.* Hutchinson, 10 C. B. 522; Reg. *v.* Isle of Ely, 5 E. & B. 496; Pittman *v.* Sutton, 9 C. & P. 706; Bennett *v.* Lycoming C. M. Ins. Co., 67 N. Y. 274; Scammon *v.* Germania Ins. Co., 101 Ill. 621; Roberts *v.* Brett, 11 H. L. Cas. 337. "The term 'forthwith,' when applied to the performance of an act, imports that it shall be performed as soon as, by reasonable exertion, confined to the object, it might be." Bouv. L. Dict., adopted in Anderson *v.* Goff (Cal.), 13 Pac. Rep. 73, and Moffat *v.* Dickson, 3 Colo. 313. "'Forthwith' has a relative meaning, and will imply a longer or shorter period, according to the nature of the thing to be done." "It is synonymous with 'immediately,' and immediately has been construed to mean 'such convenient time as is reasonably requisite for doing the thing.'" "While the term is imperative, and admits of no unnecessary delay, it imposes nothing but due diligence, to be measured by the circumstances of each particular case." Accordingly, where a court, in sustaining a demurrer to a plea, ordered the defendant to plead over forthwith, it is error to enter judgment on default on the same day. Moffat *v.* Dickson.

3 Colo. 313. "Like the term 'immediately,' it is not to be necessarily construed as a time immediately succeeding, without an interval, but an effectual and lawful time, allowing all the 'adjuncts and accompaniments' necessary to give an act full legal effect to be performed." The failure to use the word in an order for service by mail, under a statute directing that mailing be done forthwith, is an irregularity which will not render the proceedings void, but for which they might be set aside. Anderson *v.* Goff (Cal.), 13 Pac. Rep. 73.

The word is of frequent use in policies of insurance, which require notice of loss to be given forthwith. It here means within a reasonable time; without unreasonable delay; with due diligence under the circumstances of the case. Scammon *v.* Germania Ins. Co., 101 Ill. 621; Edwards *v.* Balt. F. Ins. Co., 3 Gill (Md.), 177. Eighteen days after loss was held not to be forthwith in Edwards *v.* Lycoming C. M. Ins. Co., 75 Pa. St. 378. Nor was thirty-eight,—Inman *v.* Western F. Ins. Co., 12 Wend. (N. Y.) 452;—nor forty-eight,—Brown *v.* London Assur. Co., 40 Hun (N. Y.), 101. But where the fire occurred on the 15th of the month, and the owner was informed of it on the 18th, and gave notice on the 23d, the notice was sufficiently early. N. Y. C. Ins. Co. *v.* N. P. Ins. Co., 20 Barb. (N. Y.) 468. Where the insured gave notice to the agent of the company two days after the fire, and to the secretary twenty-six days after, he having but just learned the necessity of giving notice to the secretary, as his policy was in the possession of the company, the notice was sufficient. Bennett *v.* Lycoming C. M. Ins. Co., 67 N. Y. 274. So also, where verbal notice was given two days after the loss, and written notice, which was required by the policy, twenty days after, the insured having been informed when he delivered the latter that, owing to pressure of business, it would be impossible to attend to his claim immediately. Phillips *v.* Protection Ins. Co., 14 Mo. 220.

"Forthwith" has been construed to mean within a reasonable time, where the inquisition of a jury to condemn land for the use of a railroad required the company forthwith to construct for R. a trestle, as therein described. Pa. R. Co. *v.* Reichert, 58 Md. 261. So also in a statute requiring overseers of the poor to give copies of rates to any inhabitant of the parish forthwith upon demand. When the demand was made during the night, a delivery next morning is a compliance with the statute. Spenceley *v.* Robinson, 3 B. & C. 658. A covenant, "forthwith, as soon as may be," to sell, allows a reasonable latitude as to time, such as a man diligent in business would require. Adams *v.* Foster, 5 Cush. (Mass.) 156. And as used in a covenant to bring a vessel alonside a certain wharf, the word means without delay or loss of time. Roberts *v.* Brett, 11 H. L. Cas. 337; s. c., 36 Eng. L. & Eq. 358. And in a statutory requirement, that a warrant in bankruptcy shall authorize the marshal forthwith to make publication and notify creditors, the term means as soon as conveniently practicable after the warrant issues. *In re* Devlin *v.* Hagan, 1 Ben. (C. C.) 335. It was given the same signification, "as soon after as practicable," in the construction of an act directing the officers of private lunatic asylums to discharge patients forthwith upon receipt of orders signed by those who signed the orders for reception. Lowe *v.* Fox, 54 L. J. R. Q. B. D. 561.

Under a rule requiring an appeal to be entered within twenty-one days, and a notice thereof to be sent forthwith to the register of the court, appeal from the notice to the register must be sent within the twenty-one days, or as soon thereafter as possible. *In re* Sillence, 7 Ch. Div. 238; *Ex parte* Hill, 53 L. Ch. Div. 247. Where the appeal was entered on the last day, and the notice mailed to the country solicitors upon the next day, who received it on the third day (Monday), and sent it at once to the register, the rule was complied with. *In re* Lamb, 19 Ch. Div. 169; 30 W. R. 126; 51 L. J. Ch. Div. 207.

A judge's certificate that execution shall issue forthwith, means in the ordinary course of the business of the court. Snooks *v.* Smith, 7 M. & G. 528.

And where a bond is given on a petition to review, conditioned forthwith to prosecute the review to final judgment, "to do so 'forthwith' is a stipulation satisfied by doing so within such time as the court having jurisdiction of the petition may order." Ayer *v.* Emery, 14 Allen (Mass.), 66.

What is a reasonable time depends on the circumstances of each particular case. Anderson *v.* Goff (Cal.), 13 Pac. Rep. 73; Bennett *v.* Lycoming C. M. Ins. Co., 67 N. Y. 274; Queen *v.* Justices of Berkshire, 4 Q. B. D. 471. In a rule of court directing the report of a master to be delivered to the party who obtained the reference, and who shall forthwith file the same, "forthwith" means within twenty-four hours. Champlin *v.* Champlin, 2 Edw. (N. Y.) 328. In an order directing

**FORWARDING MERCHANTS.**—(See also BAILMENT; BILL OF LADING; CARRIERS OF GOODS; EXPRESS COMPANIES; WAREHOUSEMEN.)

I. Definition, 573.
II. Forwarder Bound to Exercise Ordinary Care, 574.
III. Duty to Advise Consignee, 575.
IV. Burden of Proof as to Negligence, 575.
V. Instructions by Shipper, 575.
VI. Distinguishing Forwarder from Carrier, 577.
VII. Use of the Word "Forward" by Carriers, 580.
VIII. Breaking Carriage — Connecting Carriers, 582.
IX. Bill of Particulars in Suit Against Forwarder, 584.
X. Damages, 584.

Forwarding merchants have been superseded in large part,[1] by the expressman, who not only forwards but cares for the goods on the way. Forwarding merchants have been thus defined:

I. **Definition.**—"Forwarding merchants are a class of persons well known in America, and usually combine in their business the double character of warehousemen and agents, for a compensation, to ship and forward goods to their destination. This class of persons is especially employed upon our canals and railroads, and in our coasting navigation by steam-vessels and other packets."[2]

Employment of warehouseman and forwarding merchant, in usual course of his business, imports a hiring, and that he is to be paid.[3]

Forwarding merchants are liable for refusing to receive goods, unless they show good excuse for the refusal.[4]

a party to deposit a paper in his possession forthwith, the word was held to mean immediately, or within a reasonable time after notice. Upon his failure to do so, one hour after notice, he was committed for contempt. Chapin *v.* Whitsett, 4 Paige (N. Y.), 405.

What is a reasonable time is ordinarily for the jury. Pittman *v.* Sutton, 9 C. & P. 706; Tennant *v.* Bell, 9 Q. B. 684; Pa. R. Co. *v.* Reichert, 58 Md. 261; Edwards *v.* Balto. F. Ins. Co., 3 Gill (Md.), 177.

"Forthwith" is a sufficient expression of time within which an act is required by an order under a rule of court to be done. Thomas *v.* Nokes, L. R. 6 Eq. 521. *Contra,* Reg. *v.* Hellier, 17 Q. B. 229.

"Forthwith" is also defined to mean "with all reasonable celerity,"—Burgess *v.* Boetefeus, 7 M. & G. 494;—"with all reasonable despatch,"—Van Wyck *v.* Hardy, 20 How. Pr. (N. Y.) 222;—"with convenient speed and due diligence,"—Blackiston *v.* Potts, 2 Miles (Pa.), 389;—"with reasonable and proper diligence,"—Simpson *v.* Henderson, 1 Moo. & M. 300. It is likewise said in Queen *v.* Justices of Berkshire, 4 Q. B. D. 471.

"The words 'forthwith' and 'immediately' have the same meaning. They are stronger than the expression 'within a reasonable time,' and imply prompt, vigorous action, without any delay; and whether there has been such action is a question of fact, having regard to the circumstances of the particular case."

Where an arbitrator's award directed that A and B should forthwith execute certain reconveyances to C, and that C should forthwith execute indemnities and releases to A and B, "forthwith" in the latter case means as soon as A and B had by their execution of the reconveyances put themselves in a position to call for the execution of the releases. Boyes *v.* Bluck, 13 C. B. 652.

1. Schouler on Bailments, § 351.

2. Story on Bailments, §§ 444–450; 2 Kent. Com. 591.

3. Graves *v.* Smith, 14 Wis. 5; s. c., 80 Am. Dec. 762.

4. Maybin *v.* R. Co., 8 Rich. (S. Car.) 240.

In Maybin *v.* Railroad Co., 8 Rich. (S. Car.) 240, goods were shipped from New York to Charleston, for the plaintiffs, doing business in Columbia, South Carolina, to the care of the South Carolina Railroad Company, whose course of

**II. Forwarder Bound to Exercise Ordinary Care.**—The forwarding merchant is not a common carrier.[1]

He is liable only for ordinary diligence.[2] But he is responsible for loss occasioned by neglect to take proper care of goods.[3] The

business it was to receive and forward goods so addressed. *Held*, that the company were not liable as common carriers until the goods were received by them for carriage; that, considering them as forwarding agents, the rule as to their liability was not the same as that which applied to them as common carriers; that, considering them as forwarding agents, they would be liable for refusing to receive unless they showed good excuse for not receiving; and after receiving, they would be liable for not taking all the care which a prudent man would take about his own business.

1. A person who receives and forwards goods, taking upon himself all the expenses of transportation, for which he receives a compensation from the owner of the goods, but who has no concern in the vessels by which they are forwarded, or interest in the freight, is not a common carrier. Hence he was held not to be liable for potashes received by him to be forwarded down the Mohawk to Schenectady, and which, whilst proceeding down the river, were lost by reason of the boat running against a bridge and sinking. Roberts *v.* Turner, 12 Johns. (N. Y.) 232.

Express companies are common carriers. See EXPRESS COMPANIES, Am. & Eng. Encyc. of Law, vol. 7, p. 541.

Agisters of cattle, warehousemen, wharfingers, and forwarding men, or forwarding merchants are all responsible for want of good faith, and of reasonable care and ordinary diligence and skill, and not to any greater extent. 2 Kent Com. 591; Story on Bailments, § 444.

A person who receives goods in his own store, standing upon his own wharf, for the purpose of forwarding them, is deemed but a mere warehouseman, responsible for ordinary diligence only. Platt *v.* Hibberd, 7 Cow. (N. Y.) 497; Roberts *v.* Turner, 12 Johns. (N. Y.) 232; Brown *v.* Denison, 2 Wend. (N. Y.) 593; Bush *v.* Miller, 13 Barb. (N. Y.) 488; Story on Bailments, § 444.

Forwarders are not insurers; but they are responsible for all injuries to property, while in their charge, resulting from negligence or misfeasance of themselves, their agents or employees. Hooper *v.* Wells, 27 Cal. 11.

2. Schouler Bailments, § 351; Angell Carriers, § 75; Story Bailm. § 502; 2 Kent Com. 591, 592; Platt *v.* Hibbard, 7 Cow. (N. Y.) 497; Maybin *v.* S. Car. R., 8 Rich. (S. C.) 240; Northern R. *v.* Fitchburg R., 6 Allen (Mass.), 254; Stannard *v.* Prince, 64 N. Y. 300.

Ordinary diligence in forwarding by responsible persons discharges the forwarding merchant from liability. Brown *v.* Denison, 2 Wend. (N. Y.) 593.

3. Goods were carried to Liverpool, on their way to the Isle of Man. They were addressed to plaintiff, Isle of Man, care of defendant at Liverpool. Defendant, on receipt of notice of their arrival at Liverpool, signed the carrier's book, acknowledging the goods had arrived for him (defendant). He caused them to be entered in the clearance and manifest of a steam-vessel about to sail for the Isle of Man. On former occasions, when the carrier brought him goods he had desired that they might remain at the wharf till he sent for them. Defendant did not send for the goods in question till six days after their arrival, when they could not be found. *Held*, in an action of case against defendant, for negligence in not taking proper care of the goods, that there was evidence for the jury of a delivery to and acceptance by him. Verdict for plaintiff. Quigg *v.* Duff, 1 M. & W. 174.

Where property is delivered to a warehouseman to ship by a connecting carrier to its place of destination, and the condition of the warehouseman's yard is such that, as a man of ordinary prudence, he should have foreseen the danger to which the property would be exposed by reason of its liability to fire, he will be guilty of negligence if he does not ship it by the first opportunity afforded, and will be liable for its loss. Merchants' Wharf-boat Assoc. *v.* Wood (Miss.), 3 South. Rep. 248.

But in this case, where the jury was charged that, if the condition of the yard, proximity of laborer's cabins, habit of smoking in yard, warned the defendant of danger of fire, then the warehouseman was liable for loss by fire, although originating in neither of these sources. It was held that the charge was erroneous: following Wharf-boat Assoc. (Miss.), 2 South. Rep. 77.

Where a contract for transportation is made between a railroad company for itself, the warehouseman who is to receive the goods and deliver them to the con-

attraction of thieves by the receipt of other and valuable goods was held not to make the bailee liable unless the receipt of such other goods made robbery a probable consequence.[1]

**III. Duty to Advise Consignee.**—Forwarding merchants are bound to give advice to the consignee of the shipment made to him; and the liability of the carrier to deliver according to the bill of lading does not discharge them, although they may have been prevented from getting bills of lading in triplicate by the misconduct of such carrier.[2]

**IV. Burden of Proof as to Negligence.**—Though the forwarding merchant is only liable for ordinary care, yet he is bound to give some account of the property before he can throw on plaintiff the *onus* of proving negligence. And where he made no memorandum of the goods when they were delivered to him, nor could account for it from that time, the goods being lost, it was held that he was liable as warehouseman and forwarder, without further proof of negligence.[3]

**V. Instructions by Shipper.**—Though warehousemen and forwarding merchants are responsible only for want of good faith and reasonable diligence, yet one of the first duties of a consignee for transmission is to obey the instructions of the consignor, either express or fairly implied.[4]

If a forwarding merchant erroneously insert the name of a consignee in the bill of lading, which was not marked on the goods, and in consequence thereof the goods are seized and sold by the sheriff as the property of the person whose name is thus inserted; the merchant is liable to the real owner.

necting carrier, and the connecting carrier, on the one part, and the shipper, who has no knowledge of the tripartite agreement, on the other, the railroad company is not the agent of the shipper, and has no power to make a contract with the warehouseman that would relieve him from responsibility for its own negligence resulting in loss of the goods by fire, or to bind the shipper by any contributory negligence of which the railroad company might be guilty in delivering the goods in an unsafe position in the warehouseman's yard. Merchants' Wharf-boat Assoc. *v.* Wood (Miss.), 3 South. Rep. 248; Merchants' Wharf-boat Assoc. *v.* Wood (Miss.), 2 South. Rep. 76.

Forwarders are liable for negligence of managers of various public conveyances; such as stages, steam-tugs, lighters, and ocean steamers employed by them for delivering goods. Such managers are the agents and employees of the forwarders. Hooper *v.* Wells, Fargo & Co., 85 Am. Dec. 211; s. c., 27 Cal. 11.

1. One who receives goods, for reward, into his store, though standing upon a wharf, the goods to remain there for the purpose of being forwarded, subject to the bailor's order, is not a wharfinger, and is liable merely as a warehouseman. He is not liable as a common carrier. He is only bound to use ordinary care in preserving the goods.

*Semble*, that where goods so received are of themselves well secured, the mere circumstance of receiving goods of another sort into the same store, which invite thieves into the store, who set it on fire and the former goods are consumed, will not make the bailee liable unless the receipt of the latter goods will probably produce such a consequence. Platt *v.* Hibbard, 7 Cow. (N. Y.) 497.

2. Railey *v.* Porter, 32 Mo. 471; s. c., 82 Am. Dec. 141.

3. Bush *v.* Miller, 13 Barb. (N. Y.) 481.

In Platt *v.* Hibbard, 7 Cow. (N. Y.) 497, it was intimated that the burden of proof in case of loss is on the forwarding-man to avoid liability.

4. Forsythe *v.* Walker. 9 Pa. St. 148.

In Johnson *v.* N. Y. Central R. Co., 33 N. Y. 610, Porter, J., said: "In the absence of instructions as to the mode of

Where the consignor marks the goods with the initials only of the consignee, he is guilty of no negligence which will protect the carrier from a loss by his entering them on the bill of lading in the name of a stranger, whereby the goods are lost.

transportation from Albany, it owed no duty to the plaintiff beyond the delivery of the property in the usual course of business to safe and responsible carriers for transmission to its destination. Brown *v.* Dennison, 2 Wend. (N. Y.) 593; Van Santvoord *v.* St. John, 6 Hill (N. Y.), 157. But, when the forwarding agent is instructed as to the wishes of his principal, and elects to disregard them, he is guilty of a plain breach of duty. When he sends goods in a mode prohibited by the owner, he does it at his own risk, and incurs the liability of an insurer. Ackley *v.* Kellogg, 8 Cow. (N. Y.) 225. It appears in the present case that the contract was made with the freight agent of the defendant, who suggested that it would be better to forward the hemp by towboat from Albany; but the plaintiff replied, in substance, that it was so late in the season that he would not send it unless it could go by the People's line. This proof tends to show that the defendant received the property, with an express understanding that the hemp was not to be forwarded to New York unless by the People's line. If this was so, the defendant was clearly liable. On the refusal of the steamboat-proprietors to receive the property, the company should either have communicated the fact to the plaintiff and awaited further instructions, or it should have relieved itself from liability by depositing the hemp for safe-keeping in a suitable warehouse. Forsythe *v.* Walker, 9 Barr (Pa.), 148; Goold *v.* Chapin, 20 N. Y. 259; Fisk *v.* Newton, 1 Den. (N. Y.) 451. There is a class of cases in which an agent is justified, by an unexpected emergency, in deviating from his instructions, where the safety of the property requires it. In this instance no such exigency arose. The only inconvenience which would have resulted to the owner, from compliance by the carrier with his known wishes, would have been mere delay in transmitting the hemp to market; and he had notified the company that he would rather submit to this delay than to the hazard of towboat transportation at the close of the season of navigation. The primary duty of the agent is to observe the instructions of his principal; and when he departs from these, he must be content with the voluntary risk he assumes. 1 Pars. on Cont. 69; Forrester *v.* Boardman, 1 Story (U. S.), 43; Ackley *v.* Kellogg, 8 Cow. (N. Y.) 223. The evidence would have authorized the jury to find that there was a breach of duty by the defendant, and the nonsuit was therefore erroneous."

In Forrester *v.* Boardman, 1 Story (U. S.), 43, Story, J., charged the jury that a supercargo is not bound to observe the exact terms of his instructions if thereby the interests of the owner would be sacrificed or his objects frustrated; that in cases of necessity or great urgency it is only necessary, that the supercargo should act *bona fide* and with reasonable discretion, in order to bind the owner.

A railroad corporation whose road ended in Boston, received at a way station goods addressed to St. Louis, which it agreed to convey to Boston and forward thence by the Merchants' Express, which was a line of transportation from Boston to the West. But instead of delivering them to the Merchants' Express at Boston, it forwarded them to New York by other carriers, who there delivered them to a company styled the Merchants' Express and Transportation Company, which conveyed them thence to St. Louis at a cost greater than would have been the cost of their transportation thither by the Merchants' Express. *Held*, that the railroad corporation was liable to the consignor of the goods for the difference in cost; and that it was immaterial that its general freight agent was ignorant of the Merchants' Express line from Boston, and failed to be informed of it upon inquiring of several persons.

In these days, resort to the telegraph is easy for inquiry of owner.

A common carrier receiving goods to be forwarded to points beyond his route, in case of an interruption of the stipulated line of transportation, is bound to use all reasonable means such as a prudent owner being present would take to protect the property from unnecessary loss or damage. What constitutes reasonable care in such an emergency, and whether it is the duty of the carrier to forward the goods by a different route, are questions of fact, to be determined with reference to all the circumstances. Neglect to notify the consignee of a change of route does not render the carrier liable for loss or damage happening from delay

If it be the general custom of a carrier to forward by sailing-vessels all goods destined beyond the end of his line, he is not liable for not forwarding a particular article by a steam-vessel, unless the direction to do so be clear and unambiguous.[1]

**VI. Distinguishing Forwarder from Carrier.**—Advancement of the towage, and payment of an old bill for other towage due by the barge-owner, will not render the forwarding merchant liable as a common carrier. Such advance may become a duty of the forwarder.[2]

in the delivery of the goods, if such notice would not have avoided the injury. Regan *v.* Grand Trunk R., 61 N. H. 579. *Held*, on appeal from referee, accordingly, that where poultry, of perishable nature, were to have gone on from Portland to Boston by sea, but could not because of a violent storm, on account of which the goods were sent on by the defendant by rail, and the train ran off the track, the loss being an unavoidable one, the defendant company were not liable.

Forwarder employed with directions to send goods by railway, and who ships them by water, is guilty of conversion. Graves *v.* Smith, 14 Wis. 5; s. c., 80 Am. Dec. 762. Here it is held that if shipper notifies warehouseman that he has contracted with a certain railroad company to carry the goods, and the warehouseman replies, "It is all right," the latter has no right to afterwards send the goods in any other way; and if he does so, and they are lost, he will be liable therefor.

In the absence of instructions, forwarder may use his discretion in shipping in usual or best route. Graves *v.* Smith, 14 Wis. 5; s. c., 80 Am. Dec. 762.

**1.** Simkins *v.* Norwich & New London Steamboat Co., 11 Cush. (Mass.) 102. In this case, the following receipt was given:

"Boston & Norwich Railroad Corporation. [Date, etc.] Received from Wm. Stowe, Agent: One Case of Mdse. Marked Hardy & Delk, Norfolk, Va. To be forwarded by Steamboat and Railroad.

"Numbered and marked as above, which the company promises to forward by its railroad, and deliver to . . . or order, at its depot. . .

"[Signed by agent for railroad.]"

The case was marked thus: "Hardy & Delk, Norfolk, Virginia. To be forwarded by steamboat and railroad, for J. B. Simkins, Eastville, Virginia." Though there was no corporation of the above name, two railroad companies together owned a continuous line, one from Boston to Worcester, the other from Worcester to Norwich, which with the Norwich and New London Steamboat Company formed a line from Boston to New York.

Defendants' custom was to forward Norfolk goods by sail, that being cheaper and nearly as expeditious. It was held that the contract above set forth might have intended transportation by rail and steamer for the entire distance to Norfolk, or it might have contemplated merely the transit to New York, that being defendants' line of transportation. And that in the absence of more specific instructions, the carrier was not liable for adhering to his custom of forwarding from New York by sail.

**2.** In Stannard *v.* Prince, 64 N. Y. 300, plaintiffs were forwarding merchants at Troy, and were employed by defendant to ship certain marble to him at Philadelphia. The marble was shipped on board a canal-boat which proceeded as far as Albany. Learning that it was there delayed, one of the plaintiffs went to Albany and there learned that the only towboat company it was practicable to employ to tow the boat down the Hudson declined to take the boat unless the captain would pay an old bill, and would pay in advance the charge for towing. The captain had gone home to procure the money. Plaintiffs thereupon advanced the money and the boat was put into a tow, and by the negligence or unskilfulness of the employees of the towboat company was injured and sunk. In an action to recover for advances and charges, wherein the loss was set up as a counter-claim, *held*, that plaintiffs acted simply as forwarders, not as carriers; that by the transactions at Albany they did not assume the carriage of the property; that they had a right, and it was their duty, to pay the advance charges; and although defendant was not liable for the advance on the account of the captain, it was for his benefit, and he could not complain; and that as the loss did not occur by any negligence on the part of

Under some circumstances, it becomes a matter of nicety to decide whether the bailee is acting in the capacity of forwarder or carrier, and in what character he may be chargeable with loss.[1]

A common carrier receiving goods to keep in store until orders should be given to transport the same, is not liable as common carrier while the goods so remain awaiting orders.[2]

If a common carrier receives goods into his own warehouse for the accommodation of himself and his customers, so that the deposit there is a mere accessory to the carriage, and for the purpose of facilitating it, his liability as a common carrier begins with the receipt of the goods. If the instructions are to ship immediately, but, the navigation being obstructed, the carrier stores the goods in the warehouse, his liability is that of common carrier.[3]

Instructions to forward forthwith may be inferred from course of dealing. Prior instructions cannot be destroyed by contrary instructions of cartman.[4]

Notice by railroad company that goods in company's warehouses are at owner's risk, cannot limit or discharge the carrier's liability as to goods which are to be shipped forthwith.[4]

plaintiffs, and was not a natural or ordinary consequence of any act of theirs, they were not liable therefor.

1. Teall *v.* Sears, 9 Barb. (N. Y.) 317.

2. Platt *v.* Hibbard, 7 Cowen (N. Y.), 499.

A railroad company is not liable as common carriers for property deposited in its warehouse to await orders from the owner for its transportation. And where the company is prohibited by its charter from charging as warehousemen for storage, it can be liable as gratuitous bailee only for property so deposited with it and awaiting orders. Mich. Southern & North Indiana R.Co.*v.* Shurtz, 7 Mich. 515.

The technical liability of a common carrier does not attach until the delivery to him of the property is complete.

So, where A delivered to a railroad company, for transportation, a quantity of hay, which was placed on platform cars, the next day, when the company was about to send it forward, A requested that it should not be taken away until he could first see the party to whom it was sold, which request was complied with, and the next day the hay was ignited by sparks from a passing locomotive, and a portion of it burned. *Held*, that from the moment of A's request, the liability of the company was that of a warehouseman only. St. Louis R. Co. *v.* Montgomery, 39 Ill. 335.

Liability of a railroad company as common carrier for goods delivered to it attaches only when the duty of immediate transportation arises. So long as the shipment is delayed for further orders as to the destination of the goods or for the convenience of the owners, the liability of the company is that of warehousemen. Watts *v.* Bos. & Low. R. Corp., 106 Mass. 466; Barron *v.* Eldredge, 100 Mass. 455; Judson *v.* Western R. Corp., 4 Allen (Mass.), 520. And in the case just cited (of Judson *v.* R. Cor., 4 Allen (Mass.), 520, it was held that where the goods were detained by the second of two carriers on the same general route, although not connected, until delivery of the bill of charges of the first carrier, the liability of the second carrier until such bill was delivered was that of warehousemen. In *New York*, however, the second railroad company was held to be liable as a common carrier. Michaels *v.* N. Y. Central R. Co., 30 N. Y. 564.

3. Clark *v.* Needles, 25 Pa. St. 338. The obstruction was caused by the drawing out of water from a canal, in order to repair the canal.

4. Where a railroad corporation have a warehouse at which they receive goods for transportation, if goods are delivered there with instructions to forward presently, while the goods remain in the warehouse for the convenience of the railroad until they can be forwarded in the usual course of business, the railroad holds them as common carriers, and are liable for them as such.

A public notice will not discharge a common carrier from this legal liability. But if the goods are kept back in the warehouse for the convenience of the

Where a railroad company is prohibited by its charter from charging as warehouseman for storage, it can be liable as gratuitous bailee only, for property deposited with them and awaiting orders.[1]

In a *Pennsylvania* case, it was said that if defendants, who were warehousemen and common carriers, had been also forwarders, instructions to "ship immediately" might have applied to their duties as forwarders.[2]

Where the bailee himself is a common carrier, that fact may weigh against him in interpreting a contract alleged by him to be merely as of a forwarding merchant, and alleged by a shipper to be the contract of a common carrier.[3]

owner, and by his order, while they are so detained the railroad will not be liable as common carriers, but as depositaries only.

In Moses *v.* Boston & Me. R., 24 N. H. (4 Foster) 71, defendants gave public notice, which they offered to bring home to the knowledge of the plaintiff, that all goods would be at the owner's risk in the company's warehouses; and that no responsibility would be admitted for any loss or injury except such as might arise by fire from the locomotives or by negligence of the agents of the company. The plaintiff's goods were delivered at the warehouse, with instructions to be forwarded presently, and were consumed in the warehouse by an accidental fire not caused by the locomotives. *Held*, that the defendants were liable for the goods as common carriers, nothwithstanding the notice; that instructions to forward forthwith may be inferred from an established course of dealing between the owner and carrier; that prior instructions by owner cannot be destroyed by the unauthorized contrary instructions of the cartman who brings the goods to the railroad.

1. Mich. Southern, etc., Co. *v.* Shurtz, 7 Mich. 515.

2. Clarke *v.* Needles, 25 Pa. St. 330.

3. In Teall *v.* Sears, 9 Barb. (N. Y.) 317, the goods were *en route* from Boston to Chicago, and in the course of transportation were shipped at Albany for Buffalo, on a canal-boat. A bill of lading was made out by the plaintiffs, and forwarded by the captain of the canal-boat, with directions to deliver the goods in the bill as addressed, and collect the charges for transporting on the canal. The three cases were marked on the bill "A. B. Case, Chicago, by vessel, care of Sears & Griffith, Buffalo." The cases were received by Sears & Griffith (the defendants), at Buffalo, on the 14th of October, and they paid the canal charges, indorsing a receipt therefor, and a memorandum of the receipt of the goods, on the bill of lading. The defendants were at the time engaged in the forwarding and commission business at Buffalo. That was their principal business; but they were interested to some extent in a transportation line on the canal, and also in at least one vessel carrying freight upon the lakes. On the 17th of October, the defendants shipped the goods on board the schooner C., a transient vessel, which ran between Buffalo and Chicago, in which they had no interest. They took the captain's receipt, and themselves made a bill of lading for the goods, agreeing with the captain as to the amount of freight he should receive. The vessel was a good one, and her captain in good credit. In an action against Sears & Griffith, to recover the value of some of the goods which were lost and not delivered at Chicago, *held* (1) That the legal import of the memorandum was, not that the goods should be stored at Buffalo, and that the defendants should act as agents of the plaintiffs in procuring a carrier of them from Buffalo to Chicago, but that they were consigned to the defendants at Buffalo, with a request or direction that they should be carried by vessel from Buffalo to Chicago; (2) that the defendants, receiving the goods, with the accompanying memorandum, and transporting, or causing the same to be transported, by vessel, to Chicago, were to be regarded as impliedly contracting to carry, and that upon such receipt the risk of a *carrier*, and not that of a *warehouseman* or *forwarder*, attached.

And Roberts *v.* Turner, 12 Johns. (N.Y.) 232, was distinguished in that Turner acted only as forwarder, having no interest in the boats or wagons, or in the freight.

On the trial of an issue as to whether parties acted as common carriers or as forwarders, there was evidence tending to establish that they acted in the latter capa-

The preponderance of authority in this country favors the presumption that each carrier in a continuous transportation is only a forwarder beyond his own line.[1]

**VII. Use of the Word "Forward" by Carriers.**—The use of the word "forward" cannot reduce a common carrier's liability to that of forwarder if the contract is really one of a common carrier. The word "forward" is controlled by the nature and extent of the actual undertaking.[2]

city; that such parties were engaged in the business of receiving mercandise from a railroad company at the terminus of its road, and transporting the same to a neighboring town; that they had an office at such town where freight bills were collected and custom solicited; and that they were doing business for the general public. *Held*, that such issue should have been submitted to the jury under proper instructions. Schloss *v.* Wood (Colo.), 17 Pac. Rep. 910.

1. Schouler Bailm. § 597, reviewing the cases. See also subsequent sections of Schouler, as to effect of through receipt, special contract, etc.

2. A party doing business under the name and style of "Spaulding's Express Freight Line," and in that name receiving goods at New York "To be forwarded by Spaulding's Express to" Louisville, without liability for damage "if delivered at Louisville depot in good order," without liability "for wrong delivery of goods marked by initials" or "for wrong carriage of goods that are imperfectly marked," and the contract, in case of loss or damage for which Spaulding's Express may be liable, stipulating that the latter shall have the benefit of any insurance effected by the owner, is a carrier of goods and not a forwarder merely, notwithstanding he employs the conveyances of third parties only (railroad companies, etc.,) in the performance of his contract. Read *v.* Spaulding, 5 Bosw. (Super. Ct. N. Y. City), 395 (Woodruff, J.).

The question in cases like the one just cited regards, not the liability of a forwarding-man, but of an expressman, and this is not the proper place for their discussion, although a decision opposed to the above is reported in 19 Barbour (N. Y.), 577, Hersfield *v.* Adams, wherein it was ruled that the expressman is not liable as common carrier. But see article entitled EXPRESS COMPANIES, 7 Am. & Eng. Encyc. of Law, 541.

Express companies are clearly liable as common carriers; and this, notwithstanding such titles as "transportation company," "forwarders," be used to designate what in fact is the express business. Story on Bailments (9th Ed.), § 496, p. 470, note, citing many cases; 1 E. D. Smith (N. Y.), 115; 97 Mass. 124; 29 Ill. 392; 20 Gratt. (Va.) 264; 53 Ala. 19; 93 U. S. 174.

A receipt given by an express company for a draft "For collection, drawn by Parkhurst on Far & Co., valued at $1000 and marked 'Fay & Co., Chicago, Ill.,' which we undertake to forward to Chicago, Ill., only perils of navigation excepted, and it is hereby expressly agreed that said American Express Co. are not to be held liable for any loss or damage except as forwarders only," imposes on the express company liability for negligence in the effort to collect, notwithstanding the clause "except as forwarders only." American Express Co. *v.* Pinckney, 29 Ill. 362 (Caton, C.J., dissenting on account of the excepting provision).

The general principle was said to be that, wherever an order is given, previously to the delivery of goods. to a carrier or other bailee, to deal with them, when delivered, in a particular manner, to which he assents, and afterwards the goods are delivered to him accordingly, a duty arises on his part, upon receipt by him of the goods, to deal with them according to the order previously given and assented to; and the law infers an implied promise by him to perform such duty. Citing Streeter *v.* Horlock, 8 Eng. C. L. R. 390.

Parties doing business under the name and style of a "transportation company," advertising for patronage as such, and in that name contracting with owners to forward goods from New York to Chicago for a compensation agreed upon as an equivalent for the entire service, and stipulating respecting the carriage, are to be deemed carriers and not forwarders merely, although they employ the conveyances of third parties only in the performance of the contract. Mercantile Mut. Ins. Co. *v.* Chase, 1 E. D. Smith (Y. Y. City Common Pleas), 115. The contracts read: "New York,

In a case in *Kansas*, however, a clause that the carrier shall not be held liable for any loss or damage except as forwarders, brought home to the knowledge of the shipper, was construed to have the effect of securing the carrier from all liability except for positive negligence, and to throw upon the shipper the burden of proving negligence or fraud in the carrier.[1] It is to be observed, in regard to this decision, that the early express cases wavered between holding such companies liable as forwarders or as common carriers. The latter view, however, prevailed.

In a *New York* case, it was said that "to forward" means "to send," not "to carry." And that where an express company agrees to forward a package to a point *beyond* the terminus of its route, the contract expressly limiting its liability to that of forwarders, and through charges not having been paid, the liability of the company as common carrier ceases at the end of its route, and if the package arrives there in safety, and is delivered with proper instructions to another responsible carrier upon the line to the point of destination, its liability ceases.[2]

etc. This mem. of agreement between The Western Transportation Co. & witnesseth, that the said Western Transportation Co. agree to forward the goods of said from New York to as follows (here follows rates for various articles): The dangers of the sea, lakes, rivers, fire, breakage of looking-glasses, and the leakage of oil or other liquids at the risk of the owner. And should a loss of any of said goods occur upon the lakes or rivers, the charges to and at Buffalo should be paid by the owner of said goods." Proviso followed exempting the transportation company from liability for deficiency where the goods should be receipted in Chicago as in good order; or for deficiency in dry-goods, etc., unless properly strapped, taped, and sealed when shipped. Woodruff, J., said: "The use of the term 'forward' in the contracts is controlled by the nature and extent of the actual undertaking." See also Buckland *v.* Adams Exp. Co., 97 Mass. 124.

Where a party who is both a carrier and a warehouseman receives goods into his warehouse to be transported by him, his responsibility as a carrier commences when they are received. And where parties who were both forwarders and carriers agreed orally to transport merchandise, to be delivered to them from time to time, and subsequently, on receiving a portion thereof to be transported pursuant to the contract, they executed an instrument stating that the same was received to be forwarded, *held*, that they were responsible as carriers and not as forwarders. Blossom *v.* Griffin, 3 Kern. (N. Y.) 569.

Simmons *v.* Law, 8 Bosw. (N. Y.) 213, is another instance of a carrier being liable notwithstanding use of the term "forward." See also Christenson *v.* American Express Co., 15 Minn. 270.

Restrictions as common carrier's common law liability, contained in receipt drawn and signed by him alone, are to be construed most strongly against him: intention to exonerate must be expressed in plain and unequivocal terms. A clause so inserted that the carrier is "not to be responsible except as forwarder" was held not to exempt the carrier from liability for loss occasioned by the carelessness or negligence of the employees on a steamboat owned and controlled by other parties than the carrier, but ordinarily used by him, in his business of carrier, as a means of conveyance. Hooper *v.* Wells, 27 Cal. 11. And see the comment on this case in 2 Redf. Am. R. Cas. 261, where it is said that the clause might well have been held to contemplate only transportation beyond defendant's line, but that in either view the decision was just and sound. Also that the American rule is that the owner may elect to call on either the carrier with whom he contracted or the one under whom primarily the loss occurred, for indemnity.

1. Kallman *v.* United States Exp. Co., 3 Kan. 205.

2. Reed *v.* U. S. Express Co., 48 N. Y. 462. Hunt, Comr., and Lott, Ch. Comr., dissenting. As to contracts of

**VIII. Breaking Carriage—Connecting Carriers.**—It has been said that public policy in this country of long routes and frequent transshipment forbids any intendment which would favor an intermediate carrier in divesting himself of that character and assuming the more limited responsibility of a forwarder.[1]

As to duty of common carrier to deliver to connecting carrier, see article CARRIERS OF GOODS, Vol. II. 869.[2]

carriers for through transportation, see Vol. II. p. 866.

1. Ladue *v.* Griffith, 25 N. Y. 364. In this case, a warehouseman at Buffalo was also a carrier on the Erie canal, and used to receive freight from the west and forward itto the east by the first boat going, whether his own or that of other carriers. He received goods shipped from Detroit, addressed to his care at Buffalo, and marked "to go from Buffalo to East Albany, at 30 cts. per 100 lbs." The presumption from these facts alone is that the goods came to his possession as a carrier, and having been burned without his fault while in his warehouse awaiting transportation, he is liable for their value. Denio, C. J., and Gould and Allen, JJ., dissenting. Redfield on Railways, vol. ii. § 181, par. 9, cites the case with apparent approbation.

A common carrier's liability as such continues after he stores the goods in his warehouse, to be taken at the convenience of the succeeding carrier. Campbell, J., dissenting, believing the responsibility to be that of a warehouseman. Condon *v.* Marquette. etc., R. Co., 55 Mich. 218; s. c., 54 Am. Rep. 367.

Where carrier stores before end of transit, his liability as carrier still continues, and he must answer as such if the goods be destroyed in the warehouse. Hyde *v.* Navigation Co., 5 T. R. 389. Hence the carrier in this case was held liable as carrier, though he stored the goods in another's warehouse at the terminus; his contract requiring him to carry from the warehouse to the consignee. But Buller, J., said that ships from foreign countries could, by the established course of trade, deliver on the usual wharf.

An intermediate carrier does not relieve himself from liability by simply unloading the goods at the end of his route and storing them in his warehouse, without delivery or notice to, or any attempt to deliver to, the next carrier. McDonald *v.* Western R. Co., 34 N. Y. 497.

Proprietors of a railroad who transport goods over their road, and deposit them in their warehouse without charge, until the owner or consignee has a reasonable time to take them away, are not liable, as common carriers, for the loss of the goods from the warehouse, but are liable, as depositaries, only for want of ordinary care. Thomas *v.* Bos. & Prov. R. Corp. (1845), 10 Metc. (Mass.) 472.

It was said by Merrick, J., in Denny *v.* N. Y. Central R., 13 Gray (Mass.), 487. that where goods are deposited in the carrier's freight depot at his terminus, thence to be received by the owner, or taken up by the proprietors of the railroad next in course of the route, the first carrier's liability as common carrier ceased. Citing Norway Plains Co. *v.* Boston & Me. R. Co., 1 Gray (Mass.), 263. Discussion here of the conflicting cases respecting duty of a carrier to notify consignee on the arrival of goods would be out of place.

2. See Garside *v.* Trent & Mersey Nav. Co., 4 T. R. 583, where there was delay in effecting connection. Buller, J., said: "The keeping of the goods in the warehouse is not for the convenience of the carrier, but of the owner of the goods; for when the voyage to Manchester is performed, it is the interest of the carrier to get rid of them directly, and it was only because there was no person ready at Manchester to receive these goods that the defendants were obliged to keep them."

In *England* a common carrier, in the absence of contrary agreement, is liable until the goods are delivered at the place of destination, although beyond its own route; in *America* the rule generally prevails that the common carrier is not liable except as to its own route, unless it contract to carry the goods to their destination, and this although a through rate is named. In *Alabama* and *Illinois* the English doctrine has been held. See 3 Wood's Railway Law, 1571 *et seq.*, and authorities there cited; 2 Am. & Eng. Ency. of Law, 859 *et seq.*

The common carrier who takes goods to carry and to *forward* beyond his own route ceases to be liable as such a carrier when the goods arrive at the convenient point of intersection. He then becomes a forwarder, and ceases to be an insurer for

A carrier who acts as the forwarding agent of the owner of goods in giving directions by way-bills or otherwise to the successive lines of transportation over which they are to be carried, beyond the termination of his own route, is responsible as such forwarding agent only for the want of reasonable diligence and care.[1]

Where the transit had ended so far as the intermediate carrier was concerned, it was held in *New York* that warehousing the goods would have relieved such carrier from liability as common carrier; that a float, in the case before the court, must be regarded as employed in the carriage, and not as a warehouse; but that by the ample time afforded consignee to get the goods, such intermediate carrier had become bailee in deposit merely.[2] See cases in note 1, page 582.

the safety of the goods. Inhabitants *v.* Hall, 61 Me. 517. In Read *v.* U. S. Express Co., 48 N. Y. 462, where an express company agreed to forward beyond its route, the contract limiting its liability to that of forwarders, through charges not having been paid, its liability as insurer was held to cease at the end of its route. See also Snider *v.* Adams Express Co., 63 Mo. 376.

Intermediate common carrier's liability ends on delivery to succeeding carrier, and delivery is well made when the goods are deposited in a particular place, according to agrcement governing the business between the two carriers—in this case in a section of a depot used by the delivering carrier, and owned by the receiving carrier, whose employees handled the goods of the former company therein. Pratt *v.* Railway Co., 95 U. S. 43.

1. In Northern R. Co. *v.* Fitchburg R. Co., 6 Allen (Mass.), 254, a way-bill of iron rails, to be transported over several successive lines of transportation by railroad, made out by the agents of the first line in this form: "Way-bill of merchandise transported by Fitchburg R. R. Co., from Charlestown to Burlington, Nov. 27, 1852. Consignees: B. & C., H. & C., Ogdensburgh R. R. (description of articles),"—was held sufficient to show to the intermediate carriers that the rails were to be carried and delivered to the Ogdensburgh R. R. at Burlington, and to exonerate the first carrier from liability, although the rails were detained and used by one of the intermediate railroad companies, which at the same time was receiving other similar rails over the same route for its own use."

Common carriers received goods on board their sloop, to transport from New York to Troy, where they transferred them on board of a canal-boat bound to the north, pursuant to the bailor's instructions; but they were to receive no reward for the transfer, or further transportation. The goods were lost by the upsetting of the canal-boat. *Held,* that their character of common carriers ceased at Troy; and having exercised ordinary care in seeing the goods placed on board a safe boat, they were not responsible for the loss. Ackley *v.* Kellogg, 8 Cow. (N. Y.) 223.

2. Goold *v.* Chapin, 10 Barb. (N. Y.) 612. In this case the proprietors of the Hudson River Line of towboats received goods in the city of New York, for transport to Albany, and delivery there to the Atlantic Line for further transportation on the canal. The goods arrived safely at Albany on Monday, the 14th of August, and were put on the float belonging to the owners of the barge, which they kept in the Albany basin for the purpose of receiving goods brought by their barges, and then transferring them to the canal craft, which came alongside of the float to receive their loading. On the 15th of August the agent of the Atlantic Line was notified on behalf of the proprietors of the Hudson River Line that there were goods on their float for his line, and he was requested to call and take them away. Like notification and request were made the next day, and repeated again on the 17th, when the agent said he was taking some goods from another line, and when he got them on he would shove up to the float and take away the goods thereon. But on the same afternoon the float, with the goods in question, were consumed by fire. It was held, *inter alia,* 1. That the float in the basin was not, in any proper or legal sense of the term, a warehouse; that placing goods thereupon was merely shifting them from one vessel of the carriers to another; and that it was clearly no delivery to the consignees, the Atlantic Line. 2. That had the carriers placed the goods in a warehouse at Albany, that being the place

**IX. Bill of Particulars in Suit against Forwarder.**[1]
**X. Damages.**[2]

**FRACTIONAL.**[3]

**FRANCHISES.**—(See also CORPORATIONS (Private); FREIGHT.)


**I. Definition,** 585.
**II. Public Character and Duties of Corporations Generally,** 587.
**III. Instances of Franchises,** 593.
1. *Franchise to be a Corporation and Incidental Powers,* 593.
2. *Eminent Domain as a Franchise,* 595.
3. *Franchise of Exemption from Taxation,* 596.
4. *Municipal Aid as a Franchise,* 597.
5. *Monopolies as Franchises,* 598.
**IV. Public Duties of Particular Corporations,** 599.
1. *Railroad Companies,* 599.
(*a*) *Duty to Build and Operate Railroad,* 599. [602
(*b*) *Duty as Common Carriers,*
(*c*) *Station Accommodations, Crossings, Fences, Fires, etc.,* 604.
(*d*) *Excuses for Failing to Operate Railroad,* 606.
2. *Telegraph Companies,* 609.
3. *Telephone Companies,* 612.
4. *Water and Gas Companies,* 614.
5. *Boom Companies,* 615.
6. *Miscellaneous Corporations,* 615.
7. *Remedies for the Enforcement of Public Duties,* 615.
**V. Franchises as Contracts,** 620.
1. *Generally,* 620.
2. *Franchises always Granted Subject to the Police Power,* 621.
3. *Franchises held Subject to Legislation Affecting Remedies,* 624.
4. *Statutes Referring to Persons and their Application to Corporations,* 625.
5. *Effect upon Franchises of Reserved Right to Amend or Repeal Charters,* 627.
6. *The Reservation Rebuts any Presumption that certain Franchises are Irrevocable,* 628.
7. *What Franchises may be Controlled under the Reserved Right to Amend and Repeal,* 628.
8. *Limitations upon Reserved Powers to Amend and Repeal,* 630.
(*a*) *Generally,* 630.
(*b*) *Limitations as to Property, Contracts, etc.,* 632.
(*c*) *Miscellaneous,* 634.


of delivery so far as they were concerned, their liability as *carriers* would have been entirely discharged by such a storage and the notification to the consignees, and responsibility of warehouseman would have begun. 3. But ample notice and time had been afforded to consignee to get the goods, and responsibility as carrier (citing Angell on Carriers, §§ 320, 325) had ended, and the defendants had become bailees in deposit merely; and the goods having been destroyed without fault on their part, the defendants were not liable.

And see, as to the policy of regarding the float as used in the carriage, the text for note 1, p. 582.

**1.** Where the forwarding merchant was sued for damage to goods, and plaintiff filed a bill of particulars, it was held that plaintiff was able to offer proof that a certain claim for other storage had been paid, in rebuttal of that claim on defendant's behalf. For such proof is offered, not to make out plaintiff's claim in the first instance, but to rebut the defendant's evidence, and hence the payment needed not to be charged in bill of particulars. Brown *v.* Denison, 2 Wend. (N. Y.) 593.

**2.** In action against railroad company, as warehouseman and forwarder, for loss of oil by leakage, as the result of its neglect and want of ordinary care, recovery may be had for such loss as plaintiff can establish to the satisfaction of the jury by competent and admissible evidence; he is not required to prove to a mathematical certainty the amount of oil lost. Balto. & Ohio R. Co. *v.* Schumacher, 29 Md. 168; 96 Am. Dec. 510.

**3.** The subject of a conveyance was described as "The south fractional half of fractional section twenty-nine, and that part of the Elizabeth Jones Spanish confirmation, No. 2327, which lies north of the military road and joins the fractional half-section above described." The "part of the Elizabeth Jones confirmation," etc., was a part of the south half of fractional section twenty-nine. "The south half of fractional section twenty-nine" was accordingly decided to be all the remaining portion of the section lying south of the half-section line. Swayne *v.* Vance, 28 Ark. 282.

**VI. Mortgage, Sale, and Transfer of Franchises,** 634.
1. *Generally,* 634.
2. *Franchise to be a Corporation and Incidental Powers,* 634*b*. [634*f*
3. *Franchise of Eminent Domain,*
4. *Franchise of Exemption from Taxation,* 634*g*.
5. *Miscellaneous,* 634*h*.
6. *Sales of Franchises and Property on Execution,* 634*i*.
**VII. Forfeiture of Franchises.** See CORPORATIONS.
**VIII. Taxation of Franchises.** See TAXATION.

**I. DEFINITION.**—Franchises are special privileges conferred by government upon individuals, and which do not belong to the citizens of the country generally, of common right. It is essential to the character of a franchise that it should be a grant from the sovereign authority, and in this country no franchise can be held which is not derived from a law of the State.[1]

The vague ideas which are said to be prevalent of the meaning of the term "franchise"[2] seem to be due less to any intrinsic difficulty causing confusion than to a failure to keep pace with the development of the law of corporations: for it is only in its application to them that the subject demands separate treatment in this article. The early definition of franchises made them "branches of the king's prerogative subsisting in the hands of a subject."[3] While this central idea remains unchanged, it must be

1. Chief Justice Taney, in Bank of Augusta *v.* Earle, 13 Pet. (U. S.) 595.

2. Mr. Justice Field said, in Morgan *v.* Louisiana, 93 U. S. 217, 223 (1876): "Much confusion of thought has arisen in this case and in simalar cases from attaching a vague and undefined meaning to the term 'franchises.' It is often used as synonymous with rights, privileges, and immunities, though of a personal and temporary character; so that, if any one of these exists, it is loosely termed a 'franchise,' and is supposed to pass upon a transfer of the franchises of the company. But the term must always be considered in connection with the corporation or property to which it is alleged to appertain. The franchises of a railroad corporation are rights or privileges which are essential to the operations of the corporation, and without which its road and works would be of little value; such as the franchise to run cars, to take tolls, to appropriate earth and gravel for the bed of its road, or water for its engines, and the like. They are positive rights or privileges, without the possession of which the road of the company could not be successfully worked. Immunity from taxation is not one of them." Approved in Chesapeake & Ohio R. Co. *v.* Miller, 114 U. S. 185 (1884).

"The term 'franchise' has several significations, and there is some confusion in its use. The better opinion, deduced from the authorities, seems to be that it consists of the entire privileges embraced in and constituting the grant." City of Bridgeport *v.* New York, etc., R. Co., 36 Conn. 266.

"If there are certain immunities and privileges in which the public have an interest, as contradistinguished from private rights, and which cannot be exercised without authority from the sovereign power, it would seem to me that such immunities and privileges must be franchises." Spencer, J., in People *v.* Utica Ins. Co., 15 Johns. (N. Y.) 387. See also Wait Insolvent Corp. (1888) § 12.

3. Finch, 164; 2 Blacks. Com. 37; People *v.* Utica Ins. Co., 15 Johns. (N. Y.) 387; Miner's Ditch Co. *v.* Zellerbach, 37 Cal. 590.

**Other Definitions.**—Privileges conferred by grant from government and vested in individuals. 3 Kent's Comm. 458.

Lewis on Eminent Domain, § 135: "A franchise may be defined as a privilege or authority vested in certain persons by grant of the sovereign, to exercise powers or to do and perform acts which without such grant they could not do or perform." *Citing* Tuckahoe Canal Co. *v.* Tuckahoe, etc., R. Co., 11 Leigh (Va.), 42.

In Pierce *v.* Emery, 32 N. H. 507 (1856), Perley, C.J., said: "The word 'franchise' . . . has various significations, both in a legal and popular sense. A corporation is itself a franchise be-

modified to accord with the modern prerogatives of constitutional governments. It is a conceded power or duty of government to provide and maintain highways, bridges, and ferries, to supply water and gas, and in various other ways to make provision for the comfort and convenience of the public. When these duties are not directly assumed by the government they may be delegated.[1] But the inducement for others to undertake them must usually be some such consideration as the grant of more or less exclusive privileges. Such privileges are a common form of modern franchises. While no rule of law demands it, they are usually conferred upon corporations for obvious reasons of good business policy. But the power and perhaps duty of government

longing to the members of the corporation; and a corporation, being itself a franchise, may hold other franchises, as rights and franchises of the corporation. A municipal corporation, for instance, may have the franchise of a market or of a local court; and the different powers of a private corporation, like the right to hold and dispose of property, are its franchises. In a more popular sense, the political rights of subjects and citizens are called franchises, like the electoral franchise. Com. Dig. Franchise, F, I; Angell & Ames on Corp. 3; The King *v.* London, Skinner, 310, 311."

A franchise relates to matters concerning the State, and not to local easements, such for instance as the right, under contract with a city, to lay gas-pipes. People *ex rel.* Maybury *v.* Mutual Gas-Light Co., 38 Mich. 154. But the right to lay gas-pipes in city streets has often been deemed a franchise, only conferrable on authority from the State. Brooklyn *v.* Jourdan, 7 Abb. N. C. (N. Y.) 23; Ohio *v.* Cincin. G. L. & Coke Co., 18 Ohio St. 262; Jersey City G. Co. *v.* Dwight, 29 N. J. Eq. 242.

1. "In all civilized countries the duty of providing and preserving safe and convenient highways to facilitate trade and communication between different parts of the State or community is considered a governmental duty. This may be done by the government directly, or through the agency of corporations created for the purpose. The right of public supervision and control over highways results from the power and duty of providing and preserving them. As to ordinary highways, these propositions are unquestioned. But it is denied that they apply to railways built by private capital and owned by private corporations created for the purpose of building them. Whoever studies the nature and purposes of railways constructed, under the authority of the State, by means of private capital, will see that such railways possess a two-fold character—such a railway is in part public and in part private. Because of its public character, relations, and uses, the judicial tribunals of this country, both State and national, have at length settled the law to be that the State, to secure their construction, may exert, in favor of the corporation authorized by it to build the road, both its power of eminent domain and of taxation. This the State cannot do in respect of occupations or purposes private in their nature. . . . In its public character, a railway is an improved highway, or means of more rapid and commodious communication, and its public character is not divested by the fact that its ownership is private.

In its relations to its stockholders, a railroad, or the property in the road and its income, is private property, and, subject to the lawful or reserved rights of the public, is invested with the sanctity of other private property. The distinction here indicated marks with general accuracy the extent of legislative control except where this has been surrendered or abridged by a valid legislative contract. Over the railroad as a highway, and in all its public relations, the State, by virtue of its general legislative power, has supervision and control; but over the rights of the shareholders, so far as these are private property, the State has the same power and no greater than over other private property." Dillon, J., in Chicago, etc., R. Co. *v.* Atty.-Gen. of Iowa, 9 West. Jur. 347; People *v.* New York, etc., R. Co., 28 Hun (N. Y.), 547; Rogers Locomotive, etc., Works *v.* Erie R. Co., 20 N. J. Eq. 385; Messenger *v.* Pennsylvania R. Co., 36 N. J. Law, 409; Roper *v.* McWhorter, 77 Va. 218; Morawetz Corp. (2d Ed.) § 1114.

does not end here. While it is probably true that to-day corporations formed for such evidently public purposes constitute a minority in the infinite variety of corporate enterprises, this does not render less true the words of Chief Justice Marshall: "The objects for which a corporation is created are universally such as the government wishes to promote. They are deemed beneficial to the country; and this benefit constitutes the consideration and in most cases the sole consideration of the grant." [1]

II. **Public Character and Duties of Corporations Generally.**—The modern tendency is to lose sight of the semi-public character of the great majority of the corporations created in more primitive times, and the result is to obscure and render difficult of application the principles of corporation law which owe their development to this peculiarity. It is not easy to regard in the same light a powerful railroad corporation, endowed with valuable franchises and subject to important public duties, and an ordinary manufacturing company possessing only a sufficient membership and capital to be technically within the terms of the statute creating it. The policy of early legislation regulating the formation and control of corporations in the United States was a liberal one. Such aggregations of capital would materially aid in developing the resources of a new and growing country. The grants of franchises were customarily made by special charters, which were generous in terms; the care with which the immediate and future interests of the State were guarded therein depending in great measure upon the circumstances of the case. The influence of such considerations is also plainly discernible in contemporaneous judicial decisions. But in moulding the law to the modified conditions of the present day, this policy has given place to one not simply new and conservative, but reaching far towards the opposite extreme. By constitutional provisions in nearly all the States, incorporation by special acts is now prohibited, and the general laws regulating the formation of corporations admit of their creation for almost any lawful purpose, however far removed from those in which the public have an interest demanding protection by law. Almost every trace of the early liberality of legislation has disappeared from the late statutes affecting corporations. So radical a change accomplished in so short a period has had the natural effect of producing more or less of conflict in an important part of the law of corporations, and it is probable that an explanation of most that is difficult and confusing in an effort to under-

1. Dartmouth College *v.* Woodward, 4 Wheat. (U. S.) 637.

In the *United States*, where written constitutions define the powers of the several branches of the government, the power of chartering corporations belongs to the legislature only. McKim *v.* Odom, 3 Bland Ch. (Md.) 407; Franklin Bridge Co. *v.* Wood, 14 Ga. 80. It is a power which belongs to the legislature unless expressly taken away by the constitution, and is incidental to the general power of making laws for the welfare of the State. Briscoe *v.* Bank of Kentucky, 11 Pet. (U. S.) 257; Bell *v.* Bank of Nashville, Peck (Tenn.), 269; Bank of Chenango *v.* Brown, 26 N. Y. 467; Morawetz Corp. (2d Ed.) § 8.

stand the relation of corporations to the States creating them can be found in these facts. It has been suggested that, in addition to the several recognized kinds of private corporations, they should be further classified into those of a *quasi*-public character and those strictly private.[1] However this may be, the doctrine is everywhere conceded that certain corporations having been invested by the State with such prerogative franchises as the right of eminent domain, or having received municipal aid, or having been created for public purposes, become agents or trustees of the State, as to property secured by exercise of the right of eminent domain,[2] or receive the aid solely for public use, which is the foundation

1. In Miner's Ditch Co. *v.* Zellerbach, 37 Cal. 343, three classes of corporations were recognized: public municipal corporations, the object of which is to promote the public interest; corporations technically private, but of a *quasi*-public character, having in view some public enterprise in which the public interests are involved, such as railroad, turnpike, and canal companies; and corporations strictly private.

Thompson, C.J., points out the distinction between "those corporations that are agencies of the public, directly affecting it, and those which only affect it indirectly, by adding to its property in developing its natural resources or in improving its mental or moral qualities," and says: "Of the former are corporations for the building of bridges, turnpike roads, railroads, canals, and the like. The public is directly interested in the results to be produced by such corporations, in the facilities afforded to travel, and the movements of trade and commerce. It is well settled that this use is not to be disturbed by the seizure of any part of their property, essential to their active operations, by creditors. They must recover their debts by sequestering their earnings, allowing them to progress with their undertaking to accommodate the public. This direct benefit to and accommodation of the public clearly distinguish this class of companies from the second class, viz., private corporations, or those in which the public is but indirectly interested, such as mining and manufacturing, coal and iron companies, libraries, literary societies, schools, and the like."

2. "The road, once constructed, is, *instanter* and by mere force of the grant and law, embodied in the governmental agencies of the State and dedicated to public use. All and singular its cars, engines, rights of way, and property of every description, real, personal, and mixed, are but a trust fund for the political power, like the functions of a public office. The judicial personage—the corporation created by the sovereign power, expressly for this sole purpose and no other—is, in the most strict, technical, and unqualified sense, but its trustee. This is the primary and sole legal political motive for its creation. The incidental interests and profits of individuals are accidents, both in theory and practice." Talcott *v.* Twp. of Pine Grove, 1 Flip. (U. S.) 144.

"Whether the use of a railroad is a public or a private one depends in no measure upon the question who constructed it or who owns it. It has never been considered a matter of any importance that the road was built by the agency of a private corporation. No matter who is the agent, the function performed is that of the State. Though the ownership is private, the use is public. . . . The owners may be private companies, but they are compellable to permit the public to use their works in the manner in which such works can be used. That all persons may not put their own cars upon the road, and use their own motive power, has no bearing upon the question whether the road is a public highway. It bears only upon the mode of use, of which the legislature is the exclusive judge." Olcott *v.* Supervisors, 16 Wall. (U. S.) 694.

"Railroads are, in every essential quality, public highways, created for public use, but permitted to be owned, controlled, and managed by private persons. But for this quality, the railroads of the respondents could not lawfully exist. Their construction depended upon the exercise of the right of eminent domain," etc. People *v.* N. Y. C., etc., R. Co., 28 Hun (N.Y.), 547; Olcott *v.* Supervisors, 16 Wall. (U. S.) 694.

The fact that railroad corporations may remunerate themselves by tolls and fares "does not destroy the public nature of the road, or convert it from a public to a private use." Bloodgood *v.* Mohawk &

of the right to raise money by taxation,[1] or accept a grant of one or more of the sovereign franchises of a State in consideration of their discharging part of what are the proper duties of government,[2]

Hudson River R. Co., 18 Wend. (N. Y.) 9. See also Beekman *v.* Saratoga, etc., R. Co., 3 Paige's Ch. (N. Y.) 75.

In Inhabitants of Worcester *v.* Western R. Corp., 4 Metc. (Mass.) 566, Shaw, C.J., said: "The only principle on which the legislature could have authorized the taking of private property for its construction, without the owner's consent, is that it was for the public use. Such has been held to be the character of a turnpike corporation, although there the capital is advanced by the shareholders, and the income goes to their benefit. Commonwealth *v.* Wilkinson, 16 Pick. (Mass.) 175. It is true that the real and personal property necessary to the establishment and maintenance of the railroad is vested in the corporation; but it is in trust for the public. The company have not the general power of disposal incident to the absolute right of property; they are obliged to use it in a particular manner, and for the accomplishment of a well-defined public object; they are required to render frequent accounts of the management of this property to the agents of the public; and they are bound ultimately to surrender it to the public at a price and upon terms established."

Power to compel by *mandamus* performance of duties by a railroad corporation as carrier of freight and passengers may be rested (1) on the ground of public trust, which, having been conferred by the State and accepted by the corporation, may be enforced for the public benefit; (2) upon the contract between the corporation and the State (Abbott *v.* Johnstown R. Co., 80 N. Y. 31). People *v.* N. Y. C., etc., R. Co., 28 Hun (N. Y.), 553.

A railroad company is a private corporation. Pierce *v.* Commonwealth, 104 Pa. St. 150. See vol. 4, p. 186.

A railroad company is a *quasi*-public corporation. Board of Tippecanoe Co. *v.* Lafayette, etc., R. Co., 50 Ind. 85, 108.

1. In Loan Assoc. *v.* Topeka, 20 Wall. (U. S.) 661, Mr. Justice Miller said: "In all these cases, however, the decision has turned upon the question whether the taxation by which this aid was afforded to the building of railroads was for a public purpose. Those who came to the conclusion that it was, held the laws for that purpose valid. Those who could not reach that conclusion, held them void. In all the controversy this has been the turning-point of the judgments of the courts. And it is safe to say that no court has held debts created in aid of railroad companies, by counties or towns, valid on any other ground than that the purpose for which the taxes were levied was a public use, a purpose or object which it was the right and duty of State governments to assist by money raised from the people by taxation. The argument in opposition to this power has been that railroads built by corporations organized mainly for purposes of gain—the roads which they build being under their control and not that of the State—were private and not public roads, and the tax assessed on the people went to swell the profits of individuals and not to the good of the State or the benefit of the public except in a remote and collateral way. On the other hand, it was said that roads, canals, bridges, navigable streams, and all other highways had in all times been matter of public concern. That such channels of travel and of the carrying business had always been established, improved, regulated by the State, and that the railway had not lost this character because constructed by individual enterprise, aggregated into a corporation." See also Buncombe Co. Comrs. *v.* Tommey, 115 U. S. 128, and Taylor *v.* Ypsilante, 105 U. S. 68—where certain decisions maintaining illegality of the aid, because for private purposes, are noticed.

2. Chancellor Zabriskie, in Rogers Locomotive & Mach. Wks. *v.* Erie R. Co., 20 N. J. Eq. 385, said: "Railway companies have delegated to them, as part of their franchises, much of the sovereign power of the State, in consideration of their discharging part of what are the proper duties of government; that is, providing the means of commerce and intercourse by constructing the roads which are the avenues of that commerce. And when, being authorized, they assume to operate these roads, they have devolved upon them, in consideration of that franchise, the additional duty—which is not one of the proper functions of the government—of common carriers, and are obliged to transport all merchandise and passengers, on the terms fixed in the grant through which they obtain their franchises."

and hence are subject to all the conditions and liabilities which result.[1]

The fact that one corporation owes certain public duties which are not imposed upon all does not change its character as a private corporation.[2] The distinction between private and public or *quasi*-public corporations is well defined.[3] Among private corporations a further classification than that now made may eventually become necessary, but if introduced it will distinguish between corporations holding grants of certain franchises, or engaging in business in which the public have an interest, and all others.[4] In the first case their public relations arise from the

In Messenger *v.* Pennsylvania R. Co., 36 N. J. L. 409, Beasley, C.J., used the following language:

"In my opinion, a railroad company constituted under statutory authority is not only by force of its inherent nature a common carrier, as was held in the case of Palmer *v.* Grand Junction Railway, 4 M. & W. 749, but it becomes an agent of the public in consequence of the powers conferred upon it. A company of this kind is invested with important prerogative franchises, among which are the rights to build and use a railway, and to charge and take tolls and fares. These prerogatives are grants from the government, and public utility is the consideration for them. Although, in the hands of a private corporation, they are still sovereign franchises, and must be used and treated as such, they must be held in trust for the general good. If they had remained under the control of the State, it could not be pretended that, in the exercise of them, it would have been legitimate to favor one citizen at the expense of another. If a State should build and operate a railroad, the exclusion of everything like favoritism with respect to its use would seem to be an obligation that could not be disregarded without violating natural equity and fundamental principles. And it seems to me impossible to concede that, when such rights as these are handed over, on public considerations, to a company of individuals, such rights lose their essential characteristics. I think they are, unalterably, parts of the supreme authority; and in whatsoever hands they may be found, they must be considered as such. In the use of such franchises, all citizens have an equal interest and equal rights, and all must under the same circumstances be treated alike. It cannot be supposed that it was the legislative intention, when such privileges were given, that they were to be used as private property, at the discretion of the recipient, but, to the contrary of this, I think an implied condition attaches to such grants—that they are to be held as a *quasi*-public trust for the benefit, at least to a considerable degree, of the entire community. In their very nature and constitution, as I view this question, these companies become, in certain aspects, public agents; and the consequence is, they must, in the exercise of their calling, observe to all men a perfect impartiality."

See also Kenton County Court *v.* Bank Lick Turnpike Co., 10 Bush (Ky.), 532; Chi. & N. W. R. Co. *v.* People, 56 Ill. 379.

1. When a corporation or *quasi*-corporate body has been created for the accomplishment or carrying out of public objects, in all such cases the powers possessed by the corporation have been conferred upon it not for the advantage of itself or its individual members, but for public weal. Any employment of such powers, save and except for the public purposes and those special public purposes for the advancement of which they were designed, is *ultra vires*. Roper *v.* McWhorter, 77 Va. 218, *citing* Green's Brice's Ultra Vires, 597. See also, *infra*, this title, PUBLIC DUTIES OF PARTICULAR CORPORATIONS.

2. Olcott *v.* Supervisors, 16 Wall. (U. S.) 694; People *v.* New York, etc., R. Co., 28 Hun (N. Y.), 547; Bloodgood *v.* Mohawk, etc., R. Co., 18 Wend. (N. Y.) 9; Beekman *v.* Saratoga, etc., R. Co., 3 Paige Ch. (N. Y.) 75; Messenger *v.* Pennsylvania R. Co., 36 N. J. Law, 409; Chicago, etc., R. Co. *v.* Atty.-Gen., 9 West. Jur. 347; Alabama, etc., R. Co. *v.* Kidd, 29 Ala. 221. See also CORPORATIONS, 4 Am. & Eng. Encyc. of Law, 186.

3. Dillon on Munic. Corp. §§ 19, 24; Morawetz Corp. (2d Ed.) § 3; Waterman Corp. §§ 16, 17; Wait Insolv. Corp. § 17.

4. "Private corporations for commercial and manufacturing purposes have been known as long at least as the institution

acceptance of franchises, the grant of which constitutes a contract binding them to the performance of various public duties wherein the franchises themselves are the consideration. In the second case, having engaged in business of such a nature that it requires regulation by law, there is nothing so peculiar in that creation of law known as a corporation as to exempt it from the operation of so-called police laws which would be applicable to individuals under similar circumstances. Instances of the first class are railroad, telegraph, telephone, turnpike, canal, street-railway, water, and gas companies, which have accepted such franchises as endow them with the right of eminent domain, municipal aid, exemption from taxation, the monopoly of carrying on their business to the exclusion of all others, or any grant which amounts to a legal permission to assume certain public relations from which the public in general is debarred. Instances of the second class of corporations may not only be found in such familiar examples as companies formed for the manufacture and sale of intoxicating liquors, lottery companies, fertilizer-manufacturing companies, etc., but in addition to the public duties owing by the corporations first mentioned, and for the reasons given, many of such companies engage in a business in which the public has a more or less clearly defined interest, which justifies laws regulating rates of freight and fare, or otherwise providing for the comfort and safety of passengers, fixing maximums of tolls and the various charges of the several kinds of corporations, and, generally, the adoption of police regulations which the authorities agree are incapable of further definition than the determination in a specified instance of the question as to their validity.[1]

of the Civil War, but it has been reserved to our own times to see them so enlarged and multiplied as to engross to themselves almost exclusively many of the most important branches of industry and commerce. The advancement of the arts and sciences, and of the wants of men, have opened up so many new and important means for the benefit of mankind, which cannot from their nature be accomplished by individual resources and skill, that the aggregation of capital and a combination of energies have been found indispensable to the accomplishment of objects never before thought of, and which so eminently mark the rapidly advancing civilization of the present age. Formerly, the ends to be accomplished for the good of society but rarely required the combination of the capital and skill of many individuals and but few private corporations were created, and these cut so small a comparative figure in the destinies of States that they attracted but little attention on the part of the lawmakers, and they were but little studied by the courts." Caton, C.J., in St. Louis, Alt. & Chi. R. Co. *v.* Dalby, 19 Ill. 366.

1. "The extent to which a State can by legislation regulate the business and affairs of an association, whether it be incorporated or not, necessarily depends largely upon the nature of the business in which the association is engaged. Legislative powers extend over all matters of public interest; but where the public are not interested, private rights cannot be interfered with. If a particular kind of business or employment is of such a character or of such magnitude that the public are directly interested in its proper management, it falls within the legislative duties to regulate the same. And under these circumstances the legislature cannot be ousted from its proper sphere of action by the fact that a number of individuals have agreed to form copartnership or corporation for the purpose of carrying on the business in question. Thus, the public are obviously interested in a very high degree in the proper management and operation of

railroads; and hence the legislature may make rules and regulations for the proper management and operation of railroads, whether they be owned by corporations or not. The power of legislative interference is much more limited in case of companies formed for the purpose of carrying on employments in which the public are less directly concerned, such as manufacturing, mining, or buying and selling. The constitutionality of the legislation generally depends upon the answer to the question, Was the legislation designed to accomplish some object of public interest?" Morawetz Corp. (2d Ed.) § 1066.

"The real difficulty, however, is to draw a line between property in the management of which the public has a clearly defined interest and property in regard to which it has none. Where the property in question is that of a corporation, the interest of the public might be roughly said to be coextensive with the grant to the corporation of powers which it would be unconstitutional or improper for the legislature to grant, except for purposes in the attainment of which the public was directly concerned. For instance, it is ordinarily incompetent for the legislature to grant the right of taking private property on compulsory process except for the attainment of an object of public importance. Accordingly, as this right is ordinarily granted to a railroad corporation, the possession of the right by such corporation would seem to indicate a clear interest on the part of the public in its affairs. This is a clear case of a defined public interest in a private enterprise. But such a test, taken by itself, is not applicable to all cases; for the public is sometimes held to have an interest in enterprises where no such extraordinary powers have been granted; as, for instance, in the grain-elevator case. Munn *v.* Illinois, 94 U. S. 113. . . . The truth of the matter seems to be that what may constitute such an interest of the public in private enterprises as will warrant the regulation of them by the police power of the State is essentially incapable of definition. The chief justice says: 'When, therefore, one devotes his property to a use in which the public has an interest, he in effect grants to the public an interest in that use.' What is 'a use in which the public has an interest'? To this question the remarks of the chief justice give no answer. In any private business, as the manufacture of soap, the public has always at least this negative interest: that the business shall not be carried on in such a way as to become a public nuisance. Yet the business of manufacturing soap is as private as any business can be. Take, for another example, the business of supplying milk in a city. This is a business in which the public is held to have an interest to this extent: that the milk supplied shall be pure and wholesome. In truth, the interests of a society, be they called public or private, are so correlated and interwoven that it is impossible to pick out the life or occupation of any individual and say, That is an occupation in which the public has no conceivable interest. Whatever the public welfare calls for, the police power of the State exists to afford; and whether any given exercise of this power is a proper one is a question for the discretion of the legislature, subject to review in some way by the courts." Taylor on Private Corporations (Ed. 1888), § 476.

A company incorporated to transact a general storage and elevator business, including the right to issue warehouse receipts, advance money, etc., is not a public corporation, and its real estate used in the exercise of its franchise is not exempt from mechanics' liens. Girard Storage Co. *v.* Southwark Co., 105 Pa. St. 248. Gordon, J., said: "In the works of the corporation defendant, the community at large has no other or further interest than it has in the store houses of private individuals. It may receive the grain of one person and refuse that of another, or it may, at its own will, suspend operations and shut out the public altogether. Its organization is all that it has received from the public. Beyond this the public has no special interest in it; and when this organization disappears, there is nothing left of a public character, or anything over which the Commonwealth has control. Very different is the case of a turnpike, a canal, or railroad, which remains for the common use after the corporation which built it is dissolved, and which the State may take possession of for the public welfare. . . . Nor can we understand how the case of Munn *v.* Illinois, 94 U. S. 113, can affect the case in hand. The question there involved, not the rights of a corporation, but those of a private person, and the principle involved in the ruling of the supreme court of the United States was that, where the owner of such property as a warehouse devotes it to a use in which the public has an interest, he in effect grants to the public an interest in such use, and must therefore, to the extent thereof, submit to be controlled by the public for the common good as long as he maintains that use;

**III. Instances of Franchises.—1. Franchise to be a Corporation, and Incidental Powers.** — The power of State legislatures, as representatives of the people, who have delegated to them authority to pass laws, but have likewise restricted that authority, by State constitutions, to create corporations and endow them with franchises, is unquestioned.[1] Excepting, therefore, those grants which constitutional limitations prohibit, a State may confer upon corporations such privileges as it pleases.[2]

The right to be a corporation is in itself a franchise;[3] and when granted by special charter, which usually included other valuable franchises, and often constituted a contract preventing future legislative interference with the privileges thus secured, it possessed a value which now seldom attaches to it.[4] Constitutional limitations now prohibit the various State legislatures from creating corporations by special charter;[5] and State constitutions or general laws reserve to the State the right to amend or repeal all charters of private corporations. The right to form a corporation to engage in every variety of business enterprise is practically unrestricted by the general incorporation laws, and the procedure under these statutes is so simple as to involve the creation of a corporation with little trouble and expense.[6] Many corpora-

but he may at any time withdraw this implied grant by discontinuing the business from which it arises. But it certainly does not follow that, because of this public interest, the property of a private person is made public property, or even *quasi*-public property, or that it is therefore exempted from ordinary execution process."

1. See Corporations, 4 Am. & Eng. Encyc. of Law, 190, and authorities cited; Constitutional Law, 3 Am. & Eng. Encyc. of Law, 746; Morawetz Corp. (2d Ed.) § 1057; Taylor Corp. (Ed. 1888, § 464.

2. New Orleans Water-works Co. *v.* Rivers, 115 U. S. 674; Louisville Gas Co. *v.* Citizens' Gas Co., 115 U. S. 683; New Orleans Gas Co. *v.* Louisiana Light Co., 115 U. S. 650; Chicago Life Ins. Co. *v.* Needles, 113 U. S. 574; Briscoe *v.* Bank, 11 Pet. (U. S.) 257; Gibbons *v.* Ogden, 9 Wheat. (U. S.) 74; Wright *v.* Nagle, 101 U. S. 791, and authorities cited in preceding note.

3. Paul *v.* Virginia, 8 Wall. (U. S.) 181; Memphis, etc., R. Co. *v.* Commissioners, 112 U. S. 609; Pierce *v.* Emery, 32 N. H. 507; State *v.* Boston, etc., R. Co., 25 Vt. 442; State *v.* Commissioners of Taxation, 37 N. J. 228; Coe *v.* Columbus, etc., R. Co., 10 Ohio St. 372; Meyer *v.* Johnston, 53 Ala. 237.

4. "What is called the franchise of forming a corporation is really but an exemption from a general rule of the common law prohibiting the formation of corporations. In former times, this exemption was granted only in exceptional cases, by a special charter in each instance. It was therefore looked upon as something valuable,—as a gift of a special privilege to the grantees of the charter,—and was called a 'franchise.' At the present day, however, the prohibition of the common law has been in great measure repealed by the general incorporation laws. What was formerly the exception has now become the general rule. All persons have now the right of forming corporate associations upon complying with the simple formalities prescribed by statute. The right of forming a corporation and of acting in a corporate capacity, under the general incorporation laws, can be called a 'franchise' only in the sense in which the right of forming a limited partnership or of executing a conveyance of land by deed is a franchise." Morawetz Corp. (2d Ed.) § 923.

5. See Corporations, 4 Am. & Eng. Encyc. of Law, 191.

6. In Oregon R. Co. *v.* Oregonian R. Co., 130 U. S. 1, Mr. Justice Miller said: "With how much more reason should a court, called upon to determine the powers granted by these articles of association, construe them rigidly, with the stronger leaning in doubtful cases in

tions of the present day, therefore, hold, in a charter thus obtained, what has lost, by these gradual but almost radical changes in the law, its chief element of value, viz., the franchise to be a corporation, so granted as to secure to it what others could not afterwards acquire at all or except with difficulty, and this franchise was often accompanied by exclusive privileges, which it is no longer possible to obtain.

The right to be a corporation is a franchise, because it is a grant from the sovereign authority of a special privilege to do what otherwise would be unlawful. It is also everywhere recognized that all powers and privileges which corporations possess are derived from their charters;[1] whether specified in the charter, or raised by judicial construction out of its terms, or read into the charter as powers which the law implies from the mere grant to a corporation of the right to exist, the charter of a corporation is still the measure of its powers.[2] If the charter constituting a corporation is itself the grant of a franchise, and all the powers which the corporation may exercise are derived therefrom, it follows that all the lawfully exercised powers of a corporation are likewise within the meaning of this term.[3] This principle, although sufficiently obvious, and sometimes important, has seldom been clearly stated, but will be found to have been impliedly recognized in a large number of cases. However vague an idea

favor of the public and against the private corporation?

"We have to consider, when such articles become the subject of construction, that they are in a sense *ex parte;* their formation and execution—what shall be put into them, as well as what shall be left out—do not take place under the supervision of any official authority whatever. They are the production of private citizens, gotten up in the interest of the parties who propose to become corporators, and stimulated by their zeal for the personal advantage of the parties concerned, rather than the general good.

"These articles, when signed by the corporators, acknowledged before any justice of the peace or notary public, and filed in the office of the secretary of state and the clerk of the proper county, become complete and operative. . . . Neither the officer who takes such acknowledgment, nor those who file the articles, have any power of criticism or rejection. The duty of the first is to certify to the fact, and of the second to simply mark them filed as public documents, in their respective offices.

"These articles, which necessarily assume by the sole action of the corporators enormous powers, many of which have been heretofore considered of a public character, sometimes affecting the interests of the public very largely and very seriously, do not commend themselves to the judicial mind as a class of instruments requiring or justifying any very liberal construction. Where the question is whether they conform to the authority given by statute in regard to corporate organizations, it is always to be determined upon just construction of the powers granted therein, with a due regard for all the other laws of the State upon that subject, and the rule stated above."

1. Davis *v.* Old Colony R. Co., 131 Mass. 259; Mobile, etc., R. Co. *v.* Franks, 41 Miss. 511; Thomas *v.* Railroad Co., 101 U. S. 71; Diligent Fire Co. *v.* Commonwealth, 75 Pa. St. 291.

2. See CORPORATIONS, 4 Am. & Eng. Encyc. of Law, 207.

3. "All the functions of a corporation are, in one sense, franchises. The right to hold property in the corporate name, to sue and be sued in that capacity, to have and use a corporate seal, and by that to contract, and some others perhaps, are franchises, which constitute the very definition of a corporation." State *v.* Boston, etc., R. Co., 25 Vt. 442.

"The different powers of a private corporation, like the right to hold and dispose of property, are its franchises." Pierce *v.* Emery, 32 N. H. 507.

may thereby be conveyed, the commonest use of the word "franchises," as applied to corporations, is in reference, first, to the right given by law to be a corporation, and, second, to the numerous and often ill-defined powers derived from the same source. For reasons already explained, the first-named franchise is now usually of little or no value; and for similar reasons many powers of corporations which depended upon it, not only for their value but also for their existence, are no longer franchises of consequence. There are, however, powers or privileges which may be granted to corporations, and which constitute franchises that have been but little affected by changes in the law. It is unnecessary to repeat in this connection and in detail, what has been elsewhere said of the ordinary powers or franchises which belong to private corporations as a class. But certain extraordinary privileges sometimes granted, as already mentioned to those corporations which stand in a peculiar relation of duty to the public, are of such recognized prominence and importance as franchises that they have obscured all other franchises.

**2. Eminent Domain as a Franchise.**—The right of eminent domain could never be a franchise of value to any corporation except one formed for public purposes, because it is a prerogative of government which could not otherwise be delegated.[1] In every grant of franchises there is an implied reservation of a State right of eminent domain. It is regarded as so important and essential an element of sovereignty that no legislation can bind the State to an agreement that it shall not be exercised.[2] Franchises of corporations, like other contracts or property, are subject to appropriation by right of eminent domain, and with no further restrictions than apply in all cases, viz., that the condemnation shall be for public use, and is only authorized upon making just compensation.[3]

1. West River Bridge Co. *v.* Dix, 6 How. (U. S.) 531; EMINENT DOMAIN, 6 Am. & Eng. Encyc. of Law, 512 *et seq.*, and authorities cited in succeeding notes.

2. Commonwealth *v.* Essex Co., 13 Gray (Mass.), 239; Eastern R. Co. *v.* Boston, etc., R. Co., 111 Mass. 125; Hyde Park *v.* Oak Woods Cemetery Co., 119 Ill. 141; s. c., 14 Am. & Eng. Corp. Cas. 417.

3. In Village of Hyde Park *v.* Oak Woods Cemetery, 119 Ill. 141; s. c., 14 Am. & Eng. Corp. Cas. 417, the court say: "It is claimed that the acts of the legislature creating the cemetery association, when accepted, and the purchase of the land under such acts, and the dedication of the same to public use, constituted a contract between the State and the corporators of the association within the provision of section 10 of article 1 of the Constitution of the United States, which prohibits legislation impairing the obligation of contracts. If this position were correct, it is plain that any future legislation authorizing the taking of the lands could not be sustained, as the legislature has not authority to enact a law impairing the obligation of a contract. But the rule involved has no application to a case of this character. The right of eminent domain is an element of sovereignty; and a contract in restraint of a free exercise of this right is not obligatory on the State, and does not fall within the inhibition of the Constitution of the United States. Cooley, in his work on 'Constitutional Limitations' (5th Ed., 281, 525), in the discussion of this question, says that any legislative bargain in restraint of the complete, continuous, and repeated exercise of the right of eminent domain is unwarranted and void,—see Enfield Toll-

**3. Franchise of Exemption from Taxation.**—In like manner, grants of franchises are ordinarily made subject to the State's reserved power of taxation, a right necessary to every government, and only limited to strictly public purposes. Neither corporations as such, nor because their franchises may constitute a contract, are exempt from taxation unless by clear, unequivocal, and valid contract.[1]

Where a grant of the franchise to be exempt from taxation is lawfully made, however, it becomes a contract the obligation of which cannot be impaired by future legislation.[2]

It has several times been said that an exemption of a corporation from taxation is not a corporate franchise.[3] Taken literally,

bridge Co. *v.* Hartford & N. H. R. Co., 17 Conn. 40, 454; Matter of Kerr, 42 Barb. (N. Y.) 119; West River Bridge Co. *v.* Dix, 16 Vt. 446; s. c., 47 U. S. (6 How.) 507. And that provision of the Constitution of the United States which forbids the State violating the obligation of contracts could not be so construed as to render valid and effectual such a bargain, which originally was in excess of proper authority. See also Railroad Co. *v.* Railroad Co., 97 Ill. 506; West River Bridge Co. *v.* Dix, 47 U. S. (6 How.) 531. There are cases where the State might bind itself, and where it would be powerless, under the provisions of the Constitution cited, to pass future laws releasing itself from assumed obligations; but this is not one of them. The State had no power to divest itself of the right of eminent domain by any act it might pass which would prevent the exercise of that right in the future, when, in the opinion of the legislature, a case arose wherein the public interest demanded the exercise of the power." Greenwood *v.* Freight Co., 105 U. S. 13; New Orleans Gas Co. *v.* Louisiana Light Co., 115 U. S. 656; Backus *v.* Lebanon, 11 N. H. 19; Lake Pleasanton Water Co. *v.* Contra Costa Water Co., 67 Cal. 659; Black *v.* Delaware, etc., Canal, 22 N. J. Eq. 130; s. c., 24 N. J. Eq. 455; Philadelphia, etc., R. Co.'s App., 102 Pa. St. 123; Pennsylvania R. Co.'s App., 93 Pa. St. 150; Sixth Ave. R. Co. *v.* Kerr, 72 N. Y. 330; Enfield Toll-Bridge Co. *v.* Hartford, etc., R. Co. 17 Conn. 40; Tuckahoe Canal Co. *v.* Tuckahoe, etc., R. Co., 11 Leigh (Va.), 42; see also EMINENT DOMAIN, 6 Am. & Eng. Encyc. of Law, 520.

1. Pine Grove *v.* Talcott, 19 Wall. (U. S.) 666; North Missouri R. Co. *v.* Maguire, 20 Wall. (U. S.) 46; Southwestern R. Co. *v.* Wright, 116 U. S. 231; Memphis Gaslight Co. *v.* Shelby County, etc., 109 U. S. 398; Bank of Pennsylvania *v.* Commonwealth, 19 Pa. St. 144; Northampton Co. *v.* Lehigh Coal, etc., Co., 75 Pa. St. 461; Mayor, etc., *v.* Central R. Co., 50 Ga. 620; Hannibal, etc., R. Co. *v.* Shacklett, 30 Mo. 550; Stockton, etc., *v.* City of Stockton, 41 Cal. 147.

2. Northwestern University *v.* People, 99 U. S. 309; Farrington *v.* Tennessee, 95 U. S. 679; St. Anna's Asylum *v.* New Orleans, 105 U. S. 362; State *v.* Commissioners, 37 N. J. Law, 240; North *v.* Petersburg, etc., R. Co., 89 N. Car. 501; North *v.* Seaboard, etc., R. Co., 89 N. Car. 310; Mobile, etc., R. Co. *v.* Mosely, 52 Miss. 517; Dauphin, etc., R. Co. *v.* Kennerly, 74 Ala. 583; Atlantic, etc., R. Co. *v.* Allen, 15 Fla. 637. And see numerous authorities collected under CONSTITUTIONAL LAW, 3 Am. & Eng. Encyc. of Law, 746.

3. Exemption of a corporation from taxation is not a corporate franchise. State *v.* Maine Central R. Co., 66 Me. 488. See also Morgan *v.* Louisiana, 93 U. S. 217, cited *supra*, this title, DEFINITION; Chesapeake, etc., R. Co. *v.* Miller, 114 U. S. 185.

In Pickard *v.* East Tennessee, Virginia *v.* Georgia R. Co. (U. S. Supreme Court 1889, not yet reported; Notes of Cases, Vol. 4. No. 6. Edw. Thompson Co., publishers), the court, Field, J., observed: "Yielding to the doctrine that immunity from taxation may be granted, that point being already adjudged, it must be considered as a personal privilege not extending beyond the original grantee, unless otherwise so declared in express terms. The same considerations which call for clear and unambiguous language to justify the conclusion that immunity from taxation has been granted in any instance must require similar distinctness of expression before the immunity will be extended to others than the original grantee. It will not pass

such statements involve a serious contradiction of all authoritative definitions of a franchise. If such a grant does not constitute a franchise it is not easy to see what would come within the terms of the accepted definitions. It is evident that these decisions were not intended to be thus construed,[1] but should be confined to the doctrine that, upon an authorized transfer of the franchises of a corporation, the strict rule of construction applied to all grants in derogation of common rights demands that only those franchises should be held to be included in such a transfer as are essential to the existence and purposes of the corporation.[2]

**4. Municipal Aid as a Franchise.**—Municipal aid to corporations, chiefly railroad companies, has been frequently given, sometimes in the form of a donation of property, but usually by authorizing subscriptions to their stock and bonds by the State, or the counties, cities, and towns to be directly benefited by the construction of the road. The only principle upon which such franchises can be held to be constitutional is that the taxation by which the money is raised is for a public purpose because appropriated to instrumentalities or agencies for the purpose of accomplishing public ends.[3]

merely by a conveyance of the property and franchises of a railroad company, although such company may hold its property exempt from taxation. , . . It is true there are some cases where the term 'privileges' has been held to include immunity from taxation, but that has generally been where other provisions of the act have given such meaning to it. The later and, we think, the better opinion is that, unless other provisions remove all doubt of the intention of the legislature to include the immunity in the term 'privileges,' it will not be so construed. It can have its full force by confining it to other grants to the corporation."

1. The right to hold, exempt from taxation lands, granted to a railroad corporation in aid of its principal enterprise is a franchise, but ancillary and subordinate; and the right to exercise such franchise, and to continue its corporate existence for such purposes only, cannot lawfully survive after a sale of its railroad and the abandonment of its principal business as a railroad corporation, unless by authority of the legislature, expressed or clearly implied. The rights of the State are not lost by delay merely, nor can they be waived by its executive officers. State *v.* Minn. Cent. R. Co., 36 Minn. 246.

In Given *v.* Wright, 117 U. S. 648; s. c., 12 Am. & Eng. Corp. Cas. 606. the court observes: "If an exemption from taxation can be lost in any case by a long acquiescence under the imposition of taxes, it would seem that an acquiescence of sixty years, and indeed a much shorter period, would be amply sufficient for this purpose, by raising a conclusive presumption of a surrender of the privilege. An easement may be lost by non-user in twenty years, and even in a less time if it is affected by positive acts of invasion. A franchise may be lost in the same way, non-user being one of the common grounds assigned as a cause of forfeiture. 3 Bl. Com. 262. Exemption from taxation being a special privilege granted by the government to an individual, either in gross or as an appurtenant to his freehold, is a franchise. Non-user for sixty, or even thirty, years may well be regarded as presumptive proof of its abandonment or surrender."

2. Morgan *v.* Louisiana, 93 U. S. 217; Chesapeake, etc., R. Co. *v.* Miller, 114 U. S. 185; Pickard *v.* East Tennessee, etc., R. Co., quoted *supra*, note. See also *infra*, this title, MORTGAGE, TRANSFER, AND SALE OF FRANCHISES.

3. Loan Association *v.* Topeka, 20 Wall. (U. S.) 655; Parkersburg *v.* Brown, 106 U. S. 487; Rogers Locomotive Works *v.* Erie R. Co., 20 N. J. Eq. 379; Messenger *v.* Pennsylvania R. Co., 36 N. J. Law, 407: 37 N. J. Law, 531; Buncombe Co. Comm'rs *v.* Tommey, 115 U. S. 122.

Accordingly, in Loan Association *v.* Topeka, 20 Wall. (U. S.) 655, authority to a town to issue bonds in aid of a manufacturing company was held void, distinction being made between such private

The constitutions of several of the States now expressly prohibit such grants.[1]

**5. Monopolies as Franchises.**—The most valuable of modern franchises are the various kinds of lawful exclusive privileges, or monopolies. While constitutional limitations in many of the States prohibit the grant of such franchises except for strictly public purposes, even subject to this qualification of legislative power they are not uncommon.[2] There are many matters of such importance to the development, comfort, and general welfare of communities that no sufficient objection appears to the grant, to corporations formed for public purposes, of privileges at least sufficiently exclusive to encourage their organization. Of this character are gas and water companies, given the exclusive right to

corporations and those for public purposes, as, railroads.

In Allen *v.* Inhabitants of Jay, 60 Me. 124, a town meeting had voted to loan their credit to the amount of $10,000 to Hutchins and Lane if they would invest $12,000 in a steam saw-mill, grist-mill, and box-factory machinery, to be built in that town by them. There was a provision to secure the town by mortgage on the mill, and the select-men were authorized to issue town bonds for the amount of the aid so voted. Ten taxable inhabitants filed a bill to restrain the issue of the bonds. The Maine supreme court, in an able opinion by Chief Justice Appleton, held that this was not a public purpose, and that the town could levy no taxes on the inhabitants in aid of the enterprise, and could therefore issue no bonds, though a special act of the legislature had ratified the vote of the town: they granted the injunction. See also Lowell *v.* Boston, 111 Mass. 454; Jenkins *v.* Andover, 103 Mass. 94; Curtis *v.* Whiffle, 24 Wis. 350; Whiting *v.* Fond du Lac, 35 Wis. 188.

1. See Louisiana *v.* Taylor, 105 U. S. 454; Wyscaver *v.* Atchinson, 37 Ohio St. 80; Concord *v.* Portsmouth Savings Bank, 92 U. S. 625; Louisville *v.* Savings Bank, 104 U. S. 469; s. c., 12 Am. & Eng. R. R. Cas. 589.

2. "There are unquestionably cases in which the State may grant privileges to specified individuals without violating any constitutional provision, because in the nature of the case it is impossible that they should be possessed and enjoyed by all; and if it is important that they should exist, the proper State authority must be left to select the grantee. But in all such cases the person, whether natural or artificial, to whom the privilege is granted, is bound, upon accepting it, to render to the public that service the performance of which was the inducement to the grant; and it is because of such obligation to render service to the public that the legislature has the power to make the grant. Permission to keep a tavern or a ferry, to erect a toll-bridge over a stream where it is crossed by a public highway, to build a dam across a navigable stream, and the like, are special privileges, and, being matters in which the public have an interest, may be granted by the legislature to individuals or corporations. But the grantee, upon accepting the grant, at once becomes bound to render that service to secure which the grant was made; and such obligation on the part of the grantee is just as necessary to the validity of a legislative grant of an exclusive privilege, as a consideration, either good or valuable, is to the validity of an ordinary contract. Whenever, by accepting such privilege, the grantee becomes bound, by an express or implied undertaking, to render service to the public, such undertaking will uphold the grant, no matter how inadequate it may be; for the legislature, being vested with power to make grants of that character when the public convenience demands it, the legislative judgment is conclusive, both as to the necessity for making the grant and the amount of service to be rendered in consideration therefor, and the courts have no power to interfere, however inadequate the consideration or unreasonable the grant appears to be. But when they can see that the grantee of an exclusive privilege has come under no obligation whatever to serve the public in any matter in any way connected with the enjoyment of the grant, it is their duty to pronounce the grant void as contravening the provisions of the Bill of Rights, which prohibits the granting of exclusive privileges except in considera-

supply cities and towns, and numerous other corporations endowed with similar franchises, or with such others as more or less exclude competition by the very nature of the privileges bestowed.[1]

**IV. Public Duties of Particular Corporations.**—It is evident from what has been said that a large number of corporations are brought into no such relations to the public as require the discharge of certain public duties, because these obligations do not usually result from acceptance of the mere franchise to be a corporation and to exercise the ordinary powers or franchises which accompany it. Unless, therefore, the business in which the corporation is engaged is such that the public interest requires its regulation, these companies are free to conduct their affairs in practically the same way as individuals, partnerships, or *quasi* corporations may do. The same principles do not apply, however, to those corporations which have accepted the unusual and valuable franchises already referred to in detail, and they may, like individuals under similar circumstances, select a business which from its nature subjects them to a further responsibility to the public.

**1. Railroad Companies.**—(*a*) *Duty to Build and Operate Railroads.* —In *England*, there was at first a disposition on the part of the courts, in construing the public duty of a railroad company as created by the statute under which it was formed, to hold that the company was bound to complete and operate its road. It is now settled, however, at least so far as the statutes under which the question has arisen are concerned, that by such acts no duty is cast upon the company to make the line—the words of the act being enabling, not obligatory, and there being nothing in the subject-matter or context requiring that they should be construed as compulsory. The fact that the company had completed a part of the line does not affect the case, and a *mandamus* commanding the completion of the road will not issue.[2] There is some author-

tion of public services." Cofer, J., in Gordon, etc., *v.* Winchester Building Assoc., 12 Bush (Ky.), 110.

1. Spring Valley Water-works *v.* Schottler, 110 U. S. 347; State *v.* Columbus Gaslight, etc., Co., 34 Ohio St. 572; New Orleans Gas Co. *v.* Louisville Light Co., 115 U. S. 650; People *v.* Manhattan Gaslight Co., 45 Barb. (N. Y.) 136; Zimmer *v.* State, 30 Ark. 680; St. Louis *v.* St. Louis Gaslight Co., 70 Mo. 69; Atlantic City Water-works Co. *v.* Atlantic City, 39 N. J. Eq. 367; Hazen *v.* Union Bank, 1 Sneed (Tenn.), 115; Osborne *v.* Knife Falls Boom Co., 32 Minn. 412; s. c., 14 Am. & Eng. Corp. Cas. 203; Cohn *v.* Wausau Boom Co., 47 Wis. 314; Duluth Lumber Co. *v.* St. Louis Boom & Improvement Co., 17 Fed. Rep. 419.

2. *Mandamus* to complete a railroad cannot be supported upon the ground that the railroad company, having exercised some of their powers and made part of their line, are bound to make the whole railway authorized by their statutes. York, etc., R. Co. *v.* Queen (Excheq. Chamber), 1 El. & Bl. (72 Eng. Com. Law Rep.) 858, reversing Queen *v.* York, etc., R. Co. (Queen's Bench), 1 El. & Bl. (72 Eng Com. Law Rep.) 178. Jervis, C.J., said: "It is unnecessary here to determine the abstract proposition that a work which, before it is begun, is permissive, is, after it is begun, obligatory. We desire not to be understood as assenting to the proposition of my brother Erle that 'Many cases may occur where the exercise of some of the compulsory powers may create a duty to be enforced by *mandamus*.' And, on the other hand, we do not say that such may not be the law. If a company empowered by act of Parliament to build a bridge over the Thames

were to build one arch only, it would be well deserving of consideration whether they ought to be indicted for a nuisance in obstructing the river, or for the non-performance of a duty for not completing the bridge. It is sufficient to say that in this case there are no circumstances to raise such a duty, if such a duty can be created by the act of the party. The plaintiffs in error have made the principal portion of their line, and they have abandoned the residue from no corrupt motives, but because Beverley has already sufficient railway communication, and because the residue of their line passes through a country thinly populated, and, if made, would not be remunerative."

The court refuse to sanction the argument that for three years the land-owners were deprived of their full right of ownership, and, if not to be compensated by the construction of the railway, they would in many cases sustain a loss, because, whilst the compulsory powers of purchase subsist, they are prevented from alienating their lands or houses, and from applying them to any purposes inconsistent with the claim which may be made to them by the railway company. As to this, Jervis, C.J., said: "In truth, they are not prevented from so doing at any time before the notice to take their lands is given, if they act *bona fide* in the mean time, the notice to take their lands being the inception of the contract between the land-owners and the company. But, if this complaint were better founded, it does not follow, merely because certain land-owners are subjected to a temporary inconvenience for the advancement of the public good, that therefore the company are bound to make the whole railway. If it were a contract between the land-owners and the company, it would not be just that one should be bound and the other free: but to assert that there is a contract between the land-owners and the company is to beg the whole question; for upon this part of the case the question is whether there is such a contract. As a matter of fact, we know that in many cases no such actual contract exists. Some few proprietors may desire and promote the railway, but many others oppose it, either from a disinclination to the project or with a view to make better terms. With the dissentients there is no contract unless it be found in the statutes; and to the statutes therefore we must refer," etc.

"The words upon the subject are permissive only. . . . The company say, in the language of the statutes, that they shall make full compensation for the land taken, and no more; the prosecutors say that the consideration to be paid for the land is the full compensation mentioned in the act, and also the further consideration of an entire line of railway from York to Beverley. But, if this is the price which the prosecutors are to have, each land-owner is entitled to the same value; and yet, by this *mandamus*, the other proprietors on the line from Market Weighton to Cherry Burton, who perhaps are hostile to the application, are constrained to sell their land for an inadequate consideration, viz., a full compensation, and a part only of the line of the railway, to which, by the hypothesis, they were entitled by the original bargain." That such is not the true meaning is shown, not only by its injustice to the Market Weighton-Cherry Burton land-owners, just alluded to, but by the fact that another section of the statute contemplated total abandonment of the line, or the part performance of it, and provides for return of the land to the original proprietors in certain cases.

Chief Justice Jervis further said: "The cases upon this subject are very few and the absence of authority is very striking when we remember how many acts have passed *in pari materia*, not only for railways but also for bridges and turnpike roads. Notwithstanding the numerous occasions in which such proceedings might have been taken, and the manifest interest of land-owners to enforce their rights, no instance can be found of any indictment for disobeying such a statute, or of a *mandamus* for the purpose of enforcing it. If correctly reported, Lord Mansfield determined this point in Rex *v.* Proprietors of the Birmingham Canal, 2 W. Bl. 708; for he says: 'The act imparts only an *authority* to the proprietors, not a *command;* they may desert or suspend the whole work, and, *a fortiori*, any part of it.' On the other side, the language of Lord Eldon, in Blakemore *v.* Glamorganshire Canal Navigation, 1 Myl. & K. 162, is referred to as an authority for this *mandamus*. In our opinion it does not bear that construction, although it appears that the court of Queen's Bench took a different view of that authority in Regina *v.* Eastern Counties Railway Company, 10 A. & E. (E. C. L. R. vol. 37), 531, and was inclined to act upon it and award a *mandamus*. The writ was subsequently withheld in that case upon another ground; but Lord Denman seems to have been of opinion that upon a fitting occasion a *mandamus* ought to go. This, and the recent cases in the Queen's Bench now under discussion, are the only ones which bear upon the subject. We feel that Lord

ity for the view that a return by the company to the writ of *mandamus* of absolute want of funds or of means to obtain them would be sufficient.[1] The doctrine of these authorities has been approved in the *United States*.[2] There is little doubt, however, that where

Denman and Lord Campbell are high authorities upon this or any other matter, and are both equally entitled to the respect of this court: but we are bound to pronounce our own judgment, and, after the most careful consideration, are of opinion that judgment ought to be for plaintiffs in error."

York & North Midland R. Co. *v.* Queen was decided in 1853 by the Exchequer Chamber. In 1852, the question was before the House of Lords in a case from the court of session in Scotland, viz., Anstruther *v.* East of Fife R. Co., 19 Law Times, 130. In that case, a railway company, soliciting their bill in Parliament, wrote to A, a landed proprietor, but not a shareholder, that in return for his support they would refer all his claims to a certain arbiter. A agreed, and with his support the bill passed, but no step was ever taken to make the replevy. At last the railway resolved to go to Parliament to dissolve their company and have the deposits returned. A then prayed an injunction to restrain the directors from either going to Parliament or paying back the deposits until their agreement with him should be performed and the statute complied with. *Held*, affirming the Scots court, the circumstances did not amount to a special contract sufficient to sustain such injunction. And, *semble*, a mere landowner, as such, cannot compel a railway company to make their railway where no step has ever been taken towards its execution; though the Lord Chancellor, speaking to the Lords, said, "However, upon that I give no opinion."

1. It is to be observed that in Queen *v.* York, etc., R. Co., 1 El. & Bl. (72 Eng. C L. R.) 178, the Queen's Bench, although they held that *mandamus* would go to command building of railroad, in which, however, they were reversed, as has been stated, were themselves of opinion that absolute want of funds, or of means to obtain them, might be retnrned to the writ. But that it was not a good return that the funds which can in reasonable probability come to the possession of or be disposable by the company will fall short by £100,000 of the sum required to build. *Semble*, however, that if there appeared an entire failure of funds from unforeseen casualties, and without imprudence or bad faith in the company, the court, in its discretion, would refuse a *mandamus*.

2. York, etc., R. Co *v.* Queen, 1 El. & Bl. (72 Eng. C. L. R.) 858, was cited approvingly in State of Minn. *v.* Southern Minn. R. Co., 18 Minn. 40, 48, where it was held that a perfect and legal obligation to build the line in question was not imposed by certain acts of Congress, and of the legislatures of the territory and State of Minnesota, viz., act of Congress granting lands "for the purpose of aiding in the construction" of the road, such lands to be subject to the disposal of the legislature for that purpose, etc. By the original charter, "the said corporation is authorized and empowered, and it is hereby declared that the objects and purposes thereof are, to survey, locate, construct . . . a railroad, . . . with the privilege of a branch starting from Hokah, and running up the west bank of the Mississippi river by way of," etc., such branch being the line for which *mandamus* was sought. Section 10 of the original charter (p. 44), requiring completion within ten years, did not apply to this branch, and hence was to be disregarded in this case. By another Minnesota act (p. 49), to execute the trust created by the congressional land grant act, it is enacted that the R. railroad "are hereby authorized and empowered to survey, locate, construct . a railroad," etc. The court say: "Certainly there is nothing in any of these passages of the statutes which in terms imposes the complete and perfect legal obligation spoken of upon the defendant. The language is permissive and enabling, not imperative and obligatory. York, etc., R. Co. *v.* Queen, 1 El. & Bl. (72 E. C. L.) 858; 1 Redfield on Railways, §§ 152, 155. . . . It remains, then, to consider whether 'the complete and perfect legal obligation is imposed,' under any of the statutory provisions which we have quoted, 'by fair and reasonable construction and implication.' . . . These lands are to be exclusively applied to the construction of the road for and on account of which they are granted, and are subject to the future disposal of the legislature of the Territory, or future State, for the purposes in the act expressed, and no other. If this was all, it might perhaps furnish some ground for contending that the acceptance of the benefits conferred by the

a railroad company has received municipal aid or some other franchise granted upon consideration of the performance of a public duty, a duty results which is commensurate with the privileges.[1] Where such aid has been given and a diversion from the proposed line is attempted, the company may be enjoined.[2]

(*b*) *Duty as Common Carriers.*—The public duties of railroad companies and other common carriers requiring them to carry for all to the extent of their capacity, without undue or unreasonable discrimination in charges or facilities, is a well-settled common-law

3d section of the act of 1857, and by the act of 1864, under and in accordance with the act of Congress, by strong implication imposed upon the beneficiary a binding legal obligation to construct the whole of the line in aid of which the grant is made. Any such implication is, however, cut off by the subsequent provisions of the section prescribing the manner in which the land shall be disposed of by the Territory, or future State. An examination of these provisions . . . will show that, with the exception perhaps of one hundred and twenty sections (of the lands granted) which were to be sold in advance of construction, the lands granted were to be sold for each of said roads or branches in quantities not exceeding 120 sections for each 20 continuous miles of road completed, and so from time to time until said roads or branches are completed; and if any of said roads or branches are not completed within ten years no further sale shall be made, and the lands unsold shall revert to the United States."

1. Morawetz Corp. (2d Ed.) § 1128.

Where the charter of a log-driving company provides that the "company may drive all logs and other timber" in a certain stream, the word "may" is to be construed as permissive and not imperative. But when the company accepts the privilege thus conferred of driving "all the logs," etc., it assumes a duty commensurate with the privilege conferred. By this acceptance it has the exclusive right to drive all the logs, and the duty to drive results. Weymouth *v.* Penobscot Log-driving Co., 71 Me. 29, a case of action for damages in failing to drive logs, whereby they shrunk in quantity and quality.

The Hartford & New Haven R. Co. was chartered to construct and operate a railroad from Hartford to the navigable waters of New Haven harbor. A steamboat company was afterwards chartered to run in connection with it to New York, and the railroad and line of steamboats constituted a route that was of great convenience to the public. After the construction of the road and the use of it in connection with the steamboat line for several years, the railroad company constructed a track diverging from the original track at a point a mile and a half from its terminus at tide-water, and running to the station of the New York & New Haven Railroad Co. in the city of New Haven, and discontinued the running of passenger trains to the original terminus at tide-water. This change incommoded travellers who wished to pass by the steamboat route, of whom there were many. *Held*, that a *mandamus* ought to be issued to compel the railroad company to run passenger trains to the original terminus. State *v.* Hartford & New Haven R. Co., 29 Conn. 538.

2. A feeble railroad company, of doubtful ability to construct any road between the terminal points of its charter, will be restrained, at the suit of a municipality which has subscribed for stock and issued bonds in aid of its proposed main line, from wasting its means in constructing branch roads so as to disable it to build such main line; and where a pretended branch is such that its completion will be a complete user of the company's original franchise, and will give it a continuous road between the termini originally named, but not passing through or near the plaintiff municipality as did the main line proposed, and there is no apparent design to continue the road on such main line, the construction of the pretended branch will be restrained as a "diversion" of the road from such municipality, within the meaning of *Wisconsin* act 1872, ch. 119, § 23. Platteville *v.* Galena, etc., R. Co., 43 Wis. 493.

An elevated railroad company was authorized to construct a main line and branches in New York City. It began to construct a branch, but it did not appear probable that it would ever construct the main line. *Held*, at the suit of owners of property abutting on the branch, that the work should be enjoined. Goelet *v.* Metropolitan Transit Co., 48 Hun (N.Y.), 520. *Compare* Troy *v.* Boston, etc., R. Co. 86 N. Y. 107.

obligation, and has been further declared by various statutes.[1]

1. It is the rule of the common law that "Every common carrier must carry for all, to the extent of his capacity, without undue or unreasonable discrimination in charges or facilities." Atchison, etc.. R. Co. *v.* Denver, etc., R. Co., 110 U. S. 667, 674, in which case, however, it was decided that the service is to be equal only in the like circumstances; so that a connecting railroad company having no business connection or arrangement with the company complained of could not claim the same privileges accorded to another connecting railroad company having a business engagement. See FREIGHT, 8 Am. & Eng. Encyc. of Law. See also Scofield *v.* Lake Shore, etc., R. Co. (Ohio), 23 Am. & Eng. R. R. Cas. 612, McGowan *v.* Wilmington, etc., R. Co. (N. Car.), 27 Am. & Eng. R. R. Cas. 64; People *v.* New York Central, etc., R. Co. (N. Y. Gen. Term, 1882), 9 Am. & Eng. R. R. Cas. 1; New England Exp. Co. *v.* Maine, etc., R. Co., 57 Me. 188; Railroad Commrs. *v.* Portland, etc., R. Co., 63 Me. 269; State *v.* Railroad Co., 29 Conn. 558; Commrs. *v.* Eastern R. Co., 103 Mass. 258; Sandford *v.* Railroad Co., 24 Pa. St. 379; Messenger *v.* Pennsylvania R. Co., 36 N. J. Law, 457; Chicago, etc., R. Co. *v.* Parks, 18 Ill. 460; Chicago, etc., R. Co. *v.* People, 67 Ill. 1; Talcott *v.* Township of Pine Grove, 1 Flip. (U. S.) 120; Peik *v.* Chicago, etc. R. Co., 94 U. S. 164; Chicago, etc., R. Co. *v.* Ackley, 94 U. S. 179; Winona, etc., R. Co. *v.* Blake, 94 U. S. 180. *Compare*, Johnson *v.* Pensacola, etc., R. Co., 16 Fla. 623; s. c., 26 Am. Rep. 731; Baxendale *v.* E. C. R. Co., 4 C. B. (N. S.) 63; Branley *v.* S. E. R. Co., 12 C. B. (N. S.) 63, 75; Fitchburg R. Co. *v.* Gage, 12 Gray (Mass.), 393; Eclipse Towboat Co. *v.* Pontchartrain R. Co., 24 La. Ann. 1.

The *United States* Interstate Commerce Act provides that every common carrier shall, according to its respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines, and for the receiving, forwarding, and delivery of property and passengers to and from their several lines, and those connecting therewith, and shall not discriminate in their rates and charges between such connecting lines; but this is not to be construed as requiring any common carrier to give the use of its tracks or terminal facilities to another carrier engaged in like business. Act 1887, Feb. 4 (St. at L., 1885–87, p. 379).

The privilege of making a railroad and taking transportation money thereon, when granted to an individual or a company, is a franchise. The public have an interest in the use of the road, and the owners of the franchise are liable to respond in damages if they refuse to transport an individual or his property upon such road, without any reasonable excuse, upon being paid the usual rate of fare. Beekman *v.* Saratoga, etc., R. Co., 3 Paige (N. Y.), 45.

The proprietors of a stage-coach, who hold themselves out as common carriers of passengers, are bound to receive all who require a passage, so long as they have room and there is no legal excuse for a refusal. And it is not a lawful excuse that they run their coach in connection with another coach which extends the line to a certain place, and have agreed with the proprietor of such other coach not to receive passengers who came from that place on certain days unless they come in his coach. Bennett *v.* Dutton, 10 N. H. 481, where it was said, however, that the proprietors could legally give preference, if there were not room for all, to those who came by said connecting coach; and that if the latter passengers were the mail-carriers, the proprietors were bound to prefer them, independently of agreement.

In McDuffee *v.* Portland, etc., R. Co., 52 N. H. 454, the court observed: "Out of abundant caution, and for the information of those specially concerned, and to guard against any possible construction by implication repealing the common law, they [the English Parliament] affirmed some of its simplest rules. Sandford *v.* Railroad Co., 24 Pa. St. 378. In charters of common carriers, what is called the equality clause was inserted, requiring the carriers to furnish transportation on equal terms. The fashion of legislation once set was studiously followed with a degree of reverence for precedent that does not prevail in this country. And the practice of the *English* courts, on charters and general acts of this kind, has been so long continued, that the fact seems now to be overlooked that the general principle of equality is the principle of the common law. With so much legislation on the subject as there has been in that country, and so much litigation upon acts of Parliament, it was not strange that the bar and bench should finally lose sight of the common-law origin of the principle so many times enacted in different forms, and carried out

These duties cannot be evaded either by contract or custom.[1]

Since the purpose to be accomplished is the advantage and convenience of the public, if this is otherwise secured there is no duty upon the railroad company preventing it from discriminating between express companies seeking the use of its line,[2] or obliging it to haul the cars of a sleeping-car company.[3]

(*c*) *Station Accommodations, Crossings, Fences, Fires, etc.*—Railroad companies are bound, either upon common-law principles or by statutes in the nature of police laws adopted in the several States, to the performance of various public duties regulating such matters as the accommodations to be afforded to the public,[4] the use of

in different methods prescribed by Parliament."

1. So where a railroad company sought to evade the receiving and delivery of grain in bulk to a particular elevator, to which it was consigned, on the ground that it had the right to establish its own usage in that regard, and it never having held itself out as a carrier of grain in bulk, except upon the condition that it might itself choose the consignee, this had become the custom and usage of its business, and it could not be required to go beyond this limit, it was *held*, the company could make no such injurious or arbitrary discrimination between individuals in its dealings with the public. Chi. & N. W. R. Co. *v.* People, 56 Ill. 365.

So where a railroad company set up as a defence, in a proceeding by *mandamus* to compel them to deliver to the elevator or grain warehouse of the relator, whatever grain in bulk might be consigned to it upon the line of its road, that they had entered into contracts with the owners of certain other elevators at the same point for exclusive delivery to the latter to the extent of their capacity, it was *held*, such contracts could have no effect, when set up against a person not a party to them, as an excuse for not performing toward such person those duties of a common carrier prescribed by law. Chicago & N. W. R. Co. *v.* People of Illinois, 56 Ill. 367.

2. See EXPRESS COMPANIES, 7 Am. & Eng. Encyc. of Law, 542, where the authorities are collected. St. Louis, etc., R. Co. *v.* Southern Exp. Co., 118 U. S. 3; s. c., 23 Am. & Eng. R. R. Cas. 545; and note.

3. Pullman Car Co. *v.* Mo. Pac. Co., 115 U. S. 587, 597. The words of Waite, C. J., in reference to express companies, are applicable also to sleeping car and other companies. He said: "So long as the public are served to their reasonable satisfaction, it is a matter of no importance who serves them. The railroad company performs its whole duty to the public at large and to each individual when it affords the public all reasonable express accommodations. If this is done, the railroad company owes no duty to the public as to the particular agencies it shall select for that purpose. The public require the carriage, but the company may choose its own appropriate means of carriage, always provided they are such as to insure reasonable promptness and security. Express Cases: St. Louis, Iron Mtn., etc., R. Co. *v.* Southern Exp. Co., 118 U. S. 1, 24.

4. In a *New York* case, it was held that at common law a carrier of passengers and freight is under no obligation to provide depots for passengers awaiting transportation, or warehouses for freight; though it was intimated that the legislature had power to impose such an obligation. People *v.* N. Y., L. E. & West. R. Co., 104 N. Y. 58. The supreme court, in this case, found such duty to be imposed by New York General Railroad Act (Laws 1850, ch. 140), and its amendments; but on appeal to the court of appeals, an order granting *mandamus* against the company was reversed. The argument was, not that the statute imposed expressly the duty, but that it arose impliedly, by the fact that the company was empowered to erect and maintain all necessary and convenient buildings, stations, etc., for the accommodation and use of their passengers, freight, and business" (ib. § 28, subd. 8), and to acquire and hold real estate and other property for these purposes, "as may be necessary to accomplish the object of its incorporation." Some other provisions tend the same way but go no further. The agreement was based on these provisions, and on the circumstance that the company exercises a public trust, and to that cause owes its

the various precautions to prevent accidents at highway-crossings or railroad intersections,[1] the fencing of their tracks,[2] and the prevention of fires by the use of spark-arresters and in other similar ways.[3] The interest which the public have in the proper performance of the duties of such companies to them may sometimes render unenforceable a contract guaranteeing the erection of a station at a certain place.[4]

existence and enjoyment of its franchises. The Court of Appeals say: "In regard to the facts, there is no dispute. A plainer case could hardly be presented of a deliberate and intentional disregard of the public interest and the accommodation of the public."

Nor is the law altered by New York Laws of 1882, ch. 353, which created a commission of "competent persons," with office, clerk, marshal, etc., and endowed them with full power of investigation and supervision of all railroads and their condition, to quote the words of Danforth, J., "with reference not only to the security but accommodation of the public, and declared that, whenever, in their judgment, it shall appear, among other things, that any addition to or change of the stations or station-houses is necessary to promote the security, convenience, or accommodation of the public, they shall give notice to the corporation of the improvements and changes which they deem to be proper; and if they are not made, they shall present the facts to the attorney-general for his consideration and action, and also to the legislature." Danforth, J., then went on to say: "All these things have been done. The commissioners have heard and decided. They can do no more. . . . Its [the commission's] proceedings and determinations, however characterized, amount to nothing more than an inquest for information. We find no law by which a court can carry into effect the decision. At this point the law fails, not only by its incompleteness and omission to furnish a remedy, but by its express provision that no request or advice of the board, 'nor any investigation or report made by' it, shall have the effect to impair the legal rights of any railroad corporation." The law contained many peremptory provisions, but the provision in the present respect was expressed in permissive language only. And as to this, Danforth, J., said: "We cannot disregard this difference in language, and give by implication to one phrase the same force and meaning which the legislature has by express terms conveyed in the other."

In *Connecticut*, the act of 1886 forbids abandonment, by a railroad company, of any station or depot after such depot or station has been established for twelve months, except by approval of the railroad commissioners, public notice, and hearing. It was held that a corporation which constructed a road, and in 1848 leased it for twenty years, was unable, at the expiration of the lease, to abandon a station adopted and used by the lessee company. And it was further held that 'depot or station,' as contemplated by the statute, included a platform built for passengers at a place thenceforth called 'Brooks's Station,' and whereon an old baggage-car was fixed for the shelter of waiting passengers,—tickets to Brook's being sold at other stations, though none were sold there, nor were goods way-billed to or from there, though mail trains stopped there regularly. State *v.* New Haven, etc., Co., 37 Conn. 153.

1. See CROSSINGS, 4 Am. & Eng. Encyc. of Law, 907 *et seq.* See also Rockford, etc., R. Co. *v.* Hillmer, 72 Ill. 235; Horn *v.* Chicago, etc., R. Co., 38 Wis. 463; Pittsburgh, etc., R. Co. *v.* Southwest Penn. R. Co., 77 Pa. St. 173; Railroad Co. *v.* Richmond, 96 U. S. 521; Mobile, etc., R. Co. *v.* State, 51 Miss. 137.

2. See FENCES, 8 Am. & Eng. Encyc. of Law; Gorman *v.* Pacific R. Co., 26 Mo. 441; Thorpe *v.* Rutland, etc., R. Co. 27 Vt. 140; Ohio, etc., R. Co. *v.* McClelland, 25 Ill. 140.

3. It is the duty of a railroad company to keep the roadway clear of combustible material. Hayden *v.* Skillings, 78 Me. 413; Pitts., etc., R. Co. *v.* Jones, 86 Ind. 496; Salmon *v.* Del., etc., R. Co., 9 Vroom (N. J.), 5; s. c., 20 Am. Rep. 356; Kellogg *v.* Chicago & N. W. R. Co., 26 Wis. 227; s. c., 7 Am. Rep. 71; Webb *v.* Rome, etc., R. Co., 49 N. Y. 420; s. c., 10 Am. Rep. 389; Vaughan *v.* Taff-Vale R. Co, 5 H. & N. (Eng.) 679; Aycock *v.* Raleigh etc., R. Co, 89 N. C. 321; 1 Thomps. Neg. 162, note 8. See also FIRES CAUSED BY RAILWAYS, 8 Am. & Eng. Encyc. of Law.

4. A contract in a bond that a railroad

(*d*) *Excuses for Failing to Operate Railroad.*—The fact that the traffic to a certain point is so small as to compel the running at a loss may be a sufficient excuse for failure to operate the road.[1] It has been several times held that a strike of employees is not a sufficient excuse.[2] But with these decisions should be compared

company shall not build a side track at a certain town is illegal. Pueblo, etc., R. Co. *v.* Taylor, 6 Colo. 1.

Equity will not enforce the specific performance of a contract on the part of a railway company to locate passenger and freight depots at a particular point and at no other point in a town. "In deciding," say the court: "Whether specific performance should be enforced against a railway company, the court must have regard to the interests of the public. Raphael *v.* Railway Co., Law Rep. 2 Eq. Cases, 37. The location of railroad depots has much to do with the accommodation of the wants of the public; and when once established, a change of affairs may require a change of location in order to suit public convenience. We cannot admit that an individual is entitled to call for the interference of a court of equity to compel a railroad company to locate unchangeably its depot at a particular spot to subserve the private advantage of such individual. Railroad companies, in order to fulfil one of the ends of their creation—the promotion of the public welfare,—should be left free to establish and re-establish their depots wheresoever the accommodation of the wants of the public may require." Whatever remedy complainant may have, he must find in his suit at law for damages. Marsh *v.* Fairbury, etc., R. Co., 64 Ill. 414.

"Railroad companies are held to be *quasi*-public corporations and agencies, their directors acting in the double capacity as agents for the company and as trustees for the public, clothed with an important public trust. These roads subserve public purposes to such an extent that the public may impose upon itself the burden of taxation to aid in their construction (St. J. & D. C. R. *v.* Ryan, 11 Kan. 608), and the lawful exercise of the right of eminent domain . . . is put solely upon the ground of public use. When, therefore, the public interests are brought in conflict with the private interests of the company, or of private individuals with whom such companies deal, such private interests must yield to those of the public. It logically follows that the public has a right to say that such companies shall not be permitted to make any contract which would prevent them from accommodating the public, where entitled to it, in the matter of transportation and travel." Pueblo, etc., R. Co. *v.* Taylor, 6 Colo. 1, 8.

The directors of a railroad company are the trustees both of the public and of the stockholders of the company, and, in the discharge of their twofold duty, art required to act with reference to the public convenience on the one hand and the private interests of the stockholders on the other; and the interests of both forbid that there should be a positive prohibition against the establishment of stations at any point on the line of the road; and a contract which prohibits the establishment of such stations will not be enforced in a court of equity. The contract not to establish such stations is void. St. Louis, etc., R. Co. *v.* Mathers, 71 Ill. 592; Bestor *v.* Warthen, 60 Ill. 138; Linder *v.* Carpenter, 62 Ill. 309. *Compare* Pierce on Railroads, § 513.

1. Commonwealth *v.* Fitchburg, etc., R. Co., 12 Gray (Mass.), 180. *Compare* State *v.* Sioux City, etc., R. Co., 7 Neb. 357.

2. Railroad corporations cannot refuse or neglect to perform their public duties upon a controversy with their employees over the cost or expense of doing them. "The excuse has in law no validity. The duties imposed must be discharged at whatever cost. They cannot be laid down or abandoned or suspended without the legally expressed consent of the State. The trusts are active, potential, and imperative, and must be executed until lawfully surrendered; otherwise a public highway of great utility is closed or obstructed without any process recognized by law. This is something no public officer charged with the same trusts and duties in regard to other public highways can do without subjecting himself to *mandamus* or indictment. People *v.* N. Y. C., etc., R. Co., 28 Hun (N. Y.), 543, 555.

The duty imposed upon railroad companies in *Iowa* by the laws of that State and by "Interstate Commerce Act," Act Cong. 1887, Feb. 4, (St. at Large 1885–87, p. 379). of receiving from connecting roads freight and passengers, is one

several others holding that a railroad company is not liable for losses arising from delay where the cause of the delay was an organized strike and resistance which neither the railroad company nor the civil authorities which were called upon could control.[1]

which the federal courts sitting in that State will enforce by mandatory injunction where the injury resulting from its non-performance is continuing; and it is no defence to such relief that a strike of locomotive engineers and firemen has been ordered on plaintiff's road, and that, if defendant's road should accept cars from the "boycotted road," its own men would be called out. C., B. & Q. R. Co. *v.* Burl., etc., R. Co. (Love, J.), 34 Fed. Rep. 481.

Love, J., said: "Now, the question is, What shall be obeyed—the law of the land or the order of the chiefs of the locomotive engineers? Shall a railway company refuse obedience to the express provisions of the statutory law because some of its employees threaten to quit its service and thus stop the running of its trains? Shall the court presume that they will carry out such threats, and deny relief to the complainant upon that presumption? No temporary inconveniences to the defendant company, or the public whom it serves, are, in my judgment, for one moment to be compared with the fatal consequences which must ensue from a precedent by which it would be established that a railway company may, in violation of the law of the land, refuse to receive and haul the cars of a connecting line, at the command of any irresponsible persons, or from its own belief and apprehension that its employees will leave its service and stop the operation of its lines. Such an excuse as this is wholly inadmissible, and it must be set aside. If, in this case, the refusal of the defendant corporation to move the cars of the complainant be sustained, it will follow that, whenever in the future the locomotive engineers and firemen shall enter upon a struggle with any one road, all other corporations having connecting lines will, in violation of law, be warned not to interchange cars with the offending road, and compelled to obey the behests of their employees. Thus may the transportation of vast regions of country covered by connecting lines be controlled and paralyzed at the arbitrary will and pleasure of the Brotherhood of Locomotive Engineers. Indeed, it seems to-day to be by the grace of the leaders of this association that the various corporations owning the vast network of railways west of Chicago are permitted to operate their lines. The people of this vast region may at any moment be deprived, by the arbitrary fiat of the association in question, of all railroad facilities. Is this a power fit to be assumed and wielded by any set of irresponsible men under the sun?" See also Marvin *v.* Western Union Tel. Co., 15 Chicago Leg. News, 416. *Compare* Gray Communication by Telegraph, p. 31, note 2.

1. In People *v.* N.Y. Central & Hudson River R. Co., 28 Hun (N.Y.), 544, Davis, P.J., used the following language: "If it had been shown that a 'strike' of their skilled laborers had been caused or compelled by some illegal combination or organized body, which held an unlawful control of their actions, and sought through them to enforce its will upon the respondents, and that the respondents, in resisting such unlawful efforts, had refused to obey unjust and illegal dictation, and had used all the means in their power to employ other men in sufficient numbers to do the work, and that the refusal and neglect complained of had grown out of such a state of facts, a very different case for the exercise of the discretion of the court, as well as of the attorney-general, would have been presented."

**Liability to Shippers for Delays Caused by Strikes.**—A railroad company is not liable for losses caused by delayed freight where the cause of the delay was an organized strike and resistance, which neither the railroad company nor the civil authorities which were called upon could control. Haas *v.* Kansas City, Fort Scott & Gulf R. Co. (Ga.), 7 So. East. Rep. 629. Simmons J., said: "The evidence shows that, after the company had succeeded in employing new hands, obstructions were put upon the tracks and trains derailed and bridges burned, and that in some instances the new hands were fired upon by the strikers, and some of them killed. The evidence further shows that it was an organized resistance by the strikers, and that the company called upon the civil authorities to protect its property and franchises against this armed resistance, and that the civil authorities were unable to do so. It further shows that the company exerted

Several miscellaneous decisions determining the validity of a railroad company's excuse for non-performance of its duties to the public are cited in the notes.[1] Other instances of what are public

all its power to employ other hands and to run its trains, but that it could not do so on account of this armed resistance. Under this state of facts the jury returned a verdict in favor of the defendant; and, as we have before said, we think the verdict was right. The law seems to be that where a railroad company receives freight for shipment, and its employees strike or cease to work for the company, the company is still bound to forward the freight within a reasonable time; but if this strike is accompanied with violence and intimidation, so as to render it unsafe to forward the freight, the company is thereby relieved from liability for delay in the delivery of the freight. Tho company is bound at all hazards to deliver freight safely, except in cases of the act of God or of the public enemy. It therefore ought to be allowed to plead and prove the acts of violence and armed and organized resistance of its former employees, especially when the resistance is of such a character as could not be overcome by the company or controlled by the civil authorities when called upon by it. Geismer *v.* Railway Co., 102 N. Y. 563, and cases there cited."

See also CARRIERS OF GOODS, 2 Am. & Eng. Encyc. of Law, 847.

**1. Contract Between Companies Interfering With Duties.**—A railroad company obliged by its charter to run to navigable waters of New Haven harbor, and which by so doing had enabled passengers to take passage for New York by steamer, afterwards discontinued the use of a mile and a half of the road nearer to the harbor terminus, and, instead thereof, constructed a track to the depot of another railroad company. This was done pursuant to contract between the two companies, by which (1) the latter-mentioned company was to benefit the former by prevention of the extension of a certain railroad chartered by the legislature, which would interfere with the road first mentioned; and (2) the said second-named company was to secure advantage in competition with the steamboats. *Held*, the contract was void as against public policy. State *v.* Hartford & N. Haven R. Co., 29 Conn. 538.

**Duty to Run on Private Tracks in Illinois**—Neither under *Illinois* constitution, art. XI., § 12, nor under Illinois Rev. St. (of 1874) ch. 114, § 82, is it made the duty of a railroad company to run its cars upon spur tracks owned by other persons, for the purpose of receiving or delivering any other merchandise than wheat; and if such duty were imposed, it would still not be the duty of the company to run upon any such track that was not reasonably safe. Stetler *v.* Chi. & Northw. R. Co., 49 Wis. 609.

**Miscellaneous.**—The *New York* general railroad act requires railroad corporations formed under it to start their trains at fixed times, to be noticed publicly, to furnish accommodations for all passengers and property, and to transport all persons and property on payment of fare or freight, and declares that they shall be liable to the party aggrieved, in an action for damages, for any neglect or refusal in the premises. Duties thereunder continue to bind the corporation after a lease by it without authority therefor from the legislature. Abbott *v.* Johnstown, etc., R. Co., 80 N. Y. 27.

A statute providing that railroad corporations shall have the power "to regulate the time and manner in which passengers and property shall be transported" is not to be so construed as to justify a general or partial suspension of the duty of receiving and transporting freight. People *v.* N. Y. C., etc., R. Co., 28 Hun (N. Y.), 555, construing New York act 1850, c. 140, § 28, amended by N. Y. Laws 1880, c. 133.

A similar clause in the charter of the Portland & Oxford Central R. Co. received the same interpretation in a powerful opinion by Dickerson, J., the language of which is too long for quotation here. R. R. Commrs. *v.* P. & O. C. R. Co., 63 Me. 269. See to same effect Chi. & N. W. R. Co. *v.* People, 56 Ill. 365; Chicago *v.* Rumpff, 45 Ill. 94.

The legislature cannot compel all acts beneficial to the public, without regard to the pecuniary welfare of the company. It must, however, perform all acts to which it knew it would be liable when it obtained its charter. A railroad company cannot compel the carriage of all grain to one designated warehouse, as that would upbuild one concern at the expense of the public, or citizens in general, and thus the road would be made an instrument of mischief to the public, instead of service. Chi. & N. W. R. Co. *v.* People, 56 Ill. 383.

Where grain in bulk is consigned to a

duties enforceable by *mandamus* or *quo warranto* are elsewhere collected.[1]

**2. Telegraph Companies.**—It is well settled that telegraph companies are not common carriers in the sense in which that term is properly used.[2] But the reason for the earlier conflict of opinion, and the view now accepted, is that such corporations, because of their public employment, owe certain duties to the public, enforceable upon common-law principles, and, in some instances, declared by statute, which place them under a responsibility similar in various ways to that of common carriers.[3] They must transmit messages impartially, in good faith, and in the order in which they are received.[4] They undertake to receive, transmit, and deliver messages without unnecessary delay, according to directions.[5] Although not insurers, yet their obligations spring from the public nature of their employment and the contract under which the particular duty is assumed.[6] Because transmission of intelligence by

particular elevator on the line of a railroad, it is no sufficient excuse for the company to refuse so to deliver it that it cannot do so without large additional expense caused by the loss of the use of motive power, labor of servants, and loss of use of cars while the same are being delivered and unloaded at such elevator, and brought back; for it is precisely that expense for which the company is paid its freight. Chi. & N. W. R. Co. *v.* People, 56 Ill. 365.

1. See *infra*, this title, REMEDIES FOR ENFORCEMENT OF PUBLIC DUTIES.

2. Leonard *v.* Telegraph Co., 41 N. Y. 544; Baldwin *v.* Allen, 45 N. Y. 744; s. c., 54 Barb. (N. Y.) 505; Ellis *v.* American Tel. Co., 13 Allen (Mass.), 226; New York Tel. Co. *v.* Dryburg, 35 Pa. St. 298; Passmore *v.* West. Union Tel. Co., 78 Pa. St. 238; Telegraph Co. *v.* Carew, 15 Mich. 525; Tyler *v.* West. Union Tel. Co., 60 Ill. 421; Breese *v.* U. S. Tel. Co., 45 Barb. (N. Y.) 274; s. c., 48 N. Y. 132; Wann *v.* West. Union Tel. Co., 37 Mo. 472; Birney *v.* New York, etc., Tel. Co., 18 Md. 341; Washington Tel. Co. *v.* Hobson, 15 Gratt. (Va.) 122; Bartlett *v.* West. Union Tel. Co., 62 Me. 209; West. Union Tel. Co. *v.* Fontaine, 58 Ga. 433; Camp *v.* West. Union Tel. Co., 1 Metc. (Ky.) 164; De Rutte *v.* New York, etc., Tel. Co., 30 How. Pr. (N. Y.) 403; s. c., 1 Daly (N. Y.), 547; Aiken *v.* Telegraph Co., 5 S. Car. 358; Telegraph Co. *v.* Gildersleeve, 29 Md. 246; Sweatland *v.* Telegraph Co., 27 Iowa, 458; Western Union Tel. Co. *v.* Neill, 57 Tex. 283; Hibbard *v.* Telegraph Co., 33 Wis. 565; Berry *v.* New York, etc., Tel. Co., 18 Md. 341; Grinnell *v.* West. Union Tel. Co., 113 Mass. 299; s. c., 18 Am. Rep. 485; Schwartz *v.* Atlantic, etc., Tel. Co., 18 Hun (N. Y.), 157; Pinckney *v.* Telegraph Co., 19 S. Car. 71; Tyler *v.* West. Union Tel Co., 60 Ill. 421; s. c., 14 Am. Rep. 381; Baxter *v.* Dominion Tel. Co., 3 Leg. News, 405; Lawson's Contracts of Carriers, 3; Gulf, etc., R. Co. *v.* Levy, 12 Am. & Eng. R. R. Cas. 96, note; Smith *v.* West. Union Tel. Co., 8 Am. & Eng. Corp. Cas. 15. *Compare* Parks *v.* Alta California Tel. Co., 13 Cal. 422; Bowen *v.* Lake Erie Tel. Co., 1 Am. Law Reg. 685; Bryant *v.* American Tel. Co., 1 Daly (N. Y.), 575; McAndrew *v.* Electric Tel. Co., 17 C. B. 3; Shearm. & Redfield on Negligence, § 554 *et seq.*

Statutes imposing on telegraph companies the duty to serve equally and impartially, and at reasonable rates, are merely declaratory. Gray on Communications by Telegraph, § 18.

3. Gray on Communications by Telegraph, § 17. They are not public carriers in the strict sense of the term, yet, on account of the public nature of their employment, they have in many cases been held to a very similar responsibility. Western Un. Tel. Co. *v.* Reynolds, 77 Va. 173.

4. Dorgan *v.* Telegraph Co., 1 Am. L. J. (N. S.) 406; Crouch *v.* Railroad Co., 14 C. B. 255; Johnson *v.* Railroad Co., 4 Exch. 367; Wibert *v.* Railroad Co., 2 Kern. (N. Y.) 245.

5. Dorgan *v.* Telegraph Co. (U. S. C. C. Ala.). 1 Am. L. T. (N. S.) 406.

6. New York, etc., Tel. Co. *v.* Dryburg, 35 Pa. St. 298.

Mr. Gray maintains that the duty of the company is to the State, and not to the individuals who compose the State; that its duty to the individuals is merely to

electricity is a business of a public character, corporations formed for that purpose may receive a grant of the right of eminent domain.[1] While there seems to be but little authority determining what would amount to illegal discrimination in their charges for services, it is more than probable that the principles applicable to common carriers will be adopted by analogy.[2] A statutory penalty for the refusal to transmit messages may be recovered, although such refusal, of which public notice was given, was caused by a strike of employees.[3] A telegraph company formed to transmit stock-quotations and other news cannot refuse to furnish the news to one wishing to subscribe for it.[4] A board of trade, how-

give each what it pretends to afford to the public. Hence, so far as individuals are concerned, it can abandon or reduce its business; and so long as it treats all persons impartially, it is not liable for refusal to perform towards one of the residents its corporate duties. Hence he condemned the decision of the New York City court in holding that a telegraph company which made a general refusal, during the strike of 1883, to receive messages except "subject to delay," was liable to the statutory penalty for refusing to perform corporate duty. Marvin *v.* West. Un. Tel. Co., 15 Chi. Leg. News, 416. And as to the statute, he said that that was merely declaratory, citing for the latter proposition De Rutle *v.* N. Y., Alb. & Buf. T. Co., 30 How. Pr. (N. Y.) 403. Gray on Communications by Telegraph, p. 31, etc.

1. Pierce *v.* Drew, 136 Mass. 75.

2. See FREIGHT, 8 Am & Eng. Encyc. of Law.

Mr. Gray says: "While a telegraph company is not entitled to charge any one more than is reasonable, it might be entitled to charge favored individuals less than that. Schouler's Bailments, including Carriers, 356; 3 Kent's Com. (12th Ed.) 458, n. 1. *Cf.* Hutchinson on Carriers, §§ 302, 303."

3. In the strike of telegraph-operators and line men in 1883, the Western Union was presented with two messages for transmission in one of its New York offices, and the receiver refused to receive the same unless the would-be sender would allow the stamping upon the messages of the words "Subject to Delay;" there being also displayed at the office window, in large letters, the following: "Notice.—Messages taken to-day subject to delay and to mailing en route, if necessary." Whereupon the would-be sender, having tendered payment, declined to allow such stamping, and withdrew. Action was brought by him under *New York* Rev. St. ch. 18, part 1, title 17, § 11, for penalty of $100 imposed on telegraph companies for refusal to transmit messages. It was held by the district court of the city of New York that the penalty was recoverable, notwithstanding the strike.

Angel, J., said: "Any difference which may arise between the company and its employees in respect to their employment are subjects with which the sender has nothing to do. . . . On assuming the duty of the functions of a corporate body under State authority, for the transaction of business for the public, the corporation is bound to supply all the necessary facilities, either in material or labor, to transact the business which, by the terms of its incorporation, it undertakes."

But the court held that the simultaneous refusal to accept two messages from one sender is one act prohibited by statute, and for which but one penalty can attach. Marvin *v.* Western Union Tel. Co., 15 Chicago Legal News, 416. Mr. Gray (Communications by Telegraph, p. 31, note 2), is dissatisfied with this decision. He maintains that a corporation, whatever are its duties to the State, is not bound to the individuals composing the public to continue its business; and that, while it is liable to one individual if it refuses to him the service which it assumes to offer to the public, yet, if it reduce its business, it is liable only for refusal to serve in accordance with the reduced offer. Hence he argues that the telegraph company, having publicly declined to continue for a time its ordinary business of prompt transmission, was not subject to the penalty.

4. Friedman *v.* Gold, etc., Tel. Co., 32 Hun (N. Y.), 4, distinguishing Breese *v.* U. S. Telegraph Co., 48 N. Y. 132.

"Barnard, P. J., said: "Telegraph companies are public; have the right to take land under the laws providing that lands may be taken for a public use. The act requires them to transmit despatches

ever, has been held not to be a *quasi*-public corporation, and therefore is not bound to a similar duty.[1]

A telegraph company may remove a "ticker" from a "bucket-shop," even though gambling is not a criminal offence in the State where the removal takes place.[2] A contract for transmitting a telegraphic despatch, made on Sunday, may be void, and the retention of the despatch and charges paid by the sender does not constitute a ratification.[3] A Sunday contract as to a telegram

'with impartiality and good faith.'" In Breese *v.* U. S. Telegraph Co., 48 N. Y. 132, it was held that a by-law requiring important messages to be returned and verified at half rates was not an unreasonable by-law; which decision receives support in a Pennsylvania case, where, however, the rule was put on the ground that it is useful to the patrons themselves.

It is no part of the duty of telegraph companies to collect and transmit information; and while they are bound, if they voluntarily follow that class of employment, to do it with fidelity during the continuance of their contract, when they terminate such contract no person can compel them to enter into another, or continue it when they wish it terminated. Metropolitan Grain & Stock Exchange *v.* Chicago Board of Trade, 15 Fed. Rep. 847 (Blodgett, J.); s. c., 11 Biss. (U. S.) 531.

A similar decision was made in the Hamilton (*Ohio*) common pleas, in chancery, in the case of Bradley *v.* Western Un. Tel. Co., 9 Cin. Law Bull. 223; s. c., 27 Alb. L. J. 363. The news in question was quotations of the price of grain, etc.; and the court said that the defendant might discontinue furnishing the quotations at any time, "subject of course to the provision as to notice; and as to that, I think the plaintiff's remedy would be adequate at law in an action for the breach of the contract, and the court would refuse the aid of its extraordinary powers."

1. A board of trade, composed of merchants dealing in the products of the country, who solely for their own convenience provide a room where they meet to transact business, although incorporated under the laws of the State, is not a public corporation, and is not obliged to allow the reporters of a telegraph company on the floor of its exchange for the purpose of collecting and transmitting the reports of the markets therefrom. Metropolitan Grain & Stock Exchange *v.* Chicago Board of Trade, 15 Fed. Rep. 847 (Blodgett, J.); s. c., 11 Biss. (U. S.) 531.

"The Chicago Board of Trade," says Barr, J., in another case, in the Kentucky circuit court of the United States, "is a private corporation, and can give or withhold from the public its transactions." Bryant *v.* Western Union Tel. Co., 17 Fed. Rep. 825. See also opinion by Maxwell, J., in Bradley *v.* W. U. T. Co., Cincinnati Com. Gaz., April 8, 1883; 17 Fed. Rep. 834, in further support of this view. *Compare* note by Adelbert Hamilton, Esq., to Bryant *v.* West. Union Tel. Co., 17 Fed. Rep. 829; Gray Communications by Telegraph, p. 34.

2. Bryant *v.* Western Un. Tel. Co. 17 Fed. Rep. 825, in which case complainants dealt merely in futures and upon margins; and it was held that, as they were in the business of gambling, equity would not compel a telegraph company to furnish to them, by means of a "ticker," quotations of prices ruling upon the Chicago Board of Trade, and this even though complainants were members of that board. The case arose in Louisville. The court said: "It is true that this kind of gambling has not been made criminal by the law of the State [Kentucky]; still if a case of wager is made out, none of the State courts will enforce such contracts. Sawyer *v.* Taggart, etc., 14 Bush (Ky.), 727. Gambling on the fluctuation in the market prices of stocks, grains, etc., is against the public policy of the State, though it may not be a crime punishable by fine or imprisonment."

3. Rogers *v.* Western Un. Tel. Co., 78 Ind. 169.

A despatch "Come up in morning; bring all" cannot be regarded as a work of necessity, within the meaning of the statute for the protection of the Sabbath; nor is telegraphing, of itself, a work of necessity. The court said: "These words are to be taken in their ordinary meaning, for there is nothing ascribing to them any other or different signification. Upon their face they imply a friendly invitation to visit the sender."

Penalty for negligent failure of telegraph company to deliver message cannot be recovered by a person who delivered his message for transmission in violation of Sunday laws. Penalty cannot

may be valid as a work of necessity and charity under the Sunday laws.[1] The general rule is that a telegraph company is under no obligation to contract to communicate an illegal or an immoral message.[2]

**3. Telephone Companies.**—What are in effect the same principles of law as those determining the public duties of telegraph companies, are applied to telephone companies. They are subject to legislative control, by virtue of their public employment, as to their instruments and service[3] they cannot discriminate among customers,[4] and the public duty of such corporations is so imperative that, even though operating a patented mechanism under a license from the patentee, in which they are prohibited from supplying facilities to any but one of a certain class of customers, they may be compelled by *mandamus* to grant like facilities to any proper applicant.[5] A customer of such a company

be recovered for failure to perform an illegal contract. Rogers *v.* Western Un. Tel. Co., 78 Ind. 169.

1. A contract to communicate the message "Betty and baby dead. Come to Cleburne to-night train, to my help. Wade meet you. Tell her mother" is a legal contract, being a work of necessity and charity. G., C. & S. F. R. Co. *v.* Levy, 59 Tex. 542.

2. Gray Communications by Telegraph, § 15.

"In certain States, statutes have been enacted entitling telegraph companies to refuse to contract to communicate illegal or immoral messages." Gray Communication by Telegraph, § 15, note 1; citing *Louisiana* Rev. Sts. § 3761; *California* Code and Sts., § 13,638.

While illegal or immoral messages do not have to be transmitted by a telegraph company, yet it has been held, that, if the message offered is in inoffensive language, on payment or tender of the usual charge the duty of the company is fixed by law, and it has no discretion, but must convey the message; and that, in an action against a company for the statutory penalty for failure to transmit, an answer filed averring immoral purpose of sender, to be shown by evidence on the trial, is demurrable. West. Un. Tel. Co. *v.* Ferguson, 57 Ind. 495. *Compare* Gray Communications by Telegraph, § 15.

3. A telephone company is a common carrier in the same sense as a telegraph company. Its instruments and appliances are devoted to public use, and are subject to legislative control; so that the legislature of a State may prescribe the maximum charges for instruments and service. Such regulation of property devoted to the public use is not the taking of private property for public use, nor is it in any way an interference with the constitutional rights of a citizen in private property. Hackett *v.* Indiana, 105 Ind. 250; s. c., 11 Am. & Eng. Corp. Cas. 577. See also Telegraph Co. *v.* Bradbury, 106 Ind. 1; Johnson *v.* Indiana, 21 Am. & Eng. Corp. Cas. 65.

4. The employment of a telephone company is public, and it must treat all the public alike; and if it undertakes to remove a telephone from a coach or transfer company, it will be enjoined from so doing. Louisville Transfer Co. *v.* American Dist. Tel. Co. (Louisville, Ky., chancery), 14 Chicago Leg. News, 15, citing, among others, the Granger Cases, in 94 U. S. 113 *et seq.*

The American Union Telegraph Co., having been refused a telephone by the Bell Telephone Co., applied to the circuit court of the city of St. Louis for a *mandamus* to compel the Bell Company to accede to their request. The court overruled the motion to quash the alternative writ, and held that in refusing to grant to the relator such facilities as it affords to other customers it has violated an imperative public duty. State *ex rel.* American Un. Tel. Co. *v.* Bell Telephone Co., 10 Cent. L. J. 438. See also Chesapeake, etc., Telephone Co. *v.* Baltimore, etc., Tel. Co., 66 Md. 399; s. c., 16 Am. & Eng. Corp. Cas. 213; State *v.* Bell Telephone Co., 22 Alb. L. J. 363; State *v.* Nebraska Telephone Co., 17 Neb. 126; s. c., Am. & Eng. Corp. Cas. 1; State *v.* Bell Telephone Co., 23 Fed. Rep. 539; s. c., 8 Am. & Eng. Corp. Cas. 7. See authorities cited in preceding note.

5. Under *Ohio* Rev. Stat. ch. 4, title 2, each company operating a line or system of telephones in that State is required to

may, however, forfeit his right to an instrument by violation of a reasonable rule prohibiting the use of improper or vulgar language.[1]

receive despatches from and for telegraph and other companies without discrimination. State *v.* Telephone Co., 36 Ohio St. 296.

A contract between a telephone company and the owner of telephone instruments, to the effect that, in the use of such instruments by the company, discriminations shall be made as between telegraph companies, is void as against public policy, as declared by the statute. State *v.* Telephone Co., 36 Ohio St. 296. The use of patented property, like other species of property, when devoted to public use, is subject to control by State legislation, where the exigencies of the public welfare require it. State *v.* Telephone Co., 36 Ohio St. 296. The court say: "This doctrine is fully discussed and settled in Jordan *v.* Overseers of Dayton, 4 Ohio, 295, and Patterson *v.* Kentucky, 97 U. S. 501. The sole operation of the statute is to enable him [the patentee] to prevent others from using the products of his labors without his consent; but his own right of using is not enlarged or affected."

The Bell Telephone Co. cannot deny to a telegraph company the use of a telephone, nor can the telephone company avoid such service to the telegraph company on the ground that its license from the owner of the patent forbids the licensee to furnish telegraph companies with telephones. Such restriction is void. Peremptory *mandamus* was therefore awarded compelling respondent to place a telephone in relator's office on the same terms that it supplies instruments to other subscribers. State *ex rel.* American Union Telegraph Co. *v.* Bell Telephone Co. (circuit court of the city of St. Louis), 11 Cent. L. J. 359.

A Connecticut telephone company purchased from the Bell Telephone Co. of Massachusetts, which owned a telephone patent, a license for a term of years to use the Bell device in Connecticut. The contract contained a provision that no telegraph company, without the consent of the licensors, who designated one company for the purpose, should be allowed through it to collect and deliver messages from and to its customers. Another telegraph company, which has a station in the district, having demanded of the Connecticut corporation the same benefit with the other company with an offer of payment and been refused, applied for a *mandamus* to compel the corporation to grant the benefit. *Held*, in refusing the application.

(1) That the Massachusetts corporation, owning the patent, had a right, in granting licenses for its use, to impose whatever restrictions it chose;

(2) That the Connecticut corporation therefore acquired a right only to the restricted use of the patented device, and its duty to the public did not extend beyond that restricted use.

3. That the *Connecticut* statute (Session Laws 1879. ch. 36, amending Gen. St. p. 342, § 8), requiring all telegraph and telephone companies to receive despatch from all othert elegraph and telephone lines, and transmit them on payment ofthe usual charges, could not operate to compel the Connecticut corporation to do what it had no right to do;

(4) That a *Massachusetts* statute to the same effect was to be regarded as applying to the action of the Massachusetts corporation as a carrier of speech in that State, and as not affecting its rights to manufacture its instruments and sell or lease them in other States as the owner of the patent. American Rapid Tel. Co. *v.* Connecticut Telephone Co., 49 Conn. 352; s. c., 1 Am. & Eng. Corp. Cas. 378.

1. In Pugh *v.* Telephone Company, before the district court of Cincinnati, the question was whether Pugh had forfeited his right to use the telephone by "damning" the company over the wire. The rule prohibited the use of "improper or vulgar language. The notice of the case in the Albany Law Journal, vol. XXVII. p. 163, after stating belief that the Journal had reported the case when in a lower court of Cincinnati, said: "The court said in substance that it was hardly necessary, by its understanding of the rules of society, to go into an examination as to whether the word 'damn' is profane or vulgar. Judge Barr, of the United States district court of Kentucky, had already held that the word 'damn,' while not obscene,' was to be classed as 'coarse, unbecoming, and profane,' and in view of all the circumstances in the present case under which the word was used, it was patent to a majority of the court that it was used with a vile, low, and insulting spirit, and, if not profane, was manifestly improper. The rule prohibiting the use of 'improper or vulgar' language was certainly a reasonable rule.

**4. Water and Gas Companies.**—Laws requiring water and gas companies and other corporations of like character to supply their customers at prices fixed by the municipal authorities of the locality are within the scope of legislative power, unless prohibited by constitutional limitation or valid contract obligation.[1] The same power of the State to regulate rates exists in these cases as in that of railroad companies.[2] Gas companies possess, by virtue of their charters, powers and privileges which others cannot exercise; and the statutory duty is imposed upon them to furnish gas on payment of all moneys due from applicants.[3] The right to make and vend gas is a right conferred both for the public and by the public. The right of the company to exclude competition is for its own benefit; and while it cannot absolve itself from the former right, which is also a duty, it can, with the consent of stockholders, relinquish the right to exclude competition.[4] Such

'The telephone reaches into many family circles. It must be remembered that it is possible, from the peculiar arrangement of the instrument, to have a communication that is intended for one individual reach another. All communications, therefore, should be in proper language. Moreover, in many cases the operators in the exchanges are many of them refined ladies, and even beyond this, all operatives are to be protected from insult. Besides, the inventors have a right to be protected, and have their instrument placed in a respectable light before the world. . . .' One judge dissented on the narrow view that 'damn' is not profane."

1. Spring Valley Water Wks. *v.* Schottler, 110 U. S. 347. Waite, C.J., said: "That it is within the power of the government to regulate the prices at which water shall be sold by one who enjoys a virtual monopoly of the sale, we do not doubt. That question is settled by what was decided on full consideration in Munn *v.* Illinois" (94 U. S.).

By accepting an act of incorporation, a water company formed to supply a village with pure water undertakes to do all the public duties required of it. A refusal to supply any reasonable demand would be such a misfeasance as would subject it to indictment, or such an abuse of its franchise as would render it amenable to proceedings for the revocation of its charter. Lumbard *v.* Stearns, 4 Cush. (Mass.) 60, where it was said by Shaw, C.J., that if such an aqueduct corporation should undertake, capriciously and oppressively, to enhance the value of certain estates by furnishing them with a supply of water, and depreciate that of others by refusing it to them, such conduct would be a plain abuse of their franchise; hence the omission, in the statute, of an express requirement that it should supply all on reasonable terms was held not to affect the constitutionality of the act.

An act having imposed on a water company in *Pennsylvania* the duty to furnish a supply of water sufficient for extinguishment of fires in the borough of Easton, the borough to furnish the plugs, an act the next year provided "That it shall be the duty of the. . . . company, in addition to furnishing a sufficient supply of water for the extinguishment of fires, as provided for in the eight section of the act to which this is a supplement, to erect and keep in repair at their own expense fire-plugs, as designated in said section," etc., *held*, that the latter provision was not an attempted recital—though misrecital—of the earlier act, but required that the company should thereafter provide proper plugs and adequate supply of water for fires. Easton *v.* Lehigh Water Co., 97 Pa. St. 554.

2. State *v.* Columbus Gasl., etc , Co., 34 Ohio St. 572; New Orleans Gas Co. *v.* Louisville Light Co., 115 U. S. 650.

3. People *v.* Manhattan Gaslight Co., 45 Barb. (N. Y.) 136; R. C. Gas Co. *v.* Middletown, 59 N. Y. 228. If an applicant is already indebted to a gas company, the company may shut off the supply of gas, and refuse to furnish any more, especially if the applicant avows his insolvency, and his inability to pay for gas already furnished. Supply without objection on account of former indebtedness will not prevent the company from rejecting a subsequent application on such account. People *v.* Manhattan Gasl. Co., 45 Barb. (N. Y.) 136.

4. St. Louis *v.* St. Louis Gaslight Co., 70 Mo. 69.

a corporation cannot disable itself by contract from the performance of public duties which it has undertaken, and thereby make public accommodation or convenience subservient to its private interests.[1]

**5. Boom Companies.**—Boom companies are *quasi*-public corporations, and hence may be given the exclusive right to maintain booms or to drive logs,[2] and even to entirely obstruct navigation;[3] they may also be empowered to condemn land,[4] and to make improvements in streams, and to charge a toll upon all logs floated therein.[5] Their charges may be regulated by law, for the same reason.[6]

**6. Miscellaneous Corporations.**—Corporations formed for the transportation of petroleum by means of pipe-lines are engaged in business of such a public nature that they may possess the right of eminent domain.[7]

**7. Remedies for the Enforcement of Public Duties.**—The three remedies available for the enforcement of the public duties of a corporation are *mandamus*, *quo warranto* for the usurpation or illegal user of franchises,[8] and indictment.[9] That by *mandamus* alone requires detailed treatment in this connection.

In an action brought by the people, through the attorney-general, a railroad corporation may be compelled by *mandamus* to exercise its duties as a carrier of goods and passengers.[10] *Mandamus*

**1.** Gibbs *v.* Consolidated Gas Co., 130 U. S. 396. In this case, the contract recited that theretofore the parties to the agreement had struggled against each other in active competition causing loss of profits, and established rates for supplies to consumers thereafter, giving one of the parties, however,—"in view of the much larger interest of the party,"—the privilege of changing the price to be charged by either in case of new competition by outside parties. Provision was made for extension of plants, for division of receipts, for arbitration, and for penalties for violation of the contract. One of the companies, moreover, agreed to lay no more pipes for the supply of the city. In action based on this contract, it was averred that the competition previous to the agreement had reduced the price of gas below a profitable rate. The supreme court held that the contract was void. See also West Va. Transp. Co *v.* Ohio River Pipe-line Co., 22 W. Va. 600, where the subject is much considered; Chi., etc., Gas Co. *v.* People's Gas Co., 121 Ill. 530; W. U. Tel. Co. *v.* American Un. Tel. Co., 65 Ga. 160.

**2.** See BOOM COMPANIES, 2 Am. & Eng. Encyc. of Law, 471, 475; Cohn *v.* Wausau Boom Co., 47 Wis. 314; Duluth Lumber Co. *v.* St. Louis, etc., Co., 17 Fed. Rep. 419; South Bay Boom Co. *v.* Jewett, 5 Allen (N. B.), 267; Osborne *v.* Knife Falls Boom Co., 32 Minn. 412; s. c., 14 Am. & Eng. Corp. Cas. 203; Wisconsin River Imp. Co. *v.* Munson, 43 Wis. 255.

**3.** Herman *v.* Beef Slough Mfg. Co., 8 Biss. (U. S.) 334; Edwards *v.* Wausau Boom Co., 30 N. West. Rep. 716; Enos *v.* Hamilton, 24 Wis. 658.

**4.** Cotton *v.* Mississippi, etc., Co., 20 Minn. 378. *Compare* Grand Rapids Booming Co. *v.* Jarvis, 30 Mich. 308.

**5.** Osborne *v.* Knife Falls Boom Co., 32 Minn. 42; s. c., 49 Am. Rep. 590; Wisconsin River Imp. Co. *v.* Munson, 43 Wis. 255.

**6.** Androscoggin Side Boom Co. *v.* Haskell, 7 Me. 474. See also BOOM COMPANIES, 2 Am. & Eng. Encyc. of Law, 473.

**7.** Lewis Eminent Domain (1888), § 172. See also Turnpike Co. *v.* American, etc., News Co., 43 N. J. Law, 381.

**8.** See CORPORATIONS, 4 Am. & Eng. Encyc. of Law, 291 *et seq.*

**9.** See CORPORATIONS, 4 Am. & Eng. Encyc. of Law, 269 *et seq.*

**10.** People of New York *v.* N. Y. Central, etc., R. Co. *et al.*, 28 Hun (N. Y.), 543, where the court said: "If the people have that right, there can be no doubt that their attorney-general is the proper officer to set it in effective operation on

is the proper remedy to compel a railroad company to deliver to a particular elevator whatever grain in bulk may be consigned to it upon the line of its road,[1] or to compel the operation of the railroad in spite of a strike of employees,[2] or where it abandons or ceases to operate a portion of the route,[3] and in other instances.[4]

their behalf. 1 R. S. 179, § 1; Code of Civ. Proc. § 1993; People *v.* Halsey, 37 N. Y. 344; People *v.* Collins, 19 Wend. (N. Y.) 56.

Corporate duty may be compelled by *mandamus* applied for by state's attorney. State *v.* Hartford & New H. R. Co., 29 Conn. 547.

1. Chicago & N. W. R. Co. *v.* People, 56 Ill. 384.

2. "We are not able to perceive the difficulties that embarrassed the court below as to the form of a writ of *mandamus* in such cases. It is true the writ must be specific as to the thing to be done; but the thing to be done in this case was to resume the duties of carriers of the goods and property offered for transportation; that is, to receive, carry, and deliver the same under the existing rules and regulations as the business had been accustomed to be done. There was no necessity to specify what kind of goods should be first received and carried, or whose goods, or indeed to take any notice of the details of the established usages of the companies. It was the people who were invoking the writ on their own behalf, and not for some private suitor or to redress individual injuries. The prayer of the petition indicated the proper form of the writ. Upon the return to the writ all questions whether what has been done is a sufficient compliance with its command may properly arise and become a subject of further consideration. People *ex rel.* Green *v.* D. & C. R. Co., 58 N. Y. 152, 160, 161. They need not have been anticipated. It is suggested that the time has now passed when such a writ can be of any valuable effect. This is probably so; but we are governed by the record in disposing of the appeal, and not by subsequently occurring events. The appellants labor now under a judgment alleged to be injurious to the rights they possessed when it was pronounced, and harmful to them as a precedent. If erroneous, they are entitled to have that judgment reversed, and to be indemnified, in the discretion of the court, for the costs incurred on the appeal made necessary by the error." People *v.* New York Central & Hudson River R. Co., 28 Hun (N. Y.), 559.

3. Where a railroad corporation, after completing and operating its road, abandons or ceases to operate a portion of the route, the remedy is not an action in equity, on behalf of the public, to enforce a specific performance, but by *mandamus* or indictment, or, at the election of the State, by proceeding to annul the corporation. People *v.* Albany & Vt. R. Co., 24 N. Y. 261.

The Hartford & New Haven R. Co. was chartered to construct and operate a railroad from Hartford to the navigable waters of New Haven harbor. A steamboat company was afterwards chartered to run in connection with it to New York, and the railroad and line of steamboats constituted a route that was of great convenience to the public. After the construction of the road and the use of it in connection with the steamboat line for several years, the railroad company constructed a track diverging from the original track at a point a mile and a half from its terminus at tide-water, and running to the station of the New York & New Haven R. Co. in the city of New Haven, and discontinued the running of passenger trains to the original terminus at tide-water. This change incommoded travellers who wished to pass by the steamboat route, of whom there were many. *Held*, that a *mandamus* ought to be issued to compel the railroad company to run passenger trains to the original terminus. State *v.* Hartford & N. H. R. Co., 29 Conn. 538.

4. In People *v.* N. Y. C., etc., Co., 28 Hun (N. Y.), 552, Davis, P.J., reviewed the decisions. He says: "The writ of *mandamus* has been awarded to compel a company to operate its road as one continuous line,—Union Pacific R. Co. *v.* Hall, 91 U. S. 343;—to compel the running of passenger trains to the terminus of the road,—State *v.* H. & N. H. R. Co., 29 Conn. 538;—to compel the company to make fences and cattle-guards,—People *ex rel.* Kimball *v.* B. & A. R. Co., 70 N. Y. 569;—to compel it to consruct its road across stream so as not to interfere with navigation,—State *v.* N. E. R. Co., 9 Rich. (S. Car.) 247;—to compel it to run daily trains,—*In re* New Brunswick, etc., R., 1 P. & B. 667;—to compel the delivery of grain at a particular elevator,—Chicago & Northwestern R.

But the reciprocal right and obligation must be complete, legal, and perfect, to authorize the use of *mandamus*.[1] When a railroad company fails to use, or misuses, the public trust and function vested in it by the State, it rests in the sound discretion of the attorney-general to decide whether to apply for a *mandamus* or to have the charter of the corporation annulled.[2]

Co. *v.* People, 56 Ill. 365;—to compel the completion of its road.—Farmers' Loan & Trust Co. *v.* Henning, 17 Am. Law Reg. (N. S.) 266;—to compel the grading of its track so as to make crossings convenient and useful,—People *ex rel.* Green *v.* D. & C. R. Co., 58 N. Y. 152; N. Y. C. & H. R. R. Co. *v.* People, 12 Hun, 195; s. c., 74 N. Y. 302; Indianapolis R. Co. *v.* State, 37 Ind. 489;—to compel the re-establishment of an abandoned station,—State *v.* Railroad, 37 Conn. 154;—to compel the replacement of a track taken up in violation of its charter,—Rex *v.* Severn & Wye R. Co., 2 Barn. & Ald. 646;—to prevent the abandonment of a road once completed,—Talcott *v.* Pine Grove, 1 Flip. (U. S.) 145;—and to compel a company to exercise its franchise,— People *v.* A. & V. R. Co., 24 N. Y. 261." He then says: "These are all express or implied obligations arising from the charters of the railroad companies, but not more so than the duty to carry freight and passengers. That duty is indeed the *ultima ratio* of their existence, the great and sole public good for the attainment and accomplishment of which all the other powers and duties are given or imposed. It is strangely illogical to assert that the State, through the courts, may compel the performance of every step necessary to bring a corporation into a condition of readiness to do the very thing for which it is created, but is then powerless to compel the doing of the thing itself."

1. Where the charter of a corporation, or the general statute in force and applicable to the subject-matter, imposes a specific duty, either in terms or by fair and reasonable construction, and there is no other specific and adequate remedy, the writ of *mandamus* may be awarded to compel the performance of such duty; but the writ will not be awarded unless the right sought to be enforced is a complete and perfect legal right and the reciprocal obligation a complete and perfect legal obligation. These rules applied in a proceeding for *mandamus* to compel the Southern Minnesota R. Co. to construct its railroad to La Crescent. State of Minn. *v.* Southern Minn. R. Co., 18 Minn. 40, citing 1 Redfield on R.R.(4th Ed.) 644; York, etc., R. Co. *v.* Queen, 1 El. & Bl. '72 E. C. L. R.) 858; *Ex parte* Napier, 18 C. B. (83 E. C. L.) 694.

While the courts may by *mandamus* act in certain cases affecting corporate matters, they can only do so where the duty concerned and thus attempted to be enforced is specific and plainly imposed upon the corporation. People *v.* N. Y., etc., R. Co., 104 N. Y. 58.

The court may by *mandamus* compel performance of duties specifically and plainly imposed upon the corporation. People *v.* New York, etc., R. Co., 104 N. Y. 58, 67; as, to restore highway (a duty imposed by the New York Laws 1850, ch. 140, § 28, subd. 5),—People *v.* D. & C. R. Co., 58 N. Y. 152;—to build a bridge as directed by Laws of 1874,—People *v.* B. & A. R. Co., 70 N. Y. 569;—or fences (Laws of 1850),—People *v.* R. & S. L. R. Co., 76 N. Y. 294.

2. People *v.* N. Y. C., etc., Co., 28 Hun (N. Y.), 553: "But it is said that the State is not injured, and has no interest in the question whether the corporation perform the duty or not. The State may suffer no direct pecuniary injury, as it may not by the neglect of one or more of its numerous political officers who hold in trust for the people the official duties reposed in their hands; but that is no test of the power or duty of the State in either case. The sovereignty of the State is injured whenever any public function vested by it in any person, natural or artificial, for the common good, is not used, or is misused, or is abused; and it is not bound to inquire whether some one or more of its citizens has not thereby received a special injury for which he may recover damages in his private suit. Such an injury wounds the sovereignty of the State, and thereby, in a legal sense, injures the entire body politic. The State, in such a case as this, has no other adequate remedy. It may proceed, it is true, to annul the corporation, as has been held in many cases where corporations had neglected public duties,—People *v.* Fishkill, etc., R. Co., 27 Barb. (N. Y.) 452, 458; People *v.* H. & C. Turnpike Co., 23 Wend. (N. Y.)

Private persons may, without the intervention of the government law officer, move for a *mandamus* to enforce the performance of a public duty not due to the government as such.[1] However, the

254; Turnpike Co. *v.* State, 3 Wall. (U. S.) 210; People *v.* K. & M. Turnpike Co., 23 Wend. (N. Y.) 208; People *v.* B. & R. Turnpike Co., ib. 222; Charles River Bridge Co. *v.* Warren Bridge, 7 Pick. (Mass.) 344;—but that remedy is not adequate, for it only destroys functions where the public interests require their continued existence and enforcement. It as therefore an election which of these remedies to pursue. State *v.* H. & N. H. R. Co., 29 Conn. 538; People *v.* A. & V. R. Co., 24 N. Y. 261; Talcott *v.* Pine Grove, *supra*, 1 Flip. (U. S.) 145.

"Undoubtedly a sound discretion is vested in its law officer to decide whether the exigency is such as to call for the use of either remedy, as it is ultimately for the court to judge whether the elected remedy should be applied. But upon the question of power, and of sufficient legal injury to justify its use, where the corporation neglects or refuses to exercise its franchises or perform its duties, there seems to us no reason to doubt."

1. Union Pac. R. Co. *v.* Hall, 91 U. S. 343, in which case Mr. Justice Strong said: "The question raised by the objection, therefore, is whether a writ of *mandamus* to compel the performance of a public duty may be issued at the instance of a private relator. Clearly, in *England* it may. Tapping on Mandamus, p. 28, asserts the rule in that country to be that, 'In general, all those who are legally capable of bringing an action are also equally capable of applying to the court of King's Bench for the writ of *mandamus*.' This is true in all cases, it is believed, where the defendant owes a duty, in the performance of which the prosecutor has a peculiar interest; and it is equally true, we think, in case of applications to compel the performance of duties to the public by corporations. In King *v.* Severn & Wye R. Co., 2 Barn. & Ad. 646, a private individual, without any allegation of special injury to himself, obtained a rule upon the company to show cause why a *mandamus* should not issue commanding them to lay down again and maintain part of a railway which they had taken up. Under an act of Parliament, the railway was a public highway; and all persons were at liberty to pass and repass thereon, with wagons and other carriages, upon payment of the rates. What the prosecutor complained of was the loss by the public, and particularly by the owners of certain collieries (of which he does not appear to have been one), of the benefit of using the railway taken up. The writ was awarded. It was not even claimed that the intervention of the attorney-general was needed. Other cases to the same effect are numerous. Clarke *v.* Leicestershire & Northamptonshire Union Canal Co., 6 Ad. & El. (N. S.) 898; 1 Chit. 700.

"In this country there has been diversity of decision upon the question whether private persons can sue out the writ to enforce the performance of a public duty, unless the non-performance of it works to them a special injury; and in several of the States it has been decided that they cannot. An application for a *mandamus*, not here a prerogative writ, has been supposed to have some analogy to a bill in equity for the restraint of a public nuisance. Yet, even in the supposed analogous case, a bill may be sustained to enjoin the obstruction of a public highway when the injury complained of is common to the public at large, and only greater in degree to the complainants. It was in the Wheeling Bridge Case, 13, How. (U. S.) 518, where the wrong complained of was a public wrong—an obstruction to all navigation of the Ohio river.

"The injury to the complainants in that case was no more peculiar to Pennsylvania than is the injury to Hall and Morse in this peculiar and special to them.

"There is, we think, a decided preponderance of *American* authority in favor of the doctrine that private persons may move for a *mandamus* to enforce a public duty, not due to the government as such, without the intervention of the government law officer. People *v.* Collins, 19 Wend. (N. Y.) 56; County of Pike *v.* State, 11 Ill. 202; Ottawa *v.* People, 48 Ill. 233; Hamilton *v.* State, 3 Ind. 452; Hall *v.* People, 57 N. Y. 307; People *v.* Halsey, 37 N. Y. 344; State *v.* County Judge of Marshall, 7 Iowa, 186; State *v.* Railway, 33 N. J. Law, 110; Watts *v.* Carroll Parish, 11 La. Ann. 141. See also Dillon on Mun. Corp. § 695, and High on Ex. Rem. §§ 431, 432; Cannon *v.* Janvier, 3 Houst. (Del.) 27; State *v.* Rahway, 33 N. J. Law, 110. The principal reasons urged against the doctrine are that the writ is prerogative in its nature,—a reason which is of no force

fact that injured individuals may have private remedies for the damages they have sustained by neglect of corporate duties precludes the State from its remedy by *mandamus.*[1]

An injunction at the suit of the State will not lie to compel a railroad company to complete its road.[2] It seems that a court will not enforce the operation of an abandoned railroad by injunction.[3] So a specific contract to operate a railroad will not be enforced in equity.[4]

in this country, and no longer in *England,* —and that it exposes a defendant to be harassed with many suits. An answer to the latter objection is that granting the writ is discretionary with the court, and it may well be assumed that it will not be unnecessarily granted." See High on Ex. Rem. §§ 431, 433, for conflicting decisions on the question.

1. "Where the injury is to a single person under circumstances which do not affect the general public, the courts, in the exercise of their discretion, have properly refused this remedy on his relation. The injured party is then the suitor; he has an adequate remedy by private action for damages. That was the case of People *ex rel.* Ohlen *v.* Erie Railway Company, [22 Hun], (N. Y.), 533 . . . in which the court held that the relator's remedy was by suit for damages and not by *mandamus.*" People *v.* N. Y. C., etc., R. Co., 28 Hun (N. Y.), 554.

2. An information was filed praying a declaration that the railroad companies therein named were bound to construct the whole of certain lines of railway, and to open the whole for public traffic simultaneously, and for an injunction to prevent them from making one line without another, and from opening one line until another was made, or until the notices to treat were given to the land-owners preliminary to making such other line. A general demurrer to this bill was allowed, the vice-chancellor guarding himself from expressing any opinion as to what he should have done if this had been a bill by a shareholder, or an information and bill instead of an information only. Atty.-Gen. *v.* Birmingham & Oxford Junc. R. Co., 7 Eng. L. & Eq. 283.

Whether a corporation has violated its charter or forfeited its franchise is a question solely for the determination of a court of law. But when a bridge company, setting up an exclusive right within certain limits, asks an injunction to prohibit the building of a bridge within such limits, a court of equity will not lend its assistance when it appears from the answer that the bridge of the complainants has been so far appropriated to the uses of a railroad as to render it inconvenient and dangerous for ordinary travel. President, etc., *v.* Trenton City Bridge Co., 2 Beas. Ch. (13 N. J. Eq) 47. Approved in Troy & Boston R. Co. *v.* Boston, Hoosac Tunnel, etc., Co., 86 N. Y. 107, 125. In the latter case, plaintiff sought injuction against another company to restrain it from locating upon a long-time-abandoned road of plaintiff's. The injunction was refused. Whatever rights plaintiff may have must be asserted at law. Danforth, J., said, at page 127: "And although the form of actions and suits, and the distinction between actions at law and suits in equity have been abolished, a party, to entitle himself to the equitable remedy by injunction, must still make such a case as would, while the distinction existed, have made an equitable cause of action." *Citing* N. Y. Life Ins. Co. *v.* Supervisors of N. Y., 4 Duer (N. Y.), 192; Pumpelly *v.* Village of Oswego, (court of appeals), 45 How. Pr. (N. Y.) 259, 260; Heywood *v.* City of Buffalo, 14 N. Y. 534; Albany Northern R. *v.* Brownell, 24 N. Y. 348.

"A court of equity will not by injunction protect a naked legal right, which the complainant and those under him have covenanted not to exercise" (Bosley *v.* McKim, 7 H. & J. 468), applied in Troy & Boston R. Co. *v.* Boston, Hoosac Tun., etc., Co., 86 N. Y. 107, 130, where a lessee company, which had in the case agreed not to operate the portion of road leased to it, was denied protection in equity against another company which years afterward entered upon such abandoned portion.

3. Troy & Boston R. Co. *v.* Boston, Hoosac Tunnel & W. R. Co., 86 N. Y. 107, 124.

4. Port Clinton R. Co. *v.* Cleveland, etc., R. Co., 13 Ohio St. 544, 549; Blanchard *v.* Detroit, etc., R. Co., 31 Mich. 54; Peto *v.* Brighton, etc., R. Co., 1 H. & M. 468; Johnson *v.* Shrewsbury, etc., R. Co., 3 De G., M. & G. 914; McCann *v.* Nashville R. Co., 2 Tenn. Ch. 775; Atlanta, etc., R Co. *v.* Speer, 32 Ga. 550, 553. See also Raynor *v.* Stone, 2 Eden, 128; Gervais *v.* Edwards, 2 Dru. & W.

**V. FRANCHISES AS CONTRACTS.—1. Generally.**—The rule established in the Dartmouth College Case, that the grant of franchises in the charter of a corporation constitutes a contract the obligation of which cannot be impaired by subsequent legislation, is settled beyond dispute.[1] The rule has been criticised,[2] but whatever force there may be in the objections, they seem to result in nothing that is valuable from any other than a theoretical standpoint. Not only has the rule withstood all attacks, but injurious consequences have been averted by its further explanation and by legislation. Closely allied to the rule are two other principles, equally well-settled, and so important in their effect upon it that they may sometimes seem to nullify the rule. Under the first of these principles every grant of franchises, being in derogation of common right, receives a strict construction;[3] under the second every charter and the grants it contains is accepted subject to the police power of the State, which cannot be bartered away.[4] Finally, the right is now commonly reserved in State constitutions, general laws, or the charters themselves to amend or repeal the charters of private corporations.[5] But in many instances the rule has operated to protect various franchises of corporations of which the following are examples: Lawfully granted monopolies;[6] donation of an annual sum to a college;[7] exemption from taxation;[8] the right to charge more than the usual rate of interest;[9] right of eminent domain;[10] right to fix a tariff of charges on a public road;[11] right of forming a new corporation by consolida-

80; Blackett *v.* Bates, L. R. 1 Ch. App. 117; Marble Co. *v.* Ripley, 10 Wall. (U. S.) 339, approving Port Clinton R. Co. *v.* Cleveland & Toledo R. Co., 13 Ohio St. 544, cited *supra;* Hood *v.* Northeastern R. Co., L. R. 8 Eq. 666; L. R. 5 Ch. 525; Del., etc., R. Co. *v.* Erie R. Co., 21 N. J. Eq. 303.

See, as illustrating the subject, Baldwin *v.* Society, etc., of Useful Knowledge, 9 Sim. 393; Hamblin *v.* Dinneford, 2 Ed. Ch. (N. Y.) 529; De Revafinoli *v.* Corsetti, 4 Paige (N. Y.), 264; Sanquirico *v.* Benedetti, 1 Barb. (N. Y.) 315; Dodd *v.* Seymour, 21 Conn. 476; Waters *v.* Taylor, 15 Ves 10–25.

1. Greenwood *v.* Freight Co., 105 U. S. 13; Edwards *v.* Kearzey, 96 U. S. 607; Sinking Fund Cases, 99 U. S. 748; People *v.* O'Brien, 111 N. Y. 49. See also list of authorities, CORPORATIONS, 4 Am. & Eng. Encyc. of Law, 298; and same title, 4 Am. & Eng. Encyc. of Law, 209.

2. Toledo Bank *v.* Bond, 1 Ohio St. 622; Mechanics', etc., Bank *v.* Debolt, 1 Ohio St. 591; Skelly *v.* Jefferson Branch Bank, 9 Ohio St. 606; Morawetz on Corporations (2d ed.), §§ 1045 *et seq.;* Taylor on Corporations, § 450.

3. See CORPORATIONS, 4 Am. & Eng. Encyc. of Law, 212.

4. See CORPORATIONS, 4 Am. & Eng. Encyc. of Law, 212.

5. See CORPORATIONS, 4 Am. & Eng. Encyc. of Law, 211.

6. Gibbons *v.* Ogden, 9 Wheat. (U. S.) 74; Slaughter-House Cases, 16 Wall. (U. S.) 65.

And the monopoly may be made irrevocable. New Orleans Gas Co. *v.* Louisiana Light Co., 115 U. S. 650, 665.

7. Visitors, etc., of St. John's College *v.* Maryland, 15 Md. 330.

8. University *v.* People, 99 U. S. 309; Home of the Friendless *v.* Rouse, 8 Wall. (U. S.) 430; Farrington *v.* Tennessee, 95 U. S. 679; Railway Co. *v.* Philadelphia, 101 U. S. 528; Commonwealth *v.* Pottsville Water Co., 94 Pa. St. 516; Mobile, etc., R. Co. *v.* Kennerly, 74 Ala. 566.

9. Hazen *v.* Union Bank, 1 Sneed (Tenn.) 115.

10. Chesapeake, etc., Canal Co. *v.* Baltimore, etc., R. Co., 4 G. & J. (Md.) 108.

11. Hamilton *v.* Keith, 5 Bush (Ky.). 458; Phila., etc., R. Co. *v.* Bowers, 4 Houst. (Del.) 506. See also FREIGHT, 8 Am. & Eng. Encyc. of Law.

tion with another;[1] exemption of company's servants from the duty of serving upon juries or of working upon roads.[2]

Nearly all charters contain various provisions which are matters of general law and not of contract and are therefore subject to modification and repeal.[3] A law validating a contract not within the company's franchises is valid.[4] A railroad charter authorizing county commissioners to subscribe to the stock of the company may be repealed; until the subscription is actually made there is no contract, and a mere vote to subscribe does not form one.[5]

There are various ways in which questions arise as to how far the individual rights of stockholders can be affected by legislation without impairing the obligation of contracts, which will be found treated elsewhere.[6]

**2. Franchises always Granted Subject to the Police Power.**—The doctrine that grants of franchises are contracts has also been frequently invoked in efforts to protect corporations from the operation of laws passed in pursuance of the police power of States. But all agree that the legislature cannot bargain away the police power of the State,[7] and while irrevocable grants of property and

1. Zimmer *v.* State, 30 Ark. 680.

2. Zimmer *v.* State, 30 Ark. 680; Morawetz Corp. (2d Ed.), § 1056.

**Consideration Necessary to Support Contract with State.**—A mere grant of a privilege to a company already in existence, without any consideration moving from the company, will not be held to bind the State as a contract, unless the terms of the grant show beyond doubt that it was meant to be irrevocable. West Wisconsin R. Co. *v.* Trempealeau Co. Supervisors, 93 U. S. 595; Tucker *v.* Ferguson, 22 Wall. (U. S.) 527. In the first case, the court said: "A reasonable doubt is fatal to the claim." Providence Bank *v.* Billings, 4 Pet. (U. S.) 561; Christ's Church *v.* Philadelphia, 24 How. (U. S.) 302; Gilman *v.* Sheboygan, 2 Black. (U. S.) 513; Herrick *v.* Randolph, 13 Vt. 531; Easton Bk. *v.* Commonwealth, 10 Pa. St. 450; People *v.* Roper, 35 N. Y. 629; Salt Co. *v.* East Saginaw, 13 Wall. (U. S.) 373; Hewitt *v.* N. Y., etc., R. Co., 12 Blatchf. (U. S.) 452; People *v.* Com'rs of Taxes, 47 N. Y. 501; St. Louis, etc., R. Co. *v.* Loftin, 30 Ark. 693.

Derby Turnpike Co. *v.* Parks, 10 Conn. 522, is an instance of an additional grant held to have been meant as irrevocable, the privilege—taking additional toll—seeming to have been omitted by mistake in the first grant. P. 543. See Phila., etc., Co.'s App., 102 Pa. St. 123.

3. In Memphis R. Co. *v.* Commissioners, 112 U. S. 621, Justice Matthews said: "In many, if not in most, acts of incorporation, however, special in their nature, there are various provisions which are matters of general law, and not of contract, and are therefore subject to modification or repeal. Such, in our opinion, would be the character of the right in the mortgage bondholders, or the purchasers at the sale under the mortgage, to organize as a corporation, after acquiring title to the mortgaged property, by sale under the mortgage, if, in the charter under consideration, it had been conferred in express terms, and particular provision had been made as to the mode of procedure to effect the purpose. It would be matter of law, and not of contract."

4. Gross *v.* United States Mortgage Co., 108 U. S. 477; Satterlee *v.* Matthewson, 2 Pet. (U. S.) 380; Watson *v.* Mercer, 8 Pet. (U. S.) 88.

5. Aspinwall *v.* Daviess County Commissoners, 22 How. (U. S.) 364; Town of Concord *v.* Portsmouth, etc., Bank, 92 U. S. 625. See also, Covington, etc., R. Co. *v.* Kenton County Court, 12 B. Mon. (Ky.) 144.

After a valid subscription and acceptance the subscription cannot be repealed. Moultrie Co. *v.* Bank, 92 U. S. 631.

6. See STOCKHOLDERS.

7. Stone *v.* Mississippi, 101 U. S. 814; Beer Co. *v.* Massachusetts, 97 U. S. 32; Railroad Co. *v.* Richmond, 96 U. S. 521; Butchers' Union, etc., Co. *v.* Crescent City, etc., Co., 111 U. S. 746; Metropolitan Board, etc., *v.* Barrie, 34 N. Y.

franchises may be made if they do not impair the supreme authority to make laws for the right government of the State, no legislature can curtail the power of its successors to make such laws as they may deem proper in matters of police.[1] Accordingly corporations are subject, generally, to remedial legislation like individuals.[2] A State may impose penalties upon a corporation for non-performance of public duties.[3] Railroad companies may be controlled in their rates of freight and fares;[4] as to fires communicated from their locomotives;[5] as to liability to laborers of contractors constructing the road;[6] as to negligence causing death;[7] as to fences and cattle-guards, and may be made liable by

657; Commonwealth *v.* Hamilton Mfg. Co., 120 Mass. 383; State *v.* Morris, 77 N. Car., 512; Richmond, etc., R. Co. *v.* Richmond, 26 Gratt. (Va.) 83. See CORPORATIONS, 4 Am. & Eng. Encyc. of Law, 212, and authorities cited in succeeding notes.

1. Stone *v.* Mississippi, 101 U. S. 814; Metropolitan Board, etc., *v.* Barrie, 34 N. Y. 657.

**Police Power Generally.**—"It makes no difference how few or how many persons a statute will be likely to affect. If it regulates a matter of public concern, and is in its terms general, applying equally to all persons or property coming within its provisions, it makes no difference, in regard to its character or validity, whether it will be likely to reach one case or ten thousand. A statute requiring powder-mills to be built remote from the villages or highways, or be separated from the adjoining lands by any such muniment as may be requisite to afford security to others' property or business, would probably be a valid law if there were but one powder-mill in the State, or none at all, and notwithstanding the whole expense of the protection should be imposed upon the proprietor of the dangerous business. And even where the State legislature have created a corporation for manufacturing powder at a given point, at the time, remote from inhabitants, if in process of time dwellings approach the locality, so as to render the further pursuit of the business at that point destructive to the interests of others, it may be required to be suspended or removed, or secured from doing harm, at the sole expense of such corporation." Thorpe *v.* R. & B. R. Co., 27 Vt. 152-3; Coates *v.* New York City (Trinity Churchyard), 7 Cow. (N. Y.) 604; Presbyterian Churchyard *v.* New York City, 5 Cow. (N. Y.) 538.

2. Chicago Life Ins. Co. *v.* Needles, 113 U. S. 575; Coffin *v.* Rich, 45 Me. 507.

In Brown *v.* Penn Bank, 8 Mass. 445 (1812), it was held that the Massachusetts act of 1809, imposing a penalty of two per cent per month on the amount of bills of any bank, of which payment is by such bank refused, militates with no principle of the Constitution, either of the United States or of the Commonwealth.

As Mr. Justice Daniel says: "It would imply an incredible fatuity in the States, to ascribe to them the intention to relinquish the power of self-government and self-preservation." West River Bridge Co. *v.* Dix, 6 How. (U. S.) 531, 532.

3. Mobile, etc., R. Co. *v.* Steiner, 61 Ala. 559.

A statute may inflict penalties on telegraph companies for failure to transmit dispatches. Western Union Tel. Co. *v.* Axtell, 69 Ind. 199.

4. See FREIGHT, 8 Am. & Eng. Encyc. of Law.

Over the railroad as a highway and in all its public relations, the State, by virtue of its general legislative power, has supervision and control; but over the rights of the shareholders, so far as these are private property, the State has the same power and no greater than over other private property. Dillon, J., in Chicago, etc., R. Co. *v.* Atty.-Gen. of Iowa, 9 West. Jur. 347. See also R. Comm'rs *v.* Portland, etc., R. Co., 63 Me. 277; Olcott *v.* Supervisors, 16 Wall. (U. S.) 678; Secombe *v.* R. Co., 23 Wall. (U. S.) 108.

5. Lyman *v.* Bos. & Wor. R., 4 Cush. (Mass.) 288. See also FIRES CAUSED BY THE OPERATION OF RAILROADS, 8 Am. & Eng. Encyc. of Law.

6. Peters *v.* St. Louis, etc., R. Co., 23 Mo. 107; Branin *v.* Connecticut, etc., R. Co., 31 Vt. 214. And held in the latter case that such a statute relates also to laborers employed by sub-contractors; and held also that under it compensation for use of horse and cart was recoverable.

7. Boston, etc., R. *v.* State, 32 N. H 215.

statute for cattle killed;[1] as to stopping before crossing a drawbridge;[2] as to viaducts at crossings, or sign-boards, flagmen, speed, whistling and bell-ringing;[3] and as to numerous other matters of a similar character.[4] In like manner, where the public safety or public morals require the discontinuance of a business the legislature can abolish such business, and corporations formed for the purpose of carrying it on must as much as individuals cease from the objectionable traffic.[5] The same principles are applicable to a business the continuation of which may become a nuisance.[6]

1. Thorpe *v.* Rutland, etc., R. Co., 27 Vt. 140; Chicago, etc., R. Co. *v.* Dremser, 109 Ill. 402; s. c., 19 Am. & Eng. R. R. Cas. 545. See also FENCES, 7 Am. & Eng. Encyc. of Law, 910.

2. Thorpe *v.* Rutland, etc., R. Co., 27 Vt. 140.

3. People *v.* Boston, etc., R. Co., 70 N. Y. 569. See CROSSINGS, 4 Am. & Eng. Encyc. of Law, 906.

4. Railroad Co. *v.* Richmond, 96 U. S. 521; Galena, etc., R. Co. *v.* Loomis, 13 Ill. 548; Railroad Co. *v.* Hillmer, 72 Ill. 235; Pittsburg, etc., R. Co. *v.* Southwest Pennsylvania R. Co., 77 Pa. St. 173; Kazie *v.* Mayo, 45 Me. 560.

The regulation may be extended to supervision of the track, tending switches, running upon the time of other trains, running a road with a single track, using improper rails, not using proper precaution by way of safety-beams in case of the breaking of axle-trees, the number of brakemen upon a train with reference to the number of cars, employing intemperate or incompetent engineers and servants, running beyond a given rate of speed, and a thousand similar things. Thorpe *v.* Rutland & B. R. Co., 27 Vt. 150; Hegeman *v.* Western R. Co., 16 Barb. (N. Y.) 353.

5. In Beer Co. *v.* Massachusetts, 97 U. S. 25, Justice Bradley said: "Whatever differences of opinion may exist as to the extent and boundaries of the police power, and however difficult it may be to render a satisfactory definition of it, there seems to be no doubt that it does extend to the protection of the lives, health, and property of the citizens, and to the preservation of good order and the public morals. The legislature cannot, by any contract, divest itself of the power to provide for these objects. They belong emphatically to that class of objects which demand the application of the maxim, *salus populi suprema lex;* and they are to be attained and provided for by such appropriate means as the legislative discretion may devise. That discretion can no more be bargained away than the power itself. Boyd *v.* Alabama, 94 U. S. 645." And on page 32: "The plaintiff in error was incorporated 'for the purpose of manufacturing malt liquors in all their varieties,' it is true; and the right to manufacture, undoubtedly, as the plaintiff's counsel contends, included the incidental right to dispose of the liquors manufactured. But although this right or capacity was thus granted in the most unqualified form, it cannot be construed as conferring any greater or more sacred right than any citizen had to manufacture malt liquor; nor as exempting the corporation from any control therein to which a citizen would be subject, if the interests of the community should require it. If the public safety or the public morals require the discontinuance of any manufacture or traffic, the hand of the legislature cannot be stayed from providing for its discontinuance, by any incidental inconvenience which individuals or corporations may suffer. All rights are held subject to the police power of the State." See also Commonwealth *v.* Intoxicating Liquors, 115 Mass. 153.

6. Butchers' Union, etc., Co. *v.* Crescent City, etc., Co., 111 U. S. 746; Crescent City Slaughter-House Co *v.* New Orleans, 33 La. Ann. 934; Coates *v.* Mayor, etc., 7 Cow. (N. Y.) 585; Woodlawn Cemetery *v.* Everett, 118 Mass. 354.

**Nuisance.**—In Fertilizing Co. *v.* Hyde Park, 97 U. S. 659, an association was incorporated for the term of fifty years, with the franchise of manufacturing fertilizers within certain limits, in which limits afterwards arose the municipality of Hyde Park. About four years after this, the village of Hyde Park was empowered by statute to define and abate nuisances, under which an ordinance was passed prohibiting the carrying through the village of offal, dead animals, etc., and a locomotive engineer was arrested for violating the ordinance in carrying offensive matter to said fertilizing company. *Held*, that the charter of the manufacturing company, although, until revoked, a sufficient license, was not a contract guaranteeing that the

The monopoly secured to the patentee of an article does not prevent the operation of State police laws.[1] The obligation of corporate contracts in grants of franchises is not impaired by legislation regulating the working hours of minors and women;[2] punishing neglect or misconduct in the management of ferries;[3] regulating the prices to be charged by water and gas companies;[4] arresting the business of a corporation when it may become injurious to public interests.[5]

**3. Franchises Held Subject to Legislation affecting Remedies.**—The fact that the grant of franchises to a corporation constitutes a contract has been set up as rendering unconstitutional legislation having for its object the advancement of justice in altering legal remedies by or against corporations. But it is well settled that remedies for the security of their rights, and to compel discharge of their liabilities, as to the mode, the time when, and the courts where they should be enforced are not in any way placed beyond legislative control,[6] but are inalienable.[7] This principle has been applied where a three years' limitation in a railroad charter as the time within which suit for damages for land taken might be brought was extended;[8] where a summary remedy against defaulting stockholders was given by charter and subsequently altered;[9] a charter provision giving summary process by execution in the nature of an attachment against debtors upon notes is

company, notwithstanding its business might become a nuisance by reason of the growth of population around the place originally selected for its works, should for fifty years be exempt from the exercise of the police power of the State; and afforded no protection against the ordinance.

1. State *v.* Telephone Co., 36 Ohio St. 296.

**Patents.**—"No State has any power to make a law interfering with the sale of any patent-right; but every State has power to regulate the making, the selling, and the using of the things covered by any patent-right, to the same extent that it lawfully regulates the making, selling, and using of similar unpatented things." Walker on Patents, § 155.

2. Commonwealth *v.* Hamilton Mfg. Co., 120 Mass. 383.

3. Benson *v.* Mayor of New York, 10 Barb. (N. Y.) 223. See also Billings *v.* Breinning, 45 Mich. 65.

4. Under a special charter, granted prior to the adoption of the present constitution, the defendant was empowered to "manufacture and sell gas." The grant was exclusive for twenty years. No provision was made in the charter as to the price of gas, nor upon the subject of meters. *Held*, defendant was subject to Ohio Act for 1867 restricting price for meters. State *v.* Gas Co., 34 Ohio St. 572. See also Spring Valley Water Works *v.* Schottler, 110 U. S. 347.

5. Provisions for arresting the business of a company, when its further prosecution will be injurious to the public interests, and for the appointment of a receiver, etc., are not repugnant to the State and Federal Constitutions, prohibiting the depriving a person of property, without due process of law. Attorney-Gen. *v.* No. Am. L. Ins. Co., 82 N. Y. 172.

6. Gowen *v.* Penobscot, etc., R. Co., 44 Me. 145; Read *v.* Frankfort Bank, 23 Me. 318; Franklin Bank *v.* Cooper, 36 Me. 179; Baltimore, etc., R. Co. *v.* Nesbit, 10 How. (U. S.) 395; United States *v.* Union Pacific R. Co., 98 U. S. 569; Terry *v.* Anderson, 95 U. S. 628; Penniman's Case, 103 U. S. 714; Chicago Life Ins. Co. *v.* Needles, 113 U. S. 574; Commonwealth *v.* Cochituate Bank, 3 Allen (Mass.), 42; Commonwealth *v.* Farmers' etc., Bank, 21 Pick. (Mass.) 542; Foster *v.* Essex Bank, 16 Mass. 245; Attorney Gen. *v.* North America, etc., Ins. Co., 82 N. Y. 172.

7. Bank of Columbia *v.* Okely, 4 Wheat. (U. S.) 235.

8. Gowen *v.* Penobscot, etc., R. Co., 44 Me. 145.

9. *Ex parte* Northeast, etc., R. Co., 37 Ala. 679.

no part of the corporate franchises and may be repealed or altered;[1] a charter provision that all suits against an insurance company may be brought in a specified county may be altered by statute permitting suits in any county where the company has an agency and where the matter in controversy arose.[2] A different rule for service of process against a corporation from that in force at its creation may be prescribed.[3] A special remedy for condemnation of land given to a railroad company by charter may be repealed in a general statute applying to all railroads.[4] There is no element of contract in the special remedy.[5] Other instances are cited in the notes.[6]

**4. Statutes Referring to Persons, etc., and their Application to Corporations.**—In its legal signification it is said that the word "person" is a generic term, and, as such, *prima facie*, includes artificial as well as natural persons unless the language indicates that it is used in a more restricted sense.[7] But the question is one of the proper construction of statutes.[8]

1. Bank of Columbia *v.* Okely, 4 Wheat. (U. S.) 235; Young *v.* Alexandria Bank, 4 Cranch (U. S.), 384.

2. Howard *v.* Kentucky, etc., Ins. Co., 13 B. Mon. (Ky.) 284.

3. New Albany & Salem R. Co. *v.* Mc Namara, 11 Ind. 543.

As to remedies, it has always been held that the legislative power of change may be exercised when it does not affect injuriously rights which have been secured. Sturges *v.* Crowninshield, 4 Wheat. (U. S.) 122.

The word "shall," in statutes, is to be construed as "may," as against the government, unless a contrary intent is manifest. Hence a charter provision, "process on said company shall be served on the president by leaving a copy to his address," with the officers at the principal office of the company, may be altered. Cairo, etc., R. Co. *v.* Hecht, 95 U. S. 168, affirming 29 Ark. 661. See also Gowen *v.* Railroad Co., 44 Me 140.

4. Baltimore, etc., R. Co. *v.* Nesbit, 10 How. (U. S.) 395; Calder *v.* Ball, 3 Dall. (U. S.) 386; Mississippi, etc., R. Co. *v.* McDonald, 12 Heisk. (Tenn.) 54; Chattaroi R. Co. *v.* Kinner, 81 Ky. 221.

5. Chattaroi R. Co. *v.* Kinner, 81 Ky. 221; and authorities cited in preceding note.

6. A statute of Alabama directing that promissory notes given to the cashier of a bank may be sued upon and collected in the name of the bank is a law which affects the remedy only; and although it was passed after a note was executed, does not impair the obligation of the contract. Crawford *v.* Branch Bank of Mobile, 7 How. (U. S.) 279.

7. Endlich on Statutes, p. 116.

8. Morawetz Corp. (2d Ed.) § 1091.

It has however been said, sometimes, that statutes are to be taken according to the usual meaning of the language employed, unless from the context or other parts of the statute it was intended otherwise, and that as the term "person" is generally understood to denote a natural person, the word is to be taken in that sense, unless it should appear from the statute that it was meant to embrace artificial persons, as corporations: the more especially because, said Judge Kennedy, "it has generally, if not universally, been the case that the legislature in passing acts when it was intended that the provisions thereof should extend to corporations as well as to individuals, designate specifically, so as to leave no room for doubt." School Directors *v.* Carlisle Bank, 8 Watts (Pa.), 291 (1839); Blair *v.* Worley, 1 Scamm. (Ill.) 178 (1835).

In Betts *v.* Menard, 1 Breese's Ap. 10 (Ill. 1831), it was said of statutes that "where persons are spoken of, no other than natural persons will be intended, unless it is absolutely necessary" to include corporations so as to carry out the objects of the charter. Of course, a word may come to have a peculiar meaning in the legislation of a State. And this seems to be the explanation of the Ohio decision to the effect that a corporation was not a person within the act of 1857 for prevention of nuisances—the decision seeming to be based on the use of the word in the criminal statutes of Ohio. State *v.* Fertilizer Co., 24 Ohio St. 611; Endlich

Corporations have been held to be included within the terms of statutes applying to the following matters: promissory notes,[1] registry of a vessel,[2] contracts regulating practice or procedure and referring to person or residents,[3] tax laws,[4] statutes protecting lands of persons from trespass,[5] etc., giving a remedy for damages caused by exercise of the power of eminent domain,[6] prohibiting persons from doing a banking business,[7] giving to persons the benefit of attachment laws,[8] imposing liability in damages for injuries causing death,[9] prohibiting contracts between a municipality and persons as to supplying gas.[10]

Corporations have been held not to be included within the terms of statutes applying to the following matters: the formation of corporations,[11] United States Confiscation Acts.[12] A State is a corporation within the statute of Anne enabling it to be the payee of a promissory note.[13] The term "corporation" as used in the

on Statutes, p. 118, note; Bishop, Wr. Laws, § 212, note 8.

1. The statute of Anne, respecting promissory notes, by the word "persons" included corporations, thereby enabling them to give such notes. Mott *v.* Hicks, 1 Cow. (N. Y.) 513; Indiana *v.* Woram, 6 Hill (N. Y.), 33.

2. Regina *v.* Arnaud, 9 Q. B. 806.

3. Morawetz Corp., (2d ed.) § 1091; Bushel *v.* Comm. Ins. Co., 15 S. & R. (Pa.) 176; Mineral Point R. Co. *v.* Keep, 22 Ill. 9; St. Louis *v.* Rogers, 7 Mo. 19; Brauser *v.* New Eng. Fire Ins. Co., 21 Wis. 506; Bank of North America *v.* Chicago, etc., R. Co., 82 Ill. 493; Mayor of Mobile *v.* Rowland, 26 Ala. 498; Eslava *v.* Ames Plow Co., 47 Ala. 384; Brown *v.* Mayor of N. Y., 66 N. Y. 385. *Compare* Cook *v.* Hager, 3 Col. 386; Olcott *v.* Tioga, etc., R. Co., 20 N. Y. 210; Blossburg, etc., R. Co. *v.* Tioga, etc., R. Co., 5 Blatchf. (U. S.) 387; Connecticut, etc., Ins. Co. *v.* Duerson, 28 Gratt. (Va.) 631.

4. **Tax Laws.**—Tax laws relating to "persons," or "individuals," or "inhabitants" apply to corporations, where they are not expressly mentioned in an enumeration of taxables. People *v.* McLean, 80 N. Y. 254; Cortis *v.* Kent W. Co., 7 Barn. & Cr. (Eng.) 314; Baldwin Inhabitants *v.* Trustees, 37 Me. 369; British Com. Ins. Co, *v.* Comm'rs, 1 Keyes (N. Y.), 303.

An act providing that "no abatement shall be made of the taxes assessed upon any individual" until he shall have filed with the assessors a sworn list of his estate applies to corporations. Otis Co. *v.* Inhabitants of Ware, 8 Gray (Mass.), 509. See also Newburyport *v.* Co. Comm'rs, 12 Met. (Mass.) 211; Winnisimmet Co. *v.* Chelsea Assessors. 6 Cush. (Mass.) 477.

Foreign corporations treated as resident individuals, as to taxes on their investments in the State. Internat. Life Assur. Soc. *v.* Comm'rs of Taxes, 28 Barb. (N. Y.) 318. See also Lon. R. Co. *v.* Letson, 2 How. (U. S.) 497.

In 1819 a decision was made opposed to or modifying in a measure the above cases. An insurance company having no local limit, though required to keep its office in Hartford, was held not to be an "inhabitant" of Hartford taxable as such, though it was said that bank corporations confined to specific towns might be different. Hartford Fire Ins. Co. *v.* Hartford, 3 Conn. 15.

5. White *v.* State, 69 Ind. 273; State *v.* Nashville University, 4 Humph. (Tenn.) 157.

6. Lehigh Bridge Co. *v.* Lehigh Coal, etc., Co., 4 Rawle (Pa.), 23.

7. People *v.* Utica Ins. Co., 15 Johns. (N. Y.) 358.

8. Planters', etc., Bank *v.* Andrews, 8 Port. (Ala.) 404.

9. Chase *v.* Steamboat Co., 10 R. I. 79.

10. Cincinnati Gas, etc., Co. *v.* Avondale, 43 Ohio St. 257.

**Other Instances.** — United States *v.* Amedy, 11 Wheat. (U. S.) 392; Beaston *v.* Farmers' Bank, etc., 12 Pet. (U. S.) 102. *Compare* Commonwealth *v.* Phœnix Bank, 11 Metc. (Mass.) 129. See also Commercial Bank *v.* Nolan, 8 Miss. 508; Lumberman's Bank *v.* Bearce, 41 Me. 505; Chafin *v.* Lincoln Savings Bank, 7 Hiesk. (Tenn.) 499.

11. Factors,' etc., Ins. Co. *v.* New Harbor Protection Co., 37 La. Ann. 233.

12. Risley *v.* Phœnix Bank, 83 N. Y. 335.

13. Indiana *v.* Woram, 6 Hill (N.Y.), 33. But the term "corporation," as used

New York Statute of Wills is confined to those which have been created by the State.[1] Corporations have been held not to be within certain tax laws;[2] statutes preventing nuisances;[3] prescribing penalties for fraudulent claims against the Government;[4] for employing minors more than a certain number of working hours;[5] punishing as for larceny whoever should take the logs of another.[6]

**5. Effect upon Franchises of Reserved Right to Amend or Repeal Charters.**—Few if any charters are now granted to corporations without a reservation by the State of the right to amend or repeal them. This custom grew out of a suggestion in Judge Story's concurring opinion in the Dartmouth College Case.[7] Its effect upon the franchises of corporations when brought into exercise is not well understood.[8] The evident purpose of the reservation, in view of its history, was to eliminate as far as possible the elements of an inviolable contract from grants of franchises; but as the doctrine whose results it aims to prevent has been criticised, and its scope and bearing were not at first appreciated, the reasoning upon the reserved power is likewise often obscure.

It has been said that the effect of the reservation is to retain in the legislature precisely the power and control over the charter it has granted that would have belonged to it if the constitutional provision protecting the obligation of contracts had not existed.[9] While the powers and franchises contained in a charter are thus prevented from becoming contracts, they still constitute grants by the legislature, and, in some aspects, amount to much the same thing. Many valuable features of such grants are secured against some kinds of legislative interference by other provisions in the national and State constitutions, and it is evident that the reservation clause could never be so construed as to warrant the legislature

in the acts of Congress touching internal revenue, was held not to include a State, so that the income of the State of Georgia from the Western, etc., R. Co., property owned, controlled, and managed by that State, had not been made, by law, a subject of taxation. Georgia *v.* Atkins, 35 Ga. 315.

The term "person," as used in the United States Internal Revenue Act of 1866, § 9, and as explained in § 44, does not include a State, and Alabama certificates or receipts did not come thereunder. The Alabama Certificates, 12 Opinions Atty. Gen. 176. See also United States *v.* Railroad Co., 17 Wall. (U. S.) 328.

1. United States *v.* Fox, 94 U. S. 315; White *v.* Howard, 46 N. Y. 164. See also *Re* Fox's Will, 52 N. Y. 530.

2. Cherokee Ins., etc., Co. *v.* Justices, 28 Ga. 121; Rex *v.* Gardner, 1 Cowper. 79; Cooley on Taxation (Ed. 1886), p. 378.

3. Ohio *v.* Cincinnati Fertilizer Co., 24 Ohio St. 611.

4. United States *v.* Kansas Pac. R. Co (U. S. D. C. 1877), 4 Cent. L. J. 174.

5. Benson *v.* Monson, etc., Co., 9 Metc. (Mass.) 562.

6. Androscoggin Water Power Co. *v.* Bethel Steam Mill Co., 64 Me. 441.

**Other Instances.**—See also Pennsylvania R. Co. *v.* Canal Comm'rs, 21 Pa. St. 9; Cumberland, etc., Canal Corp. *v.* Portland, 56 Me. 77; Coddington *v.* Executors, 4 Hals. (N. J.) 590.

7. Dartmouth College *v.* Woodward, 4 Wheat. (U. S.) 518; Greenwood *v.* Freight Co., 105 U. S. 13; People *v.* O'Brien, 111 N. Y 49.

See also CORPORATIONS.—4 Am. & Eng. Encyc. of Law, 299.

8. Sinking Fund Cases, 99 U. S. 700; Morawetz Corp. (2d Ed.) § 1093; Wait Insol. Corp. § 405.

9. Bradley, Justice, in Sinking Fund Cases, 99 U. S. 700.

in assuming because of it any unconstitutional power. Constitutional limitatious upon legislative authority would operate to prevent all attempts made in this way as well as in any other.[1] It is well settled, irrespective of any question of the obligation of the contracts contained in charters, that the right of legislative interference with the affairs of corporations is measured by the public interest in those affairs.[2] Judged by this standard *quasi*-public corporations must come in for the largest share of control, in many acts of other classes of private corporations the public has no interest whatever, and an attempted legislative interference which would be valid in the first case would be void in the second.

**6. The Reservation Rebuts any Presumption that Certain Franchises are Irrevocable.**—Where the power is reserved to amend, alter, or repeal the charter of a corporation, it is evident that there can be no intention to make the grant of certain franchises an irrevocable gift. Of this class are exemptions from taxation;[3] the right to fix such charges as a railroad company shall deem reasonable;[4] and generally, it is said, all rights, privileges, and immunities derived by its charter directly from the State.[5]

**7. What Franchises may be Controlled under the Reserved Right to Annul and Repeal.**—In general whatever right, franchise, or power in the corporation depends for its existence upon the granting clauses of the charter is lost by its repeal.[6] Under this clause a legislature may make any alteration or amendment of a charter granted subject to it which will not defeat or substantially impair the object of the grant or any rights vested under it, and which the legislature may deem necessary to secure either that object or any public right.[7]

1. People *v.* O'Brien, 111 N. Y. 49.

2. Close *v.* Glenwood Cemetery Co., 107 U. S. 466; Munn *v.* Illinois, 94 U. S. 113; Stone *v.* Farmers' Loan, etc., Co., 116 U. S. 307; Morawetz Corp. (2d Ed.) § 1097.

3. Railroad Co. *v.* Maine, 96 U. S. 507; State *v.* Maine Central R. Co., 66 Me., 488; State *v.* Comm'rs, etc., 37 N. J. Law, 228; People *v.* Comm'rs, etc., 47 N. Y. 501.

4. Shields *v.* Ohio, 95 U. S. 319. See FREIGHT, 8 Am. & Eng. Encyc. of Law.

In Spring Valley Water Works *v.* Schottler, 110 U. S. 347, the California constitution provided that all future incorporations should be liable to alteration or repeal. By a general law for the formation of water corporations, for supply of municipalities, water rates were to be fixed by a board of commissioners to be appointed in part by the corporations and in part by the municipal authorities. Afterwards the constitution and laws of the State were changed so as to place in the municipal authorities alone the power of fixing rates. *Held*, that this did not violate the United States constitution.

5. Tomlinson *v.* Jessup, 15 Wall. (U. S.) 454; Greenwood *v.* Freight Co., 105 U. S. 21.

6. Greenwood *v.* Freight Co., 105 U. S. 21; Penna. College Cases, 13 Wall. (U. S.) 190; Tomlinson *v.* Jessup, 15 Wall. (U. S.) 454; Railroad Co. *v.* Maine, 96 U. S. 499; Sinking Fund Cases, 99 U. S. 700; Railroad Co. *v.* Georgia, 98 U. S. 359; McLaren *v.* Pennington, 1 Paige (N. Y.), 102; Erie & N. E. R. *v.* Casey, 26 Pa. St. 287; Miners' Bank *v.* U. S., 1 Greene (Iowa), 553; 2 Kent, 306, 307.

In Greenwood *v.* Freight Co., 105 U. S. 21, it was held that whatever right remained in the corporation to its rolling stock, its horses, its harness, its stables, the debts due to it, and the funds on hand, if any, it no longer had the right to run its cars through the streets, or any of the streets, of Boston. It no longer had the right to cumber these streets with a railroad track which it could not use, for these belonged by law to no person of right, and were vested in defendants only by virtue of the repealed power."

7. Close *v.* Glenwood Cemetery, 107

There are many matters relating to the public duties of such corporations, as railroad companies, which by means of this reservation are made peculiarly subject to legislative control freed from any question of the obligation of the contracts contained in their charters. It need not necessarily follow, however, that the reservation is essential to the authority which the cases show has been exercised and sustained; the doctrine so universally accepted that the extensive police power of the States cannot be bargained away in charters would apparently justify the control over such corporations which has been assumed in many cases. However this may be, it has been held where such reservation was made that a railroad company may be required to build a double track and station houses, to change its grade, and alter its bridges for purposes of safety and convenience;[1] they may be compelled by general or special laws to make changes in the level, grade, and surface of the roadbed, new structures at the crossings of other railroads or of highways, or station houses at particular places, in a manner, and to be enforced by forms of process, different from those provided for or

U. S. 476; Comm'rs of Inland Fisheries *v.* Holyoke Water Power Co., 104 Mass. 446, 451; Holyoke Co. *v.* Lyman, 15 Wall. (U. S.) 500, 522.

In Close *v.* Glenwood Cemetery, 107 U. S. 466, a cemetery company was incorporated in 1854 by act of Congress, to hold ninety acres in the District of Columbia, and to receive gifts and bequests; its affairs to be conducted by a president and three other managers, to be elected annually by the proprietors; the grounds were to be laid out, lots sold, by-laws made; the amount of capital stock was fixed to be divided among the proprietors; Congress to have power to alter, amend, modify, or repeal the act. Thirty acres were laid out, the cemetery dedicated, a pamphlet published exhibiting the charter, a list of officers, account of the dedication, and describing the cemetery as "altogether comprising ninety acres, thirty of which are now fully prepared for interments," and setting forth the by-laws, which declared that all lots should be held in pursuance of the charter. No stock was ever issued, although the owner of the whole tract,—named in the charter as an original associate, and in the pamphlet as president—and a manager,—with knowledge of the above facts, for more than twenty years managed the cemetery, sold about 2000 lots, etc. In 1877 Congress amended the charter, providing for the management for the equitable rights of all persons having vested interests in the cemetery, by a board of five annually elected trustees, three to be elected by proprietors of lots purchased in good faith in which burial had been made, two by the original proprietors; the gross receipts to be divided, one fourth to the original proprietors, three fourths to the maintenance and improvement of the cemetery. *Held*, the amendment was constitutional, and that its effect was on the ninety acres and not merely on the thirty.

A corporate charter of one kind cannot be altered to a charter of an entirely different kind. But a corporate charter may be altered so as to make it different in detail, so long as the general identity of the corporation remains. Atty. Gen. *v.* R. Co., 35 Wis. 577, where the *Wisconsin* authorities are reviewed at length. Kenosha R. Co. *v.* Marsh, 17 Wis. 13. See also Zabriskie *v.* Hackensack, etc., R. Co., 18 N. J. Eq. 192; Shields *v.* Ohio, 95 U. S. 319; and see authorities cited *infra*.

The legislature may make the alteration by a substitution of a new charter as well as by the amendment of the old, provided such substituted charter be germane and necessary to the objects and purposes for which the company was organized. And whatever conflict there may be as to what constitutes a fundamental change in the charter, the cases agree that the mere grant of additional powers auxiliary to the original design is not liable to that objection. Sprigg *v.* Western Tel. Co., 46 Md. 78, where the additional powers were those of consolidating and leasing; Clearwater *v.* Meredith, 1 Wall. (U. S.) 25; Green's, Brice's Ultra Vires, 80, 84.

1. Zabriskie *v.* Hackensack, etc., Co., 18 N. J. Eq. 186; Durand *v.* New Haven etc., Co., 42 Conn. 211.

contemplated by the original charter or the general laws in force when the charter was granted ;[1] the legislature may prescribe by whom, in what manner, and under whose supervision work required in making changes of grade, road-bed, etc., should be accomplished, and in what proportion, according to their respective interests, it should be paid for by the parties affected by it ;[2] railroad companies may also be required to make extensions of their roads,[3] new connections,[4] and two companies may be consolidated,[5] provided that in none of these instances a material change in the purposes of the corporation or an interference with the rights of individual stockholders is thereby effected.

Under such a clause the legislature may vary the measure, and thus enlarge the proportion, of the profits which a mutual life insurance company is required by the terms of its charter to pay to a charitable institution.[6] In the same way various legislative provisions have been sustained which increased the liability of stockholders.[7]

**8. Limitations upon Reserved Power to Amend and Repeal.**—(*a*) *Generally.*—While many of its limitations remain undefined, it is settled that the reserved power to amend or repeal has its limits.[8]

1. Roxbury *v.* Boston, etc., R. Co., 6 Cush. (Mass.) 424; Fitchburg R. Co. *v.* Grand Junction R. Co., 4 Allen (Mass.), 198; Commonwealth *v.* Eastern R. Co., 103 Mass. 254; Albany Northern R. Co. *v.* Brownell, 24 N. Y. 345 (condemning Miller *v.* New York, etc., R. Co., 21 Barb. (N. Y.) 513).

2. Fitchburg R. Co. *v.* Grand Junction R. Co., 4 Allen (Mass.) 198.

3. Buffalo, etc., R. Co. *v.* Dudley, 14 N. Y. 348.

The line of a plank-road may be extended and its capital increased, and a subscriber is not released thereby. Schenectady, etc., Co. *v.* Thatcher, 1 Kern. (N. Y.) 102.

4. Mayor of Worcester *v.* Norwich, etc., R. Co., 109 Mass. 113; Shields *v.* Ohio, 95 U. S. 325.

5. Morawetz Corp. (2d Ed.) § 1099.

6. Massachusetts Gen. Hospital *v.* State Assurance Co., 4 Gray (Mass.), 227.

7. Meadow Dam Co. *v.* Gray, 30 Me. 551; *Re* Empire City Bank, 18 N. Y. 199; Sherman *v.* Smith, 1 Black (U. S.), 587; s. c., *nom.*, *In re* Lee & Co.'s Bank, 21 N. Y. 9; Bailey *v.* Hollister, 26 N. Y. 112; Commissioners *v.* Holyoke Water Power Co., 104 Mass. 451.

8. Zabriskie *v.* Hackensack, etc., R. Co., 18 N. J. Eq. 186; Sinking Fund Cases, 99 U. S. 700; Shields *v.* Ohio, 95 U. S. 324; Commonwealth *v.* Essex Co., 13 Gray (Mass.), 253; Buffalo, etc., R. Co. *v.* Dudley, 14 N. Y. 348.

In People *v.* O'Brien, 111 N. Y. 49, Ruger, C. J., observes: "It is manifest, therefore, that in the absence of such reserved power, legislatures have no authority to violate, destroy, or impair chartered rights and privileges, or power over corporations, except such as they possess by virtue of their legislative authority over persons and property generally. It is obvious that this reserved power does not, in any sense, constitute a condition of the grant, and cannot have effect as such, but is simply a power to put an end to the contract, with such effect upon the rights of parties thereto as the law ascribes to it. (Sinking Fund Cases, 99 U. S. 700, 748; Tomlinson *v.* Jessup, 15 Wall. 454, 457.) In speaking of the exercise of this power by Congress in the Sinking Fund Cases, Chief Justice Waite says: 'Congress not only retains but has given special notice of its intention to retain full and complete power to make such alterations and amendments of the charter as come within the just scope of the legislative power. That this power has a limit no one can doubt. All agree that it cannot be used to take away property already acquired under the operation of the charter, or to deprive the corporation of the fruits actually reduced to possession of contracts lawfully made. . . . Whatever rules Congress might have prescribed in the original charter for the government of the corporation in the administration of its affairs, it retained the power to establish by amendment. In doing so, it cannot undo what has

It is not an arbitrary power authorizing a material change in the corporate enterprise, or working oppression and wrong, under the guise of amendment.[1] It will not empower the legislature to

already been done, and it cannot unmake contracts that have already been made, but it may provide for what shall be done in the future, and may direct what preparation shall be made for the due performance of contracts already entered into. It might originally have prohibited the borrowing of money on mortgage, or it might have said that no bonded debt should be created without ample provision by sinking fund to meet it at maturity. Not having done so at first, it cannot now, by direct legislation, vacate mortgages already made under the powers originally granted, nor release debts already contracted.' The judges dissenting in that case contended that the reserved power could not be construed as authorizing the alteration, violation, or nullification of any of the material provisions of the grant, but should be held to mean simply a reservation of the power to legislate, freed from the restrictions imposed by the constitutional provisions against legislation impairing the obligations of contracts. Mr. Justice Bradley said: 'The reserved power in question is simply that of legislation, to alter, amend, or repeal a charter. This is very different from the power to violate or to alter the terms of a contract at will. A reservation of power to violate a contract, or alter it, or impair its obligation, would be repugnant to the contract itself and void. A provision repugnant to the granting part of a deed, or to the enacting part of a statute, is void. Interpreted as a reservation of the right to legislate, the reserved power is sustainable on sound principles; but interpreted as the reservation of the right to violate an executed contract it is not sustainable.' This dissent proceeded upon the ground that the acts of Congress under consideration changed some of the essential features of the contract, and were therefore void, as being obnoxious to the provisions of the constitution for the protection of life, liberty, and property. The majority of the court held, however, that such acts were simply an exercise of the power of Congress to regulate the internal administration of the affairs of a corporation, which, to a certain extent, it was unanimously agreed that it possessed. There was no dispute or disagreement as to the correctness of the rule stated, that the power of amendment and repeal was a restricted power, limited by the provisions of the constitution. An interpretation conferring the power of violating a contract at will upon one of its parties, under a clause authorizing its amendment or repeal, would seem to be inconsistent with any reasonable notion of the nature of such an instrument, and beyond the power of parties to lawfully create. If it is possible to conceive the idea of a repealable grant, certainly such a grant, accompanied with power to convey or pledge the interest granted, must, on the execution of the power, necessarily preclude a resumption by the grantor of the subject of the grant, or any right of property acquired under it. An express reservation by the legislature of power to take away or destroy property lawfully acquired or created would necessarily violate the fundamental law, and it is equally clear that any legislation which authorizes such a result to be accomplished indirectly would be equally ineffectual and void."

1. In Zabriskie *v.* Hackensack & N. Y. R. Co., 18 N J. Eq. 186, it was held that the power does not enable the State to authorize one part of the stockholders, for their own benefit, at their mere option, to change the contract with the other part. The power to alter or modify a charter is restrained to the powers and franchises granted by the charter. It does not authorize the legislature to change the object of the incorporation, or to substitute another for it. An alteration or modification is necessarily of the grant or thing to be altered or modified, and cannot be done by substituting a different thing; that would be a change.

In Shields *v.* Ohio, 95 U. S. 324, Swayne, Justice, said: "The alterations must be reasonable; they must be made in good faith and be consistent with the scope and object of the act of incorporation. Sheer oppression and wrong cannot be inflicted under the guise of amendment or alteration. Beyond the sphere of the reserved powers, the vested rights of property of corporations in such cases are surrounded by the same sanctions and are as inviolable as in other cases. Two authoritative adjudications throw a strong light from opposite directions upon this subject. We cite them only for the pupose of illustration. In Miller *v.* N. Y. & E. R. Co., 21 Barb. (N. Y.) 513, the legislature, under the reserved power of alteration, required the company which had been previously incorporated to construct a highway across their road. The

impair the vested rights of stockholders; the latters' rights to their interests in the corporate property are not annihilated by a repeal of the grants in the charter, and power remains in the courts to protect those rights;[1] it has even been intimated that while the consent of the corporation cannot be necessary to a repeal under this power, an alteration could not be forced upon it until accepted by the corporation, or at least a majority of its stockholders.[2]

(*b*) *Limitations as to Property, Contracts, etc.*—When under power in a charter rights have been acquired and become vested, no amendment or alteration of the charter can take away the property or rights which have become vested under a legitimate exercise of the powers granted.[3] Direct legislation enabling a State

work was expensive and of no benefit to the company. The act imposing the burden was held to be void. [Note that this case was condemned in Albany Northern R. Co. *v.* Brownell, 24 N. Y. 351 (1862).] In Mayor and Aldermen of Worcester *v.* Norwich & Worcester R. Co. and Others, 109 Mass. 103, the legislature had passed an act requiring the railroad companies therein named to unite in a passenger station in the city of Worcester (the place to be fixed as provided), to extend their tracks in the city to the Union station, and, after the extension, to discontinue parts of their existing locations. The act was held to be constitutional and valid, being a reasonable exercise of the right reserved to the legislature to amend, alter, or repeal the charters of those companies."

In Commonwealth *v.* Essex Company, 13 Gray (Mass. 1859), 239, the Essex Company, having made and maintained a fishway in their dam across the Merrimac River, to the satisfaction of the county commissioners, as required by their charter (St. 1845), and having duly accepted the act of 1848 authorizing them to increase their capital stock on condition that they should be liable for all damages occasioned by their dam to the owners of fish rights above it, and having paid large sums of money for such damages, cannot afterwards be required by the legislature, in the exercise of their power to regulate fisheries, to make different fishways, notwithstanding the Revised Statutes reserving to the legislature the right to amend, alter, or repeal charters. In this case Shaw, C. J., said: "The power of repeal is limited and qualified. . . . It appears to us, in the present case, that after the government, acting in behalf of the public, and also of all those riparian owners whose fish rights would be damnified by the defendants' dam, with the fishway as it was, entered into a solemn and formal contract with the defendant company to exempt them from the obligation of making and maintaining a suitable and sufficient fishway, if such were practicable, by indemnifying all parties damnified in their several fisheries, and the defendant company had executed that part of the contract by the payment of a large sum of money, it was not competent for the legislature, without any change of circumstances, under their authority to amend and alter the charter of the company, to pass a law requiring them to do the acts from which, by the terms of such contract, they had been exempted, and therefore that the said act was null and void, and this indictment founded upon it cannot be maintained."

In the case just cited, the company had already *paid* for damage to fisheries. The general rule remains true that the legislature may protect fishermen. Thus where a general law reserved the right of amendment, it was held by the same court that fishing rights below the dam, not compensated for, might be protected by an amendment to the charter requiring construction of a fishway in a dam, although rights above the dam had been paid for. Comm'rs *v.* Holyoke Water Power Co., 104 Mass. 446. Affirmed: Holyoke Co. *v.* Lyman, 15 Wall. (U. S.) 500.

1. Greenwood *v.* Freight Co., 105 U. S. 13; Parker *v.* Metropolitan R. Co., 109 Mass. 508, Sage *v.* Dillard, 15 B. Mon. (Ky.) 359.

2. Yeaton *v.* Bank of Old Dominion, 21 Gratt. (Va.) 599; Morawetz Corp. (2d Ed.) § 1113.

3. Commonwealth *v.* Essex Co., 13 Gray (Mass.), 239.

Where the privilege is revocable, benefits received therefrom prior to its repeal are, of course, vested rights, and the corporation cannot be deprived thereof. Covington, etc., R. Co. *v.* Kenton Co. Court, 12 B. Mon. (Ky.) 144; Balt., etc.,

to appropriate property constituting the subject of the grant in the charter or acquired under it, would be unconstitutional, and such authority obtained through the reservation would be equally so.[1]

Personal and real property acquired by the corporation during its lawful existence, rights of contract, or choses in action, so acquired, and which do not in their nature depend upon the general powers conferred by the charter, are not destroyed by such a repeal, and the courts may, if the legislature does not provide some special remedy, enforce such rights by the means in their power.[2] Mortgages already made under the powers originally granted cannot be vacated, and debts already contracted cannot be released.[3] But the reserved power authorizes the State to provide for the due performance of contracts already entered into.[4] The legislature cannot establish such rules in regard to the management and disposition of the assets of the corporation, that the avails shall be diverted from, or divided unfairly and unequally among, the creditors, and thus impair the obligation of contracts, or that the portion of the avails which belong to the stockholders shall be sequestered and diverted from the arrears and thus injure vested rights.[5]

R. Co. *v.* Nesbit, 10 How. (U. S.) 395, and authorities cited in succeeding notes.

1. In People *v.* O'Brien, 111 N. Y. 46, Ruger, C.J., observes: "It is also to be observed that in none of the provisions for repeal in this State is there anything contained which purports to confer power to take away or destroy property or annul contracts, and the contention that the property of a dissolved corporation is forfeited rests wholly upon what is claimed to be the necessary consequence of the extinction of corporate life. It would not naturally seem to have any other operation upon its contracts or property rights than the death of a natural person upon his. Mumma *v.* Potomac Co., 3 Pet. (U. S.) 281, 285. The power to repeal the charter of a corporation cannot, upon any legal principle, include the power to repeal what in its nature is irrepealable, or to undo what has been lawfully done under power lawfully conferred. Butler *v.* Palmer, 1 Hill (N. Y.), 335. The authorities seem to be uniform to the effect that a reservation of the right to repeal enables a legislature to effect a destruction of the corporate life, and disable it from continuing its corporate business. People *ex rel.* Kimball *v.* B. & A. R. Co., 70 N. Y. 569; Phillips *v.* Wickham, 1 Paige (N. Y.), 590. And a reservation of the right to alter and amend confers power to pass all needful laws for the regulation and control of the domestic affairs of a corporation, freed from the restrictions imposed by the federal constitution upon legislation impairing the obligation of contracts. Munn *v.* Illinois, 94 U. S. 113, 123. We think no well-considered case has gone further than this, while in many cases such power has been expressly held to be limited to the effect stated. In the language of Chief-Justice Marshall in Fletcher *v.* Peck, 6 Cranch (U. S.), 87, 135: 'If an act be done under a law, a succeeding legislature cannot undo it. The past cannot be recalled by the most absolute power. Conveyances have been made; those conveyances have vested legal estates, and if those estates may be seized by the sovereign authority, still that they originally vested is a fact, and cannot cease to be a fact. When, then, a law is in the nature of a contract, when absolute rights have been vested under that contract, a repeal of the law cannot divest those rights.' It would seem to be quite obvious that a power existing in the legislature by virtue of a reservation only, could not be made the foundation of an authority to do that which is expressly inhibited by the constitution, or afford the basis of a claim to increase jurisdiction over the lives, liberty, or property of citizens beyond the scope of express constitutional power."

2. Greenwood *v.* Freight Co., 105 U. S. 13.

3. Sinking Fund Cases, 99 U. S. 700; People *v.* O'Brien, 111 N. Y. 50.

4. Sinking Fund Cases, 99 U. S. 700.

5. Lothrop *v.* Stedman, 13 Blatchf. (U. S.) 143.

(*c*) *Miscellaneous.*—The reserved right has none of the characteristics of a mere power, which, when once exercised, is exhausted. its effect is on the legislative grant itself, to prevent it becoming, what it otherwise might become, a contract with the State. An act containing such provision becomes a mere privilege, subject at any time to be withdrawn or modified at the will of the legislature.[1]

The right to repeal or alter a charter may be reserved by the operation of a constitutional provision or statute of general application in force at the time the corporation is created.[2]

Whether the alteration under the reserved power is wise, or consistent with the public interests and with the prosperity of the company, is for the legislature; it is not a question to be determined by the courts. And the court cannot presume that the legislature will exercise the power arbitrarily or unjustly.[3]

When the legislature reserves to itself the right to repeal a charter on the happening of a certain event, it may enact the repeal whenever the event happens, without first invoking the judgment of the court.[4] Where the exercise of the reserved right is conditioned upon misuse or abuse of the franchises, there is a conflict of authority as to whether the legislature shall determine the fact or whether it must first be ascertained by a judicial proceeding.[5]

**VI. Mortgage, Sale, and Transfer of Franchises.—1. Generally.**—Questions regarding the alienation of either the franchise of corporate existence or of the subordinate franchises of many corporations are not likely to arise. No doubt the chief cause for this is that the franchises of many modern corporations are practically valueless.[6] When for any reason the franchise of corporate existence is valuable in itself, or is bestowed with subordinate franchises having more or less the character of monopolies, it will commonly be found to have been conferred for public purposes, and to demand the performance of public duties for the discharge of which the corporation may be held responsible.[7] Cases in which are involved the right to alienate franchises, therefore, relate perhaps exclusively to such matters as the foreclosure of railroad mortgages covering not only the tangible property but the franchises of the company, and to this or other methods of transfer of the franchises of these and other corporations of a *quasi*-public character. Whether or not the doctrine would be confined to this class of cor-

1. State *v.* Comm'rs, etc., 37 N. J. Law, 228.

2. Chesapeake, etc., R. Co. *v.* Miller, 114 U. S. 176; Railroad Co. *v.* Georgia, 98 U. S. 365; Stone *v.* Wisconsin, 94 U. S. 181; Greenwood *v.* Freight Co., 105 U. S. 13; State *v.* Comm'r, 37 N. J. Law, 228; Pennsylvania College Cases, 13 Wall. (U. S.) 213; Suydam *v.* Moore, 8 Barb. (N. Y.) 358; Commonwealth *v.* Fayette County R. Co., 55 Pa. St. 452; Mobile, etc., R. Co. *v.* Steiner, 61 Ala. 559; State *v.* Person, 32 N. J. Law, 134; People *v.* O'Brien, 111 N. Y. 358

3. American Coal Co. *v.* Consolidation Coal Co., 46 Md. 15.

4. Commonwealth *v.* Lykens Water Co., 110 Pa. St. 397; Crease *v.* Babcock, 23 Pick. (Mass.) 334.

5. Corporations, 4 Am. & Eng. Encyc. of Law, 300.

6. See *supra* this title, Instances of Franchises.

7. See *supra* this title, Public Character and Duties of Corporations Generally.

porations, it is a settled rule, accepted by the weight of authority, that a corporation cannot mortgage, sell, or transfer its franchises unless expressly authorized by the legislature.[1] The rule is not everywhere accepted,[2] but it is commonly held that in bestowing the franchise to be a corporation and any others that may accompany it, the legislature is presumed to have regard to the character of the grantee, and the guards and restrictions placed upon

1. Memphis & L. R. Co. *v.* Arkansas Railroad Commissioners, 112 U. S. 609, 619 (1884); Carpenter *v.* Black Hawk Gold Mining Co., 65 N. Y. 43, 50 (1875); Branch *v.* Jessup, 106 U. S. 468, 484 (1882); Middlesex R. Co. *v.* Boston & Chelsea R., 115 Mass. 351 (1874); Richardson *v.* Sibley, 11 Allen (Mass.), 65 (1865); Commonwealth *v.* Smith, 10 Allen (Mass.), 448 (1865); Coe *v.* Columbus, etc., R. Co., 10 Ohio St. 372 (1859); Pierce *v.* Emery, 32 N. H. 484 (1856).

2. In Shepley *v.* Atlantic, etc., R. Co., 55 Me. 395, the court observed: "Such mortgages have always been regarded and treated as valid in this State by the courts as well as the legislature, and we confess that the contrary doctrine seems to us little better than practical repudiation, and not supported by reasons sufficiently weighty to commend it to our judgment. The whole argument seems to have no greater force than this, that it is dangerous to the public interests to have the powers and privileges conferred by a railroad franchise transferred from the original corporators to a new body. But when we consider how little importance is attached to the persons of the original corporators, how soon death must and other circumstances may remove them from all participation in the affairs of the road, how constantly those who have the active management of it are in fact being changed, we shall see how little practical merit this argument has. At the beginning, the corporators undoubtedly have a controlling influence, but afterwards the directors are elected by the stockholders and are often changed. Is there any reason to suppose that if a mortgage should by foreclosure transfer the franchise to new hands, as capable men would not be appointed to manage the road as before? Will not the bondholders be as interested and capable of appointing suitable managers as the stockholders? Does any one fear that the public interests would not be as safe with the former as with the latter? Why then is it dangerous to the public interests to allow such a transfer? We confess that, after giving the matter much thought, the doctrine that all railroad mortgages made without the consent of the legislature are illegal and void, because they may operate as a permanent transfer of the corporate powers from the original corporators to another body, seems to us to have little to commend and much to condemn it." See also Kennebec, etc., R. Co. *v.* Portland, etc., R. Co., 59 Me. 9.

In Miller *v.* Rutland, etc., R. Co., 36 Vt. 494, the court observed: "The language of Bennett, J., in Bank of Middlebury *v.* Edgerton *et als.*, 30 Vt. 190, we adopt in word and principle as expressing the true idea upon this subject as involved in the present case. He says: 'It is not necessary in this case that we should hold that the franchise to this company, to be a corporation, is a subject of sale and transfer. The right to build, own, manage, and run a railroad, or take the tolls thereon, is not of necessity of a corporate character, or dependent upon corporate rights. It may belong to and be enjoyed by natural persons, and there is nothing in its nature inconsistent with its being *assignable.*' *Citing* Peter *v.* Kendall, 6 B. & C. 703; Comyn's Digest, Grant, C."

It is to be observed, however, that in the case of Shepley *v.* Atlantic, etc., R. Co., 55 Me. 395, the mortgage, although made without statutory authority, was subsequently ratified by statute, and the court left undecided the question as to whether the mortgage was valid prior to such ratification. And in Miller *v.* Rutland, etc., R. Co., 36 Vt. 452, it appeared that statutory authority was, subsequently to the making of the mortgage, conferred upon the company; and in this case the court further observes: "It must be assumed as beyond doubt that the transaction by the authorized agents of the corporation, of delivering these bonds thus secured, in payment for the rails and for their transportation, was regarded by the corporation to be warranted by legal authority, either as existing inherently in the corporation, or as conferred upon it by the legislature; and if it was so by either means, neither the corporation, nor any one standing on rights subsequently derived from it, can impeach the validity of the transaction in this respect."

the corporation; [1] such corporations can do no act which would amount to a renunciation of their duty to the public, or directly and necessarily disable them from performing it; they cannot, therefore, convey away their franchises and corporate rights; [2] when a corporation has granted to it by charter a franchise intended in large measure to be exercised for the public good, the due performance of its duties being the consideration of the grant, any contract which disables the corporation from discharging its functions, by undertaking, without the consent of the State, to transfer to others the rights and powers conferred by the charter, and to relieve the grantees of the burden which the charter imposes, is a violation of the contract with the State and is void as against public policy.[3]

**2. Franchise to be a Corporation and Incidental Powers.**—In accordance with the principle already stated, that legislative authority is essential to the right to alienate franchises, the terms in which that authority is given must be regarded, and the vital part of the transaction is the law under which it is made.[4] It is not uncommon for charters or general laws to contain express authority to mortgage or alienate franchises as well as other property. In such cases, however, a literal transfer of franchises is never executed. Depending upon the terms in which it is given, the execution of such a power may amount to a complete or partial surrender of

1. Waterman Corp. § 159, *citing* Shrewsbury, etc., R. Co. *v.* Northwestern R. Co., 6 House of Lords, 113; East Anglican R. Co. *v.* Eastern Counties R. Co., 73 Eng. Com. L. 775; 11 C. B. 75; Winch *v.* Birkenhead R. Co., 16 Jur. 1035; Troy, etc., R. Co. *v.* Kerr, 17 Barb. (N. Y.) 601; Com. *v.* Smith, 10 Allen (Mass.), 448; Richardson *v.* Sibley, 11 Allen (Mass.), 65; Stewart's App. 56 Pa. St. 413; State *v.* Consolidation Co., 46 Md. 1; Ohio, etc., R. Co. *v.* Indiana, etc., R. Co., 14 Am. L. Reg. 733; Lanman *v.* Lebanon Valley R. Co., 30 Pa. St. 42; Susquehanna Canal Co. *v.* Bonham, 9 W. & S. (Pa.) 27; Coe *v.* Columbus, etc., R. Co., 10 Ohio St. 372; Pullan *v.* Cincinnati, etc., R. Co., 4 Biss. (U. S.) 35; Philadelphia, etc., R. Co. *v.* Western Union Tel. Co., 11 Phila. (Pa.) 327; Treadwell *v.* Salisbury, 7 Gray (Mass.), 393.

2. Pierce *v.* Emery, 32 N. H. 484; Richards *v.* Merrimack, etc., R. Co., 44 N. H. 127; Stewart *v.* Jones, 40 Mo. 140.

3. Miller, Justice, in Thomas *v.* West Jersey R. Co., 101 U. S. 71, 83; Waterman Corp. § 159, *citing* Beman *v.* Rufford, 1 Sim. N. S. 550; Great Northern R Co. *v.* Eastern Counties R. Co., 9 Hare 306; South Yorkshire R. Co. *v.* Great Northern R. Co., 3 De G. M. & G. 376; 9 Exch 84; 19 Eng. L. Eq. 513; York, etc., R. Co. *v.* Winans, 17 How. (U. S.) 30; Thomas *v.* Railroad Co., 101 U. S. 71; Black *v.* Delaware, etc., Canal Co., 22 N. J. Eq. 130; s. c., 24 N. J. 455; Hays *v.* Ottawa, etc., R. Co., 61 Ill. 422.

The power to lease a railroad, its appurtenances, and franchises is not to be presumed from the usual grant of powers in a railroad charter; and, unless authorized by legislative action so to do, one company cannot transfer them to another company by lease, nor can the other company receive and operate them under such a lease. Oregon R. & Nav. Co. *v.* Oregonian R. Co., 130 U. S. 1; Pennsylvania R. Co. *v.* St. Louis, etc., R. Co., 118 U. S. 290; Northern Pacific R. Co. *v.* Esquibel (N. M.), 36 Am. & Eng. R. R. Cas. 410.

The right of incorporation conferred under the general law, like a special charter, is in the nature of a contract. In return for the powers and franchises granted, the corporation is placed under obligations to perform certain duties to the public, and it cannot, without the consent of the other party to the contract, change its terms or absolve itself from its obligations. Abbott *v.* Johnstown, etc., Horse R. Co., 80 N. Y. 27.

4. State *v.* Sherman, 22 Ohio St. 411; Memphis, etc., R. Co. *v.* Arkansas Commissioners, 112 U. S. 609.

the franchises possessed by the transferror, and to the investing of the transferees with corporate capacity possessing such powers as the language of the grant indicates are intended to be conferred.[1] Thus where a special statute undertook, upon a sale on a mortgage given by a railroad company, to invest the purchasers with corporate capacity, and to authorize them to reorganize, create a new stock, and elect another board of directors, this was held to be in effect an original act of incorporation;[2] and although the transaction purports to be a transfer, sale, or conveyance of the franchise to be a corporation, it only amounts to a surrender of the old charter, and a grant *de novo* to the transferees of similar privileges.[3] So it is sometimes provided by general statutes that purchasers of a railroad, under foreclosure of a mortgage, may create a new corporation, and thus practically succeed to all the franchises of the old company, including that to be a corporation.[4]

1. In Memphis, etc., R. Co. *v.* Arkansas Commissioners, 112 U. S. 609, Mr. Justice Matthews said: "It is immaterial that the form of the transaction is that of a mortgage, sale, or other transfer *inter partes* of the franchise to be a corporation. 'The real transaction, in all such cases of transfer, sale, or conveyance,' as was said by the Supreme Court of Ohio in the case of State *v.* Sherman, 22 Ohio St. 411, 428, 'in legal effect, is nothing more or less, and nothing other than a surrender or abandonment of the old charter by the corporators, and a grant *de novo* of a similar charter to the so-called transferees or purchasers. To look upon it in any other light, and to regard the transaction as a literal transfer or sale of the charter, is to be deceived, we think, by a mere figure or form of speech. The vital part of the transaction, and that without which it would be a nullity, is the law under which the transfer is made. The statute authorizing the transfer and declaring its effect is the grant of a new charter couched in few words, and to take effect upon condition of the surrender or abandonment of the old charter; and the deed of transfer is to be regarded as mere evidence of the surrender or abandonment.'"

2. Atkinson *v.* Marietta & Cincinnati R. Co., 15 Ohio St. 21 (1864). In this case, the court said: "It will not do to deceive ourselves with mere forms of expression. It is certain that the mortgagees, as such, were invested with no corporate capacity, and it is equally certain that a mere purchase at the sale would have invested them with none. If they have it, then, it must have arisen in some way from the legal effect of the legislative enactment; and as without the enactment they had it not, and with the enactment are invested with it, it would seem to follow that it was not only conferred by the enactment, but also newly conferred. It does not belong to human power to make that which is false true, by declaring it to be so."

3. Memphis, etc., R. Co. *v.* Arkansas Commissioners, 112 U. S. 609; State *v.* Sherman, 22 Ohio St. 411.

4. In 1855 the Brooklyn & Jamaica Company mortgaged its property and franchises in the usual form. That mortgage was forclosed, and, upon the sale ordered by the court, all the property and franchises mortgaged were purchased by William Richardson, who thereafter, and in 1874, conveyed all his right to the Atlantic Avenue R. Co. This corporation was already in existence, having filed its articles of association under the General Railroad Act on the 1st day of May, 1872, and its route including Atlantic Avenue and other streets of the city. It is claimed that this conveyance was inoperative on the ground that under the statute the purchaser would only associate with himself other persons and so form a new corporation to which the property and franchises could be transferred. This is a plain misconstruction of the act (Laws of 1854, chap. 282, par. 1; Laws of 1873. chap. 469, par. 1, and chap. 710, par. 1). Before these acts were passed such railroad mortgage, while it certainly covered the special and peculiar franchises of the company, could with difficulty be construed to cover its corporate life, or right to be a corporation, and the subject created doubts. That right, it was argued, could scarcely be said to pass to a purchaser by virtue of his purchase, and could only be given by the authority of a State. Unless, therefore, the purchaser could find some corporate body in

Where a mortgage or transfer of corporate franchises is made without legislative authority, it may be ratified by subsequent enactment, and such ratification in reality constitutes a grant of franchises.[1]

Depending again upon the terms in which the power to transfer is given, an alienation of certain franchises under legislative authority, for example the foreclosure of a railroad mortgage which covers the company's franchises, need not deprive the corporation of all its franchises including that of corporate existence, for the surrender of this is not always a necessary part of the transaction.[2]

existence capable of holding and exercising the franchises purchased, he stood in the awkward predicament of owning a property which it was not certain he could either use or sell. It was to cure this difficulty that the act of 1854 and its subsequent amendments were designed. In the absence of an existing corporation capable of taking and exercising the franchises sold, the purchaser was authorized to create a new corporation for the purposes of the transfer, but whose corporate life came from the grant and authority of the State. It was quite evident that this authority was intended only to meet a possible emergency, and not at all to prevent a sale or transfer to a corporation already existing and capable under the law of its creation of holding the property and exercising the franchises which passed to the purchaser by the mortgage sale. We think, therefore, that the deed of Richardson was operative to convey to the Atlantic Avenue Co. all the property and rights of the mortgagor except barely the corporate life of the latter; and that the omission of the purchasing company to file a map of its line thus acquired was of no consequence, since it bought a road already constructed and in existence. *Per* Finch, J., in People *v.* Brooklyn, F. & C. I. R. Co., 89 N. Y. 84. See also Morawetz Corp (2d Ed.) § 936, note.

1. Richards *v.* Merrimack, etc., R. Co., 44 N. H. 127 (1862); Hall *v.* Sullivan R. Co., 21 Boston Law Rep. 138 (1857, U. S. Circuit Court for New Hampshire); Shaw *v.* Norfolk County R. Co., 5 Gray (Mass.), 162 (1855); Pollard *v.* Maddox, 28 Ala. 324 (1856).

In Houston & Texas Cent. R. Co. *v.* Shirley, 54 Texas, 125 (1880), the sale passed corporate capacity and qualities with respect to the mortgaged road; but this was under a general law of *Texas* to that very effect; and the purchasers being already a railroad corporation operating another road, their purchase was ratified by a subsequent statute and the two roads merged.

But of course no legislative ratification can have the effect of evading constitutional requirements respecting the creation of corporations. For instance, a requirement that all corporations should be created by general laws, in the *California* constitution, was held not to be avoidable by ratification of corporate existence. Oroville & Virginia R. Co. *v.* Plumas County Supervisors, 37 Cal. 354 (1869).

Nor ought a statute seeking primarily the protection of the general public to be construed as a ratification of an unauthorized conveyance. Thus in Thomas *v.* Railroad Co., 101 U. S. 71 (1875), a railroad corporation having without authority leased its road and franchises to another, and the legislature having subsequently regulated the fares charged by said company or its lessees, it was held that the intent of the legislature was that, whoever operated the road, passengers should be protected from excessive rates; and that the statute was not to be turned into a ratification of a transaction not within its contemplation.

2. In Eldrige *v.* Smith, 34 Vt. 484, 490 (1861), the court said: "When a railroad company mortgages its road and appurtenances as a security for debt, and also its franchise, it is not to be understood as conveying its corporate existence, or its general corporate powers, but only the franchise necessary to make the conveyance productive and beneficial to the grantees, to maintain and support, manage and operate the railroad, and receive the tolls and profits thereof for their own benefit. If it were held that all the corporate franchises, including the power of corporate existence, were conveyed by the mortgage, the conclusion would seem to be logical that, on breach and foreclosure, the mortgagees would step into the shoes of the company and merely succeed to their rights in the property, and also to their corporate liabilities—a result by no means favorable to their interest. Or, if it were held that the mortgagees did not succeed to the corporate existence and

The construction placed upon the legislative grant of power to sell, mortgage, or transfer property and franchises, while including in the alienation such franchises as are essential to the property conveyed, will not imply more.[1] The franchises to build, own, and manage a railroad are not necessarily corporate rights, but may be enjoyed by natural persons.[2] Accordingly under power to sell or mortgage "the property and franchises" of a company, it was held that mortgage bondholders, or purchasers at the foreclosure sale of a railroad, did not acquire, as part of the substantial rights intended to be secured, the franchise of being a corporation.[3] As the right to mortgage franchises would be of little value could the mortgage only pass the tangible property without the franchises, the necessary and just construction is that, on the foreclosure of a railroad mortgage, the purchaser acquires the right to operate the railroad;[4] or may exercise the franchise of using streets and supplying a city with gas where the mortgage foreclosed is that of the franchises of a gas company.[5] Where power is conferred to

functions of the railroad company, and that they did not remain in the company, then it must operate as a dissolution of the company, and lands taken compulsorily for their road would revert to the owners in fee." The above remarks were approved in Meyer *v.* Johnston, 53 Ala. 326 (1875). See also Memphis & L. R. Co. *v.* Railroad Commissioners, 112 U. S. 609, 619.

A railroad company may continue to exist as a corporation after its railroad with all its appurtenances has been sold away from it. Coe *v.* Columbus, etc., R. Co., 10 Ohio St. 372, 386 (1859); Meyer *v.* Johnston, 53 Ala. 326 (1875). In this case, Manning, J., said: "There may be other property to dispose of, or credits to get in, or obligations to be discharged, or interests to be protected, which require its continued existence, and which may not belong to or be chargeable upon the persons who were purchasers of its railroad and the franchises necessary for the maintenance and operation of it. And, on the other hand, those purchasers might not desire to be constituted into a corporation at all. Or, if they did, it might be very inconvenient to find themselves composing the same body politic whose property had just been sold to them for the payment of some of its debts."

Manning, J., said, in Meyer *v.* Johnston, 53 Ala. 323; "Strictly, 'the franchise to exist as a corporation' is not a corporate franchise, or 'franchise of the corporation,' at all. It is a franchise of the individual corporators, of the natural persons who are shareholders of the capital stock, and pertains to them as such corporators; whereby they are endowed with the privilege and capacity of being constituted into, and co-operating together, as a body politic, with power of succession, and without individual liability. And the corporation as such in its collective capacity, or by its board of directors, has no more power to sell this franchise thus pertaining to the corporators individually than it has to sell their paid-up shares of the capital stock."

1. Morgan *v.* Louisiana, 93 U. S. 217; Chesapeake, etc., R. Co. *v.* Miller, 114 U. S. 176; Pickard *v.* East Tenn., etc., R. Co. (U. S. Sup. Ct. 1889, not yet reported). See also authorities cited in preceding note.

2. Bank of Middlebury *v.* Edgerton, 30 Vt. 190 (*citing* Peter *v.* Kendal, 6 Barn. & Cress. 316); Bardstown, etc., R. Co. *v.* Metcalfe, 4 Metc. (Ky.) 199; Hall *v.* Sullivan R. Co., 21 Boston Law Reporter, 138; New Orleans, etc., R. Co. *v.* Delamore, 114 U. S. 509; Memphis, etc., R. Co. *v.* Arkansas Comm'rs, 112 U. S. 609; Ragan *v.* Aiken, 9 Lea (Tenn.), 609.

3. Memphis, etc., R. Co. *v.* Arkansas Comm'rs, 112 U. S. 609.

4. New Orleans, etc., R. Co. *v.* Delamore, 114 U. S. 501 (1884); Chaffe *v.* Ludeling, 27 La. Ann. 607; Memphis, R. Co. *v.* Comm'rs, 112 U. S. 609, 619; Galveston R. *v.* Cowdrey, 11 Wall. (U. S.) 459. See also East Boston, etc., Co. *v.* Eastern R. Co., 13 Allen (Mass.), 422 (1866).

5. Detroit *v.* Mutual Gas-light Co., 43 Mich. 594 (1880).

The power to pledge the franchises and rights of a corporation implies, as incident thereto, the power to pledge everything that may be necessary to the enjoy-

mortgage effects, tracks, etc., the right would be useless did it not imply the right to mortgage the franchises: not, as already explained, the franchise to be a corporation, but those appropriate to the nature of the property mortgaged.[1]

**3. Franchise of Eminent Domain.**—The franchise of eminent domain is not transferable without legislative warrant,[2] and power given to a telegraph company to lease lines, fixtures, and apparatus does not confer power to build new lines,[3] or authorizing railroads to lease their roads does not authorize the lease of unfinished roads,[4] or vest in the lessee any power of eminent domain, but this right remains in the lessor and the legislature may deal exclusively with the latter in amending charter provisions respect-

ment of the franchise. Phillips *v.* Winslow, 18 B. Mon. (Ky.) 431, 445. The court said: "It could not have been intended by the legislature merely to confer a power to pledge the naked franchise, which belonged to the corporation, without the right also to pledge such things as were incident and indispensable to its use and enjoyment, and without which it would be of no value whatever." The object was to enable the company to complete the road, and to put it in full and complete operation. "The corporation was authorized to pledge not only the existing property of the road, but the corporate rights and franchises, and the railroad itself, as an entire thing. To render such a pledge effectual it was necessary that it should include all such future acquisitions of the corporation as were proper accessions to the thing pledged and essential to its enjoyment, and the power thus to extend it was implied in the grant itself. Of what value would the railroad be without the cars on the road, and the fuel necessary to run them?"

1. Pollard *v.* Maddox, 28 Ala. 321 1856).

Authority to a railroad company to mortgage its "road, income, and other property" was, however, held in the case cited below not to authorize a mortgage of its franchises. In a certain sense franchises are property, but not so as to fall within an authority given in the above words. Pullan *v.* Cin. R. Co., 4 Bissell, 42 (U. S. Circuit Court, 1865).

Where a previous unbroken practice had been to provide, in granting charters, that the company might mortgage, this evinced such a public policy that the court of the State construed an authority to borrow money to imply a power to mortgage property and franchises. Bardstown & Lou. R. Co. *v.* Metcalfe, 4 Metc. (Ky.) 199 (1862).

The *Mississippi* court, where a railroad had been authorized to mortgage its "property of every kind," declined to determine whether this authorized mortgage of franchises. McAllister *v.* Plant, 54 Miss. 119 (1876).

Where *Pennsylvania* authorized a mortgage of a railroad, rolling-stock, and franchises, and the road was afterwards extended into Delaware, and Delaware by a supplemental act authorized the mortgage of the branch road's real estate, *held*, that this conferred no right to mortgage the franchises of the branch road. Randolph *v.* Wilmington & Reading R. Co., 11 Phila. 502 (U. S. Circuit Court, E. D. Pa., McKennan, J., 1876).

2. Accordingly, in Lyon *v.* Jerome, 26 Wend. (N. Y. 1841), it was held that authority conferred on canal commissioners to enter, etc., can only be executed by them in person, or under their express direction; and that an engineer, or any other sub-agent of the State, cannot lawfully exercise such power but by the express direction of the canal commissioners, or one of them, although to such engineer, or other sub-agent, has been entrusted the superintendence of the construction of the canal in the vicinity of the premises entered upon.

So where a railroad company was authorized to borrow money and to pledge, "by mortgage or otherwise, the entire road, fixtures, and equipments, with all the appurtenances, income, and resources thereof," it was held that the power which the company had to institute a judicial proceeding to appropriate private property was not transferable, and that the mortgage gave no right not given by the general law. Coe *v.* Columbus, etc., R. Co., 10 Ohio St. 373 (1859).

3. Philadelphia *v.* Western Union Tel. Co., 11 Phila. (Pa.) 327.

4. Pittsburgh, etc., R. Co. *v.* Bedford, etc., R. Co., 81* Pa. St. 104.

ing it.[1] On the other hand, purchasers at a judicial sale of an unfinished railroad who by charter succeed to "all the estate and property" of the original company, and to "all its contracts, franchises, rights, privileges, and immunities," acquire thereby the power of eminent domain.[2]

The right of a railroad company to have the damages for the appropriation of land to its uses assessed in a particular mode is not a franchise which passes to a purchaser of its property. It is a personal privilege of the company and not transferable.[3]

**4. Franchise of Exemption from Taxation.**—A statute authorizing the sale of a railroad and providing that the purchasers should have all the rights, franchises, privileges, and immunities enjoyed by the defaulting company, did not transfer an exemption from taxation because a new constitution prohibited such grants.[4] Foreclosure of a railroad mortgage executed under power to borrow "on the credit of the company and on the mortgage of its charter and works" confers on the purchaser only those franchises which had been granted as appropriate to the construction, maintenance, operation, and use of the railroad as a public highway and the right to make profit therefrom, and does not include an exemption from taxation.[5] There are earlier decisions in which this franchise has been held to be transferred because the terms of the statute and the circumstances indicated such a legislative intention,[6]

1. Worcester *v.* Norwich, etc., R. Co., 109 Mass. 103; Kip *v.* New York, etc., R. Co., 67 N. Y. 227; *In re* Petition of New York, etc., R. Co., 99 N. Y. 12; s. c., 23 Am. & Eng. R. R. Cas. 44; Dietrichs *v.* L. & N. W. R. Co., 13 Neb. 361. See Mahoney *v.* Spring Valley Water Works, 52 Cal. 159.

2. North Carolina, etc., R. Co. *v.* Carolina Central R. Co., 83 N. Car. 489.

3. Little Rock, etc., R. Co. *v.* McGehee, 41 Ark. 202; s. c., 20 Am. & Eng. R. R. Cas. 82.

4. Trask *v.* Maguire, 18 Wall. (U. S.) 391.

5. Morgan *v.* Louisiana, 93 U. S. 217; State *v.* Morgan, 28 La. Ann. 482; East Tennessee R. Co. *v.* County of Hamblen, 102 U. S. 273; s. c., 2 Am. & Eng. R. R. Cas. 652; Wilson *v.* Gaines, 103 U. S. 417; s. c., 6 Am. & Eng. R. R. Cas. 627; Memphis, etc., R. Co. *v.* Arkansas Comm'rs, 112 U. S. 609; Chesapeake, etc., R. Co. *v.* Miller, 114 U. S. 176; Pickard *v.* East Tennessee, etc., R. Co. (U. S. Supreme Court 1889, not yet reported: Notes of Cases, vol. 4, No. 6, Edw. Thompson Co., publishers). See the case of Morgan *v.* Louisiana, quoted *supra* this title, DEFINITION; and that of Pickard *v.* East Tennessee, etc., R. Co., quoted *supra* this title, INSTANCES OF FRANCHISE, *Franchise of Exemption from Taxation.*

6. In Humphrey *v.* Pegues, 16 Wall. (U. S.) 244, the company had been incorporated to build a certain railroad, but had never found sufficient inducements to go on and build. After years had passed, the legislature of the State amended its charter, so that all the "rights, powers, and privileges granted by the charter" of a certain other railroad company should be enjoyed by the corporation now spoken of. A chief privilege of the other company was that of exemption from taxation. The intent of the legislature to induce the company defendant to take up the work of building the road required the construction to be that it obtained exemption from taxation; which exemption, furthermore, was not repealable.

Where the State of Minnesota bought in at a foreclosure sale a railroad company whose property had been exempt from taxation, and the desire of the State was not to operate the road or have its powers fall into the general powers of the State, but to preserve the franchises, it was held that merger did not take place, and that a new body to which was transferred the old franchises did not have created by such transfer new cor-

and the construction would be the same where property is exempted without reference to its ownership.[1]

While an exemption from taxation is not a corporate franchise[2] in the sense that it is not essential to the operations of such a corporation as a railroad, it is evidently to be classed with franchises,[3] and it has been held that such exemption is included in the reservation by a State of power "to withdraw the franchise" of a corporation.[4]

**5. Miscellaneous.**—Authority to mortgage the franchises of a railroad company necessarily implies the power to bring the franchises so mortgaged to sale.[5] It has sometimes been held that authority to one company to purchase the franchise and property of any other is implied authority to any such corporation willing to sell.[6] A railroad company having authority to purchase and sell all kinds of property of every nature and quality, and to incorporate its stock with that of any other company, was held to have the power to sell the railroad to another company competent to purchase it.[7] The fact that a mortgage purports to mortgage the

porate franchises. Therefore the new body was not to be deemed a new corporation under the State constitution forbidding creation of corporations by special act; and the transfer to the new association carried with it the old exemption from taxes, since the State was in extreme need of railroad communication, and inducements theretofore held out were therefore not personal to the old corporation. First Division St. Paul & Pac. R. Co. *v.* Parcher, 14 Minn. 309 (1869).

1. New Jersey *v.* Yard, 7 Cranch (U. S.), 164.

In State *v.* Northern Pacific R. Co., 32 Minn. 294, exemption from taxation on payment of a percentage on gross earnings was held not to be personal, but to attach to the property.

2. State *v.* Maine Central R. Co., 66 Me. 488; Morgan *v.* Lousiana, 93 U. S. 217.

3. See *supra* this title, INSTANCES OF FRANCHISES, *Franchise of Exemption from Taxation.*

4. Railroad Co *v.* Georgia, 98 U. S. 365.

5. New Orleans, etc., R. Co. *v.* Delamore, 114 U. S. 509 (1884).

6. New York & New Eng. R. Co. *v.* New York, etc., R. Co., 52 Conn. 274 (1884); Matter of Prospect Park and Coney Id. R. Co., 67 N. Y. 377 (1876).

But in State *v.* Consolidation Coal Co., 46 Md. 3 (1876), it was held that a company must be governed by its own charter, and authority to another corporation to purchase or lease any other railroad "already constructed or hereafter to be constructed, with all the rights, powers, and franchises connected therewith," does not authorize a company not empowered by its own charter to sell or lease, to do so. It is to be remarked that the power in the Connecticut case was to buy of a certain named company.

7. Branch *v.* Jesup, 106 U. S., 468. Justice Bradley said: "As a general rule, it is true, a railroad company with only the ordinary power to construct and operate its road cannot dispose of it to another company. Legislative aid is necessary to that end. But this company had, by its charter, express power to incorporate its stock with the stock of any other company. This power has an enlarging effect upon the ordinary power to sell and dispose of property belonging to the company. Generally the power to sell and dispose has reference only to transactions in the ordinary course of business incident to a railroad company, and does not extend to the sale of the railroad itself, or of the franchises connected therewith. Outlying lands not needed for railroad uses may be sold. Machinery and other personal property may be sold. But the road and franchises are generally inalienable; and they are so not only because they are acquired by legislative grant, or in the exercise of special authority given, for the specific purposes of the incorporating act, but because they are essential to the fulfilment of those purposes; and it would be a de-

franchises does not invalidate its effect upon property which the corporation has power to mortgage.[1] The question whether the authority permits a conveyance of franchises seems to be merely one between the State and the corporation, and a question with which third persons have nothing to do.[2]

**6. Sales of Franchises and Property on Execution.**—It is a rule of the common law that franchises of a corporation cannot be seized and sold on execution, the reason assigned being that franchises are intangible and incapable of delivery by the sheriff to a purchaser.[3] Another reason, which is often stated without qualification, is that where franchises are granted for the furtherance of public purposes, creditors cannot so enforce their claims as to render the corporation incapable of fulfilling its public duties.[4]

reliction of the duty owed by the corporation to the State and to the public to part with them. But where, as in this case, power is given to incorporate the capital stock with the stock of any other company, a very large addition is made to the ordinary powers granted to a company. In this country the creation and exercise of such a power is well understood. It contemplates not only the possible transfer of the railroad and its franchises to another company, but even the extinguishment of the corporation itself and its absorption into a different organization. The greater power of alienating or extinguishing all its franchises, including its own being and existence, contains the lesser power of alienating its road and the franchises incident thereto and necessary to its operation. Its power of alienation and sale extends to a class of subjects to which it does not ordinarily apply."

1. Carpenter *v.* Black Hawk Gold Mining Co., 65 N. Y. 43, 50 (1875); Pullan *v.* Cin. & Chi. R. Co. (U. S. Cir. Ct. Ind. 1865), 4 Biss. 41-2.

2. Dunham *v.* Isett, 15 Iowa, 294 (1863). And in that way was the leaning of the Mississippi court. McAllister *v.* Plant, 54 Miss. 106 (1876).

**Purchasers of Franchises as Stockholders.**—In *Texas*, the purchasers of the road and franchises were held to become stockholders of the old company, the mortgaged property so purchased being relieved, however, of debts not prior incumbrances. Railway Co. *v.* Morris, 67 Texas, 700 (1887).

**Alienation of Franchises to Foreign Corporation.**—A domestic corporation cannot convey its franchises to a foreign corporation, so as to enable the latter to accept and exercise such franchises within our territorial limits, without the assent of our legislature. Black *v.* Delaware & Raritan Canal Co., 24 N. J. Eq. 466 (1873).

3. Stewart *v.* Jones, 40 Missouri, 140 (1867); Gue *v.* Tide Water Canal Co., 24 How. (U. S.) 257 (1860); State *v.* Rives, 5 Ired. Law (N. Car.), 305 (1844); Arthur *v.* Commercial & Railroad Bank, 9 Sm. & Mar. (Miss.), 431 (1848); Randolph *v.* Larned, 27 N. J. Eq. 557 (1876); Richardson *v.* Sibley, 11 Allen (Mass.), 71 (1865); Susquehanna Canal Co. *v.* Bonham, 9 W. & S. (Pa.) 27 (1845); Palestine *v.* Barnes, 50 Tex., 538 (1878); Baxter *v.* Turnpike Co., 10 Lea (Tenn), 488; Louisiana *v.* Morgan, 28 La. Ann. 482 (1876); New Orleans, etc., R. Co. *v.* Delamore, 34 La. Ann. 1225. *Compare* Louisville Water Co. *v.* Hamilton, 81 Ky. 517. See also Mahoney *v.* Spring Val. Water-works, 52 Cal. 163 (1877); Freeman on Executions, § 179; Taylor on Private Corporations, § 671; Morawetz on Private Corporations, § 924, note 2.

4. Freeman on Executions, § 179. See also authorities cited in preceding note.

The house occupied by the collector of tolls on a canal was held not to be subject to sale under *fieri facias*. Susquehanna Canal Co. *v.* Bonham, 9 Watts & Ser. (Pa.) 27 (1845). The road of a railroad cannot be sold, under execution, if necessary to the franchise. Shamokin Val. R. Co. *v.* Livermore, 47 Pa. St. 465 (1864); Youngman *v.* Elmira, etc., R. Co., 65 Pa. St. 286 (1870); Ammant *v.* Turnpike Road, 13 S. & R. 210.

The lot on which a market house is erected, if necessary to the franchises of the market corporation, cannot be sold under execution. Palestine City *v.* Barnes, 50 Texas, 538 (1878).

Certain property of a canal company,

While the latter doctrine is widely accepted as correct, it need not apply to such property of corporations as is not essential to the proper performance of those duties,[1] nor need it be extended to the franchises of corporations which owe none.[2] The question

viz., a house and lot, sundry canal locks, a wharf, and sundry other lots, essential to the usefulness of the corporation, having been seized under execution, it was held that the circuit court committed no error in granting injunction prohibiting the sale. Gue *v.* Tide Water Canal Co., 24 How. (U. S.) 257 (1860). See, to same effect, Taylor on Private Corporations (2d Ed.), § 671; Freeman on Execution, § 179.

The results to be produced to the public by corporations created for purposes of a public nature cannot be disturbed by the seizure by creditors of any part of the property essential to their active operations. Debt against such corporations must be recovered by sequestration, allowing them to progress with their undertaking to accommodate the public. Foster *v.* Fowler, 60 Pa. St. 27.

The buildings, etc., necessary to a corporation for introducing water into a town are not subject to mechanic's lien. Foster *v.* Fowler, 60 Pa. St. 27.

The real estate acquired by a public corporation in exercise of a delegated right of eminent domain, and necessary for uses in which the public is concerned, cannot be sold under execution apart from the franchise and its incidents, so as to give the purchaser a title to the property divested of all the duties and obligations assumed by the company. Gooch *v.* McGee, 83 N. Car. 59, criticising State *v.* Rives, 5 Ired. (N. Car.) 297. See Maryland *v.* Bank, 6 Gill & John. (Md.) 205; Ev. L., etc., *v.* Buf. Hyd. Assoc., 64 N. Y. 561; Queen *v.* Vict. Park Co., 41 E. C. L. R. 544; Ammant *v.* Pres't, etc., 13 S. & R. (Pa.) 210; Coe *v.* Railroad Co., 10 Ohio, 372; Railroad Co. *v.* Colwell, 39 Pa. 337; Youngman *v.* Railroad Co., 65 Pa. St. 278.

See, as agreeing with the Rives case and, like it, opposed to the current of opinion, Arthur *v.* Bank, 9 Sme. & Mar. (Miss.) 394.

Neither the franchises nor the roadway of a turnpike company can be levied on and sold by execution, nor perhaps any property essential to the exercise of the franchises of the company. Baxter *v.* Nashville & H. Tpk. Co., 10 Lea (Tenn.), 488.

A statute providing that "the real and personal property of corporations shall be liable to execution as other property" does not extend either to the franchises or to the real estate acquired under eminent domain for the single purpose of the franchises. Nor does a statute authorizing conveyance of "all such real and personal estate as may be necessary and convenient to carry into effect the objects of the incorporation" authorize conveyance of realty so held for the franchises. "Words must be 'restrained unto the fitness of the matter.'" Coe *v.* Columbus, etc., R. Co., 10 Ohio St. 377–8 (1859).

1. Lands purchased by a railroad corporation beyond what are actually dedicated to corporate purposes are bound by the lien of judgments against the corporation, and are liable to be levied upon in execution and sold by the sheriff, as are the lands of any other debtor; but the purchaser at such sale takes only that which is not necessary for the full enjoyment and exercise of the corporate franchise, no matter how acquired by the corporation. Plymouth Railroad Co. *v.* Colwell, 39 Pa. St. 337. See also Shamokin Valley R. Co. *v.* Livermore, 47 Pa. St. 465; Ammant *v.* New Alexandria, etc., Turnpike Road, 13 S. & R. (Pa.) 210; Girard Storage Co. *v.* Southwark Co., 105 Pa. St. 248.

A canal basin is not a legitimate incident to a railroad having no authorized canal connection, and is not protected from levy and sale on execution against the company. Plymouth R. Co. *v.* Colwell, 39 Pa. St. 337.

A railroad company may buy land in fee and hold it, and if the company becomes insolvent the property will be assets for the payment of its debts. The land in this case had not been used by the company, but the portion of route upon which it was situated had never been built upon by the corporation. American Dock, etc., Co. *v.* Public Schools, 39 N. J. Eq. 409, 448.

2. Girard Storage Co. *v.* Southwark Co., 105 Pa. St. 248 (1884). Gordon, Justice, said, *inter alia*: "It [the elevator company] may receive the grain of one person and refuse that of another, or it may, at its own will, suspend operations and shut out the public altogether. Its organization is all that it has received

usually arises where a mortgage has been made covering both the property and franchises of the corporation, and the cases show an unnecessary confusion between the two things.

The common-law rule has been changed both by special and general statutes.[1] By the constitutions of Illinois, Nebraska, West Virginia, Missouri, Arkansas, and Texas, the rolling stock and movable property of railroads are declared to be personal property, and the legislatures can pass no laws exempting it from execution.[2] Such provisions are intended to obviate the doubt which exists as to whether such property is real or personal estate, and how far it is included in mortgages covering the road and franchises.[3]

Where statutes authorize a sale of franchises the authority is derived solely from the statutes, and the sale can be made in no other mode than that pointed out therein.[4]

**VII. FORFEITURE OF FRANCHISES.**—See this subject fully covered under the main title CORPORATIONS.[5]

**VIII. TAXATION OF FRANCHISES.**—The taxation of franchises like that of Corporations generally will be treated under TAXATION.

from the public; beyond this the public has no special interest in it."

While property used for warehousing is thereby put to a use in which the public has an interest—The Granger Cases, 4 Otto—this interest may be lost at any time by the discontinuing of the business, and does not make the property even *quasi*-public property.

1. See the cases quoted in the preceding sections of this title. See also Chicago, etc., R. Co. *v.* Borough of Fort Howard, 21 Wis. 44; James *v.* Pontiac, etc., R. Co., 8 Mich. 91; Freeman on Executions, § 179.

2. Stimson's Am. Stat. Law, § 468.

By the *California* constitution the legislature shall pass no laws permitting the leasing or alienation of any franchise so as to relieve it or the property held thereunder from the liabilities of the lessor or grantor, lessee or grantee, contracted or incurred in the operation and use of such franchise or any of its privileges. California Const. 12, 10.

3. See MORTGAGES; RAILROADS. See also 3 Wood's Railway Law, § 466; Wait Insol. Corp. § 307.

4. James *v.* Pontiac, etc., R. Co., 8 Mich. 9; Freeman on Executions, § 179.

5. See CORPORATIONS, *Dissolution*, pp. 296 *et seq.* and 302 *et seq.*

To work a forfeiture, there must be wilful abuse or improper neglect. 4 Am. & Eng. Encyc. of Law, 306. Hence, where a general statute required water companies to furnish "pure" water, and verdict was that water furnished by a certain company "was and is wholesome, but not pure," the defendant was held entitled to judgment in its favor. For the very mountain streams, and springs from rocks, are not free from pollution. Abstract, chemical sense of the word "pure" therefore cannot be meant, since that would depart from the rule of common-sense. Commonwealth *v.* Towanda Water-works (Pa.), 15 Atl. Rep. 440.

**Limitation.**—A statute fixing a period of limitation after misuse or nonuse, the running out of which shall enable a company to plead the limitation against forfeiture proceedings, shall not help a company which never had authority. Its exercise of franchises is a continuous usurpation, and the statute of limitations will not run. People *v.* Stanford (Cal.), 18 Pac. Rep. 85.

**Party.**—In State *v.* Atchison & N. R. Co. (Neb.), 38 N. W. Rep. 47, Maxwell, J., said: "The rule is well settled that in a proceeding in *quo warranto*, to dissolve a corporation or declare a forfeiture of its charter, or to oust it from the exercise of franchises which it usurps, it must be against the corporation itself and not merely against its individual members. If the corporation has, by the abuse or the nonuse of its franchises, rendered itself liable to the forfeiture of its charter, such forfeiture can properly be declared and enforced only in a proceeding to which the corporation is a party. State *v.* Taylor, 25 Ohio St. 280; People *v.* Bank, 6 Cow. (N. Y.) 217. In the latter case the court say: 'It is ob-

**FRATERNITY.**—Some people of a place, united together in respect of a mystery and business, into a company.[1]

jected, in the first place, that the information, being against the defendants by their corporate name, is bad. To this it may be answered, the information is merely descriptive. It is not an affirmation that the defendants are a corporation, but that by the name of the president, directors, and company of the Bank of Hudson, or using that name, they have done the acts in the information alleged. And it then calls on them to answer by what authority. Besides, the statute authorizes proceedings against the corporation. The judgment must be against the corporate name. . . . As the proceeding is directed against the corporation itself, it is the only necessary party defendant.'"

**Land-owner** cannot take advantage of a railroad company's failure to construct in prescribed time. "It would be strange indeed if a citizen could bring an action in ejectment, and, upon the ground that the corporation had not performed a duty due from it to the State, wrest from it a strip of ground forming part of its roadway." Cincinnati, H. & Ind. R. Co. *v.* Clifford (Ind.), 15 N. E. Rep. 524; s. c., 113 Ind. ; Logan *v.* Railroad Co., 90 Ind. 552; Justice *v.* Board, 95 Ind. 576; Bravard *v.* Cin., H. & I. R. Co. (Ind.), 17 N. E. Rep. 183.

**Continuous Efforts.** — Expenditure of money, and continuous efforts to obtain more, for construction of road, held to prevent forfeiture for failure to construct in two years under Iowa Code, § 1079. Young *v.* Webster City, etc., R. Co. (Iowa), 39 N. W. Rep. 234. Rothrock, J., said: A company "may 'use its franchises' as effectually in raising means to build its road, in making preliminary surveys, and in many other ways, as it can in grading and laying ties and iron. . . . Now, it is perfectly apparent that any acts done to further the objects of the corporation are the exercise of its franchises."

**Collateral Question.**—Forfeiture cannot be declared by judicial proceeding except one instituted directly for that purpose by the government granting the charter. Jersey City Gaslight Co. *v.* Consumers' Gas Co. (N. J.), 4 Cent. Rep. 330; 2 Kent. Com. 313; Commonwealth *v.* Union Ins. Co., 5 Mass. 230; Boston Glass Manufactory *v.* Langdon, 24 Pick. (Mass.) 49; Folger *v.* Columbian Ins. Co., 99 Mass. 267; Kishacoquillas Turnpike Co. *v.* M'Conaby, 16 S. & R. (Pa.) 140; Atty. Gen. *v.* Utica Ins. Co., 2 Johns. Ch. (N. Y.) 371; Slee *v.* Bloom, 5 Johns. Ch. (N. Y.) 366; Soc'y Perun *v.* Cleveland (Ohio), 1 West. Rep. 506.

In Williamson *v.* Kokomo B. & L. Co. Assoc., 89 Ind. 389, one Leach gave to an acting corporation his mortgage on real estate. Subsequent to the execution and recording of it he executed another mortgage on the same land to Williamson. In a proceeding to foreclose the junior mortgage, Williamson maintained that the pretended corporation had no legal existence, by reason of defaults and omissions in proceedings to incorporate, and that the senior mortgage was void. The court held that the junior mortgagee could not question the corporate existence. Elliott, J., said: "Where persons assume to incorporate under the laws of the State, and in part comply with the requirements, assume corporate functions and transact business as a corporation, private persons cannot collaterally question the right of such an association to corporate existence, although there has not been a full compliance with the statute. [And see *infra*, 634 *i*.] Baker *v.* Neff, 73 Ind. 68. This rule is not limited to cases where one by contract admits corporate existence, but is a rule of general application." See also 4 Am. & Eng. Encyc. of Law, 198; Pape *v.* Capital Bank, 20 Kan. 440; Thompson *v.* Candor, 60 Ill. 244; Persse *v.* Willett, 1 Rob. N. Y. Super. Ct. (N. Y.) 131; Smith *v.* Sheeley, 12 Wall. (U. S.) 361; Grand Gulf Bank *v.* Archer, 8 S. & M. (Miss.) 151, 173; Dunning *v.* Railroad Co., 2 Carter (Ind.), 438; Danebroge M. Co. *v.* Allment, 26 Cal. 286; Searsburgh Tpk. Co. *v.* Cutter, 6 Vt. 315; Darst *v.* Gale, 83 Ill. 136; Rondell *v.* Fay, 32 Cal. 354; De Witt *v.* Hastings, 40 N. Y. Supr. Ct. 463; Banks *v.* Potiaux, 3 Rand. (Va.) 13; Tar River N. Co. *v.* Neal, 3 Hawks (N. C.), 520; Bear Camp Co. *v.* Woodman, 2 Greenl. (Me.) 404.

**Authorities for Franchises.**—Morawetz Corp. (2d Ed.); Taylor Corp. (Ed. 1888); Waterman Corp.; Wait Insolvent Corp.

1. Cuddon *v.* Eastwick, 1 Salk. 192.

**FRAUD.**—(See also DECEIT; FALSE PRETENCES; FRAUDULENT CONVEYANCES; FRAUDULENT DEBTOR; FRAUDULENT SALES, etc. For fraud in particular relations, see specific titles, as AGENCY; ATTORNEY AND CLIENT; COMPOSITION WITH CREDITORS; GUARDIAN AND WARD; OFFICERS OF PRIVATE CORPORATIONS; PARTNERSHIP, etc.)

I. **Definitions,** 635.
II. **Actual Fraud,** 635.
1. *Misrepresentation,* 635.
(*a*) *Scienter,* 642.
(*b*) *Who May Rely on Representations,* 643.
(*c*) *Duty of Party Deceived,* 643.
(*d*) *Parties on Unequal Footing,* 644.
2. *Concealment,* 644.
(*a*) *Buyers on Credit,* 646.
III. **Constructive Fraud,** 646.
1. *Fiduciary Relations,* 647. [649.
IV. **Duress and Undue Influence,**
V. **Remedies,** 650.
VI. **Promptness,** 650.
VII. **Pleading,** 653.
VIII. **Evidence,** 654.

**I. DEFINITION.**—Fraud is either actual or constructive. Actual or positive fraud is defined by Judge Cooley as "deception practised in order to induce another to part with property or to surrender some legal right, and which accomplishes the end designed."[1] Judge Story defines it as "any cunning, deception, or artifice used to circumvent, cheat, or deceive another."[2]

Constructive fraud is such as the law infers from the relationship of the parties and the circumstances by which they are surrounded, regardless of any actual dishonesty of purpose or evil design.[3]

**II. ACTUAL FRAUD** may consist: (1) In the statement of what is false, or *suggestio falsi;* and (2) in the concealment of what is true, or *suppressio veri.*

**1. Suggestio Falsi, or Misrepresentation,** may be made by conduct as well as by words;[4] but it usually consists of decep-

1. Cooley on Torts (1st Ed. 1879), 474.

2. 1 Story's Eq. Jur. (3d Ed.) § 186. Duly credited to Labeo.

This is substantially the definition adopted by Mr. Kerr. Kerr Fraud and Mist. 42.

The definition found in Bacon's Abridgment, and copied in several textbooks and opinions, that fraud is "the unlawful appropriation of another's property, with knowledge, by design, and without criminal intent," has met with severe criticism, as being "faulty in every one of its particulars." Cooley on Torts (1st Ed.), 474, note 2.

"Fraud implies a wilful act on the part of one, whereby another is sought to be deprived, by unjustifiable means, of what he is entitled to." Sir John Romily, in Green *v.* Nison, 23 Beav. 530, 535.

"All deceitful practices in depriving or endeavoring to deprive another of his known right, by means of some artful device or plan contrary to the plain rules of common honesty, is fraud." *Per* Coulter, J., in Mitchell *v.* Kintzer, 5 Pa. St. 216; s. c., 47 Am. Dec. 408.

"Fraud in equity includes all wilful or intentional acts, omissions, and concealments which involve a breach of either legal or equitable duty, trust, or confidence, and are injurious to another, or by which an undue or unconscientious advantage over another is obtained." 2 Pomeroy's Eq. Jur. (1882) § 873.

3. 1 Story's Eq. Jur. (3d Ed.) § 258; 2 Pom. Eq. Jur. § 922; People *v.* Kelly, 35 Barb. (N. Y.) 457.

4. Walters *v.* Morgan, 3 De G. F. & J. 718; Decker *v.* Hardin, 5 N. J. L. 579; Juzan *v.* Toulrain, 9 Ala. 662; s. c., 44 Am. Dec. 448; Chesterfield *v.* Jansen, 2 Ves. 155; 1 Story Eq. Jur. (3d Ed.) § 192; Croyle *v.* Moses, 90 Pa. St. 250.

**Legal Fraud.**—The meaning of this term is discussed in the recent English case of Peek *v.* Derry, L. R. 37 Ch. Div. 541; s. c., 21 Am. & Eng. Corp. Cas. 265, Sir J. Hannen saying: "I must venture to express my opinion that the expression 'legal fraud,' which has been in constant use by judges for very many years, is, to say the least, an exceedingly convenient ex-

tion accomplished by false statements. In order to render it actionable fraud in any case, the following essential elements should be present: (1) The misrepresentation must be of a matter of fact, and not of law;[1] (2) it must be of a fact, as distinguished from a mere expression of opinion;[2] (3) it must be of a fact at the time,

pression; that is to say, it is an expression which very clearly conveys an idea, which is the object of language; and it appears to me to mean this: That degree of moral culpability in the statement of an untruth to induce another to alter his position, to which the law attaches responsibility. And that is, as I think, where a man makes an untrue statement for the purpose mentioned without reasonable cause for believing it to be true. No doubt the word 'fraud' is, in common parlance, reserved for actions of great turpitude; but the law applies it to lesser breaches of moral duty. And it appears to me the making of any statement upon which others are intended to act, without reasonable ground for stating it, and without reasonable ground for believing it to be true, is a breach of moral duty, though it may not be one of such dark complexion as to blast the character of the man forever who does it. It is not necessary that there should be that amount of wrong in order to give a legal remedy. And I think the same observations apply to Lord Justice Bowen's use of the word 'dishonesty,' though, as Lord Justice Cotton has pointed out, when one comes to read the whole of his judgment we see in what sense he uses the word 'dishonesty'—namely, as something implying moral culpability."

1. Upton *v.* Tribilicock, 91 U. S. 45, 49; Seeley *v.* Reed, 25 Fed. Rep. 361; Clodfelter *v.* Hulett, 72 Ind. 137; Dillman *v.* Nadlehoffer, 119 Ill. 567, 7 N. E. Rep. 88; Fish *v.* Cleland, 33 Ill. 238; Jordan *v.* Stevens, 51 Me. 78; Gormley *v.* Gymnastic Assoc., 55 Wis. 350.

Thus, every one is presumed to know the effect of a contract which he signs, and misrepresentations as to its legal effect made to him by the other party are not actionable, and will not invalidate the contract. Clem *v.* Newcastle, etc., R. Co., 9 Ind. 488; s. c., 68 Am. Dec. 653; Smither *v.* Calvert, 44 Ind. 242, 246; Levy *v.* Burkle (Cal.), 14 Pac. Rep. 564; Jaggar *v.* Winslow, 30 Minn. 263.

So false representations as to the validity of a patent are not actionable. Dillman *v.* Nadlehoffer, 119 Ill. 567; s. c., 7 N. E. Rep. 88.

So in case of representations as to the legal effect of certain acts of a policyholder in forfeiting the policy, made by an insurance agent to obtain a compromise. Thompson *v.* Phœnix Ins. Co., 75 Me. 55; s. c., 46 Am. Rep. 357. *Compare* Kroeger *v.* Pitcairne, 101 Pa. St. 311; s. c., 47 Am. Rep. 718.

But representations as to the law of a foreign State are representations of fact, and may constitute fraud. Bethell *v.* Bethell, 92 Ind. 318.

2. Kimball *v.* Bangs (Mass.), 11 N. E. Rep. 113; Reynolds *v.* Palmer, 21 Fed. Rep. 433; Buckner *v.* Street, 15 Fed. Rep. 365; Bristol *v.* Braidwood, 28 Mich. 191; Hubbell *v.* Meign, 50 N. Y. 480, 489; Sawyer *v.* Prickett, 19 Wall. (U. S.) 146.

Thus, statements as to value are usually expressions of opinion not to be relied on. Homer *v.* Perkins, 124 Mass. 431; Gordon *v.* Butler, 105 U. S. 553; Anderson *v.* McPike, 86 Mo. 293; Schranun *v.* O'Conner, 98 Ill. 539; Dawson *v.* Graham, 48 Iowa, 378; Ellis *v.* Andrews, 56 N. Y. 83; Shade *v.* Creviston, 93 Ind. 591. *Compare* Witherwax *v.* Riddle, 121 Ill. 140.

But representations as to the facts on which the valuation is based are fraudulent. Manning *v.* Albee, 11 Allen (Mass.), 520; State *v.* Hefner, 84 N. Car. 751; State *v.* Tomlin, 29 N. J. L. 13; Bradley *v.* Luce, 99 Ill. 234; French *v.* Fitch (Mich.), 35 N. W. Rep. 258; McAleer *v.* Horsey, 35 Md. 439.

Representations as to the value and utility of machines and the like are mere matters of opinion. Neidefer *v.* Chastain, 71 Ind. 363; s. c., 36 Am. Rep. 198; McComas *v.* Haas, 93 Ind. 276. But where the inventor makes such statements as an expert and the purchaser has no other means of information, they will be fraudulent, if false. Hicks *v.* Stevens, 121 Ill. 186.

Mr. Wood, in a note to his edition of Addison on Torts, suggests the following test: "If the representation is as to a matter not equally open to both parties, it may be said to be a statement of a fact; but if it is as to a matter that rests entirely in the judgment of the person making it, and the means of information upon which a fair judgment can be predicated are equally open to both parties, and there is no artifice or fraud used to prevent the person to be affected thereby from making an examination and forming a judgment for himself, the representation is a mere

or previously, existing, and not a mere promise for the future;[1] (4) it must be of a material matter;[2] (5) it must be relied upon by the person to whom it is made, or whose action it is intended to influence.[3] Where false representations of the character indicated are so made for the purpose of being acted upon, and are so acted upon, the party to whom and for whom they are made may ordinarily maintain an action for such damages as proximately result from the deception.[4]

expression of opinion, and does not support an action for fraud." 2 Addison Torts, 422, § 1186.

1. Fenwick *v.* Grimes, 5 Cranch C. C. 439; Long *v.* Woodman, 58 Me. 49; Burt *v.* Bowles, 69 Ind. 1; Foutz *v.* Foutz, 34 Ind. 433; Bethell *v.* Bethell, 92 Ind. 318.

Thus, where it was alleged that the defendant fraudulently represented that he would grant the plaintiff an easement by locating a street, this was held not to be fraud. Richter *v.* Irwin, 28 Ind. 26.

So, where one was induced to grant another a lease upon the representation that he intended to use the premises for a certain purpose, whereas he intended to use, and did use, them for a totally different purpose, it was held that relief could not be granted on the ground of fraud. Feret *v.* Hill, 15 C. B. 207.

A misrepresentation, to avoid a warranty, must be of an existing fact, and not a mere promise to do or not to do something in the future. Bigham *v.* Bigham, 57 Tex. 238. *Compare* Wilson *v.* Eggleston, 27 Mich. 257; Dowd *v.* Tucker, 41 Conn. 197; Gross *v.* McKee, 53 Miss. 536; Farar *v.* Bridges, 3 Humph. (Tenn.) 566; Miller *v.* Howell, 1 Scam. (Ill.) 499; Higgins *v.* Higgins, 58 N. H. 224.

2. Hall *v.* Johnson, 41 Mich. 286; s. c., 2 N. W. Rep. 55; 2 Pom. Eq. Jur. § 898; Clark *v.* Everhart, 63 Pa. St. 347; Yeates *v.* Prior, 11 Ark. 58; Lynch *v.* Mercantile Trust Co., 18 Fed. Rep. 486; Seeberger *v.* Hobert, 55 Iowa, 756; s. c., 8 N. W. Rep. 482; Noel *v.* Horton, 50 Iowa, 687; First Nat. Bank *v.* Yocum, 11 Neb. 328.

"If the fraud be such that, had it not been practised, the contract could not have been made or the transaction completed, then it is material to it; but if it be made probable that the same thing would have been done if the fraud had not been practised, it cannot be deemed material. Whether material or otherwise, seems a question for the jury." *Per* Miller, J., in McAleer *v.* Horsey, 35 Md. 439, 452.

The misrepresentation need not, however, form the sole inducement for entering into the contract. 2 Pom. Eq. Jur. § 890; 2 Pars. Cont. (5th Ed.) 773; Safford *v.* Grout, 120 Mass. 20, 25; People *v.* Haynes, 1 Wend. (N. Y.) 557; Winter *v.* Baudell, 30 Ark. 363, 373; Fishback *v.* Miller, 12 Nev. 428.

Representations of an insurance agent that certain persons known to the person whom he is seeking to insure are to constitute the board of direction are material. Penn. Mut. Life Ins. Co. *v.* Crane, 134 Mass. 56; s. c., 45 Am. Rep. 282; Hedden *v.* Griffin, 136 Mass. 229; s. c., 49 Am. Rep. 25.

3. Nye *v.* Merriam, 35 Vt. 438; Hagee *v.* Grossman, 31 Ind. 223; Taylor *v.* Guest, 58 N. Y. 262, 266; Pollock on Torts (1887), 251; Roseman *v.* Canovan, 43 Cal. 110; Percival *v.* Harger, 40 Iowa, 286; Tuck *v.* Downing, 76 Ill. 71; Slaughter's Adm'r *v.* Gerson, 13 Wall. (U. S.) 379.

If a person relies upon his own judgment where he has full means of knowledge, he cannot complain of misrepresentations. Hess *v.* Young, 59 Ind. 379.

Nor will misrepresentation be a defence to a contract where the party learns all the facts afterwards but in time to "back out," yet chooses to complete or affirm the contract. Whiting *v.* Hill, 23 Mich. 399; Pratt *v.* Philbrook, 41 Me. 132; Veerol *v.* Veerol, 63 N. Y. 45; Bridge *v.* Penniman, 105 N. Y. 642.

False representations as to the kindness of a horse sold to a man do not constitute a cause of action in favor of his wife who is injured, while riding with him, by the horse running away. Carter *v.* Harden, 78 Me. 528.

4. Cooley on Torts (1879), 475; Pollock on Torts (1887), 240; Endsley *v.* Johns, 120 Ill. 469; Sellar *v.* Clelland, 2 Colo. 532; Byard *v.* Holmes, 34 N. J. L. 296; Busterud *v.* Farrington, 36 Minn. 320.

**Deceit in Sale of Land** (see FRAUDULENT CONVEYANCE).—A vendor who induces his vendee to purchase land by falsely and fraudulently representing that the title is perfect is liable to the vendee for such fraud, even though the contract of purchase provided for, and the sale was consumated by a quitclaim deed only. Ballou *v.* Lucas, 59 Iowa, 22.

Complaint states that sheriff sold plaintiff's land under execution. The sale being by the acre, a survey was made to ascer-

tain the number of acres. The purchaser and surveyor conspired to defraud, and did defraud, the plaintiff, by reporting to the sheriff that the tract contained 550 acres, whereas by the actual survey there were 700 acres. The sale was made, purchase-money paid, and deed executed to purchaser upon that false basis. *Held*, to be a good cause of action against the purchaser and surveyor; and that plaintiff was entitled to relief in an independent suit, and not by motion in the cause. Wilson *v.* Sikes, 84 N. Car. 213.

Misrepresentation of quantity or quality of land in a sale thereof, in order to amount to fraud, must not be about a trifling or immaterial thing, and must not be vague and inconclusive in its nature, nor a mere matter of opinion, nor about a fact equally open to the inquiry of either party, in regard to which neither could be presumed to trust the other. And when the misrepresentation is material and not vague, in order to amount to fraud, it must have been actually relied upon by the other party, who must have been misled thereby to his injury. Wamsley *v.* Currence, 25 W. Va. 543.

If a false representation of a material matter of fact, not patent and open to the buyer's inspection, be made by a party proposing to sell, and the buyer, induced by such representation, and relying on its truth, accepts the offer and closes the trade, without knowing the falsity of the representation, and is thereby deceived to his injury, the seller shall make good the representation. But, "If the representation was of a trifling or immaterial thing; or, if the purchaser did not trust to it, or was not misled by it; or, if it was upon a matter of opinion, or as to a fact equally open to the inquiries of both parties, and in regard to which neither could be presumed to trust the other;—in these and the like cases, there is no reason for a court of equity to interfere to grant relief on the ground of fraud." Crown *v.* Carriger, 66 Ala. 590.

So, where the seller of a mine makes representations regarding matters of which the buyer has no knowledge, and no means at hand of obtaining knowledge, and they are shown to be false and material, the burden is upon the seller to show that they were not relied upon by the buyer, and that he would have made the purchase without them. Fishback *v.* Miller, 15 Nev. 428.

A complaint lies by the lessee against the lessor of a coal mine, which could not be examined, showing that, by representations of material matters known by the lessor to be false, he induced the plaintiff to take the lease, which was of less value than if the statements had been true and specifying the particulars. Ar-Buckle *v.* Biederman, 94 Ind. 168.

Where, on the sale of land by the sheriff, one states that he holds an equitable mortgage for fifteen hundred dollars, and that the purchaser will buy subject to that encumbrance, and becomes a bidder himself, with full knowledge that five hundred dollars of the fifteen hundred is for interest taken by himself for one year's loan of one thousand dollars, and the land is knocked off to him, and another bidder, who contested with him, would have given five hundred dollars more for the land had the mortgage been represented as to secure but one thousand dollars, *held*, that the equitable mortgagor is entitled, in an action plainly and distinctly setting out the above stated facts and proving them on the trial, to recover from the buyer the difference between the price at which the land was bid off, and what it would have brought but for the misrepresentation, with interest up to the trial. Denham *v.* Kirkpatrick, 64 Ga. 71.

One who obtains land in a trade, and, before doing so, goes upon and looks at it, has nevertheless a right to show that he was misled by the representations of the other party if they related to matters of which no one could adequately judge on a casual inspection; such as the capability of the land for drainage, and the reason why water was standing. The fact of fraud in such representations is for the jury. Johnson *v.* Armstrong, 50 Mich. 65.

A mere assertion by a vendor as to the value of the property offered by him for sale, although known by him to be untrue, will not render him responsible to the vendee for damages. There must be a want of knowledge on the part of the latter, and a purchase by him in entire reliance upon the representations made, or some artifice employed to prevent inquiry or the obtaining of knowledge by him. Chrysler *v.* Canaday, 90 N. Y. 272; s. c., 43 Am. Rep. 166.

Where a grantor executes a conveyance of land to a grantee under such circumstances that, in a proper action instituted by the grantor, such conveyance may be avoided on account of the fraud of the grantee, yet if such grantor delivers possession of the premises under such conveyance, and permits it to stand, his subsequent grantee cannot question any supposed fraud in the prior conveyance. Yeamans *v.* James, 27 Kan. 195.

A statement, by the vendor, of the val-

ue, condition, and adaptability for certain uses, of the real estate, is not actionable unless he resorts to some fraudulent means to prevent the purchaser from examining the property. Williams *v.* McFadden (Fla.), 1 So. Rep. 618.

A purchaser of land, even where he takes only a quitclaim deed, may recover damages from his grantor, by whose fraudulent representations he is induced to make the purchase. Tyner *v.* Cotter, (Wis.), 30 N. W. Rep. 782.

**Deceit in Sale of Goods, etc.**—(See SALES). A vendor's honestly expressed but incorrect opinion as to the amount, quality, and value of the goods he sells will not support an action for fraudulent representations if the purchaser sees or knows the property, or has opportunities to know it. The purchaser cannot recover unless the vendor, with superior means of knowledge, intentionally gives a false opinion as to material facts, for the purpose of defrauding the purchaser, and the latter has reason to rely, and does rely, on it as true. Collins *v.* Jackson. 54 Mich. 186.

A buyer of an interest in a stock of goods and in a business, who has ample opportunity afforded him to examine the goods, and the books of the business, has no right to rely upon representations of the seller concerning the value of the goods, or of the amount of business which the seller has previously done. Poland Brownell, 131 Mass. 138; s. c., 41 Am. Rep. 215; 1 Benj. on Sales (4th Am. Ed.) § 641; and see authorities cited, *ante*, p. 637, note 4.

A wilful misrepresentation as to the income derived from the royalty on a certain patent, which induced a landowner to exchange his property for a one-half interest in such royalty, is sufficient evidence of fraud and deceit to set aside the conveyance. Crosland *v.* Hall, 33 N. J. Eq. 111.

A purchaser has a right to rely upon representations of the seller as to facts not within the purchaser's knowledge; and the seller cannot escape responsibility by showing that the purchaser might have ascertained that such representations were untrue. Bank *v.* Hiatt, 58 Cal. 234.

If a vendor knows the purposes for which an article is intended by the purchaser, and so represents to him, and also knowingly and fraudulently represents that he knows the purchaser's business, and that the article is well fitted for it, and the purchaser rely on such representations in making the purchase, and they are untrue, it is a fraud, for which he may recover. Hanger *v.* Evins, 38 Ark. 334.

A person buying stock of a bank from the bank is entitled to rely upon assurances of an officer of the bank as to its financial condition, and, if already a stockholder, is not bound to avail himself of his right of examining the books of the bank. Union Nat. Bank *v.* Hunt, 76 Mo. 439.

False representations calculated to prevent examination of goods sold, made to a purchaser who is unacquainted with them and exercises ordinary prudence, are actionable. Stewart *v.* Stearns, 63 N. H. 99; s. c., 56 Am. Am. Rep. 496.

In a bill filed by a stockholder in an incorporated building and loan association, asking an account and redemption under a mortgage which he had executed to the association, averments in these words: "Your orator's purpose in obtaining said shares of stock in the outset was to enable him to borrow the money, and not as an investment in the stock; and this purpose was well known to the officers of said company; and your orator was moved to borrow the money and pay this $75 per month by the statements and calculations made by said officers, and given to him, that this stock would be worth $200 per share after the one-hundreth instalment was paid in. And he became a shareholder by the purchase of stock for the above purpose, and under the foregoing representations" show only the expression of an opinion or judgment on a matter which was equally open to both parties, and do not amount to a charge of fraud or wilful misrepresentation. Lake *v.* Security Loan Assoc., 72 Ala. 207.

Where an agent of a mining company, by false representations as to the value of the shares of stock in such company, or as to the extent and condition of the property of the company, induces another to subscribe for and purchase shares of stock from the company, the agent will not be liable to the purchaser in an action for fraud and deceit unless he knew his representations were false when he made them. The fraud and the *scienter* constitute the grounds of the action. Holdom *v.* Ayer, 110 Ill. 448.

**Miscellaneous Examples of Fraud**: False representations that promissory notes executed by a third person are good and well secured.—Bish *v.* Beatty, 111 Ind. 403. False representations as to the credit and solvency of a third person. Pasley *v.* Freeman, 3 T. R. 51; s. c., Big. Lead Cas. Torts, 1; Upton *v.* Vail, 6 Johns. (N. Y.) 1811. Secretly giving a note to a creditor to induce him to join in a composition agreement of all

the debtor's creditors. Willis *v.* Morris, 63 Tex. 458; s. c., 51 Am. Dec. 655; Howe *v.* Litchfield, 3 Allen (Mass.), 443; Harvey *v.* Hunt, 119 Mass. 283; Bigelow on Fraud (1st Ed.), 342, 343. False representations as to the price paid by the owner of a vessel, where the purchaser had no means of knowing it at the time. Pendergast *v.* Reed, 20 Md. 398; s. c., 96 Am. Dec. 539.

Where property transferred to a corporation in payment of shares of stock is overvalued, the transaction is binding so long as it is not impeached by the corporation or its assignee, and it can be impeached only for fraud upon the corporation. Coffin *v.* Ransdell, 110 Ind. 417; Coit *v.* Gold, etc., Co., 119 U. S. 343.

A corporation purchasing the right to sell a patent may rightfully rely upon the representations of the vendors as to its merits, and is not bound by the doctrine of *caveat emptor*. Iowa Economic Heater Co. *v.* American, etc., Co., 32 Fed. Rep. 735.

An action may be maintained by the buyer of a patent-right, on there presentations of the sellers that their patent gave them the exclusive right for an improvement in spring-bed bottoms, where they were known to the sellers to be false and were the inducements to the purchase, although, by searching the Patent Office records, the buyer might have discovered the fraud. McKee *v.* Eaton, 26 Kan. 226.

A complaint to recover damages for fraud by the defendant upon the plaintiff, in the sale to him of a patent-right for a fence post consisting in part of a hollow iron point with bolts, alleged the fraud to be representations that the iron for such post would not exceed eleven pounds; that the defendant had a contract with one M., at L., to furnish to him, and his vendors of the patent, said points and bolts at one and a fourth cents per pound, —all of which were false, and known to be so by the defendant; that such points and bolts for each post would weigh from twenty-two to thirty pounds, and could not be had for less than two cents per pound, etc.; that the plaintiff was ignorant of the facts, and was deceived as the defendant intended, etc.; that, having made sales of said rights to others by making to them similar statements, he was compelled to rescind such sales, etc. *Held*, that the representations were of existing facts, and not mere opinions, and that the complaint was good. Peffley *v.* Noland, 80 Ind. 164.

If one who contemplates becoming surety to another for a third person, applies to the person to whom the security is to be given, for information as to the nature, extent, and risk of the obligation, or the circumstances, condition, or character of such third person, while the person so applied to may refuse to give such information, yet, if he undertakes to give it, he is bound to disclose every material fact within his knowledge affecting the proposed liability; and if he conceals any facts unknown to the proposed surety which, if known, would have deterred him from becoming surety (where the latter has not the present means of ascertaining the fact, or where, though he has such means, artifice is used to mislead him or throw him of his guard), this is a fraud which will relieve the surety from his obligation. And this is especially so where the surety becomes such at the request of the person to whom the security is given. Remington Sewing-machine Co. *v.* Kegertee, 49 Wis. 409. But a surety induced to sign by fraud of principal cannot set it up as against the payee or obligee where the latter had no knowledge thereof. Western N. Y. Ins. Co. *v.* Clinton, 66 N. Y. 326; Ladd *v.* Board, 80 Ill. 233.

Recovery of damages for a fraud in obtaining property by false representations as to the responsibility of the maker of the note given therefor, is not necessarily precluded by the fact that the maker is able to meet the particular note, especially if it does not appear that he can pay his other debts. Daniels *v.* Dayton, 49 Mich. 137.

A complaint alleging that a banker, expert in making computations, in settling a complicated account with one who is incapable of making such computations, falsely and fraudulently made out an indebtedness to himself of $3450.05, when only $2000 was really due, and thereby obtained payment of the larger sum in known reliance upon his computation, is good on demurrer.

In such case the rule that one who deals with another in cases where there is no relationship of trust and confidence existing, must use ordinary deligence to protect his own interests, does not apply. Worley *v.* Moore, 77 Ind. 567.

Where a party agreed to a contract which bound him to manufacture and sell 2500 dozen pincers per year, and to pay thereon, quarterly, to the patentee, a royalty of $1.44 per gross, and the other party presented for execution what he claimed to be copies, which bound him to pay a royalty on 2,500 dozen pinchers per annum, at the rate of $1.44 per gross, *held*, that the variance or difference in

such respect was not so material as to import fraud or lead to the conclusion that, had the latter been fully read, the party executing the same would have refused to sign it. Livingston *v.* Strong, 107 Ill. 295.

In an action on a note given for the price of manipulated guano sold by plaintiffs to defendant, printed circulars and posters, publicly displayed and distributed, purporting to give the chemical analysis and ingredients of the guano sold by plaintiffs, are competent evidence for the defendant, as tending to show that these statements were part of the stipulations and inducements of the contract; and the fact that they were dated and distributed several years before the sale to the defendant does not affect their admissibility as evidence in the absence of proof of any change in the composition or manufacture. The sale to defendant having been made by plaintiffs' agent, it is competent for the defendant to prove that said agent, in making the sale, "told defendant that he had authority from plaintiffs to warrant theirs to be good guano." But such statement does not, as matter of law, amount to a warranty; and even if believed, it does not necessarily constitute a defence to an action on the note. Wilcox, Gibbs & Co. *v.* Henderson, 64 Ala. 535.

An answer to a suit upon a promissory note given to create an endowment fund for a college, alleging that the note was executed upon the representations of an agent of the college; that the institution was endeavoring to raise a fund sufficient to endow it with a free department for the education of the children of those who might contribute thereto; and that, unless a sufficient amount was subscribed to make tuition free to all such pupils, the note would not be required to be paid; that, believing such representations to be true, and for the purpose of providing free educational facilities for his children, the defendant executed the note; that it was never the intention of such college to endow such free scholarship, or to make tuition therein free to any one, or to provide a fund to afford free tuition to the defendant's children, or to any of the subscribers to such fund; and that such representations were false, and made for the purpose of deceiving him and inducing him to excute the note;—is sufficient on demurrer. Elsass *v.* Moore's Hill, etc., Inst., 77 Ind. 72.

A person who contracts to prepare a deed with full covenants is guilty of a fraud if he prepares a deed without covenants, and delivers it as prepared in accordance with the terms of the preliminary agreement. Bithell *v.* Bithell, 92 Ind. 318.

If a party's signature to a written instrument, he being illiterate and unable to read or write, is procured by fraudulent representations or practices on the part of the payee or grantee, the instrument thus signed being materially different from that which he intended to sign, and which he thought he was signing, this is fraud in the execution, and is available at law to defeat an action founded on the instrument. Davis *v.* Snider, 70 Ala. 315.

Where it does not sufficiently appear from the evidence that the attachment debtor purchased the goods in question with the intention of defrauding his vendors, it will not enable them to reclaim the goods from an attaching creditor. American Express Co. *v.* Smith, 57 Iowa, 242.

In an action for damages for fraudulent representations touching the financial condition of a third person, evidence of such representations to plaintiffs by defendant are admissible in evidence if they were the means of inducing the plaintiffs to part with their property, as in that case there would be a fraud coupled with an injury. Anderson *v.* McPike, 86 Mo. 293.

Complainants brought their bill against defendants to recover certain stock, or its value, the consideration of which was certain work performed by them in completing a railroad and a transfer to defendants of stock therein. Defendants sought relief by cross-bill, on the ground that they had been led to purchase such stock and make such contract by the representations of complainants that the road was free of encumbrances or debts, and that the object of the contract was to obtain a controlling interest in such road free and unencumbered, and operate the same in connection with their line, that the representations were false and fraudulent; that liens existed, and in fact the road had been sold thereunder. *Held*, that, to support such defence and entitle defendants to relief, it would be sufficient to show that the misrepresentations or suppression of facts were of such a nature that the property purchased was of no value to the purchasers for the purposes for which it was bought, or that the purchasers would not have bought had they had knowledge of the defect. The defence is not rendered nugatory by a failure to prove an actual sale under the existing liens. Southwestern R. Co. *v.* Papot, 67 Ga. 675.

(*a*) *Scienter.*—(See DECEIT, vol. 6, p. 318.) There is some conflict in the authorities upon the question of *scienter*. Some of the courts seem to have held that there can be no fraud unless the person making the representations knows of their falsity;[1] while many others hold that such knowledge may be unnecessary.[2] It is believed that it is sufficient, to constitute actionable fraud, so far as the question of knowledge is concerned, if the person making the misrepresentations had no knowledge and no belief upon the

In an action by the assignee of a non-negotiable promissory note given to one S. for the purchase-money of mining-stock, the court, in effect, found that the stock was of no value, and that the defendant was induced to purchase partly by misrepresentations made by S. and partly by information obtained from others; but that the defendant, by reasonable diligence and inquiry, might have known the representations to be untrue, and that S., though he knew them to be untrue, did not intend to defraud the defendant, because he believed the mine to be rich and the stock to be worth the money. *Held*, that the facts stated—in connection with an offer to rescind, made within a reasonable time—constituted a defence to the action. Bank of Woodland *v.* Hiatt, 58 Cal. 234.

Plaintiff and his horse had been expelled by the National Trotting Association, and there was evidence that the design of the transaction by which defendants came into possession was to deceive said association as to the present ownership of the horse and procure a revocation of such sentence of expulsion against it. Both parties claimed that the expulsion was wrongful; and there was no evidence to the contrary. *Held*, that these facts do not show any legal fraud such as would preclude plaintiff from recovering the possession. McKesson *v.* Sherman, 51 Wis. 303.

**Vigilantibus, Non Dormientibus, Jura Subveniunt.**—Where two persons, each acting in good faith, have separate and distinct contracts with a third party, of which each has full knowledge, and the parties all meet together for the execution of the separate contracts, and a loss occurs to one of the persons by the fraud of the third party, and thereon it is to be determined between the two who shall lose, the law will protect the more rather than the less vigilant. Robbins *v.* Todman, 28 Kan. 491.

**Fraud upon Courts.**—Fraud upon courts or in obtaining judgment is sometimes committed, and may be of such a nature as to render the judgment absolutely void or at least subject to be set aside by a proper proceeding. Dunlap *v.* Cody, 31 Iowa, 260; Derringer *v.* Morchino, 93 Ind. 495 (fraud in obtaining jurisdiction); Chicago Building Assoc. *v.* Haas, 111 Ill. 176; Murphy *v.* Smith, 86 Mo. 333; Otterson *v.* Middleton, 102 Pa. St. 78; Ward *v.* Southfield, 102 N. Y. 287; Nealis *v.* Dicks, 72 Ind. 374.

**Fraud by Agents.**—An agent, of course, is liable for his own fraud. Weber *v.* Weber, 47 Mich. 569; Kennedy *v.* McKay, 43 N. J. 288; Carpenter *v.* Lee, 5 Yerg. (Tenn.) 265; Campbell *v.* Hillman, 15 B. Mon. (Ky.) 508.

But his principal may also be liable, in many cases. If the principal knowingly receives the benefit or ratifies the fraud, all the authorities agree in holding him liable. Bowers *v.* Johnson, 18 Miss. 169; Elwell *v.* Chamberlain, 31 N. Y. 611, 619; Haskit *v.* Elliott, 58 Ind. 493; Hern *v.* Nichols, 1 Salk, 289; Bennett *v.* Judson, 21 N. Y. 238; Locke *v.* Stearns, 1 Metc. (Mass.) 560; British Bank Co. *v.* Charnwood R. Co., 18 Q. B. D. 715. And see Bigelow's Leading Cases on Torts, 23 *et seq.* But if the principal is innocent, his liability is more questionable, although the weight of authority seems to be that he is liable even in that case for the fraud of the agent committed in his interest in the scope of the employment. Hern *v.* Nichols, 1 Salk. 289; Barwick *v.* Eng. Joint Stock Bank, L. R. 2 Ex. 259; Wolfe *v.* Pugh, 101 Ind. 293; Law *v.* Grant, 37 Wis. 548; Jeffrey *v.* Bigelow, 13 Wend. (N. Y.) 518; White *v.* Sawyer, 16 Gray (Mass.), 586; Sandford *v.* Handy, 23 Wend. (N. Y.) 260. See, however, Bennett *v.* Judson, 21 N. Y. 238; Western Bank *v.* Addie, L. R. 1 H. L. Scotch, 145; and observations of Mr. Bigelow in Big. Lead. Cas. Torts, 24, 25.

1. See Wilcox *v.* Henderson, 64 Ala. 535; Chandler *v.* Lofus, 2 Cro. Jac. 4; Williams *v.* McFadden (Fla.), 1 So. Rep. 618; Holdom *v.* Ayer, 110 Ill. 498; Tone *v.* Wilson, 81 Ill. 534.

2. Lynch *v.* Mercantile Trust Co., 18 Fed. Rep. 486; Henderson *v.* R. Co., 17 Tex. 576; Ainslie *v.* Medlycott, 9 Ves. 21; Alvarez *v.* Brannan, 7 Cal. 503; s. c., 68 Am. Dec. 274; Munroe *v.* Pritchett, 16

subject, and recklessly made them with intent to deceive; or even if he supposed his representations to be true, but had no reason therefor, and nevertheless made them as of positively known facts, and thereby induced the person to whom they were made to act upon them to his damage.[1]

(*b*) *Who May Rely on Representations.*—Generally, no one but the party to whom they are made is entitled to rely on representations of another intended for him;[2] but where they are made to one to be communicated to another for the purpose of influencing the latter and not the former, there is no actionable fraud as to the former.[3] And where representations are made for the express purpose of influencing the public generally, and inducing any individual members thereof that may be so influenced as one of the public, to act upon them, whoever so receiving and relying upon them does act in the manner intended, may, if deceived thereby to his damage, treat them as a fraud upon himself.[4]

(*c*) *Duty of Party Deceived.*—Where a party can protect himself by ordinary care and prudence, he must do so; and if, with full means of knowledge, being equally able to judge of a matter for himself, he relies upon the representations of another with whom he stands on equal footing, without exercising the means of knowledge open to him, neither the courts of law nor courts of equity will relieve him from the effects of such folly.[5]

Ala. 785; s. c., 50 Am. Dec. 203; Lofer *v.* Robinson, 54 Tex. 511; Furnas *v.* Friday, 102 Ind. 129.

1. Cooley on Torts, 501; Hammett *v.* Emerson, 27 Me. 308; Weed *v.* Case, 55 Barb 534; Omrod *v.* Hurtle, 14 M. & W. 652; Munroe *v.* Pritchett, 16 Ala. 785; Taylor *v.* Ashton, 11 M. & W. 401; Beebe *v.* Knapp, 28 Mich. 53, 76; Fisher *v.* Mellen, 103 Mass. 503; Litchfield *v.* Hutchinson, 117 Mass. 195; Frenzel *v.* Miller, 37 Ind. 1; Bennett *v.* Judson, 21 N. Y. 238; Allen *v.* Hart, 72 Ill. 104; Bethell *v.* Bethell, 92 Ind. 318; West *v.* Wright, 98 Ind. 335; Humphrey *v.* Merriam, 32 Minn. 197; s. c., 22 N. W. Rep. 138; Busterud *v.* Farrington, 36 Minn. 320; s. c., 31 N. W. Rep. 360; Cooper *v.* Schlesinger, 111 U. S. 148; and authorities cited in last note *supra*.

This would certainly be sufficient for relief in equity in a proper case. 1 Story Eq. Jur. (3rd Ed.) § 193; 2 Pom. Eq. Jur § 887.

2. Savings Bank *v.* Albee, 63 N. H. 152; s. c., 56 Am. Rep. 501; Carter *v.* Harden, 78 Me. 528.

A misrepresentation to one in regard to the solvency of him who makes it, gives no right of action in favor of a third person against the first for injury by reason of the second repeating such statement to the third person, no relation of principal and agent existing between the latter and the person repeating the statement, and the latter not having been authorized to communicate the statement to the third person Rawlings *v.* Bean, 80 Mo. 614.

3. Wells *v.* Cook, 16 Ohio St. 67; McCracken *v.* West, 17 Ohio, 16.

But there may be as to the party to whom they were intended to be communicated. Chubbuck *v.* Cleveland (Minn.), 35 N. W. Rep. 362; Eaton *v.* Avery, 83 N. Y. 31, 34; Langridge *v.* Levy, 2 M. & W. 519; Carvill *v.* Jacks, 43 Ark. 454.

4. Holmes *v.* Harrington, 20 Mo. App. 661; Carvill *v.* Jacks, 43 Ark. 454; Pontifee *v.* Bignold, 3 M. & G. 63; Gerhard *v.* Bates, 2 El. & Bl. 476; Peek *v.* Gurney, L. R. 13 Eq. Cas. 79; s. c. 1 Moak, 567; Terwilliger *v.* Great West. Tel. Co., 59 Ill. 249; Booth *v.* Wonderley, 36 N. J. L. 250; Morse *v.* Swits, 19 How. Pr. 275; Denton *v.* G. N. R. Co., 25 L. J. Q. B. 129.

Fraud is frequently committed in this way by false statements of directors of a company or corporation, or by a false prospectus. Edgington *v.* Fitzmaurice, 29 Ch. Div. 459; Westervelt *v.* Demarest, 46 N. J. L. 37; s. c., 50 Am. Rep. 400; 2 Pom. Ex. Jur. § 881; Bradbury *v.* Barding, 35 Conn. 577; Wilcox *v.* Henderson, 64 Ala. 535.

5. 1 Story Eq. Jur. (3rd Ed.) §§ 199,

(*d*) *Parties on Unequal Footing.*—Where the parties stand on an unequal footing, and the one making the representations is an expert in the matter in hand, or has means of knowledge not open to the other, such representations, if false, will be fraudulent in many cases in which there would be no actionable fraud if the parties stood on the same footing.[1]

**2. Suppressio Veri, or Concealment,** will amount to fraud where the concealment is of material facts which one party is under some legal or equitable duty to communicate to the other, and which the latter has a right, *juris et de jure*, to know.[2] Where parties deal "at arm's length" on equal terms, and no peculiar relation of trust or confidence exists between them, there is usually no obligation to speak, and either may remain silent and be safe.[3]

200 *a*; Ætna Ins. Co. *v.* Reed, 33 Ohio St. 283; Slaughter *v.* Gerson, 13 Wall. 379; Brown *v.* Leach, 107 Mass. 364; Long *v.* Warren, 68 N. Y. 426; Parker *v.* Moulton, 114 Mass. 99; Vincent *v.* Berry, 46 La. 571; Chrysler *v.* Canady, 90 N. Y. 272; Mamlock *v.* Fairbanks, 46 Wis. 415; s. c., 1 N.W. Rep. 167; Poland *v.* Brownell, 131 Mass. 138; Schwabacher *v.* Riddle, 99 Ill. 343. *Compare* Redgrave *v.* Hurd, 20 Ch. Div. 1.

As between vendor and vendee in such cases, the rule is *caveat emptor*; and mere "dealing talk" or "puffing of goods" will not constitute fraud. Reynolds *v.* Palmer, 21 Fed. Rep. 433, and authorities collated in note by John D. Lawson; 1 Benj. on Sales (4th Am. Ed.), § 641; Veasey *v.* Daton, 3 Allen (Mass.), 380; Teague *v.* Irwin, 127 Mass. 216; Homer *v.* Perkins, 124 Mass. 431; Farrow *v.* Andrews, 69 Ala. 96.

1. Clough *v.* Adams 71, Ia. 17; s. c., 32 N. W. Rep. 10; Fishbach *v.* Miller, 15 Nev. 428; Schwenk *v.* Naylor, 102 N. Y. 683; s. c., 7 N. E. Rep. 788; Jackson *v.* Armstrong, 50 Mich. 65; s. c., 14 N. W. Rep. 702; Haygart *v.* Wearing, L. R. 12 Eq. 320; Allen *v.* Millison, 72 Ill. 201; Eaton *v.* Winnie, 20 Mich. 156; Mitchell *v.* Zimmerman, 4 Tex. 75; s. c., 51 Am. Dec. 717; Hanger *v.* Eirus, 38 Ark. 334.

This is the case where the property right is intangible, and the falsity of the representations could not be detected by inspection. Hicks *v.* Stevens, 121 Ill. 186.

Where one buys land covered at the time with snow, he may rely upon the representations of the vendor as to its productiveness. Martin *v.* Jordan, 60 Me. 531. So where the land is at a great distance, and it is impracticable to see it. Smith *v.* Richards, 13 Pet. 26, 42; Webster *v.* Bailey, 31 Mich. 36. To same effect, Jackson *v.* Armstrong, 50 Mich. 65; Rhoda *v.* Annis, 75 Me. 17; Griffin *v.* Farrier, 32 Minn. 474.

This principle also applies where the person defrauded is of weak mind, or was drunk at the time. Cain *v.* Warford, 33 Md. 23; Griffith *v.* Short, 14 Neb. 259; Shaw *v.* Ball, 55 Ia. 55; Spargur *v.* Hall, 62 Ia. 498.

2. Dambmann *v.* Schulting, 75 N. Y. 55, 62; Bench *v.* Sheldon, 14 Barb. (N. Y.) 66; Fox *v.* Mackreth, 2 Bro. Ch. R. 420; 1 Story Eq. Jur. (3d Ed.) § 207; Hadley *v.* Clinton County Importing Co., 3 Ohio St. 502; Juzan *v.* Toulmin, 9 Ala. 662; s. c., 44 Am. Dec. 448; Couvier *v.* Wardell, 22 N. J. Eq. 492.

"The concealment of a fact which one ought, as a legal duty, to disclose, is in law a fraudulent representation." Bishop on Contracts (Ed. 1887), § 660.

An executor, previous to and without reference to a sale, published false statements as to the value of stock belonging to the estate. He knew that the purchaser had seen them and had no means of detecting their falsity. *Held*, that his silence was fraudulent; that it avoided the sale; and that the purchaser might be reimbursed out of the estate for the purchase-price. Keen *v.* James, 39 N. J. Eq. 527; s. c., 51 Am. Rep. 29.

3. Archbold *v.* Lord Howth, L. R. Ir. 2 C. L. 608; People's Bank *v.* Bogart, 81 N. Y. 101, 108; Dambmann *v.* Schulting, 75 N. Y. 55; Law *v.* Grant, 37 Wis. 548; Fisher *v.* Budlong, 10 R. I. 1; Laidlaw *v.* Organ, 2 Wheat. (U. S.) 178; Ward *v.* Packard. 18 Cal. 391; Barnett *v.* Stanton, 2 Ala. 181; Kerr Fraud & Mist. (Bump's Ed.) 100; Allen's Appeal, 99 Pa. St. 196; N. Y. Cent. R. Co. *v.* Freloff, 100 U. S. 24.

Thus, in such case, it is no fraud for a purchaser to remain silent as to the existence of a mine upon the vendor's land, of which the latter is ignorant. Harris *v.*

But where one party knows that the other places a peculiar trust and confidence in him, or where they occupy a fiduciary relationship, there is usually an obligation to disclose all material facts; and silence or concealment thereof will, in such cases, constitute fraud.[1] So, where one "stands by" and hears false representations made about a matter in which he is interested, without correcting them where it is his duty to do so,[2] or remains silent while another asserts rights, which he knows are his own, to the prejudice of a third person, whom he thus allows to incur liability on the faith thereof, which would not have been incurred except for such silence, he will be estopped on the ground of fraud from afterwards setting up such rights as against that person.[3] And there are numerous cases in which the rule is applied where there are latent defects or circumstances materially affecting the subject-matter of a sale, known to the seller, and incapable of being discovered by the purchaser, who has not equal means of knowledge.[4]

Tyson, 24 Pa. St. 347; Williams *v.* Spurr, 24 Mich. 335; 1 Story Eq. Jur. § 147. *Compare* Bowman *v.* Bates, 2 Bibb (Ky.), 47; Williams *v.* Beazley, 3 J. J. Marsh. (Ky.) 578.

1. Emmons *v.* Moore, 85 Ill. 304; Young *v.* Hughes, 32 N. J. Eq. 372; Brown *v.* Montgomery, 20 N. Y. 287; Pillage *v.* Armitage, 12 Ves. 78; Pidlock *v.* Bishop, 3 Barn. & Cres. 605; 2 Pom. Eq. Jur. § 902.

This is the rule in case of family settlements and compromises. Gordon *v.* Gordon, 2 Swanst. R. 399, 463; Story Eq. Jur. § 217.

So as between partners. Maddeford *v.* Austwick, 1 Sim. R. 89. And so as between attorney and client, trustee and *cestui que trust*, and all those occupying fiduciary relationship of the same general character. 1 Story Eq. Jur. § 218.

When a legatee by silent acquiescence encourages a testator to make a devise or bequest to him, to be by him applied for the benefit of others, it has the force of an express promise, and amounts to fraud if he does not act or intend to act accordingly. Matter of Will of O'Hara, 95 N. Y. 403; Russell *v.* Jackson, 10 Hare 204; Schultz's Appeal, 80 Pa. St. 405.

2. Shepherd *v.* Sharpe, 4 L. T. 270; Davies *v.* Davies, 6 Jur. (N. S.) 1322; 1 Story Eq. Jur. (3d Ed.) § 384; Lee *v.* Munroe, 7 Cranch, 366, 368.

3. Michigan, etc., Co. *v.* Purcell, 38 Mich. 475, 480; Kent *v.* Quicksilver-mining Co., 78 N. Y. 159; Storrs *v.* Barker, 6 Johns. Ch. (N. Y.) 166, 169; Wendell *v.* Van Rensselaer, 1 Johns. Ch. (N. Y.) 344; Thompson *v.* Sanborn, 11 N. H. 201; Olliver *v.* King, 8 D. M. & G. 118; Pickard *v.* Sears, 6 Adol. & Ell. 474. See Chellis *v.* Coble (Kan.), 15 Pac. Rep. 505; Bigelow on Estoppel (4th Ed.), 544.

But silence will have this effect only where it amounts to fraud. Nevin *v.* Belknap, 2 Johns. (N.Y.) 373; Folk *v.* Birdelmar, 6 Watts (Pa.), 339; Devereux *v.* Burgwyn, 5 Ired. Eq. (N. Car.) 351.

It is said to be essential to the operation of this rule that: (1) The conduct of the party must be wilful, that is, with knowledge of his rights, or with intent to deceive; (2) he must at least be aware that he is giving countenance to the alteration of conduct by the other party; and (3) it must appear that the other party has changed his position by reason thereof. Kerr Fraud & Mist., note by Mr. Bump, 128, citing Copeland *v.* Copeland, 28 Me. 525; Morton *v.* Hogdon, 32 Me. 127; Morris *v.* Moore, 11 Humph. (Tenn.) 433; Taylor *v.* Zipp, 14 Mo. 482; Carpenter *v.* Stillwell, 12 Barb. (N. Y.) 128; Eldred *v.* Hazlett, 33 Pa. 307.

4. Mellish *v.* Motteux, Peake, 156; Smith *v.* Harrison, 26 L. J. Ch. 412; Solomon *v.* Honeywood, 12 W. R. 572; Prout *v.* Roberts, 32 Ala. 427; Turner *v.* Huggins, 14 Ark. 21; Glasscock *v.* Muion, 11 Mo. 655; Cecil *v.* Spurger, 32 Mo. 462; Lunn *v.* Shermer, 93 N. Car. 164.

When one pays money in ignorance of circumstances with which the receiver is acquainted but does not disclose, and which, if disclosed, would have avoided the payment, the receiver acts fraudulently, and the money may be recovered back. George *v.* Taylor, 55 Tex. 97.

Knowledge and concealment by the vendor, of the fact that a horse is blind, may amount to a positive fraud, which will avoid a sale, even though there was

(*a*) *Concealment by Buyers on Credit.*—One of the most common cases of *suppressio veri* is that of the buyer who conceals his bad financial condition in order to obtain credit. One who buys on credit without evil design is not bound to volunteer a statement of his financial condition where no questions are asked.[1] But where one who is insolvent buys on credit, with the intention or preconceived design of not paying for what he buys, he is guilty of fraud.[2]

**III. CONSTRUCTIVE FRAUD.**—Constructive or legal fraud may exist (1) where some settled rule of public policy is violated, or (2) where the parties occupy some special confidential or fiduciary relation. To the former class belong marriage brokage contracts,[3] conditions and contracts in restraint of marriage,[4] agreements not

no express warranty. Dowling *v.* Laurence, 58 Wis. 282.

When a creditor sues to recover damages for fraud, retaining what he has received in the compromise about which the fraud was practised, he thereby affirms the compromise; and the damages which he is entitled to recover is the amount he would have received had no fraudulent concealment been made (following Page *v.* Wells, 37 Mich. 421, and other cases cited in opinion). Grabenheimer *v.* Blum, 63 Tex. 369.

For concealment in applications for insurance, see Clark *v.* Union Mut. Ins. Co., 40 N. H. 333; s. c., 77 Am. Dec. 721; Locke *v.* N. Am. Ins. Co., 13 Mass. 61.

1. Talcott *v.* Henderson, 31 Ohio St. 162; s. c., 27 Am. Rep. 501; *Ex parte* Whittaker, L. R. 10 Ch. App. 446; Nichols *v.* Pinner, 18 N. Y. 295; Reddington *v.* Roberts, 25 Vt. 686; Klopenstein *v.* Mulcahy, 4 Nev. 296; Garbutt *v.* Bank, 22 Wis. 384; Belding *v.* Frankland, 8 Lea (Tenn.), 67; Mears *v.* Waples, 3 Houst. (Del.) 581.

Where, however, a person desiring credit, on being asked "how he stood," correctly stated the sum of money invested in his business and the amoun of property, but was silent as to the fact that he was largely indebted to others and owed about two thirds as much as he possessed, this concealment was held a fraud; the court saying: "To tell half a truth only is to conceal the other half. Concealment of this kind, under the circumstances, amounts to a false representation." Newell *v.* Randall, 32 Minn. 171; s. c., 50 Am. Rep. 562.

2. Ayres *v.* French, 41 Conn. 142; Ross *v.* Miner (Mich.), 35 N. W. Rep. 60; Donaldson *v.* Farwell, 93 U. S. 631; Stewart *v.* Emerson, 52 N. H. 301; Burrill *v.* Stevens, 73 Me. 395; Mulliken *v.* Millar, 12 R. I. 296; Fox *v.* Webster, 46 Mo. 181; Peters *v.* Hilles, 48 Md. 506, 512; Shipman *v.* Seymour, 40 Mich. 274; Buckley *v.* Archer, 21 Barb. 585; Wright *v.* Brown, 67 N. Y. 1; Kline *v.* Baker, 99 Mass. 253; Davis *v.* McWhirter, 40 U. C. Q. B. 598; 1 Benj. on Sales (4th Am. Ed.), 576. *Compare* Smith *v.* Smith, 21 Pa. St. 367; Backenton *v.* Speicher, 31 Pa. St. 324; Bell *v.* Ellis, 33 Cal. 620, 626, overruling Seligman *v.* Kalkman, 8 Cal. 207; Wilson *v.* White, 80 N. Car. 280.

Fraud may be inferred where the buyer pays for his purchase in counterfeit money or in property to which he has no title. Williams *v.* Given, 6 Gratt. (Va.) 268; Manning *v.* Albee, 11 Allen (Mass.), 523.

So where he immediately sells the goods at a lower price, and makes an assignment or absconds. Byrd *v.* Hall, 41 N. Y. (2 Keyes) 646; Ferguson *v.* Carrington, 9 Barn. & Cress. 59; Davis *v.* McWhirter, 40 U. C. Q. B. 598.

So from other contemporaneous fraudulent dealings. Hennequin *v.* Naylor, 24 N. Y. 139; Mulliken *v.* Millar, 12 R. I. 296.

3. Scott *v.* Tyler, 2 Eq. Lead. Cas. (4th Am. Ed.) 494, 499, note; Boynton *v.* Hubbard, 7 Mass. 112; Hall *v.* Potter, 3 Lev. 412; Cole *v.* Gibson, 1 Ves. 503; Johnson *v.* Hunt, 81 Ky. 321.

4. Chalfont *v.* Payton, 91 Ind. 202; Lowe *v.* Peers, 4 Burr. 2225; Phillips *v.* Medbury, 7 Conn. 568.

A marriage benefit contract of insurance is void as a wagering contract. James *v.* Jellison, 94 Ind. 292.

The authorities on conditions and limitations in restraint of marriage annexed to testamentary or other gifts are collated and classified in 2 Pom. Eq. Jur. § 933, and notes.

to bid at public auction,[1] and various other kinds of contracts to evade the law or in violation of public trust and confidence.

1. **Fraud in Fiduciary Relations.**—"Because every fiduciary relation implies a condition of superiority held by one of the parties over the other, in every transaction between them by which the superior party obtains a possible benefit, equity raises a presumption against its validity, and casts upon that party the burden of proving affirmatively its compliance with equitable requisites, and of thereby overcoming the presumption."[2] Where two parties occupying such a relation, knowingly and intentionally deal with each other, the presumption of fraud or invalidity of the transaction is rebuttable by clear evidence of good faith, knowledge, and uninfluenced consent.[3] But where the party holding the superior relation of trust and confidence, in his fiduciary character, deals with himself in his personal and individual capacity, without the knowledge of the other party, the presumption is conclusive, and the transaction is absolutely voidable at the suit of the beneficiary.[4] These rules are applied with more or less strictness to all the well-known cases of legal or technical fiduciary relationship, such as that of attorney and client, trustee and *cestui que trust*, principal and agent, guardian and ward, and the like.[5] The principle also extends to "every possible case in which a fiduciary relation exists as a fact—in which there is confidence reposed on one side, and the resulting superiority and influence on the other."[6]

1. Weld *v.* Lancaster, 56 Me. 453; Atcheson *v.* Mallon, 43 N. Y. 147; Plaster *v.* Burger, 5 Ind. 232; Jones *v.* Caswell, 3 Johns. Cas. 29; Cocks *v.* Izard, 7 Wall. 559.

For illustrations, see Meguire *v.* Corwine, 11 Otto (U. S.), 108 (agreement to procure appointment as counsel in suits against U. S., for share of fee); Gaston *v.* Drake, 14 Nev. 175 (agreement to share salary of office in return for influence); Guernsey *v.* Cook, 120 Mass. 501; Marshall *v.* Balt. & Ohio R. R., 16 How. (U. S.) 314; Tool Co. *v.* Norris, 2 Wall. 45; Cook *v.* Frendenthal, 80 N. Y. 202.

2. 2 Pom. Eq. Jur. § 956. See also Atkins *v.* Withers, 94 N. Car. 581 "Wherever two persons stand in such a relation that, while it continues, confidence is necessarily reposed by one, and the influence which naturally grows out of that confidence is possessed by the other, and this confidence is abused, or the influence is exerted to obtain an advantage at the expense of the confiding party, the person so availing himself of his position will not be permitted to retain the advantage, although the transaction could not have been impeached if no such confidential relation had existed." *Per* Lord Chelmsford, in Tate *v.* Williamson, L. R. 2 Ch. 55, 60.

The phrases "confidential relation" and "fiduciary relation" are convertible terms. Robins *v.* Hope, 57 Cal. 493.

3. Coles *v.* Trecothick, 9 Ves. 234, 246; Spencer & Newbold's Appeal, 80 Pa. St. 317; Sallee *v.* Chandler, 26 Mo. 124.

4. Thus a trustee cannot sell the trust property to himself, nor buy his own for the purposes of his trust. Smith *v.* Frost, 70 N. Y. 65; Connolly *v.* Hammond, 51 Tex. 635; Union Slate Co. *v.* Tilton, 69 Me. 244; Tracy *v.* Colby, 55 Cal. 67; Stephen *v.* Beall, 22 Wall. 329; Brown *v.* Cowell, 116 Mass. 461.

So in case of an agent thus dealing, as such, with his own property or for himself. Nenendorff *v.* World, etc., Ins. Co., 69 N. Y. 389; Krutz *v.* Fisher, 8 Kan. 90; Hobday *v.* Peters, 28 Beav. 349; Bennett *v.* Austin, 81 N. Y. 308; Grumley *v.* Webb, 44 Mo. 444; Ewell's Evans on Agency, 262 *et seq.*; Rorer on Judic. Sales (2d Ed.), § 413.

5. See these titles in this work. Also 2 Pom. Eq. Jur. § 958 *et seq.*; 1 Story's Eq. § 307 *et seq.*; Hovenden on Fraud, *27 *et seq.*; Kerr on Fraud & Mist. (Bump's Ed.) 150 *et seq.*; Ewell's Evans on Agency, ch. 3, *254, *et seq.*; Bigelow's Law of Fraud (1888), 265 *et seq.*

6. 2 Pom. Eq. ur. § 956. See also Van Epps *v.* Van Epps, 9 Paige (N. Y.),

237; Bisph. Eq. § 93; Keech *v.* Sandford, 1 Lead. Cas. in Eq. 53, note.

**Attorney and Client.** — Dealings between attorney and client, such as gifts, conveyances, and contracts by the client, including securities given by him during the continuance of the relation, are carefully scrutinized. Gray *v.* Emmons, 7 Mich. 533; Jennings *v.* McConnell, 17 Ill. 148; Wells *v.* Middleton, 1 Cox, 112; Harris *v.* Tremenbere, 15 Ves. 84. And the burden is upon the attorney, where he seeks to uphold the transaction, to show the utmost good faith. Weeks on Attys. § 268; Rogers *v.* Marshall, 3 McCrary (U. S.), 76; Savery *v.* King, 5 H. L. Cas. 655; Condit *v.* Blackwell, 22 N. J. Eq. 481.

An attorney cannot, without his client's consent, buy an adverse title to which his employment relates. 101 U. S. 494.

Where, however, there is no fraud, but the utmost good faith, gifts and contracts between attorney and client may be upheld. Wohnsey *v.* Booth, 2 Atk. 40; Yeamans *v.* James, 27 Kan. 195.

**Principal and Agent.**—An agent to buy cannot buy his own property for his principal. Taussig *v.* Hart, 58 N. Y. 425; Conkey *v.* Bond, 36 N. Y. 427; Tewksbury *v.* Spruance, 75 Ill. 187; Bischoffsheim *v.* Baltzer, 20 Fed. Rep. 890.

Nor can an agent to sell purchase his principal's property for himself. Adams *v.* Sayre, 70 Ala. 318; Marsh *v.* Whitmore, 21 Wall. (U. S.) 178; Ruckman *v.* Berghotz, 37 N. J. L. 437; Bain *v.* Brown, 56 N. Y. 285. Nor for a firm of which he is a member. Francis *v.* Kerker, 85 Ill. 198. Nor the agent's clerk in such case. Gardner *v.* Ogden, 22 N. Y. 327; s. c., 78 Am. Dec. 192; Newcomb *v.* Brooks, 16 W. Va. 32. (See AGENCIES).

So an officer of a corporation may not act for himself as against the corporation in matters affecting his trust. Hoffman, etc., Co. *v.* Cumberland, etc., Co., 16 Md. 456; Bliss *v.* Matteson, 45 N. Y. 22; March *v.* Eastern R. Co., 43 N. H. 515; Charitable Corporation *v.* Sutton, 2 Atk. 400; Jackson *v.* Ludeling, 21 Wall. (U. S.) 616; Paine *v.* Lake Erie, etc., R. Co., 31 Ind. 238.

If the managers of a corporation knowingly exceed their powers, this is a species of fraud for which relief may be had in equity. Cooley on Torts, 518; Ship's Case, 2 De G. J. & S. 544.

Where directors of a corporation bought a steamboat from a ferry company composed of themselves, for a sum greatly in excess of the cost of the boat and repairs, this was held a fraud for which they were answerable to the purchasing corporation, although they had instructed their treasurer to pay only the cost of the boat and repairs. Parker *v.* Nickerson, 112 Mass. 195.

Directors will not be allowed to avail themselves of a mortgage which they have obtained from the corporation, so as to gain an undue advantage. Koehler *v.* Black River Falls Iron Co., 2 Black (U. S.), 715.

A member of a board of directors cannot act as such in allowing a bill presented by himself for extra compensation. But a director may purchase the shares of a stockholder where he is guilty of no actual fraud. Carpenter *v.* Danforth, 52 Barb. (N. Y.) 581; Tippecanoe Co. *v.* Reynolds, 44 Ind. 509.

An agreement for a mere colorable subscription to induce others to sign is fraudulent, and the subscription may be enforced. New Albany, etc., R. Co. *v.* Fields, 10 Ind. 187.

**Trustees.**—"The case of a trustee is the representative illustration of those in which the law demands the utmost good faith because of confidential relations." Cooley on Torts, 523.

He must not deal in the trust fund for his own benefit. If he does so without the consent of the *cestui que trust*, the transsction is invalid as against the latter regardless of good or bad faith on the part of the trustee. Dwight *v.* Blackmar, 2 Mich. 330; Sheldon *v.* Rice, 30 Mich. 296; Hammond *v.* Stanton, 4 R. I. 65; Terwilliger *v.* Brown, 44 N. Y. 237.

Where he deals directly with the beneficiary, the presumption is also against him, but it i snot conclusive; and if he can show an adequate consideration and fair dealing after putting the beneficiary upon an equal footing with himself, the transaction may be upheld. Spencer and Newbold's Appeal, 80 Pa. St. 317; Pugh *v.* Bell, 1 J. J. Marsh. (Ky.) 399; Jones *v.* Smith, 33 Miss. 215; Graves *v.* Waterman, 63 N. Y. 657.

**Guardian and Ward.**—The relation of guardian and ward is a fiduciary relation to which substantially the same rules apply. Berkmeyer *v.* Kellerman, 32 Ohio St. 239; s. c., 30 Am. Rep. 577; Bond *v.* Lockwood, 33 Ill. 212. *In re* Steele 65 Ill. 322; Ferguson *v.* Lowery, 54 Ala. 510; s. c., 25 Am. Rep. 718.

**Executors and Administrators.** — Like principles apply in case of an executor or administrator. Hall *v.* Hallet, 1 Cox, 134; Devoe *v.* Fanning, 2 Johns. Ch. (N. Y.) 252; Swayze *v.* Burk, 12 Pet. (U.

Where such a fiduciary or confidential relation has once existed, its influence may not pass away immediately upon the termination of the relation; and dealings or transactions between the parties within a short time thereafter will be closely scrutinized.[1]

**IV. DURESS AND UNDUE INFLUENCE.**—Duress is a species of fraud in which compulsion in one form or another takes the place of mere deception.[2] Mere threats which cause no real apprehension of harm are not sufficient to constitute duress;[3] but they will do so where they cause reasonable apprehension of great bodily harm,[4] or unlawful imprisonment.[5]

Undue influence is "any improper or wrongful constraint, machination, or urgency of persuasion whereby the will of a person is overpowered, and he is induced to do or forbear an act which he would not do, or would do, if left to act freely."[6] It

S.) 11; Humphreys *v.* Burleson, 72 Ala. 1; Landis *v.* Saxton, 89 Mo. 375; West *v.* Waddill, 33 Ark. 575.

**Other Confidential Relations.**—Dealings between the following classes of persons are carefully scrutinized, viz.: Physician and patient,—Cadwallader *v.* West, 48 Mo. 483; Billage *v.* Southee, 9 Hare, 534;—priest and penitent,—Huguenin *v.* Basely, 14 Ves. 273; *In re* Welsh, 1 Redf. So. Rep. 238; Lyon *v.* Howe, L. R. 6 Eq. Cas. 655;—partners, in some cases,—Pomeroy *v.* Benton, 77 Mo. 64;—and joint purchasers,—Hodge *v.* Twitchell, 33 Minn. 389; King *v.* Wise, 43 Cal. 629; so as to assignees,—*Ex parte* Reynolds, 5 Ves. 707;—receivers,—Eyre *v.* McDonald, 15 Ir. Ch. 334;—directors,—Hoffman Steam Coal Co. *v.* Cumberland, etc., Co., 16 Md. 456; Benson *v.* Heathorn, 1 Y. & C. C. C. 326;—arbitrators,—Blennerhassett *v.* Day, 2 Ba. & Be. 116;—a *prochein ami*,—Collins *v.* Smith, 1 Head (Tenn.), 251;—and in many other cases,—Kerr on Fraud and Mist. (Bump's Ed.) 162; Huguenin *v.* Basely, 2 White & T. Lead. Cas. 556 and note; 1 Storey Eq. Jur.

A beneficiary who drafts a will must show good faith on his part and full understanding by the trustee. Breed *v.* Pratt, 18 Pick. 115; Adair *v.* Adair, 30 Ga. 102.

An insurance company cannot take advantage of errors or omissions of their agents in preparing a policy or contract. Bidwell *v.* N. W. Ins. Co., 24 N. Y. 302; Clark *v.* Union, etc., Co., 40.

The relationship of first cousin is not a fiduciary relation. Robins *v.* Hope, 57 Cal. 493. (See FIDUCIARY RELATIONS).

**1.** Hatch *v.* Hatch, 9 Ves. 292; Ranken *v.* Patton, 65 Mo. 378, 413; Berkmeyer *v.* Kellerman, 32 Ohio St. 239; s. c., 30 Am. Rep. 577.

But when the agent or trustee has fully discharged his trust in good faith and sold the property to a third person, he or his wife may afterwards acquire it from such third porson. Walker *v.* Carrington 74 Ill., 446.

**2.** "Duress is an actual or threatened violence or restraint of a man's person, contrary to law, to compel him to enter into a contract, or to discharge one." 1 Bouv. Law Dict., tit. "Duress." Approved in King *v.* Williams, 65 Iowa, 167.

"Duress is any unlawful physical force, applied or threatened to the person of the party, or the party's husband, wife, parent, or child, through constraint of which he, in form, consents to what he otherwise would not." Bishop on Cont. (Ed. 1887) § 715.

Duress of goods occurs where property of another is wrongfully seized or withheld, and something extorted as a condition of its release. Spaids *v.* Barrett, 57 Ill. 289; s. c., 11 Am. Rep 10; Radick *v.* Hutchins, 59 U. S. 210; Chandler *v.* Sanger, 114 Mass. 364; s. c., 19 Am. Rep. 367.

A threat to attach property for a claim not yet due is no duress. Lehman *v.* Shackleford, 50 Ala. 437.

**3.** Harmon *v.* Harmon, 61 Me. 227; s. c., 14 Am. Rep. 556; Feller *v.* Green, 26 Mich. 70.

**4.** Baker *v.* Morton, 12 Wall. (U. S.) 150; Bogle *v.* Hammons, 2 Heisk. (Tenn.) 136; Adams *v.* Stringer, 78 Ind. 175; Bosley *v.* Shanner, 26 Ark. 280; Moore *v.* Adams, 8 Ohio, 372; s. c., 32 Am. Dec. 723.

**5.** Bane *v.* Detrich, 52 Ill. 19; Clinton *v.* Strong, 9 Johns. 370; Eddy *v.* Herrin, 17 Me. 338; s. c., 35 Am. Dec. 261; Moore *v.* Adams, 8 Ohio, 372; s. c., 32 Am. Dec. 723; Sartwell *v.* Horton, 28 Vt. 370.

**6.** 2 Abb. L. Dict. 615, tit. "Undue Influence."

generally occurs where one of the parties is weak in intellect or so situated or related to the other as to be peculiarly under his influence. "It matters not what the relation is, if confidence is reposed and influence obtained."[1] (For a more extended consideration of this subject, see titles DURESS, vol. 6, p. 57; UNDUE INFLUENCE.)

**V. REMEDIES.**—The following remedies for fraud are said by Mr. Pomeroy to be "possible at law:" (1) An action to recover damages for the injury sustained by the deceit; (2) the affirmative relief of rescission, whereby the defrauded party may treat a contract procured by fraud as rescinded, and recover, in a proper action, that of which he has been defrauded; (3) relief by way of setting up

1. Seevers, C.J., in Leighton *v.* Orr, 44 Iowa, 679, 689.

Wills (Thompson *v.* Hawks, 14 Fed. Rep. 902; Allmon *v.* Pigg, 82 Ill. 149; Kessinger *v.* Kessinger, 37 Ind. 341; 1 Redf. on Wills, 518, *et seq.*), contracts (Allove *v.* Jewell, 94 U. S. 506; 1 Whart. Cont. § 161; Wald's Pollock on Cont. *557, *558), and other transactions are often set aside because of undue influence. See Coburn *v.* Van Velzer, 11 Fed. Rep. 795; Small *v.* Small, 4 Greenl. (Me.) 220; s. c., 16 Am. Dec. 253, note, 257; King *v.* Cummins (Vt.), 11 Atl. Rep. 727.

As in cases of fiduciary relations, the presumption of fraud arises, so in cases of a similar nature involving confidential relations or superiority and excessive power on one side, and weakness or partial incapacity on the other, the mere relation itself in some cases, or the relation and slight additional circumstances in others, will raise a presumption of undue influence in transactions for the benefit of the stronger party, and cast on him the burden of showing fairness on his part and freedom of the other from undue influence. This rule has been applied in the following cases: Between parent and child,—Ashton *v.* Thompson, 32 Minn. 25; Miskey's Appeal, 107 Pa. St. 611; Miller *v.* Simonds, 27 Mo. 669; Wood *v.* Rabe, 96 N.Y. 414;—parties engaged to marry,—Lovesy *v.* Smith, 15 Ch. D. 655; Rockafellow *v.* Newcomb, 57 Ill. 186; *compare* Atkins *v.* Withers, 94 N. Car. 581;—husband and wife,—Boyd *v.* De la Montagnie, 73 N.Y. 498; Farmer *v.* Farmer, 39 N. J. Eq. 211; *compare* Shipman *v.* Shipman, 69 Ala. 555, 564;—priest and member of church,—Ford *v.* Hennersy, 70 Mo. 580; Marx *v.* McGlynn, 88 N. Y. 357; Hueguenin *v.* Baseley, 14 Ves. 273. The rule has also been applied to a step-father acting as guardian. Bradshaw *v.* Yares, 67 Mo. 221. And, in a modified degree, where the relation of brother and sister exist. Gillespie *v.* Holland, 40 Ark. 28; Williams *v.* Williams, 63 Md. 371. So where one of the parties is very old and feeble, illiterate, weak-minded, or intoxicated, very slight additional circumstances of suspicion will cast the burden on the other party. Spargur *v.* Hall, 62 Iowa, 498; Wildrick *v.* Swain, 34 N. J. Eq. 167; Reed *v.* Peterson, 91 Ill. 288; Trambly *v.* Ricard, 130 Mass. 259; Selden *v.* Myers, 20 How. (U. S.) 506; Moore *v.* Moore, 56 Cal. 89; Davis *v.* Dean, 66 Wis. 100; Wartemberg *v.* Spiegel, 31 Mich. 400; Birdsong *v.* Birdsong, 2 Head (Tenn.), 289; Samuel *v.* Marshall, 3 Leigh (Va.), 567. See also, as to the presumption of undue influence generally, Fisher *v.* Bishop, 108 N. Y. 25; Stout *v.* Smith, 98 N. Y. 25; s. c., 50 Am. Rep. 632; Woodbury *v.* Woodbury, 141 Mass. 329; s. c., 55 Am. Rep. 479; Worrall's Appeal, 110 Pa. St. 349; Drake's Appeal, 45 Conn. 9; Pressley *v.* Kemp, 16 S. Car. 334; s.c., 42 Am. Rep. 635.

Where an old lady was induced by the defendant, acting as a spiritual medium, to adopt him and to transfer to him a large amount of property by gift and by will, it was held, in a suit by her to set aside such gifts, that the burden was upon the defendant to show that plaintiff's acts were entirely voluntary and well understood by her; and as he failed to do this, she recovered judgment. Lyon *v.* Home, L. R., 6 Eq. 655. See also observations of Irving Browne on the plot of Mr. Besant's last novel, "Herr Paulus," which turns on a similar question. 37 Alb. L. J. 245.

So, where one living in illicit sexual relation with another makes a large gift to her, to the exclusion of the natural objects of his bounty, the burden will be cast, in equity, upon the recipient to show that the gift was voluntary, and not induced by fraud or undue influence. Shipman *v.* Furniss, 69 Ala. 555. See also Leighton *v.* Orr, 44 Iowa, 679; Dean *v.* Negley, 41 Pa. St. 312; Kessinger *v.* Kessinger, 37 Ind. 341.

the fraud as a defence to any action brought to enforce the fraudulent obligation.[1] In equity, relief upon the ground of fraud may be obtained: (1) By a suit to cancel or set aside the fraudulent instrument or obligation, and restore the defrauded party to his original rights; (2) by reformation of a written instrument; (3) by pecuniary recovery where the liability arose from fraud of the other party and no cancellation is necessary; and (4) by setting the fraud up in defence of an action to enforce the apparent obligation or liability.[2] It is often said that courts of law and courts of equity have concurrent jurisdiction in cases of fraud;[3] and to a certain extent this is true, but the following distinctions should be observed: (1) Where the primary right, interest, or estate of the plaintiff is equitable merely, courts of equity have exclusive jurisdiction, which will always be exercised in proper cases; (2) where the right, interest, or estate is legal and the remedy sought is equitable, jurisdiction exists, but will not always be exercised; (3) where the right is legal and the remedy pecuniary and legal, jurisdiction is concurrent, and only exists in courts of equity where the remedy at law is inadequate.[4] It will be seen, therefore, that in many cases the defrauded party has an election of remedies;[5] but he will not ordinarily be permitted to pursue them concurrently, and, having elected one, he may thus preclude himself from pursuing another.[6]

1. 2 Pom. Eq. Jur. § 872. See also Kerr Fraud & Mist. (Bump's Ed.), 324 *et seq.*

In Zabriskie *v.* Smith, 13 N.Y. (3 Kern.) 322; s. c., 64 Am. Dec. 551, it is held that a cause of action for damages for deceit does not survive and is not assignable; but it would seem otherwise under the *New York* statute. Jackson *v.* Daggett, 24 Hun, 205; Haight *v.* Hayt, 19 N. Y. 464. And, in *Missouri*, it survives. Baker *v.* Crandall, 78 Mo. 584; s. c., 47 Am. Rep. 126.

2. 2 Pom. Eq. Jur. § 872. This is substantially the classification of Mr. Pomeroy; but it does not seem to include *specific performance*, which would certainly seem to be an equitable means of relief in some cases. See also Kerr on Fraud & Mist. (Bump's Ed.) 332 *et seq.* So, an injunction may some times be obtained in aid of other relief.

3. Brewer *v.* Harris, 2 Smed. & M. (Miss.) 83; s. c., 41 Am. Dec. 587; Smith *v.* McIver, 9 Wheat. (U. S.) 532; Gilbert *v.* Burgott, 10 Johns. (N. Y.) 457; Ferrall *v.* Bradford, 2 Fla. 508; s. c., 50 Am. Dec. 293; Jamison *v.* Beaubien, 3 Scam. (Ill.) 113; s. c., 36 Am. Dec. 534.

4. 2 Pom. Eq. Jur. §§ 911, 913. See also, as to jurisdiction and its limitation in such cases, Grand Chute *v.* Winegar, 15 Wall. 373; Wampler *v.* Wampler, 30 Gratt. (Va.) 454; Miller *v.* Scammon, 52 N. H. 609; Bassett *v.* Brown, 100 Mass. 355; Williams *v.* Mitchell, 30 Ala. 299; Learned *v.* Holmes, 49 Miss. 290.

5. For illustrations, see Neblett *v.* Macfarland, 92 U. S. 101; Rawlins *v.* Wickham, 3 De G. & J. 304, 321; Bacon *v.* Bronson, 7 Johns. Ch. 194; Lindsley *v.* Ferguson, 49 N. Y. 626; Parker *v.* Marquis, 64 Mo. 38; Dietz *v.* Sutcliffe, 80 Ky. 650; Neff *v.* Landis (Pa.), 1 Atl. Rep. 177

6. Potter *v.* Titcomb, 22 Me. 300; Farmer's Bank *v.* Groves, 12 How. (U. S.) 51; Cobb *v.* Hatfield, 46 N. Y. 536; Schiffer *v.* Dietz, 83 N. Y. 308; Moller *v.* Tuska. 87 N. Y. 166. But concurrent remedies may be pursued in some cases where not inconsistent. Bigelow's Law of Fraud (1888), 63.

He cannot ordinarily affirm in part and rescind in part; but if he elects to rescind, must do so *in toto*. Nichols *v.* Pinner, 18 N. Y. 312; Joslin *v.* Cowee, 52 N. Y. 90. *Compare* Roth *v.* Palmer, 27 Barb. 652. A vendor cannot treat a sale as valid and maintain an action for the purchase-price, and at the same time repudiate it for fraud and recover the goods from a third person holding them by assignment for value. Lloyd *v.* Brewster, 4 Paige Ch. (N. Y.) 537; s. c., 27 Am. Dec. 88; Bank *v.* Beale, 34 N. Y. 475. See also Burgett *v.* Teal, 91 Ind. 260; Kellogg *v.* Turpie,

93 Ill. 265; Strong *v.* Strong, 102 N. Y. 69.

If a vendor sues on the contract, for the price of his goods, he thereby affirms the contract, and cannot afterwards claim title thereto on the ground of fraud in the contract. Dibblee *v.* Sheldon, 10 Blatch. 178; O'Donald *v.* Constant, 82 Ind. 212; Walsh *v.* Scisson, 49 Mich. 423. And after suit is begun in such case, he cannot, even by discontinuance, disaffirm the contract. Butler *v.* Hildreth, 5 Metc. (Mass) 49; Bulkley *v.* Morgan, 46 Conn. 393.

So, receiving the benefits of a contract, or otherwise ratifying it, with knowledge of the fraud, will estop a disaffirmance thereafter. Gregory *v.* Schœnel, 55 Ind. 101; Southern Life Ins. Co. *v.* Lanier, 5 Fla. 110; s. c., 58 Am. Dec. 448; Jackson *v.* Jackson, 47 Ga. 99; Evans *v.* Foreman, 60 Mo. 449; Livingston *v.* Strong, 107 Ill. 295.

Where one is induced by fraud, in the form of false representations, to enter into a contract, and afterwards, upon obtaining full knowledge of the fraud practised upon him, and of all material facts, declines to repudiate it, and expressly ratifies it, he can neither rescind nor maintain an action for damages. St. John *v.* Hendrickson, 81 Ind. 350. *Compare* Knight *v.* Houghtalling, 85 N. Car. 17.

**Miscellaneous Cases as to Remedies.**— Trover lies for goods obtained by defendant through fraud or deceit practised on plaintiff; and the plaintiff need not have accepted every statement as literally true, or count on any precise words. And fraud outside of any written statement made, may be considered by the jury. Heineman *v.* Steiger, 54 Mich. 232.

One who is defrauded into lending money on inadequate security is damnified as soon as the loan is made; and in an action for the fraud, is entitled to recover the difference between the sum lent and the value of the securities at the date of the loan, and interest thereon from that date. Briggs *v.* Brushaber, 43 Mich. 330; s. c., 38 Am. Rep. 187.

An injured party has a remedy, by action for damages, against one wrongfully assuming to make a contract with him as agent for an owner, without authority; and may recover for the loss of improvements made in good faith in pursuance of the contract, in addition to his damages for the loss of his bargain. Skaaraas *v.* Finnegan, 32 Minn. 107.

An executor who, professing to have full knowledge of the facts, with intent to defraud in the sale of the decedent's land, represents that there is no encumbrance thereon, and thereby deceives the purchaser, is personally liable for the damages occasioned, although he did not know that the representations were false. West *v.* Wright, 98 Ind. 335.

Where several conspire to defraud another for the benefit of one, all are liable in damages for the fraud. Breedlove *v.* Bundy, 96 Ind. 319.

In an action not for a rescission but for damages for the false representations of defendant, in the sale of a note and mortgage, where the validity of the instruments is not denied, and it does not appear that the mortgage has been foreclosed, the complaint is bad if it fails to show that the securities are insufficient, and what would be the probable deficiency upon a sale on foreclosure of the mortgage. Foster *v.* Taggart, 54 Wis. 391.

The measure of damages for breach of the usual covenants of a deed is the purchase-money and interest. Nothing can be allowed for improvements and the increased value of the lands. But where the vendee is induced to purchase by the fraudulent representations of the vendor as to his title, he may, upon eviction by a better title, recover of his vendor all the damages naturally resulting from the fraud, although the land was conveyed by deed with warranty. The action is upon the fraud, not upon the covenants of the deed; and the rule of damages for breach of the covenants does not apply. Carvill *v.* Jacks, 43 Ark. 439–454.

A purchased a widow's dower in lands, and sold it to B for $350. Afterwards the heirs sued B in ejectment, for the land; and by collusion between them, he suffered judgment to go against him with the view of reclaiming from A what he had paid him, and something for damages. He and his counsel then, by false and fraudulent representations as to the judgment, induced A to pay him $400. A, upon discovery of the fraud, filed his bill to cancel the deed he had made to him, and for intermediate rents and profits on the land. *Held,* that his only remedy was at law, for the fraud in obtaining the money. Dillon *v.* McAlister, 40 Ark. 189.

Where A and B conspire together, A being irresponsible and B being the owner of real estate, that B shall make a formal application to loan brokers for a loan on said real estate, the same being of value and undoubted security therefor, and the loan being one whose accomplishment was reasonably certain; and that A, upon the strength of such application and the promise of the use of the proceeds of such loan, shall seek for and obtain a temporary loan to satisfy a pressing debt of A's; and

**VI. PROMPTNESS.**—The defrauded party must proceed with promptness to assert his rights, upon discovery of the fraud; for delay may bar his right to relief.[1] But no delay will defeat his right to relief unless the fraud was or ought to have been known."[2]

**VII. PLEADING.**—"In suits instituted for the purpose of impeaching transactions on the ground of fraud, it is essential that the nature of the case should be distinctly and accurately stated. A mere general charge of fraud, without alleging specific facts, is not sufficient to sustain the bill. It must be shown in what the fraud consists, and how it has been effected."[3]

that when the money thus sought has been obtained, then the loan applied for shall be declined;—*held*, that the party loaning upon the strength of these acts and representations, may hold both B and A responsible for the money thus loaned. Lee *v.* Lemert, 26 Kan. 111.

Trespass on the case cannot be sustained for fraudulent representations as to one's pecuniary circumstances; as when the defendant obtained goods by representing that he had a contract to deliver wood on the railroad; that it was to be paid for soon; that the avails should be given to the plaintiff, when he had already promised and afterward assigned the same to another party. Best *v.* Smith, 54 Va. 617.

Where the sale of property was induced by false representations as to its value, the sale is void, and the purchaser will be regarded as holding the same in trust for the owner. In such case, the assignee of the owner may maintain an action to recover for the fraud; and the defendants cannot complain that the consideration paid was not returned before suit was brought. Clews *v.* Traer, 57 Iowa, 459.

An action for a fraudulent warranty, where a *scienter* is alleged in the complaint, is an action *ex delicto;* and the defendant can be imprisoned on the execution. Upon such a complaint, therefore, it is substantial error to direct a verdict for the plaintiff in case the jury shall find a mere breach of contract of warranty. Sweeney *v.* Vroman, 60 Wis. 278.

1. Briggs *v.* Rice, 130 Mass. 50; Badger *v.* Badger, 2 Wall. 87; Hathaway *v.* Noble, 55 N. H. 508; Campan *v.* Van Dyke, 15 Mich. 371; Shaver *v.* Radley, 4 Johns. Ch. 310; Akerly *v.* Vilas, 21 Wis. 88; Kent *v.* Quicksilver-mining Co., 78 N. Y. 159.

Election to rescind should be exercised at the earliest practicable moment after discovery of the fraud. Masson *v.* Bovet, 1 Den. (N.Y.) 69; s. c., 43 Am. Dec. 651; Hall *v.* Fullerton, 67 Ill. 450. Reasonable promptness, under the circumstances of each case, is sufficient. Bigelow's Law of Fraud (1888), 438.

2. Humphreys *v.* Maltoon, 43 Iowa, 556; Hudson *v.* Wheeler, 34 Tex. 356; Vane *v.* Vane, L. R. 8 Ch. 383, 398; Martin *v.* Martin, 35 Ala. 560; Phalen *v.* Clark, 19 Conn. 421; Kraus *v.* Thompson, 30 Minn. 64.

3. Kerr on Fraud & Mist. (Bump's Ed.) 365; Hynson *v.* Dunn, 5 Ark. 395; s. c., 41 Am. Dec. 100; Bell *v.* Lamprey, 52 N. H. 46; Darnell *v.* Rowland, 30 Ind. 346; Beaubien *v.* Beaubien, 23 How. (U. S.) 190; Kent *v.* Snyder, 30 Cal. 666; Hopkins *v.* Woodward, 75 Ill. 62; Pendleton *v.* Galloway, 9 Ohio, 178; Spence *v.* Buren, 3 Ala. 231; Smith's Adm'r *v.* Wood (N. J.), 7 Atl. Rep. 881.

"The facts constituting the fraud must be stated." Bliss Code Pleading, § 211.

Pleadings must state facts and not legal conclusions; and fraud is never sufficiently pleaded except by the statement of the facts upon which the charge is based." *Per* Beck, J., in Ockenden *v.* Barnes, 43 Iowa, 619.

"The use of epithets, however bountifully multiplied, will not supply the place of facts." *Per* Elliott, J., in Clodfelter *v.* Hulett, 72 Ind. 137, 144.

If the facts stated show a case of fraud, it is unnecessary to use that term in the pleading. Bromley *v.* Smith, 26 Beav. 671; Attorney-general *v.* Corporation of Poole, 4 M. & C. 28; Hess *v.* Young, 59 Ind. 379; Parham *v.* Randolph, 41 How. (Miss.) 455; s. c., 35 Am. Dec. 403.

It has been held in some cases that, where fraud is pleaded as a defence to an action on a written instrument, it may be charged in general terms. Huston *v.* Williams, 3 Blackf. (Ind.) 170; s. c., 25 Am. Dec. 84; Edgell *v.* Sigerson, 20 Mo. 495; Stover *v.* Wier, 10 Serg. & R. (Pa.) 25; Webb *v.* Steele, 13 N. H. 230. But there seems to be no sufficient reason for this distinction, and many of the courts

**VIII. EVIDENCE.**—The general rule is that fraud will not be presumed, but must be proved;[1] and the burden of proof, therefore, is upon the party alleging it.[2] "A man who alleges fraud must clearly and distinctly prove the fraud he alleges."[3] It is not always necessary, however, that direct affirmative or positive proof of fraud be given.[4] It may be, and usually is, proved by circumstantial or presumptive evidence.[5] If the evidence is suffi-

have applied the contrary rule to such cases. Clodfelter *v.* Hulett, 72 Ind. 137; Bliss on Code Pleading, § 339.

1. Jack *v.* Brown, 60 Iowa, 271; Strausse *v.* Krauert, 56 Ill. 254; Briscoe *v.* Bronough, 1 Tex. 326; s. c., 46 Am. Dec. 108; Farmer *v.* Calvert, 44 Ind. 209; Smith *v.* Yule, 31 Cal. 180; s. c., 89 Am. Dec. 167; McCarthy *v.* White, 21 Cal. 495; s. c., 82 Am. Dec. 754.

This phrase, when used in an instruction to the jury, has been criticised, however, as not being true without qualification, and hence calculated to mislead. Sparks *v.* Dawson, 47 Tex. 138; State *v.* Estel, 6 Mo. App. 6 See also Kaine *v.* Weigley, 22 Pa. St. 183; Lowry *v.* Beckner, 5 B. Mon. (Ky.) 43.

2. Nichols *v.* Patten, 18 Me. 231; s. c., 36 Am. Dec. 713; Bartlett *v.* Blake, 37 Me. 124; s. c., 58 Am. Dec. 775; Towsey *v.* Shook, 3 Blackf. (Ind.) 267; s. c., 25 Am. Dec. 108; Williams *v.* Lord, 75 Va. 390; Griswold *v.* Sabin, 51 N. H. 167; s. c., 12 Am. Rep. 76; Beatty *v.* Fishel, 100 Mass. 448.

But where it appears that a fiduciary relation existed between the parties at the time of the transaction claimed to be fraudulent, the burden of proof is upon the party seeking to sustain it. Kerr on Fraud & Mist. (Bump's Ed.) 386; Bigelow on Fraud (1st Ed.), 190; Billage *v.* Southee, 9 Hare, 540; Kay *v.* Smith, 7 H. L. Cas. 750; Cadwallader *v.* West, 48 Mo. 483; Ferguson *v.* Lowery, 54 Ala. 510; s. c., 25 Am. Rep. 718.

And it seems that, upon proof that the representations are false and material, the burden will be thrown upon the party making them to show that the other did not rely on them. Fishback *v.* Miller, 15 Nev. 428, 443; Holbrook *v.* Burt, 23 Pick. (Mass.) 546, 552. See also Neff *v.* Landis (Pa.), 1 Atl. Rep. 178; Zimmer *v.* Miller (Md.), 1 Atl. Rep. 858.

3. Kerr on Fraud & Mist. (Bump's Ed.) 382.

If a case of actual fraud be alleged, relief cannot be had by proving a case of constructive fraud. Parr *v.* Jewell, 1 K. & J. 671; Eyre *v.* Potter, 15 How. (U. S.) 42; Gerde *v.* Hawkins, 2 Dev. Eq. (N. Car.) 393. See also Mount Vernon Bank *v.* Stone, 2 R. I. 129; s. c, 57 Am. Dec. 709; Piper *v.* Hoard, 107 N. Y. 67.

Fraud must be proved by evidence so clear and strong as to produce satisfactory conviction. Greer *v.* Caldwell, 14 Ga. 207; s. c., 58 Am. Dec. 553.

Where it is proposed to impeach a release of a widow, to the executors of her deceased husband, on the ground of fraud, the evidence thereof should be clear, precise, and indubitable. Biern's Appeal, 92 Pa. St. 265.

To set aside a written instrument on the ground of fraud, the evidence thereof must be clear, precise, and indisputable, and of that which occurred at the execution of the instrument. A jury should not be permitted to find fraud, to impeach a settlement in writing, on any fancied equity, or on vague, slight, or uncertain evidence, although they may think it fairly and fully satisfied them. Cummins *v.* Hurlbutt, 92 Pa. St. 165. *Compare* Abbey *v.* Dewey, 25 Pa. St. 413; Carter *v.* Gunnels, 67 Ill. 270; Lynn *v.* Beltimore, 60 Md. 404. These *Pennsylvania* cases require too much. See Bigelow's Law of Fraud (1888), 142, note 3.

A charge which instructs the jury, in a civil case, "that, to justify the imputation of fraud, the facts must be such that they are not explicable on any other reasonable hypothesis," exacts too great a measure of proof, and is erroneous (Steele *v.* Kinkle, 3 Ala. 352, and Tompkins *v.* Nichols, 53 Ala. 197, disapproved and overruled). Adams *v.* Thornton & Wellborn, 78 Ala. 489; s. c., 56 Am. Rep. 49.

Fraud must be clearly proved, either directly or by circumstances which clearly lead the mind to the conclusion that it exists. Babbitt *v.* Dotten, 14 Fed. Rep. 19.

4. Llewellyn *v.* Mackworth, 2 Atk. 40; East India Co. *v.* Donald, 9 Ves. 282; McDaniel *v.* Baca, 2 Cal. 326; s. c., 56 Am. Dec. 339; Tognini *v.* Kyle, 15 Nev. 468; Stanfield *v.* Stilz, 93 Ind. 249; Massey *v.* Young, 73 Mo. 260.

5. Thames *v.* Rembert, 63 Ala. 561; Pickett *v.* Pipkin, 63 Ala. 520; Billings *v.* Billings, 2 Cal. 107; s. c., 56 Am. Dec.

319; Bryant *v.* Simonean, 51 Ill. 327; Reed *v.* Noxon, 48 Ill. 323; White *v.* Trotter, 14 Sm. & M. (Miss.) 30; s. c., 53 Am. Dec. 112; Hopkins *v.* Sievert, 58 Mo. 201; Baldwin *v.* Whitcomb, 71 Mo. 651; Sands *v.* Hildreth, 14 Johns. (N. Y.) 493; Huntzinger *v.* Harper, 44 Pa. St. 204; Lockhart *v.* Beckley, 10 W. Va. 87; Rea *v.* Missouri, 17 Wall. (U. S.) 532.

But mere suspicion does not amount to proof. Buch *v.* Sherman, 2 Doug. (Mich.) 176; *In re* Will of Vandeveer, 20 N. J. Eq. 463; Clark *v.* White, 12 Pet. (U. S.) 178; Trenchard *v.* Wanley, 2 P. Wms. 166; Taylor *v.* Fleet, 4 Barb. (N. Y.) 95.

It is not proved by showing that it could not have been for the interest of any one but the party charged with it, unless there is other evidence to show in some way his connection with the act. Hanna *v.* Rayburn, 84 Ill. 533.

Mere irregularities or carelessness sufficient to arouse suspicion, will not alone supply the place of proof of fraud. Jewett *v.* Bowman, 29 N. J. Eq. 174. See also People *v.* Cook, 8 N. Y. 67; s. c., 59 Am. Dec. 451; Ayres *v.* Scribner, 17 Wall. (U. S.) 407.

And where fraud is to be presumed, the facts upon which the presumption is based must be proved; for there can be no presumption from a presumption. Douglass *v.* Mitchell, 35 Pa. St. 440.

**Admissibility of Evidence.**—In cases of fraud, considerable latitude is allowed in the admission of evidence, as will be seen from the following cases:

In an action based upon alleged false representations made by defendants to plaintiff, whereby plaintiff was induced to enter into a contract of agency to his damage, evidence that defendants had made similar representations to others with whom they were seeking to make similar contracts of agency was admissible to corroborate the testimony of plaintiff as to the representations made to him. Porter *v.* Stone, 62 Iowa, 442.

In an action to recover goods sold by the plaintiff to E., and by his directions delivered to defendant, the plaintiffs claiming that the sale had been procured by fraud, and that it had been on that account rescinded by them, *held*, that evidence of transactions by which defendants and E. had obtained goods from other persons by means similar to those used in the case in question was admissible for the plaintiffs. Bancroft *v.* Heringhi, 54 Cal. 120. See also Lockwood *v.* Doane, 107 Ill. 235.

In an action for fraud from false representations to the plaintiff, evidence that defendant made the same representations to another person after the cheat had been accomplished is admissible, not as substantive proof of the statements, but to identify the agency by which the fraud was committed, and to show that plaintiff had not misunderstood the defendant, and because in cases of fraud a wide range of examination is allowed. Cook *v.* Perry, 43 Mich. 623.

Where the charge is that the execution of a written contract to purchase land was procured by fraudulent representations, it is competent to show, in a court administering both law and equity, the accompanying acts and declarations of the parties *dehors* the writing, as illustrating and forming a part of the transaction. Knight *v.* Hoatalling, 85 N. Car. 17.

In an action to recover damages alleged to have been sustained, by the purchase of a half-interest in the business of manufacturing artificial marble, which the plaintiff was induced to make by means of the false and fraudulent representations of the defendants, he testified on cross-examination that he had sold such half-interest for a house on Broadway, which was subject to a mortgage of $1600, and that it was not worth the mortgage. This house, together with a house belonging to his wife, he subsequently exchanged with one Gruman for a tract of land in Virginia. In reply to a question by the defendants, he denied having told Gruman that he had refused $2250 for the Broadway house. The defendants then offered to prove by Gruman that the plaintiff told him that he, plaintiff, had refused an offer of $2250 for the house at public sale. *Held*, that such declaration or admission of the plaintiff was admissible in evidence. Busdman *v.* Codd, 52 Md. 202.

In an action for breach of warranty and fraudulent representations in the sale of a glandered horse, as well as for the loss of another horse, which contracted the glanders from the horse sold, there was no error in the admission of evidence which tended to show that the purchaser believed, when he bought the horse, that he had the glanders. Such testimony was not immaterial. Proctor *v.* McCord, 60 Iowa, 153.

Complicity in fraud with joint defendants against whom there is direct evidence is provable by showing that all the defendants have been engaged together in similar transactions, and that the act was done under a general agency for the particular defendant, who had previously proposed to participate with the others in a series of frauds of the same character. Dayton *v.* Monroe, 47 Mich. 193.

In an action to recover moneys paid for

cient to satisfy the mind and conscience of the existence of the fraud, it will suffice, although it does not lead to a conviction of absolute certainty.[1] The fraud need not be proved beyond a reasonable doubt.[2] It is usually a question for the jury,[3] unless the facts are undisputed, when it may become a question of law for the court to determine.[4]

a school-district bond alleged to be spurious and worthless, proof that there never was any such school district as appears on the face of the bond to have issued it is evidence that it is spurious and worthless; and evidence that the entire county is uninhabited and without any indications of having ever been inhabited, is evidence tending strongly to show that there never was any such school district. Parmelee *v.* Knox, 24 Kan. 113.

Where a patient sued his doctor for cheating him in an exchange of land, it was held admissible to ask the patient on his examination-in-chief as to what the state of his health was previous to the bargain, it being claimed that the doctor had represented the land as a healthier location than that where the patient then resided. Dibble *v.* Nash, 47 Mich. 589.

In an action for fraud in selling plaintiff a second for a first mortgage, it is admissible to show that, at the time of making the mortgage, defendant said he did not want it to contain an exception in the covenant against encumbrances, as it might prejudice its sale. Cronkhite *v.* Dickerson, 51 Mich. 177.

In an action of tort for fraudulent representations in the sale of a business, a letter from the plaintiff to the defendant, suggesting charges of false representations, and attempting to obtain a settlement, is inadmissible in evidence in favor of the plaintiff. Percy *v.* Bibber, 134 Mass. 404.

In an action against three defendants, for obtaining by fraud a conveyance of real and personal property of the plaintiff, one of the defendants testified that he acted in good faith, and that his only connection with the matter was in making an advance to one of the codefendants, and in selling the personal property as an auctioneer. *Held*, that evidence was inadmissible, in his favor, that the codefendant had previously applied to another auctioneer to make an advance and to sell the same property, who was not employed because he charged more than the defendant. Hohnes *v.* Flanders, 134 Mass. 147.

A false representation in respect to property is quite different from a guaranty or warranty of the quality or condition of property; and evidence tending to show a guaranty is not competent in an action for damages for false representations. Clark *v.* Ralls, 58 Iowa, 201.

Where one who complains of being cheated in a land trade, testifies to having offered defendant a certain sum to trade back, it was held proper to exclude on cross-examination the question whether he had the necessary amount of money. The good faith of an offer to pay money cannot always be tested by an inquiry whether the person making the offer had the money necessary to fulfil it. Snow *v.* Nowlin, 43 Mich. 383.

1. Bryant *v.* Simonean, 51 Ill. 327; Marksbury *v.* Taylor, 10 Bush (Ky.), 519; Greer *v.* Caldwell, 14 Ga. 207; s. c., 58 Am. Dec. 553; Young *v.* Edwards, 72 Pa. St. 257; Hunter *v.* Hunter, 10 W. Va. 321; Linn *v.* Wright, 18 Tex. 317; Watkins *v.* Wallace, 19 Mich. 57; Bullard *v.* Creditors, 56 Cal. 600.

Failure of a party against whom fraud is charged, to produce as witnesses persons who are alleged to have participated in the fraud, and who are within reach, will raise a presumption in favor of the charge. Baldwin *v.* Whitcomb, 71 Mo. 651.

2. Ætna Ins. Co. *v.* Johnson, 11 Bush (Ky.), 587; s. c., 21 Am. Rep. 223; Lee *v.* Pearce, 68 N. Car. 76; Kane *v.* Hibernia Ins. Co., 39 N. J. L. 397; s. c., 23 Am. Rep. 239; Sparks *v.* Dawson, 47 Tex. 138; Rippey *v.* Miller, 1 Jones Law (N. Car.), 479; s. c., 62 Am. Dec. 177; Blaeser *v.* Milwaukee, etc., Co., 37 Wis. 31; s. c., 19 Am. Rep. 747. There are some cases holding that, where the offence charged in a civil action is also a crime, it must be proved beyond a reasonable doubt; but as will be seen from the authorities above cited, the better rule is that stated in the text, even though the fraud may amount to a crime. See 10 Am. Law Rev. 642; 62 Am. Dec. 187, note; Continental Ins. Co. *v.* Jachnichen, 110 Ind. 59, and authorities *pro* and *con* reviewed in opinion, on pages 63, 64.

3. Burch *v.* Smith, 15 Tex. 219; s. c., 65 Am. Dec., 154; Kuykendall *v.* McDonald, 15 Mo. 416; s. c., 57 Am. Dec. 212; Anderson *v.* Burnett, 5 How. (Miss.) 165; s. c., 35 Am. Dec. 425; McMichael *v.* McDermott, 17 Pa. St. 353; s. c., 55 Am. Dec. 560.

4. Weaver *v.* Lapsley, 42 Ala. 601; s.

## FRAUDS, STATUTE OF.

**I. History and Effect of the Rule,** 657.
1. *History,* 657.
2. *Effect,* 658.
**II. Subject-matter to Which it Applies,** 664.
1. *Creation of Estates in Land,* 664.
(*a*) *Creation,* 664.
(*b*) *Written Instruments,* 664.
(*c*) *Execution,* 664.
(*d*) *Execution by Agent,* 665.
(*e*) *Leases Covered by Statute,* 666.
(*f*) *Leases Exempted from Statute,* 667.
(*g*) *Assignment, Grant, and Surrender of Existing Terms,* 669.
(*h*) *Assignment or Surrender by Operation of Law,* 670.
(*i*) *Other Transfers Good by Parol,* 672.
2. *Promises to Answer for the Debt of Another,* 673.
(*a*) *The Debt, Default, or Miscarriage,* 675.
(*b*) *The Promisee,* 676.
(*c*) *The Special Promise,* 677.
3. *Promises on Consideration of Marriage,* 684.
4. *Contracts Not to be Performed Within a Year,* 685.
5. *Contracts for Sale of Interests in Lands,* 694.
6. *Contracts for Sale of Goods, Wares, and Merchandise,* 704.
(*a*) *The Contract for Sale,* 704.
(*b*) *Goods, Wares, and Merchandise,* 709.
(*c*) *The Price,* 710.
**III. Methods of Satisfying the Statute,** 710.
1. *The Memorandum,* 710.
(*a*) *Its Form,* 710.
(*b*) *Structure.* 711.
(*c*) *Time of Making,* 715.
(*d*) *Delivery,* 715.
(*e*) *Signature,* 717. [719.
(*f*) *Memorandum Made by Agents,*
(*g*) *Its Contents,* 721.
(1) *Generally,* 721.
(2) *The Parties,* 723.
(3) *The Subject-matter,* 724.
(4) *The Price,* 726.
(5) *The Terms,* 726.
(6) *The Consideration,* 727.
2. *Acceptance and Actual Receipt,* 729.
(*a*) *Generally,* 729.
(*b*) *Actual Receipt,* 730.
(*c*) *Acceptance,* 732.
(*d*) *Time,* 735.
(*e*) *Part of Goods,* 735.
(*f*) *Title,* 736.
3. *Earnest and Part Payment,* 736.
(*a*) *Earnest,* 736.
(*b*) *Part Payment,* 736.
**IV. Equitable Doctrines Modifying Effect of Statute,** 737.
1. *The Statute in Equity,* 737.
2. *Part Performance,* 738.
**V. Pleading the Statute,** 745.
1. *By the Plaintiff,* 745.
2. *By the Defendant,* 746.

**I. THE HISTORY AND EFFECT OF THE STATUTE.—1. Its History.—** The Statute 29 Ch. II. cap. 3, an act for the prevention of frauds and perjuries, better known as the Statute of Frauds, was prepared as early as the year 1673, and was introduced into Parliament in the first session of that year. It was discussed at several sessions and referred to various committees before assuming the form in which it finally passed and received the royal consent, April 16, 1677. Lord Hale has generally been regarded as its author, Lord Ellenborough assigning the authorship to him in the judgment in Wain *v.* Warlters, 5 East, 16; but it is clear that Lord Hale was not alone, for Lord Nottingham, in Ash *v.* Abdy, 3 Swanst. 664, says: "It had its first rise from me, who brought in the bill into the Lords' House, though it afterwards received

c., 94 Am. Dec. 671; Jessup *v.* Johnston, 3 Jones Law (N. Car.), 335; s. c., 67 Am. Dec. 243; Pettibone *v.* Stevens, 15 Conn. 19; s. c., 38 Am. Dec. 57; Brady *v.* Barnes, 42 Conn. 522; Upton *v.* Tribilicock, 13 Nat. Bank Reg. 181; s. c., 91 U. S. 45.

**Authorities for Fraud.**—Bigelow on Fraud; Kerr on Fraud & Mistake; Pomeroy's Equity Jurisprudence; Story's Equity Jurisprudence; and Cooley on Torts. On particular branches: Hovenden on Frauds, Bishop on Contracts, and the various other text-books on Contracts and Torts are of value.

some additions from the judges and civilians." Sir Geoffrey Gilbert, in Whitechurch *v.* Whitechurch, 1 Stra. 621, joins Sir Leoline Jenkins with Sir Matthew Hale as the author, and Lord Guilford is also stated to have had a great hand in the statute. (Lives of the Norths, I. 224, Roscoe's Ed.)

Lord Mansfield's statement in Wyndham *v.* Chetwynd, 1 Burr. 418, that Lord Hale could have had no connection with it beyond the preparation of undigested notes because he died at Christmas before the act passed, loses all its force in view of the fact that the statute had been before Parliament since 1673.

Probably the conclusion reached by Mr. John F. Baker, of New York (2 Harvard Law Review, 42), is the true one—that Sir Matthew Hale was the master-mind and prepared the bulk of the statute, with assistance from Lord Guilford, while Sir Leoline Jenkins, an authority in probate law, did the sections relating to wills and probate, and Lord Nottingham those relating to trusts and devises, the latter being also conspicuously active in piloting the bill through Parliament.

The act has proved the fruitful seed of petty litigation ; and its meaning, in its full length and breadth, has doubtless not even yet been determined. Similar statutes have been passed in most of the United States, and the terms of these acts must be borne constantly in mind in citing the decisions on any point in one State as authority for law on that point in another.

The act, by its own force, applied only to England and its dependencies then (in 1677) uninhabited.

It did not apply to *Barbadoes*,[1] to *Alabama*,[2] to *Virginia*,[3] to *North Carolina*,[4] to *Pennsylvania*,[5] or to land conveyed from Mexico, as *Utah* ;[6] but it has been held to apply to *Maryland*,[7] to *New Mexico*,[8] and the *District of Columbia*.[9]

**2. Its Effect.**—The effect of the statute upon the agreements within its scope must be regarded as still undetermined ; and no decision can ever be reached upon it as the result of all the cases, as they are in hopeless confusion and contradiction. On certain general points the modern law is well settled.

In the absence of statutory provision to the contrary, the effect of the statute is not to render the agreement void, but simply to prevent its direct enforcement, and to refuse damages for its breach.[10]

1. Attorney-Gen. *v.* Stewart, 2 Meriv. 156, note.
2. Matthews *v.* Ansley, 31 Ala. 22.
3. Carrington *v.* Roots, 1 McLean, 176.
4. Smith *v.* Williams, 1 Murf. 431.
5. Anon., 1 Dall. 1.
6. First Nat. Bank *v.* Kinnes, 1 Utah, 102.
7. Sibley *v.* Williams, 3 Gill & J. 62. It was not applied, however, to a will made shortly after its passage, but before it had been communicated to the colony. Clayland *v.* Pearce, 1 H. & McH. 29.
8. Childers *v.* Talbott (N. M.), 16 Pac. Rep. 275.
9. Huntley *v.* Huntley, 114 U. S. 399.
10. Bracegirdle *v.* Heald, 1 B. & Ald. (*per* Bayley, J.) 727; Touch *v.* Strawbridge, 2 C. B. (*per* Tindal, C.J.) 814; Sweet *v.* Lee, 4 Scott, 90; Britain *v.* Rossiter, 11 Q. B. Div. 123; Phillips *v.* Ocmulgee Mills, 55 Ga. 633; Craig *v.*

Since it does not make the contract void, an action may be maintained, after the enactment of such a statute, on an oral contract made before it;[1] and property rights acquired prior to its passage are not affected.[2]

Since it concerns the remedy alone, no action can be maintained in the jurisdiction where it obtains, although upon an agreement made where no such statute exists.[3]

That the agreements within it are not absolutely void, appears in many cases.

Such an agreement is a good consideration for another promise;[4] yet since it cannot be enforced, a discharge of it is not a good consideration.[5] Only parties to the agreement can take advantage of the defence of the statute.[6] A guarantor by an oral guaranty, who has paid the debt, can recover against the principal debtor although he could not be compelled to pay,[7] and even although the debtor prohibited his paying.[8] A party who wishes to perform cannot be compelled to set up the

Vanpelt, 3 J. J. Marsh. (Ky.) 489; Bird *v.* Munroe, 66 Me. 337; Townsend *v.* Hargreaves, 118 Mass. 325; Haynes *v.* Nice, 100 Mass. 327; McCue *v.* Smith, 9 Minn. 252; Pinkham *v.* Mattax, 53 N. H. 600; Magee *v.* Blenkenship, 95 N. Car. 563. See 9 Am. Law Rev. 434.

Yet where a penalty is imposed by a criminal statute for the breach of a contract within the Statute of Frauds, no prosecution can be sustained unless its requirements have been satisfied. Banks *v.* Crossland, L. R. 10 Q. B. 97.

In *New York*, it has been held that no action can be maintained against one who has falsely represented that he has authority to make a particular contract, unless the principal would be liable on the contract had the agent been duly authorized; and accordingly, if the agreement is within the Statute of Frauds, the agent is not liable. Dung *v.* Parker, 52 N. Y. 494. But see Baltzen *v.* Nicolay, 53 N. Y. 467; Simmons *v.* Moses, 100 N. Y. 140.

1. This was early determined, in Ash *v.* Abdy, 3 Swanst. 664, and is settled law. Gilmore *v.* Sheeter, 2 Lev. 227; T. Jones, 108; 2 Mod. 310; 2 Shaw, 16; McDonald *v.* Stewart, 18 La. Ann. 90; Dunn *v.* Thorp, 4 Ired. Eq. (N. Car.) 7; Ballentine *v.* White, 77 Pa. St. 20; Moffit *v.* Rynd, 69 Pa. St. 387; Espy *v.* State, 32 Tex. 375.

It is nevertheless difficult to reconcile with the theory that the statute affects only the remedy; and following that theory, a contrary decision has been reached in *Maine*. Kingsley *v.* Causius, 47 Me. 91.

An action may be maintained after its repeal, on an agreement made while it was in force. Work *v.* Cowhick, 81 Ill. 317.

2. Chaffe *v.* Benoit, 60 Miss. 34.

3. Levaux *v.* Brown, 12 C. B. 801; Douver *v.* Chessboragh, 36 Conn. 39; Kleeman *v.* Collins, 9 Bush (Ky.), 460; Teesnaw *v.* Hochstadter, 7 Hun (N. Y.), 80.

This was doubted by Judge Story: Smith *v.* Burnham, 3 Sumn. 435.

4. Stout *v.* Ennis, 28 Kan. 706.

The *contra* has been held in Michigan. Hall *v.* Soule, 11 Mich. 494. But see Detroit, etc., R. Co. *v.* Forbes, 30 Mich. 165.

Where an express promise to pay has been made after a complete performance of the oral agreement by the other party, the existence of the oral agreement will be a good consideration for this promise, and an action will lie upon it. Pool *v.* Horner, 64 Md. 131.

5. North *v.* Forest, 15 Conn. 400.

6. Huntley *v.* Huntley, 114 U. S. 394; Cooper *v.* Hornsby, 71 Ala. 62; Chicago Dock Co. *v.* Kinzie, 49 Ill. 289; Wright *v.* Jones, 105 Ind. 17; Savage *v.* Lee, 101 Ind. 514; Cool *v.* Peters Box, etc., Co., 87 Ind. 531; Dixon *v.* Duke, 85 Ind. 434; Ames *v.* Jackson, 115 Mass. 508; Chaffe *v.* Benoit, 60 Miss. 34; Richard *v.* Cunningham, 10 Neb. 417; Simmons *v.* More, 100 N. Y. 140; Davis *v.* Inscoe, 84 N. Car. 396; Houser *v.* Lamont, 55 Pa. St. 311.

7. Madden *v.* Floyd, 69 Ala. 221; Simpson *v.* Hall, 47 Conn. 417.

8. Beal *v.* Brown, 13 Allen (Mass.), 114.

statute as a defence.[1] Special damages can be recovered for preventing one from performing a contract which, owing to the statute, could not be enforced.[2] A person summoned as trustee may set up an oral promise to pay to a third party.[3] Special damages may be recovered for causing the loss of an oral contract.[4] A broker can recover a commission for making an oral sale.[5] A court will enforce an attorney's oral undertaking to pay his client's costs and expenses in a suit pending before it.[6]

Where a lease is invalid for want of writing, the covenants are valid so long as the tenancy at will created by the entry and possession lasts;[7] and reference may be made to the lease for the terms and time of payment, in an action for use and occupation.[8]

An oral agreement, if executed, will constitute a good accord and satisfaction.[9]

Where money has been paid or any act done by one party under the oral contract, it cannot be recovered back on the ground of the statute, if the party receiving it is ready to go on, or has performed his part.[10] The statute cannot, however, be set up to

1. Wright *v.* Jones, 105 Ind. 17; Ames *v.* Jackson, 115 Mass. 508; Cahill *v.* Bigelow, 18 Pick. (Mass.) 369.

2. Waters *v.* Towers, 8 Exch. 401; Kratz *v.* Stocke, 42 Mo. 351; Sneed *v.* Bradley, 4 Sneed (Tenn.), 301.

3. Godden *v.* Pierson, 42 Ala. 370; Garrett *v.* Garrett, 27 Ala. 687; Cahill *v.* Bigelow, 18 Pick. (Mass.) 369.

And a creditor of one who holds property on an oral trust cannot take the property discharged of the trust simply on the ground that it could not be enforced. Aicardi *v.* Craig, 42 Ala. 311; Crawford *v.* Woods, 6 Bush (Ky.), 200.

4. Rice *v.* Manley, 2 Hun (N. Y.), 492.

5. Mooney *v.* Elder, 56 N. Y. 238.

6. Grave's Case, 1 Crompt. & J. 374, note a; Evan *v.* Duncan, 1 Tyrw. 283, and cases there cited.

7. Beale *v.* Saunders, 3 Bing. N. R. 850; Richardson *v.* Gifford, 1 Ad. & E. 52; Schuyler *v.* Leggett, 2 Cow. (N. Y.) 660; Norris *v.* Morrill, 40 N. H. 395; Barlow *v.* Wainwright, 22 Vt. 88.

8. De Medina *v.* Polson. Holt, 47; Currier *v.* Barker, 2 Gray (Mass.), 224; Evans *v.* Winona Lumber Co., 30 Minn. 515.

But this is only as a measure of the value of the promises. The actual rent reserved cannot be recovered by any form of action. Ragsdale *v.* Lander, 80 Ky. 61.

9. Per Bowen, J., in Miles *v.* New Zealand Alvord Estate Co., 32 Ch. Div. 266; Thayer *v.* McEwen, 3 Ill. App. 416.

10. Since the law allows the contract to be good for some purposes, and will not interfere to prevent its performance, it obviously will not lend its aid to the recovery of whatever has been done, after it is fully performed. Once executed, the agreement is irrevocable. Newman *v.* Nellis, 97 N. Y. 285; Crane *v.* Gough, 4 Md. 316.

And the law has long been settled that one who has paid money in pursuance of the agreement cannot afterwards set up the contract and claim the return of his money unless the other party has refused to go on. Pawle *v.* Queen, 4 Bing. N. C. 445; Day *v.* Wilson, 83 Ind. 463; Gray *v.* Gray, 2 J. J. Marsh. (Ky.) 21; Kneeland *v.* Fuller, 51 Me. 16; Seymour *v.* Bennett, 14 Mass. 269; Coughlin *v.* Knowles, 7 Metc. (Mass.) 57; Bacon *v.* Parker, 137 Mass. 309; McKinney *v.* Harvie (Minn.), 35 No. West. Rep. 668; Eaton *v.* Parker, 35 N. J. L. 290.

So a debtor who has performed work for his creditor under an oral agreement that the value of his work shall be applied in payment of an old debt barred by his discharge in insolvency, cannot maintain an action for the work, although by statute such promise, to be binding, must be in writing. Pierce *v.* Mann, 130 Mass. 14.

The true principle applicable here and in the cases where a recovery is allowed seems to be that if there is any consideration for the plaintiff's performance he cannot recover if he himself repudiates the contract and sets up the statute; but if there is a complete failure of consideration caused by setting up the statute, what has been thus paid or done without con-

enable a person who has received a benefit to retain it without consideration; and accordingly, if the other party refuse to go on, the one who has paid money or rendered service on the faith of the promise can recover it or obtain its value in an action on the promise to pay implied by law.[1] And the existence of the oral agreement will not prevent the implication of this promise.[2]

Where improvements have been made in reliance upon an oral agreement and in accordance with its stipulations, their value may be recovered if the owner of the premises refuses to complete the performance on his side.[3]

sideration may be recovered. See remarks of Dewey, J., in Coughlin *v.* Knowles, 7 Metc. (Mass.) 62.

In *Michigan*, the law is settled that money paid may be recovered even though the plaintiff is the one in default. Scott *v.* Bush, 26 Mich. 418; Grimes *v.* Van Vechten, 20 Mich. 410; Hall *v.* Soule, 11 Mich. 494. The principle is not fully established and consistently applied; for, as is shown hereafter, a plaintiff may recover the value of services rendered although he repudiate the contract himself while the other party is ready to go on.

**1.** The law will not allow one to enrich himself by accepting property, work, or services from another, given in reliance upon his promise, then repudiating the agreement, and yet claiming to hold them and resisting the claim for their return by setting up the Statute of Frauds. Gifford *v.* Willard, 55 Vt. 36.

Where money has been paid, but the receiver then refused to go on, money had and received will lie for its recovery. Allen *v.* Booker, 2 Stew. (Ala.) 21; Barickman *v.* Kuykendall, 6 Blackf. (Ind.) 21; Jelleson *v.* Jordan, 69 Me. 373; Greer *v.* Greer, 18 Me. 16; Root *v.* Bust, 118 Mass. 521; Bacford *v.* Pearson, 9 All. (Mass.) 387; Moody *v.* Smith, 70 N. Y. 598; Wilkie *v.* Womble, 90 N. Car. 254.

Where services have been rendered under the contract, their value may be recovered. Touch *v.* Strawbridge, 2 C. B. 808; Knowlman *v.* Bluett, L. R. 9 Ex. 307; Sines *v.* McEwen, 27 Ala. 184; Meyer *v.* Roberts, 46 Ark. 80; s. c., 55 Am. Rep. 567; Terrill *v.* Frazier, 79 Ind. 473; Hambell *v.* Hamilton 3 Dana (Ky.), 501; Williams *v.* Bemis, 108 Mass. 91; Lockwood *v.* Barnes, 3 Hill (N. Y.), 128; King *v.* Brown, 2 Hill (N. Y.), 485; Burlingame *v.* Burlingame, 7 Cow. (N. Y.) 92; Treece *v.* Treece, 5 Lea (Tenn.), 221; Clark *v.* Davidson, 53 Wis. 317.

And the recovery may be had although the plaintiff himself repudiated the agreement while the defendant was ready to go on. Davenport *v.* Gentry, 9 B. Mon. (Ky.) 427; King *v.* Welcome, 5 Gray (Mass.), 41; Shute *v.* Dorr, 5 Wend. (N. Y.) 204.

The law is the same in *Michigan*. See the cases cited in preceding note.

In *Vermont*, however, the plaintiff cannot recover if he is in default. Mack *v.* Bragg, 30 Vt. 571, and cases there cited.

If property is conveyed, its value may be recovered. Dix *v.* Marcy, 116 Mass. 416; Baker *v.* Scott, 2 Thomp. & C. (N. Y.) 606; Hawley *v.* Moody, 24 Vt. 603.

**2.** This is implied in all the cases cited above, and very definitely in Mavor *v.* Pyne, 3 Bing. 285, which decided that the value of each item furnished under a contract bad for not being performable within a year could be recovered in *indebitatus assumpsit*.

The existence of the oral agreement will, however, prevent the implication of a different one from the relation of the parties. In Britain *v.* Rossiter, 11 Q. B. Div. 123, Britt, L.J., says: "It seems to me impossible that a new contract can be implied from the doing of acts which were clearly done in performance of the first contract only; and to infer from them a first contract would be to draw an inference contrary to the fact."

Thus, while the existence of the contract does not prevent recovery on a promise implied by law, it does stand in the way on a contract implied in fact.

**3.** That the value of improvements may be recovered is well settled. Deischer *v.* Stein, 34 Kan. 39; Findley *v.* Wilson, 3 Litt. (Ky.) 390; White *v.* Wieland, 109 Mass. 291; Kidder *v.* Hunt, 1 Pick. (Mass.) 328.

If, however, they are no benefit to the estate, there can be no recovery. Dowling *v.* McKenney, 124 Mass. 478; Vaughan *v.* Cravens, 1 Head (Tenn.), 108.

They must be required by the oral agreement. Gray *v.* Hill, Ry. & M. 421, *per* Bert, J.; Pulbrook *v.* Lawes, 1 Q. B.

Where everything has been performed on the one side, and only the payment of the price remains, an action may be maintained for that.[1]

The Statute of Frauds has an important influence on the passing of title to goods, wares, and merchandise, since, until its provisions are satisfied, the title does not pass.[2]

The oral agreement is so far good that a memorandum made upon Sunday satisfies the statute and renders the agreement enforceable.[3]

Where an agreement contains parts that are bad by reason of the statute and other parts that are valid, if the agreement is entire the whole is bad and no action can be maintained upon it.[4] But if severable, the good part may be enforced;[5] and after the complete performance of the parts obnoxious to the statute, an action may be maintained on the whole agreement.[6]

Div. 284; White *v.* Wieland, 109 Mass. 291; Williams *v.* Bennis, 108 Mass. 91; Smith *v.* Smith, 28 N. J. L. 208.

If made solely for the plaintiff's benefit, there can be no recovery. Showe *v.* Grimes, 4 Litt. (Ky.) 220; Dowling *v.* McKenney, 124 Mass. 478; Cook *v.* Daggett, 2 Allen (Mass.), 439; Miller *v.* Tobit, 41 N. H. 84; Gillett *v.* Maynard, 5 Johns. (N. Y.) 85; Welsh *v.* Welsh, 5 Ohio, 425.

In Deisher *v.* Stein, 34 Kan. 39; Wiley *v.* Bradley, 60 Ind. 62; and Rosepaugh *v.* Vredenburgh, 16 Hun (N. Y.), 606, a recovery was allowed although the expense was wholly for the plaintiff's benefit.

If profits have been received, they are to be deducted from the value of the improvements. Bellaney *v.* Rogsdale, 14 B. Mon. (Ky.) 195. And that case allowed also interest on the purchase-money to be set off. See Browne Stat. of Frauds, § 119.

1. Walker *v.* Shockelford (Ark.), 5 So. West. Rep. 887; Warden *v.* Sharp, 56 Ill. 104; Worley *v.* Sipe (Ind.), 12 No. East. Rep. 385; Stephenson *v.* Arnould, 85 Ind. 428; Atchison, etc., R. Co. *v.* English (Kan.), 16 Pac. Rep. 82; Sovereign *v.* Ortmann, 47 Mich. 181; Galley *v.* Galley, 14 Neb. 174; Harris *v.* Roberts, 12 Neb. 631; s. c., 41 Am. Rep. 779; Tuthill *v.* Roberts, 22 Hun (N. Y.), 304.

2. For the effect of the statute on title, see the article on SALES.

3. See IX. Am. Law Rev. 436, 444. Browne Stat. of Frauds, § 1386; Beaumont *v.* Breugeri, 5 C. B. 301.

4. Thomas *v.* Williams, 10 B. & C. 664; Mechelen *v.* Wallace, 7 Ad. & E. 49; Vaughan *v.* Hancock, 3 C. B. 766; Praute *v.* Schutte, 18 Ill. App. 62; Coyler *v.* Roe, 99 Ind. 1; Rainbolt *v.* East, 56 Ind. 538; Becker *v.* Mason, 30 Kan. 697; Dowling *v.* McKenney, 124 Mass. 478; McMullen *v.* Riley, 6 Gray (Mass.), 500; Irvine *v.* Stone, 6 Cush. (Mass.) 508; Duncan *v.* Blair, 5 Denio (N. Y.), 196; Thaye *v.* Rock, 13 Wend. (N. Y.) 53; Dock *v.* Host, 7 Watts & S. (Pa.) 72; Dyer *v.* Graves, 37 Vt. 369; Clark *v.* Davidson, 53 Wis. 317.

5. This point has generally arisen on promises to pay for past services, and to pay for others to be furnished in the future, another person being also liable for the past debt. Thus, a promise to pay for gas that has been furnished a third person, and for all gas to be furnished, is severable, and an action may be maintained. Wood *v.* Benson, 2 Crompt. & J. 94; Mayfield *v.* Wadsley, 3 B. & C. 377. So, an agreement to pay for board already furnished a child, and board to be furnished. Haynes *v.* Nice, 100 Mass. 327. See also Mobile, etc., Ins. Co. *v.* McMillan, 31 Ala. 711; Pierce *v.* Woodward, 6 Pick. (Mass.) 206.

6. When the agreement is so far entire that to allow recovery would be virtually to repeal the statute, no such action can be maintained.

A series of *English* cases illustrate this. In Cockins *v.* Ward, 1 C. B. 858, the defendant had promised the plaintiff to pay him £100 if he would give up his lease, which still had some years to run, and induce the landlord to accept him as tenant. The plaintiff did this, but the defendant refused to pay. It was held that the £100 could not be recovered, and a similar decision on similar facts was rendered in Kelly *v.* Webster, 12 C. B. 283, and Smart *v.* Harding, 15 C. B. 652.

The case of Hodgson *v.* Johnson, El. B.

Where an agreement is in the alternative, if one alternative is bad by the statute no action can be maintained on the agreement, although the other is good.[1]

& El. 685, which followed that, has been questioned in Pulbrook *v.* Lawes, 1 Q. B. Div. 284.

Where, however, the agreement is several, and the portion relating to the transfer of land has been completely performed, and to enforce the remainder is not contrary to the statute, the action can be maintained.

In Morgan *v.* Griffith, L. R. 6 Ex. 70, the plaintiff had gone into possession of land on a lease upon the express agreement of the lessor to keep down the rabbits. It was held he could maintain an action on this agreement. And when a landlord had agreed to repair or to pay for repairs made by the tenant, an action for the breach of this agreement has been maintained after the complete performance of the agreement to lease. Seago *v.* Deane, 4 Bing. 459; Angell *v.* Duke, L. R. 10 Q. B. 174; and where it was agreed that certain premises should be bond for a butcher shop at a rent of £37, but the lessor agreed to return £10 if the lessee could not obtain a license, an action to recover the £10 was maintained after an entry into possession and a failure to get the license. Green *v.* Saddlington, 7 El. & B. 503.

In the *United States*, the law is the same.

Thus, where, at the time of a conveyance and as part of the contract, one party agreed to pay a particular charge, a breach of the agreement after the conveyance of the land is actionable. Jewell *v.* Ricker, 68 Me. 377; Preble *v.* Baldwin, 6 Cush. (Mass.) 549; Brackett *v.* Evans, 1 Cush. (Mass.) 79; Remington *v.* Palmer, 62 N. Y. 31; Supervisors *v.* McQueen, 15 Hun (N. Y.), 551.

The *contra* was held in two earlier cases in *New York*. Baldwin *v.* Palmer, 10 N. Y. 232; Dow *v.* Way, 64 Barb. 255. Or where any other agreement has been made. Stephenson *v.* Arnould, 89 Ind. 426; Tenkler *v.* Swaynie, 71 Ind. 562; Graffam *v.* Pierce, 143 Mass. 562; Wetherbee *v.* Potter, 99 Mass. 354; Page *v.* Monks, 5 Gray (Mass.). 492; Smart *v.* Smart, 24 Hun (N. Y.), 127.

Where a contract that was valid without writing is modified by the addition of terms within the Statute of Frauds, the original agreement may be enforced disregarding the modifications. Sanderson *v.* Graves, L. R. 10 Exch. 234; Noble *v.* Ward, L. R. 1 Exch. 117; s. c., L. R. 2 Exch. 135. But no action can be maintained on the modified contract. Marshall *v.* Lynn, 6 M. & W. 109; Stead *v.* Dawber, 10 Ad. & E. 57; Noble *v.* Wood, L. R. 1 Exch. 117; Plevins *v.* Dawning, 1 C. P. Div. 220; Rogers *v.* Atkinson, 1 Kelly (Ga.), 12; Whittier *v.* Dana, 10 Allen (Mass.), 326; Cummings *v.* Arnold, 3 Metc. (Mass.) 486; Blood *v.* Goodrich, 9 Wend. (N. Y.) 68; Bryan *v.* Hunt, 4 Sneed (Tenn.), 543; Dana *v.* Hancock, 30 Vt. 616; Smith *v.* Loomis, 74 Me. 503; Low *v.* Treadwell, 12 Me. 441; Grafton Bank *v.* Woodward, 5 N. H. 99.

If the added terms do not by themselves fall within the statute, and it has been complied with as to the others, the whole may be declared upon. Emmet *v.* Dewhurst, 3 Macn. & G. 587; Negley *v.* Jeffers, 28 Ohio St. 90.

A performance in accordance with the terms of the contract as modified will be a complete performance, and will constitute a defence to an action on the original contract,—Hickman *v.* Haynes, L. R. 10 C. P. 598; Whittier *v.* Dana, 10 Allen (Mass.), 326; Cummings *v.* Arnold, 3 Metc. (Mass.) 486; Neil *v.* Cheves, 1 Bail. L. (S. Car.) 537;—or support an action upon it if given in evidence,—Leather Cloth Co. *v.* Hieronimus, L. R. 10 Q. B. 140; Swain *v* Seamans, 9 Wall. (U. S.) 254; Stearns *v.* Hall, 9 Cush. (Mass.) 31; Long *v.* Hartwell, 34 N. J. L. 116. See Browne Stat. of Frauds.

1. Thus, an oral agreement by sons with their father, to convey certain land to a sister, or, in default of conveyance, to pay her a certain sum of money, is wholly bad. Patterson *v.* Cunningham, 12 Me. 506.

A bond or note given as security for the performance of an oral agreement within the statute cannot be enforced if the maker refuses to perform on the ground of the statute. Rice *v.* Peet, 15 Johns. (N. Y.) 503; Goodrich *v.* Nichols, 2 Root (Conn.), 498. In another *Connecticut* case, however (Couch *v.* Meeker, 2 Conn. 308), a recovery was allowed, the court saying that the condition of the bond was bad, but the agreement contained in it absolute.

In accord with the general statement, see also Howard *v.* Brower, 37 Ohio St. 402; Van Allstine *v.* Wimple, 5 Cow. (N. Y.) 162.

An agreement which is unenforceable by virtue of the statute cannot found a defence, any more than it can found an action.[1]

An agreement to comply with the statute is within its provisions; and no action can be maintained for its breach.[2]

**II. SUBJECT-MATTER TO WHICH THE RULE APPLIES. — 1. The Creation, Assignment, and Surrender of Estates in Land. —** (*a*) *Their Creation.*—Prior to the Statute of Frauds, all freehold estates in corporeal hereditaments could be created by livery of seisin, and all estates less than freehold by parol. The statute changed the law so that all such freehold estates created merely by livery of seisin, and all estates less than freehold, except leases for terms not exceeding three years where on a rent of not less than two thirds the full improved value was reserved, created merely by parol, have the effect only of estates at will, unless they are put in writing and signed by the grantor.[3]

(*b*) *The Written Instrument* required by the statute must be a deed, in the case of freehold estates. An instrument in writing, but not under seal, is insufficient.[4] But in the case of estates less than freehold, the instrument need not be under seal;[5] and a written agreement for a lease signed but not sealed has been held to amount to a lease unless the parties appear to have intended otherwise.[6]

(*c*) *Execution.*—The words of the statute require that the writing be signed; but it has been held that sealing is a sufficient signing.[7]

1. Comes *v.* Lawson, 16 Conn. 246; Bernier *v.* Cubat Mfg. Co., 71 Me. 506; s. c., 36 Am. Rep. 343; King *v.* Welcome, 5 Gray (Mass.), 41; Sennett *v.* Johnson, 9 Pa. St. 335.

2. "It would leave but little if anything of the Statute of Frauds to hold that a party might be mulcted in damages for refusing to execute in writing a verbal agreement which unless in writing is invalid under the Statute of Frauds." *Per* Lord, J., in Chase *v.* Fitz, 132 Mass. 361. Lawrence *v.* Chase, 54 Mo. 196; Amburger *v.* Marvin, 4 E. D. Smith (N. Y.), 393; Ledford *v.* Ferrell, 12 Ired. (N. Car.) 285; Trammell *v.* Trammell, 11 Rich. L. (S. Car.) 471; Yates *v.* Martin, 1 Chand. (Wis.) 118.

And no action can be maintained for the breach of an agreement to waive or discharge a contract the subject-matter of which is within the statute, and as to which the requirements of the statute have been satisfied. Bell *v.* Howard, 9 Mod. 302; Arrington *v.* Porter, 47 Ala. 714.

3. The terms of the *English* statute are substantially adopted in *New Hampshire, Massachusetts, Maine, Vermont, New Jersey, Pennsylvania, Missouri, Arkansas, South Carolina,* and *Georgia,* save as to the length of the leases excepted. And a similar statute exists in all States except *Maryland, Louisiana,* and *New Mexico.*

4. Jackson *v.* Wood, 12 Johns. (N. Y.) 73; Stewart *v.* Clark, 13 Metc. (Mass.) 79.

Many of the United States have abolished the requirement of a seal, by statute. No seal is required in *Alabama, Dakota, Arizona, Idaho, Indiana, Iowa, Kansas, Mississippi, Montana, Nebraska, Ohio, Tennessee, Texas, California.*

5. Browne Stat. of Frauds (4th Ed.), § 7; Farmer *v.* Rogers, 2 Wils. 26; Lake *v.* Campbell, 18 Ill. 106; Mayberry *v.* Johnson, 3 Greene (N. J.), 116; Hill *v.* Woodman, 14 Me. 38; Allen *v.* Jaquish, 21 Wend. (N. Y.) 628.

The law has been changed by statute to require a seal in England (8 & 9 Vict. c. 106 § 3) and in many of the United States—Florida, Connecticut, Indiana, Maryland, Michigan, Missouri, New Hampshire, New York, Oregon.

6. See Browne Stat. of Frauds, § 7. citing Baxter *v.* Brown, 2 W. Bl. 973; Goodlittle *v.* Way, 1 T. R. 735; Morgan *v.* Bissell, 3 Taunt. 65; Poole *v.* Bentley, 12 East, 168.

In Harrison *v.* Parmer, 76 Ala. 157, such an agreement was held to amount to a lease, though on its face it showed that the parties intended making other papers. Cheney *v.* Newberry, 67 Cal. 125. See Hammond *v.* Winchester, 82 Ala. 470. *Contra* when clearly not final.

7. Aveline *v.* Whisson, 4 Man. & G.

It would seem that such is not the law in *Massachusetts*;[1] nor where sealing is abolished, or the distinction between sealed and unsealed instruments discarded.

(*d*) *Execution by Agent.*—The writing will be sufficient if it is signed by an agent lawfully authorized in writing.[2] Where the instrument must be under seal, the authority must be.[3] Where the signature of a party is made by another, at the party's request, and in his presence, the authority to make such signature need not be given in writing; for the act of signing is the act of the party, and not an agent. Such is law in *California*,[4] *Kentucky*,[5] *Maine*,[6] *Massachusetts*,[7] *New Jersey*,[8] and *Pennsylvania*;[9] but in *South Carolina*[10] the court was equally divided upon the question.

Where blanks are left after signing, authority to fill them must be in writing;[11] and an instrument executed in blank, in which the blanks are afterwards filled by an agent authorized by parol, is invalid.[12]

Where the act of an agent not properly authorized is ratified by the principal, the ratification must be of the same nature as the original authority should have been.[13] A contrary doctrine prevails in *Massachusetts*, where a deed executed by an agent without authority may be ratified by parol.[14]

801; Cherry *v.* Hemming, 4 Exch. 631; Parks *v.* Hazlerigg, 7 Blackf. (Ind,) 536.

The law in *Indiana* has been changed by statute, to require subscription. See, on this point, Browne Stat. of Frauds, §§ 9 and 355.

An acknowledgment will be a sufficient signing in Texas. Newton *v.* Emerson, 66 Tex. 142.

1. See Hutchins *v.* Byrnes, 9 Gray (Mass.) 369; Wood *v.* Goodridge 6 Cush. (Mass.) 117.

2. Such authority may be by parol in Tennessee (Johnson *v.* Somers, 1 Humph. 268), *Massachusetts* (see cases cited below, note 18), and, it seems, in *New Jersey* (Doughaday *v.* Crowell, 11 N. J. Eq. 201.)

In *Minnesota*, the authority must not only be in writing, but also must be recorded. Stat. 1887, ch. 26.

3. See title AGENCY, for authorities on this point, and also as to the proper form for execution by an agent. Jennings *v.* McComb, 112 Pa. St. 518.

4. Jansen *v.* McCahill, 22 Cal. 563.

5. Irvin *v.* Thompson, 4 Bibb (Ky.), 295.

6. Frost *v.* Deering, 21 Me. 156.

7. Gardner *v.* Gardner, 5 Cush. (Mass.) 483.

8. Mut. Ben. Ins. Co. *v.* Brown, 30 N. J. Eq. 193.

9. Pierce *v.* Hakes, 23 Pa. St. 242

10. Wallace *v.* McCullough, 1 Rich. Eq. (S. Car.) 426.

11. Burns *v.* Lynde, 6 Allen (Mass.), 305; Bassford *v.* Pearson, 9 Allen (Mass.), 387; Upton *v.* Archer, 41 Cal. 85.

12. People *v.* Bostwick, 32 N. Y. 445; Ohio *v.* Boving, 15 Ohio, 507; United States *v.* Nelson, 2 Brock. 64; Preston *v.* Hull, 23 Gratt. (Va.) 600.

Where, however, before delivery, blanks are filled in by an agent orally authorized so to do, in compliance with his authority the grantor will be estopped to deny that the instrument is his. Phelps *v.* Sullivan, 140 Mass. 36. This decision goes wholly upon the ground of estoppel; and the court refused to decide whether the principal would be bound if the agent exceeded his authority. In an analogous case upon a probate bond which had been executed by sureties, leaving blanks for the amount of the penal sum, where the sum inserted was larger than that authorized by the sureties the court held the sureties liable. White *v.* Duggan, 140 Mass. 18.

13. See under title AGENCY; McDowell *v.* Simpson, 3 Watts (Pa.), 129; Parrish *v.* Koons, 1 Pars. Eq. Cas. (Pa.) 79.

14. Warring *v.* Williams, 8 Pick. (Mass.) 326; Cody *v.* Shepherd, 11 Pick. (Mass.) 400; Japley *v.* Butterfield, 1 Metc. (Mass.) 515; Swan *v.* Stedman, 4 Metc. (Mass.) 548; McIntyre *v.* Park, 11 Gray (Mass.), 102; Russell *v.* Annable, 100 Mass. 72;

(*e*) *Leases Covered by the Statute.*—All leases, except those for certain specified short terms, are covered by the statute, and cannot be created by parol. The effect of a parol demise for a term greater than the statutory limit is to create merely an estate at will in most of the United States,[1] or an estate from year to year in some of the States[2] and in *England*,[3] or for the statutory period for which an oral lease is good,[4] or when possession is taken and rent paid and accepted. Unless possession is taken under the lease, it is without effect.[5]

*What Constitutes a Lease Within the Statute.*—Any grant or contract whereby the exclusive possession of land or any right in land is given, is a lease, and must be in writing.[6] An agreement to provide board and lodging in certain specified rooms is not a lease, within the statute,[7] unless the agreement contemplates that the person shall have exclusive possession of the premises.[8] Mere permission to a tenant who has been notified to quit, to remain on the premises until they are sold, is not a lease, within the statute.[9]

Neither is an agreement that one shall occupy and cultivate premises together with the owners, and receive part of the crops, or shall occupy and cultivate them by himself, paying part of the crops; but if he is given exclusive possession, this does amount to a lease.[10] A mere license to do an act upon the land of another does not require to be in writing, but if the act, or series of acts, cannot be performed without an actual holding or occupying of the licensor's land, to the exclusion of the owner, the permission to do it is more than a license—it is a lease, and must be in writing.[11] Thus, permis-

Bartlett *v.* Drake, 100 Mass. 174; Halbrook *v.* Chamberlain, 116 Mass. 174; Phelps *v.* Sullivan, 140 Mass. 36.

1. So in *Arkansas*, *Georgia*, *Maine*, *Massachusetts*, *New Hampshire*, *New Jersey*, *Missouri*, *South Carolina*, and *Vermont*.

2. *New York*,—People *v.* Rickart, 8 Cow. 226; Laughran *v.* Smith, 75 N. Y. 205; Clark *v.* Barnes, 76 N. Y. 301; *Michigan*,—Morrill *v.* Mackman, 24 Mich. 279;—*Pennsylvania*,—McDowell *v.* Simpson, 3 Watts, 129; Dunna *v.* Rothernell, 112 Pa. St. 272;—*Kentucky*,—Morehead *v.* Watkins, 5 B. Mon. 228;—*Wisconsin*,—Koplitz *v.* Gustavus, 48 Wis. 48.

3. Clayton *v.* Blakely, 8 T. R. 3.

4. So in Nebraska. Friedhof *v.* Smith, 13 Neb. 5.

5. This must be so, since where the demise creates only an estate at will, the will is determined as soon as the demise is made, unless there is an entry; and where the lease is void, there obviously no right can exist before entry. Bridler *v.* Fish, 14 Ill. App. 29.

6. See, for a fine discussion of this point, Browne Stat. of Frauds, § 21 *et seq.*

7. Wright *v.* Stavert, 2 E. & E. 721; White *v.* Maynard, 111 Mass. 250; Wilson *v.* Martin, 1 Denio (N. Y.), 602. See also Wells *v.* Kingston-upon-Hull, L. R. 10 C. P. 402.

8. Inman *v.* Stamp, 1 Stark, 12; Edger *v.* Strafford, 1 Cromp. & J. 391; s. c., 1 Tyrwh 293. And see the decision of Gray, J., in White *v.* Maynard, 111 Mass. 250.

9. Whiteacre *v.* Symonds, 10 East, 13; Hallis *v.* Pool, 3 Metc. (Mass.) 350.

10. Coul *v.* Kirkham, 47 Ill. 344; Guest *v.* Opdyke, 31 N. J. L. 552; Wilbur *v.* Sisson, 53 Barb. (N. Y.) 258; Strain *v.* Gardner, 61 Wis. 174. And see Warner *v.* Abbey, 112 Mass. 355, *per* Endicott, J. In Birmingham *v.* Rogers, 46 Ark. 254, the court says a lease is to be implied unless contrary intent clearly appears.

11. The leading case upon the distinction between leases and licenses is Wood *v.* Lake (reported in Sayer 3; Noy, 98; Rol. 152; Palm. 71; Poph. 151; Godb. 282), which was a case of a parol license to stack coals upon the defendant's land for seven years. The court held the permission a license, since it was merely for a particular purpose, and did not pass the

sion to come upon another's land, and remove timber lying there, is a license,[1] or to use a hall for dancing-parties upon certain specified afternoons at a stipulated price for each afternoon.[2] But permission to build a permanent structure upon the property of another, as a market building,[3] a dam,[4] or a dwelling-house;[5] to leave fixtures there;[6] to dig a drain or lay a pipe;[7] to overflow by a dam;[8] to dig and carry away ore, or dirt and stones;[9] to enter and occupy permanently for a railroad;[10] to enter at any time, cut and take away or stack timber;[11] to cut a canal across;[12] to haul logs across;[13] amounts to a lease, since it is the grant of an interest in the land itself.[14]

In a few States such permission has been held merely a license to do a continuous series of acts, which, when acted upon, becomes irrevocable.[15]

(*f*) *Leases Excepted by the Statute.*—The *English* statute ex-

whole interest in the land. This case apparently rests upon Wall *v.* Paternoster, Poph. 151, which was not in print. It has been followed only in Tayler *v.* Waters, 7 Taunt. 374, while it has been repudiated in a multitude of decisions. See Browne Stat. of Frauds, § 25; and the distinction there taken must be regarded as not law.

1. Whitmarsh *v.* Walker, 1 Metc. (Mass.) 313.

2. Johnson *v.* Wilkinson, 139 Mass. 3.

3. Brown *v.* Galley, Hill & Denio (N. Y.), 310. But see Brookhaven *v.* Baggett, 61 Miss. 383, *contra.*

4. Moulton *v.* Faught, 41 Me. 298; Pitman *v.* Poor, 38 Me. 237; M'Kellip *v.* M'Ilhenny, 4 Watts (Pa.), 317; Morrill *v.* Mackman, 24 Mich. 279; Muneford *v.* Whitney, 15 Wend. (N. Y.) 380; Brown *v.* Woodworth, 5 Barb. (N. Y.) 550; Trammell *v.* Trammell, 11 Rich. Law (S. Car.), 471; Bridges *v.* Purcell, 1 Dev. & B. Law (N. Car.), 492; Chete *v.* Carr, 20 Wis. 531; Cook *v.* Stearns, 11 Mass. 533; Stevens *v.* Stevens, 11 Metc. (Mass.) 231.

5. Houghtaling *v.* Houghtaling, 5 Barber (N. Y.), 383; Benedict *v.* Benedict, 5 Day (Conn.), 464; Collins Co. *v.* Marcy, 25 Conn. 239.

6. Ruffey *v.* Henderson, 21 L. J. (N. S.) Q. B. 49.

7. Hewlins *v.* Shippam, 5 B. & C. 221; Cocker *v.* Cowper, 1 C. M. & R. 418; Fryer *v.* Warne, 29 Wis. 511.

8. Woodward *v.* Deely, 11 Ill. 157; Carter *v.* Harlan, 6 Md. 20; Morrill *v.* Mackman, 24 Mich. 279; Hall *v.* Chaffee, 13 Vt. 150; French *v.* Owen, 2 Wis. 250.

9. Riddle *v.* Brown, 20 Ala. 412; Desloge *v.* Pearce, 38 Mo. 588; Cayuga R. Co. *v.* Niles, 13 Hun (N. Y.), 170; Gauter *v.* Atkinson, 35 Wis. 48.

10. Miller *v.* Auburn, etc., R. Co., 6 Hill (N. Y.), 61. But see Pence *v.* St. Paul, etc., R. Co., 28 Minn. 488, where permission to lay tracks was held merely a license.

11. Yeakle *v.* Jacob, 33 Pa. St. 376; Bennett *v.* Scutt, 18 Barb. (N. Y.) 347.

12. Phillips *v.* Thompson, 1 Johns.Ch. (N. Y.) 131.

13. Duinneen *v.* Rich, 22 Wis. 550.

14. And so an agreement to allow one to occupy as much of land as is necessary to prosecute work of finding and producing oil and minerals, including erection of buildings, etc., is a lease. McElwaine *v.* Brown (Pa.), 11 Atl. Rep. 453.

15. So in *Ohio*,—Wilson *v.* Chalfaut, 15 Ohio, 248 (where a license to erect fixtures had been acted upon);—in *Illinois*,—Russell *v.* Hubbard, 59 Ill. 335 (where grantees of one who had induced an owner of adjoining premises to build a brick house, instead of the wooden one he had intended, by orally agreeing to permit him to build into his wall, were held bound by an irrevocable license);—in *Maine*,—Clement *v.* Durgin, 5 Greenl. 9 (where permission to build a dam on grantor's land, and overflow it, and [Ricker *v.* Kelley, 1 Greenl. 117] where permission to build a bridge on his land, were held licenses irrevocable when acted upon);—and in *New Hampshire*, where permission to lay an aqueduct (Sampson *v.* Burnside, 13 N. H. 264), to build a dam (Woodbury *v.* Parshley, 7 N. H. 237), to build a bridge (Androscoggin Bridge Co. *v.* Bragg, 11 N. H. 102), were held mere licenses, valid and irrevocable if acted upon.

cepted all leases not exceeding the term of three years, whereon a rent of at least two thirds the improved value was reserved, and similar exceptions are made in the statutes of the various States.[1] Thus, *New Hampshire*, *New Jersey*, *North Carolina*, and *Pennsylvania* except terms for three years, and the other States terms for one year.[2] *North Carolina*, however, requires all leases of land for mining to be in writing, whatever the term.

Save in *New Jersey*,[3] *Maryland*,[4] and *New Mexico*,[5] with possibly *Georgia*,[6] the amount of the rent reserved is immaterial,[7] although the statutes of *New Hampshire* and *Pennsylvania* call for the reservation of "full rent."

The statute does not apply to leases from year to year.[8]

Where the statutory exception is of leases for a specified term, an oral lease for not exceeding that term is valid, although it is not to take effect till a future date and the time from the making to the expiration of the lease exceeds the statutory limit.[9]

Later cases in *Maine* and *New Hampshire* have disregarded the authority of these cases. See Moulton *v.* Faught, 41 Me. 298, and Pitman *v.* Poor, 38 Me. 237, which held permission to erect a dam on the land of the grantor to amount to a lease, and, so, to be had without writing. And see Houston *v.* Laffee, 46 N. H. 505, where permission to lay a pipe in grantor's land, and (Dodge *v.* McClintock, 47 Me. 383) to cut timber and place by a dam, were held merely licenses, good by parol; yet the court decided such license to be revocable though acted upon.

The cases in *Ohio* and *Illinois* are put largely upon the ground that the statute has been satisfied by a part performance; and this ground has been adopted in a case very like that from Illinois, cited in Walker *v.* Shackelford 49 Ark. 503.

1. Stat. 29 Charles II., c. 3, § 2.

2. See Stimson's Amer. Stat. § 4143.

3. Birckhead *v.* Cummings, 33 N. J. Law, 44; Gano *v.* Vanderveer, 34 N. J. Law, 293.

4. Union Banking Co. *v.* Gittings, 45 Md. 181.

5. Childers *v.* Talbott (N. M.), 16 Pac. Rep. 275.

6. Cody *v.* Quartermain, 12 Ga. 386.

7. In *England*, the amount of the rent reserved has received little consideration. It has been referred to in *dicta*, but no finding in regard to the amount of the rent reserved appears in any of the cases, save Edge *v.* Strafford, 1 Compt. & J. 381. Indeed the exception has been declared "practically useless" by Putnam, J., in an opinion delivered in Ellis *v.* Paige, (1823) 1 Pick. 47, but reported as a note to Coffin *v.* Lunt, 2 Pick. 77, who says: "I have not seen a case which has been decided upon it where the rent reserved in the parol lease amounted to two thirds at least of the improved value, and therefore was not affected by the statute."

No decisions as to the meaning of "full rent" in the statutes of *New Hampshire* and *Pennsylvania* appear to have been made.

In Birckhead *v.* Cummings, 33 N. J. Law, 44, and Ganó *v.* Vanderveer, 34 N. J. Law, 293, however, it was distinctly decided that the amount of rent must be established; and the same view is taken in the cases cited from *Maryland*, *Georgia*, and *New Mexico*.

8. Legg *v.* Strudwick, 2 Salk, 414; Birch *v.* Wright, 1 T. R. 578; Brown *v.* Kayser, 60 Wis. 1; Fox *v.* Nathans, 32 Conn. 348; Pugsley *v.* Aiken, 11 N. Y. 494; Morrill *v.* Mackman, 24 Mich. 279. Leases from year to year, unless in writing, do not exist in *Massachusetts*. Ellis *v.* Paige, 1 Pick. 43. Nor in *Maine*, Withers *v.* Larrabre, 48 Me. 570.

9. Young *v.* Dake, 5 N. Y. 463; Daggard *v.* Roosevelt, 1 E.D. Smith (N. Y.), 100; Whiting *v.* Ohlert, 52 Mich. 462; s. c., 50 Am. Rep. 265; Sobey *v.* Brisbee, 20 Iowa, 105.

The *contra* is law in *England*, where it is held that the statutory period must be computed from the date of making the agreement (Rawlins *v.* Turner, 1 Ld. Raym. 736), and that the lease must expire within that time. Ryley *v.* Hicks, 1 Stra. 651.

And the same is law in *Minnesota* (Judd *v.* Arnold, 31 Minn. 430), and probably in *Massachusetts* (*cf.* Delano *v.*

In estimating the time, the day of the date is to be included or excluded in the computation, according to the intention of the parties.[1] In the absence of any expression of their intention, the rule of computation varies in the different States.[2]

The provisions of Stat. 29, ch. II, c. 3, § 4 and the analogous sections in the State statutes in regard to contracts for any interest in lands, and contracts not performable within a year, do not apply to such leases.[3]

(*g*) *Assignment, Grant, and Surrender of Existing Terms.*—Every assignment, grant, or surrender of any existing term in lands not held by customary or copyhold tenure, unless by operation of law, must be in writing.[4] The writing need not be under seal, even though the term was created by deed.[5] No special form of words is necessary.[6]

The assignment or surrender must be in writing, although the term assigned or surrendered could be created by parol.[7]

Montague, 4 Cush. (Mass.) 42), which goes, however, upon the ground that the contract was not performable within a year.

1. On this point see an excellent note, 4 Kent's Com. 95.

2. In *Connecticut*, the day of the date is counted (Fox *v.* Nathans, 32 Conn. 348); while in *Massachusetts* (Atkins *v.* Sleeper, 7 All. 487), and *New Hampshire* (Keyes *v.* Dearborn, 12 N. H. 52), that day is excluded.

3. Bolton *v.* Tomlin, 5 Ad. & E. 856; Wright *v.* Stavert, 2 E. & E. 721; Birckhead *v.* Cummings, 33 N. J. Law, 44; Gano *v.* Vanderveer, 34 N. J. Law. 293; Huffman *v.* Starkes, 31 Ind. 474; Sobey *v.* Brisbee, 20 Iowa, 105; Childens *v.* Talbott (N. M.), 16 Pac. Rep. 275.

In *Massachusetts*, however, a contrary doctrine was held in Delano *v.* Montague, 4 Cush. 42, where a lease for one year from a future day was held bad as a contract not performable within a year.

4. *New York* excepts leases for a term not exceeding one year, by statute; and its courts have held that the exception extends to the surrender of the unexpired term of any lease of which not more than a year remains. South *v.* Devlin, 23 N. Y. 364. See if this is still true. *Cf.* Edge *v.* Strafford, 1 Cr. & J. 391; Inman *v.* Stamp, 1 Stark. 12; Cor *v.* Clay, 5 Bing. 440; Jenks *v.* Edwards, 11 Exch. 775. See a full discussion in Browne Stat. of Frauds, § 37 *et seq.*

5. Doe d. Courtail *v.* Thomas, 9 B. & C. 288; Dixon *v.* Buell, 21 Ill. 203; Peters *v.* Barnes, 16 Ind. 219; Esty *v.* Baker, 48 Me. 495; Boyce *v.* Bakewell, 37 Mo. 492; Benton *v.* Schulte, 31 Minn. 312; Sanders *v.* Partridge, 108 Mass. 556; Halleday *v.* Marshall, 7 Johns. (N. Y.) 211; Allen *v.* Jaquish, 21 Wend. (N. Y.) 628; Gwyn *v.* Wellborn, 1 Dev. & B. Law (N. Car.), 313. But a seal is necessary to the assignment of the contract, as distinguished from the term, if the contract was under seal. Wood *v.* Partridge, 11 Mass. 488; Brewer *v.* Dyer, 7 Cush. (Mass.) 337; Bridgham *v.* Tillston, 5 Allen (Mass.), 371.

6. Weddall *v.* Capes, 1 M. & W. 50, *per* Parke, B.; Strong *v.* Crosby, 21 Conn. 398; Gwyn *v.* Wellborn, 1 Dev. & B. Law (N. Car.), 313; Greider's App., 5 Pa. St. 422; Browne St. of Frauds, § 43.

It must appear to be the intention of both parties that the term shall absolutely cease. A recital in a new lease that it is given in consideration of the surrender of an old one does not amount to a surrender of the old (Roe *v.* Archbishop of York, 6 East, 86); while a recital in the new that the old is hereby surrendered is a sufficient note of surrender. Doe *v.* Forward, 3 Q. B. 627. See Doe *v.* Courtenay, 11 Q. B. 702.

Where a lessee made a lease of the premises held by him, to his lessor, it was held that it amounted to a surrender. Shepard *v.* Spaulding, 4 Metc. (Mass.) 416.

7. The statement of the text is law in *England*,—Batting *v.* Maatin, 1 Camp. 317; Mallett *v.* Brayne, 2 Camp. 103;—in *New York*,—Rowan *v.* Little, 11 Wend. 606;—in *Delaware*,—Logan *v.* Barr, 4 Harr. 546;—but not in *Pennsylvania*,—Kiester *v.* Miller, 25 Pa. St. 481; McKinney *v.* Reader, 7 Watts. 123;—nor in Connecticut,—Strong *v.* Crosby, 21 Conn. 398.

It is no objection that the surrender or assignment be to take effect in future.[1]

(*h*) *Assignment or Surrender by Operation of Law.*—The *English* statute in terms excepted from the operation of the statute all assignments and surrenders by operation of law; and undoubtedly such are not within the statute of the various States, though excepted in terms.[2]

Wherever, with the consent of all parties, a change of possession inconsistent with the continued existence of an existing lease takes place, there then is a surrender by operation of law.[3]

This may take place by the acceptance of a new lease by the tenant, before the old has expired in accordance with its terms;[4] by the landlord's acceptance of a new tenant with the consent of the old;[5] or by the actual or symbolic resumption of possession by the landlord with the assent of the old tenant, or under circumstances such that the law presumes his assent.[6]

Where an existing tenant accepts a new lease, there will be no surrender if the new lease is void,[7] or if it is voidable, unless it fully satisfies the intent of the parties in the new contract;[8] but if it is made determinable on a contingency, the fact that the contingency happens, and the lease determines before the date when the old lease

1. Allen *v.* Jaquish, 21 Wend. (N. Y.) 635; Allen *v.* Devlin, 6 Bosw. (N. Y.) 1.

In *England*, the *contra* has been decided in Doe *v.* Milward, 3 M. & W. 328, and very strongly intimated in Weddall *v.* Capes, 1 M. & W. 50, by Parke, B., and in Johnston *v.* Hudleston, 4 B. & C. 922.

The case of Aldenburgh *v.* People, 6 C. & P. 212, which allowed on oral surrender to take effect in future, to be good, has been greatly shaken.

2. Vandekar *v.* Reeves, 40 Hun (N. Y.), 430.

3. Dayton *v.* Craik, 26 Minn. 133.

4. *Ex parte* Vitale, 47 L.T. 480; Roe *v.* Archbishop of York, 6 East, 86; Hoag *v.* Carpenter, 18 Ill. App. 555; Donkersley *v.* Levy, 38 Mich. 54.

5. Thomas *v.* Coak, 2 B. & Ald. 119; Wallace *v.* Kennelly, 47 N. J. Law, 242.

6. Dodd *v.* Acklom, 6 Man. & Gr. 672; Rice *v.* Dudley, 65 Ala. 68; Amory *v.* Kannoffsky, 117 Mass. 351; Smith *v.* Wheeler, 8 Daly (N. Y.), 135; Krank *v.* Nichols, 6 Mo. App. 72; Stewart *v.* Munford, 91 Ill. 58; Smith *v.* Pendergast, 26 Minn. 318; Baumier *v.* Aution (Mich.), 31 No. West. Rep. 888; Loague *v.* Memphis, 7 Lea (Tenn.), 198.

7. Wilson *v.* Sewall, 4 Burr. 1975; Davison *v.* Stanley, 4 Burr. 2210; Roe *v.* Archbishop of York, 6 East, 86; Doe *v.* Courtenay, 11 Q. B. 702; Doe *v.* Poole, 11 Q. B. 7; Smith *v* Niver, 2 Barb. (N. Y.) 180. *Cf.*, *contra*, Mellows *v.* May, Cro. Elig. 874.

8. Whitly *v.* Gough, Dyer, 140; Doe *v.* Forward, 3 Q. B. 627.

Where the new lease, though voidable, fully satisfies the intent of the parties, there seems no ground for holding there is no surrender. The doctrine of surrender by operation of law is based upon the assumption that the landlord, in making a new lease, is exercising a right; and unless the tenant has surrendered, no such right can exist. To prevent injustice, however, the law will not hold the term to be surrendered if the consequence be different from what he intended. If the result be what was intended, although it be a detriment to the tenant, it is difficult to see why the law should not go back to the first assumption, and treat the lease as surrendered for all purposes. The intent of the parties thus becomes an important consideration.

The language of the court, in Doe *v.* Poole, 11 Q. B. 716, is extremely in point: "But the question has been whether acceptance of a lease which is voidable, and afterwards made void contrary to the intention of the parties thereto, and which does not pass an interest according to the contract, is still an absolute surrender in law, provided it has operated to pass any part of the term contracted for. . . . And we are of opinion that this question must be answered in the negative."

would have expired by its terms, does not prevent a surrender by operation of law.[1] The *quantum* of the new lease is immaterial, provided it is what the parties intend.[2] Obviously, the new term must begin before the old would have determined.[3]

A surrender by operation of law results where an old tenant quits, and a new enters with the assent of the old, and is accepted by the landlord. There must be an actual change of possession;[4] a new agreement to make and to assent to a change is not enough.[5] But where the tenant assigns in writing, and the landlord assents orally, an actual entry by the assignee is not necessary.[6] If the lease under which the new tenant enters proves to be invalid, mere entry and occupation by him will not operate a surrender contrary to the intent of the parties.[7]

The assent of both the landlord[8] and the original tenant is essential.[9] This assent of the landlord may be implied from his acts; but generally the mere fact of receiving rent from the new is not enough to discharge the old tenant.[10]

The resumption of the possession by the landlord, with the assent of the tenant, will be a sufficient surrender by operation of law. The resumption may be by actual entry upon the premises,[11] or symbolically by accepting the keys,[12] or by exercise of acts of ownership plainly inconsistent with the continued existence of the old tenancy.[13]

1. Fulmerston *v.* Steward, Plowd. 107 b; Doe *v.* Poole, 11 Q. B. 7, 6; Otis *v.* McMillan, 70 Ala. 46.

2. Hamerston *v.* Stead, 3 B. & C. 478; Doe *v.* Stanion, 1 M. & W. 695; Van Rensselaer's Heirs *v.* Penniman, 6 Wend. (N. Y.) 569; Schieffelein *v.* Carpenter, 15 Wend. (N. Y.) 400; Smith *v.* Niver, 2 Barb. (N. Y.) 180; Abell *v.* Williams, 3 Daly (N. Y.), 17; Flagg *v.* Dow, 99 Mass. 18. *Cf.* Lyon *v.* Reed, 13 M. & W. 285, which must be regarded as overruled.

3. Doe *v.* Walker, 5 B. & C. 111.

4. Phipps *v.* Sculthorpe, 1 B. & Ald. 80; Thomas *v.* Cook, 2 B. & Ald. 119; Bees *v.* Williams, 2 C. M. & R. 581; Randall *v.* Rich, 11 Mass. 494; Hasseltine *v.* Seavey, 16 Me. 212; Smith *v.* Niver, 2 Barb. (N. Y.) 180; Wallace *v.* Kennelly, 47 N. J. Law, 242.

5. Mallett *v.* Brayne, 2 Camp. 103; Taylor *v.* Chapman, Peake Ad. Cas. 19; Thompson *v.* Wilson, 2 Stark. 379; Lammott *v.* Gist, 2 Harr. & G. (Md.) 433.

6. Walker *v.* Richardson, 2 M. & W. 882; Logan *v.* Anderson, 2 Doug. (Mich.) 101.

7. Schieffelein *v.* Carpenter, 15 Wend. (N. Y.) 400.

8. Matthews *v.* Sawell, 8 Taunt. 270; Jackson *v.* Brownson, 7 Johns. (N. Y.) 227; Talle *v.* Orth, 75 Ind. 298; s. c., 39 Am. Rep. 147; Auer *v.* Penn, 99 Pa. St. 370; s. c., 44 Am. Rep. 114.

9. Walker *v.* Richardson, 2 M. & W. 882; Woodcock *v.* Nuth, 8 Bing. 170.

10. Copeland *v.* Watts, 1 Stark. 95; Wilson *v.* Lester, 64 Barb. 431.

The acts must be plainly inconsistent with a determination to hold the original tenant. Thus, an oral waiver of a covenant not to assign by the landlord, on the tenant's assigning does not release the latter from other breaches of the covenants of the lease. Jackson *v.* Brownson, 7 Johns. (N. Y.) 227.

The mere acceptance of rent from any one who will pay it is clearly not necessarily inconsistent with determination to hold the original tenant; but not so if the rent is claimed from the tenants as original and not as sub-tenants. Smith *v.* Niver, 2 Barb. (N. Y.) 189; Bailey *v.* Delaplaine, 1 Sandf. (N. Y.) 5.

11. Grumman *v.* Legge, 8 B. & C. 324; Shahan *v.* Herzberg. 73 Ala. 59; Lamar *v.* McNamee, 10 Gill & J. (Md.) 116; Auer *v.* Penn, 92 Pa. St. 444; Talbot *v.* Whipple, 14 Allen (Mass.), 177.

12. Dodd *v.* Acklom, 6 Man. & Gr. 672; Randall *v.* Rich. 11 Mass. 494; Grumman *v.* Legge, 8 B. & C. 325; Krank *v.* Nichols, 6 Mo. App. 72. But this is not necessarily conclusive. Lucy *v.* Wilkins, 33 Minn. 441.

13. As by letting the premises again Phene *v.* Papplewell, 12 C. B. (N. S.) 334; Nickells *v* Atherstone, 10 Q. B. 944;

The assent of the tenant may be inferred from his acts, although in words he refuse it.[1]

(*i*) *Other Transfers Good by Parol.*—Where the transfer is the act of the law, no instrument in writing is necessary. Thus, a widow's dower need not be set out by deed;[2] and judicial sales are good, though by parol.[3]

Certain transfers made by the parties are held good in some jurisdictions, although not in terms excepted from the statute.

A parol partition made by coparceners, or tenants in common, is good[4] in some States; but partition among joint tenants must be by deed.[5]

An interest in land can be created by parol, by an equitable

Amory *v.* Kannoffsky, 117 Mass. 351; Porter *v.* Noyes, 47 Mich. 55; Pratt *v.* Richards Jewelry Co., 69 Pa. St. 53. But merely advertising them to be let has been held insufficient, as not plainly irreconcilable with the relation of landlord and tenant. Redpath *v.* Roberts, 3 Esp. 225. And an unsuccessful attempt to lease to another tenant, coupled with taking the keys and washing the windows, was held not to be conclusive evidence of the landlord's acceptance of a surrender. Milling *v.* Becker, 96 Pa. St. 182.

1. Thus, where a tenant had absconded, it was held there was a surrender by operation of law on the landlord's taking possession, although the tenant denied his right to do so. McKinney *v.* Reader, 7 Watts (Pa.), 123.

2. Conant *v.* Little, 1 Pick. (Mass.) 189. "If an assignment was a conveyance from the heir to the widow, without doubt, since the statute, a deed or writing would be necessary; but it is not a conveyance; the widow holding her estate by law, and not by contract, wants nothing but to have that part which she is to enjoy set out and distinguished from the rest; and this may be done by setting it out by metes and bounds, as well as by deed." *Per curiam. Acc.:* Johnson *v.* Neil, 4 Ala. 166; Shotwell *v.* Sedam, 3 Ohio, 5; Baker *v.* Baker, 4 Greenl. (Me.) 67; Pinkham *v.* Gear, 3 N. H. 163.

3. Atty.-Gen. *v.* Day, 1 Ves. Sr. 218; Tate *v.* Greenlee, 4 Dev. (N. Car.) 149; Watson *v.* Violett, 2 Duv. (Ky.) 332. But a sale by a sheriff or other public officer not made immediately under order of a court is within the statute. Hughes *v.* Jones, 9 M. & W. 372; Robinson *v.* Garth, 6 Ala. 204; Ennis *v.* Waller, 3 Blackf. (Ind.) 472; Evans *v.* Ashley, 8 Mo. 177; Alexander *v.* Meary, 9 Mo. 510; Simonds *v.* Catlin, 2 Caines (N. Y.), 61.

In *Maryland*, a deed is not necessary to the validity of a sheriff's sale. Baring *v.* Lemmon, 5 Harr. & J. 223. See, however, *dictum* in Barney *v.* Patterson, 6 Harr. & J. 182.

An oral disposition of land by arbitrators, under a submission, is invalid,—Gratz *v.* Gratz, 4 Rawle (Pa.), 411; Stark *v.* Cannady, 3 Litt. (Ky.) 379;—and so is the submission if oral,—Gratz *v.* Gratz, 4 Rawle (Pa.), 411.

4. The statement of the text is law only in a few States: In *New York*,—Wood *v.* Fleet, 36 N. Y. 499, and cases cited;—in *Mississippi*,—Wildey *v.* Bonney's Lessee, 31 Miss. 644;—*Texas*,—Stuart *v.* Baker, 17 Tex. 417;—*Illinois*,—Tomlin *v.* Hilgard, 43 Ill. 300 (*semble*); Grimes *v.* Butts, 65 Ill. 347 (*semble*);—and *Indiana*,—Savage *v.* Lee, 101 Ind. 514, and cases cited. In all these cases it is held that the partition must be acquiesced in and possession held under it for many years. In Eaton *v.* Tallmadge, 24 Wis. 217, expressly approved in Buzzell *v.* Gallagher, 28 Wis. 678, the doctrine is put on the ground that, after such continued possession on the faith of the partition, equity would enforce it, and so it is held good at law.

The *contra* is law in *England*,—Atty.-Gen. *v.* Hamilton, 1 Madd. 214; Stat. 8 and 9 Vict. c. 106, § 3;—*Massachusetts*,—Porter *v.* Perkins, 5 Mass. 233;—*New Jersey*,—Watson *v.* Kelley, 16 N. J. Law, 517; Woodhull *v.* Longstreet, 8 N. J. Law, 405; Richman *v.* Baldwin, 21 N. J. Law, 395; Lloyd *v.* Conver, 25 N. J. Law, 47;—*South Carolina*,—Goodhere *v.* Bornwell, Rice (S.Car.), Eq. 198; but see Slice *v.* Derrick, 2 Rich. Law (S.Car.) 627—*Maine*,—Chenery *v.* Dole, 39 Me. 162; Duncan *v.* Sylvester, 16 Me. 388;—*New Hampshire*,—Ballou *v.* Hale, 47 N. H. 347;—*Pennsylvania*,—Hill *v.* Meyers, 43 Pa. St. 170;—*North Carolina*,—Anders *v.* Anders, 2 Dev. Law (N. Car.), 529; Medlin *v.* Steele, 75 N. Car. 154.

5. Brown, Stat. of Frauds, § 73.

mortgage, by deposit of title deeds;[1] and even where a mortgagee holds the legal title to the land mortgaged, an oral transfer of the debt will be a valid assignment of the mortgage.[2]

A parol agreement establishing a disputed boundary line which has been long acted upon, is given binding force in a few States.[3]

Proprietors of common and undivided lands held by title from certain States can make partition and convey in severalty by vote.[4]

The effect of the recording acts of some of the States has been to give apparent validity to certain oral transfers of land in the case where an unrecorded deed has been delivered up or cancelled with the intention of revesting title in the grantor, and a new deed has been made to a third person. If the latter deed is recorded, it passes a good title to the grantee, although in strictness the grantor has no title to convey.[5]

**2. Promises to Answer for the Debt of Another.**[6]—The 4th section of Stat. 29 Charles II. c. 3, declares that no action shall be brought to charge an executor or administrator upon a promise to answer out of his own estate, or to charge any person upon a special promise

1. See Browne Stat. of Frauds, § 64; Jones Mortgages, § 179 *et seq.* See also title MORTGAGE. The statement of the text is not law everywhere.

2. This is not law in *Maine, Maryland,* and *New Jersey.* See under title MORTGAGES, for the law on this point.

3. The mere agreement as to the position of the true line is obviously not within the statute,—Whitney *v.* Holmes, 15 Mass. 152;—but as the effect of agreeing to occupy according to a certain line will probably be that each party gives up some land to the other, a transfer of an interest in land is thus brought about. The cases are clear that the mere agreement is ineffectual unless in writing, but where there has been long acquiescence in the line, and occupation in accordance with it, a sufficient title is made out. See under title DEED; and see Browne Stat. of Frauds, § 75 and cases cited. Meyers *v.* Johnson, 15 Ind. 261; Raynor *v.* Timerson, 51 Barb. (N. Y.) 517; Sharp *v.* Blankenship, 67 Cal. 441; Camp *v.* Camp, 59 Vt. 667.

Where possession has been taken, such a partition is held good, in Kinnemore *v.* Kinnemore (S. Car.), 1 So. East. Rep. 881.

4. Thorndike *v.* Barrett, 3 Greenl. (Me.) 380; Corbett *v.* Norcross, 35 N. H. 99; Abbott *v.* Mills, 3 Vt. 521; Folger *v.* Mitchell, 3 Pick. (Mass.) 400; Stiles *v.* Curtis, 4 Day (Conn.), 328.

5. Browne Stat. of Frauds, § 60; Tomson *v.* Ward, 1 N. H. 9, Dodge *v.* Dodge, 33 N. H. 487; Mallory *v.* Stodder, 6 Ala. 801; Faulks *v.* Burns, 1 Green Ch. (N. J.) 250; Nason *v.* Grant, 21 Me. 160. But see Patterson *v.* Yeaton, 47 Me. 308; Trull *v.* Skinner, 17 Pick. (Mass.) 105.

In the last case, the real ground of these decisions is well put by Shaw, C. J., at p. 205: "The cancellation reconveys no interest to the grantor; and yet, taken together, such cancellation and conveyance to a third person make a good title to the latter by operation of law. It gives a seisin *de facto*; a conveyance by deed duly registered, being to many purposes equivalent to livery of seisin; . . . it is good against the grantor and his heirs by force of the second deed; and it is good against the first grantee, and all claiming under him, by force of the Registry Acts."

The *contra* is law in *New York, Connecticut, Kentucky,* and *Wisconsin.* See TITLE DEED.

6. The law on this subject is in a state of hopeless confusion, arising almost wholly from the different views taken of the scope of the statute. Where Thomas *v.* Cook, 8 B. & C. 728, is law, and the statute is confined to contracts of suretyship, results are reached entirely different from those obtained where Green *v.* Crosswell, 10 Ad. & E. 453, is followed, and contracts of indemnity are included within its scope.

Much of the apparent contradiction will disappear on noting the jurisdiction in which the decision is made.

As the promises of executors and administrators to answer out of their own estates are essentially the same as other promises of suretyship, it has seemed best to treat all together.

to answer for the debt, default, or miscarriages of any other person, unless the agreement, or some note or memorandum of it, be in writing, signed by the party to be charged, or by some person by him lawfully authorized. Statutes substantially the same exist in all the United States, save *Maryland* and *New Mexico*;[1] but *Arizona*, *California*, *Colorado*, *Dakota*, *Idaho*, *Louisiana*, *Minnesota*, *Nevada*, *Utah*, and *Wisconsin* omit the clauses as to executors and administrators.[2] *Delaware* and *Pennsylvania* except promises where the debt does not exceed five dollars; and in *Delaware* the promise is binding, though oral, for any amount not exceeding twenty-five dollars, if proved by the oath of a witness.[3]

In *Louisiana*, the statute extends to all promises to pay the debt of another.[3] *Alabama* and *Delaware* require the authority of an agent to be in writing.[2]

The phraseology of the statute differs slightly in the various States;[4] and the codes of *California*, *Idaho*, and *Utah* except certain clauses of contracts.[5]

In *England*, and in most of the United States, the promise, to come within the statute, must result in a contract of suretyship; there must be a deliberate intention, in fact or in contemplation of law, that the obligation arising from the special promise shall be purely a collateral promise. In others of the United States, a mere contract of indemnity is within the statute; and the fact that there is in existence, or to come into existence, an obligation of another person, the performance of which will put an end to all liability upon the special promise, or which will itself be extinguished by performance of the special promise, is enough to bring the latter within the statute.[6]

1. In these jurisdictions, however, the English statute is in force as part of the common law. Sibley *v.* Williams, 3 Gill & J. (Md.) 62; Childers *v.* Talbott (N. M.), 16 Pac. Rep. 275.

2. See Stimson Am. Stat. Law, & Sup. (1887) § 4140.

3. Stimson Am. Stat. Law, & Sup. (1887) § 4141.

4. The word "miscarriage" is omitted in *Pennsylvania* and *Louisiana*, and "misdoing" substituted for it in *Maine*, *Massachusetts*, *Vermont*, *New York*, *Virginia*, *West Virginia*, *Kentucky*, *Michigan*, *Minnesota*, *Nebraska*, and *Washington*. Stimson Am. Stat. Law, & Sup. (1887), § 4140.

5. These are promises: (1) Made by one who has received property of another, on undertaking to apply it according to such promise; or by one who has received a discharge from an obligation in consideration of his promise; (2) when the nature of the promise is such that the promisor becomes the principal obligee in the original contract and the original debtor becomes surety; (3) when, being for the antecedent obligation of another, that obligation is cancelled and the new taken in its place; or upon consideration of the release of the person or property of another from arrest or levy, upon a judgment obtained upon an antecedent obligation; or upon a consideration beneficial to the promisor from whomsoever moving; (4) of a factor acting under a *del credere* commission; and (5) made in connection with the transfer of an instrument for the payment of money, upon which a third person may become liable to the transferror in regard to that instrument. Stimson Am. Stat. Law, & Sup. (1887) § 4140, notes.

6. The doctrine that a contract of indemnity is within the Statute of Frauds is based upon the theory that, wherever there is a liability in existence, the performance of which by the debtor will put an end to liability upon the special promise, the special promise amounts to a promise to pay the debt of another, and must be regarded as collateral to it. It rests upon the case of Green *v.* Crosswell, 10 Ad. & E. 453, which decided that

(*a*) *The Debt, Default, or Miscarriage.*—The words "debt, default, miscarriage" comprehend every kind of liability enforceable by civil action.[1] To the existence of a promise within the

a promise to indemnify the plaintiff for becoming surety upon the bail bond of a third party was within the statute, since, upon his becoming surety, an obligation would arise on the part of the third person to indemnify the plaintiff, the satisfaction of which would remove all liability in damages from the promisor.

Lord Durman, C.J., in delivering the opinion, condemned the reasoning of Bayley and Parke, J.J., in Thomas *v.* Cook, and declared the effect of that case would be greatly to diminish the salutary effect of the Statute of Frauds.

Green *v.* Crosswell was disapproved in Cripp *v.* Hartwell, 2 B. & S. 697, 4 B. & S. 414, and directly disregarded in Wildes *v.* Dudlan, L. R. 19 Eq. 198; and is clearly no longer law in *England*, if indeed it was ever law there.

It has, however, been adopted as law in some of the United States; and a very recent case in *Mississippi* has expressly approved it and repudiated Thomas *v.* Cook. May *v.* Williams, 61 Miss. 125; s. c., 48 Am. Rep. 80.

It is followed in *Alabama*,—Brown *v.* Adams, 1 Stew. (Ala.) 51; Godden *v.* Pierson, 42 Ala. 370;—in *Illinois*,—Brand *v.* Whelan, 18 Ill. App. 186;—in *Ohio*,—Easter *v.* White, 12 Ohio St. 219; Kelley *v.* Hibbs, 13 Ohio St. 340; Ferrell *v.* Maxwell, 28 Ohio St. 383;—in *Mississippi*,—May *v.* Williams, 61 Miss. 125; s. c., 48 Am. Rep. 80;—in *Missouri*,—Garner *v.* Hudgins, 46 Mo. 399; Bissig *v.* Britton, 59 Mo. 204;—in *North Carolina* (*semble*),—Draughan *v.* Bunting, 9 Ired. 10;—in *South Carolina*,—Simpson *v.* Nance, 1 Speers (S. Car.), 4;—in *Tennessee*,—Macy *v.* Childress, 2 Tenn. Ch. 438;—and in *Pennsylania*,—Nugent *v.* Wolfe, 111 Pa. St. 471; s. c., 56 Am. Rep. 291; but see Hollowbush's Estate, 13 Phila. 217.

On the other hand, the doctrine that a contract of indemnity is not within the statute goes upon the ground that it concerns only contracts of suretyship.

This was definitely determind in *England* in the case of Thomas *v.* Cook, 8 B. & C. 728, which was an action upon a promise to indemnify the plaintiff if he would join with defendant and others as surety upon a bond which was to be negotiated to provide funds to enable a third person to meet his debts. It was held that the promise was an original undertaking, and, accordingly, was not within the statute.

Thomas *v.* Cook is followed in *England*. Wildes *v.* Dudlaw, L. R. 19 Eq. 198 (a case which had facts precisely similar to those of Green *v.* Crosswell); Montstephen *v.* Lakeman, L. R. 5 Q. B. 613; L. R. Q B. 196; L. R. 7 H. of L. 17; Yorkshire Railway Waggon Co. *v.* Machure, L. R. 19 Ch. Div. 478.

And it is followed in the greater number of the United States.

*Connecticut*,—Reed *v.* Holcomb, 31 Conn. 360 (*cf.* Clement's Appeal, 52 Conn. 464);—*Georgia*,—Jones *v.* Shorter, 1 Kelly (Ga.), 294;—*Iowa*,—Mills *v.* Brown, 11 Iowa, 314;—*Indiana*,—Horn *v.* Bray, 51 Ind. 555; Anderson *v.* Spencer, 72 Ind. 315; s. c., 37 Am. Rep. 162; Brush *v.* Carpenter, 6 Ind. 78, *contra*, is overruled;—*Louisiana*,—Hoggatt *v.* Thomas, 35 La. Ann. 298;—*Kentucky*,—Dunn *v.* West, 5 B. Mon. (Ky.) 376; Lucas *v.* Chamberlain, 8 B. Mon. (Ky.) 276; Jones Letcher, 13 B. Mon. (Ky.) 363;—*Maine*,—Smith *v.* Layward, 5 Greenl. (Me.) 504;—*Massachusetts*,—Perley *v.* Spring, 12 Mass. 297; Chapin *v.* Lapham, 20 Pick. (Mass.) 467; Aldrich *v.* Ames, 9 Gray (Mass.), 76;—*Michigan*,—Potter *v.* Brown, 35 Mich. 274 (but *cf.* Comstock *v.* Morton, 36 Mich. 277);—*Minnesota*,—Goetz *v.* Foos, 14 Minn. 265;—*New Hampshire*,—Holmes *v.* Knights, 10 N. H. 175; Cutter *v.* Emery, 37 N. H. 567; Demerritt *v.* Bickford, 58 N. H. 523;—*New Jersey*,—Apgar *v.* Hiler, 24 N. J. L. 812;—*New York*,—Sanders *v.* Gillespie, 59 N. Y. 250 (earlier cases in this State were conflicting);—*Vermont*,—Braman *v.* Russell, 20 Vt. 205; Green *v.* Burton (Vt.), 10 Atl. Rep. 575;—*Wisconsin*,—Shook *v.* Van Water, 22 Wis. 532; Vogel *v.* Melms, 31 Wis. 306.

See a discussion of these cases in Browne Stat. of Frauds, § 161 *et seq.*

Even in States where Green *v.* Crosswell is law, the doctrine that a new consideration inuring to the benefit of the promisor will take the promise out of the statute is countenanced; and some of the inconveniences which logically would result from that case are thus avoided.

1. "Debt" refers to a contract liability already incurred, "default" to one to be incurred—*per* Lord Ellenborough, in Cantling *v.* Aubert, 2 East. 325; while Abbott, J., in Kirkham *v.* Master, 2 B. & Ald. 613, declared that "miscarriage" differed in meaning from debt and default, comprehending "that species of wrongful

statute, it is essential that there be some obligation resting upon another person, which is clear, ascertained, and capable of being enforced against him.[1] It may be already in existence, or merely prospective.[2] It must, however, be binding upon the other.[3] Thus, a promise to answer for the debt of a married woman is not within the statute,[4] since such debt is unenforceable; but a promise to answer for the debt of a minor is within the statute,[5] since, though open to a personal defence, it is nevertheless binding until that defence is raised.[6]

The obligation need not be express.[7]

(*b*) *The Promisee.*—The promise must be made to the creditor.[8]

A promise to the debtor to pay him the amount he owes, or to pay or answer for it to his creditor, is not within the statute.[9]

act for the consequences of which the law would make the party civilly responsible."

It may nevertheless be doubted whether a liability in tort is included. Buckary *v.* Darnell, 2 Ld. Raym. 1085. In Read *v.* Nash, 1 Wils. 805, it was decided that an obligation arising from a tort could not found the relation of suretyship; and though Kirkham *v.* Master, 2 B. & Ald. 613, distinguishes Read *v.* Nash, and apparently settled the law in accordance with the statement in the text, on principle the earlier cases are preferable.

Kirkman *v.* Master is followed in Turner *v.* Hubbell, 2 Day (Conn.), 457; Combs *v.* Harshau, 63 N. Car. 198; Hayes *v.* Burkam, 51 Ind. 130; Duffy *v.* Wunsch, 42 N. Y. 243.

1. Read *v.* Nash, 1 Wils. 305; Montstephen *v.* Lakeman, L. R. 7 H. L. 24; Lehman *v.* Levy, 69 Ala. 48; Griffin *v.* Derby, 5 Greenl. (Me.) 476; Barrett *v.* McHugh, 128 Mass. 165; Thompson *v.* Blanchard, 3 N. Y. 335; Douglas *v.* Jones, 3 E. D. Smith (N. Y.), 551; Hill *v.* Frost, 59 Tex. 25; Johnson *v.* Noonan, 16 Wis. 687.

2. Jones *v.* Cooper, 1 Cowp. 227; Matson *v.* Wharam, 2 T. R. 80; Cahill *v.* Bigelow, 18 Pick. (Mass.) 369; *Ex parte* Williams, 4 Yerg. (Tenn.) 579; Mead *v.* Watson, 57 Vt. 426.

3. Prentice *v.* Wilkinson, 5 Abb. Pr. (N. Y.) 49; Means *v.* Wagner, 1 McCord (S. Car.), 395; Yorkshire Railway Waggon Co. *v.* McClure, L. R. 19 Ch. Div. 478 (where contract was *ultra vires*).

4. Moggs *v.* Ames, 1 Mo. & P. 294; s. c., 4 Bing. 470; Connerat *v.* Goldsmith, 6 Ga. 14; Miller *v.* Long, 45 Pa. St. 350; Kimball *v.* Newell, 7 Hill (N. Y.), 14. But where her separate estate is liable, or she is herself made liable by statute, such a promise is undoubtedly within the statute

A very late case in *Massachusetts* has held that no valid distinction can be made between the promise of a married woman and that of a minor; and held sureties liable on a bond given by a wife to her husband. Winn *v.* Sanford, 145 Mass. 302. Although no question on the Statute of Frauds could rise, since the promise was in writing, the case is valuable in showing how courts will treat a promise collateral to that of a married woman.

5. Dexter *v.* Blanchard, 11 Allen (Mass.) 365; Clark *v.* Levi, 10 N. Y. Leg. Obs. 184. *Contra*, King *v.* Summit, 73 Ind. 312. See Downey *v.* Hinchman, 25 Ind. 448. *Cf.* Roche *v.* Chaplin, 1 Bailey Law (S. Car.), 419.

6. If for any reason the principal contract falls, the collateral obligation goes too. Smith *v.* Hyde, 19 Vt. 54. But this is true only if the principal contract itself fails. If it is merely rendered unenforceable by a defence personal to the original debtor, the collateral obligation remains binding. See Winn *v.* Sanford, 145 Mass. 302, and cases there cited.

7. Browne Stat. of Frauds, § 158; Redhead *v.* Cator, 1 Stark. 12; Whitcomb *v.* Kephart, 50 Pa. St. 85; Kirkham *v.* Master, 2 B. & Ald. 613.

8. Aldrich *v.* Ames, 9 Gray (Mass.), 76; Eastwood *v.* Kenyon, 11 Ad. & E. 438; Browne Stat. of Frauds, § 188 and cases cited; Berry *v.* Brown (N. Y.), 14 N. East. Rep. 289; Pratt *v.* Humphrey, 22 Conn. 317; North *v.* Robinson, 2 Duv. (Ky.) 71; Hardesty *v.* Jones, 10 Gill & J. (Md.) 404; Howard *v.* Coshaw, 33 Mo. 118; Movin *v.* Martz, 13 Minn. 191; Fiske *v.* McGregory, 34 N. H. 414; Soule *v.* Albee, 31 Vt. 142; Green *v.* Randall, 51 Vt. 67; Morrison *v.* Hogue, 49 Iowa, 574.

9. Dewatt *v.* Hartzell, 7 Colo. 601; Windell *v.* Hudson, 102 Ind. 501; Clinton Nat. Bk. *v.* Studemann (Iowa), 37

(*c*) *The Special Promise.*—As has already been stated, the promise must be to answer for the debt, default, or miscarriage of another. If the effect of the promise is to put an end to the obligation of the other, obviously the statute does not apply.[1] Such a promise is collateral to nothing; it is an independent obligation, not within the statute. Equally obviously a promise to answer for one's own debt is not within the statute.[2]

This is true although another is also liable, and though the promise takes the form to pay if he does not.[3]

It must be, moreover, a promise to pay out of the promisor's own estate; a promise to pay the debt of another, out of his property in the control of the promisor, is not within the statute.[4]

No. West. Rep. 112; Wilson *v.* Smith (Iowa), 35 N. W. Rep. 506; Ware *v.* Allen (Miss.), 1 So. Rep. 738. 64 Miss. 545; Green *v.* Estes, 82 Nev. 337; Bailey *v.* Bailey, 56 Vt. 398; Haile *v.* Bailey, 58 Wis. 434.

1. Goodman *v.* Chase, 1 B. & Ald. 297; Bird *v.* Gammon, 3 Bing. (N. Car.) 883; Butcher *v.* Stewart, 11 M. & W. 857; Click *v.* McAfee, 7 Port. (Ala.) 62; Thornton *v.* Guice, 73 Ala. 321; Howell *v.* Field, 70 Ga. 592; Sapp *v.* Faircloth, 70 Ga. 690; Edder *v.* Roberts, 17 Ill. 505; Graham *v.* Mason, 17 Ill. App. 399; Parker *v.* Heaton, 55 Ind. 1; White *v.* Solomonsky, 40 Md. 585; Curtis *v.* Brown, 18 Pick. (Mass.) 467; Whittemore *v.* Wentworth, 76 Me. 201; Malcrone *v.* Amer. Lumber Co., 55 Mich. 622; Yale *v.* Edgerton, 14 Minn. 194; Booth *v.* Eighmie, 60 N. Y. 238; Allshouse *v.* Ramsey, 6 Whart. (Pa.) 331; Armstrong *v.* Flora, 3 T. B. Mon. (Ky.) 43; Mosely *v.* Taylor, 4 Dana (Ky.), 542; Anderson *v.* Davis, 9 Vt. 136; Harrington *v.* Rich, 6 Vt. 666; Watson *v.* Jacobs, 29 Vt. 169.

2. Darst *v.* Bates, 95 Ill. 493; Cott *v.* Roat, 17 Mass. 229; Palmer *v.* Witcherly, 15 Neb. 98; De Witt *v.* Root, 18 Neb. 567; Smart *v.* Smart, 97 N. Y. 559; Taylor *v.* Preston, 79 Pa. St. 436, 441; Browne Stat. of Frauds, § 188 and cases cited.

Where the promise is to pay one's own debt, not to the original creditor, but to a creditor of his, it is not within the statute, although this may be a method of paying the debt of another. McLaren *v.* Hutchinson, 22 Cal. 187; Ford *v.* Finney, 35 Ga. 258; Sanders *v.* Clason, 13 Minn. 379; Conner *v.* Williams, 2 Rob. (N. Y.) 46; Clymer *v.* De Young, 54 Pa. St. 118; Wood *v.* Moriarty (R.'I.), 9 Alt. Rep. 427; Hayle *v.* Bailey, 58 Wis, 344.

In *Massachusetts*, the promise is collateral unless made upon a consideration inuring to the benefit of the promisor and affecting the original debt. Furbish *v.* Goodnow, 98 Mass. 297.

So with an administrator's promise to pay, on a consideration accruing after intestate's death. Holderbough *v.* Turpin, 75 Ind. 84; s. c., 39 Am. Rep. 124.

So with a promise to pay an heir-at-law for not contesting a will. Bellows *v.* Sawles, 57 Vt. 164; s. c., 52 Am. Rep. 118.

And so of a guardian's promise to pay ward's taxes,—Elson *v.* Spraker, 100 Ind. 374;—or to pay ward's debts,—French *v.* Thompson, 6 Vt. 54.

3. Batsom *v.* King, 4 H. & N. 739; Hawes *v.* Martin, 1 Esp. 162; Files *v.* McLeod, 14 Ala. 611; Hopkins *v.* Carr, 31 Ind. 260. But see Headrick *v.* Wiseheart, 57 Ind. 129; Fish *v.* Thomas, 5 Gray (Mass.), 45; Hoove *v.* Morris, 3 Ohio, 56; Aiken *v.* Durea, 2 Nott & McC. (S. Car.) 370; Rice *v.* Barry, 2 Cranch (C. C.), 447; Durham *v.* Maurow, 2 N. Y. 541.

Where, however, his liability has once ceased, a new promise may be collateral. Peabody *v.* Harvey, 4 Conn. 119; Huntington *v.* Harvey, 4 Conn. 124.

4. See Browne Stat. of Frauds, § 187 and cases cited; De Watt *v.* Hatzell, 7 Colo. 601; Hughes *v.* Fisher (Colo.), 15 Pac. Rep. 702; Walkins *v.* Sands, 4 Ill. App. 207; Clarke *v.* Palmer, 129 Mass. 373; Mason *v.* Wilson, 84 N. Car. 51; s. c., 37 Am. Rep. 612; Cook *v.* Moore, 18 Hun (N. Y.), 31; Dock *v.* Boyd, 93 Pa. St. 92; Winn *v.* Wood, 97 Pa. St. 216; Shaeber *v.* Bushong, 105 Pa. St. 514; Bailey *v.* Bailey, 26 Vt. 398.

Mere possession of funds of the debtor, without authority to pay the debt, will not withdraw the promise from the statute. Woodruff *v.* Scaife (Ala.), 3 So. Rep. 311; Weyer *v.* Beach, 14 Hun (N. Y.), 231; Dilts *v.* Parke, 1 South, (N. J.) 219; Simpson *v.* Nance, 1 Speers Law (S. Car.), 4.

Yet a promise by a debtor to pay orders issued by his creditor to creditors of the latter, it is held, must be in writing.[1]

It must be also an agreement to make good to the promisee something that another is also bound to make good to him.[2] Thus, a promise to indemnify a subsequent indorsee if he will sue the acceptor of a dishonored bill;[3] to save one from payment if one will make a note to a third party for the benefit of the promisor;[4] to save harmless from a trespass;[5] an engagement by a promoter of a corporation that, if one will take stock in it, he shall receive fifteen per cent upon it within a year;[6]—these are not within the statute.

It must be a promise made upon good consideration.[7]

The great confusion in the cases has arisen in the attempt to apply these principles of law, and to determine whether or not, in truth, a promise be to pay the debt of another, or merely to perform a distinct and independent obligation of the promisor. The essential question is, What is the promise?[8] "If the real substance of the promise be to perform some duty or obligation of the party making the promise, it is not within the statute; though in form it is a promise to pay another's debt, and the result of its performance may effect the payment of the debt of another."[9]

In certain classes of cases this is easy to determine. Where goods, money, or services are furnished to a third person, at the request and on the credit of the promisor, the undertaking is clearly original.[10] But if it is contemplated that the third person shall become liable for them at all, the promise is collateral; and the fact that the liability upon which the creditor relied chiefly

Nor will the fact that the promisor holds funds placed in his hands to indemnify him in case he pays out of his own, unless the original liability is released. Ackley *v.* Parmenter, 98 N. Y. 425.

Until some duty to pay out of these funds arises, a promise to pay is collateral. Belknap *v.* Bender, 75 N. Y. 446.

1. Manley *v.* Geagan, 105 Mass. 445; Preston *v.* Young, 46 Mich. 103; s c., 41 Am. Rep. 148; Pfaff *v.* Cummings (Mich.), 34 N. W. Rep. 281.

2. See cases cited in notes 8 and 9, page 676; Cribb *v.* Houghton, 64 Wis. 333.

3. Bullock *v.* Lloyd, 2 Car. & P. 119; Winckworth *v.* Mills, 2 Esp. 484, is not law.

4. Green *v.* Brookins, 23 Mich. 48; Hull *v.* Brown, 35 Wis. 652.

5. Marcy *v.* Crawford, 16 Conn. 549; Allaire *v.* Ouland, 2 Johns. Cas. (N. Y.) 52.

6. Moorehouse *v.* Crangle, 36 Ohio St. 130.

7. Furbish *v.* Goodnow, 98 Mass. 598, *per* Gray, J.; Leonard *v.* Vredenburgh, 8 Johns. (N. Y.) 29; Ackley *v.* Parmenter, 98 N. Y. 433; Davis *v.* Tift, 70 Ga. 52; Hayden *v.* Weldon, 43 N. J. L. 128; Bailey *v.* Bailey, 56 Vt. 398; Carlisle *v.* Campbell, 76 Ala. 247; Lehman *v.* Levy, 69 Ala. 48.

8. Fullam *v.* Adams, 37 Vt. 391; Maule *v.* Bucknell, 50 Pa. St. 39; Stratton *v.* Hill, 134 Mass. 27; Spann *v.* Cochran, 63 Tex. 240; Emerson *v.* Slater, 22 How. 28.

9. Poland, J., in Fullam *v.* Adams, 37 Vt. 391. See also Emerson *v.* Slater, 22 How. (U. S.) 28.

10. Buckmyr *v.* Darnell, 2 Ld. Raym. 1085; McTighe *v.* Heaman, 42 Ark. 285; Brown *v.* Harrell, 40 Ark. 429; Davis *v.* Tift, 70 Ga. 52; Baldwin *v.* Heers, 73 Ga. 739; Chicago, etc., Coal Co. *v.* Liddell, 69 Ill. 639; Lance *v.* Pierce, 101 Ind. 595; Langdon *v.* Richardson, 58 Iowa, 610; Sanborn *v.* Merrill, 41 Me. 467; Walker *v.* Hill, 119 Mass. 249; Sutherland *v.* Caster, 52 Mich. 151; Lasson *v.* Jensen, 53 Mich. 427; Morris *v.* Osterhaut, 55 Mich. 262; Grant *v.* Wolf, 34 Minn. 32; Maurin *v.* Fogelberg (Minn.), 32 N. W. Rep. 858; West *v.* O'Hara, 55 Wis. 645.

was that of the promisor, is immaterial.[1] If credit was given both jointly, and both were held jointly liable, the promise is original.[2] In determining whether or not a primary and secondary liability has been created, the question to whom credit was given—i.e., what liabilities were created—is for the jury.[3] Who is charged upon the seller's books,[4] and to whom the bill is sent or the goods delivered,[5] are of importance in reaching a conclusion, but are not themselves conclusive.[6]

A promise to indorse the note of another, or to execute a note as surety for another, is within the statute;[7] and so too is a promise to join with others in making or indorsing a note for the purpose of raising funds to pay the debt of a third party.[8] An oral promise to accept a bill of exchange, however, is held to be good.[9] An agreement that property already pledged shall be re-

**1.** Anderson *v.* Hayman, 1 H. Bl. 120; Baykin *v.* Dohlonde, 1 Sel. Cas. 502; Foster *v.* Napier, 74 Ala. 393; Wills *v.* Ross, 77 Ind. 1; Langdon *v.* Richardson, 58 Iowa, 610; Elder *v.* Warfield, 7 Hare & J (Md.) 391; Conally *v.* Kettlewell, 1 Gill (Md.), 260; Norris *v.* Graham, 33 Md. 56; Cahill *v.* Bigelow, 18 Pick. (Mass.) 369; Hill *v.* Raymond, 3 Allen (Mass.), 540; Swift *v.* Peirce, 13 Allen (Mass.), 136; Bugbee *v.* Kendricken, 130 Mass. 437; Bresler *v.* Pendell, 12 Mich. 224; Welch *v.* Marvin, 36 Mich. 59; Cole Hutchinson, 34 Minn. 410; Walker *v.* Richards, 39 N. H. 259; Hayden *v.* Weldon, 43 N. J. Law, 128; Chase *v.* Day, 17 Johns. (N. Y) 114; Brady *v.* Sackhider, 1 Sand. (N. Y.) 514; Larsco *v.* Wynean, 14 Wend. (N. Y.) 246; Darlington *v.* McCunn, 2 E. D. Smith (N. Y.), 411; Hanford *v.* Higgins, 1 Bosw. (N. Y.) 441; Dixon *v.* Frazee, 1 E. D. Smith (N. Y.), 32; Allen *v.* Scarff, 1 Hilton (N. Y.), 209; Read *v.* Ladd (N. Y.), Edm. Sel. Cas. 100; Murphy *v.* Reakert, 12 Heisk. (Tenn.) 397; Steele *v.* Towne, 28 Vt. 771; Busbee *v.* Allen, 31 Vt. 613; Whitman *v.* Bryant, 49 Vt. 512; Mead *v.* Watson, 57 Vt. 426; Radcliff *v.* Poundstone, 23 W. Va. 724.

**2.** Boyce *v.* Murphy, 91 Ind. 1; s. c., 46 Am. Rep. 567; Swift *v.* Pierce, 13 Allen (Mass.), 136; Gibbs *v.* Blanchard, 15 Mich. 292; Rottman *v.* Fix, 25 Mo. App. 571; Hatfield *v.* Dow, 27 N. J. Law, 440; *Ex parte* Williams, 4 Yerg. (Tenn.) 579; Wainwright *v.* Strow, 15 Vt. 215; Eddy *v.* Davidson, 42 Vt. 52.

**3.** Montstephen *v.* Lakeman, L. R. 7 H. L. 17; Moshier *v.* Kitchell, 87 Ill. 18; Petit *v.* Braden, 55 Ind. 201; Dean *v.* Tallman, 105 Mass. 443. *Cf.* Stratton *v.* Hill, 134 Mass. 27; Bloom *v.* McGrath, 53 Miss. 249; Glun *v.* Lehnew, 54 Mo. 45; Eshleman *v.* Harnish, 76 Pa. St. 97; Cowdin *v.* Gottgetren, 55 N. Y. 650.

**4.** Matson *v.* Wharam, 2 T. R. 80; Anderson *v.* Hayman, 1 H. Bl. 120; Lance *v.* Pearce, 101 Ind. 595; Langdon *v.* Richardson, 58 Iowa, 610; Conally *v.* Kettlewell, 1 Gill (Md.), 260; Dixon *v.* Frazee, 1 E. D. Smith (N. Y.), 32; Leland *v.* Creyon, 1 McCord (S. Car.), 100.

**5.** Lorson *v.* Wyman, 14 Wend. (N. Y.) 246; Pennell *v.* Pentz, 4 E. D. Smith (N. Y.), 639.

**6.** Ruggles *v.* Gatton, 50 Ill. 412; Lance *v.* Pearce, 101 Ind. 595; Burkhalter *v.* Farmer, 5 Kan. 477; Myer *v.* Graffiin, 31 Md. 350; Swift *v.* Peirce, 13 Allen (Mass.), 136; Langdon *v.* Hughes, 107 Mass. 272; Walker *v.* Hill, 119 Mass. 249; Barrett *v.* McHugh, 128 Mass. 165; Champion *v.* Doty, 31 Wis. 190.

All the facts and circumstances are to be taken into account. Montstephen *v.* Lakeman, L. R. 7 Q. B. 196; Keate *v.* Temple, 1 Bos. & P. 158; Simpson *v.* Penton, 2 Crompt. & M. 430; Billingsby *v.* Dunpewolf, 11 Ind. 414; Netfield *v.* Dow, 27 N. J. Law, 440; Payne *v.* Baldwin, 14 Barb. (N. Y.) 570; Chase *v.* Day, 17 Johns. (N. Y.) 114; Worwick *v.* Groshaly, 3 Grant (Pa.), 234; Hazen *v.* Bearden, 4 Sneed (Tenn.), 48; Blodgett *v.* Lowell, 33 Vt. 174; Smith *v.* Hyde, 19 Vt. 54; Turton *v.* Burke, 4 Wis. 119.

**7.** Dee *v.* Downs, 57 Iowa, 589; Carville *v.* Crane, 5 Hill (N. Y.), 484.

**8.** State *v.* Shiner, 42 N. J. Law, 138.

So, too, an agreement with the creditor to accept his debtor's draft for the amount of his debt. Chapline *v.* Atkinson, 45 Ark. 67; s. c., 55 Am. Rep. 531.

**9.** See Ames Bills & Notes, I, p. 168, n. 2, and I, p. 186, where the cases are collected.

An acceptance must be in writing, in

tained as a pledge to secure the debt of another has been held valid though not in writing.[1]

Where the holder of a note or other obligation is himself indebted, and transfers the obligation held by him in payment of his own debt, orally undertaking as to its value, his promise is not within the statute;[2] nor is the promise of a factor selling on a *del credere* commission.[3]

The statute applies clearly to a promise of a stockholder to pay the debt of a corporation;[4] while it does not apply to the promise of a partner to pay a firm debt.[5]

The most difficult class of cases in which to determine whether or not the promise is within the statute arises where the promise is made for the purpose of obtaining a direct benefit for the promisor —where his purpose is not so much to insure the payment of the debt of another as to secure some advantage for himself. The intent must govern here, as in other cases; and certain fixed principles have become established to determine it.

Where the promisor has an interest in property subjected to a

*England* (St. 19 & 20 Vict. c. 57, § 6); and a similar statutory requirement exists in many of the United States. See Stimson Amer. Stat. Law, § 4720.

On the *Michigan* statute, see Pfaff *v.* Cummings (Mich.), 34 N. W. Rep. 281; Chapline *v.* Atkinson, 45 Ark. 67, *contra*; Louisville, etc., R. *v.* Caldwell, 98 Ind. 245, *acc.*

1. Smith *v.* Matt (Cal.), 18 Pac. Rep. 260.

2. Mobile, etc., R. Co. *v.* Jones, 57 Ga. 198; Barker *v.* Scudder, 56 Mo. 272; Wilson *v.* Hentges, 29 Minn. 102; Malone *v.* Keener, 44 Pa. St. 107; Townsend *v.* Long, 77 Pa. St. 143; Lossee *v.* Williams, 6 Lans. (N. Y.) 228; Milks *v.* Rich, 80 N. Y. 269; s. c., 36 Am. Rep. 615; Cribb *v.* Houghton, 64 Wis. 333; Eagle Mower Co. *v.* Shattuck, 53 Wis. 455; s. c., 40 Am. Rep. 780. *Contra*, Dows *v.* Swett, 134 Mass. 140; s. c., 45 Am. Rep. 310; Harsinger *v.* Newman, 83 Ind. 124; s. c., 43 Am. Rep. 64.

The case of Dows *v.* Swett, cited above, will be found reported, in other stages, in 120 Mass. 322, and 127 Mass. 364, and contains an admirable discussion of this subject. The facts, in substance, were that the defendant, being indebted to the plaintiff on a due bill given for goods sold, arranged with the plaintiff to take up the due bill and give in exchange a note of a third party, which he had procured to be made for the purpose; and, to induce the plaintiff to consent, orally agreed to pay the note himself at its maturity if the maker did not. The note was taken, and the due bill delivered up. When the note became due, it was not paid; and, in a suit on the special promise, the defendant set up the Statute of Frauds. The court held that the test whether or not the promise was to pay the defendant's own debt, was whether the original indebtedness of the defendant was extinguished on the acceptance of the note. If such original indebtedness continued, the promise, in its essence, was to pay the defendant's own debt, if another did not; and the fact that incidentally a guarantee of another's debt was involved, did not make the defendant's promise less an original one; but if the original liability was extinguished, there remained no debt of his own which the defendant promised to pay. The only existing debt was the debt of the third person; and the promise to pay that debt if he did not is clearly collateral. Applying this test, the court held the promise collateral, and the defence of the statute well taken.

Obviously, where the transaction is the purchase of the debt itself, the statute does not apply. Anstey *v.* Marden, 1 B. & P. N. R. 133.

3. Couturier *v.* Hastie, 8 Exch. 40; Swan *v.* Nesmith, 7 Pick. (Mass.) 220; Osborne *v.* Baker, 34 Minn. 307; s. c., 37 Am. Rep. 55; Seeman *v.* Inman, 6 Mo. App. 384; Sherwood *v.* Stone, 14 N. Y. 267; Bradley *v.* Richardson, 23 Vt. 720.

4. Trustees of Free Schools *v.* Flint, 13 Metc. (Mass.) 539; Searight *v.* Payne, 2 Tenn. Ch. 175.

5. Conger *v.* Cotton, 37 Ark. 286; Weatherly *v.* Hardman, 68 Ga. 592.

lien to secure the debt of another, his promise to pay the debt in order to relieve his property is held to be original, and, so, valid, though not in writing;[1] and the law is the same where he contracts to pay the debt in order to obtain the surrender or transfer of a lien or security held by the creditor.[2] It seems a presumption of law in certain jurisdictions that, if any direct benefit to the promisor is the object sought to be obtained by his promise, he must be understood to intend an original undertaking, which is not within the statute.[3]

In many jurisdictions the existence of a new consideration for the promise, distinct from the benefit to the original debtor, and the character of this consideration, is taken as the test.[4] It has been held that the existence of a new and distinct consideration for the special promise was enough to take the promise out of the statute;[5] but this is no longer law anywhere. In many jurisdictions, however, this old rule is followed, with the modification that the new consideration must inure directly to the benefit of the promisor. If it does not inure to his benefit, the promise is not within the statute, although the original liability remains, and two collateral obligations, in fact, exist.[6]

1. Williams *v.* Leper, 3 Burr. 1886; Edwards *v.* Kelly, 6 M. & S. 208; Bampton *v.* Paulin, 4 Bing. 264; Haulditch *v.* Milne, 3 Esp. 86; Fitzgerald *v.* Dressler, 7 C. B. (N. S.) 374; Thornton *v.* Williams, 71 Ala. 555; Williamson *v.* Hill, 3 Mackey (D. C.), 100; Power *v.* Rankin, 114 Ill. 52; Shaffer *v.* Ryan, 84 Ind. 140; Mitchell *v.* Griffin, 58 Ind. 559; Conradt *v.* Sullivan, 45 Ind. 180; Fears *v.* Story, 131 Mass. 47; Wills *v.* Brown, 118 Mass. 137; Leonard *v.* Vredenburgh, 8 Johns. (N. Y.) 29; Blackford *v.* Plainfield Gaslight Co., 43 N. J. Law, 438; Rogers *v.* Collier, 2 Bailey Law (S. Car.), 581; McCroy *v.* Madden, 1 McCord Law (S. Car.), 486; Young *v.* French, 35 Wis. 111; Weisel *v.* Spruce, 59 Wis. 301; Muller *v.* Riviere, 59 Tex. 640; s. c., 46 Am. Rep. 291.

2. Castling *v.* Aubert, 2 East, 325; Walker *v.* Taylor, 6 C. & P. 752; Fitzgerald *v.* Dressler, 5 C. B. (N. S.) 885; Matthews *v.* Carter, 7 Ill. App. 225; Olmstead *v.* Greenly, 18 Johns. (N. Y.) 12; Gardiner *v.* Hopkins, 5 Wend. (N. Y.) 23; Allen *v.* Thompson, 10 N. H. 32; Hindman *v.* Langford, 3 Strobh. Law (S. Car.), 207; French *v.* Thompson, 6 Vt. 54.

3. Westmoreland *v.* Porter, 75 Ala. 452; Chapline *v.* Atkinson, 45 Ark. 67; s. c., 55 Am. Rep. 531; Lerch *v.* Gallup, 67 Cal. 595.

4. The failure to recognize that the intent of the parties alone furnishes a true text of the character of the promise has led to almost inextricable confusion in the cases on this subject.

It is absolutely impossible to recognize the decisions, even in single States. The law on the point has been a growth, which is not yet completed. Within the past three years, however, it has begun to assume a definite form, and it is believed that the statements of the text contain the decided law.

The difficulty seems due primarily to a failure to exclude all but promises of pure suretyship from the scope of the statute; in consequence of which the intent of the parties has been disregarded, and more unrighteous defences been sustained than improper actions prevented.

5. Leonard *v.* Vredenburgh, 8 Johns. (N. Y.) 29. See Mallory *v.* Gillett, 21 N. Y. 412. This point is discussed in almost every case arising under the statute since the decision of Leonard *v.* Vredenburgh; and no question can now be entertained that it is utterly wrong.

6. Thornton *v.* Williams, 71 Ala. 555; Westmoreland *v.* Porter, 75 Ala. 452; Chapline *v.* Atkinson, 45 Ark. 67; s. c., 55 Am. Rep. 531; Lerch *v.* Gallup, 67 Cal. 595 (statutory); Matthews *v.* Carter, 7 Ill. App. 225; Fears *v.* Story, 131 Mass. 47; Whitechurch *v.* Hyman, 90 N. Car. 487; Railroad Co. *v.* Houston, 85 Tenn. 224; Muller *v.* Riviere, 59 Tex. 640; s. c., 46 Am. Rep. 291; Hindman *v.* Langford 3 Strobh. Law (S. Car.), 207; Young

In a large and increasing number of the *United States*, the promise, although made upon a new consideration of benefit to the promisor, is held to be collateral, whatever the intent of the parties, if the original liability remains.[1] The promise is within the statute unless it is, in effect, substituted for the original liability.[2]

*v.* French, 35 Wis. 111; Kelly *v.* Schupp, 60 Wis. 76.

1. Mitchell *v.* Griffin, 58 Ind. 559; Palmer *v.* Blain, 55 Ind. 11; Krutz *v.* Stewart, 54 Ind. 178; Vaughn *v.* Smith, 65 Iowa, 579; Gill *v.* Herrick, 111 Mass. 501; Dows *v.* Swett, 134 Mass. 140; Ruppe *v.* Peterson (Mich.), 35 N. W. Rep. 82; Ackley *v.* Parmenter, 98 N. Y. 425; Hooker *v.* Russell, 97 Wis. 257; Willard *v.* Bosshard (Miss.), 32 N. W. Rep. 538.

2. The latest cases upon this difficult subject may be classified as follows:

Wherever there is in existence an obligation on the part of another, a promise to perform that obligation if he does not, or to guarantee his performance, is not within the Statute of Frauds if it is made upon a new consideration inuring to the benefit of the promisor, although the former obligation is not extinguished, provided the chief purpose of the promisor is to obtain a benefit for himself. Thornton *v.* Williams, 71 Ala. 555; Westmoreland *v.* Porter, 75 Ala. 452; Chapline *v.* Atkinson, 47 Ark. 67; s. c., 55 Am. Rep. 531; Lerch *v.* Gallup, 67 Cal. 595 (statutory); Williamson *v.* Hill, 3 Mackey (D. C.), 100; Matthews *v.* Carter, 7 Ill. App. 225; Borchsenius *v.* Conutson, 100 Ill. 82; Clifford *v.* Lubring, 69 Ill. 401; Powers *v.* Rankin, 114 Ill. 52; Fears *v.* Story, 131 Mass. 47; Walker *v.* Hill, 119 Mass. 249; Fitzgerald *v.* Morrissey, 14 Neb. 198; Whitechurch *v.* Hyman, 90 N. Car. 487; Jefferson *v.* Slagle, 66 Pa. St. 202; Merriman *v.* McManus, 102 Pa. St. 102; Crawford *v.* Edison (Ohio), 13 N. East. Rep. 80; Railroad Co. *v.* Houston, 85 Tenn. 224; Muller *v.* Riviere, 59 Tex. 640; s. c., 46 Am. Rep. 291; Spann *v.* Cochran, 63 Tex. 240; Silsby *v.* Frost (Wash.), 17 Pac. Rep. 887.

Where the former obligation is not extinguished, or where the new obligation is not substituted for it, the promise is within the statute. Sext *v.* Geise (Ga.), 6 So. East. Rep. 174; Krutz *v.* Stewart, 54 Ind. 170; Palmer *v.* Blain, 55 Ind. 11; Mitchell *v.* Griffin, 58 Ind. 559. See Walke *v.* Fleming, 103 Ind. 105; s. c., 53 Am. Rep. 495; Vaughn *v.* Smith, 65 Iowa, 579; Farnham *v.* Davis (Maine), 9 Atl. Rep. 729; Dows *v.* Swett, 134 Mass. 140; Ruppe *v.* Peterson (Mich.), 35 No. West. Rep. 82; Studley *v.* Booth, 54 Mich. 6; Rintaul *v.* White (N. Y.), 15 No. East. Rep. 318; Ackley *v.* Parmenter, 98 N. Y. 425; Morrissey *v.* Kinsey, 16 Neb. 17; Birchall *v.* Neaster, 36 Ohio St. 331; Haverley *v.* Mercer, 78 Pa. St. 257; Hooker *v.* Russell, 67 Wis. 257; Willard *v.* Bosshard (Wis.), 32 No. West. Rep. 538.

The question has arisen in many cases where a contractor has failed to pay his employees, or is unable to obtain materials to go on with his work, and the person who is to benefit by the performance of the contract, in order to make performance possible, has promised to pay for the labor or materials if the laborers or materialmen will go on furnishing them. Obviously, such a promise is to answer for the debt of another, and yet it may not be a contract of suretyship. The following cases have held such a promise original and not within the statute, either on the ground that the interest of the parties, gathered from all the facts, was to make an original promise, or on the ground that the benefit to the promisor, which formed the inducement to him to make the promise, took it out of the statute. Clifford *v.* Lubring, 69 Ill. 401 (intent); Crawford *v.* Edison (Ohio), 13 No. East. Rep. 80 (benefit); Walker *v.* Hill, 119 Mass. 249 (intent); Jefferson *v.* Slagle, 66 Pa. St. 202 (benefit); Merriman *v.* McManus, 102 Pa. St. 102 (intent); Kelly *v.* Schupp, 60 Wis. 76 (benefit). While the following have held that the statute applied, in spite of the benefit obtained, if the original liability was allowed to remain. Sext *v.* Geise (Ga.), 6 So. East. Rep. 174; Farnham *v.* Davis (Me.), 9 Atl. Rep. 725; Gill *v.* Herrick, 111 Mass. 501; Studley *v.* Booth, 54 Mich. 6; Morrissey *v.* Kinsey, 16 Neb. 17; Birchall *v.* Neaster, 36 Ohio St. 331; Haverley *v.* Mercer, 78 Pa. St. 257; Noyes *v.* Humphreys, 11 Gratt. (Va.) 636.

The mere relinquishment of a lien has been held a sufficient consideration to render the promise to pay original, although the first liability remains, in Fears *v.* Story, 131 Mass. 48; Power *v.* Rankin, 114 Ill. 52; Weisel *v.* Spruce, 59 Wis. 301. A mere forbearance to enforce a claim is not sufficient. Vaughn

In *England*, the test is the intent of the parties; and the various circumstances which in the United States are held to be definite tests, in law, of the character of the promise, are there regarded merely as furnishing more or less satisfactory evidence of their real intent.[1]

The rule in *New York* is thus stated: "When the primary debt subsists, and was antecedently contracted, the promise to pay it is original when it is founded on a new consideration moving to the promisor, and beneficial to him, and such that the promisor thereby carries under an independent duty of payment, irrespective of the liability of the principal debtor."[2]

In *Massachusetts* the rule is that, if the main object of the promisor is some benefit to himself, while the benefit to the debtor is only incidental, the promise is original;[3] though late decisions

*v.* Smith, 65 Iowa, 579; Stewart *v.* Campbell, 58 Me. 459; Hilton *v.* Dinsmore, 21 Me. 410; Musick *v.* Musick, 7 Mo. 495; Lang *v.* Henry, 54 N. H. 57; Rintaul *v.* White (N. Y.), 15 No. East. Rep. 318; Mallory *v.* Gillett, 21 N. Y. 412; Gump *v.* Halbrostadt (Ore.), 15 Pac. Rep. 467.

Where the consideration is forbearance, it is always clear that the original liability remains.

Where, upon a conveyance of property, the grantee assumes and agrees to pay the grantor's debt, the promise is not within the statute. Walke *v.* Fleming, 103 Ind. 107, and cases cited; Clopper *v.* Poland, 12 Neb. 69; Moore *v.* Stovall, 2 Lea (Tenn.), 543, overruling Campbell *v.* Findley, 3 Humph. (Tenn.) 330.

The following cases have called especial attention to the intent of the parties as a test of the character of the promise: Clifford *v.* Lubring, 69 Ill. 401; Corkins *v.* Collins, 16 Mich. 478; Stratton *v.* Hill, 134 Mass. 27; Fitzgerald *v.* Morrissey, 14 Neb. 198; Greene *v.* Burton, 59 Vt. 423.

In *Wisconsin*, the cases are greatly confused, and any rule will be hard to reconcile with all the cases. A very late case has restated the rule in these words: "So long as the original debt remains payable by the debtor to his creditor, any arrangement by which another party promises to pay that debt is within the very letter of the statute, no matter from what source the consideration of the latter promise is derived." *Per* Orton, J., in Hooker *v.* Russell, 67 Wis. 257, citing Emerick *v.* Sanders, 1 Wis. 77; Cotterill *v.* Stevens, 10 Wis. 422; Cook *v.* Barrett, 15 Wis. 596. The case of Clapp *v.* West, 52 Wis. 638, decided that mere benefit to the promisor did not take the case out of the statute. But see Kelly *v.* Schupp, 60 Wis. 76, where the language of Lyon, J., is to the *contra*, although the decision can go upon other points.

In *Alabama* and *Arkansas*, the courts while distinctly recognizing the conflict of authority and the difficulty of the question, have announced their adhesion to the rule that a new consideration of benefit to the promisor is enough to avoid the statute. Westmoreland *v.* Porter, 75 Ala. 452; Chapline *v.* Atkinson, 45 Ark. 67.

In *Texas*, these facts, combined with the purpose of the promisor, furnish the test. Spann *v.* Cochrane, 59 Tex. 640.

1. Montstephen *v.* Lakeman, L. R. 5 Q. B. 613; s. c., L. R. 7 Q. B. 196; s. c., L. R. 7 H. L. 17.

It is submitted that this is the true rule, and that its adoption will put an end to the perplexity of the law upon this subject, though it will leave a very difficult question of fact for juries to pass upon.

2. *Per* Finch, J., in Rintoul *v.* White (N. Y.), 15 N. East. Rep. 318. This case arose on the following facts: The defendant was a creditor of a firm, and was secured by a chattel mortgage. The plaintiff was the holder of notes of the firm, which were nearly matured. The defendant disclosed the fact that he held the mortgage, and promised, if the plaintiff would forbear for a time, to pay the notes. It was held that the promise was within the statute; and the court, having examined and correlated the previous decisions, announced the rule as stated in the text. The law has been a growth through the cases of Leonard *v.* Vredenburgh, 8 Johns. 29; Mallory *v.* Gillett, 21 N. Y. 412; Brown *v.* Weber, 38 N. Y. 187; and Ackley *v.* Parmenter, 98 N. Y. 425.

3. Nelson *v.* Boynton, 3 Metc. (Mass.) 396; Alger *v.* Scoville, 1 Gray (Mass.),

place great weight upon the continued existence of the primary liability.[1] The rule approaches the *English* doctrine, that the intent governs; and the drift of *Massachusetts* decisions is toward that rule.[2]

**3. Promises Made upon Consideration of Marriage.** (See BREACH OF PROMISE OF MARRIAGE, vol. 2, p. 522.)—The clause of the fourth section of the English statute which provided that no action should be brought to charge any person upon any agreement made upon consideration of marriage, unless the agreement, or some memorandum thereof, be in writing, signed by the party, or some person lawfully authorized by him, has been enacted in all of the United States, except *Pennsylvania*, *North Carolina*, and *Louisiana*.[3]

It applies to all kinds of agreements of which marriage is the consideration, and is not confined merely to marriage settlements or agreements relating to land.[4] It does not, however, apply to mutual promises of marriage.[5]

The marriage must be the consideration. It is not enough that the parties contemplate marriage, and make the contract in view of that fact.[6]

In the absence of statutory restraint, it is sufficient that the agreement be reduced to writing after marriage;[7] but an antenuptial contract of which no note in writing is made until after the marriage, while good between the parties,[8] is not binding on creditors or innocent purchasers intervening.[9]

397; Jepherson *v.* Hunt, 2 Allen (Mass.), 417; Wills *v.* Brown, 118 Mass. 137.

1. Furbish *v.* Goodnow, 98 Mass. 299; Dows *v.* Swett, 120 Mass. 322; s. c., 127 Mass. 364; s. c., 134 Mass. 140.

2. Stratton *v.* Hill, 134 Mass. 27.

3. Stimson Am. Stat. Law, & Sup. (1887) § 4140.

4. The cases arise mostly on marriage settlements, and early cases in *England* confined the statute to them (see Harrison *v.* Cage, 1 Ld. Raym. 386); but in the United States it is well settled in accordance with the text. See Flenner *v.* Flenner, 29 Ind. 564, and Brenner *v.* Brenner, 48 Ind. 262 (where the promise was to release a judgment); *In re* Willoughby, 11 Paige Ch. (N. Y.) 257 (to support the plaintiff's daughter); Dygert *v.* Remerschnider, 32 N. Y. J. 29 (to pay debts). See also Galbreath *v.* Cook, 30 Ark. 417; Clark *v.* Pendleton, 20 Conn. 495; Riley *v.* Riley, 25 Conn. 154; Bradley *v.* Saddler, 54 Ga. 681; McAnulty *v.* McAnulty, 120 Ill. 26; Caylor *v.* Roe, 99 Ind. 1; Chase *v.* Fitz, 132 Mass. 359; Peck *v.* Vandermark, 99 N. Y. 29.

5. Caylor *v.* Roe, 99 Ind. 1; Short *v.* Statts, 58 Ind. 29.

There are very many cases implying this in all States; for actions for breach of promise are constantly maintained although no written evidence of the promise is offered. Hook *v.* George, 108 Mass. 324.

In the following States, mutual promises to marry are in terms excepted from the statute: *Alabama*, *California*, *Colorado*, *Dakota*, *Idaho*, *Kentucky*, *Michigan*, *Minnesota*, *Montana*, *Nebraska*, *Nevada*, *New York*, *Oregon*, *Utah*, *Washington*, *Wisconsin*, and *Wyoming*. See Stimson Amer. St. Law, & Sup. (1887), § 4140.

The law is well settled to the same effect in *England*.

6. Vincent *v.* Vincent, 55 L. J. (N. S.) 181; s. c., 35 W. R. 7; and, in the count of appeals, 56 L. J. (N. S.) 243; Riley *v.* Riley, 25 Conn. 154; Rambatt *v.* East, 56 Ind. 538.

7. The *Illinois* statute requires that the agreement itself be in writing, and therefore a post-nuptial reduction to writing of its terms is insufficient. McAnulty *v.* McAnulty, 120 Ill. 26; s. c., 11 No. East. Rep. 397.

8. Montacute *v.* Maxwell, 1 P. Wms. 618; s. c., Stra. 236; Cooper *v.* Worwald, 27 Beav. 266; Hammersley *v.* De Biel, 12 Cl. & F. 45; Argenbright *v.* Campbell, 3 Hen. & M. (Va.) 144. See *Ex parte* Whitehead, 14 Q. B. D. 419.

9. On this point there is conflict in the

Obviously, an oral promise to execute an agreement in writing after marriage cannot be enforced.[1]

Consummation of the marriage is not such part performance as will take the case out of the statute.[2]

**4. Contracts Not Performable Within a Year.**—The fifth clause of the fourth section of Stat. 29 Charles II. c. 3 provides that no action shall be brought to charge any person upon any agreement that is not to be performed within the space of one year from the making thereof, unless the agreement, or some note or memorandum of it, be in writing duly signed. A similar statutory provision is made in all the United States, save *Louisiana*, *North Carolina*, and *Pennsylvania*;[3] but many States[4] limit its application to such contracts as "by their terms"[5] are not to be performed within a year.

The statute applies only to contracts which cannot be fully per-

English cases, some of the earlier holding hat a post-nuptial settlement in accord with the terms of an oral ante-nuptial contract, and reciting that it is made in accordance with that, is valid against all the world. Demdas *v.* Dutens, 1 Ves. Jr. 196; s. c., 2 Cox C. C. 235; Shaw *v.* Jakeman, 4 East, 201. But these cases have been doubted several times, and distinctly disapproved in Warden *v.* Jones, 32 Beav. 487, where the *contra* was held. The latter decision was upheld on appeal. See 2 De G. & J. 76.

In a late case, *Ex parte* Whitehead, *In re* Wheatehead, 14 Q. B. D. 419, creditors of a husband sought to obtain certain money which had belonged to the wife before her marriage, and, in accordance with an ante-nuptial oral agreement, had been allowed to stand deposited in her maiden name. The wife had taken the interest, and once had withdrawn principal, with the husband's assent. Cave, J., held that the case was within the statute, and decreed for the creditors. On appeal, the court reversed his decision upon another ground, and refused to decide whether or not the statute applied.

The law in the United States is clear that, as against intervening creditors or innocent purchasers, such a settlement is invalid. Albert *v.* Winn, 5 Md. 66; Wood *v.* Savage, 2 Doug. (Mich.) 316; Reade *v.* Livingstone, 3 Johns. Ch. (N. Y.) 481; Borst *v.* Corey, 16 Barb. (N. Y.) 136; Izard *v.* Izard, Bailey Eq. (S. Car.) 228; Davidson *v.* Graves, Riley Eq. (S. Car.), 219; Smith *v.* Greer, 3 Humph. (Tenn.) 118; Blaw *v.* Maynard, 2 Leigh (Va.), 29; Lawrence *v.* Blaw, 2 Leigh (Va.), 29. The case of Satterthwaite *v.* Emley, 3 Green Ch. (N. J.) 489, holds such a settlement bad as against creditors existing at the time of the oral agreement. *Cf.* Andrews *v.* Jones, 10 Ala. 46; and Gordon *v.* Tweedy, 71 Ala. 202.

Apparently it is not essential that the written agreement executed after marriage, or the instrument made in execution of the contract, should state that it is made or done to perform or conform to the ante-nuptial parol agreement. Lloyd *v.* Fulton, 91 U. S. 479.

The language of some of the English cases would throw doubt on this.

1. Bradley *v.* Saddler, 54 Ga. 681.

2. McAnulty *v.* McAnulty, 120 Ill. 26; Bradley *v.* Saddler, 54 Ga. 681; Flenner *v.* Flenner, 29 Ind. 564; Crane *v.* Gough, 4 Md. 316; Wood *v.* Savage, 2 Doug. (Mich.) 316; Brown *v.* Conger, 8 Hun (N. Y.), 625; Finch *v.* Finch, 10 Ohio St. 507; Henry *v.* Henry, 27 Ohio St. 121; Hackney *v.* Hackney, 3 Humph. (Tenn.) 452; Lloyd *v.* Fulton, 91 U. S. 479.

3. Stimson Amer. Stat. Law, and Sup. (1887) § 4140.

4. *Alabama*, *California*, *Colorado*, *Dakota*, *Idaho*, *Michigan*, *Minnesota*, *Montana*, *Nebraska*, *Nevada*, *New York*, *Oregon*, *Utah*, *Washington*, *Wisconsin*, and *Wyoming*.

5. "The 'terms' of the agreement are what the agreement necessarily is." *Per* Marvin, J., in Day *v.* New York Central, etc., R. Co., 31 Barb. 556.

Thus, it is not necessary, even when these words occur in the statute, that the agreement should contain a provision that the contract is not to be performed within a year.

The statute applies when from the language used it must necessarily be understood that performance within a year is impossible or distinctly contrary to the intent. Rogers *v.* Brightman, 10 Wis. 55.

formed[1] in accordance with the intent of the parties within a year from the time of making. The mere expectation or supposition of the parties as to the time of performance is not the criterion of their intent. If the acts contracted for can be done within a year, and such a doing will be a complete performance of the contract, the statute does not apply; although the parties may have contemplated, and indeed expected, that the acts would not be done within the year, and although the possibility of performance within a year may not in fact have occurred to them.[2] But if it was their deliberate intention that the act should not be done within a year, although possible, and if, accordingly, such a doing would technically not be a performance of the contract, the statute does not apply,[3] and an oral agreement will be insufficient to support an action.

Clearly, then, the statute applies to such contracts as the following, when the performance within a year is impossible: A contract to labor or employ labor for more than a year, or for one year, the service to begin at a future day;[4] to take a lease for a

1. It is of the utmost importance to keep firmly in mind the difference between a contract that is performed, and one that is merely terminated—between acts that perform, and acts that put an end to, a contract. The prohibition of the statute does not extend to contracts that may by any possibility be performed consistently with the intent of the parties within the year, however unlikely or impossible that may appear at the time of making; but it does extend to all contracts that may be terminated within a year without full performance, if full performance would require more than a year. This difference is well brought out, in the case of Doyle *v.* Dixon, 97 Mass. 208, by Gray, J.

In Boydell *v.* Drummond, 11 East, 142, Lord Ellenborough snys that "performed" "*ex vi termini* must mean the complete performance or consummation of the work;" and Bagley, J., defines it as "completed."

2. For instance, in the case of Knowlman *v.* Bluett, L. R. 9 Exch. 1, it was decided that the statute did not apply to a promise by the father of certain illegitimate children to pay the plaintiff, their mother, a certain sum per year so long as she should educate and maintain them; for, conceivably, all might die within the year, and her undertaking be thus fully performed. Yet, without doubt, both parties expected that it would last much longer.

3. Thus, a contract to clear land within three years and seed down one acre the first, one acre the second, and one acre the third year (Herrin *v.* Butters, 20 Me. 119), was held to be within the statute; for though it was physically possible to clear the whole and seed down the three acres within one year, still that would not constitute a performance according to the intention of the parties.

In Boydell *v.* Drummond, 11 East, 142, the contract was for an edition of Shakespeare's works, one number at least to be published each year, but the intention was clear that the publication should extend over several years. The court held the statute to apply.

Eley *v.* Positive Assur. Co., L. R. 1 Ex. Div. 20, was the case of an agreement by the company to employ the plaintiff as its solicitor, and never to remove him except for misconduct. In the words of Amphlett, B.: "It seems to me that the parties contemplated that the contract should continue to be binding, at least as against the company, during the whole professional life of the plaintiff; and the circumstance that the contract might be determined within a year by the death, or retirement, or misconduct, or at the will of the plaintiff, would not, in my judgment, prevent the operation of the statute."

This case can be supported only on the ground of the intention of the parties; for clearly a performance complete in every respect, save in satisfying the meaning of the parties, was possible if the professional life of the plaintiff came to an end within the year.

4. Meyer *v.* Roberts, 46 Ark. 80; s. c., 55 Am. Rep. 567; La Du-King Mfg. Co. *v.* La Du (Mich.), 31 N. W. Rep. 938; Tuttle *v.* Swett, 31 Mo. 555; Kleeman *v.*

year or more, the term to begin at a future day;[1] to do any act at a time more than a year distant;[2] to continue to do an act for

Collins, 9 Bush (Ky.), 460; Drummond *v.* Burrell, 13 Wend. (N. Y.) 307; Bracegirdle *v.* Heald, 1 B. & Ald. 722; Girard *v.* Richmond, 2 C. B. 835.

It makes no difference how little the time that the term exceeds the year,—a contract for service made one day to begin the next is within the statute. Blanck *v.* Littell, 9 Daly (N. Y.), 268; McElroy *v.* Ludlum, 32 N. J. Eq. 828. But see Dickson *v.* Frisbie, 52 Ala. 165, which excluded the day of making.

In Cawthorne *v.* Cowdrey, 13 C. B. (N. S.) 406, a contract was made March 24, the services to begin March 25, and an action was sustained; but there was evidence of a new contract for a year's labor on the 25th. A *dictum* that, where the contract was made at noon, Monday, to begin Tuesday, the statute did not apply since the law disregards fractions of a day, was questioned in Britain *v.* Rossiter, 11 Q. B. Div. 123, which, however, approved the decision rendered.

Dickson *v.* Frisbie, 52 Ala. 165, cited above, quoted and followed the *dictum* in Cawthorne *v.* Cowdrey; but has been disapproved in Levison *v.* Stix, 10 Daly (N. Y.), 229. In that case a contract made December 31 of one year, for services to end on December 31 of the next year, was held void, the court saying that the performance must end within the year in which the contract was made. See also McAleer *v.* Corning, 50 N. Y. Supr. Ct. 63.

A contract made on the 2d of October, 1854, to hire the plaintiff until September 1, 1855, and for a year thereafter unless the employment was terminated by three months' notice, is within the statute. Dobson *v.* Collis, 1 H. & N. 81.

It has been intimated that, where the contract was for service to begin at a future time, a contract for a year would be implied if the parties entered upon the performance; but this is denied in Britain *v.* Rossiter, cited above, *per* Brett, L. J., who says: "It seems to me impossible that a new contract can be implied from the doing of acts which were clearly done in performance of the first contract only, and to infer from them a fresh contract would be to draw an inference contrary to the fact."

To the same effect, see Snelling *v.* Lord Huntingfield, 1 C. M. & R. 20. See also Sutcliffe *v.* Atlantic Mills, 13 R. I. 480; s. c., 43 Am. Rep. 39.

After the complete performance of the part of a contract of hiring bad by the statute, a new contract may arise, which the law will enforce.

In Cullis *v.* Bothamley, 7 W. R. 87, the defendant had agreed by parol to serve as a commercial traveller. The agreement was made in August, was to go into effect in September, and was to continue for a year therefrom certain, and after the year until the parties should determine it by three months' notice. The defendant served for three years, and then left without notice. The court held that the plaintiff was not seeking to enforce a contract to endure necessarily for more than a year. The existing contract was for service for an indefinite time, terminable at three months' notice, and was good, though by parol. Baron Watson said: "After the expiration of the year, a fresh contract arose."

The statute does not apply to a hiring from year to year. Beeston *v.* Collyer, 12 Moore 552; s. c., 4 Bing. 309; Geraud *v.* Richmond, 2 C. B. 835.

1. Atwood *v.* Norton, 31 Ga. 507; Comstock *v.* Ward, 22 Ill. 248; Ryan *v.* Kirchberg, 17 Ill. App. 132; Jones *v.* Marcy, 49 Iowa, 188; Delano *v.* Cushing, 4 Cush. (Mass.) 42; Briar *v.* Robertson, 19 Mo. App. 66.

A contrary decision has been rendered in *Michigan*, where it would seem that the provision as to contracts not to be performed within one year is not applied to leases. Whiting *v.* Ohlert, 52 Mich. 462; s. c., 50 Am. Rep. 265.

The *New York* statute has been held not to apply to interests in lands. Taggarth *v.* Roosevelt, 2 E. D. Smith (N. Y.), 100; Young *v.* Dake, 5 N. Y. 463. But see Cayuga R. Co. *v.* Niles, 13 Hun (N. Y.), 170 (which applied the provision to the case of an easement), and cases there cited, which disregard the first two cases. See also Day *v.* New York Cent. etc., R. Co., 22 Hun (N. Y.), 412.

A similar decision has been given in *Iowa*. Sobey *v.* Brisbee, 20 Iowa, 105.

In *Kentucky* the provision is applicable to agreements relating to lands. Roberts *v.* Tunnell, 3 T. B. Mon. (Ky.) 247.

2. Thus, to pay off an encumbrance that will not mature for more than a year,—Curtis *v.* Sage, 35 Ill. 22;—to deliver a crop that cannot be grown within a year,—Holloway *v.* Hampton, 4 B. Mon. (Ky.) 415;—to repay if a certain sum is not realized within three years,—Lapham *v.* Whipple, 8 Metc. (Mass.) 59;—to pay to

a period greater than one year,[1] or to refrain from doing during such a period;[2] to pay a sum of money by instalments such that full payment within the year is impossible.[3]

The contract must be one that from its very terms shows that the parties intended that it was not to be completed within the year.[4] Merely allowing an additional time for performance beyond the year will not bring the contract within the statute if the parties intended a performance within the year, or if such performance is possible and satisfactory.[5]

the mortgagor all the surplus above the mortgage debt which the promisee, the mortgagee in possession, receives, within a year after the sale, no sale being possible until after three years,—Frary *v.* Sterling, 99 Mass. 461;—to pay a certain sum in March of the year following the February in which the promise was made,—Lower *v.* Winters, 7 Cow. (N. Y.) 263;—to deliver sheep at the end of four years,—Bartlett *v.* Wheeler, 44 Barb. (N. Y.) 162;—to allow for fixtures at the end of a lease still having several years to run,—Lawrence *v.* Woods, 4 Bosw. (N. Y.) 354;—to do from year to year the things necessary to obtain a certain annual income for a curate,—Roberts *v.* Tucker, 3 Exch. 632.

1. As, to edit a book annually,—Sweet *v.* Lee, 4 Scott N. R. 177;—to support a person,—Deaton *v.* Johnson, 66 Ind. 258;—to maintain an agency,—Cowles *v.* Warner, 22 Minn. 449;—to support a widow and her children for a definite period,—Deaton *v.* Tenn., etc., Co., 12 Heisk. (Tenn.) 650;—to run a mill,—Hinckley *v.* Southgate, 11 Vt. 428. See also Drake *v.* Seaman, 97 N. Y. 230.

2. To refrain from carrying on a trade or calling for a fixed term,—Davy *v.* Shannon, 4 Exch. Div. 81; Perkins *v.* Clay, 54 N. H. 518; Gottschalk *v.* Wittes, 25 Ohio St. 76;—to refrain from using any other than a particular carding-machine,—Self *v.* Cordell, 45 Mo. 345.

Where the contract will be fully performed by the death of the party during the term, the courts of *Massachusetts* hold the statute does not apply,—Doyle *v.* Dixon, 97 Mass. 208;—but the law elsewhere is as stated in the text.

This subject will be treated more at length later on.

3. Thus, an agreement to pay for machinery in certain instalments, the last to become due after a year,—Tiernan *v.* Granger, 65 Ill. 351;—to pay $764 in instalments of $50,—Kellogg *v.* Clark, 23 Hun (N. Y.), 293;—to pay $500 in annual payments of $100,—Parker *v.* Francis, 50 Vt. 626.

The mere fact that the money is payable, in instalments, at less than a year and that no time is fixed for the complete payment, is not enough to show that the contract was to be performed within the year, and to take it out of the statute. Moore *v.* Fox, 10 Johns. (N. Y.) 244.

4. "The clause in the statute only extends to such promises where, by the express appointment of the party, the thing is not to be performed within a year." *Per* Wilmot, J., in Fenton *v.* Emblers, 3 Brev. 1278; Boydell *v.* Drummond, 11 East, 142; Roberts *v.* Tucker, 3 Exch. 632; Eley *v.* Positive Assur. Co., L. R. 1 Ex. Div. 20; Giraud *v.* Richmond, 2 C. B. 835; *Re* Pentreguinea Coal Co., 4 De G. S. & J. 541; Walker *v.* Johnson, 96 U. S. 424; Hinkle *v.* Fisher, 104 Ind. 84; Niagara Fire Ins. Co. *v.* Greene, 77 Ind. 590; Saunders *v.* Kostenbine, 6 B. Mon. (Ky.) 17; Farwell *v.* Tillson, 76 Me. 227; Lawrence *v.* Cooke, 56 Me. 187; Herrin *v.* Butters, 20 Me. 119; Linscott *v.* McIntire, 15 Me. 201; Somerby *v.* Buntin, 118 Mass. 279; Chaffe *v.* Benoit, 60 Miss. 34; Kimmins *v.* Aldham, 27 W. Va. 258; Day *v.* N. Y. Cent., etc., R. Co., 22 Hun, 412.

The case of Lockwood *v.* Barnes, 3 Hill (N. Y.), 128, disapproved by M. Browne, Stat. of Frauds, § 280, can be supported upon this ground. In that case, the agreement was to deliver the foal to be got by a stallion at a certain price, the delivery to be after the colt was weaned. In the natural course of events, the agreement would not be performed within from fifteen to seventeen months; yet, by possibility, the period of gestation and weaning might be completed within twelve months. The court held the contract within the statute.

This decision was followed in Groves *v.* Cook, 88 Ind. 169; s. c., 45 Am. Rep. 462, where the owner of a stallion furnished the use of the horse and agreed to pay a fixed sum for the foal when five months old.

5. This is so although the agreement itself provides for a few days beyond the

Where tne time of performance is not specified, the statute does not apply if by any possibility the contract may be performed within a year.[1] Nor does the statute apply where the perform-

year in case of emergency. See Jones *v.* Pouch, 41 Ohio St. 146, where twenty days beyond the year were allowed. The court said the intent that the contract should be performed within the year was clear; and the fact that to provide against an emergency, twenty days more were allowed, did not make the statute apply.

Where a contract originally intended to be performed within a year is extended by a subsequent parol agreement so that the performance is postponed beyond the year, the statute does not apply,—Ward *v.* Matthews (Cal.), 14 Pac. Rep. 604;—but if an existing valid contract is modified by parol, and the modified contract is not to be performed within a year, the statute does comply;—Keller *v.* Bley (Oreg.), 15 Pac. Rep. 705. See also Kent *v.* Kent, 18 Pick. (Mass.) 569, where the agreement was to allow a person to come upon land and cut certain trees at any time within ten years, and in Plimpton *v.* Curtis, 15 Wend. (N. Y.) 336, to build a house to be finished some time before a date more than a year distant.

1. See the language of Wilmot, J., in Fenton *v.* Emblers, 3 Burr. 1278: "The clause in the statute only extends to such promises where, by the express appointment of the party, the thing is not to be performed within a year."

Thus, a promise to pay £50 if the plaintiff would procure a certain marriage,—Francom *v.* Foster, Skin. 326;—to act as attorney, and receive payment out of the proceeds of a certain suit,—McPherson *v.* Cox, 96 U. S. 404;—to hold a surety harmless.—Blake *v.* Cole, 22 Pick. (Mass.) 97;—to employ generally,—Niagara Falls Ins. Co. *v.* Greene, 77 Ind. 590; La Du-King Mfg. Co. *v.* La Du (Minn.), 31 N. W. Rep. 938; Franklin Sugar Co. *v.* Taylor (Kan.), 15 Pac. Rep. 586.

A general promise of marriage is not within the statute. Blackburn *v.* Mann, 85 Ill. 222; Brick *v.* Gannar, 36 Hun (N. Y.), 52; Paris *v.* Strong, 55 Ind. 339; Lawrence *v.* Cooke, 56 Me. 187. See also Adams *v.* Adams, 26 Ala. 272; Sutphen *v.* Sutphen, 30 Kan. 510; Morley *v.* Nablett, 42 Ind. 85; Blair Town Lot Co. *v.* Walker, 39 Iowa, 406; Kent *v.* Kent, 18 Pick. (Mass.) 569; Lapham *v.* Whipple, 8 Metc. (Mass.) 59; Cheffe *v.* Benoit, 60 Miss. 34; Duff *v.* Snider, 54 Miss. 245; Soggins *v.* Heard, 31 Miss. 426; Suggett *v.* Cason, 26 Mo. 221; Fitzpatrick *v.* Woodruff, 96 N. Y. 561; Van Worst *v.* Albany, etc., R. Co., 67 N. Y. 538; Hedges *v.* Strong, 3 Oreg. 18; Southwell *v.* Bagley, 5 Oreg. 143; Thomas *v.* Hammond, 47 Tex. 42; Rogers *v.* Brightman, 10 Wis. 55. But see Day *v.* N. Y. Cent., etc., R. Co., 22 Hun (N. Y.), 412, where the agreement was to build a side track to the plaintiff's land, and bring all cattle freight there to be fed by the plaintiff. The court held that, as no performance within a year was expressed or implied; the statute applied. The decision can be upheld on the ground of the intent of the parties; but otherwise it would seem bad, since, conceivably, performance within a year was possible.

So an agreement to enter into a partnership is not within the statute, although it may continue much beyond the year. McKay *v.* Rutherford, 6 Moo. P. C. 414; Essex *v.* Essex, 20 Beav. 449; Treat *v.* Hiles (Wis.), 32 N. W. Rep. 517; Jordan *v.* Miller, 75 Va. 442. But if by the agreement the partnership is to continue to a time certain more than a year distant, it has been held that the statute does apply. Tomkins *v.* Randall, 19 W. R. 413. In that case the defendant orally agreed to take plaintiff into a partnership for three years; and the action was for his refusal to do it. The court, Kelly, C.B., Martin, Chaunell, and Pigott, B.B., agreed that performance clearly was not to be within the year, and held the contract unenforceable.

The case is not reconcilable with the reasoning of the other cases, which goes on the ground that the agreement is performed when the partnership is formed. The question would seem to be whether the essential matter be the formation of the partnership or the performance of the agreements which are incorporated in the articles of partnership. If the former, then the statute clearly cannot apply, unless, by express intention, the relation of partner is not to begin within a year; if the latter, the statute can apply only if the performance of the agreements is expressly made impossible within the year.

The case of Treat *v.* Hiles (Wis.), 32 N. W. Rep. 517, illustrates both. The agreement was to work a quarry and divide the profits, no time being specified. Here, clearly, the partnership might begin within a year, and every agreement as to the business, profits, and continuance of the firm be performed within that time.

ance is upon a contingency which may by possibility fall within a year.[1] Nor where the agreement is to continue to do, or refrain from doing, a particular thing until a contingency express or implied occur, if that may happen within a year.[2] But the fact that a con-

1. This was decided in the case of Peter *v.* Compton, Skin. 353; s. c., Holt, 326, where the agreement was to give the plaintiff a certain sum on the day of his marriage. A majority of the judges, Holt being *contra*, held that "Where the agreement is to be performed upon a contingent, and it does not appear within the agreement that it is to be performed after the year, then a note in writing is not necessary for the contingent might happen within the year. But where it appears by the whole tenor of the agreement that it is to be performed after the year, then a note is necessary; otherwise not."

That case has been followed ever since. The language of Denison, J., in Fenton *v.* Emblers, 3 Burr. 1278, states the law well: "The Statute of Frauds plainly means an agreement not to be performed within the space of a year, and expressly and specifically so agreed. A contingency is not within it; nor any case that depends upon contingency. It does not extend to cases where the thing only may be performed within the year; and the act cannot be extended further than the words of it."

Lord Holt, in Francom *v.* Foster, Skin. 326, accepts Peter *v.* Compton as law: "Though the promise depends upon a contingent, the which may not happen in a long time, yet, if the contingent happen within a year, the action is maintainable and is not within the statute."

The cases are very numerous. Thus, a promise to pay on the marriage of another is not within the statute,—Peter *v.* Compton, Skin. 353; s. c., Holt, 326;—nor a contract of insurance, which is a promise to pay at a moment which may come within a year,—Walker *v.* Metropolitan Ins. Co., 56 Me. 371; Wiebler *v.* Milwaukee Mech. Mut. Ins. Co., 30 Minn. 464;—nor a promise to leave by will,—Fenton *v.* Emblers, 3 Burr. 1278; Ridley *v.* Ridley, 34 Beav. 478; Maddison *v.* Alderson, 8 App. Cas. 467; Bell *v.* Hewett, 24 Ind. 280; Izard *v.* Middleton, 1 Des. Eq. (S. Car.) 116; Jilson *v.* Gilbert, 26 Wis. 637;—to pay when a suit is determined,—Derrick *v.* Brown, 66 Ala. 162; Dougherty *v.* Rosenberg, 62 Cal. 32; Gonzales *v.* Chartier, 63 Tex. 36;—or when money is received from a third person,—Archer *v.* Zeb, 5 Hill (N. Y.), 200; Hedges *v.* Strong, 3 Oreg. 18;—to do an act on the death of a third person,—Frost *v.* Tarr, 53 Ind. 390 (disapproved, but on another ground, in Wallace *v.* Long, 105 Ind. 522); Riddle *v.* Backus, 38 Iowa, 81; King *v.* Hanna, 9 B. Mon. (Ky) 369; Sword *v.* Keith, 31 Mich. 247; Thompson *v.* Gordon, 3 Strobh. Law (S. Car.), 196;—to take stock and pay when the company is incorporated,—Bullock *v.* Road Co. (Ky.), 3 S. W. Rep. 129;—to marry at the end of a voyage,—Clark *v.* Pendleton, 20 Conn. 495;—to pay on the return of a ship which was likely not to return for more than a year,—anon., 1 Salk, 280.

So, too, where a person declared that he was unable to pay a debt, but had so arranged that his executors should pay, it was held that the statute did not apply to this promise. Wells *v.* Horton, 4 Bing. 40. For other cases, see Heflin *v.* Milton, 69 Ala. 354; Parker *v.* Siple, 76 Ind. 345; Niagara Fire Ins. Co. *v.* Greene, 77 Ind. 590; Sutphen *v.* Sutphen, 30 Kan. 510; Linscott *v.* McIntire, 15 Me. 201; Cole *v.* Singerly, 60 Md. 348; Randall *v.* Turner, 17 Ohio St. 262; Hodges *v.* Richmoud Mfg. Co., 9 R. I. 480; Stringer *v.* Montgomery (Ind.), 12 N. E. Rep. 474; Connolly *v.* Giddings (Neb.), 37 N. W. Rep. 939.

2. For instance, a promise to maintain a child so long as the defendant thinks proper is not within the statute; for, although possibly it may extend over many years, yet the contingency on which it is to determine—the change in the defendant's mind—may occur within a year, and when it happens, the performance will be complete. Souch *v.* Strowbridge, 2 C. B. 808; Knowlman *v.* Bluett, L. R. 9 Ex. 1.

So an agreement to labor for five years, or so long as A shall be agent of a company,—Roberts *v.* Rockbottam Co., 7 Metc. (Mass.) 46;—to supply materials to a railroad, to be inspected monthly and paid for when accepted, the contract to continue until the contractor is notified to stop,—Walker *v.* Wilmington, etc., R. Co. (S. Car.), 1 S. E. Rep. 366;—to use a patent upon a steamboat at a certain price per annum for twelve years if the vessel last so long,—Packet Co. *v.* Sickles, 5 Wall. (U. S.) 580,—to continue to supply materials so long as wanted,—Walker *v.* Johnson, 96 U. S. 424;—to pay during coverture,—Houghton *v.* Houghton, 14 Ind. 505.

Where the contract is to continue during the life of a person, the statute clearly

does not apply, as that life may end at any moment. Thus, to support during life,—Murphy *v.* O'Sullivan, 11 Ir. Jur. (N. S.) 111; Harper *v.* Harper, 57 Ind. 347; Howard *v.* Burgen, 4 Dana (Ky.), 137; Bull *v.* McCrea, 8 B. Mon. (Ky.) 422; Carr *v.* McCarthy, 38 N. W. Rep. 241; Heath *v.* Heath, 31 Wis. 223;—to pass one over a railroad for life,—Atchison, etc., R. Co. *v.* English (Kan.), 16 Pac. Rep. 82;—to pay during the life of some person,—Gilbert *v.* Sykes, 16 East, 150; Burney *v.* Ball, 24 Ga. 505; Wiggins *v.* Keizer, 6 Ind. 252; Hutchinson *v.* Hutchinson, 46 Me. 154;—or, to work for another for his life,—Updike *v.* Ten Broeck, 32 N. J. Law, 105; Dresser *v.* Dresser, 35 Barb. 573; Kent *v.* Kent, 62 N. Y. 560;—but see Berry *v.* Doremus, 30 N. J. Law, 399.

Where the performance may become completed by the destruction of the thing upon or to which the act is to be done within the year, the statute does not apply. Sherman *v.* Champlain Trans. Co., 31 Vt. 162.

Where, however, the death of any person will simply put an end to the contract, leaving it unperformed, the fact that the death may happen within the year will not take the agreement out of the statute. On this point different decisions have been reached.

In Farrington *v.* Donohoe, 1 Ir. Rep. C. L. 675, it was held that an agreement to maintain a child, then known to be five years of age, until "she could do for herself." did not contemplate a performance within a year, and was within the statute; yet the death of the child within the year would have ended it.

A similar decision was rendered in Goodrich *v.* Johnson, 66 Ind. 258, where the agreement was to support a child until its majority; and in Von Schoyck *v.* Backus, 9 Hun (N. Y.), 68, on similar facts.

Deaton *v.* Tenn., etc., Co., 12 Heisk. (Tenn.) 650, is a case where a railroad agreed to support a widow and her three minor children during her life, and, if she died before the majority of the youngest, to support all until that majority was reached. The court held that the death of all would defeat, not complete, the contract, and that it was within the statute.

The possibility of the death of a party concerned was not considered sufficient to take the following cases out of the statutes: Shute *v.* Dorr, 5 Wend. (N. Y.) 204 (a promise that a youth then sixteen shall serve until twenty-one); Baker *v.* Lauterback (Md.), 11 Atl. Rep. 703 (a contract of apprenticeship for five years); Freeman *v.* Foss, 145 Mass. 361 (for two years); Hill *v.* Hooper, 1 Gray (Mass.), 131 (an agreement to hire an infant for five years).

On the other hand, it was held, in Peters *v.* Westborough, 19 Pick. (Mass.) 364, that an agreement to support a child, then known to be twelve years of age, until she became eighteen, was not within the statute, as the death of the child within a year would put an end to the contract. And a like decision has been reached in McKinney *v.* McCloskey, 8 Daly (N. Y.), 368, where the agreement was to take charge of a child until its majority;—in East Tenn., etc., R. Co. *v.* Staub, 7 Lea (Tenn.), 397, to employ and pay a person whether he was able to work or not;—and in Ellicott *v.* Turner, 4 Md. 476, and Wilhelm *v.* Hardman, 13 Md. 140,—to educate a child.

These cases are reconcilable if the difference in the results reached is attributed to a difference in the view taken by the courts as to what in fact constituted a complete performance of the various contracts—whether or not the contract was fully performed in accordance with the intention of the parties, at the death of the person interested.

Where the contract is to refrain from doing an act during a specified time, but the full intent and object of the parties will be accomplished if the party who is to refrain dies within the period, and thus refrains beyond the time originally contemplated, the courts of *Massachusetts* regard the performance to be, in effect, contingent on the death of the person, and so hold that the statute does not apply. Doyle *v.* Dixon, 97 Mass. 208.

The case arose on an agreement not to keep a grocery in a particular town for five years; and the court, distinguishing between a contract to do a thing and one not to do a thing, held the promise not within the statute. "So, if the death of the promisor within the year would merely prevent full performance of the agreement, it is within the statute; but if his death would leave the agreement fully performed, and its purpose fully carried out, it is not." *Per* Gray, J.

This is not law elsewhere, however; a contrary decision having been rendered on practically identical facts in the following cases: Daves *v.* Shannon, 4 Exch. Div. 81 Self *v.* Cordell, 45 Mo. 345; Perkins *v.* Clay, 54 N. H. 518; Gottschalk *v.* Witter, 25 Ohio St. 76. *Compare*, too, Mallett *v.* Lewis, 61 Miss. 105, where what was in substance an agreement to refrain from trading with any one except a particular person for five years, the whole purpose of which would be satisfied if this

tract which is, in terms, for more than a year may be determined by either party within the year and the contemplated performance thus be defeated, will not prevent the statute applying.[1]

In *England* and most of the *United States*, it is held that the statute applies only to contracts which are not to be performed upon either side within a year. If all that is to be performed on one side is to be performed within a year, the contract is not within the statute.[2]

other died within the time, was held within the statute.

Yet a general undertaking to refrain altogether from a certain course of action is not with the statute. Hill *v.* Jamieson, 16 Ind. 125; Lyon *v.* King, 11 Metc. (Mass.) 411; Worthy *v.* Jones, 11 Gray (Mass.), 168; Blanding *v.* Sargent, 33 N. H. 239; Richardson *v.* Pierce, 7 R I. 330; Blanchard *v.* Weeks, 34 Vt. 589.

Davey *v.* Shannon, 4 Exch. Div. 81, however, assumes that an agreement not to do a thing during one's life is "*prima facie* not to be performed within a year." *Per* Hawkins, J.

Obviously, where further performance may cease at the option of either party, the statute does not apply. Knowlman *v.* Bluett, L. R. 9 Ex. 307; Maddison *v.* Alderson, 8 App. Cas. 467; Estey *v.* Aldrich, 46 N. H. 127; Baptist Church *v.* Brooklyn Fire Ins. Co., 19 N. Y. 305; Blakenay *v.* Goode, 36 Ohio St. 350; Greene *v.* Harris, 9 R. I. 401; Sherman *v.* Champlain Trans. Co., 31 Vt. 162.

Where the contract will be terminated by such a change in the circumstances of the parties that it is unnecessary that they continue bound, it is suggested by Mr. Browne (Statute of Frauds, § 276a) that the statute does not apply if the change could happen within the year and is one the parties must have contemplated. On this ground, he would place Talmadge *v.* Rensselaer, etc., R. Co., 13 Barb. (N. Y.) 493, the case of a promise by the company to erect and maintain a fence to keep cattle from straying on its tracks, which was held not within the statute. That case is disregarded and a directly opposite result reached in Day *v.* N. Y. Cent., etc., R. Co., 22 Hun (N. Y.), 412, where the agreement was to lay a separate track to certain land, and bring all the railroad's cattle freight there to be fed by the owner. And it would seem that the law is other than Mr. Browne suggests. *Compare* with these cases Mallett *v.* Lewis, 61 Miss. 105, cited above.

1. A leading case upon this subject is Birch *v.* Lord Liverpool, 9 B. & C .392; 4 Mon. & R. 380. The defendant hired a carriage of the plaintiff for a term of five years at an annual payment. In an action on this contract, the plaintiff offered to show that, by the custom of his trade, such a contract was determinable at any time on the payment of a year's hire. The court held that that fact did not take the case out of the statute. The contract in itself was not performable within a year, and the defeasance did not complete performance—it put an end to the contract. The principle laid down in that case has been accepted as law ever since.

In Dobson *v.* Cullis, 1 H. & N. 81, Pollock, C.B., thus states it: "A contract which, by its general terms, is not to be performed within the year, is not taken out of the statute because it may be defeated on a given event;" and Baron Alderson, in Roberts *v.* Tucker, 3 Exch. 632, says: "The case of a defeasible contract, where the contract may be defeated or put an end to within the year, is not, for that reason, taken out of the operation of the Statute of Frauds. See also *Re* Pentreguinea Coal Co., 4 De G. S. & J. 541,

In the *United States*, the same is law. Packet Co. *v.* Sickles, 5 Wall. (U. S.) 580 (See, however, the comment of Gray, C. J., upon this case in Somerby *v.* Buntin, 118 Mass. 286); Meyer *v.* Roberts, 46 Ark. 80; s. c., 55 Am. Rep. 567; Bemier *v.* Cabot Mfg. Co., 71 Me. 506; s. c., 36 Am. Rep. 567; Cowles *v.* Warner, 22 Minn. 449; Blanding *v.* Sargent, 33 N. H. 246.

In Smith *v.* Catlin, 19 Hun (N. Y.), 234, an opposite decision seems to be reached, as the court held a contract made in October, 1876, to teach school for a year ending October 1, 1877, and for a further term of one year if no notice to the contrary were given two weeks prior to October 1, 1877, to be performable within a year, and so not within the statute. It is possible, however, to regard this contract as one for a year with a provision for renewal; and in that light the decision is not opposed to the general current of authority.

2. This doctrine is founded upon the case of Donellan *v.* Read, 3 B. & Ad. 899, and, in truth, as some courts have admitted, practically under the statute.

In Donellan *v.* Read, a landlord who had demised premises for a term at £50 per year agreed to lay out £50 in improvements, on an agreement by the tenant to pay an increased rent of £5 per year during the balance of the term. The landlord made the repairs within a year, and, on the tenant's refusal to pay the additional rent, sued him for it. The court held the Statute of Frauds no defence; the ground of the decision being thus stated by Littledale, J.: "As to the contract not being performed within a year, we think that, as the contract was entirely executed on one side within a year, and as it was the intention of the parties, founded on a reasonable expectation, that it should be so, the Statute of Frauds does not extend to such a case."

This decision was approved in Cherry *v.* Heming, 4 Exch. 631, where the plaintiff had assigned certain letters patent to the defendants, who agreed to pay £840 therefor by instalments extending over several years. The court decided that the contract was to be performed on one side within a year, and so was not within the statute; saying: "The question turns upon the construction of the words 'not to be performed;' and, in Donellan *v.* Read, the court considered that these words meant not to be performed *on either side*, and did not include cases where the contract was performed on the one side." The decision, however, can be sustained on another ground. See also, Smith *v.* Neale, 2 C. B. (N. S.) 67.

Donellan *v.* Read has been followed at *nisi prius*, in a late case, Beavan *v.* Carr, 1 Cobabe & Ellis, 499; and, in Miles *v.* New Zealand Alford Est. Co., 32 Ch. Div. 266, North, J., accepted it as law.

To a defence of an agreement not to sue on claims that would be barred within six years, it was objected that the agreement should have been in writing. North, J., said: "The answer to that is, it is quite sufficient if the agreement was or might be performed by one side within a year; and the cases of Donellan *v.* Read and Cherry *v.* Heming were cited. I think there is a great deal of force in the observation that what is required by the statute is that the agreement should be performed, and not that it should be partly performed, and that performance means performance by both parties. But that has been settled, and it has been decided that all that is required is performance by one party within the year, however many years may have to elapse before the agreement is performed by the other party.

"Considering the object of the statute was to require that certain evidence should be preserved of the terms of a contract which would require a long time to accomplish, one does not see how that object is satisfied if what is contended is correct."

On appeal, the judges refused to consider the question of the statute, and decided upon other grounds.

In the United States, Donellan *v.* Read is accepted as law in *Alabama*,—Rake *v.* Pope, 7 Ala. 161;—*Georgia*,—Johnson *v.* Watson, 1 Ga. 348;—*Illinois*,—Curtis *v.* Sage, 35 Ill. 22;—*Indiana*,—Haugh *v.* Blythe, 20 Ind. 24 (but see Wilson *v.* Ray, 13 Ind. 1, *contra*);—*Iowa*.—Smalley *v.* Greene, 52 Iowa, 241;—*Kentucky*,—Gully *v.* Greibbs, 1 J. J. Marsh. (Ky.) 387; Hallaway *v.* Hampton, 4 B. Mon. (Ky.) 415 (but see Montague *v.* Garnett, 3 Bush [Ky.] 297,);—*Maine*,—Holbrook *v.* Armstrong, 10 Me. 31;—*Maryland*,—Ellicott *v.* Turner, 4 Md. 476 (*semble*); Hardesty *v.* Jones, 10 Gill & J. 404;—*Missouri*,—Winters *v.* Cherry, 78 Mo. 344, citing earlier cases;—*New Jersey*,—Berry *v.* Doremus, 30 N. J. L. 399;—*South Carolina*,—Bates *v.* Moore, 2 Bailey (S. Car.), 614; Compton *v.* Martin, 5 Rich. Law (S. Car.), 14;—*Texas*,—Miller *v.* Roberts, 18 Tex. 16 (*semble*); Zabel *v.* Schroeder, 35 Tex. 308;—*Wisconsin*,—McClellan *v.* Sanford, 26 Wis. 595 *Cf.* Washburne *v.* Dorsch (Wis.), 32 No. West Rep. 551.

It is repudiated in *Massachusetts*,—Marcy *v.* Marcy, 9 All. (Mass.) 8; Frary *v.* Sterling, 99 Mass. 461; though (*semble*) approved in Cabot *v.* Haskins, 3 Pick. (Mass.) 83, overruled on this point;—*New York*,—Broadwell *v.* Getman, 2 Denio (N. Y.), 87; Bartlett *v.* Wheeler, 44 Barb. (N. Y.) 162; Weir *v.* Hill, 2 Lans. (N. Y.) 278; but see language of the court in Dodge *v.* Crandall, 30 N. Y. 294;—*Vermont*,—Pierce *v.* Payne's Est., 28 Vt. 34, printed in full in Browne Statute of Frauds, § 289, note 7. It is referred to, but neither repudiated nor followed, in Deeff *v.* Snider, 54 Miss. 245 (which says the whole matter is one of pleading), and Reinheimer *v.* Carter, 31 Ohio St. 579.

In *New Hampshire*, it is approved in Blanding *v.* Sargent, 33 N. H. 229, ungraciously accepted in Gault *v.* Brown, 48 N. H. 183, and Perkins *v.* Clay, 54 N. H. 518; but it is disregarded in Emery *v.* Smith, 46 N. H. 151.

Far the greater number of these cases can be supported on the ground that a debt was created by the performance, or a condition brought about from which the law would imply a promise to pay unaffected by the statute.

The following, among the cases already

The year in all cases is to be computed from the day of making the contract.[1]

**5. Contracts for the Sale of Interests in Lands.**—The fourth clause of the fourth section of the Statute of Frauds, 29 Charles II. c. 3 requires a note or memorandum of "any contract or[2] sale of lands, tenements, or hereditaments, or any interest in or concerning them."

This clause has been adopted in all the States of the United States, save *Pennsylvania*,[3] but with changes of phraseology that are important.

It applies to all sales, save judicial sales,[4] and therefore to

cited were for the price agreed to be paid, and can be sustained on grounds apart from the decision in Donellan *v.* Read: Rake *v.* Pope, 7 Ala. 161; Johnson *v.* Watson, 1 Ga. 348; Hough *v.* Blythe, 20 24; Gully *v.* Grubbs, 1 J. J. Marsh. (Ky.) 387; Halbrook *v.* Armstrong, 10 Me. 31; Zabel *v.* Schroeder, 35 Tex. 308; McClellan *v.* Sanford, 26 Wis. 595.

None of the *English* cases necessarily rest on the principle stated, and, while it is probably law, it cannot be regarded as conclusively settled.

The subject is well discussed in Browne Statute of Frauds, § 286 *et seq.*

It has been held, in *Vermont*, Sheehy *v.* Adorene, 41 Vt. 541, that "such agreements as may be wholly broken within the year, and thereby give a cause of action for a complete breach, do not fall within the letter or the reason of the statute." The case was an action for damages arising from the refusal of the defendant,—who had agreed to furnish a cow to the plaintiff at a future day and let him use it for one year therefrom, the plaintiff at the end of that time to buy the cow or pay for the use of it,—to fulfil his agreement and furnish the cow. Here the contract was one not to be performed for a year, and it would seem clear that the statute applied. The statute says nothing as to contracts that can or cannot be broken for a year; but it does provide that no action shall be maintained on a contract not performable for a year. How can this be modified or affected by the fact that a breach of the agreement is possible within a year? The statute goes upon the time of performance; and this cannot be ascertained when a breach may occur.

1. Bracegirdle *v.* Heald, 1 B. & Ald. 726; Snelling *v.* Lord Huntingfield, 1 Cr. M. & R. 20; Cowthorne *v.* Cordrey, 13 C. B. (N. S.) 406; Kelly *v.* Terrell, 26 Ga. 551; Hearne *v.* Chadbourne, 65 Me. 302.

2. These words mean "contract for the sale," *per* Parker, C. J., in Boyd *v.* Stone, 11 Mass. 346, who, in commenting on the *Massachusetts* statute then in force, said: "It is somewhat singular that a very incorrect phraseology of the Statute of Charles producing some little obscurity, should have been adopted both in the provincial act and in the Statute of the Commonwealth. 'No contract or sale of lands,' etc., was probably at first misprinted or miswritten for no 'contract for the sale of lands,' etc."

3. *Pennsylvania* adopted the first three sections of the Statute of 29 Charles II. in 1772, but the fourth section was never adopted there as to contracts for the sale of lands.

The courts of that State, while denying that the statute has force there of itself (Malana *v.* Ammon, 1 Barr [Pa.], 139), declare that it has such force that no contract for the sale of lands will be specifically enforced (Wible *v.* Wible, 1 Grant [Pa.], 406; Sales *v.* Heckman, 20 Pa. St. 180; Everhart's App., 106 Pa. St. 349; Bowers *v.* Bowers, 95 Pa. St. 471), and that the price of the land agreed to be conveyed cannot be taken as the measure of damages for a breach of the agreement (Herzog *v.* Herzog, 34 Pa. St. 418; Ellet *v.* Paxson, 2 Watts & S. [Pa.] 418); yet an action for the breach of such a contract may be maintained (Bell *v.* Andrews, 4 Dall. [Pa.] 152; Wilkins School District *v.* Milligan, 88 Pa. St. 96), and the damages will be the actual damages sustained. Herzog *v.* Herzog, 24 Pa. St. 418; Wilson *v.* Clark, 1 Watts & S. (Pa.) 554; McDowell *v.* Oyer, 21 Pa. St. 427. The case of Jack *v.* McKee, 9 Barr (Pa.), 235, which held the damages to be the value of the land, is overruled by Herzog *v.* Herzog, 24 Pa. St. 418.

4. The reasons for the statute are held not to apply in the case of judicial sales, as in them the sale is made directly by an official of the court, and is ineffective until ratified by it, and no chance for fraud or perjury exists. Attorney-gen. *v.* Day. 1 Ves. Sr. 218; Halleck *v.* Guy, 9 Cal.

sales by auction,[1] and sales by sheriffs, public officers, executors, administrators, guardians, trustees, and commissioners,[2] save in so far as these are judicial sales.[3]

The nature of the consideration is immaterial; the fact that it is labor, or anything other than money, will not prevent the statute from applying.[4] It applies to exchanges of lands.[5]

The difficulty in the administration of this part of the statute has arisen in the determination of what are the "lands," "real estate," and "interests in or concerning lands, tenements, or hereditaments" which are covered by the statute.

Clearly, every contract for the sale of the legal title to real estate is within the statute; but it applies to contracts for the sale of the equitable title as well: thus, for the sale of an equity of redemption, whether from a mortgage, a trust deed, a judicial sale, a tax sale, an execution sale, or however such an equity of redemption may arise;[6] for the sale of the interest of a *cestui que trust*;[7] for the sale of an interest as vendor under a contract for the purchase of lands, tenements, or hereditaments, or any interest in or concerning them.[8]

It applies to a contract for the sale of a pre-emption right, or an agreement to locate a land certificate and get a patent.[9]

181; Watson *v.* Violett, 2 Duvall (Ky.), 332; Warfield *v.* Dorsey, 39 Md. 299; Armstrong *v.* Vroman, 11 Minn. 220; Trice *v.* Pratt, 1 Dev. & B. Eq. (N. Car.) 626; Tate *v.* Greenlee, 4 Dev. (N. Car.) 149; King *v.* Gunnison, 4 Pa. St. 171; Emley *v.* Drumm, 36 Pa. St. 123.

1. Blagden *v.* Bradbear, 12 Ves. 466.

2. Carroll *v.* Powell, 48 Ala. 298; Hutton *v.* Williams, 35 Ala. 503; Ruckle *v.* Barbobr, 48 Ind. 274; State *v.* Ervien (N. J.), 12 Atl. Rep. 130; Ingram *v.* Dowdle, 8 Ired. (N. Car.) 455; Wolfe *v.* Sharp, 10 Rich. Law (S. Car.), 60; Brent *v.* Green, 6 Leigh (Va.), 16; Smith *v.* Arnold, 5 Mas. (C. C.) 424.

3. See Armstrong *v.* Vroman, 11 Minn. 220; Tate *v.* Greenlee, 4 Dev. (N. Car.) 149; Fulton *v.* Moore, 25 Pa. St. 468.

4. Where the promise is to pay for labor or services, in land, an action may be maintained for damages, on refusal to convey after the work has been done; but it is in the form of *assumpsit* on a *quantum meruit*. The value of the land may be a measure of damages, though not necessarily. Bland *v.* Talley (Ark.), 6 So. West. Rep. 234; Wallace *v.* Long, 105 Ind. 522; s. c., 55 Am. Rep. 222; Terrell *v.* Frazier, 79 Ind. 473; Neal *v.* Neal, 69 Ind. 419; Baxter *v.* Kitch, 37 Ind. 554; Becker *v.* Mason, 39 Kan. 697; Helm *v.* Logan, 4 Bibb (Ky.), 78; Dowling *v.* McKenney, 124 Mass. 478; Kelley *v.* Kelley, 54 Mich. 30; Sutton *v.* Rowley, 44 Mich. 112; Burlingame *v.* Burlingame, 7 Cow. (N. Y.) 921; Anderson *v.* Powers, 59 Tex. 213.

5. Purcell *v.* Miner, 4 Wall. (U. S.) 513; Connor *v.* Tippett, 57 Miss. 594; See Raubitschek *v.* Blank, 80 N. Y. 478.

6. Hughes *v.* Moore, 7 Cranch (U. S.), 176; *In re* Betts, 7 Reporter (U. S.), 522; Jenkins *v.* Lawlace, 72 Ala. 303; Scott *v.* McFarland, 13 Mass. 309; Williams *v.* Williams, 7 Reporter (Minn.), 656; Dickenson *v.* Mayo, 60 Miss. 388; Marble *v.* Marble, 5 N. H. 374; Van Keuren *v.* McLaughlin, 19 N. J. Eq. 187; Clark *v.* Condit, 18 N. J. Eq. 358; Odell *v.* Montross, 68 N. Y. 499; Kelley *v.* Stanbery, 13 Ohio, 426.

An early case in *Kentucky* has held that an equity of redemption may be pledged without writing. Griffin *v.* Coffee, 9 B. Mon. (Ky.) 452.

7. McClain *v.* McClain, 57 Iowa, 167; Richards *v.* Richards, 9 Gray (Mass.), 313; Holmes *v.* Holmes, 86 N. Car. 205, and cases cited.

8. Smith *v.* Burnham, 3 Sumn. (C. C.) 435; Richards *v.* Richards, 9 Gray (Mass.). 313; Graves *v.* Buch, 34 Mich. 519; Whiting *v.* Butler, 29 Mich. 122; Connor *v.* Tippett, 57 Miss. 594; Dickerson *v.* Mayo, 60 Miss. 388; Simms *v.* Killian, 12 Ired. (N. Car.) 252; Lillie *v.* Dunbar, 62 Wis. 198; Daniels *v.* Bailey, 43 Wis. 566;

9. Hughes *v.* Moore, 7 Cranch (U. S.), 176; Lester *v.* White, 44 Ill. 464. The

Obviously, an argument in regard to an easement or a *profit à prendre* is within the statute.[1]

It applies to a contract for the sale or conveyance of a right of dower,[2] but the mere assignment of dower to the widow may be by parol;[3] to a transfer of a mining claim;[4] to an agreement in regard to rents;[5] to agreements for the assignment or creation of leases;[6] to agreements for the mere possession of land;[7] to a contract to devise land, or to make a will of lands;[8] to a contract for the sale of a bond the sole security for which is land;[9] but a judgment constituting a lien may be released by parol.[10]

statute of *Texas* does not contain the words "or any interest in or concerning" lands; and accordingly an agreement to locate a land certificate and get patents for the land has been held not within the statute. James *v.* Drake, 39 Tex. 143, citing Miller *v.* Roberts, 18 Tex. 19; James *v.* Fulcrod, 5 Tex. 512; and Watkins *v.* Gilkerson, 10 Tex. 340.

1. Thus, an agreement to allow one to shoot over certain land, and take away part of the game killed, being a *profit à prendre* is within the Statute. Webber *v.* Lee, 9 Q. B. Div. 315. So an agreement for an easement of light. McManus *v.* Cook, 35 Ch. Div. 681; Ware *v.* Chew (N. J.), 11 Atl. Rep. 746.

In *Alabama*, however, an agreement for the use of part of a right of way is not within the statute. Alabama, etc., R. Co. *v.* Southern, etc., R. Co., (Ala.). 3 So. Rep. 286. *Cf.* Mitchell *v.* Bush, 7 Cow. (N. Y.) 185.

2. The release as a conveyance must be by deed; and any contract for a release, or agreement to get a release is within the statute. Finney *v.* Finney, 1 Wils. 34; Marlen *v.* Wharton, 38 Ala. 637; Brown *v.* Rawlings, 72 Ind. 505; Wright *v.* De Graff, 14 Mich. 164; Gordon *v.* Gordon, 50 N. H. 170; Keeler *v.* Tatnell, 23 N. J. Law, 62; White *v.* White, 16 N. J. Law, 202; Hall *v.* Hall, 2 McCord Ch. (S. Car.) 269; Madigan *v.* Walsh, 22 Wis. 501.

3. Lenfers *v.* Henke, 73 Ill. 405; Shattuck *v.* Gragg, 23 Pick. (Mass.) 88.

4. Where the owner is in possession the claim may be assigned by parol; but a transfer of a claim by one out of possession is within the statute. Copper-hill Min. Co. *v.* Spencer, 25 Cal. 18, and cases cited.

5. Thus, an agreement as to a devise of rents. Brown *v.* Brown, 33 N. J. Eq. 650.

6. See Bacon *v.* Parker, 137 Mass. 309.

7. The mere possession of land is an interest in land, within the statute. Smaat *v.* Harding, 15 C. B. 652; Onderdonk *v.* Lord, Hill & D. (N. Y.) 129; Howard *v.* Easton, 7 Johns. (N. Y.) 205; but in Storms *v.* Snyder, 10 Johns. (N.Y.) 109, where the court held that an agreement to remove a fence from land, was not within the statute it was declared that the statute dealt only with agreements in regard to the title to lands. In Rice *v.* Roberts, 24 Wis. 461, it was held that an agreement in regard to the use of a party wall was within the statute.

In *Louisiana*, permission to occupy without rent may be shown by parol. Baily *v.* Ward, 32 La. Ann. 839.

8. Maddison *v.* Alderson, Wallace *v.* Long, 105 Ind. 522; s. c., 55 Am. Rep. 222; Gould *v.* Mansfield, 103 Mass. 408; Johnson *v.* Hubbell, 2 Stock. Ch. (N. J.) 332; Gooding *v.* Brown, 35 Hun (N. Y.), 148; Harder *v.* Harder, 2 Sandf. Ch. (N. Y.) 17; Howard *v.* Brower, 37 Ohio St. 402; Campbell *v.* Taul, 3 Yerg. (Tenn.) 548.

In Doe *v.* Smith, 6 B. & C. 112, a devisee of lands, who was also heir at law, refused all benefit under the will, and brought ejectment. The court decided that this was valid though by parol, since it was not an agreement concerning an interest in lands, but a mere waiver of a benefit under a will, but refused to decide what would be the effect of a parol disclaimer or renunciation by one having no other title than under the devise.

9. Toppin *v.* Lomas, 10 C. B. 145. The bond in this case was made by trustees of land, who by act of Parliament were not to be personally liable upon it. The land was made solely liable for its payment, and the holder of the bond was, in substance, holder of a mortgage.

10. Winberry *v.* Keonce, 83 N. Car. 351. But a parol agreement that the lien of a judgment which has been satisfied may be continued as security for further liability is invalid. Trescott *v.* King, 6 N. Y. 147.

Every agreement whereby an interest in land already acquired is modified, increased, or diminished, is within the statute; thus, an agreement that a mortgagee shall not take possession before a breach of condition by the mortgagor,[1] or that a vender shall not go into possession or record his deed until an instalment of his purchase-money is paid;[2] so, too, an agreement to insert a new mortgagee in a mortgage,[3] or to extend it so as to include other land,[4] or to cover further liabilities.[5]

An agreement to execute a defeasance of an absolute deed so as to make it a mortgage,[6] or to change a mortgage into a conditional sale,[7] or to rescind a deed or contract for an interest in land,[8] must be evidenced by writing.

A parol argeement to extend the time for redeeming a mortgage is invalid;[9] and so is a parol agreement to release or discharge one,[10] save in those States where a mortgage is regarded as merely an incident of the debt.[11] A parol agreement to execute[12] or to foreclose[13] a mortgage is within the statute; and so, too, a parol sale under a power of sale in the mortgage.[14]

1. Norton *v.* Webb, 35 Me. 218; Colman *v.* Packard, 16 Mass. 39.

2 Gilbert *v.* Buckley, 5 Conn. 262.

3. Irwin *v.* Hubbard, 49 Ind. 450.

4. Castro *v.* Illies, 13 Tex. 229.

5. In Williams *v.* Hill, 19 How. (U. S.) 246, a debtor who had given a deed of trust to secure certain liabilities before a judgment in favor of his creditor, and before a sale upon that judgment under the trust deed, authorized the creditor, by parol, to retain enough from the surplus arising from the sale to secure him for a further indebtedness not secured by the deed of trust. The court held that "the real property conveyed in the deed [cannot] be retained as a security for advances or debts subsequently made on the strength of a parol agreement. Such a contract would be avoided by the Statute of Frauds." Curle *v.* Eddy, 24 Mo. 117; Stoddard *v.* Hart, 23 N. Y. 456.

Where the debt secured by a mortgage has been paid, but it is agreed that the conveyance shall stand as security for another debt, the statute applies as against other judgment creditors; but the court suggests that, as between the parties, it may be valid and binding, though by parol. Mead *v.* York, 6 N. Y. 449.

In Davis *v.* Parish, Litt. Sel. Cas. (Ky.) 153, it was held that an agreement to convey land which had once become *fructes officio* could not be revived by parol. The owner had agreed to convey land on certain terms if, when the vendee saw the land, he liked it. The vendee visited the land and refused to take it. Later, after further negotation, he consented by parol to take it. The court decided that on his first refusal the written agreement was determined by its very terms, and that it could not be revived by parol.

It may be doubted, however, whether parties may not agree that a written instrument already in existence shall be the memorandum of their agreement, and whether, on the facts of this case, they may not fairly have been held to have done so here.

6. Boyd *v.* Stone, 11 Mass. 342. *Cf.* Jones *v.* Van Dorm, 18 Fed. Rep. 619.

7. Brown *v.* Nickle, 6 Barr (Pa.), 391; Woods *v.* Wallace, 22 Pa. St. 171.

8. McEwan *v.* Ortman, 34 Mich. 325; Davis *v.* Inscoe, 84 N. Car. 396.

9. Hamilton *v.* Terry, 11 C. B. 954. *Contra*, Martin *v.* Martin, 16 B. Mon. (Ky.) 8. The courts of *Kentucky* have also held an agreement to extend the time for redeeming land from an execution sale valid though oral. Griffin *v.* Coffey, 9 B. Mon. (Ky.) 454.

10. Leavitt *v.* Pratt, 53 Me. 147; Parker *v.* Barker, 2 Metc. (Mass.) 423; Malins *v.* Brown, 4 N. Y. 403 (*semble*); Merrill *v.* Pease, 51 Vt. 556.

11. Wallis *v.* Long, 16 Ala. 738; Howard *v.* Gresham, 27 Ga. 347; Mutual Mill Ins. Co. *v.* Gordon (Ill.), 12 No. East. Rep. 747; Ackla *v.* Ackla, 6 Barr (Pa.), 228.

12. It must be unnecessary to cite authorities on this point. An agreement to advance money on the security of land is within the statute. Mannsey *v.* Rankin, 1 Cababe & E. 496.

13. Cox *v.* Peele, 2 Bro. C. C. 334; Carlisle *v.* Brennan, 67 Ind. 12; Green *v.* Groves, 109 Ind. 519.

14. Such a sale or contract of sale is unenforceable as between the parties to it,

The interest given by a covenant of warranty or for quiet enjoyment is an interest in land, within the statute.[1]

A contract for the sale of fixtures is not within this section of the statute;[2] nor is a contract to take and pay for the improvements upon land.[3]

Whether or not growing crops or timber constitute an interest in land, within this section, is decided differently in various jurisdictions. In *England* and many of the United States, the rule is that a sale of growing timber or a growing crop is not the sale of an interest in land, within the statute, when, in the contemplation of the parties, the sale is of the chattels which will exist upon the severance.[4] In other States, the rule is that growing crops which

(Jackson *v.* Scott, 67 Ala. 99); but it is binding on the mortgagor and all third parties. Mewburn *v.* Ball, 82 Ala. 520.

1. Bliss *v.* Thompson, 4 Mass. 488; Kerr *v.* Shaw, 13 Johns. (N. Y.) 236.

2. Hallen *v.* Runder, 1 C. M. & R. 266; Bostwick *v.* Leach, 3 Day (Conn.), 476.

Where a house has been erected on the land of another, a contract allowing its removal is not within the statute. Rogers *v.* Cox, 96 Ind. 157; s. c., 49 Am. Rep. 152; Keyson *v.* School District, 35 N. H. 477. And an oral sale of a building standing upon the land of the owner, but to be severed from it and taken away, is valid. Shaw *v.* Carbery, 13 All. (Mass.) 462 (*semble*); Long *v.* White, 42 Ohio St. 59.

An oral sale of the bricks of a ruined house still standing on the land has, however, been held invalid, as within the statute. Meyers *v.* Schemp, 67 Ill. 469.

No rational distinction can be made in these cases.

3. Scoggin *v.* Slater, 22 Ala. 687; Cassell *v.* Collins, 23 Ala. 676; Green *v.* Vardiman, 2 Blackf. (Ind.) 324 (*semble*); Zickafosse *v.* Hulich, 1 Morris (Iowa), *175; Clark *v.* Shultz, 4 Mo. 235; Frear *v.* Hardenbergh, 5 Johns. (N. Y.) 272; Forbes *v.* Hamilton, 2 Tyler (Vt.), 356 (*semble*).

In Scoggin *v.* Slater, 22 Ala. 687, the improvements consisted in houses built upon the land, and apparently real estate. The statute of *Alabama*, however, does not include contracts for "any interest in or concerning land;" and a contrary decision might he rendered on such facts in a State whose statute extended to such contracts.

4. The law upon this point in *England* has passed through several stages to reach that stated in the text. In a few early cases, growing crops and timber were held interests in land, within the statute; later, the character of the crop, whether *fructus naturales* or *industriales*, was adopted as a test to determine whether or not the particular agreement fell within the statute, and finally the case of Marshall *v.* Green, established the law as stated.

Growing timber was held a chattel interest, not within the fourth section of the statute, in anon., 1 Ld. Raym. 182, decided by the common pleas, in 1677. But in Emmerson *v.* Heelis, 2 Taunt. 38, Mansfeld, C.J., held a contract for growing turnips, within the statute; and Crosby *v.* Wentworth, 6 East. 602, held a contract for growing grass to be cut by the purchaser, Waddington *v.* Briston, 3 Bos. & P. 452, held a contract for the hops to be grown on certain land in the ensuing year, and Teal *v.* Aughty, 3 B & B. 99, one for growing poles, within it.

The case of Emmerson *v.* Heelis was doubted in Evans *v.* Roberts, 5 B. & C. 829. That was a case of an agreement to purchase a cover of potatoes then in the ground, to be turned up by the seller and removed by the buyer. One shilling earnest was paid, but it was contended that this was insufficient to satisfy the Statute of Frauds, since the contract related to interests in lands, and was therefore within the 4th instead of the 17th section. The court in a careful decision reviewing all the earlier cases, held that the agreement was not for an interest in land; basing the decision upon the ground that, in the contemplation of the parties, the contract related to the potatoes when severed when beyond all question they were personal chattels,—and was not for any interest in the land.

In the course of the opinion rendered, the judges discussed the character of such a crop as *fructus industriales*, and distinguished the case of Crosby *v.* Wentworth, 6 East, 602, as a case of *fructus naturales*; but they did not take the character of the crops as the test, Holrayd, J., saying: "The contract, being for the sale

of the produce of a given quantity, was a contract to render what afterwards would become a chattel; and although some advantage might accrue to the vendee by the potatoes remaining in the land, I think that was not an interest in or concerning land, within the meaning of the 4th section of the Statute of Frauds." And Littledale, J., declared: "I am of opinion that a sale of the produce of the land, whether it be in a state of maturity or not, provided it be in actual existence at the time of the contract, is not a sale of lands, tenements, or hereditaments, or any interest in or concerning them, within the meaning of the 4th section of the Statute of Frauds."

The ground of intent of the parties was the basis of the decision in Parker *v.* Staniland, 11 East, 362, where the contract was for the sale of the potatoes in two acres of land at a price per sack. Lord Ellenborough, C.J., said: "The contract here was confined to the sale of the potatoes, and nothing else was in the contemplation of the parties." The growth had ceased, and Bayley, J., declared that "here the land was considered as a mere warehouse for the potatoes till the defendant could remove them." The court held the case not within the statute.

Parker *v.* Staniland was followed in Warwick *v.* Bruce, 2 M. & S. 205; also a case of potatoes growing in the soil.

In Smith *v.* Lurnam, 9 B. & C. 561, the plaintiff bargained to sell the timber in certain trees then standing on his land, to be cut by him, but taken and carried away by the defendant. It was held that the contract was not for an interest in land, within the 4th section; Bayley, J., saying: "It seems to me that the true construction of the bargain is that it is a contract for the future sale of the timber when it should be in a state fit for delivery." Littledale, J., said: "I think that the contract in this case was not a contract for the sale of lands, tenements, or hereditaments, or any interest in or concerning the same, within the remaining of the 4th section. Those words in that section relate to contracts (for the sale of the fee-simple, or of some less interest than the fee), which give the vendee a right to the use of the land for a specific period. If in this case the contract had been for the sale of the trees, with a specific liberty to the vendee to enter the land to cut them, I think it would not have given him an interest in the land, within the meaning of the statute. The object of a party who sells timber is, not to give the vendee any interest in his land, but to pass to him an interest in the trees when they become goods and chattels."

In Watts *v.* Friend, 10 B. & C. 446, a contract for all the turnip-seed to be raised on certain land not yet planted, was held within the 17th section, on the ground that, on delivery, the thing to be delivered would be a personal chattel. And in Sainsbury *v.* Matthews, 4 M. & W. 343, a contract for the sale of growing potatoes was held not within the statute.

In none of these cases was the character of the growth made the test. In Jones *v.* Flint, 10 Ad. & E. 753, however, the court, in deciding that a contract that defendant should have certain crops of wheat, barley, and potatoes then growing, and also certain grass, adverted specially to the circumstance that the crops, save the grass, were *fructus industriales*; and Lord Denman, J., said: "We agree that the safer grounds of decision are the legal character of the principal subject-matter of sale, and the consideration whether, in order to effectuate the intentions of the parties, it be necessary to give the vendee an interest in the land."

Hullock, B., in Scorell *v.* Boxall, 1 Young & J. 398, approved this distinction *obiter*; and in Rodwell *v.* Phillips, 9 M. & W. 501, a case of growing fruit, which, however, did not turn on the Statute of Frauds, Lord Abinger, C.B., said: "The difference appears to be between annual productions raised by the labor of man, and the annual production of nature not referable to the industry of man except at the period when they were first planted."

Dunne *v.* Ferguson, 1 Hayes, 540 (Irish), held a contract for growing turnips valid though oral, going upon the character of the crop as a chattel.

This distinction is adopted by Benjamin (Sales, 94), and by Mr. Justice Stephen, in his Digest of Section 17 of the Statute of Frauds (I. Law Quar. Rev. 11), but is rejected in the case of Marshall *v.* Green, 1 C. P. Div. 35.

Marshall *v.* Green was an action for trespass, the declaration setting out an oral sale of 22 trees then growing on land of the plaintiff. "to be got away as soon as possible." The defendant entered and had cut some of the trees, when the plaintiff refused to be bound by the contract, and ordered the defendant to desist. The latter kept on, however, and cut and removed the whole. The plaintiff brought trespass. The court, Coleridge, C.J., Brett and Grow, J.J., held that the contract was not within the 4th section. They accept the rules laid down in the notes to Duppa *v.* Mayo, 1 Wm. Saund. 395; and

are *fructus industriales* are not interests in land, within the statute; while those which are *fructus naturales* do constitute interests in land, within it.[1]

Where land is owned by a partnership, the fact of the existence of the partnership and the nature of each partner's interest may be shown by parol;[2] and, while an agreement to join in the pur-

decide that *fructus industriales* are not within this section, while, as to *fructus naturales*, when the parties contemplate that they shall remain in the land for the benefit of the purchaser, and are to derive benefit from so remaining, then only are they within the statute; but when the buyer is to derive no benefit from the land, they are not within it.

The real test seems to be the intent of the parties. The time of severance is important only as showing their true intent.

The law in the United States varies as stated in the text. The law was held to be substantially as laid down in Marshall *v.* Green in *Connecticut*,—Bostwick *v.* Leach, 3 Day (Conn.), 476;—in *Kentucky*,—Cain *v.* McGuire, 13 B. Mon. (Ky.) 340; Byassee *v.* Reese, 3 Metc. (Ky.) 372;—in *Maine*,—Cutleer *v.* Pope, 13 Me. 377; Erskine *v.* Plummer, 7 Greenl. (Me.) 447;—in *Maryland*,—Smith *v.* Bryan, 5 Md. 151;—in *Massachusetts*,—Whitmarsh *v.* Walker, 1 Metc. (Mass.) 313; Claflin *v.* Carpenter, 4 Metc. (Mass.) 580; Nettleten *v.* Sykes, 8 Metc. (Mass.) 34; Steam *v.* Washburn, 7 Gray (Mass.), 188; Douglas *v.* Shumway, 13 Gray (Mass.), 502; Giles *v.* Simonds, 15 Gray (Mass.), 442; Poor *v.* Oakman, 104 Mass. 316; and in McClintock's App., 71 Pa. St. 365. But see Bowers *v.* Bowers, 95 Pa. St. 477, *contra*.

**1.** The rule founded on the distinction between *fructus naturales* and *industriales* is adopted in *Indiana*,—Cool *v.* Peters Box & Lumber Co., 87 Ind. 531; Terrell *v.* Frazier, 79 Ind. 473; Armstrong *v.* Lawson, 73 Ind. 498; Owens *v.* Lewis, 46 Ind. 488;—in *Michigan*,—Jackson *v.* Evans, 44 Mich. 510;—in *Missouri*,—Lyle *v.* Shinnebarger, 17 Mo. App. 66;—in *New Hampshire*,—Haur *v.* Batchelder, 49 N. H. 204; Kingsley *v.* Halbrook, 45 N. H. 313; Putney *v.* Day, 6 N. H. 430;—in *New Jersey*,—Slocum *v.* Seymour, 36 N. J. Law, 138; Westbrook *v.* Eager, 1 Harr. (N. J.) 81;—in *New York*,—Bishop *v.* Bishop, 11 N. Y. 123; Green *v.* Armstrong, 1 Denio (N. Y.), 550; Warren *v.* Leland, 2 Barb. (N. Y.) 613; Bank *v.* Crary, 1 Barb. (N.Y.) 542; but see Frank *v.* Harrington, 36 Barb. (N. Y.) 415;—in *Pennsylvania*,—Bower *v.* Bowers, 95 Pa. St. 477; Pattison's App., 61 Pa. St. 294;—in *Vermont*,—Buck *v.* Pickwell, 27 Vt. 157; *cf.* Sterling *v.* Baldwin, 42 Vt. 306;—and in *Wisconsin*,—Lillie *v.* Dunbar, 62 Wis. 198; Daniels *v.* Bailey, 43 Wis. 566.

In *West Virginia*, a growing crop of wheat has been held realty which can be sold only by a contract in writing. Kerr *v.* Hill, 27 W. Va. 576.

Wood in the tree has been held an interest in land, within this section, in Knox *v.* Haralson, 2 Tenn. Ch. 232.

**2.** Forster *v.* Hale, 5 Ves. 309; Lake *v.* Craddock, 3 P. Wms. 158; Dale *v.* Hamilton, 5 Hare, 369; Essex, 20 Beav. 442.

In Dale *v.* Hamilton, the plaintiff had been instrumental in persuading the defendant and another to purchase lands, and it had been agreed the three should form a partnership, the first two to put in money to buy the lands, and the plaintiff to lay them out and find purchasers, the profits and losses to be shared in thirds. Vice-chancellor Wigram held that these facts could be established by parol, and, the partnership being proved, that the partnership equities attached by implication of law. In his opinion, he recognized the closeness of the question, but, after a careful review of the cases, held that it was not established by authority that such an agreement must be in writing. This case has been much discussed (see Browne Stat. of Frauds, § 260 *et seq.*), and has been followed in many jurisdictions in the United States. It is followed in *Connecticut*,—Bunnell *v.* Taintor, 4 Conn. 568;—in *Indiana*,—Holmes *v.* McCray, 51 Ind. 358;—in *Iowa*,—Pennybacker *v.* Leary, 65 Iowa, 226; Richards *v.* Grinnell, 63 Iowa, 44;—in *Kansas*,—Marsh *v.* Davis, 33 Kan. 326;—in *Massachusetts*,—Fall *v.* River Whaling Co. *v.* Borden, 10 Cush. (Mass.) 458;—in *New York*,—Babcock *v.* Read, 99 N. Y. 609; Chester *v.* Dickerson, 54 N. Y. 1; Traphagen *v.* Burt, 67 N. Y. 30;—in *New Jersey*,—Personette *v.* Pryme, 34 N. J. Eq. 26;—and in *Texas*,—Gibbons *v.* Bell, 45 Tex. 417.

It should be noted that in *New York* and in *Texas* the statute does not require agreements concerning "any interest in or concerning" lands to be in writing.

A contrary view of the law was taken in Smith *v.* Burnham, 3 Sumn. 437, where Story, J., held that an agreement to become partners in dealing in Maine lands,

chase of land is within the statute,[1] an agreement to form a partnership for the express purpose of trading in lands is not.[2]

There have been a multitude of decisions upon this section, which it is absolutely impossible to bring into any classification or even reconcile. It seems that no agreement falls within it unless some interest in land in the nature of a title enforceable either in law or equity is sought to be obtained, created, or transferred to or for the one from whom the consideration moves, or for whose benefit it is given.[3] The mere fact that, indirectly, land is connected with the

capital to be furnished by both parties, could not be shown by parol. And such is the law in *California*,—Gray *v.* Palmer, 9 Cal. 616;—in *Pennsylvania*,—Everharts App., 106 Pa. St. 349;—in *Virginia*,—Henderson *v.* Hudson, 1 Munf. (Va.) 510; approved in Walker *v.* Herring, 21 Grat. (Va.) 678:—and in *Wisconsin*,—Bird *v.* Morrison, 12 Wis. 138.

That the interest of the partners may be shown by parol is also decided in *In re* Farmer, *Ex parte* Griffin, 18 Bank. Reg. 207. In Black *v.* Black, 15 Ga. 449, it is held that the doctrine applies only as between parties dealing with the land as partnership land.

The case of Dale *v.* Hamilton was disregarded in Caddick *v.* Skidmore, 2 De G. & J. 51, where, however, the matter was not much discussed.

In *Pennsylvania*, the statute simply prevents the oral agreement from vesting any interest in the lands in the partner, but does not preclude an action for the partner's share of the profits of the transaction. Everhart's App., 106 Pa. St. 349; McCormick's App., 57 Pa. St. 54.

1. That such an agreement is within the statute, seems well settled. Linscot *v.* McIntire, 15 Me. 201; Henderson *v.* Hudson, 1 Munf.(Va.) 510; McCormick's App., 57 Pa. St. 54; Parsons *v.* Phelan, 134 Mass. 109.

2. In the following cases, in accord with the statement of the text, the lands had not been purchased at the date of the agreement, and therefore it may be said the parties did not contemplate the purchase by one and the conveyance, by act of the party or implication of law, to the other, of an interest in the lands, since the interest of both would be established by the facts of the existence of the partnership, and of the purchase for partnership purposes, at the moment of the purchase. Bennell *v.* Taintor, 4 Conn. 568; Holmes *v.* McCray, 51 Ind. 358; Pennybacker *v.* Leary, 65 Iowa, 220; Richards *v.* Grinnell, 63 Iowa, 44; Chester *v.* Dickerson, 54 N. Y. 1; Gibbons *v.* Bell, 45 Tex. 417; Dale *v.* Hamilton, 5 Hare, 369.

In Marsh *v.* Davis, 33 Kan. 326, a firm already in existence and in ownership of land agreed orally to take in another partner; and the court held that the latter could establish his interest, as a partner in the firm land, by parol. Here there seems to have been the clearest kind of a contract for the conveyance of an interest in land, yet the court allowed it to be proved by parol. Caddick *v.* Skidmore, 2 De G. & J. 51, was a very similar case; but the court there refused the parol proof.

3. Thus, where the agreement is merely to give an interest in the proceeds of the sale of land, or to apply them in a particular way, and the parties have no intention of dealing with the land itself so as to create or transfer any new interest in it, the statute does not apply.

So, a promise by a vendee to pay a bond given by his vendor to the one from whom he purchased is not within the statute,—Ford *v.* Finney, 35 Ga. 258;—or a promise to pay part of the purchase-price to a third party,—Strong *v.* Kamm, 13 Oreg. 172;—and an oral promise to pay a mortgage as part of the purchase-money of land is valid,—Tuttle *v.* Armstead, 53 Conn. 175.

An agreement to divide the profit or losses to be derived from the sale of land is not within the statute unless, as the result of the promise, it is contemplated that the promisee shall have an interest in the land. Kilbourne *v.* Latta, 5 Mackey (D. C.), 304; Carr *v.* Leavitt, 54 Mich. 540; Snyder *v.* Walford, 33 Minn. 175; s. c., 53 Am. Rep. 22; Babcock *v.* Read, 99 N. Y. 609; Frazer *v.* Child, 4 E. D. Smith (N. Y.), 153; Benjamin *v.* Zell, 100 Pa. St. 33; Everhart's App., 103 Pa. St. 349; Bruce *v.* Hastings, 41 Vt. 380; Treat *v.* Hiles (Wis.), 32 No. West. Rep. 517.

So a promise, on a conveyance, to pay all or a part of the proceeds if more than a fixed price is obtained. Parker *v.* Siple, 76 Ind. 345; Miller *v.* Kendig, 55 Iowa, 174; Mahogan *v.* Mead, 63 N. H. 130; Graves *v.* Graves, 45 N. H. 323; Hall *v.* Hall, 8 N. H. 129. See Trowbridge *v.* Wetherbee, 11 Allen (Mass.), 361.

Many cases have arisen over agreements

transaction is not enough to make this section apply.[1] Thus an

made in connection with the foreclosure of mortgages, through which the same principle seems to run. They can be reconciled only on the ground that the intent of the parties is to determine whether the statute applies. When they intend to give an interest in the land, the agreement must be evidenced in writing; if such is not their intention, an oral agreement will be sufficient.

Thus, a promise made to the mortgagee to attend the mortgage sale and buy in the property has been held not within the statute,—Hale *v.* Stuart, 76 Mo. 20;—while are agreement to bid in at such a sale, and convey the property in a special way, has been held within it,—Bauman *v.* Holzhauser, 26 Hun (N. Y.), 505. In one case the agreement is looked upon merely as the performance of services; in the other it is in the contemplation of the parties that the promisor shall acquire an interest in the land, and deal with it in a particular way.

So, an agreement to purchase an outstanding mortgage on A's land, sell the land, and, after paying the mortgage debt, expenses, etc., to pay the balance to A, has been held valid though oral; and an action for the balance was sustained. McGinnis *v.* Cook, 57 Va. 36; s. c., 52 Am. Rep. 115.

A somewhat similar decision was reached in Reyman *v.* Mosher, 71 Ind. 596, where to save a foreclosure, it was agreed that the mortgagor should convey his equity to the mortgagee; and that the latter should pay a certain sum, allow the mortgagor time to find a purchaser, convey to the purchaser, and pay any surplus above the debt, expenses, etc., to the mortgagor. The agreement, though oral, was held valid.

An agreement by a mortgagee to bid in the property at the foreclosure and allow the mortgagor to redeem at a future time is within the statute. Jenkins *v.* Lovelace, 72 Ala. 303; Gibbs *v.* Union Mut. Life Ins. Co. (Ill.), 13 No. East. Rep. 842; Williams *v.* Williams (Minn.), 7 Reporter 656.

But an agreement by the mortgagee to bid in the land for the full amount of the debt, in consideration that the mortgagor will permit a foreclosure and pay costs and attorney's fees, is not within the statute. McOuat *v.* Cathcart, 84 Ind. 567.

An agreement by a mortgagee on foreclosure, to convey part of the lands, or of the proceeds of the sale, to the wife of the mortgagor, in consideration of her release of dower, or for other consideration, is within the statute. Green *v.* Graves (Ind.), 10 No. East. Rep. 401; Carlisle *v.* Brennan, 67 Ind. 12; Gwaltney *v.* Wheeler, 26 Ind. 415.

An agreement between joint owners of property to be foreclosed, that one shall not bid, but the other shall buy in the property and reorganize it, and that after the reorganization the interests of both parties shall be the same as before foreclosure, has been held to be good though oral. Cornell *v.* Utica, etc., R.Co., 61 How. Pr. (N. Y.) 184. And the courts of *New York* have held that a promise that if A shall purchase certain railway property at a foreclosure sale, B shall have a certain interest in it, is not a contract for the sale of lands or an interest in lands within the New York Statute of Frauds. Marie *v.* Garrison, 13 Abb. N. Cas. (N. Y.) 210.

In Hunt *v.* Elliott, 80 Ind. 245; s. c., 41 Am. Rep. 794, it was held that an agreement between two mortgagees, that one should purchase and hold and manage the property until his debt was paid, when both should have an interest in the property, was held not within this section of the statute.

It seems hard to support these last cases.

1. This is well illustrated by the case of Wilkins School Dist. *v.* Milligan, 88 Pa. St. 96, in which an agreement by a school board, with the original owner of a lot upon which a schoolhouse stood, to build elsewhere and vacate his lot if he would buy the old schoolhouse, was held not within the statute. Clearly, the agreement had nothing to do with the title to the land, which was already in the lot-owner, and, though it amounted to a release of an easement, yet the parties contemplated no contract as to real estate.

To hold that parties should put in writing an agreement which they could not contemplate as properly within the statute, would be to make the statute a burden, instead of a benefit.

In Natchez *v.* Vandervelde, 31 Miss. 706, it was agreed between the parties to a lawsuit that the plaintiff should confess a judgment for the whole of certain premises in dispute, but that the execution should be restricted to a part only which the parties agreed upon. The court held the agreement not within the statute; yet clearly the judgment created an interest which the agreement cut down. In substance, however, the contract conveyed no interest in lands, but simply settled a way of determining existing interests.

agreement to loan money or make advances in order that the promisee may purchase lands, is not within the statute.[1] Nor is an agreement to pay one if he will buy land belonging to a third party,[2] nor an agreement by one who has the refusal of land, to find a purchaser;[3] but an agreement to procure an interest in land for another is within the statute,[4] and a promise to buy land of a nominee of the plaintiff has been held to be.[5]

An agreement to break down an outstanding claim of title so as to perfect title in another is within the statute.[6]

Agreements which relate solely to the use to be made of lands are valid though oral.[7]

Where land has been taken for public purposes, an agreement releasing the claim for damages need not be in writing.[8]

So, in Michael *v.* Fail (N.Car.), 6 So. East. Rep. 264, it was held that a promise made at the time of a sale of land, and as an inducement for it, to pay one half the price obtained if a sale was made of a certain mineral interest thereon during the grantor's lifetime, was not for an interest in lands, and so was not within the Statute of Frauds.

1. Wetherbee *v.* Potter, 99 Mass. 354. And this is so even though the purchase has been made for the promisor's benefit, —Walton *v.* Carnes, 67 Cal. 25;—but if the one who makes the advances is also to make the purchase, take the title himself, and then hold for the other, the promise does fall within the statute,—Wetmore *v.* Neuberger, 44 Mich. 362; Spencer *v.* Lawton, 14 R. I. 494.

2. Little *v.* McCarter, 89 N. Car. 233. In this case A promised B to pay him $100 if he will buy C's land; thereupon B bought it, and, on A's refusal to pay, brought suit. It was held that the Statute of Frauds had no application, as A contracted for no interest in the land.

3. Hosford *v.* Carter, 10 Abb. Pr. (N. Y.) 452.

4. Thus, an agreement to procure a lease of certain premises,—Hersey *v.* Graham, L. R. 5 C. P. 9;—or a conveyance of certain lands,—Becker *v.* Mason, 30 Kan. 697.

5. Chiles *v.* Woodson, 2 Bibb (Ky.), 71.

6. Duval *v.* Peach, 1 Gill (Md.), 172, where the agreement was to "burst" certain deeds and give a good title; Bryan *v.* Jamison, 7 Mo. 106, where, in directing a sheriff to make a levy, the party promised to make the title of the judgment debtor good anyway.

An agreement by a vendor that, if a deed did not prove good, he would make it good, is obviously within the statute. Bishop *v.* Little, 5 Greenl. (Me.) 362.

An agreement, however, to allow to a vendee the cost of proceedings against an adverse claimant to the premises has been held valid though oral. American Land Co. *v.* Grady, 33 Ark. 550.

An oral agreement to pay off an encumbrance was held invalid, in Duncan *v.* Blair, 5 Denio (N. Y.), 196, where it was part of the whole transaction of the sale of the land; but the court intimated that, if it had stood by itself, it would have been valid.

A promise by a grantee to pay taxes which are an outstanding encumbrance upon the land is not within the statute. Preble *v.* Baldwin, 6 Cush. (Mass.) 549; Brackett *v.* Evans, 1 Cush. (Mass.) 79, and cases cited.

7. Thus, agreements not to use a certain building as a tavern (Leinan *v.* Smart, 11 Humph. [Tenn.] 308), or to keep up a fence (Fleming *v.* Ramsey, 46 Pa. St. 252), or to remove one (Storms *v.* Snyder, 10 Johns. [N.Y.] 109); have been held valid without writing; and so an agreement as to the use of a party wall (Rice *v.* Roberts, 24 Wis. 461). But an agreement not to build within three feet of the street (Wolfe *v.* Frost, 4 Sandf. Ch. [N.Y.] 72), and an agreement to open a street (Richter *v.* Irwin, 28 Ind. 26), have been held within the statute.

In Brown *v.* Morris, 83 N. Car. 251, a contract by which A was to use B's land for the manufacture of bricks from clay found in it, the property in the bricks to remain in the owner of the land till the wood and clay used in making them were paid for was held valid though oral.

An agreement to return leased premises in as good condition as when received—to repair and rebuild—is not within the statute. Halbert *v.* Forest City, 34 Ark. 246.

8. Fuller *v.* Commissioners, 15 Pick. (Mass.) 81; Embury *v.* Conner, 3 N. Y. 511.

An agreement to refund or discount from the price if land sold falls short in quantity, seems not within the statute.[1]

A contract to act as the agent of another in the purchase of land, and procure a conveyance to him, has been held within the statute;[2] but the law seems otherwise.[3]

**6. Contracts for the Sale of Goods, Wares, and Merchandise.**—By its 17th section, the Statute of Charles II. was made to apply to every contract for the sale of any goods, wares, or merchandise of the value of £10 sterling and upwards. And this section has been enacted in all of the *United States*,[4] though with changes of phraseology intended to mark more definitely the class of contracts to which it was designed to apply, and in the limit of value.[5]

(*a*) *Contract for the Sale.*—The statute applies not only to pure contracts of sale,[6] but also to contracts of exchange[7] or barter.[8] It applies to executory as well as to executed sales,[9] and to sales

These cases go on the ground that the claim after the land has once been taken is a mere pecuniary claim.

Likewise, claims for damages for flowing lands under the Mill Acts may be released orally. Clement *v.* Durgin, 5 Greenl. (Me.) 14; Smith *v.* Goulding, 6 Cush. (Mass.) 154.

An agreement by a municipal corporation, to compensate an owner for damages to his lot caused by a public taking, is not within the statute. Coleman *v.* Chester, 14 S. Car. 286.

1. An oral agreement to refund *pro rata* if the quantity fell short was held valid, in Sherrill *v.* Hagan, 92 N. Car. 345; and substantially the same decision was reached in Mott *v.* Hurd, 1 Root (Conn.), 73; Green *v.* Vardiman, 2 Blackf. (Ind.) 324; Garritt *v.* Malone, 8 Rich. Law (S. Car.), 335.

A guarantee of the contents of land was held within the statute, in Dyer *v.* Graves, 37 Vt. 369; but is not within the *Pennsylvania* statute. Schriver *v.* Eckinrode, 94 Pa. St. 456.

An agreement to pay an extra sum if coal was found on the land was held within the statute, in Heth *v.* Wooldridge, 6 Rand. (Va.) 605.

2. Allen *v.* Richards, 83 Mo. 55, and cases cited.

3. Snyder *v.* Walford, 33 Minn. 175; s. c., 53 Am. Rep. 22; Carr *v.* Leavitt, 54 Mich. 540.

If, however, the agent is to take the title, the contract is within the statute. Spencer *v.* Lawton, 14 R. I. 494. And, of course, whether agency exists or not, a promise to buy and convey land is within the statute. Dunphy *v.* Ryan, 116 U. S. 491; Harrison *v.* Bailey, 14 S. Car. 334.

4. *Arizona* has no provisions for sales of goods; and neither, it would seem, has *Delaware*. *Louisiana* requires at least one credible witness, and corroborating circumstances where the value exceeds $500. Stimson Amer. Stat. Law, & Sup. (1887) § 4144.

5. *Arkansas*, *Maine*, *Missouri*, and *New Jersey*, $30; *New Hampshire*, $33; *Vermont*, $40; *California* and *Idaho*, $200; *Montana* and *Utah*, $300; *Florida* and *Iowa* set no limit; the other States set $50. Stimson Am. Stat. Law, & Sup. (1887) § 4144.

6. The statute does not apply to a contract to procure goods and deliver them,—Cobbald *v.* Caston, 8 Moore, 456;—or to a promise to pay one a certain sum if he will buy certain property, and transfer it to a third person,—Frank *v.* Murray (Mont.), 14 Pac. Rep. 654;—or to purchase and hold stocks on account of another,—Kutz *v.* Fleischer, 67 Cal. 93.

7. Kuhn *v.* Bates, 92 Ind. 66.

8. Crookshank *v.* Burrell, 18 Johns. (N. Y.) 58; Bennett *v.* Hull, 10 Johns. (N. Y.) 364.

9. In the early English cases of Towers *v.* Osborne, 1 Stra. 506; Clayton *v.* Andrews, 4 Burr. 2101; and Alexander *v.* Comber, 1 H. Bl. 20, it was held that the statute did not apply to executory sales; but they have been overruled, and it is settled law that executory sales are within the statute. Rondean *v.* Wyatt, 2 H. Bl. 63; Newman *v.* Morris, 4 Harr. & McH. (Md.) 421; Carman *v.* Smick, 3 Green Law (N. J.) 252; Bennett *v.* Hull, 10 Johns. (N. Y.) 364; Ide *v.* Stanton, 15 Vt. 690.

In *England*, the matter is settled, too, by statute. 9 Geo. II., c. 14, § 7.

In the words of Lord Loughborough, in

by auction.[1] A mortgage of personal property is not a sale; and therefore a contract to give such a mortgage is not within the statute.[2] It has been said that an agreement to deliver goods in payment of a pre-existing debt is not;[3] but this is probably not law.[4]

A contract to become partners in a sale of personal property is not within the statute,[5] unless the parties contemplate a purchase by one partner and a sale by him of an interest to the other.[6]

A contract for a resale of the article purchased, to the seller, is within the statute, although made at the time of the original contract of sale.[7]

Where the subject-matter of the contract is not in existence at the moment when the contract relating to it is made, or where work and labor is to be expended upon it to prepare it for delivery, the courts of different jurisdictions have reached different conclusions as to the nature of the contract.[8]

Rondean *v.* Wyatt, "It is singular that an idea could ever prevail that this section of the statute was only applicable to cases where the bargain was immediate; for it seems plain, from the words made use of, that it was meant to regulate executory as well as other contracts."

1. This is well settled. Kenworthy *v.* Schofield, 2 B. & C. 945; 2 Kent Com. 540.

2. Bates *v.* Wiggin (Kan.), 14 Pac. Rep. 442.

"We are not satisfied that a mortgage of personal property. . . is a contract of sale within the meaning of the 3d section of the Statute of Frauds, Stat. 1821, ch. 50. That manifestly contemplates an absolute sale, where the vendee is to receive payment, and the vendee the goods purchased. . . . As this is a contract, then, in which neither payment nor delivery is expected, we are not prepared to say that it comes within the statute." Gleason *v.* Drew, 9 Greenl. (Me.) 79. See Phelps *v.* Hendricks, 105 Mass. 106.

3. This was held in Woodford *v.* Patterson, 32 Barb. (N. Y.) 630, where lumber was to be delivered in payment for goods purchased. After the acceptance and actual receipt of the goods, the parties viewed the lumber and the owner promised to deliver it in payment. It was said that the promise was not within the statute. The decision can be sustained on other grounds, and is open to serious question on this ground.

4. Sawyer *v.* Ware, 36 Ala. 675; Norwegian Plow Co. *v.* Hawthorn (Wis.), 37 No. West. Rep. 825.

5. Bullard *v.* Smith, 139 Mass. 492; Buckner *v.* Ries, 34 Mo. 357.

6. Brown *v.* Slanson, 23 Wis. 244. In this case one party was to buy a vessel, take the title to himself, and convey half to the other. It was held that the agreement was within the statute.

7. Watts *v.* Friend, 10 B. & C. 446; Rankin *v.* Grupe, 36 Hun (N. Y.), 481.

But where the original contract contains provisions for the return of the article purchased, on the happening of a certain contingency, this does not amount to a resale; and a compliance with the provisions of the statute at the time of the original contract is sufficient.

Thus, in Williams *v.* Burgess, 10 Ad. & E. 499, a mare was sold for £20, with an agreement that if she proved with foal she should be returned on the payment of £12. After the acceptance and actual receipt of the mare, she proved with foal, but the buyer refused to return her on tender of the £12. Lord Denman, C.J., said: "This is a sale by the plaintiff to the defendant on particular terms, one of which is the return of the article sold, in a certain event; the acceptance of the thing sold takes the whole contract out of the statute."

So, where a partner sold goods to his firm, which soon dissolved and the partner agreed to take back the goods, it was held not a resale. Dickinson *v.* Dickinson, 29 Conn. 600. So where bonds are sold with an agreement to take them back in certain events,—Wooster *v.* Sage, 6 Hun (N. Y.), 285; Johnson *v.* Trask, 40 Hun (N. Y.), 481; Fitzpatrick *v.* Woodruff, 96 N. Y. 561; Fay *v.* Wheeler, 44 Vt. 292;—but not if the agreement is to take them back if the buyer wishes to sell them. Boardman *v.* Cutter, 128 Mass. 388.

8. By statute in *Georgia*, it is specified that the fact that the goods are not *in esse*

In *England* and some of the *United States*, the rule is at length settled that "Where the contract is intended to result in transferring for a price, from B to A, a chattel in which A had no previous property, it is a contract for the sale of a chattel." [1]

shall make no difference; while in *Iowa*, it is provided that the statute shall not apply where the property sold is not, at the time of the contract, owned by the vender and ready for delivery, but labor, skill, or money are to be expended in procuring or producing it. The codes of *California* and *Dakota* except agreements to manufacture the article from materials furnished by the other party.

1. The doctrine that where the subject-matter of the contract was not in existence at the time when the contract was made, the contract could not be a contract of sale within the statute, was suggested for the purpose of upholding Towers *v.* Osborne, 1 Stra. 506, and Clayton *v.* Andrews, 4 Burr. 2101, which had decided that the statute did not apply to executory sales, and had held contracts to sell a chariot to be made and wheat yet unthrashed not within the statute. After the decisions had been overruled on the first ground in Rondean *v.* Wyatt, 2 H. Bl. 63, Lord Ellenborough sought to uphold them on the new ground in Groves *v.* Buck, 3 M. & S. 178, where the court held a contract to sell and deliver oak slabs to be cut from the wood was not.

The earliest test, that of Groves *v.* Buck and Towers *v.* Osborne, has been stated. The next was developed in the case of Smith *v.* Surnam, 9 B. & C. 561, where the defendant had agreed to purchase timber, to be cut by the plaintiff and taken away by himself, and it was held that the contract was not for work and labor, but for a sale of goods and chattels. Bayley, J., said: "It seems to me that the true construction of the bargain is that it is a contract for the future sale of the timber when it should be in a state fit for delivery. The vendor, so long as he was felling it and preparing it for delivery, was doing work for himself and not for the defendant."

In Atkinson *v.* Bell, 8 B. & C. 277, one who had manufactured goods out of his own materials, to fill an order for particular machines, was held unable to maintain an action for work and labor since "his labor was bestowed on his own materials, and for himself, and not for the person who employed him." *Per* Bailey, J.

The test these cases suggests is whether or not the party is working for himself upon his own materials, or for another upon what belongs to that other, or will belong to him when complete.

In Clay *v.* Yates, 1 H. & N. 73, a printer who had been employed to print a book not wholly written at the time of the contract, and to furnish paper, brought suit to recover for the printing. The court held that he could.

Blackburn, J., says: "I think that in all cases, in order to ascertain whether the action ought to be brought for goods sold and delivered, or for work and labor done and materials provided, we must look at the particular contract entered into between the parties. If the contract be such that, when carried out, it would result in the sale of a chattel, the party cannot sue for work and labor; but if the result of the contract is that the party has done work and labor which ends in nothing that can become the subject of a sale, the party cannot sue for goods sold and delivered."

Mr. Justice Stephens (1 Law Quar. Rev. 9) submits the following as the rule: "A contract by which one person promises to make goods for another, and by which the other promises to pay a price for such goods when they are made, is a contract for the sale of goods. A contract by which one person promises to make something which when made will not be his absolute property, and by which the other person promises to pay for the work done, is a contract for work, although the payment may be called a price for the thing, and although the materials of which the thing is made may be supplied by the maker."

The earlier rules adopted in *England* are of importance here, in as much as the courts of different States have adopted different ones among them within the statute. Lord Ellenborough said: "The subject-matter of this contract did not exist *in rerum natura*. It was incapable of delivery and of part acceptance; and where that is the case, the contract has been considered as not within the Statute of Frauds. And Dampier, J., also distinguished Rondean *v.* Wyatt on this ground.

The doctrine has been completely repudiated in *England*; and after a long series of cases in which various tests of the character of the contract have been suggested, the law seems definitely to

In *New York*, the rule is that, if the subject-matter of the transfer does not exist *in solido* at the time of making, the contract is for work and labor; but if it does then exist, the contract is none the less a contract of sale that work and labor of the vendor is to be expended upon it before its delivery.[1]

have taken the form stated in the text, and quoted from Mr. Benjamin (Sales, 79), as the result of the case of Lee *v.* Griffin, 1 B. & S. 272. In that case the plaintiff, a dentist, had taken a model of the mouth of the defendant's testatrix, and made two sets of artificial teeth therefrom for her. On notifying her to call for the purpose of fitting them, she replied regretting that her health would not permit; and before any acceptance or actual receipt of the teeth, she died. The declaration was for goods bargained and sold, goods sold and delivered, and for work, labor, and materials; and the defence was the Statute of Frauds. After a refusal to nonsuit the plaintiff on proof of these facts, and judgment for the plaintiff, a rule for a new trial was made absolute on the ground that the contract was for the sale of goods and plaintiff was not entitled to recover on a count for work and labor, adopting as the test of the nature of the contract, "whether work is the essence of the contract, or whether it is the materials supplied." And Pollock, C.B., said: "Where the application of skill and labor is of the highest description, and the material is of no importance as compared with the labor, the price may be recovered as work, labor, and materials."

The comparative worth of the labor and of the materials is thus suggested as a test.

In Grafton *v.* Armitage, 2 C. B. 336, where the plaintiff had been employed to exert his skill in constructing a machine for curving metal tubing for a life-saving device, patented by the defendant, it was held that he could recover for work and labor since the purpose of his employment was to obtain his skill and mechanical ingenuity.

The result of these cases is that the intent of the parties furnishes the test of the contract.

This rule has found little hearty adoption in the *United States*, since most of the States had adopted some rule before this was announced.

It has, however, been adopted in *New Jersey*,—Pawelski *v.* Hargreaves, 47 N. J. Law, 334; s. c., 54 Am. Rep. 162; Finney *v.* Apgar, 31 N. J. Law, 266;—and approved in *Wisconsin*,—Meincke *v.* Falk, 55 Wis. 427;—and it lies at the base of the *Massachusetts* rule given later, which is merely a statement of a method of getting at the intent of the parties.

1. *New York* early adopted the rule that, where the article to be delivered is not in existence at the time the contract is made, the statute does not apply to it,—Crookshank *v.* Burrell, 18 Johns. (N. Y.) 58; Sewall *v.* Fitch, 8 Cow. (N. Y.) 215.

In the first of these cases, the plaintiff agreed to make the woodwork of a wagon and take his pay in lambs; and the court held the agreement not within the statute, following the distinction between contracts for things existing *in solido*, and agreements for things not yet made, to be delivered at a future day, and declaring: "However refined this distinction may be, it is well settled, and it is now too late to question it."

In Sewall *v.* Fitch, 8 Cow. (N. Y.) 215, the agreement was to manufacture nails to meet an order; and as they were not in existence when the contract was made, the court held that the statute did not apply.

These cases were followed in Robertson *v.* Vaugh, 5 Sandf. (N. Y.) 1, and Donavan *v.* Willson, 5 Barb. (N. Y.) 138; and the law of the State is firmly settled in accordance with them. Cooke *v.* Millard, 65 N. Y. 352; Parsons *v.* Loucks, 48 N. Y. 17.

Some of the very late cases show a tendency to get away from a rule that makes the statute ridiculous.

Thus, in Millar *v.* Fitzgibbons, 9 Daly (N. Y.), 505, where the contract was for the future delivery of goods to be manufactured by another than the seller, it was held that it was for the sale of goods, wares, and merchandise, within the statute. The case has since been explained and the rule re-established in its integrity, in Jay *v.* Schloss, 15 Abb. N. C. (N. Y.) 373.

In that case, there was a contract to deliver suitings which the parties understood were not in existence, but was to be manufactured by certain mills, for which one of the parties were agent. The court held that the sole consideration was whether or not the goods were in existence at the time the agreement was made; and that, as they were not in existence in this case, it was not within the statute. On appeal, however (Jay *v.*

In *Massachusetts*, if the subject-matter consists of articles which the seller habitually manufactures in the course of his business, the contract is of sale; but if the goods are to be made to satisfy a particular order not in the ordinary course of business, the contract is one for work and labor.[1]

Schloss, 12 Daly (N. Y.), 533), this decision was reversed and Millar *v.* Fitzgibbons approved.

This latest decision lays down the rule, almost in accord with the *New Hampshire* doctrine, that if a delivery of any goods, manufactured by any person, would satisfy the contract, it is for a sale of goods, and not for work and labor. According to it, the existence or nonexistence of the subject-matter is not the criterion, but whether or not the party is himself to manufacture, or be responsible for the manufacture, of the goods.

In Donnell *v.* Heson, 12 Daly (N. Y.), 230, where the contract was to deliver lamps of a peculiar pattern, much stress was laid upon the fact that the goods were not such as were usually in stock or regularly manufactured for sale, and the *Massachusetts* rule followed in holding the contract to be for work and labor.

"If the thing sold exist at the time *in solido*, the mere fact that something remains to be done to put it into marketable condition will not take the contract out of the operation of the statute." *Per* Bronson, J., in Downs *v.* Ross, 26 Wend. (N. Y.) 270. Thus, as in that case, where wheat is yet to be thrashed, or as in Bennett *v.* Hull, 10 Johns. (N. Y.) 364, where apples were to be gathered together before delivery.

The New York test is apparently adopted as the law of *Vermont*. Mattison *v.* Wescott, 13 Vt. 258.

1. The *Massachusetts* rule is the one most widely adopted throughout the *United States*. It was laid down by Shaw, C. J., in the case of Mixer *v.* Hawarth, 21 Pick. (Mass.) 205, where the facts were as follows: The defendant came to the shop of the plaintiff, who was a manufacturer of carriages, picked out a certain buggy lining, and agreed that the plaintiff, who was then at work upon a buggy body, should finish it for him, and put the lining into it. The buggy was finished, notice sent the defendant, and a request made that he take it away. This he refused to do. The declaration contained counts for goods sold, and for work and labor. The court held that the agreement essentially was that the plaintiff should build a carriage for the defendant, and that the defendant should take it when finished, and pay for it at an agreed or a reasonable value, but that such an agreement was not a contract of sale. "When the contract is a contract of sale either of an article then existing or of articles which the vendor usually has for sale in the course of his business, the statute applies to the contract; as well where it is to be executed at a future time, or where it is to be executed immediately. But where it is an agreement with a workman to put materials together and construct an article for the employer, whether at an agreed price or not, though in common parlance it may be called a purchase and sale of the article, to be completed *in futuro*, it is not a sale until an actual or constructive delivery and acceptance; and the remedy for not accepting is on the agreement."

This decision was followed in Spencer *v.* Cone, 1 Metc. (Mass.) 283, where the agreement was to manufacture stave machines out of materials of the manufacturer's, and the court held it essentially for furnishing labor and materials; and in Gardner *v.* Jay, 9 Metc. (Mass.) 177, where the agreement made by a candle maker was for the delivery of candles which were not then in existence, and where the court thought the contract essentially for a sale, Shaw, C.J., saying: "If it is a contract to sell and deliver goods, whether they are then completed or not, it is within the statute. But if it is a contract to make and deliver an article or quantity of goods, it is not within the statute."

The doctrine received its final statement in Lamb *v.* Crafts, 12 Metc. (Mass.) 353: "Where a person stipulates for the future sale of articles which he is habitually making, and which at the time are not made or finished, it is essentially a contract of sale, and not a contract for labor; otherwise where the article is made pursuant to the agreement." *Per* Shaw, C.J., at p. 356.

The rule thus announced has since been adhered to in *Massachusetts*,—Goddard *v.* Binney, 115 Mass. 450; Dowling *v.* McKenney, 124 Mass. 478; May *v.* Ward, 134 Mass. 127;—and has been adopted in other States,—Sawyer *v.* Ware, 36 Ala. 675; Atwater *v.* Haugh, 29 Conn. 508; Allen *v.* Jarvis, 20 Conn. 38; Cason *v.* Cheely, 6 Ga. 554; Edwards *v.* Grand

In *Maryland*, the fact that work and labor is to be expended upon the goods before delivery takes the case out of the statute.[1]

In *New Hampshire*, where goods are to be manufactured, or work and labor expended upon them before delivery, the test of the nature of the contract is whether or not the seller is himself to manufacture or work upon them, or procure a particular person to do so. If the delivery of goods manufactured by any one will satisfy the contract, it is a contract of sale; otherwise it is a contract for work and labor.[2]

In all jurisdictions where the personal skill or attention of the party is the object in view, the contract is for work and labor.[3]

(*b*) *Goods, Wares, and Merchandise.*—In *England*, only personal chattels, possessed of intrinsic value in themselves and capable of delivery, are goods, wares, or merchandise; and stocks, notes, checks, bonds, and other evidences of value are therefore not within the statute.[4]

Trunk R., 54 Me. 105; s. c., 48 Me. 379; O'Neil *v.* New York Min. Co., 3 Nev. 141; Bird *v.* Muhlinbrink, 1 Rich. (S. Car.) 199; Meincke *v.* Falk, 55 Wis. 427; s. c., 42 Am. Rep. 722.

1. In Eichelberger *v.* McCauley, 5 Harr. & J. (Md.) 213, the contract was to deliver wheat then unthrashed at a certain price per bushel on delivery. The court held: "Whatever opinion may be entertained of the true meaning of the 17th section of the statute, the court think the distinction between mere contracts of sale of goods, and those contracts for the sale of goods where work and labor is to be bestowed on them previous to delivery, and subjects are blended together, some of which are not in the contemplation of the statute, has too long prevailed to be at this day questioned;" and accordingly held that the statute did not apply to this agreement.

The law is established in accordance with that decision. Rentch *v.* Long, 27 Md. 188.

It will be noted that these cases do not deny that the contract in each case was for the sale of goods, but they hold that the additional element of the work to be performed renders the statute inapplicable or creates an exception to it.

2. The rule is thus stated by Bellows, J., in Pitkin *v.* Noyes, 48 N. H. 294: "If a person contract to manufacture and deliver at a future time, certain goods, at prices then fixed or at reasonable prices, the essence of the agreement being that he will bestow his own labor and skill upon the manufacture, it is held not to be within the statute.

If, on the other hand, the bargain be to deliver goods of a certain description at a future time, and they are not existing at the time of the contract, but the seller does not stipulate to manufacture them himself or procure a particular person to do so, the contract is within the statute." *Acc.*, Prescott *v.* Locke, 51 N. H. 94.

3. Grafton *v.* Armitage, 2 C. B. 336; Allen *v.* Jarvis, 20 Conn. 38; Crockett *v.* Scriber, 64 Me. 447; Abbott *v.* Gilchrist, 38 Me. 260; Hight *v.* Ripley, 19 Me. 139; Goddard *v.* Benney, 115 Mass. 450; Turner *v.* Mason (Mich.), 32 No. West. Rep. 846; O'Neil *v.* New York Min. Co., 3 Nev. 141; 51 N. H. 94; Finney *v.* Apgar, 31 N. J. Law, 266; Parker *v.* Schenck, 28 Barb. (N. Y.) 38; Higgins *v.* Murray, 4 Hun (N. Y.), 565; Winship *v.* Buzzard, 9 Rich. Law (S. Car.), 103; Puget Sound Iron Co. *v.* Worthington, 2 Wash. Ter. 472; Meincke *v.* Folk, 55 Wis. 427.

In holding that a contract to paint a portrait was for work and labor (Turner *v.* Mason [Mich.], 32 No. West. Rep. 846), the court disregards the English rule completely unless the sitter is regarded as having a special property in the completed work. An exactly contrary decision has been rendered in *England*, the court holding the contract to be for the sale of a chattel. Isaacs *v.* Hardy, 1 Cubebe & E. 287.

4. This was settled after a conflicting decision in Humble *v.* Mitchell, 11 Ad. & E. 205, where Lord Denman, C.J., stated the law to be that "Shares in a joint-stock company like this are mere choses in action, incapable of delivery, and not within the scope of the 17th section;" and the law so stated has been affirmed in many cases.

In the *United States*, however, a different view has been taken, and stock in corporations, notes of banks, promissory notes, book accounts, and bond scrip have been held goods, wares, and merchandise, within the statute.[1] An interest in a patent-right has been decided not within it.[2] An "option" is not goods, wares, or merchandise.[3]

(*c*) *The Price.*—If in fact the price exceeds the statutory limit, it is immaterial that, at the time the contract was made, it could not be known that it would exceed it:[4] and the burden of proving that the price is greater than the limit rests upon the party setting up the statute.[5] Where many different articles are bought at the same time but for various prices, the statute applies if the whole is fairly one transaction and the aggregate price exceeds the limit.[6] The fact that the transaction covers other matters beside the sale, and that the full price agreed upon is enhanced by these, is immaterial.[7]

**III. Methods of Satisfying the Statute.—1. The Memorandum.**—(*a*) *Its Form.*—The memorandum of an agreement sufficient to satisfy the Statute of Frauds must not be confounded with a writing which constitutes an agreement of itself. The real agreement is never written where a memorandum is necessary.[8]

It need not be in any way a formal document: but it must contain the whole contract; it must be made before an action is brought; it must be signed by the party to be charged, or some one author-

1. That stocks are within the statute as goods, wares, or merchandise, see Tisdale *v.* Harris, 20 Pick. (Mass.) 13; Thompson *v.* Alger, 12 Metc. (Mass.) 428. Boardman *v.* Cutter, 128 Mass. 388; Mann *v.* Bishop, 136 Mass. 495; North *v.* Forest, 15 Conn. 400; Pray *v.* Mitchell, 60 Me. 430; Colvin *v.* Williams, 3 Harr. & J. (Md.) 38; Gadsden *v.* Lance, McMull. Eq. (S. Car.) 87;—promissory notes,—Hudson *v.* Weer, 29 Ala. 294; Gooch *v.* Holmes, 41 Me. 523; Baldwin *v.* Williams, 3 Metc. (Mass.) 316; Riggs *v.* McGruder, 2 Cranch (C. C.), 143; *contra*,—Vawter *v.* Griffin, 40 Ind. 593; Whittemore *v.* Gibbs, 24 N. H. 484; Beers *v.* Crowell, Dudley (Ga.), 28;—book accounts, Walker *v.* Supple, 54 Ga. 178;—land scrip,—Smith *v.* Bouck, 33 Wis. 19. But the statute expressly includes "things in action."

The statute of *New York* includes expressly choses in action; and so no question arises but that bonds or stock—Wooster *v.* Sage, 6 Hun (N. Y.), 285; Fitzpatrick *v.* Woodruff, 96 N. Y. 561; Tomlinson *v.* Miller, 7 Abb. Pr. N. S. (N. Y.) 364,—notes—Armstrong *v.* Cushing, 43 Barb. (N. Y.) 340,—and judgments—People *v.* Beebe, 1 Barb. (N. Y.) 379,—are within it.

The statute of *Florida* brings all sales of "personal property" within its scope; and shares are therefore within it. Southern Life Ins. Co. *v.* Cole, 4 Fla. 359.

An agreement to transfer stock to the purchaser, made after a completed sale, is not within the statute. Eastern R. Co. *v.* Benedict, 10 Gray (Mass.), 212.

2. Somerby *v.* Benetin, 118 Mass. 285.

A right to use a patented invention is not within the statute. Chanter *v.* Dickinson, 5 Man. & Gr. 253.

3. Kerhof *v.* Atlas Paper Co. (Wis.), 32 No. West. Rep. 766.

4. Thus, an agreement to take all the produce of certain land at a certain price per bushel is within the statute if the total price proves to exceed the statutory limit, although obviously no one could tell at the time of the agreement what the amount would be. Bowman *v.* Conn, 8 Ind. 58; Brown *v.* Sanborn, 21 Minn. 402; Watts *v.* Friend, 10 B. & C. 446.

5. Crookshank *v.* Burrell, 18 Johns. (N. Y.) 58.

6. Boldey *v.* Parker, 2 B. & C. 37; Jenness *v.* Wendell, 51 N. H. 63; Allard *v.* Greasert, 61 N. Y. 1.

7. Harman *v.* Leeve, 25 L. J. C. P. 257.

8. It can hardly be necessary to cite authorities on this point. The reason for the existence of the statute is gone when the agreement is written; and a memo-

ized to act for him. If it is lost, its contents may be proved like those of any writing; it is enough, for the purposes of the statute, that a sufficient memorandum in writing has once been made.[1]

It need not state that any agreement has actually been made, or furnish evidence of that fact; its function is to show the terms and the parties to a contract.[2]

(*b*) *Its Structure.*—The memorandum need not be a single piece of paper in the distinctive form of a note of an agreement.[3] A mere written offer or proposal of a contract is a sufficient memorandum to bind the person signing it, if, in fact, it was accepted, and a contract made upon those terms.[4] A bill of parcels,[5] a receipt for money,[6] an account stated,[7] a sheriff's return on an execution,[8] a

randum of a written agreement, as a condition of its validity, is a legal absurdity.

1. The statute is satisfied when a written memorandum has been made; and mere fact that such memorandum cannot be found at the time of trial, should not render the contract which once was enforceable no longer actionable. A contrary view was suggested in the case of Pitts *v.* Beakett, 13 M. & W. 743, but was not involved in the decision. In accord with the text, see Dickerson *v.* Lilwal, 1 Stark. 128.

The law in the *United States* is generally settled as stated in the text. Reid *v.* Kenworthy, 25 Kan. 701; Jelks *v.* Barrett, 52 Miss. 315; Stoddert *v.* Vestry, 2 Gill & J. (Md.) 227; Raubitschek *v.* Blank, 80 N. Y. 478.

It will be presumed that the memorandum contained all the essential terms. Raubitschek *v.* Blank, 89 N. Y. 478.

2. This is established by the cases referred to later, in which it has been held that a written offer or proposal of a contract may be a sufficient memorandum. Obviously, such a writing bears on its face proof that no contract existed when it was made, and contains nothing to show that one will exist at any future moment.

The fact that a contract has been made may be established always by parol. But, the question for the court is not, "Did such a contract exist?" "but assuming it existed, is it unforceable?" The function of the memorandum is to render it enforceable by supplying a requisite demanded by the Statute of Frauds.

3. The forms which the memorandum may take are as various as the kinds of written documents.

An entry on the record of a case in court may constitute a memorandum. Huston *v.* Cincinnati, etc., R. Co., 21 Ohio St. 235; Boykin *v.* Smith, 3 Munf. (Va.) 102.

So of drafts. Neaves *v.* North State Min. Co., 90 N. Car. 412; s. c., 47 Am. Rep. 529.

And of telegrams. North *v.* Mendel, 73 Ga. 400; s. c., 54 Am. Rep. 879; Whaley *v.* Hinchman, 22 Mo. App. 483.

4. Stewart *v.* Eddowes, L. R. 9 C. P. 311; Reuss *v.* Pickley, L. R. 1 Ex. 342; Western Union Tel. Co. *v.* Chicago, etc., R. Co,, 86 Ill. 246; Sanborn *v.* Flagler, 9 All. (Mass.) 474; Lonz *v.* McLaughlin, 14 Minn. 72; Vindquest *v.* Perky, 16 Neb. 284; *Argus* Co. *v.* Albany, 55 N. Y. 495; Himrod Furnace Co. *v.* Cleveland, etc., R. Co., 22 Ohio St. 62; Griffin *v.* Pembert, 2 S. Car. 410.

But such an offer is not a binding memorandum unless it was accepted. Waul *v.* Kirkman, 27 Miss. 283.

An order by letter is essentially a proposal, and is binding if goods are sent, or the act directed is done. Hawkinson *v.* Harmon (Wis.), 35 No. West. Rep. 28; J. I. Case Co. *v.* Smith (Oreg.), 18 Pac. Rep. 641.

5. Saunderson *v.* Jackson, 2 Bos. & P. 238; Batters *v.* Sellers, 5 Harr. & J. (Md.) 117; Hawkins *v.* Chace, 19 Pick. (Mass.) 502.

6. Evans *v.* Prathers, 1 De G. M. & G. 272; Barickman *v.* Kuykendall, 6 Blackf. (Ind.) 21; Fulton *v.* Robinson, 55 Tex. 401.

The receipt, however, must contain all the terms of the contract. Raubitschek *v.* Blank, 80 N. Y. 478; Mims *v.* Chandler, 21 S. Car. 480.

A mere receipt for money paid, at the close of an oral transaction, is not enough. Wright *v.* Mischo, 52 N.Y. Super. Ct. 241.

Obviously, a mere receipt for purchase money cannot take the place of a deed to divest the vendor's title. Mason *v.* Ammon (Pa.), 11 Atl. Rep. 449.

7. Bourland *v.* County of Peoria, 16 Ill. 538; Barry *v.* Coombe, 1 Pet. (U. S.) 640.

8. Such a return supplies the place of a memorandum (Fenwick *v.* Floyd, 1

vote of a private or municipal corporation duly recorded,[1] have been held sufficient *memoranda*. It may be either printed or stamped, as well as written.[2]

Several papers may be taken together to make up the memorandum; but they must refer to one another in such way that no external evidence is necessary to identify and connect them.[3]

Harr. & G. [Md.] 172), although it is not indorsed upon the writ, but is made on a separate slip. Hanson *v.* Barnes, 3 Gill. & J. (Md.) 359.

The law is well settled to this effect. See also Elfe *v.* Gadsden, 2 Rich. Law (S. Car.), 373; Nichol *v.* Ridley, *v.* Yerg. (Tenn.) 63.

1. Thus, a vote of a corporation authorizing the employment of a certain person, and stating the time, wages, and other terms of the contract actually entered into, entered on its records, and signed by its clerk, is a sufficient memorandum, Tufts *v.* Peymount Co , 14 Allen (Mass.), 107, or a vote of a church in employing a minister,—Johnson *v.* Trinity Church Soc., 11 Allen (Mass.), 123;—so, a record of a resolution of a city council may be sufficient,—Chase *v.* Lowell, 7 Gray (Mass.), 33. See Green *v.* Hamilton County, 37 Iowa, 290; District of Columbia *v.* Johnson, 1 Mackey (D. C.), 51.

2. This follows inevitably from the cases which hold a printed signature sufficient. Schneider *v.* Norris, 2 Maule & S. 286.

It may be written in pencil. Geary *v.* Physic, 5 B. & C. 234; Clason *v.* Bailey, 14 Johns. (N. Y.) 484; McDowel *v.* Chambers, 1 Strobh. Eq. (S. Car.) 347.

3. The law on this point is so well settled that it would be mere supererogation to collate cases upon it. Jackson *v.* Lowe, 1 Bing. 9; Craig *v.* Elliott, 15 L. R. Ir. 25.

There are a multitude of cases in which a series of letters, or of telegrams, have been put together to form the memorandum, or where the conditions of sale, the catalogue of articles to be sold, and the auctioneer's *memoranda* of purchasers and prices have been taken together.

To cite a few instances from recent cases: In Hollis *v.* Burgess (Kan.), 15 Pac. Rep. 536; Smith *v.* Theobald (Ky.), 5 So. West. Rep. 394; Sherwood *v.* Walker (Mich.), 33 No West. Rep. 919; Peck *v.* Vandermark, 99 N. Y. 29, a series of letters have been held sufficient.

A promissory note and letters were taken together, in *Alabama*. Gold Life Ins. Co. *v.* Oliver (Ala.), 2 So Rep. 444.

A bond given under a city ordinance, and the ordinance, were taken to make up a memorandum, in District of Columbia *v.* Johnson, 1 Mackey (D. C.), 51.

When, however, there are several papers which together make up the memorandum, they will not be sufficient for that purpose unless they are so connected together, either physically or by reference or internal evidence, that parol evidence is not necessary to establish their connection with the contract if all be signed, or, if some be unsigned with the paper which is signed. When the papers are all signed, it is sufficient if they all refer to the contract; it is not necessary that they should refer to each other. Studds *v.* Watson, 28 Ch. Div. 305.

Thus, where a sale has been made at auction, and the memorandum of the purchaser's name and the price is made upon a piece of paper not attached to the conditions of sale and description of the property, parol evidence is inadmissible to connect them. Dobell *v.* Hutchinson, Ad. & E. 371; Peirce *v.* Coof, L. R. 9 Q. B. 210; Rishton *v.* Whatmore, L. R. 8 Ch. Div. 467; Morton *v.* Dean, 13 Metc. (Mass.) 385; Meyer *v.* Adrian, 77 N. Car. 83; Johnson *v.* Buck, 25 N. J. Law, 338.

A physical connection is sufficient; as for example, a memorandum written on the back of another paper referring to the agreement,—Laythroop *v.* Bryant, 2 Bing. N. R. 735;—or even a signed refusal to take the goods included in a certain invoice, written upon the back of the invoice,—Wilkinson *v.* Evans, L. R. 1 C. P. 407. But, in Ridgway *v.* Ingram, 50 Ind. 145, parol evidence to connect a written indorsement on the back of another writing, with that writing, was refused; and a mere indorsement upon the back of a note has been held an insufficient note of an agreement to guarantee it. Schafer *v.* Farmer's, etc., Bank, 59 Pa. St. 144. See also, on the general subject, Jackson *v.* Lowe, 1 Bing. 9; Buxton *v.* Rust, L. R. 7 Exch. 279; Williams *v.* Morris, 95 U S. 444; North *v.* Mendel, 73 Ga. 400; s. c., 54 Am. Rep. 879; Watt *v.* Wisconsin Cranberry Co., 63 Iowa, 730; Scarlott *v.* Stein, 40 Md. 512; Jice *v.* Freeman, 30 Minn. 389; Boeckler *v.* McGowan, 12 Mo. App. 507.

Parol evidence is admissible to identify the papers, but not to connect them. Alabama Gold Life Ins. Co. *v.* Oliver (Ala.), 2 So. Rep. 445.

If a signed and an unsigned paper are at one time connected, it is immaterial that they are afterwards disconnected; and apparently the mere imposition of the sheets one upon another is a sufficient attachment. *Per* Holroyd, J., in Kenworthy *v.* Schofield, 2 B. & C. 945.

Where a signed paper refers to an unsigned one, the reference will be ineffectual unless the latter is in existence at the time,—Wood *v.* Midgley, 5 De G. M. & G. 41;—but it seems immaterial that it is not in its final form, if it is in existence at all,—Ridgway *v.* Wharton, 6 H. L. C. 258. In the first of these cases, there was a reference to an agreement which was to be signed as soon as it was prepared; and the court held that the two papers could not be taken together. In the last case, the reference was to an agreement already written out, but in the hands of a solicitor to be put in its final shape; and the court held that the final agreement, and the paper referring to it, could be taken together.

Where there is more than one signed paper, it is not necessary that each one should refer to all the others or contain any definite reference to other papers. The connection betwem them may be gathered from their contents, and parol evidence is admissible to identify and explain them. Wilkinson *v.* Evans, L. R. 1 C. P. 407; Buxton *v.* Rust, L. R. 7 Exch. 279; Allen *v.* Bennett, 3 Taunt. 169; Roche *v.* Haumesser (Ind.), 15 No. East. Rep. 345; Learned *v.* Wannemacher, 9 All. (Mass.) 412; Peck *v.* Vandemark, 99 N. Y. 29; Peabody *v.* Speyers, 56 N. Y. 230; Thayer *v.* Luse, 22 Ohio St. 62.

Thus in Work *v.* Cawhick, 81 Ill. 317, the parties went together to an office and executed a bond, deed, and other papers, which did not of themselves state that they were connected, yet the court held that they could be taken together as a memorandum of the contract, and that parol evidence of these circumstances was admissible.

In Wiley *v.* Robert, 27 Mo. 388, a writing contained at its head the name of a case then in court; and it was held that this was a sufficient reference to render the papers of record in that case a part of a valid memorandum.

In Beckwith *v.* Talbot, 95 U. S. 289, Mr. Justice Bradley uses the following language: "It is undoubtedly a general rule that collateral papers, adduced to supply the defects of signature of a written agreement, under the Statute of Frauds, should, on their face, sufficiently demonstrate their reference to such agreement without the aid of parol proof. But the rule is not absolute. . . . There may be cases in which it would be a violation of reason and common-sense to ignore a reference which desires its significance from such proof. If there is ground for any doubt in the matter, the general rule should be enforced; but where there is no ground for doubt, its enforcement would aid, instead of discouraging, fraud. Suppose an agreement be made out and signed by one of the parties, the other being absent. On the following day, the latter writes to the party who signed it, as follows: 'My son informs me that you yesterday executed our proposed agreement, as proposed by J. S. I write this to let you know that I recognize and adopt it.' Would not this be a sufficient recognition, especially if the parties should act under the agreement? And yet parol proof would be required to show what agreement was meant." But see Grafton *v.* Cummings, 99 U. S. 100.

In a late case, in *Alabama*, it was held, where a memorandum in writing, signed by both parties, was insufficient as lacking certainty, that its defects could be supplied from instruments reciprocally executed a few days afterwards, signed and executed as deeds, but not delivered, and that if they did not expressly refer to each other, their connection could be shown by parol proof of the attendant circumstances. Jenkins *v.* Harrison, 66 Ala. 345.

But unless some connection appear, parol proof is inadmissible. Jacob *v.* Kirk, 2 Moo. & R. 221; Hinde *v.* Whitehouse, 7 East, 558; North *v.* Mendel, 73 Ga. 400; s. c., 54 Am. Rep. 879; Ridgway *v.* Ingram, 50 Ind. 145; O'Donnell *v.* Leeman, 43 Me. 158; Morton *v.* Dean, 13 Metc. (Mass.) 385; Lincoln *v.* Erie Preserving Co., 132 Mass. 129; Tice *v.* Freeman, 30 Minn. 389; Johnson *v.* Buck, 35 N. J. Law, 338; Stocker *v.* Partridge, 2 Rob. (N. Y.) 193; Johnson *v.* Kellogg, 7 Tenn. 262.

In the case of an unsigned and a signed paper, it is not enough that both refer to the same contract; there must be a reference to the signed paper. Jacob *v.* Kirk, 2 Moo. & R. 221; Parke, B., in Johnson *v.* Dodgson, 2 M. & W. 653.

In Salmon Falls Mfg. Co. *v.* Goddard, 14 How. (U. S.) 446, the court referred to an unsigned bill of parcels to explain a written memorandum; but the case is undoubtedly wrong. *Compare* Grafton *v.* Cummings, 99 U. S. 100.

Where a signed paper refers to an unsigned one, the latter must be in existence at the time, or the memorandum is sufficient. If a writing contain many terms, some of which were not embodied in the computed contract, parol evidence is inadmissible to show which terms were adopted.[1] The memorandum must be certain.

Where bought and sold notes are given, either note may be a sufficient memorandum, or both may be taken together, or both be taken together with the entry in the broker's book, to constitute the whole memorandum.[2]

**1.** In Brodie *v.* St. Paul, 1 Ves. Jr. 326, a writing set out many terms for a proposed agreement, and stated that the final agreement should contain such of those terms as were read to the other party. Here, although there was in existence a memorandum containing all the terms, parol evidence was rendered absolutely essential to establish the agreement actually reached, and the court held the memorandum insufficient.

**2.** In *England*, the custom of giving bought and sold notes, is very general. When the transaction is conducted through a broker, it is the custom for the broker to send to the seller a note stating the sale, (a "sold note"), and to the buyer a note of the purchase (the "bought note"), and also for him to enter a note of the transaction in his own books. Where no broker is employed, the seller gives to the buyer a sold note, and receives from him a bought note.

In the absence of the broker, the transaction is simple enough: each party receives from the other a note stating all the terms of the contract, and signed by him, and, of course, in case of disagreement, has in his possession a note signed by the party he wishes to charge. Whether or not the bought or sold note, as the case may be, is by itself a sufficient memorandum, the contract, under such circumstances, can hardly be open to question. Either note by itself will be a sufficient memorandum to charge the signer,—Darling *v.* Baxter, 6 B. & C. 360; Marshall *v.* Lynn, 6 M. & W. 109;—but it is only in rare cases that the buyer can be charged on the sold note, or the seller on the bought note; for, in all but exceptional cases, each signs only the note he gives. Such an exceptional case is Johnson *v.* Dodgson, 2 M. & W. 653, where the buyer wrote the sold note, and was charged on it, because the court held that the insertion of his own name in the body of the note, with the intention of being bound by it, constituted a signing by him. Barry *v.* Low, 1 Cranch (C. C.), 77. illustrates such a course of dealing where the buyer was not bound.

Where a broker is employed, however, the question of the memorandum is more difficult. He is the agent of both parties authorized to bind them by his signature, and accordingly it has been held that a memorandum in his books, signed by him with his own name, is sufficient to bind either buyer or seller,—Heyman *v.* Neale, 2 Comp. 337; Toomer *v.* Dawson, Cheves (S. Car.), 68;—and either party may be charged upon the note the broker has sent him, the seller on the sold, the buyer on the bought note, or upon both notes taken together, although no entry sufficient to charge the parties has been made by the broker in his book. Hawes *v.* Forster, 1 Moo. & R. 368; Dickerson *v.* Lilewal, 1 Stark, 125; Soames *v.* Spencer, 1 Dowl. & R. 32; Trueman *v.* Loder, 11 Ad. & E. 289; Newberry *v.* Wall, 84 N. Y. 576; Weidman *v.* Champion, 12 Daly (N. Y.), 552.

The notes must agree in their terms, if both are offered, or the memorandum will be insufficient.

*Per* Gibbs, C.J., in Cumming *v.* Roebuck, Holt N. P. 172: "If the broker delivers a different note of the contract to each party contracting, there is no valid contract." Grant *v.* Fletcher, 5 B. & C. 436; Gregson *v.* Ruck, 4 Q. B. 737; Sievewright *v.* Archibald, 17 Q. B. 103; Davis *v.* Shields, 26 Wend. (N. Y.) 341; Suydam *v.* Clark, 2 Sandf. (N. Y.) 133; Peltier *v.* Collins, 3 Wend. (N. Y.) 459; North *v.* Mendal, 73 Ga. 400; s. c., 54 Am. Rep. 879.

In Rowe *v.* Osborne, 1 Stark. 140, the defendant was charged, although the notes differed, since he had actually himself signed the one on which the action was brought.

And in McCaull *v.* Strauss, 1 Cubabe & E. 106, where a broker acting for an undisclosed principal, and for him alone, sent to him a note differing from the one he had given the buyer, it was held immaterial, since the note given the buyer was the true note of the contract. The

(*c*) *Time of Making.*—The memorandum may be made at any time before action is brought,[1] except in the case of an auctioneer's memorandum, which, to bind the buyer, must be made at the time of the sale.[2]

The time of making may be shown by parol, even in contradiction of the terms of the memorandum.[3]

(*d*) *The Delivery.*—No delivery of a memorandum to the opposite party is necessary, nor is any publication required. It is suffi-

case is thus exactly in accord with Rowe *v.* Osborne.

If only one note is given in evidence, the court will presume that the terms of the other correspond with it. Hawes *v.* Forster, 1 Moo. & R. 368; Parton *v.* Crafts, 16 C. B. (N. S.) 11; s. c., 33 L. J. C. P. 189.

Whether the notes or the broker's entry are the original memorandum, seems unsettled. That the broker's entry is the memorandum, is intimated in Heyman *v.* Neale, 2 Camp. 337; Grant *v.* Fletcher, 5 B. & C. 456; Pitts *v.* Becket, 13 M. & W. 743, *per* Parke, B.; Townsend *v.* Drakeford, 1 Car. & K. 20; Sievewright *v.* Archibald, 17 Q. B. 103; *per* Pattason, J., and *per* Lord Campbell, C.J.

That the notes are the memorandum is held in Thornton *v.* Meux, Moo. & M. 43; Hawes *v.* Forster, 1 Moo. & R. 368; Townsend *v.* Drakeford, 1 Car. & K. 20. See Cumming *v.* Roebuck, Holt N. P. 172; Thornton *v.* Charles, 9 M. & W. 802.

That all may be taken together, see North *v.* Mendel, 73 Ga. 400; s. c., 54 Am. Rep. 879.

In *England*, the broker's entry is insufficient if unsigned. Grant *v.* Fletcher, 5 B. & C. 436; Goom *v.* Aflalo, 6 B. & C. 117; Henderson *v.* Bornewall, 1 Y. & J. 387.

But in the *United States*, the undersigned entry is enough. Boardman *v.* Spooner, 13 All. (Mass.) 353.

In *New York*, the early cases held it sufficient. Merritt *v.* Clason, 12 Johns. (N. Y.) 102; Clason *v.* Bailey, 14 Johns. (N. Y.) 484. But since the change in the statutes requiring subscription, it would seem insufficient. Davis *v.* Shields, 26 Wend. (N. Y.), 341.

A recent case in *New Hampshire* has, however, decided that an unsigned memorandum made by an auctioneer, unconnected with any writing signed by the party to be charged, is insufficient. Rafferty *v.* Langee, 63 N. H. 54.

1. Bailey *v.* Sweeting, 30 L. J. C. P. 150; Gibson *v.* Holland, L. R. 1 C. P. 11; Sievewright *v.* Archibald, 17 Q. B. 107; Williams *v.* Bacon, 2 Gray (Mass.), 387; Heideman *v.* Wolfstein, 12 Mo. App. 366.

In Wilkinson *v.* Heavenrich, 58 Mich. 574; s. c., 55 Am. Rep. 708, a contract signed only by one party was repudiated by him. Afterwards the other party signed a written acceptance of the agreement. It was held that it was too late to render the contract binding, even as against the first signer. The court, however, held that a signature by one party was insufficient to charge him unless the other party was alsochargeable; and this holding undoubtedly influenced the decision on the question of the time of signing.

In Tricker *v.* Thomlinson, 1 M. & G. 772, Maule, J., intimated his opinion that a memorandum signed even after action brought, would be sufficient. But the case of Bill *v.* Baurent, 9 M. & W. 36, which decided that an acceptance and actual receipt after action was brought an insufficient reply to a plea of the statute, necessarily decides that a memorandum made after action brought will not be enough. See also Remington *v.* Linthieum, 14 Pet. (U. S.) 84 at 92, where it is held that a sheriff's return on an execution made after action brought is a sufficient memorandum of the sale under the execution. The action here was not on the contract of sale, however.

2. The law is well stated by Pollock, C.B., in Meers *v.* Carr, 1 H. & N. 484: "No doubt an auctioneer at the sale is agent for both seller and buyer, so as to bind them by his signature. But the moment the sale is over, the same principle does not apply, and the auctioneer is no longer the agent of both parties, but of the seller only; and the signature of the seller or his agent cannot bind the buyer." Buckmaster *v.* Harrap, 13 Ves. 456; Horton *v.* McCarty, 53 Me. 394; Gill *v.* Picknell, 2 Cush, (Mass.) 355; Price *v.* Durin, 56 Barb. (N. Y.) 647.

When acting for the seller, a subsequent memorandum is insufficient. Price *v.* Durin, 56 Barb. (N. Y.) 647.

3. Hews *v.* Taylor, 70 Pa. St. 387.

cient that a writing is signed with the intention that it shall constitute a note of an agreement already made or intended to be consummated. If so executed, it will be binding on the party as a memorandum, although in terms he utterly repudiate any obligation.[1]

1. Not every writing signed by a party to a contract within the Statute of Frauds, and containing some or all of its terms, can be taken by itself, or with other papers, to make a memorandum of the contract. Thus, it is said by Williams, J., in Bailey *v.* Swerting, 9 C. B. (N. S.) 843; "You cannot lay down absolutely that the mere recital of a contract is a memorandum to satisfy the statute."

It is sometimes said that no writing not delivered by the party making it, or communicated by him to others, can form a memorandum. This is untrue. Any writing made and signed by the party, with the intent that it shall be a memorandum of the contract, is binding upon him, though never communicated or delivered by him to any other.

In the case of Johnson *v.* Dodgson, 2 M. & W. 653, in answer to a question put by counsel in their argument, whether a memorandum entered by the defendant in his own book, that plaintiffs had sold to him would be sufficient, Baron Parke answered: "If he meant it to be a memorandum of the contract between the parties, it would; not so if he meant it to be a mere memorandum to be kept by himself for himself."

That a paper signed as a memorandum, but retained by the party, may be binding upon him, though not delivered, seems well settled. Kuhn *v.* Brown, 1 Hun (N.Y.), 244; Drury *v.* Young, 58 Md. 546; s. c., 42 Am. Rep. 343.

In Bowles *v.* Woodson, 6 Gratt. (Va.) 78, after an agreement for a sale of land had been made, and a deed containing all the terms of the agreement had been executed, further negotiations stopped, and the deed was never delivered. It was retained several years; and in a suit brought after a refusal to complete the transaction, it was held that the deed was admissible as a memorandum of the contract. This decision can be sustained in spite of its apparent conflict with the cases which follow, if we hold that the signer retained the deed as a memorandum of the transaction, and not as undelivered and worthless deed.

But in Remington *v.* Linthicum, 14 Pet. (U. S.) 84, the court refused to accept private *memoranda* in a personal book kept by a sheriff, to fill out official *memoranda* of an execution sale made by him. And the same decision was reached in Linn Boyd, etc., *v.* Terrill, 13 Bush (Ky.), 463.

A deed or other instrument executed as the final act in the performance of an agreement, but not delivered or allowed out of the maker's possession, is not admissible as a memorandum. Thus, a deed left in escrow is not a sufficient memorandum,—Popp *v.* Swanke (Wis.), 31 No. West. Rep. 916; Cogger *v.* Lansing, 43 N. Y. 558,—or a deed executed for the conveyance of the land to be sold and exhibited to the vendee, but not delivered,—Comer *v.* Baldwin, 16 Minn. 172;—or a deed, for any reason, not delivered,—Weir *v.* Batdorf (Neb.), 38 No, West. Rep. 22; Hart *v.* Carroll, 85 Pa. St. 508; Johnson *v.* Brook, 31 Miss. 17.

But where the parties intended to make a complete memorandum, and the one made was insufficient because too indefinite, undelivered deeds were admitted to supply the deficiencies, in Jenkins *v.* Harrison, 66 Ala. 345.

So where an agreement retained for many years by the signer, and never delivered, was found among his papers after his death, it was held that it could not be used as a memorandum against his heirs. Grant *v.* Levan, 4 Pa. St. 393.

A deed or other final instrument which has been delivered may be used as a memorandum, although through some defect it fails to take effect. Heary *v.* Root, 33 N.Y. 526; Argenbright *v.* Campbell, 3 Hen. & M. (Va.) 144; Campbell *v.* Thomas, 42 Wis. 437; Reeves *v.* Pye, 1 Cranch, (C. C.) 219.

In Pulse *v.* Miller, 81 Ind. 190, it was held that an instrument given to secure the performance of an agreement to convey land was not a sufficient memorandum of the agreement.

The writing will be sufficient as a memorandum if drawn so as to recognize the obligation, although not made for that purpose, if delivered to the other party. Shippey *v.* Dennison, 5 Esp. 190; Evans *v.* Prothers, 1 De G. M. & G. 572; Smith *v.* Arnold, 5 Mas. (C. C.) 414; Ellis *v.* Deadman's Heirs, 4 Bibb (Ky.), 466; Howe *v.* Deming, 2 Gray (Mass), 476; Thayer *v.* Luce, 22 Ohio St. 62.

And so if communicated to an agent or other third person, and not intended to be communicated to the other party.

(*e*) *The Signature.*—The memorandum must be signed,[1] but it need not be sealed.[2] The signature may be printed or stamped;[3] it may be by mark,[4] or by initials.[5]

The place of signing is immaterial;[6] but, wherever the name

Thus, a letter to an agent,—Gibson *v.* Holland, L. R. 1 C. P. 1; Spangler *v.* Danforth, 65 Ill. 152; Wood *v.* Davis, 82 Ill. 311; Warfield *v.* Wisconsin Cranberry Co., 63 Iowa, 312; Lee *v.* Cherry (Tenn.), 4 So. West. Rep. 394;—or to a solicitor,—Owen *v.* Thomas, 3 Myl. & K. 353;—or to any other third person,—Moore *v.* Hunt, 1 Vern. 110; Moss *v.* Atkinson, 44 Cal. 3; Tugatt *v.* Hansford, 3 Litt. (Ky.) 262; Moore *v.* Mountcastle, 61 Mo. 424.

Even a letter from one partner to another has been held enough to bind the firm. Kleeman *v.* Collins, 9 Bush (Ky.), 460.

In Eley *v.* Positive Assur. Co. L. R. 1 Ex. Div. 20, a free statement of an agreement to employ the plaintiff as counsel was embodied in the articles of the defendant company, signed by its directors; yet it was held not a sufficient memorandum, since, in the language of Kelly, C.B.: "The signatures affixed to the articles were *alio intuitu*, and it can hardly be suggested that the directors had any idea that, in signing the articles, they were signing a note of the contract."

This decision is hard to reconcile with the cases which held that it is immaterial, so far as the binding force of the memorandum is concerned, that the party did not intend to be bound by it. The law is clear that a writing which distinctly repudiates the obligation of the contract, may yet constitute a good memorandum of it. Bailey *v.* Sweeting, 9 C. B. (N. S.) 843; Wilkinson *v.* Evans, L. R. 1 C. P. 407; Dobell *v.* Hutchinson, 3 Ad. & E. 355; Elliott *v.* Dean, 1 Cubabe & E. 283; Justice *v.* Lung, 42 N. Y. 493.

**1.** This is very familiar law. Bowdes *v.* Amhurst, Finch Prc. Ch. 402; Hubert *v.* Turner, 4 Scott N. R. 486; Graham *v.* Musson, 5 Bing. N. R. 603; Barry *v.* Law, 1 Cranch (C. C.), 77; Hammond *v.* Winchester, 82 Ala. 470; Newby *v.* Rogers, 40 Ind. 99; McElroy *v.* Seery, 61 Md. 389; s. c., 48 Am. Rep. 110; Barton *v.* Patrick (Neb.), 31 N. W. Rep. 370; Bailey *v.* Ogden, 3 Johns. (N. Y.) 399; Wade *v.* City of Newbern, 77 N. Car. 460; Welch *v.* Darling (Vt.), 7 Atl. Rep. 547.

**2.** Wheeler *v.* Newton, Prec. in Ch. 16; Worrall *v.* Munn, 5 N. Y. 229; Farris *v.* Martin, 10 Humph. (Tenn.) 491; Welch *v.* Darling (Vt.), 7 Atl. Rep. 547. Sealing without signing. Browne, § 235.

**3.** Pitts *v.* Beckett, 13 M. & W. 743; Drury *v.* Young, 58 Md. 546; s. c., 42 Am. Rep. 343.

**4.** Dyar *v.* Stafford, 7 L. R. Ir. 590; Schneider *v.* Norris, 2 M. & S. 286; Evans *v.* Prothers, 1 De G. M. & G. 572.

A mere scrawl was held sufficient, in Hubert *v.* Moreau, 2 Car. & P. 528.

In Carlisle *v.* Campbell, 76 Ala. 247, the defendant put his mark to the paper, and then the promisee wrote the name against it. The court held the signature insufficient on the ground that one party cannot be agent of the other to sign the memorandum. It is suggested, however, that the court overlooked the real signing, which was done by the defendant himself, and was wrong in treating the designation of the mark written in by the plaintiff as the real signature.

**5.** Phillimore *v.* Barry, 1 Camp. 513; Barry *v.* Coombe, 1 Pet. (U. S.) 640; Salmon Falls Mfg. Co. *v.* Goddard, 14 How. (U. S.) 446; Sanborn *v.* Flagler, 9 All. (Mass.) 474.

Although evidence is admissible to explain the characters used in a memorandum, the court, in Hubert *v.* Moreau, 2 Car. & P. 528, refused to allow a memorandum signed with a scrawl which, it was contended, was an initial.

The signature must be by a name, or something intended as a signature, not a mere designation of the writer. Thus, the words "Your dear mother," at the end of a letter were held insufficient as a signature. Selby *v.* Selby, 3 Meriv. 2.

Where the memorandum is made by telegrams, the signature to the blanks written by the sender is a sufficient signature. Godwin *v.* Francis, L. R. & C. P. 295; Little *v.* Dougherty (Colo.), 17 Pac. Rep. 292.

**6.** Schneider *v.* Norris, 2 M. & S. 286; Knight *v.* Crockford, 1 Esp. 188; Johnson *v.* Dodgson, 2 M. & W. 653; Ogilvie *v.* Foljambe, 3 Meriv. 53; Holmes *v.* Mackrell, 3 C. P. (N. S.) 789; McElroe *v.* Seery, 61 Md. 389; s. c., 48 Am. Rep. 110; Drury *v.* Young, 58 Md. 546; s. c., 42 Am. Rep. 343; Sanborn *v.* Sanborn, 7 Gray (Mass.), 142.

It is immaterial that it is in the third person. Propert *v.* Parker, 1 Russ. & M. 625; Western *v.* Russell, 3 Ves. & B. 187; Bleakley *v.* Smith, 11 Sim. 150.

In Koonheim *v.* Johnson, 7 Ch. Div.

occurs, it must have been used with the intent that it should constitute the final signature.[1] A signature by a principal has been held sufficient to bind him, though he attached it as a witness.[2]

A signature in blank is sufficient if the blanks be afterward filled by a competent agent.[3]

The signature need not be with the name of the principal, or be stated to be made at his act, where the memorandum is signed by an agent.[4]

The signature of the party to be charged, or of his agent, is sufficient. It is not essential that the other party should have signed a binding memorandum.[5] In some of the United States,

60, a supplement to a signed letter began with I and contained the memorandum. It was held sufficiently signed, though there was no other reference to the signature of the letter.

In *New York*, however, where the statute requires subscription, the signature, to be binding, must be at the foot. Davis *v.* Shields, 26 Wend. (N. Y.) 341; James *v.* Patten, 6 N. Y. 9; Vielie *v.* Osgood, 8 Barb. (N. Y.) 130; McGivern *v.* Fleming, 66 How. Pr. (N. Y.) 300; McGivern *v.* Fleming, 12 Daly (N. Y.), 289.

1. Hubert *v.* Turner, 4 Scott N. R. 486; Barry *v.* Coombe, 1 Pet. (U. S.) 640; McDonnell *v.* Brillhart, 17 Ill. 354; McMillan *v.* Terrell, 23 Ind. 163; Wise *v.* Ray, 3 Green (Iowa), 439; Higdon *v.* Thomas, 1 Harr. & G. (Md.) 139; Hawkins *v.* Chase, 19 Pick. (Mass.) 502.

2. This was decided in the case of Coles *v.* Trecothick, 9 Ves. 234, on the ground that, as a principal cannot be witness, and some effect should be given the signature, he should be held as principal.

The decision is disapproved by Lord Denman, in Gosbell *v.* Archer, 2 Ad. & E. 508.

In Hill *v.* Johnson, 3 Ired. Eq. (N. Car.) 132, it is said that there is no presumption that a witness knows the contents of the document to which he puts his name; and as a witness is unnecessary (Welch *v.* Darling (Vt.), 7 Atl. Rep. 547), it would seem better to disregard a signature as witness.

3. Uderwood *v.* Hossack, 38 Ill. 208; Ulen *v.* Kittridge, 7 Mass. 233; Blacknall *v.* Parish, 6 Jones Eq. (N. Car.) 70.

But the law in *England* is contrary. In Wood *v.* Midgley, 8 De G. M. & G. 41, where a person, to save the time of waiting for a copy of an agreement to be made, signed in blank, it was held that the signatnre was insufficient.

The same is law in *New York*,—Jackson *v.* Titles, 2 Johns. (N. Y.) 430;—and *New Hampshire*,—Hodgkins *v.* Bond, 1 N. H. 287.

It would seem that the principal would be bound, although the agent exceeded his authority. White *v.* Duggan, 140 Mass. 18.

4. Batturs *v.* Sellers, 5 Harr. & J. (Md.) 117; Williams *v.* Bacon, 2 Gray (Mass.), 387; Sanborn *v.* Fagler, 9 All. (Mass.) 474; McWilliams *v.* Lawless, 15 Neb. 131; Wheeler *v.* Walden, 17 Neb. 122; Dykers *v.* Townsend, 24 N. Y. 57.

In Squier *v.* Norris, 1 Lans. (N. Y.) 282, it was held, however, that a wife was not bound by an agreement for the sale of her land, made by her husband, as her agent, and signed by him, her name nowhere appearing.

5. Laythoarp *v.* Bryant, 2 Bing. N. R. 735; Schneider *v.* Norris, 2 M. & S. 286; Allen *v.* Bennet, 3 Taunt. 167; Reuss *v.* Picksley, L. R. 1 Ex. 342; Hatton *v.* Gray, 2 Ch. Cas. 164; Fowle *v.* Freeman, 9 Ves. 351; Alabama Gold Life Ins. Co. *v.* Oliver (Ala.), 2 So. Rep. 445; Shirley *v.* Shirley, 7 Blackf. (Ind.) 452; Barston *v.* Gray, 3 Greenl. (Me.) 409; Old Colony R. Co. *v.* Evans, 6 Gray (Mass.), 25; Penniman *v.* Hartshorn, 13 Mass. 87; Morin *v.* Martz, 13 Minn. 191; Marqueze *v.* Caldwell, 48 Miss. 23; Gortrell *v.* Stafford, 12 Neb. 545; s. c., 41 Am. Rep. 767; Justice *v.* Lang, 42 N. Y. 493; Wiedman *v.* Champion, 12 Daly (N. Y.), 522; Love's Exrs. *v.* Welch (N. Car.), 2 So. East Rep. 242; Thayer *v.* Luce, 22 Ohio St. 62; Griffin *v.* Rembert, 2 S. Car. 410; Douglass *v.* Spears, 2 Nott & M. (S. Car.) 207.

This is doubted in Martin *v.* Mitchell, 2 Jac. & W. 426; and, in Cason *v.* Bailey, 14 Johns. (N. Y.) 484, while admitting the law to be as stated in the text, the chancellor said he thought the law ought to require that both he bound if one was.

In Newby *v.* Rogers, 40 Ind. 9, the court declares that the words "party to be charged" mean simply "the defendant."

however, a memorandum of a sale of land must be signed by the vendor, and, unless so signed, will be of no avail;[1] while, if so signed, it will be binding upon a vendee who has not signed, provided he has accepted it, or assented to it.[2]

(*f*) *Memoranda Made by Agents.*—An agent may be constituted without writing;[3] and the acts of an unauthorized agent may be ratified by parol.[4]

Neither party can be the agent of the other to sign a memorandum;[5] but any other person may be agent to sign, and the same

In *Michigan*, the law is *contra*, a late case deciding that, where the consideration of the agreement is the mutual promises of the parties, unless both are bound, neither is bound; and accordingly, Michigan requires the signature of both. Wilkinson *v.* Heavenrich, 58 Mich. 574; s. c., 55 Am. Rep. 708.

1. Coles *v.* Bowne, 10 Paige (N. Y.), 526; McWhorter *v.* McMahan, 10 Paige (N. Y.), 386; Champion *v.* Parish, 11 Paige (N. Y.), 405; Gortrell *v.* Stafford, 12 Neb. 545; s. c., Am. Rep. 767; Frazer *v.* Ford, 2 Head (Tenn.), 464; Lawber *v.* Connit, 36 Wis. 176.

2. In all the States where the signature of the vendor is required, a vendee who accepts or assents to the *memoranda*, is bound by it although he does not sign it. Nat. Fire Ins. Co. *v.* Loomis, 11 Paige (N.Y.), 431; Worrall *v.* Munn, 5 N. Y. 229; Gartrell *v.* Stafford, 13 Neb. 545; s. c., 41 Am. Rep. 767; Lawber *v.* Counit, 36 Wis. 176; Hutchinson *v.* Chicago, etc., R. Co., 37 Wis. 582; Vilas *v.* Dickinson, 13 Wis. 488.

But where the vendee has not expressly accepted or assented to the memorandum, the law in *New York* is doubtful,—Miller *v.* Pelletier, 4 Edw. Ch. (N. Y.) 102;—while in *Wisconsin*, it is definitely settled that the vendee is not bound,—Bamber *v.* Savage, 52 Wis. 110; s. c., 38 Am. Rep. 723.

If the memorandum is made at the time of the sale, the vendee is conclusively presumed to assent. Bamber *v.* Savage, 52 Wis. 100; s.c., 38 Am. Rep. 723.

3. Acebal *v.* Levy, 10 Bing. 376; Durrell *v.* Evans, 1 H. & C. 174; Rutenberg *v.* Main, 47 Cal. 213; Johnson *v.* Dodge, 17 Ill. 433; Roehl *v.* Hanneesser (Ind.), 15 No. East. Rep. 345; Talbot *v.* Bowen, 1 A. K. Marsh. (Ky.) 436; Inhabitants *v.* Plummer, 4 Greenl. (Me.) 258; Ulen *v.* Kittridge, 7 Mass. 232; Curtis *v.* Blair, 4 Cush. (Miss.) 309; Merritt *v.* Clason, 12 Johns. (N. Y.) 102; Worrall *v.* Munn, 5 N. Y. 229; Yerby *v.* Grigsby, 9 Leigh (Va.), 387; Conaway *v.* Sweeney, 24 W. Va. 643.

In Bullard *v.* Johns. 50 Ala. 382, however, it was held that an indorsement of a person's name as security for costs, made by an attorney at the request of that person, was insufficient to charge him.

And in Caperton *v.* Gray, 4 Yerg. (Tenn.) 563, a similar oral authority to a justice, to enter one's name as security, was held insufficient.

The authority of an agent to sell land must be in writing, in *Illinois*. Albertson *v.* Ashton, 102 Ill. 50.

4. Maclean *v.* Dunn, 4 Bing. 722; Gosbell *v.* Archer, 2 Ad. & E. 500; Hawkins *v.* Baker, 46 N. Y. 666.

Apparently, ratification will not be presumed. *Re* Pentreguinea Coal Co., 4 De G. F. & J. 541.

5. Wright *v.* Dannat, 2 Camp. 202; Farebrother *v.* Simmons, 5 B. & Ald. 333; Shorman *v.* Brandt, L. R. 6 Q. B. 720; Smith *v.* Arnold, 5 Mas. (C. C.) 414; Carlisle *v.* Campbell, 76 Ala. 247; Boardman *v.* Spoone, 13 All. (Mass.) 353; Adams *v.* Scales, 1 Baxt. (Tenn.) 337.

It is immaterial that the party has but a nominal interest. Thus, the auctioneer cannot sue on a memorandum signed by him for the defendant. Buckmaster *v.* Harrop, 13 Ves. 456; Farebrother *v.* Simmons, 5 B. & Ald. 333; Smith *v.* Arnold, 5 Mas. (C. C.) 414; Robinson *v.* Garth, 6 Ala. 204. But, in Bent *v.* Cobb, 9 Gray (Mass.), 397, the court intimates that if the signer has absolutely no interest, he may sue.

A *contra* view is taken in Ennis *v.* Waller, 3 Blackf. (Ind.) 472.

If the signature is made by the auctioneer's clerk, the auctioneer may maintain a suit. The law simply requires that one party of record to the auction shall not be agent to bind the other party. Bird *v.* Boulter, 4 B. & Ald. 443; Murphy *v.* Boese, L. R. 10 Exch. 126; Johnson *v.* Burk, 35 N. J. L. 335. So a sheriff may sue on a memorandum made by his deputy as agent for the defendant. Brent *v.* Green, 6 Leigh (Va.), 16.

In Sanborn *v.* Chamberlain, 101 Mass.

person may be agent for both parties.[1] A partner is a competent agent to bind his firm.[2]

An auctioneer is, by virtue of his position, the agent of both parties to execute a memorandum;[3] but the agency, to bind the buyer, exists only at the time of the sale.[4] And the same is law in regard to any public or *quasi*-public officer acting as auctioneer at a sale conducted by him; thus, with sheriffs and their deputies,[5] administrators,[6] commissioners under the seal of court,[7] and land commissioners,[8] or a clerk of court in entering agreements of parties upon the record.[9]

A broker also is agent of both parties if his character as broker is known to both buyer and seller.[10]

But no person who is not licensed or authorized as a public officer has such power to bind both parties.[11]

An auctioneer's clerk has the same power as the auctioneer at the time of sale,[12] but a broker's clerk has not.[13]

409, the court sustained an officer's return as a sufficient memorandum even in a suit by himself.

1. See the cases in regard to auctioneers, brokers, and officers cited later.

2. Brettel *v.* Williams, 4 Exch. 623; Sanborn *v.* Flagler, 9 All. (Mass.) 474; Kyle *v.* Roberts, 6 Leigh (Va.), 495.

3. Simon *v.* Motivos, 1 W. Bl. 579; Mews *v.* Carr, 1 H. & N. 484; Kenworthy *v.* Schofield, 2 B. & C. 945; Adams *v.* McMillan, 7 Port. (Ala.) 73; Gill *v.* Hewitt, 7 Bush (Ky.), 10; Cleavs *v.* Foss, 3 Greenl. (Me.) 11; Singstock *v.* Harding, 4 Harr. & J. (Md.) 186; Morton *v.* Dean, 13 Metc. (Mass.) 385; Endicott *v.* Penny, 14 Sm. & M. (Miss.) 144; Springer *v.* Kleinsorge, 83 Mo. 152; Price *v.* Durin, 56 Barb. (N. Y.) 647; Anderson *v.* Check, Bail. Eq. (S. Car.) 118.

4. See note 2, page 715; Parton *v.* Crofts, 16 C. B. (N. S.) 11.

5. Robinson *v.* Garth, 6 Ala. 204; Ennis *v.* Waller, 3 Blackf. (Ind.) 472; Sanborn *v.* Chamberlain, 101 Mass. 409; Endicott *v.* Penny, 14 Sm. & M. (Miss.) 144; Christie *v.* Simpson, 1 Rich. Law (S. Car.), 407; Brent *v.* Green, 6 Leigh (Va.), 16.

6. Smith *v.* Arnold, 5 Mas. (C. C.) 414.

7. Jenkins *v.* Hogg, 2 Tread. (S. Car.) 821.

8. Hart *v.* Woods, 7 Blackf. (Ind.) 568.

9. Huston *v.* Cincinnati, etc., R. Co., 21 Ohio St. 235; Baykin *v.* Smith, 3 Munf. (Va.) 102.

10. Parton *v.* Crafts, 16 C. B. (N. S.) 11. But, in the *United States*, not unless his character of broker is known. North *v.* Mendel, 73 Ga. 400; s. c., 54 Am. Rep. 879; Shaw *v.* Finney, 13 Metc. (Mass.) 453; Davis *v.* Shields, 26 Wend. (N. Y.) 341.

In *England*, as brokers are public officers, no such disclosure seems necessary.

11. Hutton *v.* Williams, 35 Ala. 503; Anderson *v.* Chick, Bail. Eq. (S. Car.) 118; Adams *v.* Scales, 1 Baxt. (Tenn.) 337; Walker *v.* Herring, 21 Gratt. (Va.) 678.

A commission merchant is not an auctioneer or broker so as to bind both parties. Sewall *v.* Fitch, 8 Cow. (N. Y.) 215. But if the buyer accepts a memorandum signed by him from him, that will constitute a sufficient ratification of his act to bind the buyer. Batters *v.* Sellers, 5 Harr. & J. (Md.) 117.

12. Gosbell *v.* Archer, 2 Ad. & E. 500; Henderson *v.* Barnewall, 1 Y. & J. 387; Bird *v.* Baulter, 4 B. & Ad. 443; Adams *v.* McMillan, 7 Port. (Ala.) 73; Doty *v.* Wilder, 15 Ill. 407; Hart *v.* Woods, 7 Blackf. (Ind.) 568; Inhabitants *v.* Plummer, 4 Greenl. (Me.) 258; Gill *v.* Bicknell, 2 Cush. (Mass.) 355; Johnson *v.* Buck, 35 N. J. L. 338; First Church *v.* Bigelow, 16 Wend. (N. Y.) 28; Price *v.* Durin, 56 Barb. (N. Y.) 647; Smith *v.* Leigh, 7 Leigh (Va.), 165; Brent *v.* Green, 6 Leigh (Va.), 16.

The *contra* is law in *South Carolina*. Enty *v.* Mills, 1 McMull. Law (S. Car.), 453; Meadows *v.* Meadows, 3 McCord Law (S. Car.), 458. But see Christie *v.* Simpson, 1 Rich. Law (S. Car.), 407.

In Pierce *v.* Corf, L. R. 9 Q. B. 210. Blackburn, J., intimates that the clerk has no such authority; but the law seems clearly otherwise.

13. Henderson *v.* Barnewall, 1 Young

The existence of the relation of attorney and client does not of itself authorize the attorney to bind his client by executing a memorandum.[1]

The agent must be authorized to sign, in order to bind the principal; mere power to settle terms or write out agreements is not enough.[2]

The form of execution by an agent is immaterial. It may be in his own name, or by the name of his principal as his own act, or the principal's.[3]

(*g*) *The Contents of the Memorandum.*—(1) *Generally.*—The memorandum must contain all the essential terms of the contract actually completed,[4] and must correspond exactly with the contract set out in the declaration. Merely formal or non-essential terms will be implied by the law;[5] but the memorandum will be insufficient if it falsify the contract declared on, or vary its terms by annexing conditions or disclosing agreements not set out in the declaration,[6] or show that no completed contract has been made.[7]

As the memorandum is not an agreement in writing, parol evidence is admissible to show that a memorandum clear and complete on its face does not in fact embody all the terms of the agreement.[8] But parol evidence is inadmissible to establish the

& J. 387. But see Townend *v.* Drakeford, 1 Car. & K. 20, where an opposite result was reached, though no question was raised on this point. Johnson *v.* Mulay, 4 Rob. (N. Y.) 401.

1. Bushell *v.* Beavan, 1 Bing. N. R. 103. See also *Re* Pentreguinea Coal Co., 4 De G. F. & J. 541.

2. Rutenberg *v.* Main, 47 Cal. 213; Edwards *v.* Johnson, 3 Houst. (Del.) 435; Taylor *v.* Merrill, 55 Ill. 52; Coleman *v.* Garrigues, 18 Barb. (N. Y.) 60; Rice *v.* Rawlings, Meigs (Tenn.), 496; Earl of Gengal *v.* Barnard, 1 Keen, 769; Dixon *v.* Broomfield, 2 Chitty, 205.

3. McWilliams *v.* Lawless, 15 Neb. 131; Conaway *v.* Sweeny, 24 W. Va. 643.

4. Marshall *v.* Berridge, 19 Ch. Div. 233; Rock Portland Cement Co. *v.* Wilson, 52 L. J. Ch. 214; Donnison *v.* People's Café Co., 45 L. T. 187; Wyse *v.* Russell, 11 L. R. Ir. 173; McMullen *v.* Helberg, 6 L. R. Ir. 363; Rossiter *v.* Miller, L. R. 3 H. L. 1124; Williams *v.* Morris, 95 U. S. 444; Barry *v.* Coombe, 1 Pet. (U. S.) 640; Eppich *v.* Clifford, 6 Colo. 493; Banks *v.* Chas. P. Harris Manfg. Co., 20 Fed. Rep. 667; North *v.* Mendel, 73 Ga. 400; s. c., 54 Am. Rep. 879; Smith *v.* Jones, 66 Ga. 338; s. c., 42 Am. Rep. 72; Ballingall *v.* Bradley, 16 Ill. 373; Fry *v.* Platt, 32 Kan. 62; Elliott *v.* Barrett, 144 Mass. 256; Lincoln *v.* East Preserving Co., 132 Mass. 129; Boardman *v.* Spooner, 13 Allen (Mass.), 353; Smith *v.* Shell, 82 Mo. 215; s. c., 52 Am. Rep. 365; Drake *v.* Seaman, 97 N. Y. 230; Ullman *v.* Meyer, 10 Abb. N. C. (N. Y.) 281. But see Williams *v.* Robinson, 73 Me. 186; s. c., 40 Am. Rep. 352, and *compare* with Smith *v.* Shell, 82 Mo. 215; Lash *v.* Parlin, 78 Mo. 374; O'Neil *v.* Crane, 67 Mo. 251; Moss *v.* Green, 41 Mo. 387; Briggs *v.* Munchon, 56 Mo. 467; Rollins *v.* Claybrook, 22 Mo. 407; Ellis *v.* Bray, 79 Mo. 227.

The case of Lindsley *v.* Tibballs, 40 Conn. 522, distinctly *contra*, contains no discussion of the question, and apparently rests upon its peculiar facts.

5. Lymes *v.* Hutley; 2 L. T. (N. S.) 509; Barry *v.* Coombe, 1 Pet. (U. S.) 640; Smith *v.* Shell, 82 Mo. 215; s. c., 52 Am. Rep. 365.

6. Nesham *v.* Selby, L. R. 7 Ch. Ap. 406; Smith *v.* Surnam, 9 B. & C. 561; Cooper *v.* Smith, 15 East, 103; Williams *v.* Morris, 95 U. S. 444.

7. Hawkesworth *v.* Chaffey, 55 L. J. Ch. 335; Goodall *v.* Harding, 52 L. T. 126; Munday *v.* Asprory, 13 Ch. Div. 855; Rossiter *v.* Miller, 5 Ch. Div. 648; Reid *v.* Kenworthy, 25 Kan. 701; Jenness *v.* Mt. Hope Iron Co., 53 Me. 20; May *v.* Ward, 134 Mass. 127; Boozer *v.* Teague (S. Car.), 3 So. East. Rep. 551.

8. Smith *v.* Shell, 82 Mo. 215; s. c., 52 Am. Rep. 365. The cases in which this

terms omitted.[1] The circumstances existing at the time of making may be shown in evidence to explain the relation of the parties and the meaning of the words.[2] Parol evidence is admissible always to show the meaning of technical terms or trade hieroglyphics.[3]

It must show what contract was finally agreed upon, and the exact nature of that contract; accordingly, it must set out the parties, the subject-matter, the price, the terms, and conditions, and, in *England* and many of the *United States*, the consideration of the contract.[4] If there are any special and collateral agreements entering into the completed contract, they must be set out; as, for example, if a sale be with warranty, the memorandum must show it.[5] Great particularity is unnecessary;[6] but every essential

point has been tacitly decided are innumerable, and it seems impossible to deny its correctness; yet in the case of Williams *v.* Robinson, 73 Me. 186; s. c., 40 Am. Rep. 352, it was decided that parol evidence was inadmissible to impeach a written note of the agreement which contained, apparently, the essential elements of a contract, by showing that there were essential terms of the contract actually made, which were not embodied in that memorandum. The court clearly confounded the paper offered as a memorandum with a written contract, and indeed Virgin, J., says of the writing: "Its terms are clearly expressed and contain all the elements necessary to give it legal effect as a written contract."

1. Banks *v.* Harris Mfg. Co., 20 Fed. Rep. 667; Lee *v.* Hills, 66 Ind. 474; Fry *v.* Platt, 32 Kan. 62; White *v.* Core, 20 W. Va. 272.

The law of *Missouri* seems *contra*. The late case of Smith *v.* Shell, 82 Mo. 215; s. c., 52 Am. Rep. 365, decided that, although a memorandum was not insufficient simply because it failed to state a time and place for delivery, yet if the plaintiff testifies that a time and place were actually agreed upon, he cannot recover unless the memorandum states them. In Lash *v.* Parlin, 78 Mo. 391, it was held that "Where a written memorandum of a contract does not purport to be a complete expression of the entire contract, or part only of it is reduced to writing, the matter thus omitted may be supplied by parol evidence." That case is directly contrary to Banks *v.* Harris Mfg. Co., 20 Fed. Rep. 667; but it follows a number of Missouri cases announcing the same doctrine.—O'Neil *v.* Crane, 67 Mo. 251; Briggs *v.* Munchon, 56 Mo. 467; Moss *v.* Green, 41 Mo. 387; Rollins *v.* Claybrook, 22 Mo. 407;—and is distinctly followed and approved in Ellis *v.* Bray, 79 Mo. 227.

2. Carr *v.* Hastings, 7 Q. B. Div. 125; Shardlow *v.* Catterell, 20 Ch. Div. 90; s. c., 18 Ch. Div. 280; Wylson *v.* Dunn, 34 Ch. Div. 569; Bainbridge *v.* Wade, 16 Q. B. 89; Steele *v.* Hoe, 14 Q. B. 431; Goldshede *v.* Swan, 1 Exch. 154; Allnut *v.* Ashanden, 5 Man. & G. 392; Thornton *v.* Jengus, 1 Man. & G. 166; Lysoght *v.* Walker, 5 Bligh (N. S.), 1 at 27; Haigh *v.* Brooks, 10 Ad. & E. 309; Shortride *v.* Cheek, 1 Ad. & E. 57; D'Wolf *v.* Raband, 1 Pet. (U. S.) 476; Doherty *v.* Hill, 144 Mass. 465; Ellis *v.* Bray, 79 Mo. 227; Wholley *v.* Hinchman, 22 Mo. App. 483; Walroth *v.* Thompson, 4 Hill (N. Y.), 200. But see Weed *v.* Clark, 4 Sandf. (N. Y.) 31, *contra*.

3. Heideman *v.* Wolfstein, 12 Mo. App. 366.

4. Eppich *v.* Clifford, 6 Colo. 493.

5. McMullen *v.* Helberg, 6 L. R. Ir. 463; Pettier *v.* Collins, 3 Wend. (N. Y.) 459.

6. That great particularity of statement is not essential, will appear very clearly from the cases which are cited, in regard to the note of the parties, price, terms, etc.; and a collection of the cases is unnecessary here. The principle is indubitable, and is well stated by Shaw, C.J., in Atwood *v.* Cobb, 16 Pick. (Mass.) 229: "The paper writing on which the plaintiff relies to support this action is certainly extremely loose and indeterminate; but considering how often agreements are necessarily drawn up by illiterate persons incapable of expressing their intentions with clearness and certainty; and the injurious consequences which would follow if effect should not be given to such agreements, it must be a rule of construction governing courts of justice not wholly to reject such instruments as uncertain if it is possible, with the helps allowed to be brought to the aid of such construction, to ascertain the meaning of the parties."

term must be ascertainable without resource to parol evidence.[1]

(2) *The Parties.*—The memorandum must show who are the parties to the contract by some reference sufficient to identify them;[2] and which is vendor, which vendee.[3] The reference need not be by name; it will be sufficient if the person is identified.[4]

When the memorandum is signed by one of the parties, it will be sufficient if it appears from the body of the memorandum who

1. Thus, a memorandum which is so worded that parol evidence is necessary to show the intent of the parties is insufficient. In Banks *v.* Harris Mfg. Co., 20 Fed. Rep. 667, a memorandum sent by a travelling salesman to his firm, directing them to "send" certain articles to A, was held insufficient; and parol evidence to show that this meant that he had sold the articles to A was rejected. And so, in Lee *v.* Hills, 66 Ind. 474, the court refused to admit parol evidence that the word "sold" should have been inserted beneath the plaintiff's name in a memorandum written upon one of his printed billheads, and containing all the other essential terms of a contract.

Parol evidence is admissible to apply the words of description used in the writing to the article intended to be described; but that is very different from admitting it to show the existence of an essential element of the memorandum.

On the general subject, see Brodie *v.* St. Paul, 1 Ves. Jr. 326, where the writing contained many conditions, of which only a part were actually embodied in the contract; and the court rejected parol evidence to show which were so embodied. Wood *v.* Aylward, 84 L. T. J. 79; Carr *v.* Hastings, 7 Q. B. Div. 125; Erskine *v.* Armstrong, 20 L. R. Ir. 296; Eckman *v.* Brash, 20 Fla. 763; Doherty *v.* Hill, 144 Mass. 465; May *v.* Ward, 134 Mass. 127; Bishop *v.* Fletcher, 48 Mich. 555; Miens *v.* Chandler, 21 S. Car. 480.

2. Thus, where a subscription was written on a paper bearing a printed heading, "Congregational Union of England and Wales Jubilee Fund," but no address was inserted, it was held an insufficient identification of the parties. Hudson, *In re* Creed *v.* Henderson, 54 L. J. Ch. 811. On the general subject, see Phelan *v.* Tedcastle, 15 L. R. Ir. 169; Champion *v.* Plummer, 1 Bos. & P. N. R. 252; Dyas *v.* Stafford, 9 L. R. Ir. 520; Williams *v.* Byrnes, 8 L. T. (N. S.) 69; Wheeler *v.* Collier, Moo. & M. 123; Grafton *v.* Cummings, 99 U. S. 100; Grant *v.* Naylor, 4 Cranch (U. S.), 224; Sherburne *v.* Shaw, 1 N. H. 157; Sheid *v.* Stamps, 2 Sneed (Tenn.), 172.

3. Vandenbergh *v.* Spooner, L. R. 1 Ex. 316; Champion *v.* Plummer, 1 Bos. & P. N. R. 252; Nichols *v.* Johnson, 10 Conn. 192; Osborn *v.* Phelps, 19 Conn. 63; North *v.* Mendel, 73 Ga. 400; s. c., 54 Am. Rep. 879; Frank *v.* Eltringham (Miss.), 3 So. Rep. 655; Sherburne *v.* Shaw, 1 N. H. 157; Bailey *v.* Ogden, 3 Johns. (N. Y.) 399. But see Newell *v.* Radford, L. R. 3 C. P. 52, where the court intimates that the rule of Vandenbergh *v.* Spooner is too strict.

The *contra* has been held in Salmon Falls Mfg. Co. *v.* Goddard, 14 How. (U. S.) 446; but in that case a very powerful dissenting opinion was delivered by Justice Curtis, in which Catron, J., concurred, and the decision is questioned in Grafton *v.* Cummings, 99 U. S. 100.

That parol evidence is admissible to show which party was vendor and which vendee, has also been held in Harvey *v.* Stevens, 43 Vt. 653.

In the case of Osborn *v.* Phelps, 19 Conn. 63, the parties had by accident signed the wrong papers, the vendee signing as vendor, and *vice versa*. The court held that the true character of the signers could not be shown by parol in a suit for specific performance of one of these contracts, in support of the contract, but was admissible in defence.

4. Webster *v.* Ela, 5 N. H. 540.

The omission of an initial does not make the name uncertain. Fessenden *v.* Mussey, 11 Cush. (Mass.) 127.

One who advances on the faith of a circular-letter addressed to whom it might concern can doubtless show by parol proof that he is a party, and charge the writer. Union Bank *v.* Coster, 1 Sand. (N. Y.) 563; s. c., 3 N. Y. 203. But it has been held that one who advanced on the faith of a guaranty blank as to the address, and who in fact was not the party intended to receive it, cannot recover. Williams *v.* Lake, 2 El. & El. 349.

is the other party, although the party signing is not referred to in it.[1]

A letter addressed to one party by the other, or received from him, if properly connected with other writings containing the memorandum, is sufficient to show the parties.[2]

A name on the outside of a book in which one party made the memorandum has been held a sufficient identification.[3]

So too, a statement, in an announcement of the sale of certain property, that it is made by order of J. S., proprietor, is a sufficient identification of the vendor.[4]

A mere reference to one of the party as "the vendor" is insufficient;[5] but a reference to one of "the proprietors,"[6] or "the trustee for sale"[7] has been held insufficient.

Although parol evidence is not admissible to show which of the parties is the vendor and which the vendee, it is admissible to show that one is merely an agent and to prove who is his principal.[8]

(3) *The Subject-matter.*—The memorandum must definitely

1. Jacob *v.* Kirk, 2 Moo. & R. 221; Cummins *v.* Scott, L. R. 20 Eq. 11; Grafton *v.* Cummings, 99 U. S. 100; Thornton *v.* Kelly, 11 R. I. 498.

2. Allen *v.* Bennet, 3 Taunt. 169; Jacob *v.* Kirk, 2 Moo. & R. 221; Grant *v.* Naylor, 4 Cranch (U. S.), 224; Farwell *v.* Lawther, 18 Ill. 252; Griffin *v.* Rembert, 2 S. Car. 410.

3. This was distinctly decided in Sarl *v.* Bourdillon, 1 C. B. (N. S.) 188, where the defendant wrote his name and address in the plaintiff's order-book just before the entry of the articles purchased. The plaintiff's name was on the fly-leaf of the book, and the defendant could have seen it, though there was no evidence that he did see it.

A similar decision was rendered in Harvey *v.* Stevens, 43 Vt. 653, where the entry was written in an auctioneer's book, which bore his name upon it; and the cases of Newell *v.* Radford, L. R. 3 C. P. 52, and Allen *v.* Bennet, 3 Taunt. 169, where entries were made by one party or his agent in the book of the other, at the other's request, although they contain further facts which rendered a decision on this point unnecessary, are substantially in accord.

In the late case of Dyas *v.* Stafford, 9 L. R. Ir. 520, however, it was held that the presence of the name of an auctioneer printed upon the book of the particulars and conditions of sale was not enough to render a memorandum, signed by the other party sufficient; and the ruling of the court below (7 L. R. Ir. 590) that it was enough, was distinctly reversed. That such is not a sufficient identification, see also Nichols *v.* Johnson, 10 Conn. 192.

4. Laythoorp *v.* Bryant, 2 Bing. N. R. 735.

5. Potter *v.* Duffield, L. R. 18 Eq. 4. In Jarret *v.* Hunter, 34 Ch. Div. 182; s. c., 35 W. R. 132, a memorandum referring to the "vendor," and to "A B, solicitor of the vendor," was held insufficient, although in point of fact A B was himself the owner and vendor.

6. Sale *v.* Lambert, L. R. 18 Eq. 1; Rossiter *v.* Miller, 5 Ch. Div. 648; s. c., L. R. 3 H. L. 1124. These cases go on the ground that it is possible to find from the documents of title just who the proprietor, and consequently the vendor, is.

A mere reference to documents of title is not, however, enough to render a memorandum which does not state who is vendor, sufficient; although from a study of them it would appear who is vendor. Jarret *v.* Hunter, 34 Ch. Div. 182.

7. Cutting *v.* King, 5 Ch. Div. 660.

8. Beer *v.* London, etc., Hotel Co., L. R. 20 Eq. 412; Lerned *v.* Johns, 9 Allen (Mass.), 419; Hunter *v.* Giddings, 97 Mass. 41; Gowen *v.* Klous, 101 Mass. 449.

The law is the same where the reference to the party is the address of a letter written to him. It may be shown by parol that the person addressed was merely an agent, and who was his principal. Bateman *v.* Phillips, 15 East, 272; Williams *v.* Bacon, 2 Gray (Mass.), 387; Walsh *v.* Barton, 24 Ohio St. 28; Shayer *v.* Lirce, 22 Ohio St. 62.

fix the subject-matter to which it applies.[1] It is not essential that it contain a particular description of the subject; but it must contain some statement or reference by which that may be completely identified.[2]

1. Shardlaw *v.* Cotterell, 20 Ch. Div. 90; s. c., 18 Ch. Div. 280; Montacute *v.* Maxwell, 1 P. Wms. 618; Clinan *v.* Cooke, 1 Sch. & Lef. 22; Williams *v.* Morris, 95 U. S. 444; Baldwin *v.* Kerlin, 46 Ind. 426; Fry *v.* Platt, 32 Kan. 62; Sherer *v.* Trowbridge, 135 Mass. 500; Wheelan *v.* Sullivan, 102 Mass. 204; Bishop *v.* Fletcher, 48 Mich. 555; Eggleston *v.* Wagner, 46 Mich. 610; Pierson *v.* Ballard, 32 Minn. 263; Fisher *v.* Kuhn, 54 Miss. 480; Holmes *v.* Evans, 48 Miss. 247; Scarritt *v.* St. John's Church, 7 Mo. App. 174; Webster *v.* Clark, 60 N. H. 36; Ferguson *v.* Stover, 33 Pa. St. 411; Miens *v.* Chandler. 21 S. Car. 480; Church *v.* Farrow, 7 Rich. Eq. (S. Car.) 378; Johnson *v.* Kellogg, 7 Heisk. (Tenn.) 262; Pipkin *v.* James, 1 Humph. (Tenn.) 225; Johnson *v.* Granger, 51 Tex. 42; White *v.* Core, 20 W. Va. 272.

It is immaterial that parol evidence is necessary to prove the fact that a certain event has happened, if the lease is stated to be to begin on the happening of that event. Erskine *v.* Armstrong, 20 L.R. Ir. 296.

Where the subject-matter is land, any reference by which the parcel can be definitely ascertained is sufficient; thus, a reference to an estate by a name by which it is commonly known in its vicinity, as, "Rose Hill" (Dougherty *v.* Chesnutt [Tenn.], 4 So. West. Rep. 444), "The Snow Farm" (Holles *v.* Burgess [Kan.], 15 Pac. Rep. 536), "The Gentle Property" (Smith *v.* Freeman, 75 Ala. 285), "The Wilson Farm" (Springer *v.* Kleinsorge, 83 Mo. 152); but "The Bradley Sand Bank" was held insufficient (Johnson *v.* Kellogg, 7 Hiesk. [Tenn.] 262).

A reference to land as that purchased from a particular person is sufficient. Smith *v.* Freeman, 75 Ala. 285; Atwood *v.* Cobb, 16 Pick. (Mass.) 227.

Where the contract refers to property, it will be presumed to refer to property owned by the promisor. Hurley *v.* Brown, 98 Mass. 545.

The reference must be such that it cannot apply to more than the one piece of property. Thus, an agreement by A to sell his house on a particular street is sufficient if he owns but one on that street,—Scanlon *v.* Geddes, 112 Mass. 115;—but not if he owns more than one,—Doherty *v.* Hill, 144 Mass. 465.

2. The cases in which the sufficiency of the identification of the subject-matter has been passed upon are very numerous; but all lay down the general principle stated in the text. The difficulty lies in its application. Particular decisions are often contradictory; but the difference in the decisions reached depends almost wholly on the view of the evidence taken by the court.

Certain points are definitely determined.

Thus, a memorandum of an agreement for a lease will be insufficient unless it states the term, and the date when the term is to begin, or sets out facts from which these may be ascertained. Fitzmaurice *v.* Bayley, 9 H. L. C. 79; Wood *v.* Aylward, 57 L. J. 84; s. c., 84 L. T. J. 79; Rock Portland Cement Co. *v.* Wilson, 52 L. J. Ch. 214; Marshall *v.* Berridge, 19 Ch. Div. 233; Clark *v.* Fuller, 16 C. B. (N. S.) 24; Clinan *v.* Cooke, 1 Sch. & Lef. 22; Erskine *v.* Armstrong, 20 L. R. Ir. 296; White *v.* McMahon, 18 L. R. Ir. 460; Phelan *v.* Tedcastle, 15 L. R. Ir. 169; Wyse *v.* Russell, 11 L. R. Ir. 173; Farwell *v.* Mather, 10 Allen (Mass.), 322; Hurley *v.* Brown, 98 Mass. 545; Abiel *v.* Radcliff, 13 Johns. (N. Y.) 297; Hodges *v.* Howard, 5 R. I. 149.

There is no inference that the day of the agreement is the time for the beginning of the term. Marshall *v.* Berridge, 19 Ch. Div. 233, overruling Jaques *v.* Millar, 6 Ch. Div. 153.

Parol evidence has been admitted to show the city in which the street is situated. Mead *v.* Parker, 115 Mass. 413.

A reference to the deeds of the land is sufficient. Owen *v.* Thomas, 3 M. & K. 353.

On the general point that any reference which makes the subject-matter so clear that no reasonable doubt can be entertained, and that parol evidence is unnecessary further to identify it is sufficient, see, further, Wylson *v.* Dunn, 34 Ch. Div. 569; Shardlaw *v.* Cotterell, 20 Ch. Div. 90; s. c., 18 Ch. Div. 280; Dyas *v.* Stafford. 7 L R. Ir. 590; Baumann *v.* James, L. R. 3 Ch. App. 508; Horsey *v.* Graham, L. R. 5 C. P. 9; McMurray *v.* Spicer, L. R. 5 Eq. 527; Barry *v.* Coombe, 1 Pet. (U. S.) 640; Leute *v.* Clarke (Fla.), 1 So. Rep. 149; Hall *v.* Soule, 11 Mich. 494; Tice *v.* Freeman, 30 Minn. 389; Whaley

Parol evidence is admissible to apply the words used to the object referred to.[1]

(4) *The Price.*—The memorandum must contain the price, if any, actually agreed upon.[2] If none was fixed, the memorandum will be sufficient if it states the agreement actually made.[3] If it states that the price has been paid, it need not set out what it was.[4]

(5) *The Terms.*—As has been stated already, the memorandum must contain all the terms and conditions of the contract; but no memorandum will be held insufficient because it does not set out an agreement as to an element of a contract, if, in fact, no agreement on that subject was made.[5]

*v.* Hinchman, 22 Mo. App. 483; Schroeder *v.* Toafe, 11 Mo. App. 267; Vindquest *v.* Perky, 16 Neb. 284; Williams *v.* Lawless, 15 Neb. 131; Tallman *v.* Franklin, 14 N. Y. 584; Sale *v.* Darragh, 2 Hilton (N. Y.), 184; Thornburg *v.* Marton, 88 N. Car. 293; Phillips *v.* Hooker Phil. Eq. (N. Car.) 173; Meadows *v.* Meadows, 3 McCord L. (S. Car.) 458; Simmons *v.* Spruil, 3 Jones Eq. (S. Car.) 9; White *v.* Motley, 4 Baxt. (Tenn.) 544; Morrison *v.* Dailey (Tex.), 6 So. West. Rep. 426.

1. Cave *v.* Hastings, 7 Q. B. Div. 125; Horsey *v.* Graham, L. R. 5 C. P. 9; Mead *v.* Parker, 115 Mass. 413; Bishop *v.* Fletcher, 48 Mich. 555; Tice *v.* Freeman, 30 Minn. 387; Vindquest *v.* Perky, 16 Neb. 284; Tallman *v.* Franklin, 14 N. Y. 584.

2. Elmore *v.* Kingscote, 5 B. & C. 583; Goodman *v.* Griffiths, 1 H. & N. 574; Williams *v.* Morris, 95 U. S. 444; Smith *v.* Arnold, 5 Mas. (C. C.) 414; Phillips *v.* Adams, 70 Ala. 373; North *v.* Mandel, 73 Ga. 400; s. c., 54 Am. Rep. 879; Farwell *v.* Lowther, 18 Ill. 252; Norris *v.* Blair, 29 Ind. 90; Barickman *v.* Kuykendall, 6 Blackf. (Ind.) 21; Camp *v.* Moreman (Ky.), 2 So. West. Rep. 179; Kay *v.* Curd, 6 B. Mon. (Ky.) 100; Ellis *v.* Deadman, 4 Bibb (Ky.), 466; McElroy *v.* Buck, 35 Mich. 434; Williams *v.* Lawless, 15 Neb. 131; Phelps *v.* Stillings, 60 N. H. 505; Soles *v.* Hickman, 20 Pa. St. 180; M'Farson's App., 11 Pa. St. 503; Fulton *v.* Robinson, 55 Tex. 401; Ide *v.* Stanton, 15 Vt. 685.

*Cf.* Johnson *v.* Ronald, 4 Munf. (Va.) 77, where the court admitted parol evidence as to price when the memorandum was silent. Nothing is said on this point in the opinion.

In two recent cases a memorandum stating that a sum was received in part payment of the price was held insufficient, though the full price was not stated. Williams *v.* Lawless, 15 Neb. 131; Fulton *v.* Robinson, 55 Tex. 401. See also Ellis *v.* Bray, 79 Mo. 227.

3. Of course where nothing is said between the parties as to price, the memorandum can contain nothing in regard to it, and will not be held insufficient on that account. Valpy *v.* Gibson, 4 C. B. 837; Aubal *v.* Levy, 10 Bing. 378; Hoadly *v.* M'Lame, 10 Bing. 482.

The law is well stated by Wilde, C.J., in Valpy *v.* Gibson, 4 C. B. 864: "With regard to the terms of the contract not having been completely agreed upon, it appears that the price was agreed on, but that the mode and time of payment were not at first specified. But the omission of the particular mode or time of payment, or even of the price itself, does not necessarily invalidate the contract of sale. Goods may be sold, and frequently are sold, when it is the intention of the parties to bind themselves by a contract which does not specify the price or the mode of payment, leaving them to be settled by some future agreement, or to be determined by what is reasonable under the circumstances."

If any agreement was made between the parties, it will be sufficient if it is stated; thus, if the memorandum states the price was to be referred to arbitrators,—Camp *v.* Moreman (Ky.), 2 So. West. Rep. 179; Brown *v.* Bellows, 4 Pick. (Mass.) 179; Norton *v.* Gale, 95 Ill. 533; s. c., 35 Am. Rep. 173;—or that it shall be the same the seller paid for it,—Atwood *v.* Cobb, 16 Pick. (Mass.) 227; — or the amount he has expended on it.—Vindquest *v.* Perky, 16 Neb. 284;—or simply says "terms moderate,"—Ashcraft *v.* Morrill, 4 Man. & Gr. 450.

Where the memorandum stated that the price was not to exceed $1000, it was held sufficient, although no evidence was offered that $1000 was the amount fixed. Chase *v.* Lowell, 7 Gray (Mass.), 33.

4. Holman *v.* Bank, 12 Ala. 369; Tugate *v.* Hansford, 3 Litt. (Ky.) 262.

5. Smith *v.* Shell, 82 Mo. 215; s. c., 52 Am. Rep. 365; Baumann *v.* James, L. R. 3 Ch. App. 508; Valpy *v.* Gibson, 4

Thus, the memorandum need not stipulate the time and place of delivery of property or performance of the contract, unless a stipulation in regard to that was made.[1]

If credit is to be given, it must be so stated;[2] and in the absence of any statement, it will be assumed the terms were cash.[3]

(6) *The Consideration.*—In *England* and many of the United States, the memorandum will be insufficient unless it contains the consideration for the promise.[4] It need not set it out

C. B. 837; McElroy *v.* Buck, 35 Mich. 434.

1. Valpy *v.* Gibson, 4 C. B. 837; Salmon Falls Mfg. Co. *v.* Goddard, 14 How. (U. S.) 446; Camp *v.* Moreman (Ky.), 2 So. West. Rep. 179; Kriete *v.* Meyer, 61 Md. 558; Gault *v.* Stormont, 51 Mich. 636; Goreley-Burnham Grocery Co. *v.* Capen, 23 Mo. App. 301; Smith *v.* Shell, 82 Mo. 215; s. c., 52 Am. Rep. 365; Davis *v.* Shields, 26 Wend. (N. Y.) 341; First Church *v.* Bigelow, 16 Wend. (N. Y.) 28.

But a memorandum of an agreement of marriage, which does not show the time of performance, was held insufficient, in Ullman *v.* Meyer, 10 Abb. N. C. (N. Y.) 281.

2. Carroll *v.* Powell, 48 Ala. 298; Ellis *v.* Deadman, 4 Bibb (Ky.), 102; Davies *v.* Shields, 26 Wend. (N. Y.) 341; Soles *v.* Hickman, 20 Pa. St. 180; Elfe *v.* Godsden, 2 Rich. Law (S. Car.), 473; Buck *v.* Pickwell, 27 Vt. 157.

When the memorandum, by agreement of the parties, states that the terms are cash, it will be sufficient; and oral evidence that really they are something else is inadmissible. Wright *v.* Weeks, 3 Bosw. (N. Y.) 372.

*Cf.* Smith *v.* Jones, 7 Leigh (Va.), 165.

Evidence to show when credit is to begin has been admissible. Salmon Falls Mfg. Co. *v.* Goddard, 14 How. (U. S.) 446. But not to establish the time for payment. Gault *v.* Stormont, 51 Mich. 636.

3. Valpy *v.* Gibson, 4 C. B. 837; Fessenden *v.* Mussey, 11 Cush. (Mass.) 127.

4. The rule that the memorandum must contain the consideration was laid down in the case of Wain *v.* Warlters, 5 East, 10, which went upon the ground that the statute required a note of the "agreement," and that the consideration was an essential element of an agreement. This case was somewhat questioned in Egerton *v.* Mathews, 6 East, 307, but has been maintained and followed as law in a long series of cases in *England*.

By Stat. 19 and 20 Vic. c. 97, a memorandum of a guarantee need not state the consideration. Holmes *v.* Durkee, 1 Cababe & E. 23.

Wain *v.* Warlters was followed and affirmed in Saunders *v.* Wakefield, 4 B. & Ald. 595; Morley *v.* Boothby, 3 Bing. 107; Jenkins *v.* Reynolds, 3 Brod. & B. 14. See cases cited in Browne Frauds, § 388, note.

In the *United States*, the doctrine of that case has been adopted in *Alabama*,—Foster *v.* Napier, 74 Ala. 393; Phillips *v.* Adams, 70 Ala. 373; Bolling *v.* Munchus, 65 Ala. 558;—*Colorado*,—Eppich *v.* Clifford, 6 Colo. 493; *cf.* Sanders *v.* Barlow, 21 Fed. Rep. 836;—*Delaware*,—Weldin *v.* Porter, 4 Houst. (Del.) 236;—*Georgia*,—Hargroves *v.* Cooke, 15 Ga. 321; Henderson *v.* Johnson, 6 Ga. 390, (but not in cases of guaranty: Davis *v.* Tift, 70 Ga. 52; Black *v.* McBain, 32 Ga. 128);—*Kansas* (*semble*),—Fry *v.* Platt, 32 Kan. 62;—*Maryland*,—Hutton *v.* Podgett, 26 Md. 228; Wyman *v.* Gray, 7 Harr. & J. 409; Elliott *v.* Gray, 7 Harr. & J. 457; Sloan *v.* Wilson, 4 Harr. & J. 322; Edelen *v.* Gough, 5 Gill, 103;—*Minnesota*,—Nichols *v.* Allen, 23 Minn. 542;—*Montana*,—O'Bannon *v.* Chamasero, 3 Mont. 419;—*New Hampshire*,—Underwood *v.* Campbell, 14 N. H. 393; Neilson *v.* Sanborne, 2 N. H. 413, (but not in cases of a guarantee: Goodman *v.* Bond, 59 N. H. 150; Britton *v.* Angier, 48 N. H. 420);—*New Jersey*,—Laing *v.* Lee, 20 N. J. Law, 337 (but by statute the consideration need not be stated: Stimson Am. Stat. Law, § 4142);—*New York*,—Drake *v.* Seaman, 97 N. Y. 230; Newberry *v.* Wall, 65 N. Y. 484; Church *v.* Brown, 21 N. Y. 315; Staats *v.* Howlett, 4 Denio (N. Y.), 35;—*Wisconsin*,—Taylor *v.* Pratt, 3 Wis. 674; Reynolds *v.* Carpenter, 3 Chand. (Wis.) 31.

The statutes of *Alabama*, *Minnesota*, *Nevada*, and *Oregon* expressly require the statement of the consideration; while those of *Illinois*, *Indiana*, *Kentucky*, *Maine*, *Massachusetts*, *Michigan*, *Nebraska*, *New Jersey*, and *Virginia* provide that it need not be stated. Stimson Am. Stat. Law, § 4142.

In *Illinois*, between 1869 and 1874, the

expressly, but it must be so framed that "any person of ordinary capacity must infer, from the perusal of it, that such, and no other, was the consideration upon which the undertaking was given."[1]

statute required its statement in all land contracts. Patmore *v.* Haggard, 78 Ill. 607.

In others of the United States, however, Wain *v.* Warlters has been repudiated, and the law finally established that the consideration need not be expressed.

In some, this has gone upon the words of the State statutes, the courts availing themselves of the distinction taken in Wain *v.* Warlters, and Egerton *v.* Mathews (6 East, 307), between "agreement" and "promise," and following the latter case in holding that, where the statute simply required a note of the "promise," it did not demand that it state the consideration.

In others, the courts have distinctly repudiated the doctrine that the presence of the word "agreement" in the statute requires that the consideration be contained in the memorandum.

That the consideration need not be contained in the memorandum is law in —*Arkansas* (*semble*),—Ringgold *v.* Newkirk, 3 Pike (Ark.), 97;—*Connecticut*,— Edgerton *v.* Edgerton, 8 Conn. 10; Sage *v.* Wilcox, 6 Conn. 81;—*Florida*,—Doreman *v.* Bigelow, 1 Fla. 281;—*Indiana*,—by statute, overthrowing Gregory *v.* Logan, 7 Blackf. (Ind.) 112;—*Kentucky*,—Ratliff *v.* Trout, 6 J. J. Marsh. (Ky.) 605;—*Louisiana*.—where the civil-law doctrine is followed, that no consideration is necessary;—*Maine*,—Williams *v.* Robinson, 73 Me. 186; s. c., 40 Am. Rep. 352; Gillighan *v.* Boardman, 29 Me. 79; Levy *v.* Merrill, 4 Greenl. (Me.) 180;—*Massachusetts*,—Packard *v.* Richardson, 17 Mass. 121;—*Michigan*, —Jones *v.* Palmer, 1 Doug. (Mich.) 379 (*semble*), now settled by statute; —*Mississippi*, — Wren *v.* Pearce, 4 S. & M. (Miss.) 91;—*Missouri*,—Halsa *v.* Halsa, 8 Mo. 303; Bean *v.* Valle, 2 Mo. 126;—*Nebraska* (*semble*), —McWilliams *v.* Lawless, 15 Neb. 131; —*North Carolina*,—Thornberg *v.* Marten, 88 N. Car. 293; Ashford *v.* Robinson, 8 Ired. Law (N. Car.), 114; Miller *v.* Irvine, 1 Dev. & B. Law (N. Car.), 103;—*Ohio*,— Reed *v.* Evans, 17 Ohio, 128;—*Tennessee*, —Gilman *v.* Kibler, 5 Humph. (Tenn.) 19; Taylor *v.* Ross, 3 Yerg. (Tenn.) 330; —*Texas*,—Fulton *v.* Robinson, 55 Tex. 401; Ellet *v.* Brittain, 10 Tex. 208;— *Vermont*,—Patchin *v.* Swift, 21 Vt. 292; Smith *v.* Ide, 3 Vt. 290;—*Virginia*,— Violett *v.* Patten, 5 Cranch (U. S.), 142.

In *Alabama*, the cases of Thompson *v.* Hall, 16 Ala. 204, and Rigby *v.* Norwood, 34 Ala. 129, which held the statement of consideration unnecessary, have been overthrown by statute; and so, in *California*, the cases of Ellison *v.* Jackson Co., 12 Cal. 542; Evoy *v.* Tewksbury, 5 Cal. 285; and Baker *v.* Cornwall, 4 Cal. 15.

The law in *South Carolina* is unsettled,— Wain *v.* Warlters was followed in Stevens *v.* Winn, 2 Nott & McC. Law (S. Car.), 372, note a;—but the question was treated as still open in Secat *v.* Tavel, 3 McCord Law (S. Car.), 158. And it is settled that no consideration need be stated in a memorandum of an agreement to guarantee. Tyler *v.* Givens, Riley (S. Car.), 56; Woodward *v.* Pickett, Dudley (S. Car.), 30.

1. *Per* Tindal, C.J., in Hawes *v.* Armstrong, 1 Bing. N. R. 761. The law is well settled in accord with the statement of the text; but it is impossible to determine in advance what a court will consider clear to a person of ordinary understanding. And many apparent inconsistencies arise from the different views taken in different jurisdictions upon similar facts. Hawes *v.* Armstrong, 1 Bing. N. R. 761; Raikes *v.* Todd, 8 Ad. & E. 846; Caballero *v.* Slater, 23 L. J. C. P. 67; Price *v.* Richardson, 15 M. & W. 389; Sykes *v.* Dixon, 9 Ad. & E. 697; Ryde *v.* Curtis, 8 Dowl. & R. 62; Lees *v.* Whitcomb, 5 Bing. 34; Powers *v.* Fowler, 4 El. & B. 511; Weldin *v.* Porter, 4 Houst. (Del.) 236; Hutton *v.* Padgett, 16 Md. 228; O'Bannon *v.* Chumasero, 3 Mont. 419; Church *v.* Brown, 21 N. Y. 315; Staats *v.* Howlett, 5 Denio (N. Y.), 559; Williams *v.* Ketchums, 19 Wis. 231.

The rule is well stated by Mr. Browne (Stat. of Fraud, § 406), thus: "In all cases where the language of the memorandum shows with reasonable clearness that the defendant's promise is designed to procure something to be done, forborne, or permitted by the party to whom it is made, either to or for the promisor or a third party, such act, forbearance, or permission, so stipulated for by the defendant, is taken to be the inducement to his promise; and the suggestion of it in his memorandum, preventing him from asserting that his promise is without consideration, suffices to make the memorandum binding upon the plaintiff."

"Value received" is a sufficient statement of the consideration;[1] and a recital of one dollar has been held enough.[2]

**2. Acceptance and Actual Receipt.**—(*a*) *Generally.*—The words of the 17th section, that the sale shall be allowed to be good where the buyer accepts and actually receives part of the goods, seem clear and simple; but no little difficulty has arisen in determining the exact meaning of "acceptance" and "actual receipt." The earlier cases confound the two with delivery, and many later ones use delivery carelessly, as though it were equivalent to them;[3] while many neglect the plain words of the statute, and treat it as though it read "acceptance *or* actual receipt."

The question has most frequently arisen in cases of guaranties. In some of the United States, it is definitely settled that the memorandum of a guarantee need not state the consideration. Davis *v.* Tift, 70 Ga. 52; Black *v.* McBain, 32 Ga. 128; Goodnow *v.* Bond, 59 N. H. 150; Britton *v.* Angier, 48 N. H. 420. But, generally, the rule is the same for guaranties as for other agreements affected by the statute.

If the memorandum of the guaranty does not of itself contain anything as to the consideration, but is written upon or connected with other contemporaneous instruments, parol evidence is admissible to show its connection with these; and if the consideration then appears, it will be sufficient. Coldham *v.* Shawler, 3 C. B. 312; Stead *v.* Liddord, 1 Bing. 196; D'Wolf *v.* Raband, 1 Pet. (U. S.) 476; Dorman *v.* Bigelow, 1 Fla. 281; Adams *v.* Bean, 12 Mass. 136; Simons *v.* Steele, 36 N. H. 73; Union Bank *v.* Coster, 3 N. Y. 203; Douglass *v.* Howland, 24 Wend. (N. Y.) 35; Bailey *v.* Freeman, 11 Johns. (N. Y.) 221; Lecat *v.* Tavel, 3 McCord Law (S. Car.), 158.

*Cf.* Draper *v.* Snow, 20 N. Y. 331, where such evidence was refused, the court refusing to allow a principal contract, upon which the words "I guarantee the within" had been written, to be read in evidence to show the consideration for the guaranty.

If the consideration is forbearance, it must appear plainly. Powers *v.* Fowler, 4 El. & B. 511; Emmott *v.* Kearns, 5 Bing. N. R. 559; Wills *v.* Ross, 77 Ind. 1.

The fact that a memorandum of guaranty refers to the principal debt as already due, is not necessarily enough to prove that forbearance to enforce that debt was the consideration for the guaranty. Wain *v.* Warlters, 5 East, 10; Cole *v.* Dyer, 1 Cr. & J. 461; James *v.* Williams, 5 B. & Ad. 1109; Smith *v.* Ives, 15 Wend. (N. Y.) 182. *Contra*, see Neelson *v.* Sanborne, 2 N. H. 413.

Where the guaranty and the principal obligation are not contemporaneous, the memorandum of the guarantee must state the consideration. Rigby *v.* Norwood, 34 Ala. 129; Brewster *v.* Silence, 8 N. Y. 207; Gould *v.* Moring, 25 Barb. (N. Y.) 444; Wood *v.* Wheelock, 25 Barb. (N. Y.) 625. And so if made at the same time, if the principal obligation is given for a pre-existing debt. Hall *v.* Farmer, 2 N. Y. 553.

An indorsement of a note has been held an insufficient memorandum of guaranty. Schafer *v.* Farmer's, etc., Bank, 59 Pa. St. 144.

1. Osborne *v.* Baker, 34 Minn. 307; s. c., 37 Am. Rep. 55; Miller *v.* Cook, 23 N. Y. 495; Cooper *v.* Dedrick, 22 Barb. (N. Y.) 516; Cheney *v.* Cook, 7 Wis. 413; Day *v.* Elmore, 4 Wis. 495.

2. Bolling *v.* Munchus, 65 Ala. 558.

3. Thus, in Searle *v.* Keeves, 2 Esp. 598, Eyn, C. J., says: "The Statute of Frauds does not attach where there has been earnest or a delivery of a part of the things sold." In Chaplin *v.* Rogers, 1 East, 192, Lord Kenyon says: "I do not mean to disturb the settled construction of the statute, that, in order to take a contract for the sale of goods of this value out of it, there must be either a part delivery of the thing or a part payment of the consideration, or the agreement must be reduced to writing in the manner therein specified." And Lord Ellenborough, in Anderson *v.* Scot, 1 Camp. 235, note, spoke of "an incipient delivery, sufficient to take the case out of the Statute of Frauds."

Similar loose expressions occur in Hinde *v.* Whitehouse, 7 East, 558; Elmore *v.* Stone, 1 Taunt. 457; Blenkinsop *v.* Clayton, 7 Taunt. 597; Tempest *v.* Fitzgerald, 3 B. & Ald. 680; Bell *v.* Bament, 9 M. & W. 36; Wright *v.* Percival, 8 L. J. Q. B. (N. S.) 258; Norman *v.* Phillips, 14 M. & W. 277; King *v.* Jarman, 35 Ark. 190; s. c., 37 Am. Rep. 11; Kuhns *v.* Gates, 92 Ind. 66; Dehority *v.* Paxson, 97 Ind. 253;

It is settled clearly that both acceptance and actual receipt are necessary,[1] and that the burden of proving them rests upon the person trying to set up the contract.[2] They are both facts, and the circumstances which go to make up acceptance and actual receipt are for the jury;[3] but whether or not certain facts amount in law to an acceptance, or to actual receipt, is of course for the court.[4]

(*b*) *Actual Receipt.*—To the existence of actual receipt by the buyer,[5] it is essential that there should be a relinquishment by the seller of his vendor's lien,[6] coupled with a taking of the goods in whole or part by the buyer, or an agent with his authority, with the intention of maintaining a possession adverse to the seller.[7] The duration of this possession is immaterial.[8]

Vincent *v.* Germond, 11 Johns. (N. Y.) 283.

**1.** "This provision is not complied with unless the two things concur: the buyer must accept, and he must actually receive, part of the goods; and the contract will not be good unless he does both." Blackburn Sales, 92; Kent *v.* Huskinson, 3 B. & P. 233; Maberley *v.* Sheppard, 10 Bing. 99; Billin *v.* Henkel (Colo.), 13 Pac. Rep. 420; Hewes *v.* Jordan, 39 Md. 472; Frostberg Min. Co. *v.* N. E. Glass Co., 9 Cush. (Mass.) 115; Knight *v.* Mann, 118 Mass. 143; Heermance *v.* Taylor, 14 Hun (N. Y.), 149; Hollenback *v.* Cochran, 20 Hun (N. Y.), 416.

**2.** Maberley *v.* Sheppard, 10 Bing. 99; Rennick *v.* Sandford, 120 Mass. 309.

**3.** Blenkinsop *v.* Clayton, 7 Taunt. 597; Edan *v.* Dudfield, 1 Q. B. 302; Lillywhite *v.* Devereux, 15 M. & W. 285; Coleman *v.* Gibson, 1 Moody & Rob. 168; Curtis *v.* Pugh, 10 Q. B. 111; Garfield *v.* Paris, 96 U. S. 557; Williams *v.* Evans, 39 Mo. 201; Wylie *v.* Kelly, 41 Barb. (N. Y.) 594.

**4.** Edan *v.* Dudfield, 1 Q. B. 302; Norman *v.* Phillips, 14 M. & W. 277; Denny *v.* Williams, 5 All. (Mass.) 1; Stone *v.* Browning, 68 N. Y. 598.

**5.** An acceptance by an assignee in insolvency, of the buyer, is sufficient. McElroy *v.* Seery, 61 Md. 389; s. c., 48 Am. Rep. 110.

**6.** The language of the cases upon this point is often contradictory; but the law is clearly established that, until the seller has parted with his lien, there can be no actual receipt. It must be clear upon principle, since possession by the buyer is essential to actual receipt, and there can be a lien only while the possession is in the seller or the goods are *in transitu.* Proctor *v.* Jones, 2 C. & P. 532; Elmore *v.* Stone, 1 Taunt. 457; Tempest *v.* Fitzgerald, 3 B. & Ald. 680; Carter *v.* Toussaint, 5 B. & Ald. 855; Maberley *v.* Sheppard, 10 Bing. 99; Cusack *v.* Robinson, 1 B. & S. 299; Stone *v.* Browning, 51 N. Y. 211; s. c., 68 N. Y. 598; Wright *v.* Percival, 8 L. J. Q. B. (N. S.) 258. So far as it is *contra*, it is not law.

Merely putting the goods into the buyer's custody is not enough. Phillips *v.* Bistolli, 2 B. & C. 511; Tempest *v.* Fitzgerald, 3 B. & Ald. 680; Hinchman *v.* Lincoln, 124 U. S. 38; Baker *v.* Cuyler, 12 Barb. (N. Y.) 667.

**7.** Thus, merely taking goods into one's hand for the purpose of examination does not amount to an actual receipt of them. Phillips *v.* Bistolli, 2 B. & C. 511; Moore *v.* Love, 57 Miss. 765. Nor would such an act as putting them in a safe place while refusing to accept them. Nicholle *v.* Plume, 1 C. & P. 272.

So, where goods are put in a third person's hands, to be delivered upon certain conditions, his possession, although in one sense a possession for the buyer, is not adverse to the seller, and does not constitute an actual receipt. Hinchman *v.* Lincoln, 124 U. S. 38.

**8.** This must necessarily be so; for the act is momentary, and, once done, can never be undone.

Thus, in Somers *v.* McLaughlin, 57 Wis. 358, a horse then in C's keeping was sold by A to B, payment to be in future. B went to C and received the horse on an oral order from A, saying that he took it merely for trial. Later he returned it, and refused to take it. It was held that he had actually received it, yet his possession of it adversely to A may have been but momentary.

In Marvin *v.* Wallis, 6 El. & B. 726, Coleridge, J., said: "It is admitted that if there be an actual visible possession in the vendee for a single moment, that is enough: the question cannot turn on time."

Actual receipt is complete when the seller has given up his lien or renounced the benefit of it, and there has been, with his assent,[1] either: (1) A delivery of part or the whole of the goods to the buyer himself, and a taking by him personally, with the intention of maintaining a possession adverse to the seller;[2] or (2) a delivery to an agent appointed by the buyer, and the taking by him with the buyer's assent, with a similar intent;[3] or (3) a holding by the vendor, or a former agent of his, in a changed character as bailee of the buyer, with the buyer's assent;[4] or (4) a holding by the buyer, or an agent of his already in possession of the goods, in a changed character as owner of the goods.[5]

Where the goods are in a warehouse, or are bulky, or inaccessible, the delivery of a warehouse receipt, a bill of lading, or any symbolic delivery will not constitute an actual receipt, even though taken by the buyer, until the warehouseman or other keeper has attorned to the buyer,[6] or he has exercised some act of

1. A mere tortious taking without his assent will not be a sufficient actual receipt.

In Baker *v.* Cuyler, 12 Barb. (N. Y.), 667, A agreed to sell to B all the wheat in his warehouse, save 800 bushels, which he was first to take away. Before A removed any, B entered and carried off 100 bushels. A demanded that he return them, but, later, took off his own 800 bushels and notified B to take the rest. This B failed to do. In a suit for the price of the balance, it was held that there had been no actual receipt, since to actual receipt there must be a parting with possession by the seller, with the intention of vesting it in the buyer.

Abbott, C.J., intimated a contrary opinion, in Tempest *v.* Fitzgerald, 3 B. & Ald. 680, declaring: "I do not mean, however, to say that, if the buyer were to take away the goods without the assent of the seller, that would not be sufficient to bind him."

It would seem that it did not lay in his mouth to deny a receipt if the seller chooses to assent to it; but the decided case is otherwise.

2. It can hardly be necessary to cite cases which illustrate such a receipt. Tompkinson *v.* Staight, 25 L. J. C. P. 85; Dodsley *v.* Varley, 12 Ad. & E. 632.

3. Elmore *v.* Stone, 1 Taunt. 457; Hart *v.* Sattley, 3 Camp. 528; Hanson *v.* Armitage, 5 B. & Ald. 557; Dodsley *v.* Varley, 12 Ad. & E. 632; Bushel *v.* Wheeler, 15 Q. B. 442, note; Frostberg Min. Co. *v.* New England Glass Co., 9 Cush. (Mass.) 115.

A general carrier is not an agent to accept; and so a delivery to him is not an actual receipt by the buyer. Hopton *v.* M'Carthy, 10 L. R. Ir. 266; Billin *v.* Henkel, 9 Colo. 394; Rodgers *v.* Phillips, 40 N. Y. 519; Grey *v.* Cary, 9 Daly (N.Y.), 363. See Astey *v.* Emery, 4 M. & S. 262; Hunt *v.* Hecht, 8 Exch. 814; Nicholson *v.* Bower, 1 E. & E. 172.

And clearly a delivery to a carrier selected by the seller himself is not an actual receipt. Simmons Hardware Co. *v.* Mullen, 33 Minn. 195.

4. Beaumont *v.* Brengeri, 5 C. B. 301; Marvin *v.* Wallis, 6 El. & B. 726; Castle *v.* Sworder, 6 H. & N. 828; Walden *v.* Murdock, 23 Cal. 540; Bassett *v.* Camp, 54 Vt. 232; Greene *v.* Merriam, 28 Vt. 801.

5. Edan *v.* Dudfield, 1 Q. B. 302; Lillywhite *v.* Devereux, 15 M. & W. 285; *Re* Hoover, 33 Hun (N. Y.), 553; Snider *v.* Thrall, 56 Wis. 674.

6. Bentall *v.* Burn, 3 B. & C. 423; Forina *v.* Home, 16 M. & W. 119; Godts *v.* Rose, 17 C. B. 229, Simmonds *v.* Humble, 13 C. B. (N. S.) 262; King *v.* Jarman, 35 Ark. 190; s. c., 37 Am. Rep. 11; Franklin *v.* Long, 7 Gill & J. (Md.) 407; Boardman *v.* Spooner, 13 All. (Mass.) 353; Hallgarten *v.* Oldham, 135 Mass. 1; Bass *v.* Walsh, 39 Mo. 192; Williams *v.* Evans, 39 Mo. 201; Hankins *v.* Baker, 46 N. Y. 666.

An assent to receive the symbol as the actual receipt of the goods seems enough without attornment. Franklin *v.* Long, 7 Gill & J. (Md.) 407; Bass *v.* Walsh, 39 Mo. 192.

In King *v.* Jarman, 35 Ark. 190; s. c., 37 Am. Rep. 11, cotton in a warehouse was sold, and the seller delivered an order to the buyer, and himself notified the warehouseman to deliver the cotton. The buyer sent his man for the cotton, but the warehouse was closed, and a de-

ownership inconsistent with a denial of his actual receipt of the goods.[1]

The evidence which will justify a jury in finding an actual receipt must always be clear; but in the third and fourth cases it must be very clear.[2]

Actual receipt must always consist in something more than mere words.[3]

(*c*) *Acceptance.*—The exact meaning of acceptance is involved in doubt.[4] The result of the *English* cases seems to be, that an acceptance is an assent by the buyer to a proposal by the seller, that certain goods shall form part of the goods sold.[5] It is not

livery was postponed till the morrow. During the night the cotton was destroyed by fire. The warehouseman testified that, from the time of the notification by the seller, he regarded himself as holding for the buyer. It was held that there had been sufficient acceptance and actual receipt, though here the attornment was without the buyer's knowledge, and so without his active assent.

1. Thus, if he has sold them in the mean time, it would hardly lie in his mouth to deny an actual receipt, though in fact none had taken place.

Chaplin *v.* Rogers, 1 East, 192, is such a case. The purchaser from the vendee took away the goods from the vendor, against the vendee's direction and without his knowledge, yet the court held it sufficient. See also Currie *v.* Anderson, 2 El. & El. 592. But see Holmes *v.* Hoskins, 9 Exch. 753.

2. Thus, in Norman *v.* Phillips, 14 M. & W. 277, a silent retention of goods for one month was held insufficient evidence. Thompson *v.* Maceroni, 3 B. & C. 1; Lillywhite *v.* Devereux, 15 M. & W. 185; Holmes *v.* Hoskins, 9 Exch. 753.

Merely marking goods, however, has been held a sufficient evidence of actual receipt,—Anderson *v.* Scott, 1 Camp. 235, note; Bill *v.* Bament, 9 M. & W. 36; Dyer *v.* Libby, 61 Me. 45,—even though the marking was by the seller or his agents, —Walden *v.* Murdock, 23 Cal. 540; Byassee *v.* Reese, 4 Metc. (Ky.) 372.

It was held insufficient in Proctor *v.* James, 2 C. & P. 532; Kesly *v.* Tenant, 13 Ir. C. L. 394.

3. Thus, where an employee of the seller was invoicing certain goods, a person standing near said he would take them, and the seller said he could have them. It was held that the mere words could not constitute an actual receipt of the goods by the buyer. Dehority *v.* Paxson, 97 Ind. 253.

So, where the seller of stocks put them in the hands of a third party, to be delivered upon the performance of a condition precedent, and the buyer assented, and later introduced the seller as the one who had sold him the stock, it was held insufficient. Hinchman *v.* Lincoln, 124 U. S. 38.

In Shindler *v.* Houston, 1 Const. (N. Y.) 261, the buyer inspected certain lumber as it lay on the wharf, and made an offer for it. The seller said, "The lumber is yours;" and the buyer gave directions as to the bill. Later he refused to take the lumber. It was held that there had been no actual receipt, and that, "in order to satisfy the statute, there must be something more than mere words."

So, where A and B bargained for a sale of hay, and A, in sight of the hay, made an offer for it, B said, "The hay is yours," and A said "Yes," it was held that mere words could not constitute an actual receipt. Hollenbeck *v.* Cochran, 20 Hun (N. Y.), 416.

And where A agreed to buy a scale of B, cash on delivery, a carter took it to A's place of business and carried in the bill to A, who directed the carter to drive to another part of the building and put it in. On the way, the carter accidentally broke the scale. It was held that there had been no sufficient actual receipt by A. Grey *v.* Cary, 9 Daly (N. Y.), 363. See also *Re* Hoover, 33 Hun (N. Y.), 553. Sheby *v.* Whitman (Mich.), 34 No. West. Rep. 879.

Mere words are not enough to prevent a taking from being an actual receipt.

Thus, where A, who had agreed to purchase a horse, then in C's keeping, from its owner, B, got it from C on an oral order from B, saying that he took it for trial only, and, later, returned it, the court held there had been an actual receipt by A. Somers *v.* McLaughlin, 57 Wis. 358.

4. Acceptance is a purely mental act, and, like all such acts, is often impossible to prove. The question in all cases is, then, not, Has there been an acceptance? but, Is there evidence from which we must infer there has been an acceptance?

5. Stephen § 17 of the Statute of

necessary that the buyer should take to the goods as owner; it is sufficient that by some act of his he agrees, or precludes himself from denying, that certain goods are the very ones in regard to which he has entered into a contract of sale.[1]

The law in the *United States* is far from settled, but seems to require that the buyer shall take to the goods as owner under a contract of sale.[2]

Acceptance may precede, accompany, or follow the actual receipt of the goods;[3] but where the sale is by sample, the buyer must

Frauds, 1 Law Quar. Rev. 14; Blackburn Sales, 23.

1. An acceptance, to satisfy the Statute of Frauds, need not be an act which precludes the buyer from objecting that the goods are not such as he bargained for, and, accordingly, an acceptance, instead of being a consent to take to goods as the owner, may be accompanied by a refusal to take to them at all. The later *English* cases treat an acceptance as the mere identification of goods as those in regard to which one has contracted.

Thus, in the latest case, Page *v.* Morgan, 15 Q. B. Div. 228, the parties had entered into a contract for the sale of certain grain, which was shipped to the buyer, taken and examined by him, and immediately rejected and refused. There was the most distinct refusal to accept the goods as owner, and yet the court held that there had been an acceptance sufficient to satisfy the Statute of Frauds. The buyer, by his very act of examining the grain to see if it was such as agreed upon, had identified it as goods which formed the subject of a contract to which he was a party.

The same decision was rendered in Morton *v.* Tibbett, 15 Q. B. 428, where the purchaser of wheat by sample, before a delivery to himself, resold it. The second purchaser refused to accept it, on the ground that it was not up to sample, and thereupon the first repudiated the contract with his vendor. It was held that the resale was a sufficient acceptance, but that the first purchaser was not precluded from setting up that the wheat did not correspond with the contract. Lord Campbell, C.J., said: "There may be an acceptance and receipt within the meaning of the act, without the buyer having examined the goods, or done anything to preclude him from contending that they do not correspond with the contract. The acceptance to let in parol evidence of the contract appears to us to be a different acceptance from that which affords conclusive evidence of the contract having been fulfilled."

The acceptance need not be such that it affirms all the conditions or furnishes evidence of all the terms of the contract. Tomlinson *v.* Staight, 25 L. J. C. P. 85.

"The statute does not mean that the thing which is to dispense with the writing is to take the place of all the terms of the contract, but that the acceptance is to establish the broad fact of the relation of vendor and vendee." *Per* Williams, J.

2. Thus, in Remick *v.* Sandford, 120 Mass. 309, Devens, J., says the acceptance must "be by some unequivocal act done on the part of the buyer, with the intent to take possession of the goods as owner." In Knight *v.* Mann, 120 Mass. 219, goods picked out in accord with buyer's orders were placed ready for delivery, and seen by buyer, who promised to send for them, but were destroyed by fire before an actual taking by him. It was held there had been no sufficient acceptance. And in the case of Atherton *v.* Newhall, 123 Mass. 141, where part of the goods had actually been received, but there were circumstances tending to prove that it was not the buyer's intention to accept them under the contract, it was held that there had been no sufficient acceptance, because the acts were "not with an intention to perform the whole contract, and to assert the buyer's ownership under it."

So, too, in Stone *v.* Browning, 51 N. Y. 211; s. c., 68 N. Y. 598, it was held that there must be an acceptance of the goods, with the intention of taking possession as owners absolutely and unconditionally, in full performance of the contract of sale.

Yet in Vanderbilt *v.* Little, 43 N. J. Eq. 669, it was held that an actual taking of goods delivered under certain contracts, and use of the goods, amounted to an acceptance, although they were taken in ignorance of certain facts, and not accepted on account of those contracts.

And in Meyer *v.* Thompson (Oreg.), 18 Pac. Rep. 16, the acts of the servants of the buyer, in removing coal from a wharf to his premises, was a sufficient acceptance, although he had never seen the coal, and, when he did see it, refused to accept it.

3. That acceptance may precede was de-

first have an opportunity to examine the goods before he can accept them,[1] unless the sample be a bulk sample, and he accepts that.[2] And where the goods are unspecified, he must have a similar opportunity.[3]

The buyer may preclude himself by his acts from denying his acceptance.

An acceptance may be inferred where goods are marked or set apart for the buyer with his consent, before an actual receipt by him;[4] or where he inspects and approves them before such receipt;[5] or where, having actually received them, he unreasonably detains them,[6] or exercises any act of ownership over them, which renders it impossible, without self-contradiction, to deny that he has consented to take to them as owner.[7]

cided in Cusack *v.* Robinson, 1 B. & S. 299; that it may accompany or follow the actual receipt can need no citation of authority. Wilcox Co. *v.* Green, 72 N. Y. 17.

There can be no acceptance, however, until there is a complete contract. Proctor *v.* Jones, 2 C. & P. 532. And there can be none after the vendor has done any act to revoke the contract. Smith *v.* Hudson, 6 B. & S. 431; Taylor *v.* Wakefield, 6 El. & B. 765.

1. Hanson *v.* Armitage, 5 B. & Ald. 557; Morton *v.* Tibbett, 15 Q. B. 428; Hunt *v.* Hecht, 8 Exch. 814; Smith *v.* Hudson, 6 B. & S. 431; Bacon *v.* Eccles, 43 Wis. 227.

2. Hinde *v.* Whitehouse, 7 East, 558; Talver *v.* West, Holt, 178; Gardner *v.* Grant, 2 C. B. (N. S.) 340; Brock *v.* Knower, 37 Hun (N. Y.), 609.

Taking such a sample, with intention not to accept, is not an acceptance. Nicholson *v.* Brower, 1 El. & El. 172.

The acceptance of a sample merely as a specimen does not bind the buyer. Moore *v.* Love, 57 Miss. 765.

3. Morton *v.* Tibbett, 15 Q. B. 428; Knight *v.* Mann, 118 Mass. 143; s. c., 120 Mass. 429; Atherton *v.* Newhall, 123 Mass. 141; Powlski *v.* Hargreaves, 47 N. J. Law, 334; s. c., 54 Am. Rep. 162; Stone *v.* Browning, 68 N. Y. 598; s. c., 51 N. Y. 211; Cooke *v.* Millard, 65 N. Y. 352; Brewster *v.* Taylor, 63 N. Y. 587.

4. Proctor *v.* Jones, 2 C. & P. 532 (where the buyer tasted some wine and ordered casks marked with his name), and Rappleye *v.* Adee, 65 Barb. (N. Y.) 589 (where sheep were picked out and marked by the buyer), illustrate such an acceptance by marking.

5. Chaplin *v.* Rogers, 1 East, 192; Beaumont *v.* Brengeri, 6 C. B. 301; Hollenbock *v.* Cochran, 20 Hun (N. Y.), 416.

6. The unreasonable detention of the goods is clearly evidence of ownership. Mere detention for a reasonable time for the sake of inspecting the goods would seem a sufficient acceptance under the decisions in Page *v.* Morgan, 15 Q. B. Div. 228, and Morton *v.* Tibbett, 15 Q. B. 428; but it has been held that such detention does not necessarily constitute an acceptance, even where the goods are unpacked and opened for inspection. Parker *v.* Wallis, 5 E. & B. 21; Coleman *v.* Gibson, 1 Moo. & R. 168; Bushel *v.* Wheeler, 15 Q. B. 442, note; Norman *v.* Phillips, 14 M. & W. 277. In the last case, a retention of one month was held insufficient.

A retention of *indicia* of title for an unreasonable time will have the same effect as an acceptance. Meredith *v.* Meigh, 2 El. & B. 364; Currie *v.* Anderson, 2 El. & El. 592; Farina *v.* Home, 16 M. & W. 119.

But where goods are already in the possession of the alleged purchaser, a continued possession by him is not necessarily sufficient evidence of acceptance. *Re* Hoover, 33 Hun (N. Y.), 553.

7. The cases which illustrate this point are legion. Any act on the part of the buyer in dealing with the goods as owner must necessarily render it impossible for him to deny that he has accepted them. A resale, a confusion with his own goods, any act inconsistent with a denial of ownership, will be sufficient; and for the purposes of such acceptance a dealing with *indicia* of title will have the same effect as a dealing with the goods. Blenkinsop *v.* Clayton, 7 Taunt. 597; Baines *v.* Jevons, 7 Car. & P. 288; Wright *v.* Percival, 8 L. J. Q. B. (N. S.) 258; Dodslee *v.* Varley, 12 Ad. & E. 632; Lillywhite *v.* Devereux, 15 M. & W. 285; Curtis *v.* Pugh, 10 Q. B. 111; Parker *v.* Wallis, 5 El. & B. 21; Tomkinson *v.* Staight, 25 L. J. C. P. 85; Simmons *v.* Humble, 13 C. B. (N. S.) 258; Rennick

A mere promise to accept does not amount to an acceptance, nor does the moral obligation to accept.[1]

A carrier appointed by the buyer to receive the goods is not necessarily his agent to accept them.[2] The seller, though often the buyer's agent to identify goods in cases of sales of unspecified goods, is not his agent to accept them.[3]

(*d*) *Time.*—The acceptance and actual receipt may take place at any time before action is brought, but will not be sufficient if after action is brought[4] or after the contract has been revoked by the seller.[5]

An actual receipt on Sunday is sufficient to satisfy the statute.[6]

(*e*) *Part of the Goods.*—Any part, however small, will be sufficient.[7] An acceptance and actual receipt of a sample which is part of the bulk of the goods will be sufficient.[8]

Where only part of the goods are in existence at the time of the contract, an acceptance of that part is sufficient.[9]

Where several articles are purchased, or purchases are made, at different times, an acceptance and receipt of one binds the bargain for all, if the transaction is really one whole.[10] Purchases at auction are regarded as separable in *England*, but not in this country.[11]

*v.* Sandford, 120 Mass. 316; Quintard *v.* Bacon, 99 Mass. 185; Rodgers *v.* Phillips, 40 N. Y. 519; Vincent *v.* Germond, 11 Johns. (N. Y.) 283; Greene *v.* Merriam, 28 Vt. 801.

1. Kent *v.* Huskinson, 3 Bos. & P. 233; Stone *v.* Browning, 68 N. Y. 598.

2. Hart *v.* Sattley, 3 Camp. 528, *contra*, is overruled by Meredith *v.* Meigh, 2 El. & B. 364; and the law is firmly established as stated in the text. Billin *v.* Henkel, 9 Colo. 394; Simmons Hardware Co. *v.* Mullen, 33 Minn. 195; Spencer *v.* Hale, 30 Vt. 314.

An order to deliver to a carrier appointed by the buyer, for transportation to a place where the buyer cannot be to accept or reject the goods, may be evidence of acceptance. Currie *v.* Anderson, 2 El. & El. 592.

3. See Index, § 13, Langdell's Cases on Sales, 1022, and cases there cited; Kent *v.* Huskinson, 3 B. & P. 233; Hart *v.* Sattley, 3 Camp. 528; Haur *v.* Palmer, 3 B. & Ald. 321; Hanson *v.* Armitage, 5 B. & Ald. 557; Acebal *v.* Levy, 10 Bing. 376; Meredith *v.* Meigh, 2 El. & B. 364; Hart *v.* Bush, El. B. & El. 494; Coombs *v.* Bristol, etc., R. Co., 3 H. & N. 510; Rodgers *v.* Phillips, 40 N. Y. 519.

4. Bill *v.* Bament, 9 M. & W. 36; Marsh *v.* Hyde, 3 Gray (Mass.), 331; Seymour *v.* Davis, 2 Sandf. (N. Y.), 239, which holds they must be, at the time of the contract under the *New York* statute, must be regarded as overruled by Jackson *v.* Tupper, 101 N. Y. 515, which approves McKnight *v.* Dunlap, 1 Seld. (N. Y.) 537.

5. Smith *v.* Hudson, 6 B. & S. 431; Taylor *v.* Wakefield, 6 El. & B. 765.

In Sullivan *v.* Sullivan (Mich.), 38 No. West. Rep. 472, the buyer, after an oral order, telegraphed to cancel it, but, learning that the goods had then been shipped, accepted them. This was held a sufficient acceptance.

6. Beaumont *v.* Brengeri, 5 C. B. 301. See 9 Amer. Law Rev. 436–438.

7. Robde *v.* Thevaites, 6 B. & C. 388; Elliott *v.* Thomas, 3 M. & W. 170; Williams *v.* Burgess, 10 Ad. & E. 499; Mills *v.* Hunt, 20 Wend. (N. Y.) 431.

8. Hinde *v.* Whitehouse, 7 East, 558; Talver *v.* West, Holt, 178; Gardner *v.* Grant, 2 C. B. (N. S.) 340. See Hart *v.* Mills, 15 M. & W. 85; Farmer *v.* Gray, 16 Neb. 401; Moore *v.* Love, 57 Miss. 765; Smith *v.* Fisher 59 Vt. 53.

9. Scott *v.* Eastern Counties R. Co., 120 M. & W. 33; Van Woest *v.* Albany, etc., R., 67 N. Y. 538.

10. Boldey *v.* Parker, 2 B. & C. 37; Elliott *v.* Thomas, 3 M. & W. 170; Champion *v.* Short, 1 Camp. 53; Bailey *v.* Sweeting, 9 C. B. (N. S.) 843; Garfield *v.* Paris, 96 U. S. 557; Farmer *v.* Gray, 16 Neb. 401; Allard *v.* Greasért, 61 N. Y. 1.

11. Emmerson *v.* Neelis, 2 Taunt. 38; Jenness *v.* Wendell, 51 N. H. 63; Mills *v.* Hunt, 17 Wend. (N.Y.) 333; Tompkins *v.* Haas, 2 Pa. St. 74.

(*f*) *Title.*—The effect of the Statute of Frauds in preventing the passing of title and affecting the right of stoppage *in transitu* will be discussed under the title of SALES; and the result of the acceptance and actual receipt of part of the goods sold will be there dwelt upon.

**3. Earnest and Part Payment.**—(*a*) *Earnest.*—Earnest is something given by the buyer to the seller to be forfeited to the seller in the event that the buyer fails to complete his bargain.[1] The giving of earnest is a complete satisfaction of the 17th section of the Statute of Charles II. and of the corresponding sections of the State statutes. It must be money or money's worth,[2]—a mere crossing the hand with money is not sufficient;[3] and it must be given by the buyer to the seller,—a deposit of money with a third party to be forfeited to the one who fails or refuses to go on is not earnest.[4]

(*b*) *Part Payment.*—To constitute a part payment, there must be an actual transfer of money or money's worth made from the buyer to the seller.[5] A tender of part payment is insufficient if the seller refuse it.[6] A promise to accept something in part payment is insufficient while it remains unexecuted;[7] and a promise to pay is not part payment until performed.[8] And so, too, a promise by the buyer to give the seller credit upon money due from him is not enough unless the credit is actually given.[9]

1. For a fine statement of the nature and history of earnest, see the remarks of Fry, J., in Howe *v.* Smith, 27 Ch. Div. 89, 101, 102. He traces it from Phœnicia, and quotes Bracton, lib. II., c. 27, as to the early English law: "Item cum arrarum nomine, aliquid datum fuerit ante traditionem, si emptorem emptionis pœnituerit et a contractu resilare voluerit perdut quod dedit: si autem venditorem, quod arrarum nomine reciperit emptori restituat duplicatum."

2. Artcher *v.* Zeb, 5 Hill (N. Y.), 200.

3. Blenkinsop *v.* Clayton, 7 Taunt. 597, where the buyer, taking a shilling from his pocket, drew the edge across the seller's palm to "strike off" the bargain, and it was claimed that this amounted to a giving of earnest. The court held that nothing was given and the act not earnest.

4. Noakes *v.* Morey, 30 Ind. 103; Howe *v.* Hayward, 108 Mass. 54. In the latter case Chapman, C.J., said: "As used in the Statute of Frauds, 'earnest' is regarded as a part payment of the price." This is probably true in the sense that what was given in earnest was generally taken as part of the payment when the price came to be paid, but not in the sense that earnest and part payment are the same.

"That earnest and part payment are two distinct things is apparent from the 17th section of the Statute of Frauds which deals with them as separate acts, each of which is sufficient to give validity to a parol contract." *Per* Fry, J., in Howe *v.* Smith, 27 Ch. Div. 102.

5. Hudnut *v.* Wier, 100 Ind. 501; Artcher *v.* Zeb, 5 Hill (N. Y.), 200; Walrath *v.* Ingles, 64 Barb. (N. Y.) 265.

6. Edgerton *v.* Hodge, 41 Vt. 676.

7. Walker *v.* Nussey, 16 M. & W. 302; Edgerton *v.* Hodge 41 Vt. 676.

8. In Combs *v.* Bateman, 10 Barb. (N. Y.) 573, it was held that giving one's own note was not part payment since, that was a mere unperformed promise to pay; but this is open to serious question if the note is taken in absolute payment.

It has been held that giving a note not governed by the law merchant does not constitute a sufficient part payment, Krohn *v.* Bantz, 68 Ind. 277. It would seem that giving a note of a third person would be sufficient. An agreement to pay to a third person was held sufficient in Cotteril *v.* Stevens, 10 Wis. 422; but the facts show that the third person actually gave the seller credit for the payment.

9. Gaddis *v.* Leison, 55 Ill. 83; Gilman *v.* Hill, 36 N. H. 311; Matthiesson, etc., Co. *v.* McMahon, 38 N. J. Law, 536; Organ *v.* Stewart, 60 N. Y. 413; Brabin *v.*

Whether there has been such an actual transfer is a question of fact for the jury.[1]

Except where, as in *New York*[2] and *Wisconsin*,[3] the statute requires it to be "at the time" when the agreement is made, a part payment at any time before action brought is sufficient.[4]

**IV. EQUITABLE DOCTRINES MODIFYING THE EFFECT OF THE STATUTE.**

**—1. The Statute in Equity.**—The Statute of Frauds is as binding upon a court of equity as upon a court of law; and accordingly equity will not relieve against the simple moral wrong of refusing to perform an agreement which the statute forbids the courts to enforce.[5] But equity will not allow a statute designed to prevent frauds to be made an instrument for committing them; and it will give relief where a wrongful advantage has been fraudulently obtained by means of the statute.[6] Thus, where an absolute con-

Hyde, 32 N. Y. 519; Ely *v.* Ormsby, 12 Barb. (N. Y.) 570; Walrath *v.* Richie, 5 Lans. (N. Y.) 362.

1. Walrath *v.* Ingles, 64 Barb. (N. Y.) 265; Dow *v.* Worthen, 37 Vt. 108; Cotteril *v.* Stevens, 10 Wis. 422.

2. In *New York*, the part payment, to be sufficient, must be made at the time of making the agreement. Hallenback *v.* Cochran, 20 Hun (N. Y.), 416; Jackson *v.* Tupper, 101 N. Y. 515; Webster *v.* Zielly, 52 Barb. (N.Y.) 482.

Where, however, upon a subsequent part payment, the parties restate the contract, the court will treat it as a new making of the contract, and hold such part payment sufficient. Hunter *v.* Wetsell, 84 N. Y. 549; s. c., 38; Am. Rep. 544; s. c., 57 N. Y. 375; Bissell *v.* Balcom, 39 N. Y. 275.

3. The *Wisconsin* statute requires part payment "at the time," and a subsequent payment is not enough. Kerhof *v.* Atlas Paper Co., 68 Wis. 674. But if at the time of such payment there is an express reference to the contract, and a declared intention to reaffirm it, the contract will be regarded as made then, and treat the payment as sufficient. Bates *v.* Chesebro, 32 Wis. 594. But it is not enough that the payment is made to make the first agreement binding. Bates *v.* Chesebro, 36 Wis. 636.

An agreement to pay part, made at the time and subsequently followed by an actual payment, is not enough. Paine *v.* Fulton, 34 Wis. 83.

4. Thompson *v.* Alger, 12 Metcalf (Mass.), 428.

5. "There can be no fraud or legal wrong in a breach of a trust, from which the statute withholds the right of judicial recognition." *Per* Wells, J., in Campbell *v.* Dearborn, 109 Mass. 140.

To grant specific performance or compensation for the bare refusal to perform a contract within the statute would be utterly to repudiate the statute; and the law is well settled that such refusal is not a fraud against which equity can give relief. Montacute *v.* Maxwell, 1 P. Wms. 620; Maddison *v.* Alderson, 8 App. Cas. 467; Dunphy *v.* Ryan, 116 U. S. 491; Purcell *v.* Miner, 4 Wall. (U. S.) 513; Scott *v.* Harris, 113 Ill. 447; Green *v.* Groves, 109 Ind. 519; Caylor *v.* Roe, 99 Ind. 1; McClain *v.* McClain, 57 Iowa, 167; Whitridge *v.* Parkhurst, 20 Md. 62; Clifford *v.* Held, 141 Mass. 322; Salter *v.* Bird, 103 Pa. St. 436; Kinard *v.* Hiers, 3 Rich. Eq. (S. Car.) 423; Schmidt *v.* Galewood, 2 Rich. Eq. (S. Car.) 162; Pusey *v.* Gardner, 21 W. Va. 469.

6. This is the ground upon which the jurisdiction of equity was first maintained, and is, beyond all question, on principle and authority, sufficient. It manifestly cannot sustain all the superstructure which successive relaxations of the statute have created.

In every case of fraud, equity can furnish relief; and wherever there is a deliberate use of the statute as a means of obtaining property or an advantage, without consideration, there a fraud exists. But it is difficult to perceive how there can be legal fraud in refusing to perform an agreement within the statute, although this may result in damage to the other party. For the statute distinctly provides that no damages shall be given for such refusal; and a party who takes the chances of refusal cannot justly claim that he has been defrauded. Equity has, however, taken the step. It will regard such refusal, when coupled with certain circumstances, as a fraud, and will nullify the statute to the extent of enforcing the performance of the promise.

In support of the jurisdiction on this

veyance has been made as security, equity will declare it a mortgage;[1] where property has been obtained by an oral promise to make a particular use of it, with the fraudulent intent not to perform it, but to set up the statute as a defence against any action to compel a performance, equity will decree a specific performance;[2] and where a compliance with the requirements of the statute has been fraudulently prevented, equity will give relief.[3]

**2. Part Performance.**—But courts of equity have gone further, and in most jurisdictions have engrafted the exception upon the statute that, where the oral agreement has in good faith been so far performed that it is impossible to put the parties in *statu quo* or to compensate the doer in damages for the breach of the agreement, and where certain specified acts of part performance have been done, the statute no longer applies, and equity will grant specific performance or give compensation in damages.[4]

ground of fraud, see Walker *v.* Walker, 2 Atk. 98; Bohm *v.* Bohm, 9 Colo. 100; Ayers *v.* Tlifer, 69 Ind. 433; Teague *v.* Fowler, 56 Ind. 569; Arnold *v.* Cord, 16 Ind. 177; Whitridge *v.* Parkhurst, 20 Md. 62; Barrett *v.* Nichols, 56 Miss. 622; Leahey *v.* Leahey, 11 Mo. App. 413; Shaw *v* Abbott, 61 N. H. 583; Busick *v.* Van Ness (N. J.), 12 Atl. Rep. 609; Williams *v.* Vreeland, 32 N. J. Eq. 135, 734; Dodge *v.* Wellman, 43 How. Pr. (N. Y.) 427; McBurney *v.* Wellman, 42 Barb. (N. Y.) 390; Shields *v.* Whitaker, 82 N. Car. 516; Kinard *v.* Hiers, 3 Rich. Eq. (S. Car.) 423; Sullivan *v.* O'Neil, 66 Tex. 433; Seaman *v.* Aschermann, 51 Wis. 678; s. c., 37 Am. Rep. 849.

1. The jurisdiction of equity on this ground is too well established to need extended citation of cases here. See Jones on Mortgages.

The agreement to hold the property as security must be made at the time of the conveyance, and be an inducement to it. If made subsequent to the conveyance, it will not be sufficient. Campbell *v.* Dearborn, 109 Mass. 130; Richardson *v.* Johnson, 41 Wis. 100.

If the conveyance, though made on the faith of the agreement to hold as security, was intended to defraud other creditors, equity will not relieve. Taylor *v.* Sayles, 57 N. H. 465.

The evidence to prove such an agreement must be such that it would justify equity in re-forming a written contract. Howland *v.* Blake, 97 U. S. 624.

2. In *England*, this case has most often arisen where a testator has been induced to devise property to one on his promise to use it for the benefit of another, the done intending not to perform the agreement. In such a case it is well settled that equity will compel a specific performance of the promise. Chamberlain *v.* Chamberlain, 2 Freem. 34; Jones *v.* Badley, L. R. 3 Ch. 362; McCormick *v.* Grogan, L. R. H. L. 82. Similar decisions have been rendered in this country. Whitridge *v.* Parkhurst, 20 Md. 62; Williams *v.* Vreeland, 32 N. J. Eq. 135, 734; see Olliffe *v.* Wells, 30 Mass 221. In any case where a conveyance has been obtained by such fraud, equity will enforce specific performance.

Thus, where a purchaser at an auction induced another not to bid by promising him an interest in the land, and the other, in reliance thereon, refrained, equity enforced performance. Kinard *v.* Hiers, 3 Rich. Eq. (S. Car.) 423.

So where a conveyance has been obtained by a promise to hold the land in trust for creditors or only a security. Cameron *v.* Ward, 8 Ga. 245; Shields *v.* Whitaker, 82 N. Car. 516; Arnold *v.* Cord, 16 Ind. 177.

3. Thus, where the execution of a lease was prevented fraudulently,—Lester *v.* Foxcraft, Colles P. C. 108;—the registration of a bill of sale of a vessel until too late to be valid;—Mestaer *v.* Gillespie, 11 Ves. 621;—the republication of a will,—Dixon *v.* Olmins, 1 Cox, 414;—a change of a will,—Ruch *v.* Kennegal, 1 Ves. Jr. 123;—mere refusal to have agreement reduced to writing is not such a fraud,—Caylor *v.* Roe, 99 Ind. 1.

4. This is the doctrine of part performance, which is based upon the injustice of allowing a man to profit by his own turpitude. It has been carried to such a point that the mere performance of any part of the agreement by an act in accord with it which, but for it, would not have been done, has been held to remove the bar of the

The doctrine is established law in *England*.[1] It has been embodied in the statutes of several of the United States,[2] and is recognized as law in all jurisdictions which have courts of full equity jurisdiction.[3]

In the absence of statute, it is absolutely of no effect at law.[4] In

positive statute and justify the granting of specific performance or of damages as compensation. The test which on principle is the true one is well stated in the opinion in the case of Meach *v.* Perry, 1 D. Chip. (Vt.) 191: "The question never ought to have been, Is it a case of part performance? but, Does the part performance, with the attending circumstances, make a case of fraud against which a court of equity can relieve?" That has not in fact been the test universally adopted, as the cases cited on this topic will show. There are, however, many cases which illustrate its proper application.

In W. Va. Oil, etc., Co. *v.* Vinal, 14 *West Virginia*, 637, the court went so far as to enforce an agreement different from either that set up in the bill or that alleged in the answer, apparently claiming, for equity, jurisdiction to do whatever it thought right.

1. Maddison *v.* Alderson, 8 App. Cas. 467; s. c., 7 Q. B. D. 174; *Ex parte* Routh, 14 Q. B. D. 419; Coton *v.* Coton, L. R. 1 Ch. Ap. 137; Chinan *v.* Cooke, 1 Sch. & Lef. 22; Morphett *v.* Jones, 1 Swanst. 172.

2. *Georgia* excepts contracts fully performed on one side, or where there has been such part performance that, to refuse to go on, would amount to a fraud, or where the agreement has been completely executed. *Alabama* and *Iowa* expressly provide that the statute shall not apply where the vendee has been put in possession and part of the purchase-money has been paid. And so too *Arkansas*.

In *California*, *Colorado*, *Dakota*, *Idaho*, *Indiana*, *Michigan*, *Minnesota*, *Montana*, *Nebraska*, *Nevada*, *New York*, *Oregon*, *Utah*, and *Wisconsin*, the statute provides that nothing contained in it is to abridge the powers of equity to compel specific performance of agreements partly performed. See Stimson Amer. Stat. Law & Supp. 1887, § 4145.

In *Iowa* too, by statute, the plaintiff can recover whenever the agreement can be fully proved by the testimony of the defendant himself, taken apart from all other evidence. Dewey *v.* Life, 60 Iowa, 361.

3. The doctrine is recognized in all of the United States, save North Carolina, Mississippi, and Tenessee.

In *North Carolina*, the law is as stated in the early cases of Ellis *v.* Ellis, 1 Dev. Eq. (N. Car.) 341; Albra *v.* Griffin, 2 Dev. & B. Eq. (N. Car.) 9; Allen *v.* Chambers, 4 Ired. Eq. (N. Car.) 125; Dunn *v.* Moore, 3 Ired. Eq. (N. Car.) 364.

In *Mississippi*, the cases of Bax *v.* Stanford, 13 Sm. & M. (Miss.) 93, and Beaman *v.* Buck, 9 Sm. & M. (Miss.) 207, which repudiate the doctrine, are adhered to; but in a late case, Barrett *v.* Nichols, 56 Miss. 622, where a gross fraud was perpetrated, the court, while declaring its inability to give specific performance, did allow compensation.

The law of *Tennessee* is stated in Ridley *v.* McNairy, 2 Humph. (Tenn.) 174, and Patton *v.* McClure, Man. & Y. (Tenn.) 333.

Until recently it was repudiated in *Massachusetts*.—Jacobs *v.* Peterborough, etc., R. Co., 8 Cush. (Mass.) 223; Barnes *v.* Boston & Maine R. Co., 130 (Mass.) 388; Glass *v.* Hurlbert, 102 (Mass.) 24;—but since full equity jurisdiction has been granted to the courts, specific performance has been decreed,—Potter *v.* Jacobs, 111 (Mass.) 32; Burns *v.* Daggett, 141 (Mass.) 368. The courts of Massachusetts proceed very carefully in their assumption of jurisdiction.

So too in *Maine*. The early decisions repudiate the doctrine, owing to the limited equity powers of the courts,—Inhabitants *v.* Harwood, 23 (Me.) 131; Patterson *v.* Yeaton, 47 Me. 308;—but in Woodbury *v.* Gardner, 77 Me. 68, and Green *v.* Jones, 76 Me. 563 (decided since the Statute of 1874, ch. 175, gave full equity jurisdiction) the court went the full way of adapting it, and held part payment of purchase-money, entry, and retention of possession sufficient part performance to justify specific performance. Both cases contain excellent discussions of the whole subject of equity's jurisdiction in cases of part performance.

4. Kelly *v.* Webster, 12 C. B. 283; O'Herlihy *v.* Hedges, 1 Sch. & Lef. 123; Meredith *v.* Naish, 4 Stew. & P. (Ala.) 59; Allen *v.* Barker, 2 Stew. (Ala.) 21; Heary *v.* Wells (Ark.), 3 So. West. Rep. 637; Brockway *v.* Thomas, 36 Ark. 518; Downey *v.* Hotchkiss, 2 Day (Conn.), 225; Sailors *v.* Gambril, Smith (Ind.), 82; Hunt *v.* Coe, 15 Iowa, 197; Norton *v.* Preston, 15 Me. 14; Barnes *v.* Boston & Maine R. Co., 130 Mass. 388; Thomp-

*England*, it is confined to cases arising on agreements relating to land,[1] but in the *United States*, the tendency is to give it a wider scope.[2]

Equity will decree a specific performance of an oral contract within the statute where a certain and definite agreement is proved to exist,[3] in pursuance of which or in reliance upon which acts have been done not remediable in damages,[4] and under such circumstances that a refusal to complete the performance of the agreement will operate a fraud upon the other party.[5]

The acts of part performance must be those of the plaintiff.[6]

son *v.* Gould, 20 Pick. (Mass.) 328; Payson *v.* West, Walker (Miss.), 515; Lane *v.* Shackford, 5 N. H. 130; McElroy *v.* Ludlum, 32 N. J. Eq. 828; Abbott *v.* Draper, 4 Denio (N. Y.), 51; Thomas *v.* Dickinson, 14 Barb. (N. Y.) 90; Henderson *v.* Hays, 2 Watts (Pa.), 148; Davis *v.* Moore, 9 Rich. Law (S. Car.), 215; Hibbard *v.* Whitney, 13 Vt. 21.

1. Britain *v.* Rossiter, 11 Q. B. D. 123; Maddison *v.* Alderson, 8 App. Cas. 467. But see McManus *v.* Cooke, 35 Ch. Dev. 681, which implies that the doctrine of part performance applies wherever equity would decree specific performance had the contract been in writing.

2. Brown *v.* Brown, 33 N. J. Eq. 650. This is also illustrated by the case of Birdsall *v.* Birdsall, 52 Wis. 208, where equity disregarded the statute on the ground of part performance where a person had been induced by a promise of employment to give up his business and incur expense in travelling, etc., on the faith of the promise to employ.

The contract was not good in that case on the ground that it was not performable within a year. It has been held that the doctrine of part performance has no application where the agreement is open to that objection. Walke *v.* Fleming, 103 Ind. 105.

3. Pike *v.* Petters, 71 Ala. 98; Moore *v.* Gordon, 44 Ark. 334; Beall *v.* Clark, 71 Ga. 818; Marshall *v.* Peck, 91 Ill. 187; Thomas *v.* Griffith, 68 Iowa, 11; Hopkins *v.* Roberts, 54 Md. 312; Brown *v.* Brown, 47 Mich. 378; Berry *v.* Hartzell, 91 Mo. 132; Brown *v.* Brown, 29 Hun (N. Y.), 498; Wagonblast *v.* Whitney, 12 Oreg. 83.

4. If in any way the party who has performed can obtain an adequate remedy in damages, equity will not grant specific performance. Williams *v.* Morris, 95 U. S. 444; Baldwin *v.* Squier, 31 Kan. 283; Brown *v.* Hoag, 35 Minn. 373; Armstrong *v.* Kattenhorn, 11 Ohio, 265; Dean *v.* Anderson, 34 N. J. Eq. 496; Mayer's App., 105 Pa. St. 432; Lord's App., 105 Pa. St. 451; Overmeyer *v.* Körner, 81 Pa. St. 17; Eason *v.* Eason, 61 Tex. 225; Wright *v.* Pucket, 22 Grat. (Va.) 370. It does not follow that, wherever the remedy is inadequate, equity will enforce the agreement.

5. The case of Seaman *v.* Aschermann, 51 Wis. 678, furnishes an example. There the defendant, by his promise to accept a lease of certain premises five years, had induced the lessor to break off negotiation with other parties, and to make extensive alterations to fit the premises for his use. He had entered and occupied for two years, but refused to execute the lease for five years. It was held that, to allow him to withdraw under such circumstances, would be to sanction a fraud upon the lessor. The many cases in which parol agreements to convey lands to children or other dependents in return for services and the renunciation of other plans, have been upheld after the performance by the donee in good faith, can be placed upon the same ground. A strong instance is Warren *v.* Warren, 105 Ill. 568, where the court decreed specific performance of an alleged agreement by a father to convey certain lands to his daughter, who for thirty-eight years had lived with and cared for him. There was no evidence that the services had been rendered in reliance on this promise. The case must rest on this ground of fraud, if it is to be supportod at all. Chicago, etc., R. *v.* Boyd, 118 Ill. 73; Nelson *v.* Worrall, 20 Iowa, 469; Hund *v.* Roberts, 40 Me. 187; Hamilton *v.* Jones, 3 Gill & J. (Md.) 127; Leahey *v.* Leahey, 11 Mo. App. 413; Shaw *v.* Abbott, 61 N. H. 583; Hodges *v.* Howard, 5 R. I. 149; Meach *v.* Stone, 1 D. Chip. (Vt.) 182; Campbell *v.* Tetterman, 20 W. Va. 398.

6. Browne Stat. of Frauds, § 453.

In a very late case, a purchaser under an oral contract of sale, who had been put in possession of the property, sold it to a third party, who made valuable improvements. Later, the first vendee repurchased from his vendee, and, in a suit for

They must be such that, but for the agreement, they would not have been done; but it is not essential that they be in performance of stipulations contained in it.[1] They must be acts from which the other party derives a benefit. Acts which are merely preparatory to performance are not sufficient.[2]

a conveyance, it was held that he could not set up the improvements made by his vendee as acts of part performance. Abbott *v.* Baldwin, 61 N. H. 583.

It might appear that in the cases where specific performance has been decreed at the suit of the vendor, the acts of part performance had been on the side of the vendee. the defendant; but consideration will show that the vendor has performed in past by giving possession and cannot be replaced in his original position. Lawrence *v.* Saratoga Lake R. Co., 36 Hun (N. Y.), 467. See also Rathburn *v.* Rathburn, 6 Barb. (N. Y.) 98; Buckmaster *v.* Harrop, 7 Ves. 341; Steinrod *v.* Wheeling, etc., R. Co., 27 W. Va. 1; Wharton *v.* Stantenberg, 35 N. J. Eq. 266.

1. Clearly, no act which the plaintiff would have performed, whether the contract alleged existed or not, can found an equity on the ground of part performance. The plaintiff is not damnified; the defendant is not unjustly benefited; and the act of itself does little to create a belief that any contract existed. Accordingly, the law has long been settled as stated in the text. Lacon *v.* Mestias, 3 Atk. 1; Morphett *v* Jones, 1 Swanst. 172; Coath *v.* Jackson, 6 Ves. 12; Frame *v.* Dawson, 14 Ves. 386; Whitteck *v.* Mozley. 1 Cababe & E. 86; Small *v.* Northern Pacific R. Co., 20 Fed. Rep. 753; Hines *v.* McGlone, 44 Ark. 79; Osburn *v.* Phelps, 19 Conn. 63; Rawbeis *v.* Shropshire, 45 Ga. 282; Shepherd *v.* Bevin. 9 Gill (Md.), 32; Lydick *v.* Holland, 83 Mo. 73; Lavison *v.* Polhemus. 36 N. J. Eq. 506; Chamberlain *v.* Manning. 41 N. J. Eq. 651; Rathburn *v.* Rathburn, 6 Barb. (N. Y.) 98; Jervis *v.* Smith. Hoff. Ch. (N. Y.) 470; Armstrong *v.* Kattenhorn, 11 Ohio, 265; Moore *v.* Small, 19 Pa. St. 461; but see Warren *v.* Warren, 105 Iowa, 568.

The likelihood of the performance of the act, had no agreement been made, is of assistance to equity in determining the fact of the existence of the agreement; and it is well settled that acts which are doubtful in their nature, acts which would be likely to be done even in the absence of an agreement such as that alleged, will not be sufficient to justify equity in interfering. Some acts are clearly to be referred to some agreement; such, for instance, as the delivery of possession of land, the expenditure of large sums of money upon it in permanent improvements, the renunciation of plans and serious changes in one's personal arrangements. They create a reasonable belief in the existence of the agreement alleged. Other acts are essentially dubious, and do little to justify such a belief.

The question of the character of the act has arisen most frequently in contests between lessor and lessee, where acts of improvements or repairing have been alleged as part performance; or where a child or other relative has been placed in possession of property, and has proceeded to make improvements with his own money. In the first case, the act is explainable as done for the better use of the premises under the lease; in the second, as done in view of ultimate ownership as heir or probable donee.

The cases cited hereafter in the notes bearing upon possession fully illustrate the principle and its application. The acts do not need to be such as to prove the existence of the contract; but they must be such that they do not admit of easy explanation without supposing the agreement to exist. Dale *v.* Hamilton, 5 Hare, 369; Frame *v.* Dawson, 14 Ves. 386; Sutherland *v.* Briggs, 1 Hare, 26; Nunn *v.* Fabian, 1 L. R. Ch. 35; Conner *v.* Fitzgerald, 11 L. R. Ir. 106; Lanyan *v.* Martin, 13 L. R. Ir. 297; Church *v.* Sterling, 16 Conn. 388; Irwin *v.* Dike, 114 Ill. 302; Gorham *v.* Dodge, 122 Ill. 528; Clark *v.* Clark (Ill.), 13 No. East. Rep. 533; Radfield *v.* Radfield, 92 Ill. 198; Johns *v.* Johns, 67 Ind. 440; Bord *v.* Elston, 31 Kan. 274; Hiatt *v.* Williams, 72 Mo. 214; Montgomery *v.* Carlton, 56 Tex. 361. *Cf.* Smith *v.* Yocum, 110 Ill. 142; Bruahan *v.* Bruahan, 96 Ill. 591; Larison *v.* Polhemus, 36 N. J. Eq. 506.

It is manifest from the cases cited that the act need not be performed in accord with any stipulation of the agreement. Thus, improvements made by a lessee for his own benefit on the faith of the agreement for a lease, will be as effective for part performance as if called for by the agreement, provided they redound to the advantage of the lessor without consideration. Sutherland *v.* Briggs, 1 Hare, 26

2. Thus, ordering papers to be drawn up is not enough. Earl of Glengal *v.* Barnard, 1 Keen, 769; Clerk *v.* Wright, 1

Neither is payment of the whole or part of the purchase-money.[1] But if such payment is accompanied by acts, such as the assumption of possession and the making of improvements, or by other acts difficult to compensate in damages, it becomes sufficient.[2]

Atk. 12; Thyme *v.* Earl of Glengal, 2 H. L. C. 131; Hawkins *v.* Holmes, 1 P. Wms. 770; Redding *v.* Wilkes, 3 Bro. C. C. 400; Gratz *v.* Gratz, 4 Rawle (Pa.), 411; Givins *v.* Calder, 2 Desaus. Ch. (S. Car.) 171.

So as to dealing with property preparatory to performing an agreement in regard to it; as, having admeasurements made,—Pembroke *v.* Thorpe, cited in 3 Swanst. 437;—having surveys made prior to partition by arbitrators,—Coath *v.* Jackson, 6 Ves. 12;—making preparations for the receipt of goods to be delivered,—Harris *v.* Raemsevel, 61 N. H. 250;—selling land in order to be able to receive performance by the other party;—Lydeck *v.* Holland, 38 Mo. 703;—payment of debts and discharge of encumbrance preparatory to conveying,—Colgrove *v.* Solomon, 34 Mich. 494;—and so as to purchasing land in order to fulfil an agreement to convey one half to another;—Dunphy *v.* Ryan, 116 U. S. 491. But where a loss would result to the doer not remediable in damages, equity will sometimes allow compensation for these expenditures. Parker *v.* Niggeman, 6 Mo. App. 516; Sheldon *v.* Priva, 57 Vt. 263; Birdsall *v.* Birdsall, 52 Wis. 208.

1. Humphries *v.* Green, 10 Q. B. D. 148; Clinan *v.* Coope, 1 Sch. & Lef. 22; Lord Pengall *v.* Ross, 2 Eq. Cas. Abr. 46; Jenkins *v.* Lovelace, 72 Ala. 303; Lewis *v.* Montgomery Mut. Bld. & L. Assoc., 70 Ala. 276; Forrester *v.* Flores, 64 Cal. 24; Neal *v.* Gregory, 19 Fla. 356; Frazer *v.* Gates, 118 Ill. 99; Temple *v.* Johnson, 71 Ill. 13; Fulton *v.* Smith, 84 Ind. 485; Carlisle *v.* Brennan, 67 Ind. 12; Suman *v.* Springate, 67 Ind. 115; Nay *v.* Mogram, 24 Kan. 75; Kelley *v.* Kelley, 54 Mich. 30; Peckham *v.* Balch, 49 Mich. 179; Townsend *v.* Fenton, 30 Minn. 525; Baker *v.* Wiswell, 17 Neb. 52; Jamison *v.* Dimock, 95 Pa. St. 52; Mims *v.* Chandler, 21 S. Car. 480; Ann Berta Lodge *v.* Leverton, 42 Tex. 18; Wood *v.* Jones, 35 Tex. 64; Gallagher *v.* Gallagher (W. Va.), 5 So. East. Rep. 297.

It makes no difference that payment is made in services,—Crahill *v.* Marsh, 38 Ohio St. 331;—or goods,—McPherson *v.* Wiswell, 16 Neb. 625.

The fact that the defendant is insolvent creates no greater equity for specific performance. Townsend *v.* Fenton, 32 Minn. 482.

The law of *Iowa* is *contra*, payment in full or part being a sufficient part performance. Stein *v.* Nysonger, 69 Iowa, 512; Franklin *v.* Tuckerman, 68 Iowa, 512; Miller *v.* Nelson, 64 Iowa, 458; Nan *v.* Jackman, 58 Iowa, 359. And so is that of *Delaware*. Townsend *v.* Houston, 1 Harr. (Del.) 532.

2. Part payment accompanied by entry into possession is enough. Lanyan *v.* *v.* Martin, 13 L. R. Ir. 297; Shakespeare *v.* Alba, 76 Ala. 351; Brewer *v.* Brewer, 19 Ala. 48; Day *v.* Cohn, 65 Cal. 508; Pleasanton *v.* Raughley, 3 Del. Ch. 124; Cannon *v.* Collins, 3 Del. Ch. 132; Fitzsimmons *v.* Allen, 39 Ill. 440; Shirley *v.* Spencer, 4 Gilm. (Ill.) 583; Felton *v.* Smith, 84 Ind. 485; Tebbs *v.* Barker, 1 Blackf. (Ind.) 58; Woodbury *v.* Gardner, 77 Me. 68; Green *v.* Jones, 76 Me. 563; Bechtel *v.* Cone, 52 Md. 698; Dugan *v.* Gittings, 3 Gill (Md.), 138; Walker *v.* Owen, 79 Mo. 563; Davis *v.* Townsend, 10 Barb. (N. Y.) 333; Kelley *v.* Stanbery, 13 Ohio, 408; Jamison *v.* Dimock, 95 Pa. St. 52; Mims *v.* Chandler, 21 S. Car. 480; Griffith *v.* Abbott, 56 Vt. 356.

Equity will refuse to interfere, however, where the acts are of slight import and the payment small. Miller *v.* Zufall, 113 Pa. St. 317.

Where the payment is accompanied by the performance of acts which are difficult to compensate in damages, equity will grant relief. Armes *v.* Bigelow, 3 MacArthur D. C. 442; Bigelow *v.* Arms, 108 U. S. 10; McClure *v.* Otrich, 118 Ill. 320; Watson *v.* Mahon, 20 Ind. 223; Marsh *v.* Davis, 33 Kan. 326; Anderson *v.* Shockley, 82 Mo. 250; Gupton *v.* Gupton, 47 Mo. 37; Davison *v.* Davison, 13 N. J. Eq. 246; Wendell *v.* Stone, 39 Hun (N. Y.), 382; Malins *v.* Braun, 4 N. Y. 403; Rhodes *v.* Rhodes, 3 Sandf. Ch. (N. Y.) 279.

If the consideration is marriage, the consummation of the marriage is not of itself a sufficient part performance. Montacute *v.* Maxwell, 1 P. Wms. 618; Caton *v.* Caton, L. R. 1 Ch. App. 137; Finch *v.* Finch, 10 Ohio St. 501. But if any further act is done, it may become sufficient. *Ex parte* Rauth, 14 Q. B. D. 419; Ungley *v.* Ungley, 4 Ch. Div. 73; Seercome *v.* Peninger, 3 De G. M. & G. 571; Hammerslay *v.* De Biel, 12 Cl. & S. 45.

Where everything has been done on

The delivery and assumption of possession are strong acts of part performance sometimes held sufficient of themselves to avoid the bar of the statute ; [1] but generally they must be accompanied by other acts.[2] Unless possession, is taken, no act of part performance is enough.[3] The tender of a deed is not a sufficient delivery of possession.[4]

both sides, save the mere delivery of a deed, so that the holder of the legal title has become a bare trustee, equity will compel the delivery. Bechtel *v.* Cone, 52 Md. 698; Rook *v.* Jameson, 67 Iowa. 202.

1. Ungley *v.* Ungley, 4 Ch. Div. 73; Coles *v.* Pickington, L. R. 19 Eq. 174; Butcher *v.* Stapely, 1 Vern. 383; Arrington *v.* Porter, 47 Ala. 714; Pledger *v.* Garreson, 42 Ark. 79; Eaton *v.* Whitaker, 18 Conn. 222; White *v.* Crew, 16 Ga. 416; Savage *v.* Lee, 101 Ind. 514; Anderson *v.* Simpson, 21 Iowa, 399; Southmayd *v.* Southmayd, 4 Mont. 100; Murray *v.* Jayne, 8 Barb. (N. Y.) 612; Pugh *v.* Good, 3 Watts & S. (Pa.) 56; Holmes *v.* Caden, 57 Vt. 111. But see Haines *v.* McGlone, 44 Ark. 79.

2. In Moore *v.* Small, 19 Pa. St. 461, Woodward, J., said: "Without possession taken and maintained under the contract, there can be no pretence of part performance; but generally that is an act which admits of compensation, and therefore too much stress is made of it when it is treated as sufficient ground for decreeing specific execution." And undoubtedly his statement is true. Heflin *v.* Milton, 69 Ala. 354.

The fact that possession is taken is strong evidence of a contract.

The cases already cited on the subject of payment accompanied by entry and possession are explicit on the effect of possession. Railsbock *v.* Walke, 81 Ind. 409.

Where a parol gift of land has been made, mere possession by the donee will not be sufficient part performance. There must have been some further act; such as expenditure for improvements, or a sacrifice of other plans, or a complete performance of an agreement to support and care for the donor. Neale *v.* Neales, 9 Wall. (U. S.) 11; Swain *v.* Seamans, 9 Wall. (U. S.) 254; Guynn *v.* McCauley, 32 Ark. 97; Manley *v.* Howlett, 55 Cal. 94; Gorham *v.* Dodge, 122 Ill. 528; Clark *v.* Clark, 122 Ill. 388; Irwin *v.* Dyke, 114 Ill. 302; Smith *v.* Yocum, 110 Ill. 142; Warren *v.* Warren, 105 Ill. 565; McDowell *v.* Lucas, 97 Ill. 489; Bonahan *v.* Bonahan, 96 Ill. 591; Bright *v.* Bright, 41 Ill. 97; Johns *v.* Johns, 67 Ind. 440; Kenyon *v.* Young, 44 Mich. 339; Sharkey *v.* McDermott, 91 Mo. 647; Hiatt *v.* Williams, 72 Mo. 214; s. c., 37 Am. Rep. 438; Story *v.* Black, 5 Mont. 26; s. c., 51 Am. Rep. 37; Dawson *v.* McFadden (Neb.), 34 N. West. Rep. 338; Hartman *v.* Stretz, 17 Neb. 557; Larison *v.* Polhemus, 36 N. J. Eq. 506; Dana *v.* Wright, 23 Hun (N. Y.), 29; Freeman *v.* Freeman, 43 N. Y. 34; Brown *v.* Lord, 7 Oreg. 302; Ballard *v.* Ward, 89 Pa. St. 358; Sower *v.* Weaver, 84 Pa. St. 262; Shellhammer *v.* Ashbough, 83 Pa. St. 24; Harris *v.* Richey, 56 Pa. St. 395; McLain *v.* School Directors, 51 Pa. St. 196; Poorman *v.* Kilgore, 26 Pa. St. 365; Young *v.* Glendenning, 6 Watts (Pa.), 509; Stewart *v.* Stewart, 3 Watts (Pa.), 253; Syler *v.* Eckhart, 1 Binn. (Pa.) 378; Montgomery *v.* Carlton, 56 Tex. 361; Littlefield *v.* Littlefield, 51 Wis. 23.

For cases in which possession coupled with other acts has been held sufficient, see Robinson *v.* Thorndike, 110 Ind. 117; Rink *v.* Sample, 56 Iowa, 100; Evergreen Cemetery Assoc. *v.* Armstrong (Minn.), 34 N. West. Rep. 32; Walker *v.* Owen, 79 Mo. 563; Hanies *v.* Spanogle, 17 Neb. 637; Hanlon *v.* Wilson, 10 Neb. 138; Chamberlain *v.* Manning, 41 N. J. Eq. 651; Martin *v.* Petterson (S. Car.), 3 So. East. Rep. 859; Griffith *v.* Abbott, 56 Vt. 356; Bowman *v.* Walford, 80 Va. 213; Steenrod *v.* Wheeling, etc., R. Co., 27 W. Va. 1; Tracy *v.* Tracy, 14 W. Va. 243.

The ground for granting specific performance where possession is given is stated to be the fraud that would be practised on the purchaser if he could be proceeded against as a trespasser. Clinan *v* Cooke, 1 Sch. & Lef. 22; Ham *v.* Goodrich, 33 N. H. 32.

The cases already cited show that equity to-day does not regard that alone as sufficient.

3. Ackerman *v.* Fisher, 57 Pa. St. 457; Moore *v.* Small, 19 Pa. St. 461; McKee *v.* Phillips, 9 Watts (Pa.), 85; Ward *v.* Stuart, 62 Tex. 333. *Cf.* Wooldridge *v.* Hancock (Tex.), 6 S. W. Rep. 808.

4. Graham *v.* Theis, 47 Ga. 479; Arnold *v.* Stephenson, 79 Ind. 410; Sands *v.* Thompson, 43 Ind. 18; Clifford *v.* Heald, 141 Mass. 322; Dunphy *v.* Ryan, 116 U. S. 491.

The possession must be notorious, exclusive, and taken under the contract, and solely referable to it.[1] Where one is already in possession, a continuance under the agreement will not be sufficient; but it may become so if further acts of part performance are made.[2] It must be taken in the lifetime of the vendor, with his knowledge, and retained against him.[3]

1. It must be notorious. Charpiat *v.* Sigerson, 25 Mo. 63; Story *v.* Blake, 5 Mont. 26; s. c., 51 Am. Rep. 37; Brown *v.* Lord, 7 Oreg. 302; Moore *v.* Small, 19 Pa. St. 461; Brawdy *v.* Brawdy, 7 Pa. St. 157.

In Zimmerman *v.* Wengert, 31 Pa. St. 401, however, the court held that it was sufficient if well known to the other party.

It must be exclusive. Thus, occupation as the guest of the vendor is not sufficient,—Davis *v.* Moore, 9 Rich. Law (S. Car.), 215;—nor possession in common with other lands of the vendor;—Haslet *v.* Haslet, 6 Watts (Pa.), 464;—nor in company with the alleged vendor or donor,—Gorham *v.* Dodge (Ill.), 14 No. East. Rep. 44; Clark *v.* Clark (Ill.), 13 No. East. Rep. 553; Irwin *v.* Dyke, 114 Ill. 302; Johns *v.* Johns, 67 Ind. 440; Larison *v.* Polhemus, 36 N. J. Eq. 506; Brown *v.* Lord, 7 Oreg. 302; Fryer *v.* Shepler, 7 Pa. St. 91; Montgomery *v.* Carlton, 56 Tex. 361. But see Warren *v.* Warren, 105 Ill. 568; Sharkey *v.* McDermott, 91 Mo. 647; Hiatt *v.* Williams, 72 Mo. 214; Dana *v.* Wright, 23 Hun (N. Y.), 29; Littlefield *v.* Littlefield, 51 Wis. 23.

It must be taken pursuant to the agreement. Humphries *v.* Green, 10 Q. B. D. 148; *Ex parte* Broderick, 18 Q. B. D. 380, 766; Moore *v.* Gordon, 44 Ark. 334; Gorham *v.* Dodge, 122 Ill. 528; Clark *v.* Clark, 122 Ill. 388; Kaufmann *v.* Cook, 114 Ill. 11; Padfield *v.* Padfield, 92 Ill. 198; Brown *v.* Brown, 33 N. J. Eq. 650; Beozer *v.* Teague (S. Car.), 3 So. East. Rep. 551.

Where the agreement relates to several parcels, a possession of one will be sufficient. Smith *v.* Underdunck, 1 Sandf. Ch. (N. Y.) 579; Jones *v.* Pease, 21 Wis. 644. *Contra*, Allen's Estate, 1 Watts & S. (Pa.) 383; Small *v.* No. Pacific R. Co., 20 Fed. Rep. 753.

2. Where the party is already in possession, the act of retaining possession is so equivocal in its nature that equity will not regard it as a sufficient part performance. Morphett *v.* Jones, 1 Swanst. 172; Kine *v.* Balfe, 2 Ball & B. 343; Danforth *v.* Laney, 28 Ala. 274; Haines *v.* McGlone, 44 Ark. 79; Kaufmann *v.* Cook, 114 Ill. 11; Creighton *v.* Sanders, 89 Ill. 543; Johns *v.* Johns, 67 Ind. 440; Johnston *v.* Haney, 4 Blackf. (Ind.) 94; Wilmer *v.* Farris, 40 Iowa, 309; Billingslea *v.* Ward, 33 Md. 48; Lamne *v.* Dodson, 4 Mont. 560; Cole *v.* Potts, 10 N. J. Eq. 67; Armstrong *v.* Kattenhorn, 11 Ohio, 265; Brown *v.* Lord, 7 Oreg. 302; Birkbeck *v.* Kelly (Pa.), 9 Atl Rep. 313; Greenlee *v.* Greenlee, 22 Pa. St. 225; Christy *v.* Bornhart, 14 Pa. St. 260. *Cf.* Savage *v.* Lee, 101 Ind. 514.

Further acts of part performances, such as the payment of a different rent or the making of repairs and improvements, may constitute a sufficient part performance. Lanyan *v.* Martin, 15 L. R. Ir. 297; Conner *v.* Fitzgerald, 11 L. R. Ir. 106; Nunn *v.* Fabian, 1 L. R. Ch. App. 35, Wills *v.* Stradling, 3 Ves. Jr. 378; Savage *v.* Carroll, 1 Ball & B. 265; Dowell *v.* Dew, 1 Young & C. C. C. 345; Sutheriand *v.* Briggs, 1 Hare, 26; Peck *v.* Williams (Ind.), 15 No. East. Rep. 270; Bard *v.* Elston, 31 Kan. 274; Spear *v.* Orendorf, 26 Md. 37; Spalding *v.* Conzelman, 30 Mo. 177; Williams *v.* Landman, 8 Watts & S. (Pa.) 55; Wildes *v.* Fox, 1 Rand. (Va.) 165.

Mere payment of rent is not by itself enough. Webster *v.* Blodgett, 59 N. H. 120. And equity will not give specific performance unless the improvements are considerable. Brennan *v.* Bolton, 2 Dru. & W. 349; Eason *v.* Eason, 61 Tex. 225.

3. The possession must be in the vendor's lifetime; otherwise, the delivery of possession loses much of its evidenciary force. Shirey *v.* Cumberhouse, 41 Ark. 97; Sage *v.* M'Guire, 4 Watts & S. (Pa.) 228; Ryan *v.* Wilson, 56 Tex. 36.

In Hibbert *v.* Aylott, 52 Tex. 530, however, the court allowed specific performance of an agreement to convey at the expiration of a lease, on the faith of which the tenant had made extensive improvements, although the promisor died before the lease had expired.

The same reasons require that the possession be with the knowledge of the vendor,—Cole *v.* White, cited in 1 Bro. C. C. 409; Johnson *v.* Glancy, 4 Blackf. (Ind.) 94; Carrolls *v.* Cox, 15 Iowa, 455; Groncher *v.* Martin, 9 Watts (Pa.), 106; Theneson *v.* Scott, 1 McCord Ch. (S. Car.) 32;—and that it be retained against him,—

The making of improvements in reliance upon the contract, which are beneficial to the estate and an expense to the maker, will be sufficient part performance.[1]

Instead of granting specific performance of the agreement, equity will sometimes grant compensation for damage actually suffered.[2]

Where equity will grant specific performance at all, it is immaterial whether at the suit of the vendor or vendee.[3]

Where the registration of the conveyance is essential to its validity, the court will not decree specific performance of an unregistered agreement.[4]

The doctrine has no application, it is said, to contracts not performable within a year.[5] Nor to cases of guaranties.[6]

**V. PLEADING THE STATUTE.—1. By the Plaintiff.**—In the *United States*, both at law and in equity, it is presumed that the statute has been complied with, and the plaintiff need not set out that fact in his bill or declaration;[7] but in *England*, while at law the

Dougan *v.* Blocher, 24 Pa. St. 28; Rankin *v.* Simpson, 19 Pa. St. 28.

If the possession is abandoned, all claim for part performance will be lost. Chambliss *v.* Smith, 30 Ala. 366. But not if merely it be suspended temporarily, without intent to abandon. Drum *v.* Stevens, 94 Ind. 181.

1. "The ground upon which this equitable jurisdiction is exercised, although sometimes said to be part performance, really is to prevent a fraud being practised upon the parol purchaser by inducing him to expend his money upon improvements upon the faith of the contract, and then deprive him of the benefit of the expenditure and secure it to the seller by permitting the latter to avoid the performance of his contract." *Per* Grover, J., in Freeman *v.* Freeman, 43 N. Y. 34.

The jurisdiction, to decree specific performance where such improvements have been made, has been sustained in a multitude of cases. The following recent cases fully support it: Manly *v.* Howlett, 55 Cal. 94; Hayt *v.* Hurst (Colo.), 15 Pac. Rep. 410; Irwin *v.* Dyke, 114 Ill. 302; Drum *v.* Stevens, 94 Ind. 181; Bard *v.* Elston, 31 Kan. 274; Potter *v.* Jacobs, 111 Mass. 32; Evergreen Cemetery Assoc. *v.* Armstrong (Minn.), 34 No. West. Rep. 32; Anderson *v.* Shockley, 82 Mo. 250; Dawson *v.* McFadden (Neb.), 34 No. West. Rep. 338; Dana *v.* Wright, 23 Hun (N.Y.), 29; Ballard *v.* Ward, 89 Pa. St. 358; Montgomery *v.* Carlton, 56 Tex. 361; Hibbert *v.* Aylott, 52 Tex. 530; Halsey *v.* Peters, 79 Va. 60; Tracy *v.* Tracy, 14 W. Va. 243; Littlefield *v.* Littlefield, 51 Wis. 23.

It is not essential that they be called for by the agreement. Deercome *v.* Pininger, 3 De G. M. & G. 571; Freeman *v.* Freeman, 43 N. Y. 34; Ingles *v.* Patterson, 36 Wis. 373.

They must be beneficial to the property and a sacrifice to the purchaser. Hamilton *v.* Jones, 3 Gill & J. (Md.) 127; Wock *v.* Tarber, 2 Wheat. (Pa.) 387; but see Robinson *v.* Thrilkill, 110 Ind. 117. But the court will not inquire whether it was judicious to make them or not. Whitbread *v.* Brockhurst, 1 Bro. C. C. 417.

2. Lord Pengoll *v.* Ross, 2 Eq. Cas. Abr. 46; Goodwin *v.* Lyon, 4 Port. (Ala.) 297; Deisher *v.* Stern, 34 Kan. 39; Parkhurst *v.* Van Cortland, 1 Johns. Ch. (N.Y.) 273; Avermeyer *v.* Koerner, 32 P. F. Sm. (Pa.) 517.

3. The law is too well settled to need many citations. Walker *v.* Owen, 79 Mo. 563; Wharton *v.* Stoutenberg, 35 N. J. Eq. 266.

4. White *v.* Holly, 91 N. Car. 67.

5. Walke *v.* Fleming, 103 Ind. 105.

6. A loan relying on an oral guaranty is not a sufficient part performance. Daniel *v.* Mercer, 63 Ga. 442. Nor is the delivery of goods, and the fact that the guarantor has paid part of the debt, gives no greater equity against him. McGaughey *v.* Latham, 63 Ga. 67.

7. Bailey *v.* Irwin, 72 Ala. 62; Perrine *v.* Leachman, 10 Ala. 140; Hurlburt *v.* Mfg. Co., 38 Ark. 594; Tucker *v.* Edwards (Colo.), 3 Pac. Rep. 233; Piercy *v.* Adams, 22 Ga. 109; Bowman *v.* Ainslie, 1 Idaho (N. S.) 644; Porter *v.* Drennan, 13 Ill. App. 362; Eckes *v.* Bohn, 45 Md. 278; Mullaly *v.* Holden, 123 Mass. 583; Elliott *v.* Jenness, 111 Mass. 29; Price *v.* Weaver, 13 Gray (Mass.), 272; Richards *v.* Richards, 9 Gray (Mass.), 313; Dayton *v.*

presumption is the same,[1] in equity, until the Supreme Court of Judicature Act,[2] no such presumption was made, and the plaintiff was found to allege compliance with its provisions, or else to set out all the facts in his favor, which took the case out of the statute.[3]

If the bill or declaration discloses an oral agreement within the statute, it must also contain averments showing that the statute has been satisfied or avoided.[4]

**2. By the Defendant.**—The benefit of the statute as a defence may be taken either by demurrer, plea, or answer, or by setting it up in evidence under the general denial.[5]

It can be taken by demurrer only when the bill or declaration discloses an oral contract, without alleging facts which would avoid the statute as a defence, or a memorandum insufficient on its face.[6]

It can be taken by plea or answer under all circumstances; but

Williams, 2 Doug. (Mich.) 31; Benton *v.* Schulte, 31 Minn. 312; Walsh *v.* Kattenburgh, 8 Minn. 127; Sharkey *v.* McDermott (Mo.), 4 So. West. Rep. 107; Swetland *v.* Barrett, 4 Mont. 217; Walker *v.* Richards, 39 N. H. 259; Elting *v.* Vanderlyn, 4 Johns. (N. Y.) 237; Cranston *v.* Smith, 6 R. I. 231; Groce *v.* Jenkins (S. Car.), 5 So. East. Rep. 352; Carroway *v.* Anderson, 1 Humph. (Tenn.) 61; Horne *v.* Shambling, 57 Tex. 243; Cross *v.* Everts, 28 Tex. 523.

In *Indiana*, the statute requires an averment that the agreement declared on is in writing; and accordingly, in the absence of such averment, the law presumes the agreement oral. Neal *v.* Neal, 96 Ind. 419; Pulse *v.* Miller, 81 Ind. 190; Carlisle *v.* Brennan, 67 Ind. 12; Langford *v.* Freeman, 60 Ind. 46.

In *Iowa*, the declaration must state how the agreement is to be proved; and the presumption is that this is by oral testimony. Babcock *v.* Meek, 45 Iowa, 137.

1. Young *v.* Austen, L. R. 4 C. P. 553; Clarke *v.* Callow, 46 L. J. Q. B. 53; Williams *v.* Leper, 3 Burr. 1890, *per* Yates, J.; Spurrier *v.* Fitzgerald, 6 Ves. 555.

The old rule of pleading required, however, that, when an agreement within the statute was set up as a defence, it must be alleged to be in writing or the statute satisfied. Case *v.* Barber, J., Raym. 450; Villers *v.* Handley, 2 Wils. 49. But the objection to the plea that it did not so state having to be taken by special demurrer, when special demurrers were abolished ceased to be available, and to-day the plea need not show that the statute has been complied with. Young *v.* Austen, L. R. 4 C. P. 54.

Even under the old pleading, it was not necessary to show a writing where a title was set up. Peacock *v.* Purvis, 2 Brod. & B. 362.

Of course a plea that on its face disclosed that the statute had not been complied with; or if it showed an oral agreement, failed to set out facts to avoid the statute, would be bad. Montgomery *v.* Carlton, 56 Tex. 361.

2. 36 and 37 Vict. c. 66; 37 and 38 Vict. c. 83; 38 and 39 Vict. c. 77.

3. Barkworth *v.* Young, 26 L. J. Ch. (N. S.) 153; Spurrier *v.* Fitzgerald, 6 Ves. 555; Whitchurch *v.* Bevis, 2 Bro. C. C. 566.

4. Hart *v.* McClennan, 41 Ala. 251; Underhill *v.* All, 18 Ark. 466; Small *v.* Owings, 1 Md. Ch. Dec. 363; Gulley *v.* Macy, 84 N. Car. 434; Meach *v.* Stone, 1 D. Chip. (Vt.) 182.

5. The rule that it must always be pleaded applies, as the cases cited hereafter show, only where on the pleadings the contract must be taken as admitted.

6. Randall *v.* Howard, 2 Black. (U. S.), 585; Pulse *v.* Miller, 81 Ind. 190; Smith *v.* Theobald (Ky.), 5 So. West. Rep. 394; Lawrence *v.* Chase, 54 Me. 196; Clifford *v.* Heald, 141 Mass. 322; Sanborn *v.* Chamberlain, 101 Mass. 417; Howard *v.* Brower, 37 Ohio St. 402.

A demurrer will lie if a memorandum set out is insufficient on its face. Pierson *v.* Ballard, 32 Minn. 263.

The objection cannot be taken by demurrer *ore tenus*. Harrison *v.* Harrison, 1 Md. Ch. Dec. 331.

The defects are cured by an answer denying the agreement. Smith *v.* Theobald (Ky.), 5 So. West. Rep. 394.

when by plea, the plea must be supported by an answer denying that the statute has been complied with, and denying all the facts set out to avoid the bar of the statute.[1]

It can be taken in evidence under the general issue only where the defendant denies the fact of making the contract alleged. In such a case, the plaintiff must prove an actionable contract as alleged, and must fail unless the statute is satisfied; since he cannot give oral evidence in its support.[2]

The statute must be set up in the pleadings and its benefit claimed in all cases where in fact or in law the defendant admits making the contract alleged; otherwise he will be held to have waived the benefit of it.[3]

**1.** Obviously, no answer in support is necessary at law. In equity, however, such answer is required. Brown *v.* Cator, 4 Ves. 91; Moore *v.* Edwards, 4 Ves. 23; Child *v.* Godolphin, 1 Dick. 39; Dinkel *v.* Gundelfinger, 35 Mo. 172; Bean *v.* Vialle, 2 Mo. 126; Mitf. Eq. Pl. 265.

If the bill sets out facts avoiding the statute, the answer in support must deny them and insist upon the benefit of the statute. Evans *v.* Harris, 2 Ves. & B. 361; Rowe *v.* Teed, 15 Ves. 378; Cooth *v.* Jackson, 6 Ves. 12; Thompson *v.* Tod, Pet (C. C.), 380; Miller *v.* Cotten, 5 Ga. 341; Tarleton *v.* Vietes, 1 Gilm. (Ill.) 470; Hall *v.* Hall, 1 Gill (Md.), 383; Harris *v.* Knickerbocker, 5 Wend. (N. Y.) 638; Champlin *v.* Parish, 11 Paige Ch. (N. Y.) 405; Chambers *v.* Massey, 7 Ired. Eq. (N. Car.) 286; Meach *v.* Stone, 1 D. Chip. (Vt.) 182.

**2.** In some jurisdictions, a failure to set up the statute specially is held to be a waiver of its benefit and a consent that the agreement may be proved by parol. Angel *v.* Simpson (Ala.), 3 So. Rep. 758; Brigham *v.* Carlisle, 78 Ala. 243; Martin *v.* Blanchett, 77 Ala. 288; Bailey *v.* Irwin, 72 Ala. 505; Bolling *v.* Munchus, 65 Ala. 558; Guynn *v.* McCauley, 32 Ark. 97. *Cf.* Wynn *v.* Garland, 19 Ark. 23; and Trapnall *v.* Brown, 19 Ark. 39, *contra*; McClure *v.* Atrich, 118 Ill. 320; Chicago, etc., Coal Co. *v.* Liddell, 69 Ill. 639; Boston *v.* Nichols, 47 Ill. 353; Maybee *v.* Moore, 90 Mo. 340; Gordon *v.* Madden, 82 Mo. 193; Huffman *v.* Ackley, 34 Mo. 277.

In *Maine*, the general issue alone is not sufficient to allow the defendant to claim the benefit of the statute. There must be a specification of the statute as a defence. Lawrence *v.* Chase, 54 Me. 196. But if such specification is made, mere failure to object as oral evidence goes in will not waive the benefit of it. Farwell *v.* Tillson, 76 Me. 227.

In *Massachusetts*, the statute cannot be relied on unless set up. Graffam *v.* Pierce, 143 Mass. 386.

In general, however, throughout the *United States*, a denial of the agreement alleged places the burden of proving it upon the plaintiff, and he must sustain it by proper evidence; and the objection that parol evidence is insufficient may be interposed at any time. And the law was the same in *England*, until the late rules under the Judicature Act required the statute to be pleaded specially. Rule XIX. par. 2, sched. I.; Leaf *v.* Tuton, 10 M. & W. 393; Buttemere *v.* Hayes, 5 M. & W. 456; Elliott *v.* Thomas, 3 M. & W. 170; Reade *v.* Lamb, 6 Exch. 130; Eastwood *v.* Kenyon, 11 Ad. & E. 438; Dunphy *v.* Ryan, 116 U. S. 49; May *v.* Sloan, 101 U. S. 231; Suman *v.* Springate, 67 Ind. 115; Fowler *v.* Lewis, 3 A. K. Marsh. (Ky.) 443; Small *v.* Owings, 1 Md. Ch. Dec. 363; Metcalf *v.* Brandon, 58 Miss. 841; Busick *v.* Van Ness (N. J.), 12 Atl. Rep. 609; Blanck *v.* Littell, 9 Daly (N.Y.), 268; Ontario Bank *v.* Root, 3 Paige (N. Y.), 478; Gulley *v.* Macy, 84 N. Car. 434; Birchell *v.* Neaster, 36 Ohio St. 331; Givens *v.* Calder, 2 Desaus. Ch. (S. Car.) 171; Popp *v.* Swanke, 68 Wis. 364.

Even in *Massachusetts*, if the declaration alleges a writing, the defendant can show under the general denial that the statute has not been complied with. Reid *v.* Stevens, 120 Mass. 209.

When the declaration is on the common counts, the statute may be used in defence under the general denial. Durant *v.* Rogers, 71 Ill. 121; Hunter *v.* Randall, 62 Me. 423; Boston Duck Co. *v.* Dewey, 6 Gray (Mass.), 446; Alger *v.* Johnson, 4 Hun (N. Y.), 412.

**3.** Wherever the agreement alleged is admitted, the benefit of the statute must be specially claimed, or the defendant will be held to have waived it. Thus, error will not lie to a judgment rendered on a

He may, however, claim its benefit in his pleadings, although he admit the contract.[1] The plea of the statute is a bar to discovery of the agreement.[2]

**FRAUDULENT CONVEYANCES.** — (See also FRAUDULENT SALES.)


**I. Definition and Essentials Generally**, 748.
**II. The Creditor**, 750.
1. *Subsequent Creditor*, 751.
**III. The Debtor**, 753.
1. *Intent*, 753.
2. *Retention of Possession*, 754.
**IV. The Purchaser**, 756.
1. *Bona Fide Purchasers*, 756.
2. *Purchasers with Notice*, 757.
**V. The Conveyance**, 758.
1. *The Subject-matter*, 758.
2. *The Consideration*, 759.
3. *Form and Nature*, 761.
**VI. Conveyances Between Husband and Wife, and Members of Family**, 764.
**VII. Preferences**, 768.
**VIII. Badges of Fraud**, 770.
**IX. Effect of Fraudulent Conveyances as Between Parties**, 771.
**X. Remedies**, 771.
1. *Kinds and Jurisdiction*, 771.
2. *Suits to Set Aside*, 774.
(*a*) *Parties*, 774.
(*b*) *Pleading. Practice, and Evidence*, 776.
3. *Other Remedies*, 779.


**I. Definition and Essentials Generally.**—A fraudulent conveyance has been defined as "a conveyance, the object, tendency, or effect of which is to defrand another, or the intent of which is to avoid some duty or debt due by or incumbent upon the party making it."[3] The famous Statute of 13 Eliz. c. 5, passed in 1570, and perpetuated by the Statute of 29 Eliz., c. 5, in 1587, is the model on which all of our statutes upon the subject have been formed, and is said to have been merely declaratory of the common law as it

default, although the declaration would have been bad on demurrer a disclosing a contract within the statute. Mullaly *v.* Holden, 123 Mass. 583; Thornton *v.* Vaughan, 2 Scam. (Ill.) 218. A decree *pro confesso* is valid, though the statute might have been set up. Newton *v.* Swazey, 8 N. H. 9.

In accord with the principal statement, see Maybee *v.* Moore, 90 Mo. 340; Connor *v.* Hengtgen, 19 Neb. 472; Gulley *v.* Macy, 84 N. Car. 434; League *v.* Davis, 53 Tex. 9; Battell *v.* Matot, 58 Vt. 271. *Cf.* Popp *v.* Swanke, 68 Wis. 364.

**1.** This must follow, since the right to claim the benefit of the statute is wholly apart from the propriety of denying or admitting the fact of the agreement. Rowe *v.* Teed, 15 Ves. 375; Blagden *v.* Bradbear, 12 Ves. 466; Worlters *v.* Morgan, 2 Cox, 369; Thompson *v.* Tod, Pet. (C. C.) 380; Thompson *v.* Jamiesson, 1 Cranch (C. C.), 295; Burt *v.* Wilson, 28 Cal. 632; Hollingshead *v.* McKenzie, 8 Ga. 457; Stearns *v.* Hubbard, 8 Greenl. (Me.) 320; Winn *v.* Albert, 2 Md. Ch. Dec. 169; Barner *v.* Teague, 1 Jones Eq. (N. Car.) 277.

The benefit must be claimed. It is not enough to deny the validity of the agreement in law. Skinner *v.* McDonall, 2 De G. & S. 265; Rigby *v.* Norwood, 34 Ala. 129; Nanpel *v.* Woodward, 2 Sandf. Ch. (N. Y.) 143; Battell *v.* Matot, 58 Vt. 271.

A denial of the agreement, under oath, for the sake of raising the defence of the statute is not perjury. Rex *v.* Demston, Ry. & M. 112.

**2.** Meach *v.* Stone, 1 D. Chip. (Vt.) 182; Argenbright *v.* Campbell, 3 Hen. & M. (Va.) 144; Browne Stat. of Frauds, § 532.

As to the law in *England*, see Browne Stat. of Frauds, § 532.

**Authorities.**—Browne Statute of Frauds, 4th Edition; Reed Statute of Frauds; Wood Statute of Frauds; Agnew Statute of Frauds; Throop Verbal Agreements.

In the foregoing article, reliance has been placed chiefly upon Mr. Browne's masterly work, and free use has been made of the assistance its learning affords.

**3.** Wait on Fraudulent Conveyances (1884) § 15. See also 1 Abbott's Law Dict. 523, tit. "Fraudulent Conveyances: 2 Kent Com. *440: 1 Story Eq. Jur. §§ 349, 352; McKibbin *v.* Martin, 64 Pa. St. 352.

already existed.[1] To constitute a fraudulent conveyance, there must, as a rule, be a concurrence of three elements; that is to say, there must be a creditor to be defrauded, a debtor intending to defraud, and a conveyance of property out of which the creditor could have realized his claim, or some portion thereof.[2] We will consider these in their order.

1. Farr *v.* Sims, Rich. Eq. (S. Car.) 122; s. c., 24 Am. Dec. 396; Clement *v.* Moore, 6 Wall. 299, 312; Davis *v.* Turner, 4 Gratt. (Va.) 429; Baker *v.* Humphrey, 101 U. S. 499.

Although not re-enacted in *Iowa*, they constitute part of the unwritten law of that State. Gardner *v.* Cole, 21 Iowa, 209. See also Howe*v.* Ward, 4 Me. 196, 199; Butler *v.* Moore, 73 Me. 154.

2. O'Conner *v.* Ward, 60 Miss. 1036; Hoyt *v.* Godfrey, 88 N. Y. 669.

The test as to whether a conveyance is fraudulent or void as to a creditor is: Does it hinder him in enforcing his debt? Does it deprive him of a right which would be legally effective if the conveyance or devise had not been resorted to? Wagner *v.* Smith, 13 Lea (Tenn.), 560.

To constitute a disposition of property by a debtor, with intent to defraud his creditors, the thing disposed of must be of value, out of which a creditor could have made a portion of his claim; it must have been transferred by the debtor, and this with intent to defraud. Hoyt *et al. v.* Godfrey, 88 N. Y. 669.

Where, therefore, a debtor, on the eve of a general assignment, cancelled upon his books, without consideration, an old account against one who was insolvent, *held*, that this did not amount to a disposition of property with intent to defraud, as the debt was not property within the purview of the statute, the entry did not amount to a transfer or disposition of it, and the fact of the entry was no evidence of intent to defraud. Hoyt *et al. v.* Godfrey, 88 N. Y. 669.

Where property is not subject to the demands of creditors, a conveyance of the same with intent to defraud such creditors does not come within the Statute of Frauds. O'Conner *v.* Ward, 60 Miss. 1025.

Where a corporation, solvent at the time, and having no actual intent to defraud creditors, disposes of its lands for an inadequate consideration or by a voluntary conveyance, its subsequent creditors cannot question the transaction. Graham *v.* Railroad Co., 102 U. S. 148.

A mortgage will not be held fraudulent at the instance of creditors merely because it was given to secure an antecedent debt, and the mortgagee knew that the mortgagor was financially embarrassed. Cromelin *v.* McCauley *et al.*, 67 Ala. 542.

A conveyance back to the grantor, of property conveyed to defraud creditors, pursuant to an agreement made at the time, is not fraudulent or illegal. Second Nat. Bank of La Fayette *et al. v.* Brady *et al.*, 96 Ind. 498.

A sale of chattels by a debtor cannot be impeached for want of delivery if they are already under the purchaser's control, as where the debtor is the purchaser's son-in-law, and is indebted to him, and the chattels are in a building belonging to the purchaser's wife, and to which he has the key. Edwards *v.* Edwards, 54 Mich. 347.

A mortgage of chattels furnished by the mortgagee to the mortgagor, and to be used and consumed by him for the benefit of the mortgagee, is not void as to the creditors of the mortgagor. Place *v.* Langworthy, 13 Wis. 629, and Steinart *v.* Deuster, 23 Wis. 136, distinguished; Knapp *v.* Deitz, 64 Wis. 31.

A sale by one member of an insolvent firm, of his individual property, at a fair price, in payment of his antecedent personal indebtedness, without any secret trust or benefit reserved to himself, and by which a preference is given to such creditor over those of the firm, is opposed to no principle of law, and will be upheld. Schoverling *et al. v.* Korar *et al.*, 15 Neb. 306.

Where, a husband, who is entirely solvent, openly purchases property, and causes the same to be conveyed to his wife, retaining sufficient property in his own hands for the purposes of his business and abundant means to pay all his existing debts, and the circumstances show that neither insolvency nor inability to meet his obligations could reasonably have been within his contemplation, and that no new or more hazardous business was in contemplation, the transaction cannot be held fraudulent and void as against subsequent creditors. Carr *v.* Breeze, 81 N. Y. 584.

A creditor who, by the terms of a trust deed executed in good faith by the debtor to secure payment of the debt, has the power to order the land to be sold by

**II. The Creditor.**—A creditor, in this connection, is not necessarily the holder of a debt merely, as that term is generally understood; for one having a legal right to damages capable of judicial enforcement is a creditor within the meaning of the statutes and law upon the subject of fraudulent conveyances.[1] So, where one

public auction or private sale, and to direct the trustee to convey to the purchaser, and the amount of whose debts is thrice the value af the land, may accept the land in satisfaction of the debt, and cause it to be conveyed by the trustee to the debtor's children as a gift to them from the creditor, without affording to other creditors of the debtor any just cause of complaint. Van Riswick *v.* Spalding *et al.*, 117 U. S. 370.

A creditor by simple contract, having the right to file a bill to set aside a voluntary conveyance as fraudulent, and thereby acquire a lien on the property superior to that of subsequent judgment creditors, may accept from the debtor a mortgage on the lands as security for his debt; and having foreclosed the mortgage by bill in equity, making the donees parties, there is nothing in the transaction of which such creditors can complain, since it merely accomplishes by the act of the parties what the court would have compelled them to do. Battle *v.* Reid,, 68 Ala. 149.

A sale of his entire stock of goods by a failing or insolvent debtor, at a fair and reasonable valuation, in absolute payment and satisfaction of a *bona fide* debt, no interest or benefit being reserved to himself, is not fraudulent as against his other creditors; and the payment of an additional sum of money by the purchasing creditor, the estimated difference between the amount of his debt and the value of the goods, does not render the transaction fraudulent when it is shown that the money was paid under an express stipulation that it should be applied in payment of the debt due to another *bona fide* creditor, and that it was so applied. Rankin & Co. *v.* Vandiver & Co., 78 Ala. 562.

A conveyance which is absolute on its face will not be declared a mortgage, and therefore fraudulent as against creditors, because it is shown that, a few days after the consummation of the transaction, the parties entered into a new contract in writing, by which the purchaser gave the vendor a right to re-purchase the property at the same price; nor will the transaction be held fraudulent because the vendor remained in possession after the sale, when it is shown that this was under an agreement to pay rent; nor because the grantee agreed to withhold the deed from record, for fear of injuring the credit of the grantor, but nevertheless did record it by advice of his attorney. Danner Land & Lumber Co. *v.* Stonewall Ins. Co., 77 Ala. 184.

1. Bishop *v.* Redmond, 83 Ind. 157; Shean *v.* Shay, 42 Ind. 375; s. c., 13 Am. Rep. 366; Damon *v.* Bryant, 19 Mass. 411; Post *v.* Stiger, 29 N. J. Eq. 558; Scott *v.* Hartman, 26 N. J. Eq. 90; Pendleton *v.* Hughes, 65 Barb. (N. Y.) 136; Miller *v.* Dayton, 47 Iowa, 312; Weir *v.* Day, 57 Iowa, 87; Bougard *v.* Block, 81 Ill. 186; Harris *v.* Harris, 23 Gratt. (Va.) 737. *Compare* Fowler *v.* Frisbie, 3 Conn. 320; Evans *v.* Lewis, 30 Ohio St. 11.

One who has a cause of action for seduction of his wife is a creditor of the wrongdoer. Hunsinger *v.* Hoffer, 110 Ind. 390.

So is one who has a cause of action for libel or slander. Cooke *v.* Cooke, 43 Md. 522; Hall *v.* Sands, 52 Me. 355.

So where one has a cause of action for deceit,—Miner *v.* Warner, 2 Grant (Pa.), 448;—or for assault and battery,—Martin *v.* Walker, 12 Hun (N.Y.), 46;—or breach of promise to marry,—Hoffman *v.* Junk, 51 Wis. 613;—McVeigh *v.* Ritemour, 40 Ohio St. 107.

And a wife may attach a conveyance intended to defeat her claim for alimony. Morrison *v.* Morrison, 49 N. H. 69; Turner *v.* Turner, 44 Ala. 437; Dugan *v.* Trisler, 69 Ind. 553; Chase *v.* Chase, 105 Mass. 385; Bailey *v.* Bailey, 61 Me. 361.

The Statute of 13th Eliz. c. 5 is sufficiently comprehensive in its terms to embrace, and does embrace, not only creditors technically so, but "all others who have cause of action, or suit, or any penalty or forfeiture; and embraces actions of slander, *trespass* and other torts." Welde *v.* Scotten, 59 Md. 72.

No third party can question the validity of a conveyance from the husband to the wife unless he was a creditor of the husband before the conveyance was made, or was a subsequent purchaser without notice. De Garca *v.* Galvan, 55 Tex. 53.

Where a fund was to be invested during the lifetime of a widow, and then to

incurs liability for another as surety or the like, he may be considered as a creditor of the latter from the time of entering into the obligation.[1] And various other claims, absolute or contingent, have been held sufficient to constitute the holders thereof creditors.[2]

1. *Subsequent Creditor*, as well as antecedent or existing creditors may avoid a conveyance fraudulent as to them.[3] And a vol-

be paid over to a remainderman, *held*, that a remainderman is, as to his share of the fund, to be regarded as a creditor as against whose claim, therefore, a voluntary conveyance of lands may be set aside, although made during the lifetime of the tenant for life. Soden *v.* Soden *et ux.*, 36 N. J. Eq. 115.

A surety on a promissory note, the maker of which had become insolvent, conveyed his land to his son for an inadequate consideration and in evident contemplation of being held liable as surety. The other sutety paid the note, sued him for contribution, and levied on the land conveyed. *Held*, on a bill in aid of execution, that the deed should be set aside as against the execution levy. Pashly *v.* Mandigo *et al.*, 42 Mich. 172.

A person having a claim for a tort is a creditor; and where the conveyance was made with the intent in part to evade fines and judgments which might be obtained for torts, it renders the conveyance wholly fraudulent. Weir *v.* Day, 57 Iowa, 84.

Section 2322, R.S. (providing that a conveyance which is void as to creditors shall be equally void against their assignees), applies to assignees who purchased their claims after, as well as to those who purchased before, the void conveyance. Lutton *v.* Kasey, 58 Wis. 556.

One claiming a vendor's lien on property amply sufficient to satisfy the lien is not entitled to have declared void, as against such lienor as a creditor, a conveyance from the vendee of other property. Christopher *v.* Christopher, 64 Md. 583.

The distributees of an estate are creditors of the administrator from the execution of his bond, and may set aside, as constructively fraudulent, a voluntary conveyance subsequently executed by him, although a *devastavit* may not occur, or may not be judicially ascertained, until after the execution of the conveyance. Anderson *v.* Anderson, 64 Ala. 403.

1. Pennington *v.* Seal, 49 Miss. 518; Hamet *v.* Dundass, 4 Pa. St. 178. See also Van Wyck *v.* Seward, 18 Wend. (N. Y.) 375; Seward *v.* Jackson, 8 Cow. (N. Y.) 406; Keel *v.* Larkin, 72 Ala. 493.

2. "Whoever has a right, claim, or demand founded on contract, whether contingent or absolute, for the performance of a duty, or for the payment of damages if the contract should not be fully performed, has been regarded as a creditor, within the meaning of the statute, against whom a voluntary conveyance will not be supported, though no breach of the contract furnishing a cause of action may occur until after the execution of the conveyance." *Per* Brickell, C. J., in Anderson *v.* Anderson, 64 Ala. 403.

See also Warren *v.* Williams, 52 Me. 343; Cramer *v.* Reford, 17 N. J. Eq. 367; Fearn *v.* Ward, 65 Ala. 33; Swan *v.* Smith 57 Miss. 548; Stimson *v.* Wrigley, 87 N. Y. 332.

3. Parkman *v.* Welch, 19 Pick. (Mass.) 237; Day *v.* Cooley, 118 Mass. 527; Wyman *v.* Brown, 50 Me. 139; Bailey *v.* Bailey, 61 Me. 361; Candee *v.* Lord, 2 N. Y. 275; McPherson *v.* Kingsbaker, 22 Kan. 646; Shaud *v.* Hanley, 71 N. Y. 319; Stevens *v.* Works, 81 Ind. 445.

To avoid a voluntary conveyance, under the Statute of 13 Eliz., a subsequent creditor must show a fraud against himself, and not merely a fraud as to existing creditors. Kimble *v.* Smith, 95 Pa. St. 69.

A subsequent creditor can only avail himself of the fraud which is practised against him. Harlan *et al. v.* Maglaughlin *et al.*, 90 Pa. St. 293.

Before a subsequent creditor can attack a settlement or transfer of a party made when not indebted, he must show that the same was voluntary and was made with reference to future indebtedness, or prove circumstances of fraud other than that which arises from its being voluntary. Evans & Cogswell *v.* Bollman Bros., 22 S. Car. 512.

Where a corporation has waived or omitted to exercise the right to institute proceedings to recover lands of which it has been defrauded, such right does not inure to the benefit of subsequent creditors or purchasers. Graham *v.* Railroad Co., 102 U. S. 148.

Where the conveyance was voluntary, and included all of the individual property of one member of a partnership

untary conveyance may often be impeached by a future or subsequent creditor, even for fraud as to creditors existing at the time it was made.[1] In case of an attack by existing creditors, however, they are aided by the presumption that the conveyance, if voluntary, was intended to defraud them;[2] while the burden is upon subsequent creditors to show fraud in the transaction.[3] This is usually done by showing that the gift, conveyance, or settlement was made by the debtor in contemplation of future indebtedness.[4] A subsequent creditor who became such with knowledge or notice

which was largely indebted at the time, subsequent creditors whose means have been used to pay off the prior indebtedness will be subrogated to the rights of the prior creditors, and they may avoid such conveyance. Barhydt *v.* Perry, 57 Iowa, 416.

A voluntary conveyance of real estate to defraud existing creditors is void as to such creditors; but it cannot be attacked by a subsequent creditor where the conveyance was not made in contemplation of future indebtedness and the claim of the subsequent creditor was not incurred on the faith or credit that the property in contest belonged to the debtor. Sheppard *et al. v.* Thomas, 24 Kan. 780.

1. Toney *v.* McGehee, 38 Ark. 419; Day *v.* Cooley, 118, Mass. 527; Wadsworth *v.* Williams, 100 Mass. 126; Claflin *v.* Mess, 30 N. J. Eq. 211; McLane *v.* Johnson, 43 Vt. 48; Dart *v.* Stewart, 17 Ind. 221.

A conveyance in fraud of one creditor has been held void as to all creditors. Hoke *v.* Henderson, 3Dev. (N. Car.) 312.

2. Cook *v.* Johnson, 1 Beas. Ch. (N. J.) 51; s. c., 72 Am. Dec. 381; Nicholas *v.* Ward, 1 Head (Tenn.), 323; s. c., 73 Am. Dec. 177; Emerson *v.* Bemis, 69 Ill. 540; Jenkins *v* Clement, 1 Harp. Eq. (S. Car.) 72; s. c., 14 Am. Dec. 705; Lloyd *v.* Fulton, 91 U. S. 479, 485; Lee *v.* Figg, 37 Cal. 336.

Several of the cases just cited hold this presumption to be conclusive, and there are other cases to the same effect. See Reade *v.* Livingston, 3 Johns. Ch. (N. Y.) 481; s. c., 8 Am. Dec. 520; Crawford *v.* Kirksey, 55 Ala. 282; Emerson *v.* Bemis, 69 Ill. 540; Richardson *v.* Rhodus, 14 Rich. L. (S. Car.) 96. But the leading case of Reade *v.* Livingston, 3 Johns. Ch. (N. Y.) 481, seems to have been repudiated by the same court that decided it. Seward *v.* Jackson, 8 Cow. (N. Y.) 406. And the weight of authority is decidedly in favor or regarding such presumption as rebuttable and making merely a *prima facie* case of fraud. Lerow *v.* Wilmarth, 9 Allen (Mass.), 386; Lloyd *v.* Fulton, 91 U. S. 495; Fellows *v.* Smith, 40 Mich. 689; Grant *v.* Ward, 64 Me. 239; Pence *v.* Croan, 51 Ind. 336; Gwyer *v.* Figgins, 37 Iowa, 517; Dulame *v.* Young, 3 Bush (Ky.), 343; Holden *v.* Burnham, 63 N. Y. 74; Dewey *v.* Long, 25 Vt. 564; Clark *v.* Depew, 25 Pa. St. 509. And see note to Jenkins *v.* Clement, 1 Harp. Eq. (S. Car.) 72; s. c., 14 Am. Dec. 705.

3. Herring *v.* Richards, 1 McCrary (C. C.), 574; Ford *v.* Johnston, 7 Hun (N. Y.), 568; Dygert *v.* Remerschnider, 32 N. Y. 649; Claflin *v.* Mess, 30 N. J. Eq. 212; Belford *v.* Crane, 16 N. J. Eq. 265, 272.

A voluntary conveyance made by a party solvent at the time may be impeached and set aside by subsequent creditors, provided it be executed with the inintention and design to defraud those who should thereafter become his creditors. Where such fraud is charged, the fraudulent purpose will not be presumed, but must be proved. The *onus* rests on the parties assailing the deed to establish the fraudulent intent by satisfactory proof. Matthai, Ingram & Co. *v.* Heather, 57 Md. 483.

A voluntary conveyance may be impeached by a subsequent creditor on the ground that it was made in fraud of existing creditors; but to do so, he must show either that actual fraud was intented or that there were debts still unpaid which the grantor owed at the time of making it. Toney *v.* McGehee, 38 Ark. 419.

4. Savage *v.* Murphy, 34 N. Y. 508; Walter *v.* Lane, 1 McArthur (D. C.), 282; Burdick *v.* Gill, Iowa, 7 Fed. Rep. 670.

Thus, where a voluntary conveyance is made by the debtor on the eve of embarking in a hazardous business enterprise for the purpose of casting the hazards of the business upon others and securing for himself "a retreat in the event of probable pecuniary disaster," subsequent creditors may successfully attack it as fraudulent. Fisher *v.* Lewis, 69 Mo. 631; Black *v.* Nease, 37 Pa. St. 438; Case *v.* Phelps, 39 N. Y. 169; Smith *v.* Vodges, 92 U. S. 183.

of the conveyance cannot, ordinarily at least, successfully attack it as fraudulent.[1] Where a conveyance is once avoided, however, even though it be at the suit of existing creditors, the proceeds become assets generally, for the benefit of subsequent as well as existing creditors.[2]

**III. The Debtor.**—1. *Intent.*—"Intent or intention is an emotion or operation of the mind, and can usually be shown by acts or declarations; and, as acts speak louder than words, if a party does an act which must defraud another, his declaring that he did not by the act intend to defraud is weighed down by the evidence of his own act."[3] Every man is presumed to intend the natural and necessary consequences of his own acts.[4] The intent may be to hinder or delay creditors, as well as to defraud them, and either is sufficient under the statute.[5] Intent alone, however, is not sufficient to render a conveyance fraudulent unless it is carried out so as to prejudice creditors;[6] but where such is the natural and proximate result of the debtor's act, it may be fraudulent notwithstanding a good motive or intention.[7]

1. Baker *v.* Gilman, 52 Barb. (N. Y.) 39; Lehmberg *v.* Biberstein, 51 Tex. 457; Monroe *v.* Smith, 79 Pa. St. 459; Herring *v.* Richards (Minn.), 3 Fed. Rep. 443.

*Compare* Kirksey *v.* Snedecor, 60 Ala. 192.

2. Kehr *v.* Smith, 20 Wall. 36; Norton *v.* Norton, 5 Cush. (Mass.) 530. See also Magawley's Trust, 5 De G. & S. 1; O'Daniel *v.* Crawford, 4 Dev. L. (N. Car.) 197, 204; Robinson *v.* Stewart, 10 N. Y. 189; Ammon's Appeal, 63 Pa. St. 289; Trimble *v.* Turner, 21 Miss. 348.

3. *Per* Sutherland, J., in Babcock *v.* Eckler, 24 N. Y. 632. See also Newman *v.* Cordell, 43 Barb. (N. Y.) 456; Potter *v.* McDowell, 31 Mo. 62.

A party may testify directly to his intention as a fact. Bedell *v.* Chase, 34 N. Y. 386; Starin *v.* Kelly, 88 N. Y. 422; Sedgwick *v.* Tucker, 90 Ind. 271; "Evidence of Intent," 22 Cent. L. J. 271. *Compare* Hathaway *v.* Brown, 18 Minn. 414.

4. Wait on Fraud. Conv. § 9; Knight *v.* Capito, 23 W. Va. 639; Sims *v.* Gaines, 64 Ala. 395; Harman *v.* Hoskins, 56 Miss. 142; Coleman *v.* Burr, 93 N. Y. 31. See also Moore *v.* Wood, 100 Ill. 451.

5. Crow *v.* Beardsley, 68 Mo. 439 State *v.* Mueller, 10 Mo. App. 87; Burdick *v.* Post, 12 Barb. (N. Y.) 172; Wait on Fraud. Conv. § 11.

6. Williams *v.* Davis, 69 Pa. St. 28; Rice *v.* Perry, 61 Me. 150.

7. Winchester *v.* Charter, 97 Mass. 140; Potter *v.* McDowell, 31 Mo. 62, 69; Farrow *v.* Hayes, 51 Md. 497; Allan *v.* McTavish, 8 Ont. App. Rep. 440; Phelps *v.* Curts, 80 Ill. 112; Gardiner Bank *v.* Wheaton, 8 Me. 381; Roberts *v.* Radcliff, 35 Kan. 502.

There are two distinct grounds upon which conveyances and other contracts will be deemed fraudulent as against creditors—first, such as are entered into with a fraudulent intent, and, second, such as, from the terms of the agreement or the nature of the transaction itself, are deemed so as a mere inference of law, without regard to the motives or actual intentions of the contracting parties. Lawson *et al. v.* Funk, 108 Ill. 502.

Where it is shown that there was fraud in fact in the making of a deed conveying real estate, whether the actual fraudulent intent relates to existing creditors or is directed exclusively against subsequent creditors the effect is the same; and subsequent as well as existing creditors may for such fraud successfully impeach such conveyance. Silverman *v.* Greaser, 21 W. Va. 553.

Under the *Connecticut* statute with regard to frandulent conveyances (Gen. Statutes, p. 345), it is not necessary to prove a specific design to defraud the particular creditor who assails the conveyance; the intent to defraud one creditor renders the conveyance void as to all. Allen *v.* Rundle, 50 Conn 9. See also, Savage *v.* Knight, 92 N. Car. 493; s. c., 53 Am. Rep. 423.

The motive or purpose with which a voluntary transfer of property is made, by a party indebted at the time, is not material. Such a conveyance, irrespective of the actual intent of the debtor, is

2. *Retention of Possession.*—The retention of the possession of personal property by the debtor after its alleged sale is presumptive evidence of fraud therein ; [1] and some of the authorities go

*prima facie* in fraud of creditors. Goodman *v.* Wineland, 61 Ind. 449.

The right to dispose of one's property for an honest purpose, is not terminated by indebtedness or insolvency, although such a disposition may or does have the effect of hindering or delaying creditors. Dougherty *v.* Cooper, 77 Mo. 528.

1. Grant *v.* Lewis, 14 Wis. 487; s. c., 80 Am. Dec. 785; Davis *v.* Turner, 4 Gratt. (Va.) 422; Mayer *v.* Clark, 40 Ala. 259; Coburn *v.* Pickering, 3 N. H. 415, 428; Stowe *v.* Taft, 58 N. H. 445; Dempsey *v.* Gardner, 127 Mass. 381; Ingalls *v.* Herrick, 108 Mass. 354; Shaw *v.* Wilshire, 65 Me. 385; Sarle *v.* Arnold, 7 R. I., 582; Mead *v.* Gardiner, 13 R. I. 257; Rose *v.* Colter, 76 Ind. 590; Miller *v.* Pancoast, 29 N. J. L. 253; Guice *v.* Sanders, 21 La. Ann. 463; Thorne *v.* Bank, 37 Ohio St. 254; Benton *v.* Snyder, 22 Minn. 247; Uhl *v.* Robison, 8 Neb. 272; Conway *v.* Edwards, 6 Nev. 190; George *v.* Norris, 23 Ark. 128.

Where a vendor retains possession of personal property sold to the vendee upon the consideration of a pre-existing debt, in a contest between the vendee and a subsequent purchaser the character of such possession is a question of fact, which should be submitted to the jury, with the burden on the vendee of proving good faith. Pregnall *v.* Miller, 21 S. Car. 385; s. c., 53 Am. Rep. 684. See also Nelson *v.* Good, 20 S. Car. 223.

A conveyance in consideration of a pre-existing debt, the vendor retaining possession, and such possession not satisfactorily explained, is fraudulent as to creditors. Werts *v.* Spearman, 22 S. Car. 200.

The retention by the vendor of the possession of personal property sold is not a conclusive presumption that the sale is invalid as to his creditors, but imposes upon the purchaser the burden of showing good faith; and if it be shown that a valuable consideration was paid for the property, and that when the sale was made the vendor had sufficient other property to pay all his debts, the presumption of fraud arising from the retention of possession is overcome. Rose *v.* Colter, 76 Ind. 590.

The possession of personal property by the seller after sale does not of itself make the sale fraudulent; for if it appears that the sale was for a valuable and fair consideration, and the seller remained in possession merely as agent, and there was no fraudulent intent on the part of the buyer, the sale will be valid. Powell *v.* Stickney, 88 Ind. 310.

The provision of the *New York* Statute of Frauds (2 R. S. 136, § 5), declaring every sale of chattels not accompanied by immediate delivery and followed by an actual and continued change of possession to be presumptively fraudulent and void as against creditors of the vendor, applies to a sale on execution; and this whether the plaintiff in the execution or a third person be the purchaser. The statute draws no distinction between modes of transfer. And a municipal corporation, upon the issue by it to the proper officer of a tax warrant, directing the collection of a tax against the defendant in the execution, is a creditor within the meaning of the statute. Stimson *v.* Wrigley, 86 N. Y. 332.

The same rule is applied to chattel mortgages.

A mortgage of personal property, to be valid as against the creditors of the mortgagor, must be accompanied by a delivery within a reasonable time, followed by an actual and continued change of possession or the mortgaged property. The fact that the mortgagee retains the mortgagor in his employ in caring for or in the selling of the property, though a badge of fraud, is not *per se* a fraud against creditors not susceptible of explanation, and which vitiates the mortgage. Ewing *v.* Merkley, 3 U. Ter. 406.

Under the provisions of § 11, ch. 32, Compiled Statutes of *Nebraska*, a chattel mortgage, although filed for record, is *prima facie* fraudulent as to *bona fide* purchasers if the mortgagor retains possession of the mortgaged property. And the person claiming under such mortgage must make it appear that the same was made in good faith, in order to recover. Pyle *v.* Warren, 2 Neb. 252, and Marsh *v.* Burley, 13 Neb. 261. adhered to; Severance *v.* Leavitt, 16 Neb. 439.

The presumption of fraud arising from the vendor or mortgagor remaining in possession is one of fact, and not a conclusive presumption of law. And even such a presumption of fact does not necessarily arise where the possession follows the provisions of the deed, or where there is a mere mortgage. It is a question for the jury, or, in equity, for the chancellor, under all the circumstances. Martin *v.* Ogden, 41 Ark. 186.

to the extent of holding it conclusive evidence of fraud.[1] The matter is largely regulated by statute, however, which will account for much of the apparent conflict in the authorities. The change of possession must be actual; and mere words, even if accompanied by inspection, are insufficient.[2] It should be immediate where practicable, and, in any event, within a reasonable time under the circumstances of the particular case;[3] and it should also be exclusive[4]

The fact that some of the property included in a mortgage was consumable in its use, and was retained by the mortgagor, would, in the absence of an express reservation in the deed of the possession and use in favor of the grantor, be only a badge of fraud as matter of fact, not law. Lincoln Savings Bank *v.* Ewing, 12 Lea (Tenn.), 598. See also McLaughlin *v.* Ward, 77 Ind. 383; Sandlin *v.* Anderson, 76 Ala. 403; Sperry *v.* Etheridge, 63 Iowa, 543.

A chattel mortgage given in good faith is void for want of immediate possession of the goods only where rights have arisen in conseqence, or injury resulted, in the interval before possession is given. Wallen *v.* Rossman, 45 Mich. 333, distinguished; Waite *v.* Mathews, 50 Mich. 392.

1. Capron *v.* Porter, 43 Conn. 383; Clow *v.* Woods, 5 Serg. & R. (Pa.) 275; Thompson *v.* Yeek, 21 Ill. 73; Rozier *v.* Williams, 92 Ill. 187; Claflin *v.* Rosenberg, 42 Mo. 39; Prather *v.* Parker, 24 Iowa, 26; Merrill *v.* Hurlburt, 63 Cal. 494.

In the last case just cited, the property sold consisted of loose hay stored in the vendor's barn. The plaintiff examined the hay at the time of the sale, and there was a verbal delivery. A keeper was left in charge of the hay. A portion of it was subsequently removed, but the part in controversy remained in the barn until it was attached by a creditor of the vendor. The period between the sale and attachment was about three months. The barn continued in the possession and under the control of the vendor. The court below found that there was not an immediate delivery and an actual and continued change of possession. *Held*, that the finding was justified by the evidence. Merrill *v.* Hurlburt, 63 Cal. 494.

A deed conveying a stock of goods and merchandise, and notes and accounts, of a merchant to a trustee, to secure the payment of notes not then due, which provides that said conveyance shall cover "such goods and merchandise as may be added to said stock from time to time by the grantor and brought into the store in course of business, or to take the place of such goods as may hereafter be sold," but does not authorize the trustee to take possession or control of said goods until the grantor has made default in the payment of one or more of said notes, and has been requested to do so by the holder or holders of such note or notes, is, as against the unsecured creditors of the grantor, fraudulent and void on its face, although it provides that the "trustee, by himself or by his agent or attorney, shall at once take possession" of the notes and accounts transferred by such deed, and collect the same for the benefit of the trust creditors. Claflin *v.* Foley, 22 W. Va. 434. See also Livesay *v* Beard, 22 W. Va. 585; Klee *v.* Reitzenberger, 23 W. Va. 749.

So, there are cases in which chattel mortgages have been held void where the mortgagor is given the right to retain possession, especially if it includes the right to sell. Lund *v.* Fletcher, 39 Ark. 325; s. c., 43 Am. Rep. 270; Gauss *v.* Orr, 46 Ark. 129; Rome Bank *v.* Haselton, 15 Lea (Tenn.), 216; Bullene *v.* Barrett, 87 Mo 185. *Compare* Lister *v.* Simpson, 38 N. J. Eq. 438; Sperry *v.* Etheridge, 63 Iowa, 543; Brackett *v.* Harvey, 91 N. Y. 214.

2. Crandall *v.* Brown, 18 Hun (N. Y.), 461, 463; Billingsley *v.* White, 59 Pa. St. 466; Steele *v.* Benham, 84 N. Y. 638; Wait on Fraud. Conv. § 253; Merrill *v.* Hurlburt, 63 Cal. 494.

There are, however, cases in which actual delivery is impracticable, and, therefore, not required. Bethel Steam Mill Co. *v.* Brown, 57 Me. 9; Walden *v.* Murdock, 23 Cal. 540; Martin *v.* Adams, 104 Mass. 262. Judge Sharswood gives the cases of a vessel at sea, goods in a warehouse, bricks in a kiln, articles in process of manufacture, and the like, as examples. McKibbin *v.* Martin, 64 Pa. St. 357. See also Wait on Fraud. Conv. §§ 260. 262.

3. Seymour *v.* O'Keefe, 44 Conn. 132; State *v.* King, 44 Mo. 238.

4. Clow *v.* Woods, 5 Serg. & R. (Pa.) 275; Sumner *v.* Dalton, 58 N. H. 296; Brunswick *v.* McClay, 7 Neb. 137. But see Ross *v.* Draper, 55 Vt. 404; s. c., 45 Am. Rep. 624; Gilligan *v.* Lord, 51 Conn. 562.

and continuous.[1] The rule requiring change of possession does not apply with the same force, if indeed it applies at all, to real estate.[2]

**IV. The Purchaser.**—1. *Bona Fide Purchasers.*—"The interests of a *bona fide* purchaser of a debtor's property are superior to those of creditors,"[3] for the reason that "the purchaser has not trusted, as the creditor has, to the personal responsibility of the debtor, but has paid the consideration upon the faith of the debtor's actual title to the specific property transferred."[4]

"Three things," it is said, "must concur to protect the title of the purchaser: (1) He must buy without notice of the bad intent on the part of the vendor; (2) he must be a purchaser for a valuable consideration; and (3) he must have paid the purchase-money before he had notice of the fraud."[5]

1. Webster *v.* Peek, 31 Conn. 495; Davis *v.* Bigler, 62 Pa. St. 248; Tilson *v.* Terwilliger, 56 N. Y. 273.

But there may be cases where temporary use by the vendor after possession has once been taken by the vendee will not be considered fraudulent. Knight *v.* Forward, 63 Barb. (N. Y.) 311. Thus, in *Iowa*, it has been held that where one in good faith purchases chattels and takes possession thereof, he may afterwards loan or hire them to the seller without making them subject to attachment for the seller's debts. Deere *v.* Needles, 65 Iowa, 101.

2. Phettiplace *v.* Sayles, 4 Mas. (U. S.) 321, *per* Story, J.; Clute *v.* Newkirk, 46 N. Y. 684; Avery *v.* Street, 6 Watts (Pa.), 249. See also Tibbals *v.* Jacobs, 31 Conn. 431; Suiter *v.* Turner, 10 Iowa, 517; Merrill *v.* Locke, 41 N. H. 489.

As to growing crops, see Ticknor *v.* McClelland, 84 Ill. 471; Brantom *v.* Griffiths, 2 C. P. Div. 212. And *compare* Smith *v.* Champney, 50 Iowa, 174; Reventas *v.* Green, 57 Cal. 255.

3. Wait on Fraud. Conv. § 369.

4. *Per* Selden, J., in Seymour *v.* Wilson, 19 N. Y 417, 420. See also Goshora's Ex. *v.* Snodgrass, 17 W. Va. 717; Thames *v.* Rembert, 63 Ala. 561; Mansfield *v.* Dyer, 131 Mass. 200; Hawkins *v.* Davis, 8 Baxt. (Tenn.) 508.

**Bona Fide Purchasers from Fraudulent Grantee.**—A *bona fide* purchaser for value without notice, from a fraudulent grantee, gets a good title, as against a creditor of the fraudulent grantor. Neal *v.* Gregory, 19 Fla. 356; Schebel *v.* Jordan, 30 Kan. 353; Zoeller *v.* Riley, 100 N. Y. 102; s. c., 53 Am. Rep. 157

A, in fraud of his creditors, conveyed land by a quitclaim deed to B, who participated in the fraud, and who, by a deed in like form, conveyed the land to C. The land was then specifically attached by a creditor of A, under the Gen. Stats. ch. 123, § 55. *Held*, on a writ of entry, by the purchaser at a sale on execution made under this attachment, against C, that the fact that the latter took his title by a quitclaim deed was not conclusive evidence that he was not a purchaser in good faith and without notice of the fraud. Mansfield *v.* Dyer, 131 Mass. 200.

5. Wait on Fraud. Conv. § 369, citing Dougherty *v.* Cooper, 77 Mo. 532; Arnholt *v.* Hartwig, 73 Mo. 485; Bishop *v.* Schneider, 46 Mo. 472; Dixon *v.* Hill, 5 Mich. 408.

As to the last point, however, there is some question. See Nicol *v.* Crittenden, 55 Ga. 497; Prestidge *v.* Cooper, 54 Miss. 77.

**Bona Fide Purchasers and Their Rights.**—A mortgagee may be a *bona fide* purchaser to the extent of his interest. Ledyard *v.* Butler, 9 Paige (N. Y.), 132; Murphy *v.* Briggs, 89 N. Y. 451.

Where a party purchases, from an insolvent and failing merchant, a stock of goods, and the merchant makes such sale with the purpose to defraud his creditors, and the purchaser thereof has no actual or constructive notice of the fraud at the time of his purchase, but subsequently, and before the payment of all the consideration of his purchase, has actual notice thereof, he can only be protected to the extent of the money actually paid, or the security or property actually appropriated by way of payment before notice. If notice of the fraud is after payment of a part of the purchase-money, the purchaser is only entitled to reimbursement for the money paid or the security or property actually appropriated by the seller as payment. He is not to be regarded as a purchaser for a valuable con-

2. *Purchasers with Notice.*—Notice may be either actual or constructive.[1] Actual notice is usually a question for the jury, and may be established by implication or inference from other facts. Constructive notice is a legal inference from established facts, and

sideration as to the purchase-money not paid. Bush *v.* Collins, 35 Kan. 535.

While generally a fraudulent vendee cannot, as against the creditors of the fraudulent vendor, sell, assign, or transfer the property to a third person who has notice of the fraud, nor transfer or assign the same to even a person who has no such notice, where such transfer or assignment is merely to pay a preëxisting debt of the fraudulent vendee, yet such fraudulent vendee may make a valid sale of the property to a *bone fide* purchaser without notice of the fraud, or may, with the consent of the fraudulent vendor, and probably without his consent, make a valid transfer or assignment of such property to a creditor of the fraudulent vendor, either in payment or partial payment of a *bona fide* debt of the fraudulent vendor or as a security for such debt, and whether such creditor has notice or not of the prior fraudulent sale. Dolan *v.* Van Demark, 35 Kan. 304. See also Thames *v.* Rembert, 93 Ala. 561.

A purchaser from one who sold with intent to delay, hinder, or defraud creditors must, as against such creditors seeking to subject the property to payment of their debts, show that he paid a valuable consideration, and that he was not chargeable with notice of the fraudulent intent; and although such purchaser was not chargeable with notice of the fraudulent intent of his vendor, yet, if he did not pay a valuable consideration, no title passed as against such creditors. A void patent would constitute no consideration, and if void, both the contracting parties would be chargeable with notice of its validity. Brown *v.* Texas Cactus Hedge Co., 64 Tex. 396.

One who, in good faith and for a valuable and sufficient considerarion, purchases a tract of land, will be protected in such purchase, although the grantor was in debt and intended by such sale and conveyance to hinder, delay, and defraud his creditors. Forlin *v.* Sook, 30 Kan. 401; s. c., 46 Am. Rep. 100.

A sale of his property by a debtor who is insolvent or in failing circumstances, with the intent thereby to place it beyond the reach of his creditors, or to hinder, delay, or defraud them, will pass a good title to the purchaser paying full value, *unless* he had knowledge of such fraudulent intent or was possessed of information which was calculated to put him on inquiry, and which, if followed up, would have led to the discovery of the fraudulent intent; but, if the purchaser had such knowledge, or the means of acquiring it, the payment of full value for the property is not sufficient to protect him. Lehman *v.* Kelly, 68 Ala. 192.

Where a debtor purchases real estate, and causes it to be conveyed to his wife in fraud of his creditors, a *bona fide* mortgage, from the husband and wife will not be affected by the fraud. Shorten *v.* Drake, 38 Ohio St. 76.

The title of a purchaser in good faith, at the sale on foreclosure of a chattel mortgage, is not affected by the fact that the mortgage was executed in pursuance of a conspiracy between the mortgagor and mortgagee to hinder, delay, and defraud the creditors of the former.

If creditors enter into a composition agreement with their debtor, and sign a receipt for the agreed amount, and a third party, relying upon this, in good faith advances money to the debtor to enable him to settle with his creditors, and, in consideration of the advances, receives a transfer of property from the debtor, the transfer will be valid as against the creditors, though they are in fact never paid. This is not upon the principal of estoppel, but because the transferee is a *bona fide* purchaser. Kuhn *v.* Weil, 73 Mo. 213.

A purchaser at the execution sale, who makes a deed of gift to the grantee, cannot escape the consequences of the grantor's fraud in such a case upon the ground that he had no notice thereof if the purchase-money was derived, not from his skill, but from a business established with the grantor's funds, in fraud of his creditors. Montgomery *v.* McGuire, 59 Mass. 193.

A lot of land of the father was sold under execution founded upon a valid judgment, and was redeemed by the son, who was aiding his father in the purpose of hindering, delaying and defrauding his creditors as to all his property. *Held*, that said redemption was fraudulent and void as to the creditors of his father, and the son was not entitled to the redemption money paid by him. Shepherd *v.* Woodfolk, 10 Lea (Tenn.). 593.

1. Wait on Fraud. Conv. § 373; Brad-

cannot, ordinarily at least, be controverted.[1] Where the purchaser has knowledge of such facts as "would lead any honest man, using ordinary caution, to make further inquiries" whereby the fraud would be discovered, he will be deemed to have notice.[2] A purchaser from the fraudulent grantee, with notice of the fraud, will take the title subject to all the infirmities with which it was affected in the hands of such fraudulent grantee.[3] But a purchaser from a *bona fide* purchaser, although he has notice, will generally take a good title under such *bona fide* holder.[4] A fraudulent grantee with notice, who sells the property to a *bona fide* purchaser, is nevertheless liable to the creditors of his grantor for the proceeds thereof.[5]

**V. The Conveyance.**—The conveyance may be considered, first, as to its subject-matter; second, as to its consideration; and, third, as to its form and nature generally.

1. *The Subject-matter* of the conveyance must, as a rule at least, be something out of which the creditor could otherwise have realized all or a portion of his claim.[6] Thus, fraud cannot be predicated of a conveyance of property exempt from execution.[7] And,

bury *v.* Falmouth, 18 Me. 65; Tufts *v.* King, 18 Pa. St. 157.

1. Parker *v.* Connor, 93 N. Y. 124; Williamson *v.* Brown, 15 N. Y. 359; Townsend *v.* Little, 109 U. S. 504; 1 Story Eq. Jur. § 399.

2. See Whitbread *v.* Jordan, 1 Y. & C. (Eng. Exch. Eq.) 328; Acer *v.* Westcott, 46 N. Y. 384; Williamson *v.* Brown, 15 N. Y. 362; Baker *v.* Bliss, 39 N. Y. 70; Bartles *v.* Gibson (Wis.), 17 Fed. Rep. 297; Atwood *v.* Impson, 20 N. J. Eq. 156; Wilson *v.* Prewett, 3 Woods (U. S.), 641; Mills *v.* Howeth, 19 Tex. 257; s. c., 70 Am. Dec. 331; David *v.* Birchard, 53 Wis. 495; Traylor *v.* Townsend, 61 Tex. 144; Hooser *v.* Hunt, 65 Wis. 71.

It is held, in several cases, that such knowledge is not sufficient where a valuable consideration has been paid. Stearns *v.* Gage, 79 N. Y. 102; Farley *v.* Carpenter, 27 Hun (N. Y.), 359; Parker *v.* Connor, 93 N. Y. 118. See also Carroll *v.* Hayward, 124 Mass. 122. But these cases are criticised, as it would seem, with justice, by Mr. Wait, in his treatise on Fraudulent Conveyances, §§ 375–378. See also note to Parker *v.* Connor, 93 N. Y. 113; s. c., 45 Am. Rep. 178, 184.

3. Wilcoxen *v.* Morgan, 2 Col. 478; Studabaker *v.* Langard, 79 Ind. 320; Evans *v.* Nealis, 69 Ind. 148.

4. Allison *v.* Hagan, 12 Nev. 55; 1 Story Eq. Jur. § 409; Fulton *v.* Woodman, 54 Miss. 158; Studabaker *v.* Langard, 79 Ind. 320.

5. Smith *v.* Sands, 17 Neb. 498; Blair *v.* Smith (Ind.), 15 N. E. Rep. 817. See also Ferguson *v.* Hillman, 55 Wis. 181; Bank *v.* Warner, 12 Hun (N. Y.), 306; Briggs *v.* Merrill, 58 Barb. (N. Y.) 389; Williamson *v.* Williams, 11 Lea (Tenn.), 355.

So where other land is taken in exchange. Sloan *v.* Torry, 78 Mo. 623.

6. Hoyt *v.* Godfrey, 88 N. Y. 669; Smillie *v.* Quinn, 90 N. Y. 492; Fellows *v.* Lewis, 65 Ala. 343; s. c., 39 Am. Rep. 1; O'Conner *v.* Ward, 60 Miss. 1025.

7. Taylor *v.* Deusterberg, 109 Ind. 165, 170; Prout *v.* Vaughn, 52 Vt. 45; Derby *v.* Weyrich, 8 Neb. 174; s. c., 30 Am. Rep. 827; Burdge *v.* Bolin, 106 Ind. 175, 178; Barnard *v.* Brown, 112 Ind. 53; Carhart *v.* Harshaw, 45 Wis. 340; s. c., 30 Am. Rep. 752; Delashmut *v.* Trau, 44 Iowa, 613; Morrison *v.* Abbott, 27 Minn. 116; Washburn *v.* Goodheart, 88 Ill. 229; Smith *v.* Rumsey, 33 Mich. 183; Flask *v.* Tindall, 39 Ark. 571; Stanley *v.* Snyder, 43 Ark. 429.

A deed of a homestead cannot be avoided as in fraud of the rights of a judgment creditor. The holder is as free to dispose of it as though he were not a debtor. Thead *v.* Hownson, 46 Mich. 243.

A conveyance by husband to wife, of lots not exceeding in value the statutory homestead, sustained against a creditor, though the consideration, but for the homestead right, would have been inadequate. Pulte *v.* Geller, 47 Mich. 560. *Compare* Brackett *v.* Watkins, 21 Wend. (N. Y.) 68; Currier *v.* Sutherland, 54 N. H. 475; s. c., 20 Am. Rep. 143; Strouse's

upon the same principle, it has been held that the transfer of a thing of no value,[1] or of property in which the debtor has no beneficial interest,[2] cannot be fraudulent as to creditors. But all kinds of property of value, "real and personal, legal and equitable, vested, reversionary, or contingent, which are subject to the payment of debts or liable to be taken in execution," are susceptible of fraudulent alienation, and may be reclaimed by the creditor in a proper case.[3] This rule includes intangible rights and choses in action, as well as tangible property, wherever they are subject to execution.[4]

2. *The Consideration* is often an important element in determining the validity of a conveyance, especially where the conveyance is made and received in good faith. "Every man is bound to be just before he is generous;"[5] and a gift or voluntary conveyance which has the effect of hindering or delaying his creditors may be set aside by them, although it may have been made without any evil intention.[6] And a conveyance by a debtor, without consideration, for the purpose of defrauding his creditors may be impeached by the creditors, even though the grantee took it in good faith and in ignorance of such fraudulent intention on the part of the debtor.[7] Where the consideration is valuable and adequate,

Ex'r *v.* Becker, 38 Pa. St. 192; Piper *v.* Johnston, 12 Minn. 27.

1. Stacy *v.* Deshaw, 7 Hun (N. Y.), 451; Hamburger *v.* Grant, 8 Oreg. 182; French *v.* Holmes, 67 Me. 183. *Compare* Garrison *v.* Monaghan, 33 Pa. St. 234; Ithaca Gas Co. *v.* Treman, 93 N. Y. 660.

2. Youmans *v.* Boomhower, 3 T. & C. (N. Y.) 21; Wait Fraud. Conv. 44, § 23.

3. May Fraud. Conv. 17; Wait Fraud. Conv. 46, § 24.

"The entire property of which a debtor is the real or beneficial owner constitutes a fund which is primarily applicable, to the fullest extent of its entire value, to the payment of its owner's debts." Quoted by Mr. Wait from an essay by John Reynolds, Esq., on Fraudulent Conveyances, read before the N. Y. Bar Assoc., Nov. 18, 1879.

4. Annuities,—Norcutt *v.* Dodd, 1 Craig & Ph. 100;—book royalties,—Lord *v.* Harte, 118 Mass. 271;—legacies,—Bigelow *v.* Ayrault, 46 Barb. (N. Y.) 143;—life-insurance policies,—Burton *v.* Farinholt, 86 N. Car. 260; Anthracite Ins. Co. *v.* Sears, 109 Mass. 383;—and stocks,—Beckwith *v.* Burrough, 14 R. I. 366; s. c., 51 Am. Rep. 392; Bayard *v.* Hoffman, 4 Johns. Ch. (N. Y.) 450; Weed *v.* Pierce, 9 Cow. (N. Y.) 723,—have all been held reclaimable by the creditor when fraudulently alienated.

So with many other choses in action. Drake *v.* Rice, 130 Mass. 410; Powell *v.* Howell, 63 N. Car. 283; Pendleton *v.* Perkins, 49 Mo. 565; Rogers *v.* Jones, 1 Neb. 417; Stinson *v.* Williams, 35 Ga. 170; Tautum *v.* Green, 21 N. J. Eq. 364; Hitt *v.* Ormsbee, 14 Ill. 233; City of Newark *v.* Funk, 15 Ohio St. 462. *Compare* Wallace *v.* Lawyer, 54 Ind. 501; Nantes *v.* Corrock, 9 Ves. 188.

5. 1 Story Eq. Jur. (3d Ed.) § 353; Copis *v.* Middleton, 2 Madd. 428.

6. Potter *v.* McDowell, 31 Mo. 62; Patten *v.* Casey, 57 Mo. 118; Winchester *v.* Charter, 97 Mass. 140.

7. Spaulding *v.* Blythe, 73 Ind. 93; Barkley *v.* Tapp, 87 Ind. 25; Lee *v.* Figg, 37 Cal. 328; Hitchcock *v.* Kiely, 41 Conn. 611; Laughton *v.* Harden, 68 Me. 213; Beecher *v.* Clark, 12 Blatchf. (U. S.) 256; Carter *v.* Grimshaw, 49 N. H. 100; Doe, *d.* Lassiter *v.* Davis, 64 N. Car. 498; Seymour *v.* Wilson, 19 N. Y. 417.

A conveyance of real estate without consideration, or for a mere nominal one, by a party who is at the time largely indebted and insolvent, will be regarded as fraudulent and void, even as against subsequent creditors. Morrill *et al. v.* Kilner, 113 Ill. 318.

The conveyance, without consideration, of any estate subject to execution, to defraud existing creditors, gives them the right to reach such estate where it appears that the debtor has no other property subject to execution. Iles *et al. v.* Cox, 83 Ind. 577.

The purchase of property by a man, for a woman, in his own name, and its con-

the conveyance cannot generally be avoided by the creditors as against a good-faith purchaser without notice.[1] If the consideration be valuable, inadequacy alone will not make the conveyance fraudulent, for the law will not "weigh considerations in diamond-scales."[2]

veyance to her without any pecuniary consideration, and in view of illicit intercourse with her past and expected, will not be sustained as against the claims of creditors for debts owing at the time of the grant, which he at that time was unable to pay. Jackson *v.* Minor *et al.*, 101 Ill. 550.

1. Prewit *v.* Wilson, 103 U. S. 22, 24; Jaeger *v.* Kelley, 52 N. Y. 275; Choteau *v.* Jones, 11 Ill. 300; s. c., 50 Am. Dec. 460; Hood *v.* Fahnestock, 8 Watts (Pa.), 489; s. c., 34 Am. Dec. 489; Howe *v.* Waysman, 12 Mo. 169; s. c., 49 Am. Dec. 126; Farlin *v.* Sook, 30 Kan. 401; s. c., 46 Am. Rep. 100; Fifield *v.* Gaston, 12 Iowa, 218; Howe Machine Co. *v.* Claybourn (Mich.), 6 Fed. Rep. 438; Zoeller *v.* Riley, 100 N. Y. 102; Starin *v.* Kelly, 88 N. Y. 418; Parker *v.* Conner, 93 N. Y. 118; Dougherty *v.* Cooper, 77 Mo. 528. *Compare* Hildreth *v.* Sands, 2 Johns. Ch. 35; Gamble *v.* Johnson, 9 Mo. 605; Miller *v.* Tollison, 1 Harp. (S. Car.) Eq. 145.

2. Quoted from Lord Talbot, by Wilmot, C. J., in Roe *v.* Milton, 2 Wils. 358, n.

The following cases will show what consideration has been held sufficient to support the conveyance:

Where a deed provides that the grantee shall support his invalid brothers (naming them) and comply with the conditions imposed, it is not voluntary, within the meaning of the *North Carolina* statute, but rests upon a valuable consideration. Worthy *v.* Brady, 91 N. Car. 265. See also Barnes *v.* Foxen, 53 Mich. 475; Holsington *v.* Ostrom *et al.*, 27 Kan. 110. *Compare* Stanley *v.* Robbins, 36 Vt. 422.

A conveyance of real estate, made in discharge of a moral obligation, is not without consideration and will not be set aside as fraudulent, and the land subjected to the satisfaction of a judgment against the grantor, which was not a lien upon the land when the conveyance was made. The moral right and legal title of the grantee outweigh the mere moral right of the judgment creditor. Cottrell *v.* Smith *et al.*, 63 Iowa, 181.

Where a surety assumes payment of the debt of his principal, and mortgages his land to secure it, and in consideration thereof the principal transfers personal property to him, the transaction is upon a valuable consideration, and the sale will not be set aside unless it is shown that both buyer and seller were guilty of fraud. Powell *v.* Stickney, 88 Ind. 310.

**Marriage** is a valuable consideration,—Magniac *v.* Thompson, 7 Pet. (U. S.) 348; Herring *v.* Wickham, 29 Gratt. (Va.) 628; Sterry *v.* Arden, 1 Johns. Ch. (N. Y.) 260, 271; Jones's Appeal, 62 Pa. St. 324; Smith *v.* Allen, 5 Allen (Mass.), 454; Pierce *v.* Harrington, 58 Va. 649.—and an ante-nuptial settlement will not be set aside for fraud unless the wife participated therein,—Prewitt *v.* Wilson, 103 U S. 22.

**Illegal Consideration,** as future illicit cohabitation or the like, is insufficient. Potter *v.* Gracie, 58 Ala. 305; Jackson *v.* Miner, 101 Ill. 559. See also 1 Story Eq. Jur. §§ 353, 354; Weeks *v.* Hill, 38 N. H. 205.

**Services** by members of the family whom the debtor is bound to support will not constitute a sufficient consideration. Gardner *v.* Schooley, 25 N. J. Eq. 150. See also Coleman *v.* Burr, 93 N. Y. 17, 25; Grant *v.* Green, 41 Iowa, 88; Birkbeck *v.* Ackroyd, 74 N. Y. 356.

**Other Voluntary Conveyances.**—A voluntary conveyance to a relative by an insolvent person, though *prima facie* evidence of fraud, is not void unless it is in fact tainted by fraudulent intent. Stevens *v.* Robinson, 72 Me. 381.

It is the settled law of *Alabama*, that a voluntary conveyance—that is, a conveyance founded only on a good, as distinguished from a valuable, consideration—is fraudulent, and void as against the existing creditors of the donor, without regard to the motives or intent which led to its execution, or to the amount and value of the other property retained by him. Early & Lane *v.* Owens, 68 Ala. 171.

A settlement upon a wife or child by a voluntary conveyance, without consideration, where the grantor is insolvent, or where he is largely indebted and fails to retain property which proves sufficient to discharge his debts, cannot be sustained. Crawford *v.* Logan, 97 Ill. 396.

Where an insolvent paid the consideration for certain real estate, and procured the conveyance of the same to his wife, it was held not to differ from a voluntary conveyance made by a husband, while insolvent, to his wife; and that the property was properly subjected to the pay-

3. *Form and Nature.*—Fraud assumes many and various forms and shapes. But "What cannot be done directly, cannot be done by indirection. Forms are of little moment; for where fraud appears, courts will drive through all matters of form, and expose and punish the corrupt act."[1] The authorities cited and classified in the note below will serve to show what conveyances have been held fraudulent by the courts, as well as their form and nature generally.[2]

ment of the husband's debts. Gear *et al. v.* Schrei *et al.*, 57 Iowa, 666.

The mere fact that an assignment of property by a debtor was voluntary and without consideration is not sufficient to require a finding that it was fraudulent against creditors. Genesee River Nat. Bank *v.* Mead, 92 N. Y. 637.

A voluntary deed made by a debtor while insolvent is void against his creditors; or any deed made by a debtor with the intention of delaying, hindering, or defrauding creditors, such intention being known to the party taking, is void. Cothran *v.* Forsyth, 68 Ga. 560.

A voluntary conveyance of land, made with a fraudulent intent, is void as to creditors and purchasers both prior and subsequent; and this is true although the grantee in such voluntary conveyance was ignorant of the fraudulent purpose of the grantor. Shaw *et al. v.* Tracy *et al.*, 83 Mo. 224.

Where the difference between the price paid and the actual value of the property is apparent and great, the conveyance will be regarded as voluntary to the extent of that difference. Strong *v.* Lawrence, 58 Iowa, 55.

Where the debtor is insolvent at the time judgment is rendered, his insolvency will be considered as extending back beyond a voluntary conveyance of his property, made during his indebtedness, unless the contrary be shown; and the burden is upon the party claiming under the conveyance, to show that, at the time it was made, his donor had other property amply sufficient to pay all his debts. Strong *v.* Lawrence, 58 Iowa, 55.

A voluntary conveyance made by a debtor in embarrassed circumstances is constructively fraudulent, and will be set aside at the instance of a creditor without proof of actual fraud. Bohannon *v.* Combs, 79 Mo. 305.

Where a member of a partnership which was largely indebted made a voluntary conveyance of all his individual property, but without any purpose to defraud the firm-creditors, such conveyance would be constructively fraudulent and liable to be avoided. Barhydt & Co. *v.* Perry *et al.*, 57 Iowa, 416.

A conveyance, of lands by a husband to his wife, which purports to be made in consideration of love and affection, "and for the sum of one dollar cash in hand paid, the receipt whereof is hereby acknowledged," is purely voluntary, and void as against the existing creditors of the husband; and when assailed by them, parol evidence cannot be received to show that it was founded on a valuable consideration. Houston *v.* Blackman, 66 Ala. 559; s. c., 41 Am. Rep. 756.

A gift of personal property exempt from execution, to take effect at the death of the donor, the sole object of which is to defraud creditors, when the exemption has ceased to exist, may be set aside by the administrator of the donor, for the benefit of creditors. Martin, Admr. *v.* Crosby, 11 Lea (Tenn.), 198.

A voluntary post-nuptial conveyance or settlement upon a wife will be set aside in favor of pre-existing creditors of the grantor if he does not retain ample means to discharge his indebtedness. Otis, Receiver *v.* Spencer, 102 Ill. 622; s. c., 40 Am. Rep. 617.

A voluntary transfer of a chose in action by an insolvent donor, to his children, without valuable consideration, is fraudulent and void, and the same may be reached in equity by creditors, and subjected to the payment of their debts. Burton *v.* Farinholt, 86 N. Car. 260.

1. *Per* Elliott, J., in Buck *v.* Voreis, 89 Ind. 116, 117.

2. **Secret Trusts.**—Deeds absolute on their face, but accompanied by a secret trust, are a common form of fraudulent conveyance. Winkley *v.* Hill, 9 N. H. 31; s. c., 31 Am. Dec. 215; McCulloch *v.* Hutchinson, 7 Watts (Pa.), 434; s. c., 32 Am. Dec. 779; Lukins *v.* Aird, 6 Wall. (U. S.) 79; Young *v.* Heermans, 60 N. Y. 382; Rice *v.* Cunningham, 116 Mass. 469.

**Absolute Conveyances by Way of Security** are often fraudulent. Sins *v.* Gaines, 64 Ala. 396; Ladd *v.* Wiggin, 35 N. H. 426; Wait Fraud. Conv. § 238.

**Miscellaneous Cases.** — One who has bought property under an arrangement which would be fraudulent as against the creditors of the vendor, or by an unratified sale in which the vendor's agent has exceeded his authority, obtains no title which he can protect from attachments sued out by the vendor's creditors. Newburn *v.* Woods, 52 Mich. 610.

If a wife permits her husband to take title to her lands, and to hold himself out to the world as the owner of them, and to contract debts upon the credit of such ownership, she cannot afterwards, by taking title to herself, withdraw them from the reach of his creditors, and thus defeat their claims. City Nat. Bank *v.* Hamilton, 34 N. J. Eq. 158.

But the payment of an insolvent corporation to a stockholder, of a demand which is not a legally subsisting debt capable of being enforced by suit, is a mere gift, and fraudulent as to *bona fide* creditors. Bouton *v.* Smith, 113 Ill. 481.

A debtor conveys his property, stating upon the face of the deed that he has more property than will pay his debts; declares his object to be to prevent a sacrifice of his property, and to save a residue for himself. The deed is fraudulent as to creditors, upon its face. German Ins. Bank *v.* Nunes, 80 Ky. 334.

The fraudulent effect of a gift from a man to his wife, by which the property is placed beyond the reach of creditors, is not changed by the fact that the wife, while she knew her husband was indebted, did not know that he could not give her his property under the circumstances. Watson *v.* Melchor, 42 Mich. 477.

A sold certain cattle to B without transfer of possession. These parties afterwards intermarried. A still retained possession of the cattle, and, with the knowledge and consent of his wife, continued to exercise full acts of ownership over them. He afterwards made a bill of sale of them to Dean, in his own name, but under his wife's direction. After the sale, the property remained in the possession of A. *Held*, that the transfer to Dean was void as against the creditors of A while he remained in possession. Dehn *v.* Walkenhorst *et al.*, 64 Cal. 78.

Moneys were given by a married woman to her husband in 1855, and for which she received no evidence or security until 1877, when he had become insolvent. *Held*, not to sustain, under the circumstances, as against his existing creditors, a transfer of property to her in 1877, but, as to them, to be fraudulent. Leurs, *et al. v.* Brunjes *et ux.*, 34 N. J. Eq. 19.

A conveyance in trust, of all the debtor's property (realty), to secure a debt of only one third its value, with two and a half years to run before maturity, is fraudulent in law, though the creditor have no purpose except to secure his debt. Hartman, Adm'r, *et al. v.* Allen *et al.*, 9 Lea (Tenn.), 657.

Where a debtor made a conveyance, fraudulent as to creditors, to his son, taking from him at the same time a mortgage to secure certain trust-moneys in his hands, a court of equity, in setting aside such conveyance on a creditor's bill, will validate the mortgage in behalf of the *cestuis que trust.* First National Bank of Clinton *v.* Cummins, 39 N. J. Eq. 577.

If the property conveyed is of a stable character, and the property retained is of uncertain and doubtful value, or if the donor is indebted to an extent that the conveyance will have the effect to hinder and delay his creditors, fraud will be presumed; but if existing debts are provided for in the conveyance, or if they are afterwards paid, or if the intention to pay them is clearly manifested by the amount and character of the property retained, the presumption of fraud will be rebutted. Spence *v.* Dunlap, 6 Lea (Tenn.), 457.

Where a wife filed her bill against one who claimed land, under a sheriff's sale thereof, as her husband's property, and from whom she and her husband had since rented, to enjoin him from dispossessing them on the ground that the property was her separate estate; and where the bill and exhibits showed that her claim rested on a voluntary conveyance from her husband, made after the debt under which the sale took place was contracted, for the purpose of defrauding his creditors, an injunction was properly refused. May *v.* Huntington, 66 Ga. 208.

Where a debtor has conveyed real estate in fraud of his creditors, and at his request his grantee has given a mortgage thereon, to secure a debt of the grantor which existed at the time of the conveyance; to a creditor ignorant of its fraudulent character, the mortgage comes within the exception in the Statute of Frauds (2 R. S. 137, § 5) protecting the rights of purchasers in good faith and "for a valuable consideration;" and although the conveyance be set aside in an action brought by other creditors, the mortgage cannot be affected. Murphy, Receiver, *v.* Briggs *et al.*, 89 N. Y. 446.

A executed to B a promissory note and warrant of attorney, upon which judgment was rendered; and an execution having been issued on the judgment, the sheriff levied the same on A's goods.

The note was without consideration, and A was insolvent when it was executed. In doing, and procuring to be done, these various acts, both A and B concurred, and their object was to defraud A's creditors. *Held*, that the acts were within the statute, which provides that "All transfers, conveyances, or assignments made with intent to hinder, delay, or defraud creditors shall be declared void at the suit of any creditor." 75 Ohio L. 938. § 10; Rev. Stat. § 6344. Bloomingdale *v.* Stein, 42 Ohio St. 168. See also Crane *v.* Timberlake, 81 Mo. 431; Switz *v.* Bruce *et al.*, 16 Neb. 463; Shattuck & Jackson *v.* Knight & Bros., 25 W. Va. 590; Kanawha Valley Bank *v.* Wilson, 25 W. Va. 242; Fisher *v.* Schlosser, 41 Ohio St. 147; Hope *v.* Salt Co., 25 W. Va. 789; Gillett *v.* Bate, 86 N. Y. 87; s. c., 10 Alb. (N. Y.) N. Cas. 88.

**Where Not Fraudulent.**—So long as a debtor remains solvent, no sale, mortgage, or assignment by him can be held to have been made in contemplation of insolvency, unless actual fraud be alleged and proved. Griffith *v.* Cox, 79 Ky. 562.

A husband who used the proceeds of a note, given to his wife by her father in 1861 soon after her marriage, in purchasing land in his own name, became her debtor; and after her death, he, in 1879, could, as against his creditors, convey all his real estate to a trustee to discharge the debt to the extent of her children's interest in her estate. Rogers *v.* Mayer *et al.*, 59 Mass. 524.

A compromise by a debtor with his creditors, by which he paid fifty cents on the dollar of his indebtedness, and procured releases, will not be set aside in the absence of proof of any false representations or fraud except his omission to inform his creditors that he had held the title to certain houses and lots, and had made a gift of them to another. Jackson *v.* Miner *et al.*, 101 Ill. 550.

Where property was bought for another as a gift, and the person to whom the gift was made put in possession of the same in 1870, and the conveyance made to her and recorded in December, 1871, at which times the party making the purchase and gift was solvent and in good credit, it was held that the gift could not be set aside by creditors for debts accruing to them in 1873 and 1874. Jackson *v.* Miner *et al.*, 101 Ill. 560.

Where one holds lands in secret trust for another, to defraud creditors, and by subsequent parol agreement the land is converted into money to be used by the trustee in paying the creditors, the balance to be put at interest until called for or until the grantor's youngest child reaches full age, the new agreement purges the original fraud, is valid though not in writing, the Statute of Limitations does not begin to run until demand by the *cestui que trust* or full age of the youngest child, and the lapse of twenty years raises no presumption of payment. Langsdale *v.* Woollen, Adm'r, 99 Ind. 575.

A decedent's estate was bid in on foreclosure for the benefit of the widow and heirs, and the purchaser conveyed it to the widow for the benefit of an invalid son, to whom, in pursuance of this arrangement, she afterward conveyed the title thus received. Meanwhile she became liable as a surety, and her creditors, having obtained judgment against her in a suit brought after these arrangements were carried out, filed a bill to set aside the deed to her son. *Held*, that he had prior equities, and that the bill must be dismissed. Victor Sewing-machine Co. *v.* Jacobs *et al.*, 46 Mich. 494.

The fact that a grantor is embarrassed and in failing circumstances, will not render void a deed made by him to one creditor, to the exclusion of others, provided the deed be made in good faith in payment of an honest debt. Totten *v.* Brady, 54 Md. 170.

A trust deed to secure a note payable one day after date, which conveys personal property, and also choses in action, is not fraudulent because it provides that the trustee should sell the property conveyed on demand by the *cestuis que trust* or either of them. Harden *v.* Wagner, 22 W. Va. 356.

Where a married woman actually loaned her husband money which she derived from her father and his estate, taking the husband's notes for its repayment, and she did not know at the time of making the loans that he was in failing circumstances, and he afterwards conveyed a tract of land to her not worth any more at the time than the amount due from him to her, such conveyance was held valid as against creditors of the husband whose debts were contracted prior to the conveyance. Tomlinson *v.* Matthews, 98 Ill. 178.

A provision, in the conveyance of a stock of goods or other chattels, that the trustee may continue the business, if intended merely as a means of realizing the trust fund, and with a view of winding up the business, is not fraudulent *per se.* Nor is a provision in such conveyance that a grantor shall attend to the business, he being under the control of the trustee, who may at any time, on demand of the

**VI. Conveyances Between Husband and Wife and Other Members of Family.**—A wife may be a creditor of her husband, and he may pay an honest debt to her, as to any other creditor.[1] But because

*cestuis que trust*, sell the property, fraudulent *per se*. Harden *v.* Wagner, 22 W. Va. 356.

A conveyance by a solvent debtor, of a portion of his property, to trustees, to pay a portion of his creditors, containing a provision that any surplus after execution of the trust shall be returned to him, is not, as matter of law, fraudulent and void as to creditors not provided for. Knapp, Receiver, *v.* McGowen, 96 N. Y. 75.

See also Pillsbury *v.* Kingon, 36 N. J. Eq. 413; Popfinger *v.* Yutte, 102 N. Y. 38.

1. Brookville Nat. Bank *v.* Kimble, 76 Ind. 195; Atlantic Nat. Bank *v.* Tavener, 130 Mass. 407; Medsker *v.* Bonebrake, 108 U. S. 66; Crane *v.* Barkdoll, 59 Md. 534; Hogan *v.* Robinson, 94 Ind. 138; Sedgwick *v* Tucker, 90 Ind. 271; Goff *v.* Rogers, 71 Ind. 459; Draper *v.* Buggee, 133 Mass. 258.

A husband may prefer his wife in a deed of trust for the benefit of creditors, or he may convey property to her absolutely in consideration and discharged of such debt, as he could in respect of a debt due by him to any other party. Crane *v.* Barkdoll, 59 Md. 534.

A wife who is a *bona fide* creditor of the husband is entitled to security or payment out of her husband's estate, the same as any other creditor; and although the husband is in failing circumstances, he may in good faith prefer her to the exclusion of other creditors by transferring real estate or other property to her at a fair price in payment of her debt against him. Kennedy *v.* Powell, 34 Kan. 22; Rudershausen *v.* Atwood, 19 Ill. App. 58.

A judgment honestly confessed by an insolvent man in favor of his wife to secure her for money loaned to him by her out of her separate estate, is not fraudulent as against creditors merely because it includes interest on the loan, when there was in fact no agreement that the sum loaned should bear interest. Meckley's App., 102 Pa. St. 536.

The husband, having conveyed a tract of land to his wife in payment of an existing indebtedness, and afterwards effected another conveyance to her through the medium of a third person as the conduit of title, for the purposes of curing supposed defects in the first conveyance, though the latter conveyance, if standing alone, might be constructively fraudulent against the husband's creditors this would not affect the validity of the first deed nor afford a ground for equitable relief. Warren *v.* Jones, 68 Ala. 449.

If the wife give her money or other property to her husband to assist him in his business, he will not be permitted, as against his creditors, to give it back to her when insolvent, to save something for his wife and family. If, however, the wife loan her husband money, although no time be fixed for its repayment and although no express promise to repay is made, yet if the circumstances attending the receipt of the money by the husband are such as to prove that they dealt with each other as debtor and creditor, the husband may pay the indebtedness, or secure the indebtedness by a chattel mortgage upon his property, and such payment or such chattel mortgage will be no fraud upon his creditors. Bailey *v.* Kansas Mfg. Co., 32 Kan. 73.

When a title bond for land is executed by the vendor of land to the husband, and the consideration is paid by the husband as the agent of his wife directly from the proceeds of the sale of his wife's separate estate and from timber taken from the land, the husband having no estate or means of his own, and the circumstances showing that the purchase was made for the wife, and the deed is subsequently made by the vendor directly to the wife, such deed is not fraudulent as against the creditors of the husband, and the land cannot be subjected to the payment of the debts of such creditors. Hamilton *v.* Steele, 22 W. Va. 348

A husband in failing circumstances had conveyed sixty acres of land, including his homestead, in satisfaction of prior loans of his wife to him of $1700; and being pressed by his creditors he procured a loan of $3000 on the land, and the wife gave up her conveyance, and joined in the mortgage to secure such loan, releasing her dower in consideration that her husband would settle upon her twenty-three acres of the land, including their homestead, agreeing to sign any other deed or mortgage her husband might make to settle with his creditors. The husband, in pursuance of such arrangement, conveyed to her the tract of twenty-three acres, and it appeared that his indebtedness to her was ample consideration for the property conveyed to her above the amount of the homestead exemption. *Held*, that the conveyance to the wife was upon a

of the oppotunities which the marriage relation affords for the practice of fraud upon creditors, transactions between husband and wife should be closely scanned and their *bona fides* clearly established.[1] Transactions between other members of a family

sufficient consideration, and valid against the creditors of her husband. Payne *v.* Miller, 103 Ill. 142.

A conveyance of real estate was made by a third party to the wife, which was paid for by the husband in pursuance of an agreement between them under which the husband had used the separate funds of the wife, to repay which the deed was made. *Held*, that if the money, while in the husband's hands, remained the property of the wife, the creditors of the husband had no claim on it, and it would follow that its investment in land, title to which was made in the wife's name, during coverture, could not be a fraud on their rights. McKamey *v.* Thorp, 61 Tex. 648. See also Hoffman *v.* Copeland, 86 Ind. 224.

The creditors cannot compel the husband to take advantage of the Statute of Frauds or Limitations. Gordon *v.* Tweedy, 71 Ala. 202; Brookville Nat. Bank *v.* Kimble, 76 Ind. 195; Comer *v.* Allen, 72 Ga. 1.

**Gifts.**—A gift made by a husband to his wife, in good faith, and not for the purpose of hindering, delaying, or defrauding his creditors, and at a time when the husband is not owing anything, is not void, but is valid in all respects and for all purposes. Tootle *v.* Caldwell, 30 Kan. 125; Taylor *v.* Eatman, 92 N. Car 601; Wheeler & Wilson Mfg. Co. *v.* Monahan, 63 Wis. 198. See also Kane *v.* Desmond, 63 Cal. 464.

**A Gift by Husband to Wife** will not be held void because it embraces all the property of the grantor—at least, not unless it is shown to be more than a reasonable provision for her. Wood *v.* Broadley, 76 Mo. 23; s. c., 43 Am. Rep. 754.

Where a husband, having less money and property than the amount to which he is entitled as exempt from execution, gives a part thereof to his wife, which she uses in making the first payment on real estate purchased by her, such real estate is not subject to execution for the husband's debts. Burdge *v.* Bolin, 106 Ind. 175; s. c., 55 Am. Rep. 724; Robb *v.* Brewer, 60 Iowa, 539.

1. Hoxie *v.* Price, 31 Wis. 86; Booker *v.* Worrill, 57 Ga. 235; Horton *v.* Dewey, 53 Wis. 413; Kennedy *v.* Powell, 34 Kan. 22; Robinson *v.* Clark, 76 Me. 493; Lipscombe *v.* Lyon, 19 Neb. 511; First Nat. Bank *v.* Bartlett, 8 Neb. 329; Kaiser *v.* Waggoner, 59 Iowa, 40.

A conveyance made by a husband on the verge of bankruptcy, to his wife, of a valuable tract of land, upon the ground of an alleged agreement between them many years before and not satisfactorily proved, that, having reduced to possession the wife's distributable share in her father's estate, he would thereafter convey land to her, is void as to his creditors. Anderson *v.* Anderson, 80 Ky. 638.

A conveyance made to the wife, the consideration for which was property owned by the husband, is voluntary, and therefore void as to existing creditors of the husband. Boulton *v.* Hahn, 58 Iowa, 518; Meredith *v.* Citizens Bank, 92 Ind. 343; Adams *v.* O'Rear, 80 Ky. 129; Wiswell *v.* Jarvis (Me.), 9 Fed. Rep. 84.

Where a husband and wife, by their joint industry and management, acquire property, and keep it in the husband's name, a conveyance thereof, without consideration, by the husband to the wife, to the prejudice of existing creditors of the husband, cannot be upheld. Langford *v.* Thurlby, 60 Iowa, 105.

The husband has the right to receive the rents of the wife's statutory estate, free from liability to account (Code, § 2706); and his receipt and use of them do not create a liability or debt such as will support a conveyance to the wife as against his creditors. Bollinge *v.* Jones, 67 Ala. 508.

Where a husband, who is insolvent, makes a voluntary conveyance to his wife, or pays the purchase-price of property which is conveyed to the wife, the conveyance is presumptively fraudulent; and it is not necessary in such case to charge fraud as against the wife. Triplett *v.* Graham, 58 Iowa, 135.

A man on the eve of his marriage, and on the alleged consideration of the marriage, but with intent to defeat the claims of his creditors, conveyed his entire visible estate to his intended wife, she being ignorant of his fraudulent purpose. *Held*, that the deed was fraudulent, and its terms were sufficient to charge the wife with notice and to affect her with the fraud. McGowan *v.* Hitt, 16 S. Car. 602; s. c., 42 Am. Dec. 650.

That part of the purchase money of a lot of land was paid by a husband with his wife's money, and that his father gave her

are also closely scrutinized by the courts;[1] and where an obligation rests upon one to perform services for another, as members

a part of the materials afterwards used in erecting a house on the lot, is not a sufficient consideration to uphold a voluntary conveyance of the house and lot by the husband to the wife as against his creditors, whose debts were nearly all contracted before the date of the conveyance. Aber *v.* Brant, 36 N. J. Eq. 116.

A conveyance made by a husband to his wife in payment of an existing indebtedness, and accepted for such purpose, cannot be assailed by his creditors. But the mere fact that the wife's father sent her a note against her husband, which she destroyed, without holding it against him as a claim, is not equivalent to a finding that he was thus indebted to her. Meredith *v.* Citizens Bank, 92 Ind. 343.

R. loaned his own money, taking a bond and mortgage as security therefor in the name of his wife, and having the mortgage recorded without making any other delivery thereof to his wife, which appears to have been one of a number of transactions avowedly done, with the knowledge of the wife, to hinder creditors. *Held*, that such transaction cannot be upheld as a gift against the creditors of the husband who have liens by judgment or attachment. Conover *v.* Ruckman, 36 N. J Eq. 493.

A conveyance by a husband to his wife, she knowing he was largely indebted at the time, will be treated as a security for the amount of her husband's *bona fide* indebtedness to her, and sustained to that extent; and, subject thereto, creditors may enforce their judgment against the property so conveyed. Stamy *v.* Laning, 58 Iowa, 662.

In *Tennessee*, a conveyance of land by husband to wife will be set aside as against creditors when the consideration was money which the husband had previously received under an agreement that she should be reimbursed. The common law has settled that marriage amounts to an absolute gift of all personal goods of which she is possessed at the time of marriage or which may come into her possession during coverture; and there is no statutory innovation of this principle. Joiner *v.* Franklin, 12 Lea (Tenn.), 420. See also Coleman *v.* Burr, 93 N. Y. 17; s. c., 45 Am. Rep. 160.

1. Harrell *v.* Mitchell, 61 Ala. 271; Marshall *v.* Croom, 60 Ala. 121; Knight *v.* Capito, 23 W.Va. 639; Owens *v.* Hobbie, 82 Ala. 466. See also Libby *v.* Crossley (Mass.), 31 Fed. Red. 647.

A voluntary deed executed by an insolvent person is void *per se* as to creditors; where the deed was made upon a fair consideration, it is not necessarily void; and where the transaction is between an insolvent father and his son, a rebuttable presumption of a fraudulent intent arises from the close relationship of the parties: therefore, where there was evidence tending to show that the deed was supported by a valuable consideration, and the judge charged the jury that, if at the time it was executed the bargainor did not retain property sufficient to pay his debts, then in law the deed is void, and failed to submit the question as to the *bona fides* of the transaction, it was held to be erroneous. McCanless *v.* Flinchum, 89 N. Car. 373.

The conveyance by an insolvent debtor, pending suits against him, of all his property, to a member of his family for a grossly inadequate consideration expressed, but never paid, is conclusive of his intent to defraud his creditors; and it is immaterial whether the grantee participated in his design. Beeves *v.* Sherwood, 45 Ark. 520.

Where a father conveys all of his property to his two young sons, under suspicious circumstances as to the time, the method, and the consideration thereof, the fact that the deed itself purports to have been given for a valuable consideration, and that the answers of the sons, under oath, aver that it was so given and was *bona fide*, will not sustain it as against the father's creditors. Hoboken Bank *v.* Beckman, 36 N. J. Eq. 83. See also Peyron *v.* Lemon, 67 Ala. 458.

The execution by a father to his son, of a bill of sale absolute on its face but admitted to be a mortgage to secure a debt much less than the value of the property thereby conveyed, the limited means of the grantee, he not being in a condition pecuniarily, to justify the conclusion that he was able either to loan or become a creditor of the grantor to the amount of the alleged debt, the voluntary assignment about the same time by the grantor, of a life-policy to his sons, and the utter insolvency of the grantor, are facts which, taken together and in the absence of any evidence whatever on the part of the grantee, to explain them, show that the bill of sale was fraudulent. Earnshaw *v.* Stewart, 64 Md. 513.

In *Wisconsin*, a conveyance of land and personal property by a father to his son, upon condition that the son give to the

of the same family, such services will not, in the absence of an express contract, be a sufficient consideration to support a conveyance from the latter to the former.[1]

parents one half of the buildings and one half of all the crops raised on the land during their lives, and one third of the avails of the land to the survivor of them, that the pay certain sums to his sister and brother after the death of the parents, and that he pay a mortgage upon the land, was held to have created a trust in the property for the maintenance of the parents and the payment of the sums specified, and to have been void, under § 2306, R. S., as against the creditors of the father. The fact that the son had previously made advances of money to the father does not change the character of the conveyance. Severen *v.* Rueeckerick, 62 Wis. 1.

A son, knowing his father's financial embarrassments, and taking a conveyance of the title for all his father's real estate, only giving back therefor a mortgage, without a bond, for $2047.62 and a check for $200, the father at the same time surrendering a note against the son for $200, cannot hold the real estate against the creditors of his father. First Nat. Bank *v.* Cummins, 38 N. J. Eq. 191.

A sister purchased lands of her brother when the complainant was a previous creditor, which she knew. She paid $50 in cash, and gave her brother her note for the balance of the consideration, $650, which note he held for four years, although very needy. *Held*, that if she had notice of the fraud before she paid the note, she was not a *bona fide* purchaser, even if she had no notice thereof when she took her deed. Keyser *v.* Angle, 40 N. J. Eq. 481.

A father and mother conveyed to their son, who was living with them, all their real estate for no other coneriatdsion than the assumption by the son of certain liens on the land; but the amount of those liens was considerably less than the value of the land. *Held*, that the conveyance, so far as the value of the property exceeded the amount of the liens assumed by the grantee, should be held subject to the claims of a creditor whose demands arose prior to the conveyance. Lyon *v.* Haddock, 59 Iowa, 682.

**Valid Conveyances.**—Where a deed is alleged to be fraudulent as to creditors of the grantor, fraud must be proved. A voluntary deed made by a father to his daughter at a time when no indebtedness is shown against him, and when, for aught appearing, he was perfectly solvent, is good and valid; and a second conveyance made by him to her, for another tract, in case of her relinquishing her right and estate in the land first conveyed and allowing the father to sell the same and receive the proceeds, being founded upon a valuable consideration, is not fraudulent as to creditors of the father having claims against him when the same is made. Davis *v.* Kennedy, 105 Ill. 300. See also Herring *v.* Richards (Minn.), 3 Fed. Rep. 439; Curry *v.* Lloyd (Pa.), 22 Fed. Rep. 258.

An insolvent had conveyed his home place to his sister in payment of an antecedent debt, and a few days afterwards the sister reconveyed to a trustee, in trust for the wife and children of such brother, who continued to occupy the place. The judge charged that, if the deed to the sister was made without agreement for the reconveyance, and was not induced by her promise to reconvey, but was really in satisfaction of the debt, the deed would be avoided even though the brother expected that his wife and children would receive some donation from his sister. *Held*, that in this there was no error. McPherson *v.* McPherson, 21 S. Car. 261.

"There is no law prohibiting persons standing in near relations of business or affinity from buying from each other, or requiring them to conduct their business with each other in special form." Dunlap *v.* Bournonville, 26 Pa. St. 73.

Sales of property by father to son or from son to father have been upheld. Shearon *v.* Henderson, 38 Tex. 245; Wheelden *v.* Wilson, 44 Me. 11. And so of other relations. Coley *v.* Coley, 14 N. J. Eq. 350; Wilson *v.* Lott, 5 Fla. 305; Pusey *v.* Gardner, 21 W. Va. 469.

1. Gardner *v.* Schooley, 25 N. J. Eq. 150; Wait Fraud. Conv. § 218; Irish *v.* Bradford, 64 Iowa, 303; Hack *v.* Stewart, 8 Pa. St. 213.

An agreement to support one's parents is not, as against creditors, a valid consideration for a deed from the parents if made with the purpose of putting the property beyond the reach of execution, as such an agreement is for the direct benefit of the grantors. Rynearson *v.* Turner, 52 Mich. 7. See also Ridgway *v.* English, 22 N. J. L. 499; Coleman *v.* Burr, 93 N. Y. 17; Lawson *v.* Funk, 108 Ill. 502; Dowell *v.* Applegate (Oreg.), 15 Fed. Rep. 419; Van Wyck *v.* Seward, 18 Wend. (N. Y.) 375.

**VII. Preferences.**—A debtor, although in failing circumstances and unable to pay his indebtedness in full, may, in good faith, make preferences among his creditors,[1] and may even transfer all

See, as holding that no contract for remuneration is implied in such cases, McGarvey *v.* Roods, 26 Cent. L. J. 184, and note 186; Neale *v.* Engle (Pa.), 7 Atl. Rep. 60, and note 61.

But it was held in a recent case that where a daughter, after attaining her majority, renders domestic service in her father's family under promise, made before the services have ended, that she shall be compensated therefor, such services may be a valid consideration for a conveyance of land by the father to the daughter; and, in view of all the facts in the case, such a conveyance was sustained as against the father's creditors. Collier *v.* Funch, 64 Iowa, 577. See also Howard *v.* Reynearson, 50 Mich. 307.

So, a bill in aid of execution was dismissed where the premises which complainant sought to reach had been deeded by the judgment debtor to his daughter before complainant's claim arose and while he was solvent, in consideration of the daughter's kindness and attention to him in sickness, and where, though the grantor had kept the deed in his own custody, he had repeatedly recognized its execution and delivery to the daughter, who had for years occupied the premises with the understanding, on the part of the family, that they were hers. Dunham *v.* Pitkin, 53 Mich. 504.

1. Guggenheimer *v.* Brookfield, 90 N. Car. 232; Brookville Nat. Bk. *v.* Kimble, 76 Ind. 195; Giddings *v.* Sears, 115 Mass. 505; French *v.* Motley, 63 Me. 328; Totten *v.* Brady, 54 Md. 170; Shelley *v.* Booth, 73 Mo. 74; Murphy *v.* Briggs, 89 N. Y. 451; Jewett *v.* Noteware, 30 Hun (N. Y.), 194; Preusser *v.* Henshaw, 49 Iowa, 41; Jordan *v.* White, 38 Mich. 253; Smith *v.* Skeary, 47 Conn. 47; Cushman *v.* Gephart, 97 Ind. 46; Dessar *v.* Field, 99 Ind. 548; Frazer *v.* Thatcher, 49 Tex. 26; Allen *v.* Kennedy, 49 Wis. 549.

A son who is indebted to his father has a legal right to prefer him to other creditors, and to convey to him, in payment of his debt, enough of his property to meet it, even though he should not have enough left to pay the rest of his debts. State Bank *v.* Whittle, 48 Mich. 1.

So a father may prefer his son in the same way. Sands *v.* Peirson, 61 Iowa, 702. See also Micon *v.* Nat. Bank, 104 U. S. 543.

And a husband indebted to his wife may prefer her. Bragg *v.* Stanford, 82 Ind. 234; Leppig *v.* Bretzel, 48 Mich. 321.

A debtor, even in failing circumstances, may prefer creditors, if the same is done in good faith; and this not only in the form of actual payment of money to the particular creditors preferred, but also in the form of the sale or appropriation of property or the giving of chattel mortgages to such creditors. Tootle *v.* Coldwell, 30 Ark. 125.

A failing debtor may prefer one creditor over another, and, to that end, may use property bought on credit of one for the payment of another. O'Donald *v.* Constant, 82 Ind. 212.

A debtor has the right to execute a mortgage to secure a note due one creditor, although such mortgage has the effect to hinder and delay his other creditors. Colbern *v.* Robinson, 80 Mo. 541.

Fraud is not to be imputed to an honest creditor who is preferred by a failing debtor as against another creditor who had been promised payment by the debtor out of the proceeds of the same property assigned to the former to secure him. McKeown *v.* Coogler, 18 Fla. 866.

The mere fact that a creditor of an insolvent procures, by a trust deed from him, a preference over other creditors equally meritorious, and that the transfer effected by such deed has the effect of hindering or delaying other creditors, and that it was so intended by the debtor, will not of itself, if the transaction is in truth *bona fide* on the part of the preferred creditor, necessarily vitiate the transfer. Iglehart *v.* Willis, 58 Tex. 306.

In the absence of fraud, a transfer by a debtor, in *Mississippi*, of all his property to one of his creditors in satisfaction of the debt is valid; nor is it invalidated if, before it was made, the same property had been transferred by the debtor to a trustee to secure the same debt in like good faith, by an instrument which was void, under the statutes of Mississippi, by reason of its form and contents, and if the trustee joins in the transfer to the debtor. Stewart *v.* Dunham, 115 U. S. 61.

Where a debtor, although insolvent or in failing circumstances, makes an absolute sale of his property to a creditor, in payment of an antecedent debt, by way of preference over other creditors the debt being honestly due, the price or

of his property to one creditor, to the exclusion of the others.[1] But under the statutes of many of the States, governing general or voluntary assignments for the benefit of creditors, a preference cannot be made in the deed of assignment.[2] The preference must not be tainted with fraud; and if it is made and accepted merely to aid the debtor in covering up his property, it cannot be sustained even though the debt of the preferred creditor may have been a *bona fide* one.[3] And it will not be good, in any event, as against creditors, unless the person preferred is a *bona fide* creditor or holder of a valid subsisting claim.[4]

consideration received being fair and adequate, and no interest being reserved by the grantor, his mere fraudulent intent does not vitiate the conveyance, because the act itself is legal, and fraud without damage gives no right of action. These concurrent facts absolutely rebut all inferences that might be drawn from attendant badges of fraud, and impart validity to the conveyance as an allowable preference of the particular creditor. Hodges *v.* Coleman, 76 Ala. 103.

A mortgage made by an insolvent debtor to secure a valid claim is not invalid because it was executed while a suit was pending by another creditor against the mortgagor for the collection of a debt, and because it was made to give the mortgagor for the collection of a debt, and because it was made to give the mortgagee a preference over such creditor. Ayers *v.* Adams, 82 Ind. 109.

A debtor executed a chattel mortgage to secure the payment of a *bona fide* pre-existing debt, and soon thereafter executed a general assignment of his property for the benefit of his creditors. The assignment being abandoned by the assignee and all parties interested, and the mortgaged property taken possession of by the mortgagee, the mortgage will be upheld even though it was executed on the same day and near the same time at which the assignment was executed. Bierbower *v.* Polk, 17 Neb. 268.

Where an insolvent debtor executes a mortgage to *bona fide* creditors, with the design of hindering and delaying other creditors in the enforcement of their claims, and the evidence does not show that the mortgagees had any intention of aiding in the fraudulent plans of the mortgagor for hindering and delaying other creditors except so far as was necessary to secure their own protection, it is a case of a race between creditors, and such mortgage will not be fraudulent. Kohn *v.* Clement, 58 Iowa, 589.

1. Richardson *v.* Marqueze, 59 Miss. 80; Wait on Fraud. Conv. § 390; Stewart *v.* Dunham, 115 U. S. 61.

2 See 1 Am. & Eng. Encyclo. of Law, 860, and authorities there referred to.

3. Smith *v.* Schwed (Mo.), 9 Fed. Rep. 483. See also David *v.* Birchard, 53 Wis. 494; Banfield *v.* Whipple, 14 Allen (Mass.), 13; Giddings *v.* Sears, 115 Mass. 507; Shelley *v.* Boothe, 73 Mo. 74; s. c., 39 Am. Rep. 481.

4. Union Nat. Bank *v.* Warner, 12 Hun (N. Y.), 306; Davis *v.* Leopold, 87 N. Y. 620; Crowinshield *v.* Kittridge, 7 Metc. (Mass.) 522.

An insolvent debtor mortgaged his stock of merchandise, worth about $6000, some of which was of a perishable nature, to secure a debt of $3000, the mortgagee not knowing that the debtor was insolvent, but knowing that he was financially embarrassed, and it not appearing that the debtor owned any other property liable to the satisfaction of his debts. In the mortgage the express power to sell the merchandise, or any of it, is not retained by the mortgagor, but the merchandise is left in his possession, and, by implication, it is clear that it was the intention of the parties that he should remain in possession until the law-day, which was ninety days from the date of execution. *Held*, (1) that a power of sale was impliedly retained by the mortgagor, which was as much a part of the contract as if expressed; (2) that the mortgage, operating in the most effectual manner to shield the property from the attack of the unsecured creditors, for the joint benefit of the mortgagor and mortgagee, inevitably tended to hinder and delay such creditors, and, as against them, it was therefore fraudulent and void. Benedict *v.* Renfro, 75 Ala. 121; s.c., 51 Am. Rep. 429. See also Robinson *v.* Elliott, 22 Wall. (U. S.) 513; Herman Chat. Mortg. 227–236.

A creditor cannot purchase the goods of his debtor at a price in excess of his debt when he knows that the excess so

**VIII. Badges of Fraud.**—A badge of fraud is a fact calculated to throw suspicion on a transaction, and calling for an explanation.[1] "Badges of fraud afford grounds of inference from which the jury are authorized to conclude that a transaction surrounded by them is fraudulent."[2] But they do not of themselves constitute the fraud.[3] It would be useless to attempt to anticipate and catalogue all possible badges of fraud;[4] but it may be well to mention some of the most important. In the famous case known as Twyne's Case,[5] the following badges or marks of fraud were pointed out by the court: (1) The gift was general, without exception of the donor's apparel, or of anything of necessity;[6] (2) the donor continued in possession, and used the goods as his own, and by means thereof traded with others and defrauded them;[7] (3) it was made in secret;[8] (4) it was made pending the writ;[9] (5) there was a trust between the parties;[10] (6) the deed expressed that the gift was made honestly, truly, and *bona fide*.[11] Other badges of fraud are, recitals in the deed or mortgage of a fictitious consideration,[12] inadequacy of consideration,[13] and insolvency;[14] and almost any unusual and suspicious act accompany-

paid such debtor is by the latter to be placed beyond the reach of his other creditors. Such purchaser is a participant in the fraud of his debtor, whether his purpose be to aid him or not. McVeagh *v.* Baxter, 82 Mo. 518. See also Olmstead *v.* Mattison, 45 Mich. 617.

**1.** Peebles *v.* Horton, 64 N. Car. 376.

It is simply "one of the signs or marks of fraud." Pilling *v.* Otis, 13 Wis. 495. See also Burrill on Assignments (4th Ed.), 518, § 346.

**2.** Sherman *v.* Hogland, 73 Ind. 472 (opinion of Elliott, J., 477).

**3.** Wilson *v.* Lott, 5 Fla. 305; Thames *v.* Rembert, 63 Ala. 567.

**4.** See Phinizy *v.* Clark, 62 Ga. 623, 627; Wait on Fraud. Conv. § 225.

**5.** 3 Rep. 80.

**6.** See, to same effect, *In re* Alexander, 4 Nat. Bank. Reg. 181; Bigelow *v.* Doolittle, 36 Wis. 119; Redfield *v.* Buck, 35 Conn. 328; Sarle *v.* Arnold, 7 R. I. 582; Sayre *v.* Fredericks, 16 N. J. Eq. 207; Monell *v.* Scherrick, 54 Ill. 270; Wheelden *v.* Wilson, 44 Me. 20; Hughes *v.* Roper, 42 Tex. 126.

**7.** Peck *v.* Land, 2 Ga. 1; s. c., 46 Am. Dec. 368; Grant *v.* Lewis, 14 Wis. 487; s. c., 80 Am. Dec. 785. See also "Possession as Evidence of Fraud," 11 Cent. L. J. 21; and Retention of Possession by Debtor, *infra*.

**8.** To same effect, Fishel *v.* Ireland, 52 Ga. 632; Warner *v.* Norton, 20 How. (U. S.) 460; May on Fraud. Conv. 83.

So if afterwards kept secret. Hungerford *v.* Earle, 2 Vern. 261; Coates *v.* Gerlach, 44 Pa. St. 43; Blennerhassett *v.* Sherman, 105 U. S. 100; Wait on Fraud. Conv. § 235.

**9.** A transfer *pendente lite* is a badge of fraud. Godfrey *v.* Germain, 24 Wis. 416; Thomas *v.* Pyne, 55 Iowa, 348; Merrill *v.* Locke, 41 N. H. 490; Hartshorn *v.* Eames, 31 Me. 99; Soden *v.* Soden, 34 N. J. Eq. 115; King *v.* Wilcox, 11 Paige (N. Y.), 589; Shean *v.* Shay, 42 Ind. 377; Peck *v.* Land, 2 Ga. 1; s. c., 46 Am. Dec. 368.

**10.** See also Oriental Bank *v.* Haskins, 3 Metc. (Mass.) 332; s. c., 37 Am. Dec. 140; Lukins *v.* Aird, 6 Wall. (U. S.) 78; Moore *v.* Roe, 35 N. J. Eq. 90; Emmons *v.* Bradley, 56 Me. 333; Ross *v.* Duggan, 5 Colo. 100.

**11.** For synopsis of this decision, see Roberts on Frauds, 545, 546.

**12.** Stinson *v.* Hawkins (Mo.), 16 Fed. Rep. 850; King *v.* Hubbell, 42 Mich. 599; Goff *v.* Rogers, 71 Ind. 461; Blakeslee *v.* Rossman, 43 Wis. 123; Lynde *v.* McGregor, 13 Allen (Mass.), 179; McKinster *v.* Babcock, 26 N. Y. 382; Peebles *v.* Horton, 64 N. Car. 374; Enders *v.* Swane, 8 Dana (Ky.), 105; Gibbs *v.* Thompson, 7 Humph. (Tenn.) 179.

**13.** Stevens *v.* Dillman, 86 Ill. 232; Delaware *v.* Ensign, 21 Barb. (N. Y.) 85; Fuller *v.* Brewster, 53 Md. 361; Ames *v.* Gilmore, 59 Mo. 537; Apperson *v.* Burgett, 33 Ark. 328; Fisher *v.* Shelver, 55 Wis. 498; Scott *v.* Winship, 20 Ga. 429; Blish *v.* Collins (Mich.), 13 West. Rep. 546; Commercial Bank *v.* Brewer, 71 Ala. 574. *Compare* Day *v.* Cole, 44 Ia. 452.

**14.** Hudgins *v.* Kemp, 20 How. (U.S.)

ing or relative to the transaction may constitute a badge of fraud.[1]

**IX. Effect of Fraudulent Conveyances as Between the Parties.**—As a general rule, a fraudulent conveyance is good as against the debtor, or grantor, and his heirs.[2] There are exceptional cases, however, which seem to be sufficient in number and authority to justify a distinction, or perhaps even a modification, of the general rule. These cases are to the effect that relief will be granted as between the parties when they are not *in pari delicto*, although they may be *in delicto*.[3] The parties will generally be left in the situation in which they have placed themselves, without aid from the courts,[4] although the grantee may be under a moral obligation to restore the property, which has been held sufficient to give the grantor a claim at least equal to that of the vendee's creditors until they acquire a lien thereon.[5]

**X. Remedies.**—1. *Kinds and Jurisdiction.*—"It may be observed," says Mr. Wait, "that the general purpose of creditors' actions is two-fold—first, to reach assets such as choses in action, which by their intrinsic nature cannot be taken on execution at law; and,

45; Merrill *v.* Locke, 41 N. H. 490; Bibb *v.* Baker, 17 B. Mon. (Ky.) 292; Purkitt *v.* Polack, 17 Cal. 327; Ringgold *v.* Waggoner, 14 Ark. 69; Blodgett *v.* Chaplin, 48 Me. 322.

1. See Brinks *v.* Heise, 84 Pa. St. 253; Mead *v.* Noyes, 44 Conn. 491; State *ex rel.* Pierce *v.* Merritt, 70 Mo. 275; Owen *v.* Arvis, 26 N. J. L. 22, 32; Marshall *v.* Green, 24 Ark. 410; McKibbin *v.* Martin, 64 Pa. St. 352; Rothgerber *v.* Gough, 52 Ill. 438; Crapster *v.* Williams, 21 Kan. 109; Hartshorn *v.* Eames, 31 Me. 100; Langford *v.* Fly, 7 Humph. (Tenn.) 587; Gollober *v.* Martin, 33 Kan. 252.

Relationship is calculated to awaken suspicion; and dealings between near relatives are closely scrutinized. Sherman *v.* Hogland, 73 Ind. 473; Seitz *v.* Mitchell, 94 U. S. 580; Harrell *v.* Mitchell, 61 Ala. 271; Marshall *v.* Croom, 60 Ala. 121; Bumpas *v.* Dotson, 7 Humph. (Tenn.) 310; Engraham *v.* Pate, 51 Ga. 537; Fisher *v.* Shelver, 53 Wis. 501.

2 Smith *v.* Grim, 26 Pa. St. 95; s. c., 67 Am. Dec. 400; George *v.* Williamson, 26 Mo. 190; Ellis *v.* Higgins, 32 Me. 34; Evans *v.* Herring, 3 Dutch. (N. J.) 243; Stewart *v.* Kearney, 6 Watts (Pa.), 453; s. c., 31 Am. Dec. 482; Osborne *v.* Moss, 7 Johns. (N. Y.) 161; s. c., 5 Am. Dec. 252; Sharpe *v.* Davis, 76 Ind. 17; Bush *v.* Rogan, 65 Ga. 321; Peterson *v.* Brown, 17 Nev. 173; Williams *v.* Higgins, 69 Ala. 511. 523; Freeland *v.* Freeland, 102 Mass. 477; Mercer *v.* Mercer, 29 Iowa, 537; Shaw *v.* Millsaps, 50 Miss. 380; Crawford *v.* Lehr, 20 Kan. 509; Stewart *v.* Platt, 101 U. S. 738; Graham *v.* R. Co., 102 U. S. 148.

3. Freelove *v.* Cole, 41 Barb. (N. Y.) 326; Ford *v.* Harrington, 16 N. Y. 285; Boyd *v.* De la Montagnie, 73 N. Y. 498; Pinckston *v.* Brown, 3 Jones Eq; (N. Car.) 496; Holliway *v.* Holliway, 77 Mo. 396; Smith *v.* Bromley, 2 Doug. 696. Austin *v.* Winston, 1 Hen. & M. (Va.) 33; s. c., 3 Am. Dec. 583.

Where the fraud is practised upon an innocent debtor by his grantee, it seems that the creditors cannot successfully attack the sale as void at law, and thus reach the property for themselves." Garretson *v.* Kane, 27 N. J. L. 211. And see Graham *v.* R. Co., 102 U. S. 148. *Compare* Eaton *v.* Perry, 29 Mo. 96; McAlpine *v.* Sweetser, 76 Ind. 78.

4. Powell *v.* Ivey, 88 N. Car. 256; s. c., 28 Alb. L. J. 254; Walton *v.* Tusten, 49 Miss. 569; Sweet *v.* Tinslar, 52 Barb. (N. Y.) 271; Canton *v.* Dorchester, 8 Cush. (Mass.) 525; Schuman *v.* Peddicord, 50 Md. 562; Ruckman *v.* Ruckman, 32 N. J. Eq. 260; Dunaway *v.* Robertson, 95 Ill. 419.

An exception exists, however, where the transaction is executed, and aid of the court is required by the grantee to enforce it thereafter so as to prevent the grantor taking advantage of his own fraud. Peterson *v.* Brown, 17 Nev. 177; Walton *v.* Tuston, 49 Miss. 569, 576.

5. Davis *v.* Graves, 29 Barb. (N. Y.) 485; Stanton *v.* Shaw, 3 Baxt. (Tenn.) 12. See also Second Nat. Bank *v.* Brady, 96 Ind. 498.

second, to recover property, whether tangible or intangible, which has been fraudulently alienated by the debtor."[1] In the first case, courts of equity have exclusive jurisdiction.[2] In the second case, the jurisdiction of courts of equity and courts of law is usually concurrent.[3] The judgment creditor may treat the attempted fraudulent transfer as a nullity, and proceed at law to sell the property under execution just as if no transfer had been made;[4] or he may resort to a court of equity and have the conveyance avoided or set aside as fraudulent.[5] The latter course is generally

1. Wait on Fraud. Convey. § 4. See also Cornell *v.* Radway, 22 Wis. 264; Robert *v.* Hodges, 16 N. J. Eq. 299, 302.

2. Drake *v.* Rice, 130 Mass. 410, citing Taylor *v.* Jones, 2 Atk. 600; King *v.* Dupine, 2 Atk. 603, note; Horn *v.* Horn, Ambl. 79; Ryall *v.* Ralle, 1 Atk. 165; Partridge *v.* Gopp, 1 Eden, 163; Bayard *v.* Hoffman, 4 Johns. Ch. (N. Y.) 450; Hadden *v.* Spader, 20 Johns. (N. Y.) 554; Abbott *v.* Tenny, 18 N. H. 109; Sargent *v.* Salmond, 27 Me. 539. See also Weed *v.* Pierce, 9 Cow. (N. Y.) 722; Sexton *v.* Wheaton, 1 Am. Lead. Cas. (5th Ed.) 59; Mulford *v.* Peterson, 35 N. J. L. 127.

3. Waite Fraud. Convey. § 51; Scott *v.* Indianapolis Wagon Works, 48 Ind. 75, 79; Orendorf *v.* Budlong, 12 Fed. Rep. 24. See also Partee *v.* Matthews, 53 Wis. 146; Sheafe *v.* Sheafe, 40 N. H. 515; Tupper *v.* Thompson, 26 Minn. 386; Barto's Appeal, 55 Pa. St. 386; Bergen *v.* Snedeker, 8 Abb. N. C. (N. Y.) 58.

A bill in equity will lie for the double purpose of aiding an execution and of reaching property that is not open thereto. Bean *v.* Bennett, 51 Mich. 148.

4. Tupper *v.* Thompson, 26 Minn. 386; Chautauqua Co. Bank *v.* Risley. 19 N. Y. 369; s. c., 74 Am. Dec. 347; Henry *v.* Heinnan, 25 Minn. 199; Nat. Park Bank *v.* Lanahan, 60 Md. 513; Carter *v.* Castleberry, 5 Ala. 277; Gormly *v.* Chapman, 51 Ga. 421; Staples *v.* Bradley, 23 Conn. 167; Brown *v.* Snell. 46 Me. 490; Thompson *v.* Neeley, 50 Miss. 313; Allen *v.* Berry, 50 Mo. 90; Fowler *v.* Trebein, 16 Ohio St. 493; Booth *v.* Bunce, 33 N. Y. 139.

A different rule, however, obtains in *Louisiana*. Peet *v.* Morgan, 6 Mart. N. S. (La.) 137; Yocum *v.* Bullit, 6 Mart. N. S. (La.) 324; s. c., 17 Am. Dec. 184.

Thus, if a mortgage of personal property is fraudulent and void as to creditors of the mortgagor, a judgment creditor may levy an execution upon the mortgaged property, as if the mortgage did not exist, although the property has not been previously attached. Sherman *v.* Davis, 137 Mass. 132.

When, for the purpose of defrauding his creditors, a debtor pays for lands, taking title thereto in the name of another, the lands may be sold on execution to satisfy a judgment of the creditor; but to maintain his title, or to establish it against the holder of the legal title, or those claiming under him, the purchaser upon the execution must show that, at the time of the conveyance, and at the time of sale, the debtor had not other property subject to execution sufficient to satisfy the judgment. Eve *v.* Louis, 91 Ind. 457.

Land purchased by a husband, and conveyed to his wife in fraud of his creditors, may be sold under execution at law against him, without first uncovering it by bill in equity. Hershy *v.* Lathan, 42 Ark. 305; Hanna *v.* Aebker, 84 Ind. 411.

By the levy of an attachment upon lands which have been fraudulently conveyed, for the debt of the grantor, the attaching creditor acquires a lien which is not disturbed by a decree in chancery setting aside the fraudulent conveyance, and subjecting the proparty to sale, for the payment of a judgment recovered by another creditor after the levy of the attachment. The levy of the attachment, before the recovery of judgment by the other creditor and the filing of his bill, creates a prior lien on the property. McKinney *v.* Farmer's Nat. Bank of Keithsburg, 104 Ill. 180.

A creditor who, after a fraudulent conveyance of real estate by his debtor, takes a note for the debt, does not thereby waive his right of action to subject the land to his execution. Stout *v.* Stout, 77 Ind. 537.

5. Planters, etc., Bank *v.* Walker, 80 Ala. 926; Dargan *v.* Waring, 11 Ala. 988; Waddell *v.* Lanier, 62 Ala. 347.

So long as the right to have execution upon a judgment continues, the plaintiff may maintain an action to have the judgment declared a lien on land fraudulently conveyed by the defendant. To maintain such action, it is not necessary that the land shall first have been sold under execution. The creditor may, however, if

he chooses, pursue that course. Zoll *v.* Soper, 75 Mo. 460.

Suit may be maintained to cancel and declare void for fraud a conveyance to the defendant by a third party, against whom the plaintiff had obtained a judgment for damages, the land having been sold under that judgment to the plaintiff, and the petition charging that the defendant knew of the fraudulent intent of such third party to defraud plaintiff of his claim for damages by the conveyance, and colluded with him to consummate the fraud. Holden *v.* McLaury, 60 Tex. 228.

The return of a justice's execution *nulla bona* on the same day that it is issued will authorize the filing of the transcript of the judgment and return in the circuit clerk's office; and upon return of *nulla bona* by the sheriff, upon an execution issued by the clerk, the plaintiff may file a bill in equity to set aside a fraudulent conveyance of the judgment debtor, and to sell the land for satisfaction of the judgment. Reeves *v.* Sherwood, 45 Ark. 520.

A voluntary conveyance may be avoided by creditors upon allegation and proof that the debtor, at the time he made the conveyance, had no other property than that which he could claim as exempt from execution. Williams *v.* Osborne, 95 Ind. 347.

A judgment creditor may set aside a sheriff's sale of mortgaged premises when the mortgage was fraudulently given by the judgment debtor to protect his property, for an amount greater than he owed, and the creditor was deterred from bidding at the sale, which was under prior judgments, by the fact that the amount of the fraudulent mortgage, with those judgments, amounted to more than the value of the premises. Bentley *v.* Heintze, 33 N. J. Eq. 405.

Where an insolvent debtor has purchased land with his own means and caused the title to be conveyed to his wife, and his creditors file a bill to subject the property to the payment of their demands, the wife is not entitled to dower in such land. Simmons *v.* Ingram, 60 Miss. 886.

A transferred certain corporate stock in fraud of his creditors. It was subsequently attached as the property of A, and, after judgment against A, sold on execution. The purchaser filed a bill in equity to obtain the stock. *Held*, that the shares of stock were liable to attachment and execution sale as the property of A, notwithstanding the prior fraudulent transfer by him, and that the bill in equity should be maintained, the complainant having no adequate remedy at law, if any. Beckwith *v.* Burrough, 14 R. I. 366; s. c., 51 Am. Rep. 392.

The fact that at the time a conveyance is made to the debtor's wife, the creditor's judgment was no lien on the land by reason of no execution having been issued thereon within a year, will not prevent the creditor, after the revival of his judgment and suing out an execution, from questioning the *bona fides* of the transaction. If the debtor paid for the land, and had the title made to his wife in fraud of the rights of the creditor, the land may be reached in equity by the creditor. Bennett *v.* Stout, 98 Ill. 47.

A creditor recovered a judgment against thirteen joint and several debtors, and issued an execution against them all, under which levies were made, ample to satisfy the judgment debt; twelve thirteenths of the whole amount had been paid by twelve of the defendants, each one paying one thirteenth. *Held*, that since the creditor could make the whole debt out of the property under levy, this court had no jurisdiction to entertain a bill filed by the creditor to set aside fraudulent conveyances made by the thirteenth debtor (the defendant), in order to defeat the complainant's attempt to satisfy the remaining unpaid one thirteenth of the judgment out of the defendant's property. Wales *v.* Lawrence, 36 N. J. Eq. 207.

In a suit brought by a creditor to subject property, alleged to have been fraudulently conveyed, to the claims of himself and the creditors of the estate, a compromise and agreement to dismiss the suit, made between the original plaintiff and defendant, cannot affect the right of a creditor, who has intervened by leave of the court, to have his rights as a creditor adjudicated. An order dismissing the suit after such intervention and dismissing the petition of intervention is error, for the original action could only have been maintained when brought for the benefit of all the creditors. Nix *v.* Dukes, 58 Tex. 96.

But where a judgment creditor has elected to treat as fraudulent a conveyance made by his debtor before the judgment, and, notwithstanding the transfer of title, has proceeded to sell the property on an execution, he cannot afterward maintain a bill in equity to set aside the conveyance. Cranson *v.* Smith, 47 Mich. 647.

Although in *Texas*, a creditor may sue upon a debt, and in the same action seek to set aside a conveyance of land because made in fraud of his rights as a creditor, such suit does not give a general creditor prosecuting it a new and independent

to be preferred.[1]

2. *Suits to Set Aside—(a) Parties.*—As a general rule, none but creditors, or those standing "in the equity of creditors," can maintain a suit to set aside a fraudulent conveyance;[2] and it is almost equally well settled that only such creditors as have obtained judgment, and not mere general creditors at large, can maintain the suit.[3]

right of lien on the property alleged to have been fraudulently conveyed. Cassaday *v.* Anderson, 53 Tex. 527.

1. See Fowler's Appeal, 87 Pa. St. 454; Wait Fraud. Conv. § 60.

2. Etter *v.* Anderson, 84 Ind. 333; Shoutz *v.* Brown, 27 Pa. St. 131; Douglass *v.* Dunlap, 10 Ohio, 163; Wait on Fraud. Conv. § 197.

Subsequent *bona fide* purchasers should probably be included among those standing in the equity of creditors, and may generally avoid a fraudulent conveyance by which they are injured. Burgett *v.* Burgett, 1 Ohio, 469; s. c., 13 Am. Dec. 634; Jewell *v.* Porter, 31 N. H. 34; Thompson *v.* Moore, 36 Me. 47.

So with sureties subrogated to the rights of the creditor. See Lewis *v.* Palmer, 28 N. Y. 271; Townsend *v.* Whitney, 75 N. Y. 425.

**Administrators and Executors** cannot ordinarily impeach the fraudulent conveyances of their decedents. McLaughlin *v.* McLaughlin, 16 Mo. 242; Merry *v.* Fremon, 44 Mo. 522; Blake *v.* Blake, 53 Miss. 182; Davis *v.* Swanson, 54 Ala. 277; Burton *v.* Farinholt, 86 N. Car. 260; Van Wickle *v.* Calvin, 23 La. Ann. 205; Wait on Fraud. Conv. § 112; and leading articles in 21 Cent. L. J. 494. But they have been given this right by statute in many of the States. See Wait on Fraud. Conv. § 112; Mosely *v.* Mosely, 15 N. Y. 336; Southard *v.* Benner, 72 N. Y. 427; Welsh *v.* Welsh, 105 Mass. 229; Hills *v.* Sherwood, 48 Cal. 392; Bushnell *v.* Bushnell, 88 Ind. 403; Ewing *v.* Handley, 4 Litt. (Ky.) 346; s. c., 14 Am. Dec. 157, and note; Hudnal *v.* Wilder, 4 McCord (S. Car.), 294; s. c., 17 Am. Dec. 744, note.

**Assignees,** under the Bankrupt Law, could impeach the fraudulent conveyances of the bankrupt. Moyer *v.* Dewey, 103 U. S. 301; Platt *v.* Mead (N. Y.), 9 Fed. Rep. 95; Phelps *v.* McDonald, 99 U. S. 298; Southard *v.* Benner, 72 N. Y. 427. But, upon principle, assignees by voluntary assignment should not be allowed to do so. Housel *v.* Cremer, 13 Neb. 302; Hahn *v.* Salmon (Oreg.), 20 Fed. Rep. 801; Clapp *v.* Nordmeyer (Mo.), 25 Fed. Rep. 71; Bridgford *v.* Barbour, 80 Ky. 528; Tyler *v.* Abergh, 65 Md. 18; Flower *v.* Cornish, 25 Minn. 473.

But it has been held otherwise under a number of the statutes on voluntary assignments. See Hallowell *v.* Bayliss, 10 Ohio St. 537; Freeland *v.* Freeland, 102 Mass. 475; Spring *v.* Short, 90 N. Y. 544; Staton *v.* Pittman, 11 Gratt. (Va.) 99; Merrill *v.* Ressler, 37 Minn. 82; Grant *v.* Crowell, 42 N. J. Eq. 524; Seibert *v.* Milligan, 110 Ind. 106, 110, 111.

3. King *v.* Clay, 34 Ark. 291; Goembel *v.* Arnett, 100 Ill. 34; Southard *v.* Benner, 72 N. Y. 426; Dunlevy *v.* Tallmadge, 32 N. Y. 459; Massey *v.* Gorton, 12 Minn. 145; s. c., 90 Am. Dec. 287; Estes *v.* Wilcox, 67 N. Y. 264; Smith *v.* R. Co., 99 U. S. 393, 401; Turner *v.* Adams, 46 Mo. 95; Smith *v.* Millet, 12 R. I. 59; Haggerty *v.* Nixon, 26 N. J. Eq. 42; Griffin *v.* Nitcher, 57 Me. 270; Sexey *v.* Atkinson, 34 Cal. 346; Bassett *v.* St. Albans, 47 Vt. 314; Scripps *v.* King, 103 Ill. 469. *Compare* Mebane *v.* Layton, 86 N. Car. 571; Bank *v.* Harris, 84 N. Car. 206; Reynolds *v.* Welch, 47 Ala. 200.

A creditor of an insolvent estate, who is under injunction not to sue the executor, has a good excuse for not obtaining judgment on his debt before proceeding by bill in equity to set aside a voluntary conveyance made by the testator in his lifetime; and if, during the pendency of the bill, a judgment or decree establishing the amount of the debt is obtained against the executor, the same may be brought into the bill by way of amendment, and may thus be used as effectively as if the adjudication had preceded the filing of the bill and had been alleged therein originally. Cleveland *v.* Chambliss, 64 Ga. 352.

**Attaching Creditors** have specific liens by virtue of the levy of their writs of attachment, and may, before judgment, according to some of the authorities, maintain a suit to set aside a fraudulent transfer of property by their insolvent debtor. Joseph *v.* McGill, 52 Iowa, 128; Merriam *v.* Sewall, 8 Gray (Mass.), 316; Sheafe *v.* Sheafe, 40 N. H. 516; Hunt *v.* Field, 9 N. J. Ex. 36; Rinchey *v.* Stryker, 28 N. Y. 45.

But Mr. Wait controverts this doctrine, and is supported by the following authorities: Weil *v.* Lankins, 3 Neb. 384; Tennent *v.* Battey, 18 Kans. 324; Martin *v.*

It is also a general rule that no creditor can obtain such relief unless he has first exhausted all remedies at law.[1] The return of an execution unsatisfied is required in ordinary cases.[2] Judgment creditors, although they be such by virtue of different judgments, may generally unite as complainants in a suit to reach property fraudulently alienated by their debtor,[3] or one may sue on behalf of all.[4]

*As to parties defendant*, the rule is stated by Mr. Pomeroy that, "In an action by a judgment creditor to reach equitable assets of the debtor in his own hands, or to reach property which has been transferred to other persons, or property which is held by other persons under such a state of facts that the equitable ownership is vested in the debtor, the judgment debtor is himself an indispensable party defendant."[5] It is certainly safer to proceed in

Michael, 23 Mo. 50; s. c., 66 Am. Dec. 656; Mills *v.* Block, 30 Barb. (N. Y.) 549; Melville *v.* Brown, 16 N. J. L. 364. See Wait on Fraud. Conv. § 81.

In some of the States, other creditors are authorized by statute to file creditors' bills before obtaining judgment. This seems to be the case in *Alabama*, *Maryland*, *Massachusetts*, *Mississippi*, *Tennessee*, *Virginia*, and *West Virginia*. See note to Massey *v.* Gorton, 12 Minn. 145; s. c., 90 Am. Dec. 290.

1. Adsit *v.* Butler, 87 N. Y. 585; Allyn *v.* Thurston, 53 N. Y. 622; Howell *v.* Cooper, 37 Barb. (N. Y.) 582; Fletcher *v.* Holmes, 40 Me. 364; Jones *v.* Green, 1 Wall. (U. S.) 330; Henderson *v.* McVay, 32 Ala. 471; Cubbedge *v.* Adams, 42 Ga. 124; Tyler *v.* Peatt, 30 Mich. 63; Dormueil *v.* Ward, 108 Ill. 216; Dahlman *v.* Jacobs (Mo.), 15 Fed. Rep. 863; Taylor *v.* Robinson, 7 Allen (Mass.), 253; Bickerstaff *v.* Doub, 19 Cal. 109; s. c., 79 Am. Dec. 204; Massey *v.* Gorton, 12 Minn. 145; s. c., 90 Am. Dec. 287, note 286; Wales *v.* Lawrence, 36 N. J. Eq. 209.

But it has been held otherwise where legal process is impossible. Merchants Nat. Bank *v.* Paine, 13 R. I. 592.

2. Verner *v.* Downs, 13 S. Car. 449; Adsit *v.* Butler, 87 N. Y. 585; Child *v.* Brace, 4 Paige (N. Y.), 309; Adee *v.* Bigler, 81 N. Y. 349; Napper *v.* Yager, 79 Ky. 241; Wait on Fraud. Conv. § 75.

It must in some way be made to appear that the debtor had no other property subject to execution at the time of bringing the action. Bruker *v.* Kelsey, 72 Ind. 51; Adams *v.* Slate, 87 Ind. 573. See also Heyneman *v.* Dannenberg, 6 Cal. 376; s. c., 65 Am. Dec. 519.

It has been held, however, in a number of cases, that, where the object of the suit is to reach *real estate* fraudulently conveyed, and the judgment itself constitutes a lien thereon, the return of an execution unsatisfied is not required. Dunham *v.* Cox, 2 Stockt. Ch. (N. J.) 437; s. c., 64 Am. Dec. 460; West *v.* McCarty, 4 Blackf. (Ind.) 244; Payne *v.* Sheldon, 63 Barb. (N. Y.) 169; Loving *v.* Pairo, 10 Iowa, 282; Newman *v.* Willets, 52 Ill. 98; Vasser *v.* Henderson, 40 Miss. 519; s. c., 90 Am. Dec. 351; McCalmont *v.* Lawrence, 1 Blatchf. (U. S.) 232.

And, in general, where the creditor already has a lien on the property by attachment or otherwise, a return of *nulla bona* is unnecessary. Heye *v.* Bolles, 33 How. Pr. (N. Y.) 266; Buswell *v.* Links, 8 Daly (N. Y.), 518; Fleming *v.* Grafton, 54 Miss. 89.

3. Brinkerhoff *v.* Brown, 6 Johns. Ch. (N. Y.) 139; Brown *v.* Bates, 10 Ala. 432; Strong *v.* Taylor School Twp., 79 Ind. 208; Robbins *v.* Sandcreek Turnp. Co., 34 Ind. 461; Powell *v.* Spaulding, 3 Greene (Iowa), 443; Buckingham *v.* Walker, 51 Miss. 494; North *v.* Bradway, 9 Minn. 183; Chapman *v.* Banker, etc., Co., 128 Mass. 478; Banknight *v.* Sloan, 17 Fla. 286; Higby *v.* Ayres, 14 Kan. 256, 331; Dewey *v.* Moyer, 72 N. Y. 74; Wall *v.* Fairley, 73 N. Car. 464; Wright *v.* Mack, 95 Ind. 332; Fry *v.* Kruse, 43 Ark. 142. *Compare* Yeaton *v.* Lenox, 8 Pet. (U. S.) 123; Seaver *v.* Bigelow, 5 Wall. (U. S.) 209.

4. Pomeroy Rem. & Remed. Rts. § 394; Chewett *v.* Moran (Mich.), 17 Fed. Rep. 820; Greene *v.* Breck, 10 Abb. Pr. (N. Y.) 42; Brooks *v.* Peck, 38 Barb. (N. Y.) 519; Edmeston *v.* Lyde, 1 Paige Ch. (N. Y.) 637; s. c., 19 Am. Dec. 454. A single creditor may maintain the action. Bottorff *v.* Covert, 90 Ind. 508; White's Bank *v.* Farthing, 101 N. Y. 344.

5. Pom. Rem. & Remed. Rts. § 447. See also Lawrence *v.* Bank of Republic, 35 N. Y. 324; Shaver *v.* Brainard, 29

consonance with the above rule in all cases: but there are many authorities which hold that the debtor, although he may be a proper party, is not generally a necessary party to a suit to set aside a fraudulent conveyance of specific property otherwise subject to execution.[1] The fraudulent grantee or assignee is, however, a necessary party defendant.[2] But parties to intermediate conveyances need not be joined.[3] What other parties are necessary must depend largely on the circumstances of each particular case.[4]

(*b*) *Pleading, Practice, and Evidence.*—The general rules for pleading fraud have already been stated in the article on FRAUD; and it is sufficient to state, in this connection, that, as a general rule, the plaintiff must show his *status* as a judgment creditor, the facts constituting the fraud, hindrance or delay complained, and lack or unsuccessful trial of all legal remedy.[5] The general rules govern-

Barb. (N. Y.) 25; Miller *v.* Hall, 70 N. Y. 252; Edmeston *v.* Lyde, 1 Paige (N. Y.) 637; North *v.* Bradway, 9 Minn. 183; Lovejoy *v.* Irelan, 17 Md. 525; s. c., 79 Am. Dec. 667.

1. Buffington *v.* Harvey, 95 U. S. 103; Fox *v.* Moyer, 54 N. Y. 130; Potter *v.* Phillips, 44 Iowa, 357; Campbell *v.* Jones, 25 Minn. 155; Taylor *v.* Webb, 54 Miss. 36. See also Smith *v.* Grim, 26 Pa. St. 65; Dockray *v.* Mason, 48 Me. 178; Jackman *v.* Robinson, 64 Mo. 289; Merry *v.* Fremon, 44 Mo. 518.

2. Sage *v.* Mosher, 28 Barb. (N. Y.) 287; Gray *v.* Schenck, 4 N. Y. 460; Tichenor *v.* Allen, 13 Gratt. (Va.) 15; Thronberry *v.* Baxter, 24 Ark. 76; Hamlin *v.* Wright, 23 Wis. 491.

*Compare* Herzog *v.* Weiler, 24 W. Va. 199.

3. Stout *v.* Stout, 77 Ind. 537; Jackman *v.* Robinson, 64 Mo. 289; Walter *v.* Riehl, 38 Md. 211.

4. See, generally, Powe *v.* McLeod, 76 Ala. 418; Tucker *v.* Zimmerman, 61 Ga. 599; Vetterlein *v.* Barnes, 124 U. S. 169; Walker *v.* Powers, 104 U. S. 245, 251; First Nat. Bank *v.* Crafts (Mass.), 14 N. E. Rep. 758; Wait on Fraud. Conv. §§ 132, 136, 138.

5. See Wait on Fraud. Conv. § 140; Dunham *v.* Cox, 2 Stockt. Ch. (N. J.) 437; Lupton *v.* Lupton 3 Cal. 120; Crippen *v.* Hudson, 13 N. Y. 165; McCole *v.* Loehr, 79 Ind. 431; Burdsall *v.* Waggoner, 4 Colo. 261; Lawson *v.* Grubbs, 44 Ga. 466; Merrell *v.* Johnson, 96 Ill. 230.

Fraud being a conclusion of law, a general averment that a deed is fraudulent, ort hat it was executed with the intent to hinder, delay, or defraud creditors, is not sufficient; but, while the general facts constituting the fraud must be averred, it is not necessary that all the particular facts and circumstances, which are matters of evidence, should be minutely charged. Where the bill alleged that the debtor, a short time before the commencement of the plaintiffs' suits against him, and for many years prior thereto, owned and possessed a large estate, consisting of real and personal property, "which has been so artfully and fraudulently arranged and conveyed that no title to any portion thereof is now in his name, and he pretends that he has no property subject to levy and sale under execution," giving a description of each one of the several conveyances, alleging that the consideration of each was assumed or fictitious, and averring that they were made with intent to hinder, delay, and defraud the complainants, and that the debtor and the several grantees fraudulently conspired together to defeat the complainants in the collection of their debts, *held*, that these averments were sufficient. Pickett *v.* Pipkin, 64 Ala. 520. See also, as to particularity required, Donovan *v.* Finn, 1 Hopk. (N. Y.) 59; s. c., 14 Am. Dec. 534, and note, 542; Rhead *v.* Hounson, 46 Mich. 246; Small *v.* Boudinot, 9 N. J. Eq. 381; Skinner *v.* Stuart, 15 Abb. Pr. (N. Y.) 391.

The claim of the plaintiff must usually be shown to have existed at the time of the fraudulent alienation. Merrell *v.* Johnson, 96 Ill. 230; Donley *v.* McKiernan, 62 Ala. 34; De Garca *v.* Galvan, 55 Tex. 53; Bruggerman *v.* Hoerr, 7 Minn. 264; s. c., 82 Am. Dec. 97.

The complaint should affirmatively show a complete right to resort to the land for satisfaction of the debt; and that cannot be unless the conveyance when made was fraudulent as against

ing the evidence and proof in cases of fraud, have also been given under the heading just referred to; and the cases cited in the note below will serve to illustrate and show their application in suits to set aside fraudulent conveyances.[1]

creditors, and unless the right of action which then accrued is shown to continue. It is necessary, therefore, to allege in the complaint, not only that such debtor had no other property at the time of the conveyance out of which the debt could be made, but also that at the time of the commencement of such suit he had not sufficient other property subject to execution to satisfy the plaintiff's claim. Bruker *v.* Kelsey, 72 Ind. 51; Adams *v.* Slate, 87 Ind. 803; Sherman *v.* Hogland, 73 Ind. 472; Spaulding *v.* Blythe, 73 Ind. 93; Emery *v.* Yount, 7 Colo. 107.

An allegation in the complaint, that such debtor "owned no property of any consequence" except that alleged to have been fraudulently conveyed, is not equivalent to an allegation that he owned no other property subject to execution sufficient for the payment of all his debts. Pfeifer *v.* Snyder, 72 Ind. 78.

But an averment that the debtor "has not now, nor has he since the note was executed had, any property subject to execution more than the exemption allowed by law" is sufficient. Simpkins *v.* Smith, 94 Ind. 479. See also Bruker *v.* Kelsey, 72 Ind. 51; Jennings *v.* Howard, 80 Ind. 214.

A complaint, in an action by a guardian to set aside a conveyance made by the surety on the bond of a former guardian, on the ground that the conveyance was made to defraud creditors, which fails to show that the surety was indebted to any one at the time he made the conveyance, or that his principal in the bond had not, up to the date of the conveyance, faithfully discharged his duties as guardian, is insufficient on demurrer. Robinson *v.* Rogers, 84 Ind. 539.

In an action to set aside a conveyance of real estate on the ground of fraud, where the complaint shows that the defendant's grantor derived his title through the medium of an intervening judicial sale, in good faith, for value and without notice of the alleged fraud, the complaint is bad on demurrer, even though it shows that the conveyance of the defendant was without any valuable consideration. Moore *v.* Trimble, 94 Ind. 153.

A complaint to set aside a fraudulent conveyance of lands by a deceased debtor, which fails to make the administrator a party, or, if there be a valuable consideration, does not aver a fraudulent intent and knowledge thereof by the grantee, and that the estate is insolvent, is bad on demurrer. Willis *v.* Thompson, 93 Ind. 62.

A complaint which fails to allege that the purchaser participated in the vendor's fraudulent purpose, but in lieu thereof avers that such purchaser agreed to pay the consideration of such purchase to a third party, and was notified of the plaintiff's claim and of the vendor's fraudulent purpose before the payment of the purchase-money, is not good unless it also avers that such third party had not accepted the promises of such purchaser, or that the same had been rescinded, in order to show that the purchaser was still indebted to the vendor. Seager *v.* Aughe, 97, Ind. 285.

**In the Answer,** where fraud is denied, the denial should be full and specific. Stanton *v.* Green, 34 Miss. 576, 592; Robinson *v.* Stewart, 10 N. Y. 194; Miller *v.* Fraley, 21 Ark. 22; Wait on Fraud. Conv. § 162.

It is usually a sufficient answer that the debtor has property subject to execution, from which the demand can be fully satisfied. Storm *v.* Badger, 8 Paige (N. Y.), 130; Wilson *v.* Dale, 5 Ind. 163; Canaday *v.* Nuttall, 2 Ired. Eq. (N. Car.) 265.

An answer, to a complaint to set aside a conveyance alleged to be fraudulent as to creditors, alleging that the deed was drawn up in the name of the debtor as grantee, that it was never delivered, that the grantor intended to make a gift of the land to his daughter, the wife of the debtor, and that, at his daughter's solicitation, he made another deed, conveying the land to her, is good. Bremmerman, *v.* Jennings, 101 Ind. 253.

1. In the absence of evidence to the contrary, honesty and fair dealing in all transactions are always presumed; and if any person claims that there was fraud in any transaction, it devolves upon such person to prove the fraud. Long *v.* West, 31 Kan. 298; Sawyer *v.* Moyer, 109 Ill. 461; Williamson *v.* Williams, 11 Lea (Tenn.), 355.

But in an action between a wife and her husband's creditors, where she claims property in dispute, by purchase from her husband, the burden is upon her to prove, by clear and satisfactory evidence, that such purchase was made in good faith,

for valuable consideration paid out of her separate estate or by a third person for her; and the same rule applies to one who took from the wife with notice. Horton *v.* Dewey, 53 Wis. 410; Fisher *v.* Shelver, 53 Wis. 498. Qualified in other respects, in Semmens *v.* Walters, 55 Wis. 675. See also Herzog *v.* Weiler, 24 W. Va. 199. *Compare* Wolf *v.* Chandler, 58 Iowa, 569.

In another case, under the peculiar circumstances it was held that the grantee of a wife, to whom property had been conveyed by her husband, was not bound, in a contest with a creditor of the husband, to establish the *bona fides* of such conveyance to the wife, by that positive and cogent proof which would be required of her, and that the burden of proof was upon the party seeking to impeach the conveyance. Hooser *v.* Hunt, 65 Wis. 71.

The intent with which a grantor executes a deed must be gathered from the deed itself, and from his acts and the surrounding circumstances. And when those circumstances are of such a character as to lead to the inference that there has been a fraudulent intent, the *onus* of disproving fraud rests on the parties to the transaction. Zimmer *v.* Miller, 64 Md. 296.

Common report of a person's insolvency is admissible upon the issue whether another knew of such insolvency, or had reasonable ground to believe it. Gordon *v.* Ritenour, 87 Mo. 54.

Where the good faith of one who buys a stock of goods is in question in a contest between himself and an officer who has taken them under an attachment, the purchaser may properly testify that he bought them in good faith for what he considered a full consideration and with no other purpose than to get the stock at a fair price. Bedford *v.* Penny, 58 Mich. 424. See also Starin *v.* Kelly, 88 N. Y. 478.

In attacking the good faith of a sale or conveyance of property, it is always competent to show that the vendor or grantor was in embarrassed circumstances when the sale or conveyance was made. Geisendorff *v.* Eagles, 106 Ind. 38.

The acts and declarations of a debtor charged with the execution of a conveyance in fraud of creditors, made in the absence of the grantee, are admissible in evidence to prove the fraudulent purpose of the debtor; and knowledge on the part of the grantee, of such fraudulent purpose of the debtor, may be shown by any circumstances tending to show participation in the designs of the latter, and without proving the grantee's knowledge of particular acts and declarations so made by the grantor. Holmes *v.* Braidwood, 85 Mo. 610.

But a creditor of an alleged fraudulent vendor cannot prove the acts or declarations of such vendor, made after the sale and delivery of the property, against the purchaser for the purpose of impeaching his title. Ohio Coal Co. *v.* Davenport, 32 Ohio St. 194; Adler *v.* Apt, 30 Minn. 45.

Where the good faith of a transfer from a son to his father is in question in an action of replevin, brought by the father to recover the property after it has been seized on an attachment against the son, it is not leading, and it is proper, to ask a witness who aided in the transfer whether there was any suggestion by the parties that they were seeking to avoid creditors, or anything of that kind; it is also proper to ask the attachment debtor whether any portion of his object in making the transfer was to delay, hinder, or defraud creditors. Hart *v.* Newton, 48 Mich. 401.

Where the question in issue is as to the *bona fides* of an alleged purchase of a stock of goods, large latitude of inquiry should be permitted as to the conduct of the parties, the circumstances of the transaction, the consideration of the purchase, and the means of the vendee. Douglas *v.* Hill, 29 Kan. 527. See also Kalk *v.* Fielding, 50 Wis. 338.

Where a husband and wife act in concert to defraud the creditors of the husband, the declarations of the latter, made before the common purpose was accomplished, are admissible in evidence against both; and the sworn statements of the wife to the assessor, as to her separate property, are properly admissible in evidence, as showing her ability or inability to pay for the real estate conveyed to her. Sherman *v.* Hogland, 73 Ind. 472.

On the issue whether a conveyance of real estate is fraudulent as to creditors, evidence of the register of deeds for the district in which the estate lies, that he has searched the records of the registry and found that there was no other property standing in the name of the grantor, is admissible. Bristol Co. Bank *v.* Keavy, 128 Mass. 298.

Evidence of similar transactions showing fraud occurring about the same time, or as part of the same scheme, is usually admissible. Day *v.* Stone, 59 Tex. 612; Heath *v.* Page, 63 Pa. St. 108; Adams *v.* Kenney, 59 N. H. 133.

But where two transactions are claimed to be fraudulent, only one of which, however, is controverted, it must be shown

3. *Other Remedies.*—In many of the States, an additional remedy is provided for by statute, in the form of a proceeding supplementary to execution. It is very similar to a creditor's bill in equity. The nature of the remedy, and the procedure necessary to obtain its advantages, have, however, already been explained. (See EXECUTIONS, sub-heading *Supplementary Proceedings;* also CREDITORS' BILLS.)

Provisional relief by injunction is also obtainable in a proper case.[1] And an action on the case against the debtor and his fraudulent grantee seems to have been maintained in several instances;[2] but this form of remedy is not appropriate in ordinary cases, if indeed it can be proper in any case.[3]

that they are so connected as to evince a common purpose, before the uncontroverted transaction can be admitted in evidence for the purpose of establishing the other to be fraudulent. Much less, in such a case, can an uncontroverted transaction, which is not shown to be fraudulent, and which was too remote in time to raise any presumption of its being connected in purpose with the other, be admitted in evidence. Hardy *v.* Moore, 62 Iowa, 65. See also Williams *v.* Robbins, 15 Gray (Mass.), 590; Staples *v.* Smith, 48 Me. 470.

One who claims title to real estate through a sheriff's sale, upon the ground that a previous conveyance of the land by the execution defendant was made to defraud creditors, has the burden of proving fraud; and without evidence that at the time of the levy there was not sufficient other property of the defendant subject to execution, and that when the conveyance was made he did not retain sufficient to pay his debts, he must fail. Pennington *v.* Flock, 93 Ind. 378.

A party claiming under a deed which is attacked as fraudulent cannot support it by showing a different consideration from that expressed on its face. Carmack *v.* Lovett, 44 Ark. 180.

Evidence of the value of a tract of land adjoining that retained by the donor, in a deed of gift, is incompetent to show that the donor did not retain property fully sufficient and available to satisfy existing debts. Warren *v.* Makely, 85 N. Car. 12.

Where a bill is filed in aid of execution, and the question at issue is the good faith of a transfer of the land, and the purchaser is made a party defendant, and evidence is given tending to show that the sale was made with an evident intent to defraud creditors, his neglect to make an affirmative showing to support the sale will warrant a court in giving their full force to any legitimate inferences drawn from the evidence given against it. Whitney *v.* Rose, 43 Mich. 27.

In a suit to set aside a fraudulent conveyance, evidence tending to show that the debtor had been overreached in the transaction out of which the indebtedness was created, and induced to contract the debts, upon which the judgments were recovered, by false representations made by some of the complainants, is not admissible. Sawyer *v.* Moyer, 109 Ill. 461.

1. Hyde *v.* Ellery, 18 Md. 501; Rosenberg *v.* Moore, 11 Md. 376; Joseph *v.* McGill, 52 Iowa, 127; Witmer's Appeal, 45 Pa. St. 455; Appeal of Fowler, 87 Pa. St. 449. But no injunction will be granted unless there appears to be a necessity for it. Portland, etc., Assoc. *v.* Creamer, 34 N. J. Eq. 107. See also Comer *v.* Coates, 69 Ga. 491.

A mere general creditor without a judgment cannot ordinarily enjoin a debtor from transferring his property. Crowell *v.* Horacek, 12 Neb. 622; McGoldrich *v.* Slevin, 43 Ind. 522; Uhl *v.* Dillon, 10 Md. 500.

2. Meredith *v.* Johns, 1 H. & M. (Va.) 585; Quinby *v.* Strauss, 90 N. Y. 664.

3. Lamb *v.* Stone, 11 Pick. (Mass.) 527; Adler *v.* Fenton, 24 How. (U. S.) 412; Klous *v.* Heneressey, 13 R. I. 335. See also Austin *v.* Barrows, 41 Conn. 287; Bradley *v.* Fuller, 118 Mass. 239; Green *v.* Kimball, 6 Blackf. (Ind.) 552; Moody *v.* Burton, 27 Me. 427; Kimball *v.* Harman, 34 Md. 407; Mowry *v.* Schroder, 4 Strobh. L. (S. Car.) 69.

**Assumpsit** will not lie against the purchaser. Aspinal *v.* Jones, 17 Mo. 212.

A creditor who has no lien upon the property of his debtor cannot maintain an action against a person who has accepted a conveyance of the property for the purpose of defrauding the creditor, and who has conveyed the property to another at the instance and for the benefit of the

**FRAUDULENT DEBTOR.**—(See also DECEIT; FRAUD; FRAUDULENT CONVEYANCES; IMPRISONMENT FOR DEBT; POOR DEBTOR.)

**I. Fraudulently Contracting Debts,** 780.
1. *Badges of Fraud in the Debtor's Transactions,* 780.
(*a*) *Intent of Debtor to Defraud Creditors,* 781.
(*b*) *Consideration,* 782.
(*c*) *Unusual Transactions by the Debtor,* 783.
(*d*) *Near Relationship of Parties,* 784.
2. *Absconding Debtor,* 785.
**II. Punishment of Fraudulent Debtors.** See IMPRISONMENT FOR DEBT; POOR DEBTOR.

**I. FRAUDULENTLY CONTRACTING DEBTS.**—The abolition of imprisonment for debt, as was the practice under the common law, is general throughout the *United States.* Our present laws for the benefit of honest but unfortunate creditors have been perverted in some cases, and made to shield fraudulent transactions.[1]

The creditor has a right to the thorough investigation of the insolvent's transactions, especially in the disposition of his assets, in which the creditor has an equitable interest.[2] A party has a legal right to contract debts to be satisfied out of his property, to create liens upon it, to sell or give it to others, and he will be bound by his own acts. But in these transactions he is legally bound to pay his debts, and he must exercise good faith in the disposition of his property. He must not create fictitious debts, or do any act *mala fide* to the injury of his creditors. He must impose no conditions upon the right of his creditors to participate in his assets, nor authorize any delay on the part of his trustee. He must use all his property absolutely for the payment of his obligations.[3]

**1. Badges of Fraud in the Debtor's Transactions.**—Circumstances sometimes attend a transaction which have a tendency to hinder,

debtor, without retaining any portion of it or receiving any benefit from it. Tasker *v.* Moss, 82 Ind. 62.

An embarrassed or failing debtor, before the execution of a voluntary assignment of all his property in trust for the benefit of all his *bona fide* creditors, may lawfully mortgage his property to secure his valid and subsisting debts to some of his creditors in preference to his other creditors. But where, in such case, after the execution of his voluntary assignment, the acts of the assignor and his mortgagees, in collusion with his trustee, show a wrongful conversion of the trust property from the purposes of the trust, they and each of them will be liable to the general creditors, as beneficiaries in the trust, for their damages resulting from such conversion. Wright *v.* Mack, 95 Ind. 332.

In *Maine,* a statute provides for the recovery of a penalty from one who assists a debtor in fraudulently transferring his property. Rev. Stats. ch. 113, § 51. But one who has commenced such an action waives his right to prosecute his suit by filing a petition against his debtor and having him declared a bankrupt, and then causing a suit to be commenced against the alleged fraudulent transferee, by the assignee in bankruptcy, to recover the value of the property alleged to have been fraudulently transferred. Fogg *v.* Lawry, 71 Me. 215.

**Authorities for Fraudulent Conveyances.**—Wait on Fraudulent Conveyances; Bump on Fraudulent Conveyances; Bishop on Insolvent Debtors; Kerr on Fraud and Mistake; Story's and Pomeroy's Equity Jurisprudence; May on Fraudulent Conveyances; and Roberts on Frauds. Valuable notes on some portions of the subject will also be found in the American Decisions and American Reports.

1. Wait Fraud. Conv. 2.
2. Egery *v.* Johnson, 70 Me. 261.
3. West *v.* Snodgrass, 17 Ala. 554; Donovan *v.* Dunning, 69 Md. 436; Towle *v.* Hoit, 14 N. H. 61; Wooten *v.* Clark, 23 Miss. 75; Lukins *v.* Aird, 6 Wall. (U. S.) 79.

delay, and defraud creditors, and are generally termed badges of fraud. These evidences do not constitute fraud, but merely circumstances from which it may be inferred.[1] The circumstances which the law makes badges of fraud, and not fraud *per se*, are generally submitted to the jury so that they may draw their own conclusions.[2]

(*a*) *The Intent to Defraud Creditors.*—The intent to defraud is shown by acts and declarations. If a party is guilty of an act which defrauds another, his declaration that his intentions were honest cannot be taken as sufficient to overthrow the act.[3] And where a transaction by its operation hinders, delays, or defrauds creditors, it shows the intent; and if it be a conveyance, no evidence of intention can change the presumption. A different intent cannot be shown by parol testimony nor be deduced from surrounding circumstances.[4] A fraudulent purpose or intent is an important element in the transaction, but it is not the only one; in addition, there must be connected with it actual fraud, hindrance, or delay resulting therefrom to the creditors.[5] It is not necessary to show that the fraudulent intent was the sole purpose, but that it constituted a part of the design of the transaction; it is the part of the scheme to hinder or delay creditors which gives the negotiation its fraudulent character.[6]

1. Thames *v.* Rembert, 63 Ala. 567.

2. King *v.* Russell, 40 Tex. 124.

A badge of fraud is a fact calculated to throw suspicion on the debtor's acts, and which calls for an explanation. Peebles *v.* Horton, 64 N. Car. 376; Sherman *v.* Hogland, 73 Ind. 473.

The evidence is not generally conclusive as to the fraudulent transaction, but indicates that there is a sign or mark of fraud. At one time this evidence may be almost conclusive, and again only a reasonable inference of fraud. Pilling *v.* Otis, 13 Wis. 495.

3. Babcock *v.* Eckler, 24 N. Y. 623.

4. Farrow *v.* Hayes, 51 Md. 498.

5. Rice *v.* Perry. 61 Me. 150.

6. Holt *v.* Creamer, 34 N. J. Eq. 187.

**A Question of Fact.**—The question whether a conveyance is made to defraud creditors in the first instance is a question of fact,—Splor *v.* Rood, 51 Mich. 140;—and to be determined from all the surrounding facts and circumstances of the case,—Livesay *v.* Beard, 22 W. Va. 585.

**Voluntary Conveyance.**—Where the conveyance is alleged to be fraudulent as to creditors of the grantor, this intent must be proved. A voluntary deed made by a father to his daughter, at a time when he owes no debts, is valid; and a second conveyance made by him to her, of another tract of land, in case of her relinquishing her right and estate in the first, and allowing the father to sell the same and receive the proceeds, being founded upon a valuable consideration, are not fraudulent as to creditors of the father having debts against him when the last deed was executed. Davis *v.* Kennedy, 105 Ill. 300.

The mere fact of indebtedness at the time of the execution of a voluntary conveyance by a father to a child does not show a fraudulent intent where he is solvent or where the facts do not justify a presumption of insolvency. Carr *v.* Breese, 81 N. Y. 584.

Fraudulent intent is generally a question of fact for the jury, and not for the court. Hyde *v.* Chapman, 33 Wis. 392; Barkow *v.* Sanger, 47 Wis. 501; Mehlhop *v.* Pettibone, 54 Wis. 656.

A fraudulent intent is never presumed when fairly reconcilable with honesty. Mey *v.* Gulliman, 105 Ill. 272.

A conveyance is not necessarily fraudulent because its effect is to hinder and delay creditors, unless there was a design for that purpose, and the grantee participated in it. Daniel *v.* Vaccaro, 41 Ark. 316.

If the intent is vicious, and the conveyance is fair and regular upon its face, it must then be proved *aliunde*. Harman *v.* Hoskins, 56 Miss. 142.

If a conveyance is made by a debtor, of all his personal and real property,

(*b*) *Consideration.*—Some of the older authorities hold that, if one bound by a moral obligation to do a thing, promises to do it, the promise is upon a valid consideration; but at the present time this doctrine does not prevail in *England*, and probably not to any great extent in the United States.[1] Inadequacy of consideration may be a strong evidence of fraud.[2] But mere inadequacy of consideration does not *per se* constitute fraud.[3] The consideration must be so glaringly small as to satisfy the court that the transaction was not conducted in good faith.[4] It must appear that the price was so manifestly unjust as to shock the moral sense and create a suspicion of fraud.[5] But there is authority that holds that, in the absence of other evidence tending to show fraud, the court will not deem inadequacy of consideration sufficient ground for inferring fraud.[6] Other authority holds that where an insolvent debtor disposes of his property at a sacrifice, it is a strong and violent presumption of a fraudulent intent on the part of the debtor.[7] But if the intent be to hinder, delay, or defraud creditors, the presence of the adequate consideration will not make the transaction *bona fide*.[8] Unilateral fraudulent intent will not of course suffice to invalidate the transaction.[9] The consideration must be good and *bona fide;* that is, both good and *bona fide*.[10]

without consideration, and in trust for his benefit for life, and, after his death, for the payment of his debts, it is fraudulent *per se*, and it is not necessary to establish the fraudulent intent. Young *v.* Heermans, 66 N. Y. 374.

It has been held that there is no solid foundation for a distinction to be given between fraud in law and fraud in fact. Olive Lee, etc., Bank *v.* Talcott, 19 N. Y. 148.

**A Question of Fact, of Law, and Mixed.**—Fraud is sometimes a question of law, sometimes a question of fact, and sometimes a mixed question of law and of fact. Estmick *v.* Cailland, 5 T. R. 420.

Fraud is never purely a question of law nor exclusively a question of fact. Foster *v.* Woodfin, 11 Ired. (N. Car.) 339.

What intent is, in law, fraudulent, the court must inform the jury; and every case must create its own law. Leadman *v.* Harris, 3 Dev. (N. Car.) 146.

**Division of Fraud.**—Some authorities divide fraud as follows: (1) Fraud that is self-evident, thus not needing the conclusion of a jury; (2) fraud which depends upon a variety of circumstances usually connected with intent, which is a question of fact for the jury, with instructions from the court as to what is fraud; (3) presumptive fraud where the presumption may be rebutted. Hardy *v.* Simpson, 13 Ired. (N. Car.) 139.

It has been held that it is not important to determine what motive animated the debtor if he has so disposed of his property that the necessary effect is to hinder and delay creditors. The law will consider such action fraudulent. Phelps *v.* Corts, 80 Ill. 112; Power *v.* Alston, 93 Ill. 587; Moore *v.* Wood, 100 Ill. 454.

1. Bish. Cont. § 44.
2. Griffith *v.* Spratley, 1 Cox, 383.
3. Kempner *v.* Churchill, 8 Wall. (U. S.) 369.
4. Fuller *v.* Brewster, 53 Md. 361.
5. Clark *v.* Krause, 2 Mackey (D. C.), 559.
6. Emonds *v.* Termehr, 60 Iowa, 92.
7. Shelton *v.* Church, 38 Conn. 420.
8. Bradley *v.* Ragsdale, 64 Ala. 559.
9. Prewit *v.* Wilson, 103 U. S. 24; Herring *v.* Wickham, 29 Gratt. (Va.) 628.
10. Schmit *v.* Opil, 33 N. J. Eq. 141. "**Mala Fides** supersedes all inquiry into the consideration, but *bona fides* alone is not always sufficient to support a transaction not founded on any valuable consideration." May Fraud. Conv. 233.

A voluntary gift or settlement is fraudulent if it was the intent of the grantor of hinder, defraud, or delay creditors, whether the donee joins in the fraudulent

(*c*) *Unusual Transactions by the Debtor.*—Wherever there appear to be connected with the transaction circumstances indicating excessive effort to give it the appearance of fairness or regularity, and which are not usual attendants of such business, the courts and juries are often influenced in favor of the creditor.[1] If parties not usually very exact in their negotiations carry out a transaction with great precision, accurate calculations, and the claim of the grantee made to overbalance the valuation, these, with other facts, will lead the court to believe the transaction is not *bona fide*.[2] Generally, *bona fide* transactions do not need to be clothed with extraordinary pretence of prompt payment.[3]

intent or not. An absolute conveyance for a valuable consideration is good, notwithstanding the grantor intended to defraud, unless the other party participated in the fraud. Doe *d.* Lassiter *v.* Davis, 64 N. Car. 498.

**Inadequacy of Consideration** is evidence of a secret trust; and it may be *prima facie* evidence, that the conveyance is not *bona fide* if it be accompanied with any trust. Kuykendall *v.* McDonald, 15 Mo. 420.

A fair exchange of values may be made at any time, even if one of the parties to the transaction be insolvent. Cook *v.* Tullis, 18 Wall. (U. S.) 332; Stewart *v.* Platt, 101 U. S. 738.

One partner cannot make a valid transfer of partnership property to pay his individual debts without the consent of his copartners. Hartley *v.* White, 94 Pa. St. 36.

Inadequacy of consideration, pure and simple, and unmixed with any other fraud, is of rare occurrence. The rule is well settled, however, although rather by *dicta* than by decisions, that a transaction will be set aside if there is "an inequality so strong, gross, and manifest that it must be impossible to state it to a man of common-sense without producing an exclamation at the inequality of it." Such a transaction is fraudulent. Case *v.* Case, 26 Mich. 484; Byers *v.* Durget, 19 How. (U. S.) 303; Dunn *v.* Chambers, 4 Barb. (N. Y.) 376; Kelley *v.* McGuire, 15 Ark. 555; Osgood *v.* Franklin, 2 Johns. Ch. (N. Y.) 1; Hodgson *v.* Farrell, 2 McCart. (N. J.) 88; Davidson *v.* Little, 10 Harr. (Pa.) 245; Morriso *v.* Philliber, 30 Mo. 145; Mitchel *v.* Jones, 50 Mo. 438; Maconpin Co. *v.* People, 58 Ill. 191; Butler *v.* Haskell, 4 Desaus Eq. (S. Car.) 651; Gifford *v.* Thorn, 1 Stockt. (N. J.) 702; Hamet *v.* Dundars, 4 Pa. St. 178.

Such a consideration is evidence of a fraudulent transaction. Kerr, Fraud and Mist. 187; Bigelow Fraud, 137.

1. Comstock *v.* Rayford, 20 Miss. 369.
2. Hartshorn *v.* Eames, 31 Me. 100.
3. King *v.* Moon, 42 Mo. 551.

**Needs the Attention of the Court and Jury.** — Many transactions require the careful attention of the court (in equity cases, where a jury trial is not had), and of the jury, to determine whether they are fraud upon the creditors. For instance, taking additional security by way of chattel mortgage on a claim already abundantly secured by real estate mortgage—Crapster *v.* Williams, 21 Kan. 109;—the absence of *memoranda* or of any record of the consideration in an important deal—Hubbard *v.* Allen, 59 Ala. 283; Alexander *v.* Todd, 1 Bond. (U. S.) 179;—sacrificing property for one fourth of its value—Stevens *v.* Dillman, 86 Ill. 235;—the failure to take an account of the stock, and no agreement as to the exact terms of the transaction—Wheelden *v.* Wilson, 44 Me. 20;—transfers to prevent the sacrifice of property—German Ins. Bank *v.* Nunes, 80 Ky. 334;—a false statement of the receipt of the consideration—Balt., etc., R. Co. *v.* Hoge, 34 Pa. St. 214;—absence of means in the buyer —Danby *v.* Sharp, 2 McArthur (D. C.), 435;—failure to introduce evidence within the control of the debtor—Peebles *v.* Horton, 64 N. Car 374;—using terms and clauses in the instrument, of unusual occurrence — Gibbs *v.* Thompson, 7 Humph. (Tenn.) 179;—Pilling *v.* Otis, 13 Wis. 496;—employment of the debtor after the transfer of the property—Hurlburd *v.* Bogardus, 10 Cal. 518; McKibbin *v.* Martin, 64 Pa. St. 352;—destroying letters passing between parties of the transaction—Goshone *v.* Snodgrass, 17 W. Va. 717; Henderson *v.* Henderson, 55 Mo. 534;—the omission of a party to testify as a witness for himself, in reply to the evidence against him, is of great weight—Bowden *v.* Johnson, 107 U. S. 251, 262; same principle, Clarke *v.* Van Riemsdyk, 9 Cranch (U. S.), 153; Clem-

(*d*) *A Near Relationship of Parties.*—A transaction with a near relative is open to more suspicion than with a stranger, because it is more likely to be intended, not as a real transaction, but as a feigned and collusive arrangement by which it is secretly understood that the donee shall hold the property against the claims of creditors and still let the debtor receive the benefit from it.[1] But such sale of property is not *per se* a badge of fraud.[2] But the relationship of parties in business transactions where one is insolvent makes their acts of special interest to the creditors who may be thus suspicious, and the transactions will be closely scrutinized,[3] though the transaction of itself is not sufficient to raise the presumption of fraud on the part of the debtor,[4] but where this near relationship exists, coupled with secrecy in the transaction, it may be regarded as fraudulent, unless explained.[5]

ents *v.* Moore, 6 Wall. (U. S.) 299; *compare* Clark *v.* Krause, 2 Mackey (D. C.), 559;—neglect to testify—Burke *v.* Burke, 34 Mich. 451;—a sale to a creditor without taking back the evidence of the debt—Gardner *v.* Broussard, 39 Tex. 372;—a sale conducted in an unusual way, and not in the ordinary course of business—State *v.* Merritt, 70 Mo. 283;—a conveyance of real estate without adequate security—Owen *v.* Arvis, 26 N. J. L. 22;—preparation of the deed at the sole instance of the grantee—Sears *v.* Shafer, 1 Barb. (N. Y.) 408;—receiving rents and managing the estate by the vendor, after the alleged sale, under an assumed agency from the vendee, but without any writing as evidence, and only the uncorroborated assertions of the party or debtor—Sands *v.* Codwise, 4 Johns. (N. Y.) 536;—absence of authenticated evidence of indebtedness, large in amount, other than a pencil memorandum—Brinks *v.* Beise, 84 Pa. St. 253;—contradictory and unreconcilable accounts of the transaction by the parties—Marshall *v.* Green, 24 Ark. 419.

**Sale upon Credit.**—A sale, however, by an insolvent, of his whole stock in trade, upon credit, is not always fraudulent. Schetlin *v.* Stone, 43 Barb. (N. Y.) 634. The fact that the buyer has no use for the goods is not evidence of fraud. Grubbs *v.* Greer, 5 Coldw. (Tenn.) 160. It may not be fraudulent, if a debtor sells an uninventoried stock of goods on credit, to a near relative; nor is a trust void because not particularly declared. Forbes *v.* Scannell, 13 Cal. 287.

1. May Fraud. Conv. 236.
2. Fleisher *v.* Dignon, 53 Iowa, 288.
3. Engraham *v.* Pate, 51 Ga. 537; Sherman *v.* Hogland, 73 Ind. 473; Marshall *v.* Croom, 60 Ala. 121; Fisher *v.* Shelner, 53 Wis. 501; Seitz *v.* Mitchell, 94 U. S. 580.
4. King *v.* Russell, 40 Tex. 124.
5. Reiger *v.* Davis, 67 N. Car. 189.

**Confession of Judgment.**—The fact that the creditors, who obtained judgments by confession, bore intimate relations with the debtor, the delay in the levy of the execution, the unusual time and order under which the assignee took possession, and the agency of the same attorney in all the proceedings, though perhaps casting suspicion upon the proceedings, are not in themselves sufficiently strong to sustain an imputation of bad faith or a charge of fraudulent preference. Baldwin *v.* Freydendall, 10 Ill. App. 106.

**Conveying Entire Estate.**—When the debtor conveys his entire estate in secrecy, and other badges attach, it is fraudulent as to creditors. Embury *v.* Klemm, 30 N. J. Eq. 523.

No law prohibits parties, standing in close relationship by affinity or in business, from buying from each other, or requiring them to conduct their business in special. Dunlap *v.* Bournonville, 26 Pa. St. 73.

The relationship of assignor or assignee, and their intimacy and friendship, prove nothing by themselves. This relationship can only be considered fraudulent when other circumstances indicative of fraud are present. Schultz *v.* Hoagland, 85 N. Y. 468.

**Preference at Common Law.**—At common law, a debtor has a right to prefer one class of creditors to another; and a jury must not take this preference as a suspicious circumstance, in deciding the fairness of the transaction. Born *v.* Sham, 29 Pa. St. 288.

**2. Absconding Debtor.**—The States generally accord the remedy by attachment where the debtor seeks to elude the effect of ordinary legal proceedings by secreting, removing, or otherwise fraudulently disposing of his property within the State, or by removing it out of the State in order to escape his creditors. The charge against the debtor is that ordinary process is rendered inadequate or precarious.[1] Fraudulent withholding of property from ordinary process may be inferred from an evil intent to hinder and delay creditors.[2] False promises to pay do not tend to show that the debtor was about to dispose of his property to defraud his creditors.[3]

**II. Punishment of Fraudulent Debtors.**—See Imprisonment for Debt.

The common law permits a debtor to prefer one creditor to another. Lininger *v.* Raymond, 12 Neb. 19; Tootle *v.* Coldwell, 30 Kan. 125; Francis *v.* Rankin, 84 Ill. 169; Thornton *v.* Tandy, 39 Tex. 544; Sands *v.* Pierson, 61 Iowa, 702; Leppig *v.* Bretzel, 48 Mich. 321; Straus *v.* Rose, 59 Md. 525; Elliot *v.* Benedict, 13 R. I. 473.

But the statutes of bankruptcy and insolvency commonly prohibit this preference. Dexter *v.* Snow, 12 Cush. (Mass.) 594.

1. Waples Attach. 52.

2. Parsons *v.* Stockbridge, 42 Ind. 121.

3. Evans *v.* Warner, 21 Hun (N. Y.), 574.

When the absconding debtor has left no legal assets that can be reached, the creditors may, before the recovery of judgment, file a bill to reach equitable assets. Pendleton *v.* Perkins, 49 Mo. 565; Scott *v.* McMillen, 1 Litt. (Ky.) 302; Peay *v.* Morrison, 10 Gratt. (Va.) 149; Farrar *v.* Haselden, 9 Rich. (S. Car.) 331; Keller *v.* McGlemery, 2 Blackf. (Ind.) 488; Merchants Bank *v.* Paine, 13 R. I. 592.

The leading purpose of the statutes granting attachment when the debtor is about to remove his personal property out of the State with intent to evade the payment of his debts and defraud his creditors, is to authorize proceedings *in rem*. If the fraudulent design to remove exists, attachment will lie, though the debtor may not intend to complete his design for some time. Myers *v.* Farrell, 47 Miss. 281.

The intent to defraud by leaving the State, being difficult of direct proof, may be inferred from circumstances. Ross *v.* Clark, 32 Mo. 296; Young *v.* Nelson, 25 Ill. 464; Gibson *v.* McLaughlin, 1 Bro. (Pa.) 292.

The fraudulent debtor is entitled to circumstances in his favor. Bennett *v.* Avant, 2 Sneed (Tenn.), 152; Boardman *v.* Bickford, 2 Aik. (Vt.) 345; Simons *v.* Jacobs, 15 La. Ann. 425; Matter of Warner, 3 Wend. (N. Y.) 424; Havis *v.* Taylor, 13 Ala. 324; Burgess *v.* Clark, 3 Ind. 250; Reeves *v.* Comly, 3 Rob. (La.) 363.

For a debtor to give a mortgage without consideration, in order to conceal interest in land and defraud creditors, is a fraud. Taylor *v.* Kuhuke, 26 Kans. 132.

Mere removal of property, without fraudulent intent, is no fraud. Steele *v.* Dodd, 14 Neb. 496.

Whether the transfer of property is made to defraud creditors is always a question dependent upon the intent of the debtor and the circumstances of the transaction. Curtis *v.* Hoadley, 29 Kan. 566; Spencer *v.* Deagle, 34 Mo. 455; Clark *v.* Smith, 7 B. Mon. (Ky.) 273.

## FRAUDULENT SALES. (See also FALSE PRETENCES.)


**I. In General,** 791.
1. *Nature of Fraud,* 791.
(a) *No Sufficient Assent of Parties,* 791.
(b) *Distinguished from Mistake,* 791.
(c) *Definition,* 791.
(d) *Fact for the Jury,* 792.
(e) *Leading Instances,* 792.
(f) *Legal Consequences,* 792.
2. *Requisites of Fraud,* 792.
(a) *Representations Necessary,* 792.
(b) *Mere Expression of Opinion,* 793.
(c) *Evidence in Tort for Fraud in Sale,* 793.
3. *Inducement to Contract,* 793.
(a) *Deceit Must be Successful,* 793.
(b) *Need Not be Sole Inducement,* 794.
4. *Reliance upon Representations,* 794.
(a) *Illustration from Seller's False Representation,* 795.
5. *Opinions Concerning Value or Cost,* 795.
(a) *As Governed by Caveat Emptor,* 795
(b) *Recognized Principle,* 796.
6. *Misrepresentation of the Law,* 796.
(a) *Fraud Cannot be Predicated upon,* 796.
(b) *No Misunderstanding of Facts,* 796.
7. *Liability in Tort to Strangers,* 797.
(a) *Principles Concerning,* 797.
(b) *Application of Principles,* 797.
8. *Materiality of Representation,* 798.
(a) *Doctrine Concerning,* 798.
(b) *Illustrations from Sale of Ship or Engine,* 798.
(c) *Criterion Suggested,* 799.
9. *Design to Deceive,* 799.
(a) *Need of,* 799.
(b) *Statement of Principle Concerning,* 800.
10. *Claiming Knowledge of Fact Asserted,* 800.
(a) *Doctrine of Liability for,* 800.
(b) *Pretending Knowledge or Making Reckless Statements,* 801.
11. *Damage to Party Deceived,* 801.
(a) *Need of,* 801.
(b) *Gravamen of Charge, etc.,* 802.
12. *Concealment, or Equivalent Devices,* 802.
(a) *Positive Misrepresentation Unnecessary,* 802.
(b) *Illustrative Instances,* 802.
13. *Matters Open to Observation,* 803.
(a) *Doctrine Concerning,* 803.
(b) *Representation of Value of Article Sold,* 803.
(c) *Effect of Concealment,* 803.
14. *Duty of Disclosure Where Fiduciary Relation,* 804.
(a) *Effect of Failure to Disclose,* 804.
(b) *Examples,* 804.
15. *Effect of Silence,* 804.
(a) *General Doctrine,* 804.
(b) *When Amounts to False Representation,* 804.
16. *Remedies for Fraud,* 805.
(a) *Right to Rescind,* 805.
(b) *Rescission Must be Total, Prompt, etc.,* 805.
(c) *Remedy in Damages,* 806.
17. *Restoring Consideration,* 806.
(a) *Need of,* 806.
(b) *Requisite if Property of any Value,* 806.
(c) *Change in Condition of Property,* 807.

**II. Seller's Fraud,** 807.
1. *Seller's Dealing with Defects,* 807.
(a) *Avoidance of Contract for Seller's Fraud,* 807.
(b) *Seller Need Not Point out Defects,* 808.
(c) *Established Doctrine,* 808.
2. *When Buyer Not Protected,* 808.
(a) *Duty of Purchasing Party,* 808.
(b) *Instances of Failure to Show Fraud,* 809.
3. *Seller's Statements as to Price, etc.,* 809.
(a) *Doctrine Concerning,* 809.
(b) *Application of Doctrine,* 810.
4. *Expressions of Opinion,* 810.
(a) *Not Ground for Avoiding Sale,* 810.
(b) "*Dealer's Talk,*" 810.
5. *Seller's Liability for Fraud,* 811.
(a) *When Caveat Emptor Inapplicable,* 811.
(b) *Reliance upon Representations,* 811.
6. *Seller's Concealment or Silence,* 812.
(a) *Non-disclosure as Constituting Fraud,* 812.
(b) *Seller's Silence,* 812.
7. *Puffers or By-bidders at Auction,* 813.
(a) *Employment Fraudulent,* 813.
(b) *Good Faith as Criterion,* 814.
(c) *Limiting Bids,* 814.
(d) *Number of Puffers or By-bidders,* 815.
8. *Buyer's Rescission,* 816.

(a) *Declining to Carry Out Contract*, 816.
(b) *When Goods Need Not be Returned*, 817.
(c) *Possibility of Restoring Matter to Statu Quo*, 817.
(d) *When Right of Repudiation Lost*, 817.
(e) *Purpose to Rescind Must be Clearly Signified*, 817.
9. *Return of Property*, 817.
(a) *When Necessary*, 817.
(b) *When Not Necessary*, 818.
10. *Ratification of Contract*, 819.
(a) *Acts Affecting*, 819.
11. *Affirmance of Sale*, 819.
12. *Fraud and Warranty*, 819.
(a) *Difference and Assimilation*, 819.
(b) *Scienter and Damages*, 820.
13. *Damages*, 820.
14. *Fraud of Agent*, 821.
(a) *View Adverse to Principal's Liability*, 821.
(b) *Rule Favoring Principal's Liability*, 821.
(c) *Innocent Agent of Defrauding Principal*, 821.

**III. Buyer's Fraud**, 822.
(A) *Varieties*, 822.
1. *Buyer's Fraudulent Devices*, 822.
(a) *Extent*, 822.
(b) *Instances of*, 822.
2. *Misrepresentations of Credit*, 822.
(a) *Effect of*, 822.
(b) *Recommendation by Third Party*, 823.
(c) *Communications of Representations*, 823.
(d) *Writing Required to Charge Third Party*, 823. [823.
(e) *Requisites of Representations*,
3. *Inducing Sale to Insolvent*, 824.
(a) *Liability of Buyer for*, 824.
(b) *Merely False Statement as to Another's Solvency*, 824.
4. *Design Not to Pay for Goods*, 825.
(a) *As Fraud Authorizing Avoidance of Sales*, 825.
(b) *Concealment of Insolvency, etc., Insufficient*, 826.
(c) *Fraudulent Conduct as Showing Intent*, 826.
(d) *Intent Never to Pay*, 826.
(e) *Need of Deceptive Artifice Sometimes Declared*, 827.
5. *Proof of Design Not to Pay*, 828.
(a) *Direct Evidence Rarely Attainable*, 828.
(b) *False Rating*, 829.
6. *Remedies Where Design Not to Pay*, 829.
(a) *Disaffirmance and Reclamation*, 829.
(b) *Dishonest Intention as Prerequisite*, 829.
(c) *Possession Recoverable Against Assignee for Creditors*, 829.
7. *Depressing Price*, 830.
(a) *Concealment of Facts Enhancing Price*, 830.
(b) *Such Concealment Not of Itself Fraudulent*, 830.
(c) *Misleading Words or Deceitful Conduct*, 830.
8. *Stifling Competition*, 831.
(a) *As Rendering Auction Sale Fraudulent*, 831.
9. *Combinations of Bidders*, 831.
(a) *Discountenanced by the Law*, 831.
(b) *When Rule Inapplicable*, 832.
10. *Chilling Bids at Judicial Sales*, 832.
(a) *As Ground for Vacating Sale*, 832.
(b) *Title of Purchaser at Law*, 833.
(c) *Combination of Capital Authorized*, 833.
(B) *Protection of Bona Fide Purchasers*, 833.
1. *Doctrine on Subject*, 833.
2. *Prevalence of Exemption*, 833.
3. *Grounds of Exemption*, 834.
4. *Doctrine of the Voidable or Defeasible Title*, 836.
(a) *In this Country*, 836.
(b) *In England*, 837.
(c) *Seller's Option to Affirm or Disaffirm*, 837.
(d) *Transfer to Innocent Third Person*, 837.
5. *Doctrine of Estoppel and Superior Equity*, 837.
(a) *Statement of*, 837.
(b) *Apparent Ownership of Original Buyer*, 837.
(c) *One of Two Innocent Persons*, 838.
(d) *Exceptions to Rule as to Taking only Title Transferred*, 838.
(e) *Nature of Estoppel Raised*, 838.
(f) *Superior Equity of Honest Purchaser*, 838.
(g) *Incorporation of Idea of Voidable or Defeasible Title*, 839.
6. *The Modern English Doctrine*, 839.
(a) *Property Formerly Regarded as Not Passing*, 839.
(b) *Later Doctrine of Voidable Title*, 839.
(c) *Goods in Hands of Bona Fide Purchaser*, 839.
(d) *Statement of Rule*, 839.
(C) *Who are Bona Fide Purchasers*, 840.

1. *Who are Purchasers*, 840.
(*a*) *Those Giving Partial or Qualified Interest*, 840.
(*b*) *Carrier or Custodian Treated as Purchaser*, 840.
2. *Good Faith and Notice*, 841.
(*a*) *Taint of Fraud or Collusion*, 841.
(*b*) *Notice of Circumstances to Put on Inquiry*, 841.
(*c*) *Burden of Proof*, 841.
(*d*) *Purchaser with Notice*, 841.
3. *Consideration of Transfer*, 842.
(*a*) *Absolute Purchase Not Essential*, 842.
(*b*) *Incurring Liability*, 842.
(*c*) *Payment of Pre-existing Debt*, 842.
(*d*) *Attaching Creditors, Assignees for Insolvents, Execution Creditors, etc.*, 843.
(*e*) *Additional Consideration*, 843.
4. *Fraudulent Possession*, 843.
(*a*) *Doctrine and Illustrations*, 843.
(*b*) *Statement of General Principle*, 844.
5. *Mistaken Identity*, 844.
(*a*) *Fraudulent Possession at Inception of Bailment*, 844.
(*b*) *False Personation Inducing Sale Rather Than Delivery*, 844.
(*c*) *Bargain With Buyer Personally*, 845.
(*d*) *Rights of Bona Fide Purchasers*, 845.
6. *Criminally False Pretences*, 846.
(*a*) *Rule in This Country*, 846.
(*b*) *English View*, 846.
(*c*) *Transfer of Title as Well as Possession*, 846.
(*D*) *Remedies*, 846.
1. *Defrauded Vendor's Diligence in Rescission*, 846.
(*a*) *Delay Pending Change in Buyer's Position*, 846.
(*b*) *Keeping Question of Ratification Open*, 847.
2. *Requisites of Such Rescission*, 847.
(*a*) *Seller's Election*, 847.
(*b*) *Suit for Price Before Expiration of Credit*, 847.
(*c*) *Finality of Seller's Election*, 848.
(*d*) *Fraudulent Buyer's Expenses or Obligations*, 848.
(*e*) *Right Confined to Defrauded Seller*, 848.
(*f*) *Suit for Unrecovered Residue*, 848.
(*g*) *Notice Not a Prerequisite to Suit*, 848.
(*h*) *Burden and Scope of Proof*, 848.
(*i*) *Demand of Goods Unnecessary*, 849.
3. *Restoration of Consideration by Defrauded Seller*, 849
(*a*) *Restoration as Prerequisite to Suit*, 849.
(*b*) *When Offer of Restoration Unnecessary*, 849.
(*c*) *Doctrine Concerning Tender or Return of Notes*, 849.
(*d*) *Restoration After Bringing Action*, 850.
4. *Ratification or Affirmation*, 850.
(*a*) *Suit for Price*, 850.
(*b*) *When Rescission Barred*, 851.
(*c*) *When Rescission Not Barred*, 851.

**IV. Fraud on Creditors**, 851.
(*A*) *In General*, 851.
1. *Statutory Regulations*, 851.
(*a*) *Scope of Enactments*, 851.
(*b*) *Protection of Subsequent Creditors*, 852.
(*c*) *Scope of Statute of Elizabeth*, 852.
2. *Subsequent Creditors*, 852.
(*a*) *Where Transfer Not Fraudulent as to Existing Creditors*, 852.
(*b*) *Where Transfer Fraudulent as to Existing Creditors*, 853.
3. *Defeating Executions*, 853.
(*a*) *Mere Intention of Defeating Executions Does Not Make Sale Fraudulent*, 853.
(*b*) *Chattel Mortgage and Confession of Judgment*, 854.
4. *Fraudulent Preferences by Insolvents*, 854.
(*a*) *Policy of Bankruptcy and Insolvency Laws Against*, 854.
(*b*) *Buyer's Dealing with Goods After or Before Final Possession*, 854.
5. *Preferences Not Fraudulent*, 855.
(*a*) *Where Honest Intention to Pay Debt*, 855.
(*b*) *Under Assignment Acts and Late Bankrupt Law*, 855.
(*c*) *General Doctrine*, 856.
6. *Valid Sales by Insolvents, and Purchases from Them*, 856.
(*a*) *Validity of Sale in Good Faith, etc.*, 856.
(*b*) *Protection of Innocent Purchaser*, 856.
7. *Between Whom Fraudulent Transfers Valid*, 856.
(*a*) *Between the Parties and Against All Except Creditors*, 856.
(*b*) *No Relief on Contract Founded on Fraud*, 856.
8. *Voluntary Assignments*, 857.

(a) *At Common Law*, 857.
(b) *Assignment with Preferences*, 857.
(c) *Effect of Statute of Bankruptcy*, 857.
9. *Assent of Creditors*, 857.
(a) *Not Ordinarily Necessary at Time of Assignment*, 857.
(b) *Assent Presumed to Absolute Assignment*, 858.
(c) *Secret Preferences*, 858.
10. *Assignment Exacting Release*, 858.
(a) *Not Necessarily Fraudulent*, 858.
(b) *Question of Tendency to Delay and Defraud Creditors*, 858.
11. *Effect of Special Agreement*, 859.
(a) *With Indorser of Buyers' Note*, 859.
(b) *Retaining Ownership on Transfer of Stock*, 859
(c) *Promise to Use Property so as to Confer Pecuniary Benefit*, 859.
12. *Hurried Sales Under Peculiar Circumstances*, 859.
(a) *Hasty Sale to Creditor for His Debt and Cash*, 859.
(b) *Variety of Peculiar Features*, 859.
13. *Admissibility of Vendor's Declarations*, 860.
(a) *Inadmissible Where Entirely Apart from Sale*, 860.
(b) *Admissible Where Combination to Defraud, or Where They Form Part of Res Gestæ*, 860.
14. *Protection of Bona Fide Purchasers*, 860.
(a) *Need of Valuable Consideration Passing Before Notice*, 860.
(b) *Effect of Notice Before Payment of Entire Consideration*, 861.
(c) *From Seller Retaining Possession*, 861.
15. *Transfer for Pre-existiug Debt*, [861.
(a) *When Invalid*, 861.
(b) *When Valid*, 861.
(B) *Bills of Sale Acts*, 862.
1. *English Bills of Sale Acts*, 862.
(a) *Design and Effect of*, 862.
(b) *Requirements of*, 862.
(c) *Recording of Bills of Sale in United States*, 862.
2. *Effect of Non-compliance*, 862.
(a) *Void, under Act of* 1878, *Against Particular Classes of Persons*, 862.
(b) *Absolutely Void under Later Act*, 863.
(c) *Formerly Valid Between Parties, or Voidable Only*, 863.
3. *Documents Included*, 863.
(a) *Inventories and Receipts*, 863.
(b) *Other Specified Documents*, 864.
4. *Documents Not Included*, 864.
5. *Personal Chattels*, 866.
(a) *What Term Includes*, 866.
(b) *What Term Does Not Include*, 866.
(c) *Apparent Possession*, 866.
(1) *Provisions Concerning*, 866.
(2) *Bailee's Possession, etc.*, 867.
(3) *Furniture, Agricultural Implements, etc.*, 867.
6. *Attestation*, 868.
(a) *Provisions Concerning*, 868.
(b) *Rulings Concerning*, 869.
7. *Registration*, 869.
(a) *Provisions Concerning*, 869.
(b) *Subsequent Bill of Sale*, 869.
(c) *Bill of Sale Subject to Defeasance or Condition*, 870.
8. *Description of Residence and Occupation*, 871.
(a) *Object of Provisions*, 871.
(b) *Fatal Misdescription*, 871.
(c) *Immaterial Errors*, 871.
9. *Statement of Consideration*, 872.
(a) *Rules Concerning*, 872.
(1) *Small Inaccuracy Immaterial if Statement Not Merely Colorable*, 872.
(2) *Consideration Need Not Pass at the Time of Execution of Bill of Sale*, 873.
(3) *Collateral Agreement as to Application of Consideration*, 873.
(4) *Retention of Part of Consideration to Cover Interest*, 873.
(5) *Expenses Incurred in Preparing Bill of Sale*, 873.
10. *American Enactments*, 873.
(a) *Recording of Bills of Sale*, 873.
(1) *Provisions in Maryland*, 873.
(2) *Provisions in Iowa*, 874.
11. *Registration and Change of Possession*, 874.
(a) *Canadian Provisions Concerning*, 874.
(1) *Rulings Concerning*, 874.
12. *Fraudulent Chattel Mortgages*, 875.
(a) *Retention of Possession under Conditional Bill of Sale Where Transaction in Good Faith*, 875.
(b) *Statutory Provisions Concerning Record, etc.*, 875.
(C) *Change of Possession*, 876.
1. *Question of Fraud for Jury*, 876.
(a) *Doctrine in England*, 876.
(b) *Doctrine of Federal Courts*, 876.

(c) *General Tendency of Later Decisions*, 877.
2. *Retention of Possession*, 877.
(a) *Conclusiveness as Proof of Fraud*, 877.
(b) *English Rule*, 878.
(c) *Views Held in the United States*, 878.
(d) *Statutory Provisions Concerning*, 878.
(e) *Retention as Evidence of Fraud*, 878.
(f) *Retention as Constituting Fraud*, 880.
(g) *Retention Prima Facie Fraudulent*, 880.
(1) *Maine Doctrine—Ohio*, 880.
(2) *Doctrine in New Hampshire*, 881.
(3) *Doctrine of Massachusetts, Rhode Island, and New Jersey*, 881.
(h) *Inconclusive Presumption of Fraud*, 881.
(1) *Alabama Doctrine*, 881.
(2) *Indiana Doctrine*, 881.
(i) *Retention Fraud per se*, 882.
(1) *Kentucky Doctrine*, 882.
(2) *Illinois Doctrine*, 882.
(j) *Possession Coupled with Power to Sell*, 882.
(1) *Retention by Seller Constitutes Fraud*, 882.
(2) *Sale as Agent for Buyer*, 883.
(3) *Fraud as Question of Fact*, 883.
(k) *Conclusive Presumption of Fraud*, 883.
(1) *Connecticut Rule*, 883.
(2) *Pennsylvania Doctrine*, 883.
3. *Delivery Required by Statute*, 884.
(a) *In Delaware and Nevada*, 884.
(b) *Missouri Rule*, 884.
4. *Manual Possession or Notice to Custodian*, 884.
(a) *Rule Requiring*, 885.
(b) *Slight Evidence of Actual Delivery Sufficient*, 885.
5. *Substantial and Visible Change of Possession Required*, 885.
(a) *Vermont Doctrine*, 885.
(b) *Province of Court and Jury*, 885.
6. *Actual and Continued Change of Possession Required*, 885.
(a) *In New York*, 885.
(b) *In Minnesota and Nebraska*, 886.
(c) *In Wisconsin*, 886.
(d) *Nature and Requisites of Such Change*, 887.
(1) *California*, 887.
(2) *In General*, 887.
7. *Effect of Want of Change of Possession*, 889.
(a) *Difference Dependent on Statutes*, 889.
(b) *Colorado View*, 889.
(c) *Pennsylvania View*, 889.
8. *Delivery Required*, 890.
(a) *Impossibility Not Exacted*, 890.
(b) *Variation with Circumstances*, 890.
(c) *Distinction Between Ponderous and Light Articles*, 890.
(d) *Nature of Required Acts of Possession, Control, and Ownership*, 890.
9. *What Constitutes Delivery*, 890.
(a) *On What Matter Depends*, 890.
(b) *Manual Possession Not Necessary*, 890.
(c) *Goods in Third Person's Custody*, 891.
(d) *Collecting Animals, and Turning Them Out to Pasture on Accustomed Range*, 891.
(e) *Sheep Selected, Marked, and Left with Third Party to Hold for Vendor*, 891.
(f) *Presentation of Delivery Order and Pointing Out of Cattle, etc.*, 891.
(g) *Public, Continuous, and Substantial Possession*, 892.
(h) *Actual, Visible, and Continued Change of Possession*, 892.
(i) *Open, Notorious, and Unequivocal Possession — Colorado Doctrine*, 892.
(j) *Determination of Character of Possession*, 892.
10. *Manual Change of Possession Unnecessary*, 892.
(a) *Well-settled Rule*, 892.
(b) *Sufficient Assumption of Control*, 893.
(c) *Formal Delivery of Iron Marked and Shipped*, 893.
11. *Concurrent Possession*, 893.
(a) *In Pennsylvania*, 893.
(b) *Vermont Rule*, 894.
(c) *Possession Given Before Attachment*, 894.
12. *Acts Indicating Change of Possession, or Want of It*, 894.

(a) *Purchaser Assuming Charge of Stores, etc.*, 894.
(b) *Families of Parties Staying in Same House, etc.*, 895.
(c) *Stencilling Buyer's Name on Sides of Cars*, 895.
(d) *Actual Delivery, etc., Required*, 895.
(e) *Furnishing Bill of Parcels*, 895.
(f) *Selecting, Packing, and Charging Goods, etc.*, 896.
13. *Continuance of Change of Possession*, 896.
(a) *Vendor's Control Not Precluded*, 896.
(b) *Continuance for All Time, etc., Not Required*, 896.
14. *Employment of Vendor*, 896.
(a) *Insubordinate Capacity Not Necessarily Fraudulent*, 896.
(b) *Vendor May Act as Vendee's Agent or Servant*, 896.
(c) *Proviso that Change of Possession Sufficiently Shown*, 897.
(d) *Employment of Vendor's Brother*, 897.
15. *Delay in Change of Possession*, 897.
(a) *No Business Hours Covered by Delay*, 897.
(b) *Delivery Next Day Not Necessarily Fraudulent*, 897.

**I. In General.—1. Nature of Fraud.**—1. *No Sufficient Assent of Parties.*—Fraud renders all contracts voidable[1] from the beginning, both at law and in equity; since there is no real assent where the bargain is induced by deception,[2] or, at least, no such consent as would deprive the party misled of an option to annul and defeat the agreement.[3]

2. *Distinguished from Mistake.*—As a ground of avoidance, fraud differs from mistake in relying upon misconduct on the other side, rather than upon the party's own innocent error, as the ground for setting aside the transaction.[4]

3. *Definition.*—Fraud has been defined to be every kind of artifice employed by one person for the purpose of deceiving another;[5] but this covers merely actual or positive fraud.[6] And it is said that the modes of fraud are infinite; so that courts are indisposed to lay down any precise definition of the word,[7] or to adopt

1. Adams *v.* Nelson, 22 Up. Can. Q. B. 199; Somes *v.* Bremer, 2 Pick. (Mass.) 201.

2. See Bank of Georgia *v.* Higginbottam, 9 Pet, (U. S.) 48; Duncan *v.* McCullough, 4 Serg. & R. (Pa.) 483. So cited in Benj. Sales (4th Am. Ed.), p. 464, § 428; id. (Corb. Am. Ed.) p. 554, § 636. But *compare* Campb. Sales, 144. Consult also Ames *v.* Hightown, 70 Cal. 440, and various of the authorities there reviewed.

3. See Oakes *v.* Turquand, L. R. 2 App. Cas. 349; Somes *v.* Brewer, 2 Pick. (Mass.) 201; Poth. Obl. pt. 1, ch. 1, art. 3, § 1, n. 29; Brown Sales, 396; Grant Fraud. Vendees; 7 South. Law Rev. (N. S.) 549. Consult also note to Ames *v.* Hightown, 70 Cal. 440.

4. 2 Sch. Pers. Prop. (2d Ed.) § 602.

5. Story Contracts (5th Ed.), p. 570, § 620; Story Sales (4th Ed.). p. 147, § 158. And see Benj. Sales (4th Am. Ed.). p. 464; § 428. *Compare* Campb. Sales, 510; 4 Dig. Lib. tit. 3, § 2; Civ. Code France, art. 1116; 1 Bouv. Law Dict. (14th Ed.) 612; 1 Whart. Contr. § 232; Winf. Adj. Words, 274, collecting definitions of fraud.

6. Story Sales (4th Ed.), p. 147, § 158. And see Smith *v.* Smith, 21 Pa. St. 367; Rodman *v.* Thalheimer, 75 Pa. St. 232; Dambmann *v.* Schulting, 75 N. Y. 55; 1 Benj. Sales (Corb. Am. Ed.), p. 554, § 636, n. 2.

7. 2 Sch. Pers. Prop. (2d Ed.) § 602. And see Stewart *v.* Emerson, 52 N. H. 313; Benj. Sales (4th Am. Ed.), p. 464, § 428; 2 Pars. Contr. (5th Ed.) 769; Story Eq. Jur. § 186.

exact rules concerning its nature or proof,[1] through a fear that their powers in regard to it might be thereby restricted, and an opportunity be thus created for its ingenious evasion.[2]

(*d*) *Fact for Jury.*—Fraud is therefore a fact to be determined by the jury[3] from the circumstances of each particular case.[4]

(*e*) *Leading Instances.*—Misrepresentation, wrongful concealment, the abuse of confidence, and employment of force are among the leading causes which justify the interference of the courts for fraud.[5]

(*f*) *Legal Consequences.*—The legal consequences of fraud are that the act is subject to certain limitations, voidable at the option of the deceived person; or, in case of an unexecuted contract, unenforceable against such person; and that he is entitled, as against the person guilty of the fraud, to compensation for damage sustained as a result thereof.[6]

**2. Requisites of Fraud.**—(*a*) *Representations Necessary.*—In order to establish fraud and authorize a rescission of the contract for that cause, it has been laid down that the representations made must have been such as to deceive a person of ordinary prudence; and they must have been false, and known at the time to be un-

1. Story Sales (4th Ed.), p. 148, § 158.

2. See Lawley *v.* Hooper, 3 Atk. 279; 1 Domat Civ. Law, bk. 1, tit. 18, § 3, art. 1; Story Contr. (5th Ed.) p. 570, § 620.

3. See Hadley *v.* Clinton, etc., Co., 13 Ohio St. 502; s. c., 82 Am. Dec. 454.

4. Story Sales (4th Ed.), p. 148, § 158. See also Second Nat. Bank *v.* Dix, 101 N. Y. 684, reversing 50 N. Y. Super. Ct. 527, *mem.* But consult full discussion of this matter in Burr *v.* Clement, 9 Colo. 1.

5. 2 Sch. Pers. Prop. (2d Ed.) § 602.

The one party must do wrong intentionally, and the other act because of such wrong. *Id.*

Concerning misrepresentation and abuse of confidence, see Bigelow on Fraud (1st Ed.), pp. 4–9, 10.

As to reliance on confidential relations in the sale of an oyster-bed, see Hemingway *v.* Coleman, 49 Conn. 390; s. c., 44 Am. Rep. 243.

In regard to wrongful concealment, see Kohl *v.* Lindley, 39 Ill. 195; s. c., 89 Am. Dec. 294, 298, 299. And *compare* Decker *v.* Fredericks, 47 N. J. L. 469, 472.

As to deceit, consult 5 Am. & Eng. Encyc. of Law, 318–347.

6. Campb. Sales, 511, 524, 525.

**Contract Not Complete in Formal Elements.**—"Fraud only becomes important as such where a sale or contract is complete in its formal elements, and therefore valid unless repudiated; but the right is claimed to rescind it. It goes to the motives for making the contract, not to its execution: as when a vendee expressly or impliedly represents that he is solvent and intends to pay for goods, when in fact he is insolvent and has no reasonable expectation of paying for them; or, being identified by the senses, and dealt with as the person so identified, says that he is A, when in fact he is B. But when one of the formal constituents of illegal transactions is wanting, there is no question of rescission,—the transaction is void *ab initio*,—and fraud does not impart to it, against the will of the defrauded party, a validity that it would not have if the event was due to innocent mistakes." Rodliff *v.* Dallinger, 141 Mass. 1; s. c., 55 Am. Rep. 439.

**Change of Title by Fraud.**—It is said that "The rule is well settled that, where a sale of personal property is procured by fraud, the ownership of the property is not changed unless the seller afterwards ratified the sale,—Ames *v.* Hightown, 70 Cal. 440, reviewing Ash *v.* Putnam, 1 Hill (N. Y.), 303; Cary *v.* Hotailing, and Olmstead *v.* Hotailing, 1 Hill (N. Y.), 311, 317; Masson *v.* Bovet, 1 Den. (N. Y.) 73; Hodgeden *v.* Hubbard, 18 Vt. 504; Thurston *v.* Blanchard, 22 Pick. (Mass.) 18; Butler *v.* Collins, 12 Cal. 457;—but the preferable doctrine seems to be that a title is generally acquired, though voidable and defeasible at the option of the seller,—Benj. Sales (2d Am. Ed.), 342. Consult, on this matter, Newmark on Sales, § 197. See also note to Ames *v.* Hightown, 70 Cal. 440.

true by the person who made them; and the person to whom they were made must have believed them to be true, and relied upon them; and they must have been the inducement which caused him to part with his property.[1]

(*b*) *Mere Expression of Opinion.*—Representations made on the transfer of property, which cover merely matters of opinion, as distinguished from false representations of facts, do not constitute fraud.[2]

(*c*) *Evidence in Tort for Fraud in Sale.*—In an action of tort, charging the defendants with falsely and fraudulently representing flour to be sound and sweet, knowing it to be unsound and sour, thereby inducing the plaintiff to buy it, it is competent for the defendants to show that they did not know that the flour was unsound; and evidence is admissible that it was received by the defendants as a part of a large lot of flour the rest of which was sound.[3]

**3. Inducement to Contract.**—(*a*) *Deceit Must be Successful.*—In order to constitute fraud at common law,[4] it is necessary that the means employed should be successful in deceiving the party upon whom they are used.[5] And artifices which fail to deceive do not warrant an avoidance of the contract,[6] for however untrue and

1. Gregory *v.* Schoenell, 55 Ind. 101, 106.

"The law holds a contracting party liable as for a fraud on his express representations concerning facts material to the treaty, the truth of which he assumes to know, and the truth of which is not known to the other contracting party; where the representations were false, and the other party, relying upon them, has been misled, to his injury. Upon such representations so made, the contracting party to whom they are made has a right to rely; nor is there any duty of investigation cast upon him. In such a case, the law holds a party bound to know the truth of his representations. Bigelow Fraud (1st Ed.), 60, 63, 67, 68, 87; Kerr Fraud & M. 54 *et seq.*; 3 Wait Act. & Def. 436.." Stimson *v.* Helps, 9 Colo. 33.

As to requisites for action of deceit, *compare* Weir *v.* Mitchell, L. R. 3 Ex. D. 238, 242; Western Bank *v.* Addie, L. R. 1 H. L. S. 145; Arkwright *v.* Newbold, L. R. 17 Ch. D. 301; Smith *v.* Chadwich, L. R. 20 Ch. D. 27; Bigelow Fraud (1st Ed.), 3, 63.

2. See Rendell *v.* Scott, 70 Cal. 514, where, on a contract to purchase land, it was represented that the land was the best ranch in Ione Valley, and was very rich and productive, and would produce fifty bushels of wheat to the acre; that a portion was good alfalfa land, and that another portion was rich in mineral deposits, etc.

3. Bowker *v.* De Long, 141 Mass. 315, with note concerning fraudulent representations, 835.

Concerning requisites of recovery for representations of solvency of bank (knowledge, etc.), see Cole *v.* Cassidy, 138 Mass. 437; s. c., 52 Am. Rep. 284.

In regard to fraudulent purpose to deceive, see Cowley *v.* Smith, 46 N. J. L. 380; s. c., 50 Am. Rep. 432.

4 Benj. Sales (4th Am. Ed.), § 429; id. (Corb. Am. Ed.) 637; and see Gregory *v.* Schoenell, 55 Ind. 101.

5. 2 Chitty Contr. (11th Am. Ed.) 1036, 1039, and note (z); Atwood *v.* Small, 6 Clark & F. (Am. Ed.) 233, and note 2, with cases cited; Vigers *v.* Pike, 8 Clark & F. (Am. Ed.) 562, 650; Taylor *v.* Fleet, 1 Barb. (N. Y.) 471; Vandewalker *v.* Osmer, 65 Barb. (N. Y.) 556; Morris Canal Co. *v.* Everett, 9 Paige (N. Y.), 268; Bruce *v.* Burr, 67 N. Y. 237; Phipps *v.* Buckman, 30 Pa. St. 402; Clark *v.* Everhart, 63 Pa. St. 347; Gunby *v.* Sluter, 44 Md. 237; Foy *v.* Houghton, 83 N. Car. 467; Smith *v.* Newton, 59 Ga. 113; Hagee *v.* Grossman, 31 Ind. 223; Bowman *v.* Carithers, 40 Ind. 90; Stebbins *v.* Eddy, 4 Mas. (U. S.) 414; Doggett *v.* Emerson, 3 Story (U. S.), 732; Mason *v.* Crosby, 1 Wood & M. (U. S.) 342.

6. McDonald *v.* Grafton, 15 Me, 225; Phipps *v.* Buckman, 30 Pa. St. 401; Clark *v.* Everhart, 63 Pa. St. 347; Weist *v.* Grant, 71 Pa. St. 95; Gunby *v.* Sluter, 44 Md. 237, 247; Hagee *v.* Newton, 59 Ga.

dishonest may be the artifices or contrivances whereby one person strives to induce another to contract, they do not amount to a fraud if the other knows the facts and penetrates the devices;[1] since, if an agreement is made under such circumstances, the inducement for entering into it is not necessarily the uncredited false or fraudulent representations, but some other independent motive.[2] While, even if the party is unaware of the truth, yet if the artifice adopted by the other has not induced him to enter into the contract, he will not be entitled to relief.[3]

(*b*) *Need Not be Sole Inducement.*—But it is not necessary, according to the annotated editions just cited and the authorities therein noted,[4] that the fraudulent means used should have been the sole, or even the predominant[5] motive of the contract.[6]

**4. Reliance upon Representations.**—While it is requisite that the party claiming to be defrauded should have relied upon the statements made to to him,[7] yet the presumption, though rebuttable, would be that false representations made by one party were relied upon by the other;[8] for where a person has received the positive representation or assurance of another as to a material fact, he has a right, so far as that other is concerned, to rely upon it without further inquiry.[9]

113; Todd *v.* Tambro. 62 Ga. 664; Sledge *v.* Scott, 56 Ala. 202, 206; Parker *v.* Marquis, 64 Mo. 38, 42; Merwin *v.* Arbuckle, 81 Ill. 501; Hanna *v.* Rayburn, 84 Ill. 533; Frenzel *v.* Miller, 37 Ind. 117; Bowman *v.* Carithers, 44 Ind. 90; Cochrane *v.* Halsey, 25 Minn. 52, 63.

1. Embodied in the maxim: *Haud enim decipitur qui sit se decipi*; and see Morse *v.* Rathbun, 48 Mo. 91; Howell *v.* Briddlecomb, 62 Barb. (N. Y.) 131; Story Sales, § 167.

2. Benj. Sales (4th Am. Ed.), § 429. Yet, if worthless notes are taken in payment for goods, after discovery of the fraud intended in passing them, but merely to obtain evidence thereof, the seller is not estopped from setting up such fraud when sued for failure to deliver the goods. Royce *v.* Watrous, 73 N. Y. 597, reversing same case, 7 Daly (N. Y.), 87.

3. 1 Benj. Sales (Corb. Am. Ed.), § 637.

4. See also Strong *v.* Strong, 102 N. Y. 69, affirming 33 Hun (N. Y.), 664, *mem.*

5. See Safford *v.* Grout, 120 Mass. 20.

6. Clarke *v.* Dixon, 6 Com. B. (N. S.) 453; Traill *v.* Baring, L. J. Ch. 521; Rawlins *v.* Wickham, 3 De Gex & J. 304; Reynell *v.* Sprye, 1 De Gex, M. & G. 660; Smith *v.* Kay, 7 H. L. Cas. 750; Kerr Fraud (1st Am. Ed.), 74, 75; Shaw *v.* Stone, 8 Bosw. (N. Y.) 157; Hersey *v.* Benedict, 15 Hun (N. Y.), 282; People *v.* Haynes, 11 Wend. (N. Y.) 551; Morgan *v.* Skeddy, 62 N. Y. 319; McAleer *v.* Horsey, 35 Md. 429, 452; Ruff *v.* Jarrett, 94 Ill. 475, 480; Winter *v.* Bandell, 30 Ark. 363, 373.

7. See Gregory *v.* Schoenell, 55 Ind. 101; Story Cont. (5th Ed.) p. 596, § 636. In order to avoid the sale on the ground of the seller's false representations (see Newmark on Sales, § 356), the party purchasing must have been deceived by the representations; and in general it must appear that the buyer trusted to the inducement, which proved fraudulent, and bought on the strength of it. 2 Schouler Pers. Prop. (2d Ed.) § 605, referring to Bennett's Benj. on Sales, § 429; Smith *v.* Hughes, Law R. 6 Q. B. 597, and Morse *v.* Rathbun, 49 Mo. 91.

Concerning ignorance and reliance of the complaining party, consult, generally, art. DECEIT, 5 Am. & Eng. Encycl. of Law, 327, 329, 333.

8. Holbrook *v.* Burt, 22 Pick. (Mass.) 546; Fishback *v.* Miller, 15 Nev. 428; Redgrave *v.* Hurd, Law Rep. 20 Ch. D. 1. But see Taylor *v.* Guest, 58 N. Y. 262; Sims *v.* Eiland, 57 Miss. 607; Merriam *v.* Pine City Lumber Co., 23 Minn. 314; Jackson *v.* Collins, 39 Mich. 557.

9. Vigers *v.* Pike, 8 Clark & F. 562, 650; Kish *v.* Central, etc., R. Co., 3 De Gex, J. & S. 122; Law R. 2 Ch. 114; Law R. 2 H. L. 99, 120, 121; Reynell *v.* Sprye, 1 De Gex, M. & G. 710; Rawlins *v.* Wick-

(*a*) *Illustration from Seller's False Representation.*—Thus, where the seller has made a false representation, which from its nature might induce the buyer to enter into the contract on the faith of it, it will be inferred that the buyer was induced thereby to enter into the contract, and it does not rest with him to show that he in fact relied upon the representation;[1] while, in order to displace this inference, the seller must prove either that the buyer had knowledge of facts which showed the representation to be untrue, or that he expressly stated in terms or showed by his conduct that he did not rely upon the representations, but acted upon his own judgment.[2]

**5. Opinions Concerning Value or Cost.**—(*a*) *As Governed by Caveat Emptor.*—The mere affirmations or expressions of opinion[3] by a seller, in regard to the value of the property he is attempting to sell, or of a purchaser in regard to the value of the property he desires the seller to take in payment, though false and intended to deceive, can never be safely relied on by the other party; and if he confides in them, he is not entitled to relief.[4] For they are the common and well-understood representations in respect to property, as between buyer and seller, made for the purpose of increasing the price and effecting a sale or barter, which are subject to the application of the maxim, *caveat emptor*;[5] and this doctrine has been extended even to false representations as to the cost of the property.[6]

ham, 3 De Gex. & J. 319; Perfect *v.* Lane, 3 De Gex, F. & J. 369; Conybeare *v.* New Brunswick, etc., R. Co., 1 De Gex, F. & J. 578, and notes; 9 H. L. Cas. 711; Wilson *v.* Short, 6 Hare, 366, 375; Smith's Case, L. R. 2 Ch. 614; Dominion Bank *v.* Blair, 30 Up Can. Com. Pl. 591; Devebar *v.* Roof, 3 Pugsley (N. B.), 295; Bean *v.* Herrick, 12 Me. 262; Vanderwalker *v.* Osmer, 65 Barb. (N. Y.) 556; Mead *v.* Bunn, 32 N. Y. 275; Young *v.* Harris, 2 Ala. 108; Clopton *v.* Cozart, 13 Smed. & M. (Miss.) 363; Merchants Bank *v.* Sells, 3 Mo. App. 85; Rose *v.* Hurley, 39 Ind. 82; Thome *v.* Prentiss, 83 Ill. 99; Strong *v.* Livington, 8 Ill. App. 436; Boyce *v.* Gundy, 3 Pet. (U. S.) 210; Kerr Fraud (1st Am. Ed.), 79, 255; Kerr Inj. 39. See those authorities so cited in Benj. Sales (4th Am. Ed.), § 429.

**Basis of Doctrine.**—"In all cases where it is sought to hold one liable for false representations, the question naturally arises whether, under all the circumstances, the plaintiff had a right to rely upon them. In determining this question, the representations must be viewed in the light of all the facts of which the plaintiff had actual notice, and also of such as he might have availed himself [of] by the exercise of ordinary prudence. If, therefore, in thus considering the representations, it appears there were 'facts and circumstances present at the time' they were made, sufficient to put the plaintiff upon his guard or to cast a suspicion upon their truthfulness, and that he neglected to avail himself of the warning thus given, he would not afterwards be heard to complain, for the reason [that] his own conduct contributed to this injury." Dillman *v.* Nadlehoffer, 19 Ill. 567.

1. Redgrave *v.* Hurd, Law R. 20 Ch. D. 1.

2. Redgrave *v.* Hurd, Law R. 20 Ch. D. 1; as stated in Benj. Sales (5th Am. Ed.), § 453.

3. See, generally, Story Contr. (5th Ed.) p. 599, § 637.

4. Homer *v.* Perkins, 124 Mass. 431.

5. Homer *v.* Perkins, 124 Mass. 431.

6. Long *v.* Woodman, 58 Me. 49; Holbrook *v.* Conner, 60 Me. 578; Somers *v.* Richards, 46 Vt. 170, 175; Medbury *v.* Watson, 6 Metc. (Mass.) 246, 259, 260; Vesey *v.* Daton, 3 Allen (Mass.), 380; Mooney *v.* Miller, 102 Mass. 220; Cooper *v.* Lovering, 106 Mass. 79; Yeagin *v.* Irwin, 127 Mass. 217; Poland *v.* Brownell, 131 Mass. 138; Van Epps *v.* Harrison, 5 Hill (N. Y.), 63; Uhler *v.* Semple, 20 N. J. Eq. 288; Buschman *v.* Cold, 52 Md. 202, 207; State *v.* Phifer, 65 N. Car. 321, 326; Sledge *v.* Scott, 56 Ala 202; Wilcox

(*b*) *Recognized Principle.*—Indeed the principle has been recognized that "A misrepresentation as to the market value of an article of general commerce, made falsely and fraudulently by one party to induce a sale, and relied upon by the other, will not avoid a contract therefor when there are no circumstances making it the special duty of the one party to communicate the knowledge he possesses, and none giving him the peculiar means of ascertaining such market price." [1]

**6. Misrepresentation of the Law.**—(*a*) *Fraud Cannot be Predicated Upon.*—It has been held that fraud could not be predicated on false statements of the law; [2] for the party to whom they were made could not be deceived thereby, as he must be conclusively presumed to know the law.[3]

(*b*) *No Misunderstanding of Facts.*—And it has been declared to be well settled [4] that a misrepresentation or misunderstanding of the law will not vitiate a contract where there is no misunderstanding of the facts; [5] so that misstatements have been deemed

*v.* Henderson, 6 Ala. 535, 541; Merwin *v.* Arbuckle, 81 Ill. 501; Schramm *v.* O'Conner, 98 Ill. 539; Kennedy *v.* Richardson, 70 Ind. 524, 534; Cagney *v.* Cuson, 77 Ind. 494, 497; Dawson *v.* Graham, 48 Iowa, 378; People *v.* Jacobs, 35 Mich. 36; Stevens *v.* Rainwater, 4 Mo. App. 292; First Nat. Bank *v.* Yocum, 11 Neb. 328; Samson *v.* Lord, 13 How. (U. S.) 198; Gordon *v.* Butter, 105 U. S. 553. See these authorities so cited in 1 Benj. Sales (Corb. Am. Ed.), § 641, n. 10, p. 562.

1. Graffenstein *v.* Epstein, 23 Kan. 443.

**Goods Fraudulently Billed.**—But where the seller agreed to sell a stock of staple groceries, suitable for the buyers' trade, of first-class quality, at prices greatly below the current rates for such goods, and the buyers relied upon these representations and permitted the seller to select and ship the goods, evidence is relevant which tends to show that the stock of goods has been fraudulently billed and charged at current rates, and in some instances above current rates. Cavender *v.* Roberson, 33 Kan. 626, citing Lord *v.* French, 61 Me. 420. See Newmark on Sales, § 357, also referring, concerning false representation as to price paid, to Richardson *v.* Noble, 77 Me. 390.

**Statement of Doctrine.**—"Ordinarily, statements of an indefinite or general character made by either of the parties, pending a negotiation for the sale of property, relating to its cost or value, or offers made for it, and the like, will not, in the absence of special circumstances, afford any ground for avoiding the sale, although false and made with a fraudulent intent. Cooper *v.* Lovering, 106 Mass. 217; Mooney *v.* Miller, 102 Mass. 77; Hemmer *v.* Cooper, 8 Allen (Mass), 334; Holbrook *v.* Connor, 60 Me. 578; Jennings *v.* Broughton, 5 De Gex, M. & G. 134; Drysdale *v.* Mace, 5 De Gex, M. & G. 103; Ellis *v.* Andrews, 56 N. Y. 83; Noetling *v.* Wright, 72 Ill. 390; Walker *v.* Carrington, 74 Ill. 446; Allen *v.* Hart, 72 Ill. 104; Clement *v.* Boone, 5 Bradw. (Ill.) 109; Fauntleroy *v.* Wilcox, 80 Ill. 477; Eames *v.* Morgan, 37 Ill. 260; Miller *v.* Craig, 36 Ill. 109; Banta *v.* Palmer, 47 Ill. 99; Kenner *v.* Harding, 85 Ill. 264; Bond *v.* Ramsey, 89 Ill. 29; Tuck *v.* Downing, 76 Ill. 71. Yet it is just as well settled that, where the contracting parties, for any cause are not on equal terms, and such representations are gross exaggerations, resulting in an unconscionable bargain, equity will not hesitate to interpose in favor of the injured party. Jackson *v.* Armstrong, 50 Mich. 65; Haygarth *v.* Wearing, L. R. 12 Eq. 120." Dillman *v.* Nadlehoffer, 119 Ill. 567.

2. 1 Benj. Sales (Corb. Am. Ed.), § 637, p. 556; § 616, note 8.

"It is well settled that, ordinarily, one is not liable for false representations respecting a mere question of law. Fish *v.* Cleland, 33 Ill. 238." Dillman *v.* Nadlehoffer, 119 Ill. 567.

3. Burt *v.* Bowles, 69 Ind. 1.

4. 1 Benj. Sales (Corb. Am Ed.) *supra*, n. 2.

5. Upton *v.* Tribilcock, 91 U. S. 45, 50; and see Fish *v.* Clelland, 33 Ill. 243; Clem *v.* Newcastle, etc., R., 9 Ind. 488; Rose *v.* Hurley, 39 Ind. 77, 82; Clodfelter *v.* Hulett, 72 Ind. 137, 143; Dailey *v.* Jassup, 72 Mo. 144.

not fraudulent where they concerned the validity of a patent [1] or the forfeiture of an insurance policy; [2] but a misrepresentation of private acts or foreign laws may be fraudulent.[3]

**7. Liability in Tort to Strangers.**—(*a*) *Principles Concerning.*—A person may render himself liable upon a contract in an action founded on tort for fraud or deceit, or perhaps negligence,[4] brought by parties with whom he has not contracted; as, a stranger, or any of the public at large who may be injured by acting upon his false representation.[5] But the liability is limited to this extent: that it must appear that such representation was made with the direct intent that it should be acted upon by such third person in the manner which has occasioned the injury or loss; [6] and no action of contract can be maintained in such cases except by parties and proxies.[7]

(*b*) *Application of Principles.*—These principles apply, according to the writers cited in the notes, to the sale of dangerous articles; [8] to the procurement of a purchase, by false statements that a prior though unenforceable contract of sale had been false abandoned; [9] to the making of representations of pecuniary standing, to mercantile agencies; [10] and to the issuance of a deceptive prospectus of a company, addressed to the public, whereby an individual is induced to take shares.[11]

1. Rawson *v.* Harger, 48 Iowa, 269. See also Dillman *v.* Nadlehoffer, 119 Ill. 567.

2. Ins. Co. *v.* Reed, 33 Ohio St. 283, 293. But *compare* Tabor *v.* Mich. Mut. Life Ins. Co., 40 Mich. 324, 331.

3. See King *v.* Doolittle, 1 Head (Tenn.), 77.

4. George *v.* Skivington, L. R. 5 Ex. 1; but see Heaven *v.* Pender, L. R. 9 Q. B. 102, following Winterbottom *v.* Wright, 10 M. & W. 109.

5. See Benj. Sales, (4th. Am. Ed.) §§ 431, 432; 1 id. (Corbin's Ed.) §§ 642–647.

Concerning the evidence in an action of tort for false and fraudulent representations in sale, see Bowker *v.* De Long, 141 Mass. 315.

6. Langridge *v.* Levy, 2 Mees. & W. 159; 4 Mees. & W. 337; Barry *v.* Crosskey, 1 Johns & H. 117, 118, 122, 123; Peek *v.* Gurney, L. R. 6 H. L. 377, 412, 413, discussed in Campb. Sales, 510, 553, 560, 561; and see Hosegood *v.* Bull, 36 L. T. (N. S.) 617.

While a false statement to one will not ordinarily give a right of action to another, to whom it was communicated (Eaton *v.* Avery, 83 N. Y. 31, 34), yet, if the statement is made for the purpose of being communicated to another, and to influence his mind, such other, if he acts on the statement, may have a remedy. Com. *v.* Call, 21 Pick. (Mass.) 515; Com. *v.* Harley, 7 Met. (Mass.) 463; Naugatuck Cutlery Co. *v.* Babcock, 22 Hun (N. Y.), 481, 485.

7. Winterbottom *v.* Wright, 10 Mees. & W. 109; Longmeid *v.* Holiday, 6 Ex. 761; Howard *v.* Shepherd. 9 Com. B. 297; Playford *v.* Un. Kingdom Tel. Co., L. R. 4 Q. B. 706.

8. Langridge *v.* Levy, 2 Mees. & W. 519; s. c., 4 Mees. & W. 337. See, on doctrines of this case, Medbury *v.* Watson, 6 Met. (Mass.) 259; Randall *v.* Hazelton, 12 Allen (Mass.), 414, 415; Carter *v.* Towne, 103 Mass. 507.

9. Benton *v.* Pratt, 2 Wend. (N. Y.) 385 (and see Randall *v.* Hagelton, 94 Mass. 412, 417); Story Sales (4th Ed.), § 173; Rice *v.* Manley, 66 N. Y. 82.

10. Eaton *v.* Avery, 83 N. Y. 31.

11. Gerhard *v.* Bates, 2 El. & B. 476; Scott *v.* Dixon, 29 L. J. Ex., note; Peek *v.* Gurney, L. R. 6 H. L. 377, overruling Bagshaw *v.* Seymour, 18 Com. B. 903, and Bedford *v.* Bagshaw, 4 Hurl. & N. 538; Campb. Sales, 550–569; and see North Brunswick R. Co. *v.* Conybeare, 9 H. L. Cas. 712; Western Bank of Scotland *v.* Addie, L. R. 1 Sc. App. 145; Henderson *v.* Lacon, L. R. 5 Eq. 249; Benj. Sales (4th Am. Ed), § 432.

**Responsibility of Corporate Directors and Officers.**—In *England,* the responsibility of the directors does not extend to a transferee of the person to whom the shares

**8. Materiality of Representation.** — (*a*) *Doctrine Concerning.*—In order that a misrepresentation may sustain an action at law or be a ground for relief in equity, it is essential that it should be material in its nature, and should be a determining factor of the transaction;[1] and hence, if the representations relate to another matter than the one in dispute, or concern it in a trivial and unimportant manner only, they afford no sufficient ground to set aside the contract.[2]

(*b*) *Illustrations from Sale of Ship or Engine.*—Thus, the sale of ship is not binding if the vendor falsely represent her to be copper-fastened, or to be newly rigged, or to have been built within a year.[3] And, so, a false representation has been

are allotted,—Peek *v.* Gurney, L. R. 6 H. L. 377;—and it has been stated that some of the *American* cases recognize similar principles,—Com. *v.* Harley, 7 Met. (Mass.) 462; Cazeau *v.* Mali, 25 Barb. (N. Y.) 578; Bruff *v.* Mali, 36 N. Y. 200; Morgan *v.* Skiddy, 62 N. Y. 319; Eaton Co. *v.* Avery, 83 N. Y. 31; Bank of Montreal *v.* Thayer, 2 McCrary (U. S.), 1; Benj. Sales (4th Am. Ed.), § 432, note (y2);—but the prevailing doctrine in this country, as derived from some of the same cases, has been declared to be that officers issuing void shares, or making fraudulent representations in the issuance of shares, are liable not only to the first purchaser, but to any *bona fide* purchaser for value,—see Bruff *v.* Mali, 36 N. Y. 200, 206; Bartholomew *v.* Bentley, 15 Ohio 659; Bank of Montreal *v.* Thayer, 2 McCrary (U. S.), 1; s. c., 7 Fed. Rep. 622, 628; 1 Benj. Sales (Corb. Am. Ed.), § 646, note; but *compare* Wakeman *v.* Dally, 51 N. Y. 27; Arthur *v.* Griswold, 55 N. Y. 400; Thomp. Liab. Off. Corp. p. 401 *et seq.*

1. Jennings *v.* Broughton, 5 De Gex, M. & G. 126; Kerr on Fraud (1st Am. Ed.), 73, 74; Lapp *v.* Firstbrook, 24 Up. Can. Com. Pl. 239; Nolan *v.* Cain, 3 Allen (Mass.), 263; Teague *v.* Irwin, 127 Mass. 217; Blair *v.* Laflin, 127 Mass. 518; Com. *v.* Jackson, 132 Mass. 16; Brown *v.* Tuttle, 66 Barb. (N. Y.) 169; Mason *v.* Raplee, 66 Barb. (N. Y.) 180; Swikehard *v.* Russell, 66 Barb. (N. Y.) 560; Smith *v.* Countryman, 30 N. Y. 655; Rice *v.* Manley, 66 N. 82; Duffany *v.* Ferguson, 66 N. Y. 482; Miller *v.* Barber, 66 N. Y. 558; Bower *v.* Ferm, 90 Pa. St. 359; Wilcox *v.* Henderson, 64 Ala. 535; Miller *v.* Young, 33 Ill. 355; Higgins *v.* Bicknell, 82 Ill. 502; Hauna *v.* Rayburn, 84 Ill. 533; Race *v.* Weston, 86 Ill. 91; Melendy *v.* Keen, 89 Ill. 395; Smith *v.* Brittenham 98 Ill. 188; Bradley *v.* Luce, 99 Ill. 234; Schwabacker *v.* Riddle, 99 Ill. 343; Welshbillig *v.* Dienhart, 65 Ind. 94; Jones *v.* Hathaway, 77 Ind. 14; Elsass *v.* Moore's Hill Inst., 77 Ind. 72; Mather *v.* Robinson, 47 Iowa, 403; Dawson *v.* Graham, 48 Iowa, 378; Noel *v.* Horton, 50 Iowa, 687; Meyers *v.* Funk, 56 Iowa, 52; Stevens *v.* Rainwater, 4 Mo. App. 292; Winter *v.* Bandel, 30 Ark. 362; Cooper *v.* Merritt, 30 Ark. 586; Sanders *v.* Lyon, 2 McArthur (U. S.), 452; Smith *v.* Richards, 13 Pet. (U. S.) 26; Gordon *v.* Butler, 105 U. S. 553. See authorities so cited in Benj. Sales (4th Am. Ed.), § 429. note (e); also Story Contr. (5th Ed.), pp. 593, 595, § 633.

2. Hall *v.* Johnson, 41 Mich. 286, 290; Frenzel *v.* Miller, 37 Ind. 1, 17; First Nat. Bank *v.* Yocum, 11 Neb. 328; Noel *v.* Horton, 50 Iowa, 687. See these cases so cited in 1 Benj. Sales (Corb. Am. Ed.) § 639. note 5, p. 558.

**Property and Stock of Corporation.**—"A false and fraudulent representation as to the property of a corporation, of material facts which necessarily affect the value of shares of stock therein, constitutes a cause of action against a party inducing another, by means of such fraudulent misrepresentations, to purchase such shares, quite as sufficient as if the purchase had been of the property of the company with regard to which the representation was made; nor is it material in either case that the purchase-price of the property, or the money advanced on the faith of the representation, be paid to the party making it for his individual benefit. If known to be false, and made with intent to deceive and defraud the person who is thereby induced to pay out his money, the person guilty of the fraud is liable to respond in damages, on the same principle on which one person is held liable in damages for fraudulently giving a false recommendation by which another is induced to give credit to a third party. Schwenck *v.* Naylor, 102 N. Y. 683, reversing 50 N. Y. Super. Ct. 57.

3. Loundes *v.* Lane, 2 Cox, 363; 1

held to be such a fraud as to vitiate the contract where it was to the effect that a steam-engine was of twenty horse-power, was fit for mining purposes, was in good order as certified by engineers, was free from rust, and had been standing for two or three years;[1] while it has been said that any false representation of a fact which substantially affects the price or value of the thing sold may well be considered material.[2] But if the misrepresentation be in respect to an entirely immaterial fact, exerting no influence upon the mind of the purchaser, as, where the vendor of a ship represents it to be in complete repair, although there are several particulars in which it is out of repair, the sale would nevertheless be binding.[3]

(*c*) *Criterion Suggested.*—A criterion suggested is,[4] that if the representation be such as to make it probable that, had it not been used, the contract could not have been made or the transaction completed, then it is material thereto and not otherwise;[5] and whether, in a particular case, the misrepresentation was or was not material, seems to be a question for the jury.[6]

**9. Design to Deceive.**—(*a*) *Need of.*—It is now well settled that there can be no fraud without dishonest intention, such as was formerly termed[7] a legal fraud.[8] Hence, however false may be the representation which is the inducement to the contract, there is no right to avoid the agreement as procured by fraud if the party making the representation honestly and on reasonable grounds believed it to be true;[9] although other remedies may sometimes be invoked

Story Eq. Jur. § 196; Shepherd *v.* Kain, 5 Barn. & Ald. 240; Fletcher *v.* Bowsher, 2 Stark. 561.

1. Hazard *v.* Irwin, 18 Pick. (Mass.) 95.

2. Smith *v.* Countryman, 30 N. Y. 655.

3. Hazard *v.* Irwin, 18 Pick. (Mass.) 95; Morris Canal Co. *v.* Emmett, 9 Paige (N. Y.), 168; Taylor *v.* Fleet, 1 Barb. (N. Y.) 471; Phipps *v.* Buckman, 30 Pa. St. 470; Winch *v.* Winchester, 1 Ves. & B. 375; Stebbins *v.* Eddy, 4 Mas. (U. S.) 414. See Story Sales (4th Ed.), § 166; also Story Contr. (5th Ed.) p. 594, § 633.

4. See writers cited in notes.

5. See McAleer *v.* Horsey, 35 Md. 439, 452; Bushman *v.* Codd, 32 Md. 202, 207; 1 Benj. Sales (Corb. Am. Ed.), § 639, note 5, p. 558.

6. Lindenau *v.* Desborough, 8 Barn. & C. 586; Westbury *v.* Aberdeen, 2 Mees. & W. 267; Story Sales (4th Ed.), § 166; McAleer *v.* Horsey. 35 Md. 439, 452.

7. See criticism of expression in Weir *v.* Bell, L. R. Ex. D. 343.

8. 1 Benj. Sales (Corb. Am. Ed.), § 638; and see § 678.

Payment in a check which is dishonored because of other forgeries by the buyer upon the bank is not sufficient to constitute fraud. Comins *v.* Coe, 117 Mass. 45.

Concerning fraudulent purpose to deceive, see Cowley *v.* Smith, 46 N. J. L. 380; s. c., 50 Am. Rep. 432.

In regard to the scope of the intent in actions for false representations, consult article in 27 Cent. L. J. 471.

9. McDonald *v.* Trafton, 15 Me. 225; Weeks *v.* Burton, 7 Vt. 67; Hanson *v.* Edgerly, 29 N. H. 343; Page *v.* Parker, 40 N. H. 47, 69; Pettigrew *v.* Chellis, 4 N. H. 95; Salem India-rubber Co. *v.* Adams, 23 Pick. (Mass.) 256; Tryon *v.* Whitmarsh, 1 Metc. (Mass.) 1; Page *v.* Bent, 2 Metc. (Mass.) 371; Stone *v.* Denny, 4 Metc. (Mass.) 151, 155, and cases cited; Brown *v.* Castles, 11 Cush. (Mass.) 348-351; King *v.* Eagle Mills, 10 Allen (Mass.), 548; French *v.* Vining, 102 Mass. 132; Fisher *v.* Mellen, 103 Mass. 503; Cooper *v.* Lovering, 106 Mass. 78, 79; Beach *v.* Bemis, 107 Mass. 498; Young *v.* Covell, 8 Johns. (N. Y.) 25; Babcock *v.* Libbey, 53 How. Pr. (N. Y.) 255; Barrett *v.* Barrett, 66 Barb. (N. Y.) 205; Frisbie *v.* Fitzsimmons, 3 Hun (N. Y.), 674; Marshall *v.* Fowler, 7 Hun (N. Y.), 237; Westcott *v.* Ainsworth, 9 Hun

by the deceived party,[1] as, those based on mistake and failure of consideration,[2] or on breach of warranty.[3]

(*b*) *Statement of Principle Concerning.*—The true principle is stated to be that a representation, false in fact, gives no right of action if innocently made by a party who believes the truth of what he asserts;[4] and that, in order to constitute fraud, there must be a false representation knowingly made;[5] that is to say, a concurrence of fraudulent intent[6] and false representation.[7] Yet fraud arises, not only when a party states what he knows to be untrue,[8] but also if, for a fraudulent purpose, he states what he does not believe to be true, even though he may have no knowledge on the subject;[9] or makes false statements recklessly, not knowing or caring whether they are true or false.[10]

**10. Claiming Knowledge of Fact Asserted.**—(*a*) *Doctrine of Liability for.*—The design to deceive must be proved by other evidence

(N. Y.), 53; Morehouse *v.* Yeager, 9 Jones & S. 135; Stilt *v.* Little, 63 N. Y. 427; Boyd *v.* Browne, 6 Barr (Pa.), 310; Dilworth *v.* Bradner, 85 Pa. St. 238; Duff *v.* Williams, 85 Pa. St. 490; Kimball *v.* Moreland, 55 Ga. 164; Merwin *v.* Arbuckle, 81 Ill. 501 (explaining Mitchell *v.* McDougall, 62 Ill. 498); Tone *v.* Wilson, 62 Ill. 529; St. Louis, etc., R. Co. *v.* Rice, 85 Ill. 406; Wharf *v.* Roberts, 88 Ill. 426; Josselyn *v.* Edwards, 57 Ind. 212; Righter *v.* Roller, 31 Ark. 170; Seller *v.* Clelland, 2 Colo. 532; Russell *v.* Clark, 7 Cranch (U. S.), 69; Lord *v.* Goddard, 13 How. (U. S.) 198; French *v.* Skead, 24 Grant's Ch. (Ont.), 179; Chitty Contr. (11th Am. Ed.) 1044, 1045, and notes.

But where a person, with intent to influence the conduct of another, wilfully leads him into a false belief, and the latter acts accordingly, to his hurt, the act is said to have been induced by fraud. Campb. Sales, 510.

1. Benj. Sales (4th Am. Ed.), §§ 420-422, 429, 610; Story Contr. (5th Ed.) pp. 590, 592, § 632.

2. See Kennedy *v.* Panama Mail Co., Law R. 2 Q. B. 580, 587; 1 Benj. Sales (Corb. Am. Ed.), § 638, note 4; Smith *v.* Richards, 13 Pet. (U. S.) 26; Grim *v.* Byrd, 32 Gratt. (Va.) 293, 300; Crump *v.* U. S. Mining Co., 7 Gratt. (Va.) 352; Allen *v.* Hart, 72 Ill. 106; Thorne *v.* Prentiss, 83 Ill. 99; Rupp *v.* Jarrett, 94 Ill. 475, 479; Pendarvis *v.* Gray, 41 Tex. 326; Lopes *v.* Robinson, 54 Tex. 510.

3. See Stroud *v.* Pierce, 6 Allen (Mass.), 513, 416; Boothby *v.* Scales, 27 Wis. 626, 636.

4. Benj Sales (4th Am. Ed.), p. 499, § 454, Haycraft *v.* Creasy, 2 East, 92. But see Story Contr. (5th Ed.) p. 584, § 632.

5. Collins *v.* Evans, 5 Q. B. 120; Ormrod *v.* Huth, 14 Mees. & W. 651.

6. However innocent the motive. Foster *v.* Charles, 6 Bing. 396; s. c., 7 Bing. 105; Polhill *v.* Walter, 3 Barn. & Adol. 122; Peek *v.* Gurney, L. R. 6 H. L. 409; and see Leddell *v.* McDougall, 29 Week. R. 403.

7. See King *v.* Eagle Mills, 10 Allen (Mass.), 551; McFarland *v.* Newman, 9 Watts (Pa.), 55; Weimer *v.* Clement, 37 Pa. St. 147; Da Lee *v.* Blackburn, 11 Kan. 190.

8. Pasley *v.* Freeman, 3 T. R. 151; 2 Smith's, L. C. (8th Ed.) 66; Dickson *v.* Reuter's Tel. Co., L. R. 3 C. P. D. 1.

9. See Sledge *v.* Scott, 56 Ala. 202.

10. Weir *v.* Bell, L. R. 3 Ex. D. 238, 242; and see Evans *v.* Edmonds, 13 Com. B. 777, 786; Western Bank *v.* Addie, L. R. 1 H. L. S. 145; Rawlins *v.* Wickham, 3 De Gex & J. 304, 316; Reis Silver Mfg. Co. *v.* Smith, L. R. 4 H. L. 64; Hart *v.* Swaine, L. R. 7 Ch. D. 42; Redgrave *v.* Hurd, L. R. 20 Ch. D. 1; Smith *v.* Chadwick, L. R. 20 Ch. D. 27; Matthias *v.* Yetts, 46 L. T. (N. S.) 497; Leddell *v.* McDougall, 29 Week. R. 403.

The foregoing authorities are cited to the effect stated, in Benj. Sales (4th Am. Ed.), p. 510, § 461, note ($n^2$.)

Concerning statements made without knowledge of their truth or falsity, consult Stimson *v.* Helps, 9 Colo. 33.

**Obtaining Property Without Consideration.**—The fact that one person has obtained the property of another under a form of purchase, without having paid any consideration therefor, and with a design of acquiring it for nothing, is fraudulent in itself. Misrepresentation and deception will be implied, as they are necessary concomitants of the act. Archer *v.* Lapp, 12 Oreg. 196,

than the mere fact that the representations were not true.[1] But the defendant[2] is liable if he stated, as of his own knowledge, in order to effect the purchase thus induced, material facts which he could have known and which were false,[3] although it be shown that he was himself misinformed as to the facts;[4] for such evidence of error would not disprove the fraud, which consists in a party's representing matters to be true as of his own knowledge.[5]

(*b*) *Pretending Knowledge or Making Reckless Statements.*—And not only is the rule laid down that a statement made with false pretence of knowledge is fraudulent if false,[6] so as to warrant an action for deceit;[7] but statements which are not true, and which the party makes recklessly, not knowing whether they are true or false, will, if relied upon, warrant the avoidance of the contract.[8]

11. **Damages to Party Deceived.**—(*a*) *Need of.*—Even where there is a false representation, which is known by the maker to be such, the fraud must produce damage to the party deceived,[9] in order to

1. McDonald *v.* Trafton, 15 Me. 225; McKown *v.* Furgason, 47 Iowa, 626. But see McBean *v.* Fox, 1 Bradw. (Ill.) 177.

2. See Fisher *v.* Mellen, 103 Mass. 506.

3. Concerning wrongdoer's knowledge of the false representations, consult, generally, art. DECEIT, 5 Am. & Eng. Encycl. of Law, 319–326.

4. Namnatt *v.* Emerson, 27 Me. 308; Hazard *v.* Irwin, 18 Pick. (Mass.) 95; Page *v.* Bent, 2 Metc. (Mass.) 371; Stone *v.* Denny, 4 Metc. (Mass.) 451; Fisher *v.* Mellen, 103 Mass. 506; Savage *v.* Stevens, 126 Mass. 207; Burgess *v.* Wilkinson, 13 R. I. 646; Gunby *v.* Sluter, 44 Md. 237; Grim *v.* Byrd, 32 Gratt. (Va.) 293; Foard *v.* McComb, 12 Bush (Ky.) 723; Mitchell *v.* Zimmerman, 4 Tex. 75; Parmlee *v.* Adolph, 28 Ohio St. 10; Ætna Ins. Co. *v.* Reed, 33 Ohio St. 283; Graham *v.* Nowlin, 54 Ind. 389; Rawson *v.* Harger, 48 Iowa, 269; Clark *v.* Rolls, 58 Iowa, 201; Hough *v.* Richardson, 3 Story (U. S.), 691; Doggett *v.* Emerson, 3 Story (U. S.), 733; Doyle *v.* Hart, 4 L. R. Ir. 661.

The foregoing authorities are so cited in Benj. Sales (4th Am. Ed.), § 429. See, further, Hammond *v.* Pennock, 61 N. Y. 145, 151; Bower *v.* Fenn, 90 Pa. St. 359; Blackman *v.* Johnson, 35 Ala. 252; Sledge *v.* Scott, 56 Ala. 202; Einstein *v.* Marshall, 58 Ala. 153; and Allen *v.* Hart, 72 Ill. 104; all cited in 1 Benj. Sales (Corb. Am. Ed.), § 691, note 35, p. 604.

5. Fisher *v.* Mellen, 103 Mass. 506; and see Litchfield *v.* Hutchinson, 117 Mass. 195.

6. Cabot *v.* Christie, 42 Vt. 121; Fisher *v.* Mellen, 103 Mass. 503; Beach *v.* Beamis, 107 Mass. 498; Marsh *v.* Faulkner, 40 N. Y. 569; Meyer *v.* Amidon, 45 N. Y. 169, 175; Bower *v.* Fenn, 90 Pa. St. 359; Smith *v.* Newton, 59 Ga. 113; Estell *v.* Myers, 54 Miss. 174; Sims *v.* Eiland, 57 Miss. 607; Ford *v.* McComb, 12 Bush (Ky.), 723; Dunn *v.* Oldham, 63 Mo. 181; Dulaney *v.* Rogers, 64 Mo. 201; Beebe *v.* Knapp, 28 Mich. 53; Frenzel *v.* Miller, 37 Ind. 1, 17; McKown *v.* Furgason, 47 Iowa, 636; Cotzhauser *v.* Simon, 47 Wis. 163.

7. Meyer *v.* Amidon, 23 Hun (N. Y.), 553. The foregoing authorities are so cited in 1 Benj. Sales (Corb. Am. Ed.), § 691, note 35, p. 604.

8. 1 Benj. Sales (Corb. Am. Ed.), §§ 691–694, citing Burrowes *v.* Lock, 10 Ves. 470; Slim *v.* Croucher, 1 De Gex, F. & J. 518; Reese River Co. *v.* Smith, L. R. 4 H. L. 64; and referring to Hine *v.* Campion, 7 Ch. D. 344; West. Bank of Scotland *v.* Addie, L. R. 1 H. L. 145; Weir *v.* Bell, L. R. 3 Ex. D. 238, 242.

**Basis of Doctrine.**—"It is not necessary, in order to constitute a fraud, that the party who makes a false representation should know it to be false. He who makes a representation as of his own knowledge, not knowing whether it be true or false, and it is in fact untrue, is guilty of fraud as much as if he knew it to be untrue. In such a case, he acts *to his own knowledge* falsely; and the law imputes a fraudulent intent. Kerr Fraud & M. 54 *et seq.*, and cases cited; Bigelow Fraud (1st Ed.), 63, 84, 453; 2 Estee Pr. 394 *et seq.*" Stimson *v.* Helps, 9 Colo. 33.

9. Consult, generally, article DECEIT, subd. Acting upon Representations, 5 Am. & Eng. Encycl. of Law, 331.

warrant a suit therefor;[1] since, according to the familiar maxim, "Fraud without damage, or damage without fraud, gives no cause of action."[2]

(*b*) *Gravamen of Charge, etc.*—And the *gravamen* of the charge is,[3] not that the defendant has gained an advantage, but that the plaintiff has been deceived to his hurt;[4] so that inducing the payment of plaintiff's own debt, by means of a false representation, whereby he obtains no more than is rightfully due him, is no fraud, because of the want of damage.[5]

**12. Concealment, or Equivalent Devices.**—(*a*) *Positive Misrepresentation Unnecessary.*—The mistaken belief as to facts may be produced by active means, as by fraudulent concealment, or by false representations, known to be such by the person making them;[6] or passively, by mere silence when it is the duty of the party to speak.[7] And it is, in effect, the same thing whether the representation is made by express statements, or by acts which are intended to convey the belief, and have that result.[8]

(*b*) *Illustrative Instances.*—Hence, whenever a person conceals a material fact, which it was his duty to communicate,[9] or uses any

1. See Attwood *v.* Small, 6 Clark & F. 232, 443–447; Redgrave *v.* Hurd, L. R. 20 Ch. D. 1, 14–17; Smith *v.* Kay, 7 H. L. Cas. 774; Fuller *v.* Hodgden, 25 Me. 248; Weaver *v.* Wallace, 9 N. J. L. 251, 314; Weist *v.* Grant, 71 Pa. St. 95; Sledge *v.* Scott, 56 Ala. 202, 206; Wiley *v.* Howard, 15 Ind. 169; Neidefer *v.* Chastain, 71 Ind. 363, 365; First Nat. Bank *v.* Yocum, 11 Neb. 328; Morrison *v.* Lods, 39 Cal. 381, 385.

See, for sources of these authorities, and of succeeding statements and citations, Benj. Sales (4th Am. Ed.) § 429; 1 Benj. Sales (Corb. Am. Ed.). § 639; Story Contr. (5th Ed.) p. 595. § 634.

2. 3 Bulst. 95; Pasley *v.* Freeman, 3 T. R. 51; 2 Sm. L. Cas. 71; Story Sales (4th Ed.) § 167; 2 Kent Com. 490; 1 Story Eq. Jur. §§ 202, 203; Pothier Contrat de Vente, 210 n; Foster *v.* Charles, 6 Bing. 396; 7 Bing. 105; Vernon *v.* Keys, 12 East, 637; Fellowes *v.* Lord Gwyder, 1 Russ. & M. 83; Phipps *v.* Buckman, 30 Pa. St. 402; Hagee *v.* Grossman, 31 Ind. 223; Castlemann *v.* Griffin, 13 Wis. 535; Hughes *v.* Sloan, 2 Ark. 146

3. Fisher *v.* Mellen, 103 Mass. 505.

4. Adams *v.* Paige, 7 Pick. (Mass.) 542; Page *v.* Bent, 2 Metc. (Mass.) 371, 374; Medbury *v.* Watson, 6 Metc. (Mass.) 246; Stiles *v.* White, 11 Metc. (Mass.) 356; Randall *v.* Hazelton, 12 Allen (Mass.), 414; Milliken *v.* Thorndike, 103 Mass. 385; Fisher *v.* Mellen, 103 Mass 505; Hanson *v.* Edgerton, 29 N. H. 357; Newell *v.* Horn, 45 N. H. 422; Hart *v.* Tallmadge, 2 Day (Conn.), 382; White *v.* Wheaton, 3 Seld. (N. Y.) 352; Phipps *v.* Buckman, 30 Pa. St. 402; Young *v.* Hall, 4 Ga. 95; Weatherford *v.* Fishback, 3 Scam. (Ill.) 170; Bartlett *v.* Blaine, 83 Ill. 25; Hagee *v.* Grossman, 31 Ind. 223; Castleman *v.* Griffin, 13 Wis. 535; Hughes *v.* Sloan, (8 Ark.) 146; McMaster *v.* Geddes, 19 Up. Can. Q. B. 216.

5. Brown *v.* Blunt, 72 Me. 415, 421; Marsh *v.* Cook, 32 N. J. Eq. 262. See Clark *v.* Tennant, 5 Neb. 549; Mo. Valley Land Co. *v.* Bushnell, 11 Neb. 192, 196; First Nat. Bank *v.* Yocum, 11 Neb. 328; Bartlett *v.* Blaine, 83 Ill. 25.

6. Benj. Sales (4th Am. Ed.), § 430.

7. 1 Benj. Sales (Corb. Am. Ed.). § 640.

8. See Campb. Sales, 510. It does not matter in what mode or by what means the deception is practised,—whether by signs, by words, by silence, or by acts (Story Sales [4th Ed.] § 165),—provided that it actually produces a false and injurious impression. Moens *v.* Heyworth, 10 Mees. & W. 147, 157; Hammeth *v.* Emerson, 27 Me. 308; Collins *v.* Dennison, 12 Metc. (Mass.) 549; Taylor *v.* Fleet, 1 Barb. (N.Y.) 471; Hunt *v.* Moore, 2 Barr (Pa.), 105; Lewis *v.* M'Lemore, 10 Yerg. (Tenn.) 206; Doggett *v.* Emerson, 3 Story (U. S.) 700.

9. Atwood *v.* Chapman, 68 Me. 38; Paddock *v.* Strobridge, 29 Vt. 6; Maynard *v.* Maynard, 49 Vt. 297; Hanson *v.* Edgerly, 29 N. H. 343; Matthews *v.* Bliss, 22 Pick. (Mass.) 48; Otis *v.* Raymond, 3 Conn. 413; Nickley *v.* Thomas, 22 Barb. (N.Y.), 652; March *v.* First Nat. Bank, 4

device which is calculated to induce the other party to forego inquiry into a material fact whereon the party arresting investigation has information, though it be not exclusively within his reach,[1] the transaction wherein such concealment or other deception is shown to have been practised, will be voidable on the ground of fraud.[2]

**13. Matters Open to Observation.**—(*a*) *Doctrine Concerning.*—If the false representations relate to material facts not within the observation of the opposite party, and they are made with intent to deceive, they are actionable ;[3] but if the truth can be ascertained with ordinary diligence, they are not actionable.[4]

(*b*) *Representation of Value of Article Sold.*—Thus, a representation of the value of an article sold, however exaggerated, false, and deceptive it may be, is not actionable if the subject of sale be open to the buyer's observation,[5] as he is bound to examine or inquire for himself and trust his own judgment, or take a warranty from the seller.[6]

(*c*) *Effect of Concealment.*—But though ordinarily each party to a sale may act upon the knowledge which he has, without communicating it to the other, yet concealment differs from silence ;[7] and if there be studied efforts to prevent the other from coming

Hun (N. Y.), 466; Brown *v.* Montgomery, 20 N. Y. 287; Sides *v.* Hilleary, 6 Har. & J. (Md.) 86; Van Arsdale *v.* Howard, 5 Ala. 596 ; Emmons *v.* Moore, 85 Ill. 304; Irvine *v.* Kirkpatrick, 7 Bell (Scotch Ap.), 186. See Story Contr. (5th Ed.), p. 610, § 645; p. 615, § 647.

1. See Green *v.* Gorden, 3 M. & G. 446, 450.

**Weather Preventing Examination** — When, however, pending the negotiation of an exchange of property for a farm, the party visits the farm to examine it, but is prevented from so doing by the weather, and the owner practises no fraud on him, his contract of sale and exchange will not be rescinded. Fuller *v.* Bince (Ga.), 6 S. E. Rep. 17, as stated, 26 Cent. L. J. 639.

2. Prentiss *v.* Russ, 16 Me. 30; Stevens *v.* Fuller, 8 N. H. 463; Coddington *v.* Goddard, 16 Gray (Mass.), 436; French *v.* Vining, 102 Mass. 135; Howell *v.* Biddlecomb, 62 Barb. (N. Y.) 131; Cassel *v.* Heron, 5 Pa. L. J. 250; Croyle *v.* Moses, 90 Pa. St. 250; Roper *v.* Trs. of Sangamon Lodge, 91 Ill. 518; Roseman *v.* Canovan, 43 Cal. 110; Smith *v.* Richards, 13 Pet. (U. S.) 26; Baker *v.* Humphrey, 101 U. S. 494; Green *v.* Gorden, 3 M. & G. 446 450; Machar *v.* Vandewater, 26 Grant (Ont.), 178; Lovelace *v.* Harrington, 27 Grant (Ont.), 178. See 2 Chitty Contr. (11th Am. Ed.) 1042, 1043; and, for source of statements and authorities, Benj. Sales (4th Am. Ed.), § 430, note (k).

Concerning fraudulent concealment by seller, see Newmark on Sales, § 357.

3. Mooney *v.* Miller, 102 Mass. 220.

4. Mooney *v.* Miller, 102 Mass. 220; as stated in Benj. Sales (4th Am. Ed.), § 430, note (l), which refers also to Atwood *v.* Small, 6 Clark & F. 233; James *v.* Lichfield, L. R. 9 Eq. 51; 1 Sugden Vend. & P. (8th Am. Ed.) 331, and cases in note (4[1]); Crooks *v.* Davis, 6 Grant (Ont.), 317; McRae *v.* Froom, 17 Grant (Ont.), 357; Coates *v.* Bacon, 21 Grant (Ont.), 21; Chamberlain *v.* Rankin, 49 Vt. 133; Randall *v.* Farnum, 52 Vt. 539; Newell *v.* Horn, 49 N. H. 422; Brown *v.* Castides, 11 Cush. (Mass.) 348; Prescott *v.* Wright, 4 Gray (Mass.), 461; Cooper *v.* Lovering, 106 Mass. 77, 79; Dickinson *v.* Lee, 106 Mass. 557; Poland *v.* Brownell, 131 Mass. 138; Furman *v.* Tufts, 8 Jones & S. (N. Y.) 284; Sparmann *v.* Keim, 12 Jones & S. (N. Y.) 163; Long *v.* Warren, 68 N. Y. 426; Crown *v.* Cuninger, 66 Ala. 590; Hess *v.* Young, 59 Ind. 379; Hustin *v.* McCloskey, 76 Ind. 38; Bank of Woodland *v.* Hiatt, 58 Cal. 234.

5. Veasey *v.* Daton, 3 Allen (Mass.), 380.

6. Veasey *v.* Daton, 3 Allen (Mass.), 380, as stated in 1 Benj. Sales (Corb. Am. Ed.) § 641, note 8, p. 560, which refers also to Teague *v.* Irwin, 127 Mass. 217; McClanahan *v.* McKinly, 52 Iowa, 222.

7. See Matthews *v.* Bliss, 22 Pick. (Mass.) 48, 52.

to the knowledge of the truth, or if there be any false and fraudulent suggestion or representation, however slight, then the transaction is tainted with turpitude.[1]

**14. Duty of Disclosure Where Fiduciary Relation.**—(*a*) *Effect of Failure to Disclose.*—In cases where there is a duty on one of the parties to disclose all material facts, the mere omission to disclose, without any active concealment, has, in contemplation of law, the effect of fraud—at least, so far as to make the transaction voidable.[2]

(*b*) *Examples.*—This occurs where one of the parties is agent or guardian of the other, or stands in some other fiduciary relation to the latter,[3] as in the case of promoters of companies.[4]

So, where a person, in a fiduciary capacity, undertakes the sale of property, he must not become the buyer on his own account, however fair the bargain might otherwise be;[5] while any surreptitious dealing between a principal on one side and an agent of the other principal will give the latter sufficient ground to rescind the contract.[6]

**15. Effect of Silence.**—(*a*) *General Doctrine.*—In general, it is only where a party is under some express or implied obligation to reveal facts to another, that mere silence will be considered a mode of deception.[7]

(*b*) *When Amounts to False Representation.*—But there are cases where the failure to disclose a material fact may be equivalent to active misrepresentation;[8] for the withholding of that which is

1. Matthews *v.* Bliss, 22 Pick. (Mass.) 48, 52; Roseman *v.* Conovan, 43 Cal. 110, 118; Smith *v.* Countryman, 30 N. Y. 655, 681. See these and following authorities so cited in 1 Benj. Sales (Corb. Am. Ed.) § 641, note 9, p. 561. But *compare* Graffenstein *v.* Epstein, 23 Kan. 443.

One who is as prudent on the particular occasion as most prudent men would be, and is nevertheless cheated, can hardly be called negligent. Jackson *v.* Collins, 39 Mich. 557, 661. And see Savage *v.* Stevens, 126 Mass. 207; Smith *v.* Countryman, 30 N. Y. 655, 670, 681.

2. Campb. Sales, 514. And see Story Sales (4th Ed.), p. 170, § 181; Story Contr. (5th Ed.) pp. 617, 618, § 648.

3. See Tate *v.* Williamson, L. R. 2 Ch. 55; Macpherson *v.* Watt, L. R. 3 App. Cas. 254. *Compare* O'Rorke *v.* Bolingbroke, 26 Week. R. 239.

4. See New Sombrero Phosphate Co. *v.* Erlanger, L. R. 5 Ch. D. 73; Erlanger *v.* New Sombrero Phosphate Co., L. R. 3 App. Cas. 1218; Emma Silver Mfg. Co. *v.* Lewis, L. R. 4 C. P. D. 396. These statements thus supported are based on Campb. Sales, 515–516, 521.

5. *Ex parte* Dyster, 2 Rose, 349; Rothschild *v.* Brookman, 5 Bligh. (N. S.) 165; Waddell *v.* Blockey, L. R. 4 Q. B. D. 678. The paragraph is based on Campb. Sales, 425, 516. See also Mallett *v.* Robinson, L. R. 7 Com. Pl. 84.

6. Panama, etc., Co. *v.* India Rubber, etc., Co., L. R. 10 Ch. 515; Smith *v.* Lorby, L. R. 3 Q. B. D. 522.

7. Smith *v.* Hughes, L. R. 6 Q. B. 597. And see Laidlaw *v.* Organ, 2 Wheat. (U. S.) 178, where goods were bought at cheaper price because of information not having come to vendor of the declaration of peace between Great Britain and the United States; also People's Bank *v.* Bogert, 81 N. Y. 101, 108; Kintzing *v.* McElrath, 5 Pa. St. 467; Butler's Appeal, 26 Pa. St. 63, 66; Perry *v.* Johnston, 59 Ala. 648; Blydenburgh *v.* Welch, Baldw. (U. S.) 331, 337.

8. Devoe *v.* Brandt, 53 N. Y. 462. And see Brown *v.* Montgomery, 20 N. Y. 287; Hanson *v.* Edgerly, 29 N. H. 343; Armstrong *v.* Huffstuttler, 19 Ala. 51; Stevens *v.* Orman, 10 Fla. 9; Turner *v.* Huggins, 14 Ark. 21; Marsh *v.* Webber, 13 Minn. 109; Pease *v.* McClelland, 2 Bond (U. S.), 42. As where, on the purchase of goods on credit, no mention was made of the existence of an undefended suit against the buyer for more than he

suppressed may make that which is stated absolutely false;[1] or, again, from the nature of the transaction, the fact not disclosed may be such that it is impliedly represented not to exist.[2]

**16. Remedies for Fraud.**—(*a*) *Right to Rescind.*—It is a rule that a contract is voidable at the option of the person who has entered into it through the fraud of the other party, if on the discovery of the fraud he repudiates the transaction by giving up all benefit from it, and restoring the other party, so far as possible, to the same condition as before.[3]

(*b*) *Rescission Must be Total, Prompt, etc.*—But a party having an election to rescind an entire contract must rescind it wholly or in no part;[4] and he cannot avoid it to retain his property, and at the same time enforce it to recover damages;[5] nor can the contract be rescinded as to one party and kept in force as to the other;[6] nor is it competent for one party to a contract to enforce a performance upon a refusal by the other party to perform his part of it, and then use the refusal as a ground for rescinding the contract;[7] nor nor can a party rescind a contract and at the same time retain, in whole or in part, the consideration which he has received under it.[8] And a right to rescind must be exercised at the earliest practicable moment after the discovery of the ground therefor.[9]

was worth. Devoe *v.* Brandt, 53 N. Y. 462.

1. Peek *v.* Gurney, L. R. 6 H. L. 403; Arkwright *v.* Newbold, L. R. 17 Ch. D. 817; Smith *v.* Chadwick, L. R. 20 Ch. D. 58.

2. Lee *v.* Jones, 17 Com. B. (N. S.) 506; Phillips *v.* Foxall, L. R. 7 Q. B. 679. See, for basis of paragraph, and of preceding one, Benj. Sales (4th Am. Ed.), § 430; 1 Benj. Sales (Corb. Am. Ed.), § 640. Concerning the seller's silence, see Newmark on Sales, § 355.

3. Bulchy. Plum, etc. *v.* Baynes, L. R. 2 Ex. 324, 326; Camp. Sales, 522, 524, referring to Lindsay Pet. Co. *v.* Hurd, L. R. P. C. 221; Panama, etc., Co. *v.* India-rubber Co., L. R. 10 Ch. 515. See also 1 Story Contr. (5th Ed.) pp. 572, 576, §§ 622, 623.

4. Miner *v.* Bradley, 22 Pick. (Mass.) 457; Preston *v.* Travelers Ins. Co., 58 N. H. 76; Voorhees *v.* Earl, 2 Hill (N.Y.), 292, 293. But consult full discussion as to equitable remedy on divisible contract, in Higham *v.* Harris, 108 Ind. 246.

5. Junkins *v.* Simpson, 14 Me. 364; Weeks *v.* Robie, 42 N. H. 316.

6. Coolidge *v.* Brigham, 1 Metc. (Mass.) 550; Fullager *v.* Reville, 3 Hun (N. Y.), 600.

7. Allen *v.* Webb, 4 Fost. (N. H.) 278; Luey *v* Bundy, 9 N. H. 298.

8. Norton *v.* Young, 3 Greenl. (Me.) 30; Cushman *v.* Marshall, 21 Me. 122; Sumner *v.* Parker, 36 N. H. 449; Weeks *v.* Robie, 42 N. H. 316; Willoughby *v.* Moulton, 47 N. H. 205; Miner *v.* Bradley, 22 Pick. (Mass.) 457; Perley *v.* Balch, 23 Pick. (Mass.) 286; Coolidge *v.* Brigham, 1 Metc. (Mass.) 550; Jennings *v.* Gage, 13 Ill. 610. But see Mullen *v* Old Colony R. Co., 127 Mass. 86.

**Rescission Against Insolvent Purchaser.**—Where a person, who afterwards becomes insolvent, buys goods from the plaintiff, pays for some of them and gives his notes for others, the plaintiff cannot rescind the contract and maintain replevin for the goods which are still in the hands of the purchaser, while retaining the money received for the goods; and such is the case although the purchaser knew he was insolvent when he bought the goods. Thompson *v.* Peck, 115 Ind. 512.

9. Central R. Co. *v.* Kish, L. R. 2 H. L. 99; Smith's Case, L. R. 2 Ch. 604; Heyman *v.* European, etc., R. Co, L. R. 7 Eq. 154; Matteson *v.* Holt, 45 Vt. 336; Boughton *v.* Standish, 48 Vt. 594; Whitcomb *v.* Denio, 52 Vt. 382; Weeks *v.* Robie, 42 N. H. 316; Willoughby *v.* Moulton, 47 N. H. 205; Ross *v.* Titterton, 6 Hun (N. Y.), 280; Hammond *v.* Pennock, 61 N.Y. 145; Davis *v.* Betz, 66 Ala. 206; Parmlee *v.* Adolph, 28 Ohio St. 10; Hall *v.* Fullerton, 69 Ill. 448; Gatling *v.* Newell, 9 Ind. 572, 578 *et seq.*; Rose *v.* Hurley, 39 Ind. 77; St. John *v.* Hen-

(*c*) *Remedy in Damages.*—But even where it is no longer open to the party defrauded, from the change of circumstances which has taken place in the mean time, to avoid the contract upon the discovery of the fraud, he has a remedy in damages by action of deceit against the party by whose misrepresentations he has been misled to his injury.[1]

**17—Restoring Consideration.**—(*a*) *Need of.*—The rights of a party who has been defrauded in making a contract are, on the discovery of the fraud within a reasonable time, to rescind the contract and restore the parties to their former condition, or to affirm the contract and claim compensation or damages for the injury he has sustained by reason of the fraud.[2]

(*b*) *Requisite if Property of any Value.*—A person who would rescind a contract must put the opposite party in as good a situation as he was before.[3] And the rule that timely restoration is requisite[4] applies to all cases where the consideration of the contract is of the

drickson, 81 Ind. 350; Collins *v.* Townsend, 58 Cal. 608; Pence *v.* Langdon, 99 U. S. 578. See foregoing authorities so stated in Benj. Sales (4th Am. Ed.), p. 496, § 452, note (a); p. 497, note (d); and *compare* Story Sales (4th Ed.), p. 524, § 427, and note 4.

**Admission Preventing Rescission.**—But if a party, having once been entitled to rescind a contract because it has not been performed in a reasonable time, does any act which amounts to an admission of the existence of the contract, he cannot afterwards elect to consider it as void. Brinley *v.* Tibbetts, 7 Greenl. (Me.) 70.

**Knowledge of Falsity of Representations.**—A party can rescind a contract induced by fraud, without first having positive knowledge of the falsity of the representations. The right of rescission depends upon the existence of the fraud. Peterson *v.* Chicago, etc., R., 38 Minn. 511. as stated in 27 Cent. L. J. 535.

**Promptness and Statu Quo.**—One who disaffirms a contract for fraud must act promptly upon such discovery. If he seeks to recover money paid, he must place the other party substantially in the condition he was before the contract was made. Bell *v.* Keepers, 39 Kan. 105, noted in 26th Cent. L. J. 612.

"It is a settled rule that the right to rescind a contract for fraud must be exercised immediately upon its discovery; and that any delay in doing so, or the continued employment, use, and occupation of the property received under the contract will be deemed an election to affirm it. Schiffer *v.* Dietz, 83 N. Y. 300." Strong *v.* Strong, 102 N. Y. 69, affirming 33 Hun (N. Y.), 664, *mem.*

1. See Clarke *v.* Dickson, El. Bl. & E. 148; Queen *v.* Saddlers Co., 10 H. L. Cas. 421, and Western Bk. *v.* Addie, L. R. 1 H. L. C. 167, cited to this effect in Benj. Sales (4th Am. Ed.), p. 497, § 452, note (a).

Concerning buyer's remedies for fraud, see Newmark on Sales, § 358. As to remedies for deceit, see 5 Am. & Eng. Encycl. of Law, 342–346.

**Price Paid, etc., as Measure of Damages.**—In an action to recover damages for fraudulent representations in the sale of mortgage coupons, the price paid by the purchaser, with interest thereon, is the measure of damages when there is no evidence of their market value at the time of sale. South., etc., R. Co. *v.* Guest, 34 Fed. Rep. 628; as stated, 27 Cent. L. J. 153.

**Election of Remedies on Fraudulent Settlement of Claims.**—Concerning right to elect either to make restoration or sue for damages, see Strong *v.* Strong, 102 N. Y. 69, affirming 33 Hun (N. Y.), 664, *mem.*

2. Herrin *v.* Libbey, 36 Me. 357; Gifford *v.* Carvill, 29 Cal. 592; Collins *v.* Townsend, 58 Cal. 615.

3. Perley *v.* Balch, 23 Pick. (Mass.) 285; Gifford *v.* Carvill, 29 Cal. 592; and see Hunt *v.* Silk, 5 East. 449; Conner *v.* Henderson, 5 Mass. 314; Shepherd *v.* Temple, 3 N. H. 457; Carter *v.* Walker, 2 Rich. (S. Car.) 40; Christy *v.* Cummins, 2 McLean (U. S.), 386.

4. Burton *v.* Stewart, 3 Wend. (N. Y.) 239; 20 Am. Dec. 692; Gifford *v.* Carvill, 29 Cal. 592; Collins *v.* Townsend, 58 Cal. 615; and see Kimball *v.* Cunningham, 4 Mass. 502; 3 Am. Dec. 30; Norton *v.* Young, 3 Greenl. (Me.) 32; Campbell *v.* Fleming, 1 Ad. & E. 40.

slightest value to any one;[1] for though it should be without value to the party sued, yet if it is or may be of any value to either party, or if its detention would produce any loss or injury to the other party, the contract must be rescinded and the property returned within a reasonable time after the discovery of the fraud.[2] But if the article is absolutely valueless for any purpose, it is not necessary to return it, as it cannot be the basis of a binding contract.[3]

(*c*) *Change in Condition of Property.*—And if the party desiring to rescind has changed the condition of the property while ignorant of the fraud, he can no longer have the remedy of rescission;[4] but if the guilty party has disposed of part of the property received by him, he cannot thereby prevent a rescission, as the party defrauded may elect to take a partial restoration.[5]

**II. SELLER'S FRAUD.—1. Seller's Dealing with Defects.**—(*a*) *Avoidance of Contract for Seller's Fraud.*—A purchaser may avoid the contract of sale, according to Newmark on Sales, § 355, for false and fraudulent representations of the seller.[6]

**1.** Gifford *v.* Carvill, 29 Cal. 592; Collins *v.* Townsend, 58 Cal. 615.

**2.** Norton *v.* Young, 3 Greenl. (Me.) 33, note.

**3.** Norton *v.* Young, 3 Greenl. (Me.) 33, note; Gifford *v.* Carvill, 29 Cal. 592. But see Spencer *v.* St. Clair, 57 N. Y. 1.

**4.** Smith *v.* Buttenham, 98 Ill. 188.

**5.** Hammond *v.* Pennock, 61 N. Y. 145. See these cases so cited in 1 Benj. Sales (Corb. Am. Ed ), p. 530, § 606, note 2, and p. 593, § 674, note 26.

**6.** Taylor *v.* Missisippi Mills, 1 South W. Rep. (Ark.) 283, citing Plant *v.* Condit, 22 Ark. 454; Morton V. 289; and Right *v.* Roller, 31 Ark. 170.

**Fraud on Buyer, in General.**—The following cases may be consulted (according to Newmark on Sales, § 355, note 11, and § 357, note 7) on the points indicated: Inadequate price,—Wood *v.* Boynton, 64 Wis. 265; s. c., 54 Am. Rep. 610;—procuring signature to order,—Gross *v.* Dryer, 66 Wis. 150;—by bidding and puffers at auction sales,—Miller *v.* Baynard, 2 Houst. (Del.) 559; s. c., 83 Am. Dec. 168; Peck *v.* List, 23 W. Va. 338; s. c., 48 Am. Rep. 398;—false representations, —Morehouse *v.* Northrop, 33 Conn. 380; s. c., 89 Am. Dec. 211;—burden of proof in actions for false represetations,—Faville *v.* Shehan, 68 Iowa, 241;—knowledge of falsity of representations,—Holder *v.* Ayer, 110 Ill. 448;—misrepresentation of material fact on sale of shares in electric-light company,—Coolidge *v.* Goddard, 77 Me. 578;—representations concerning profits of business,—Taylor *v.* Saurman, 110 Pa. St. 3;—representation by director that bonds of corporation good,—Drake *v.* Grant, 36 Hun (N. Y.), 464;—misrepresentations by executor corcerning sale of stock,—Keen *v.* James, 39 N. J. Eq. 527; s. c., 51 Am. Rep. 29.

**Explaining Circumstances Surrounding Representations.**—In an action of replevin for goods sold upon false representations, the vendor may explain in his evidence how and why he was with the defendant when the false representations were made. Amstine *v.* Treat (Mich.), 39 N. W. Rep. 749; as noted, 27 Cent. L. J 514.

**Claiming to Have Orders for Goods.**—Where defendant falsely stated that he had fourteen orders for goods in plaintiff's district, which he would transfer to plaintiff; and thereby induced the latter to purchase the goods to fill these orders, it was held that plaintiff was entitled to a verdict, although some of the orders were valid, others forged, and still others conditional. Henkel *v.* Trulin (Conn.), 11 Atl. Rep. 722.

**Pretended Agent Making Sale for Himself.**—Where the defendant assumed to act for plaintiffs as their agent in the purchase of a mine, which he represented as belonging to a third person but which really belonged to him, and which he sold to the plaintiffs, who believed him to be their agent, the relation of vendor and vendee between the defendant and plaintiffs does not exist, and the plaintiffs will be relieved by a court of equity from the fraud of the defendant. Dole *v.* Wooldredge, 142 Mass. 161.

(*b*) *Seller Need Not Point out Defects.*—Where, however, an article which is offered for sale is open to the inspection of the purchaser, the common law does not generally permit such buyer to complain that the defects of the article, if any exist, are not pointed out to him;[1] for the rules governing the transaction are *caveat emptor* (let the purchaser beware) and *simplex commendatis non obligat* (mere praise is not binding).[2] And as the buyer, in his anxiety to get a good bargain, is sufficiently inclined to find imaginary fault, the seller is equally free to praise his merchandise and thus seek to exhance its value;[3] provided,[4] that he abstains from any misrepresentation of facts, and that the buyer has a full and fair opportunity of inspecting it, and that no artifices are used to hide the defects.[5] While, if the buyer is unwilling to negotiate on these terms, he can protect himself by requiring from the seller a warranty concerning any matters wherein he does not wish to run the risk of his want of care or skill.[6]

(*c*) *Established Doctrine.*—And the doctrine seems to be firmly established that in cases of sales, if there be no warranty as to quality, or wilful misrepresentation, or artful device to disguise the character or conceal the defects of the thing sold, the vendee should be bound by the contract.[7]

2. **When Buyer Not Protected.**—(*a*) *Duty of Purchasing Party.*—Under the doctrine of *caveat emptor*, the purchasing party must inform himself as to the qualities of the specific chattel sold,[8] and must draw no inferences from outside appearances, from the price demanded, or the seller's failure to point out defects; but must exercise judgment so far as the opportunity permits;[9] and, if he desires further assurance, must ask for a warranty.[10]

1. See Atwood *v.* Small, 6 Clark & F. (Am. Ed.) 233, and note (2), and cases cited; Vigers *v.* Pike, 8 Clark & F. 650; Kerr on Fraud (1st Am. Ed.), 78; Aberaman Iron Works *v.* Wikers, L. R. 4 Ch. 101; L. R. 5 Eq. 485; Hoit *v.* Holcomb, 32 N. H. 185, 202, 205; Brown *v.* Castles, 11 Cush. (Mass.) 350; Teasey *v.* Daton, 3 Allen (Mass.), 380; Dickinson *v.* Lee, 106 Mass. 557, 558, 559; Lytle *v.* Bird, 3 Jones (N. Car.), 222; Stephens *v.* Orman, 10 Fla. 9; Port *v.* Williams, 6 Ind. 219; Hough *v.* Richardson, 3 Story (U. S.), 659; Warner *v.* Daniels, 1 Wood & M. (U. S.) 90, 101, 102; Smith *v.* Babcock, 2 Wood & M. (U. S.) 246; Tuthill *v.* Babcock, 2 Wood & M. (U. S.) 298. *Compare* 2 Schouler's Pers. Prop. (2d Ed.), § 604.

2. Benj. Sales (4th Am. Ed.), § 430, citing cases given in last note; 1 id. (Corb. Am. Ed.), § 641; and see Veasey *v.* Daton, 3 Allen (Mass.), 380; Homer *v.* Perkins, 124 Mass. 431.

3. See Homer *v.* Perkins, 124 Mass. 431.

4. See Beninger *v.* Corwin, 24 N. J. L. 257.

5. Benj. Sales (4th Am. Ed.) § 430; 1 id. (Corb. Am. Ed.) § 641.

It is as much a fraud as active concealment would be, for the seller to employ any device to induce the buyer to forego inquiry and examination into the defects of the thing sold. Benj. Sales (4th Am. Ed.), § 430; 1 id. (Corb. Am. Ed.), § 641. 2 Chitty Contr. (8th Am. Ed.) 1042, 1043.

6. Benj. Sales (4th Am. Ed.) § 430; 1 id. (Corb. Am. Ed.) § 641; and see Veasey *v.* Daton, 3 Allen (Mass.), 380.

7. Beninger *v.* Corwin, 24 N. J. L. 257, as cited in 1 Benj. Sales (Corb. Am. Ed.), § 641, note 8, p. 560, referring also to Morris *v.* Thompson, 85 Ill. 16; Cogel *v.* Kinseley, 89 Ill. 598; Protection, etc., Co. *v.* Osgood, 93 Ill. 69, 76; Dillard *v.* Moore, 7 Ark. 166.

8. 2 Schouler's Pers. Prop. (2d Ed.) § 60.

9. Concerning failure to disclose latent defect, see Hadley *v.* Clinton, etc., Co., 13 Ohio St. 502; s. c., 82 Am. Dec. 454. Consult also Cecil *v.* Spurger, 32 Mo. 462; s. c., 82 Am. Dec. 140.

10. 2 Schouler's Pers. Prop. (2d Ed.) §

(*b*) *Instances of Failure to Show Fraud.*—Hence, the buyer cannot allege fraud where he inspects what he purchases and the defect is apparent;[1] nor where from appearances the seller did not know a defect to be such, and no concealment was practised with deceptive design;[2] nor where the buyer takes the thing with all faults;[3] nor where it appears that the buyer did not trust to the seller's statements on the point, but verified by his own expert or employed his own agent, and consummated the bargain upon their report;[4] nor where he makes his own fair examination as to the point, and relies upon his judgment;[5] nor, in general, where the matter was open to his observation, so that he could have ascertained the defect by exercising ordinary diligence and prudence.[6]

**3. Seller's Statements as to Price, etc.**—(*a*) *Doctrine Concerning.*—Mere statements of a vendor, either of real or of personal property, which are not in the form of a warranty concerning its value or the price which he has given or been offered for it, are held to be immaterial.[7] But this is the extreme limit of the rule in this country, and an action has been sustained for false and fraudulent representations as to the price paid by a third person for the property which is the subject of the negotiation;[8] though in *England*, more favor seems to be shown to the vendee, where the vendor has misrepresented as to the price in fact paid by him for the proper-

603; Newmark on Sales, § 355, citing Bennett's Benj. Sales, § 430; Smith *v.* Hughes, L. R. 6 Q. B. 596; Jackson *v.* Metherel, 7 Serg. & R. (Pa.) 422; and Grossly *v.* Eagle Sugar Refinery, 103 Mass. 331.

This rule applies to incorporeal as well as corporeal personalty. Renton *v.* Maryott, 21 N. J. Eq. 123.

1. Morse *v.* Rathbun, 49 Mo. 91.

2. Cogel *v.* Kinseley, 89 Ill. 598 (second-hand engine cracked by Chicago fire).

3. Pearce *v.* Blackwell, 12 Ired. (N. Car. 49; Baglehole *v.* Walters, 3 Camp. 154, overruling Mellish *v.* Motteux, Peake, 456; Pickening *v.* Dowson, 4 Taunt. 779; Baywater *v.* Richardson, 1 Ad. & E. 508; and see Freeman *v.* Baker, 5 B. & Ad. 797; Whitney *v.* Boardman, 118 Mass. 247, 248; Hanson *v.* Edgerly, 29 N. H. 343; Taylor *v.* Fleet, 4 Barb. (N. Y.) 102; Ward *v.* Hobbs, L. R. 2 Q. B. D. 331; s. c., L. R. 3 Q. B. D. 150; Henshaw *v.* Robins, 9 Metc. (Mass.) 83, 90; Gossler *v.* Eagle Sugar Ref., 103 Mass. 331, 334; Smith *v.* Andrews, 3 Ired. (N. Car.) 6. The authorities are so cited in Benj. Sales (4th Am. Ed.), pp. 533, 534, §§ 477, 477a; 1 id. (Corb. Am. Ed.) p. 630, § 726, note 50; and reference is made to Sugden Vend. & P. (8th Am. Ed.) 333 *et seq.*; Chitty Contr. (11 Am. Ed.) 645, 646.

4. Howell *v.* Biddlecorn, 62 Barb. (N. Y.) 131.

5. Pattison *v.* Jenks, 33 Ind. 87; Stephens *v.* Orman, 10 Fla. 9.

6. Brown *v.* Leach, 107 Mass. 364; Rocchi *v.* Schwabacher, 33 La. Ann. 1364; and *compare* Poland *v.* Brownell, 131 Mass. 131. See, for source of paragraph, 2 Schouler's Pers. Prop. (2d Ed.) § 603; Newmark on Sales, § 365.

7. Holbrook *v.* Connor, 60 Me. 578, 582, 583; Bishop *v.* Small, 63 Me. 12; Willard *v.* Randall, 65 Me. 81, 86; Brown *v.* Castles, 11 Cush. (Mass.) 350; Medbury *v.* Watson, 6 Metc. (Mass.) 259, 260; Gordon *v.* Parmelee, 12 Allen (Mass.), 212; Veasey *v.* Daton, 3 Allen (Mass.) 381; Hemmer *v.* Cooper, 8 Allen (Mass.). 334; Mooney *v.* Miller, 102 Mass. 217; Cooper *v.* Lovering, 106 Mass. 79; Brown *v.* Leach, 107 Mass. 364; Comer *v.* Perkins, 124 Mass. 431; Chrysler *v.* Canaday, 90 N. Y. 272; Wolcott *v.* Mount, 38 N. J. L. 496, 499; Merrian *v.* Arbuckle, 81 Ill. 501; Righter *v.* Roller, 31 Ark. 170.

For statement of doctrine as applicable to either party, see Dillman *v.* Nadlehoffer, 119 Ill. 568.

8. Medbury *v.* Watson, 6 Metc. (Mass.) 246. See also Ives *v.* Carter, 24 Conn. 403; Somers *v.* Richards, 46 Vt. 170; Sandford *v.* Nandy, 23 Wend. (N. Y.) 269; Cowles *v.* Watson, 14 Hun (N. Y.). 41; Simar *v.* Canaday, 53 N. Y. 306, 307; Miller *v.* Barber, 66 N. Y. 558; Kenner *v.* Harding, 85 Ill. 264; McClelland *v.* Scott, 24 Wis. 81.

ty,[1] while the same principle applies when the purchaser seeks to avail himself of the deceit in defence of a suit for the price of the goods or in reduction of damages.[2]

(*b*) *Application of Doctrine.*—Among false statements affecting value which have yet been held fraudulent, are those that a patent had been largely sold and was profitable;[3] that certain persons named had made purchases of other stock of a company;[4] that certain offers had been made for property;[5] and that an old stock of goods was fresh and new.[6]

**4. Expressions of Opinion.**—(*a*) *Not Ground for Avoiding Sale.*—Where the representation is made as a matter of opinion or belief merely, and not of fact, it cannot be made the ground for avoiding the sale.[7]

(*b*) "*Dealer's Talk.*"—So far, indeed, has the doctrine, that "dealer's talk"[8] will not give rise to an action of deceit, been carried, that a false statement by the vendor, as to the value of stock, has been held to be a mere expression of opinion, giving no right of action

1. Leake Dig. Contr. p. 355.

See, for basis of statements and authorities of paragraph, Benj. Sales (4th Am. Ed.) § 430, note (m); Newmark on Sales, § 357; Cavendir *v.* Roberson, 33 Kan. 626.

2. See Hazard *v.* Irwin, 18 Pick (Mass.) 95, 105; Henshaw *v.* Robins. 9 Metc. (Mass.) 83, 88; Tyre *v.* Cansey, 4 Harr. (Del.) 425; Hawkins *v.* Berry, 5 Gilm. (Md.) 36; 1 Sugd. Vend. & Pur. (8th Am. Ed.) 2, 3, and notes.

**General Principle, and When Inapplicable.**—The principle recognized in the case of Graffenstein *v.* Epstein, 23 Kan. 443, is that "A misrepresentation as to the market value of an article of general commerce, made falsely and fraudulently by one party to induce a sale, and relied upon by the other, will not avoid a contract therefor when there are no circumstances making it the special duty of the one party to communicate the knowledge he possesses, and none giving him the peculiar means of ascertaining such market price."

But this case has been deemed not in point in a subsequent case, where it is said of the special circumstances under consideration: "Here the seller agreed to sell a stock of staple groceries suitable for the defendants' trade, of first-class quality, at prices greatly below the current rates for such goods. The defendants relied upon these representations and permitted the seller to select and ship the goods. Therefore, evidence tending to show that the stock of goods had been fraudulently billed, and charged at current rates, and in some instances above current rates, was relevant." Lord *v.* French, 61 Me. 420; Cavendir *v.* Roberson, 33 Kan. 626.

3. Somers *v.* Richards, 46 Vt. 170, 175; Crossland *v.* Hall, 33 N. J. Eq. 111, and reporter's note.

4. Miller *v.* Barber, 66 N. Y. 558, 567.

5. Kenner *v.* Harding, 85 Ill. 264; Ives *v.* Carter, 24 Conn. 392, 405.

6. Jackson *v.* Collins, 39 Mich. 557, 561. See for source of paragraph, 1 Benj. Sales (Corb. Am. Ed.), § 641, note 8, pp. 650, 651, referring also to Bradley *v.* Luce, 99 Ill. 244, where worthless stock and mortgages far exceeding the security were represented to be valuable.

7. See 1 Benj. Sales (Corb. Am. Ed.), p. 561, § 641, note 10; Story Sales (4th Ed.), pp. 157, 158, § 169, whence paragraph derived.

So that the common language of commendation (see Nowlan *v.* Cain, 3 Allen [Mass.], 263; Chester *v.* Comstock, 6 Rob. [N. Y.] 1; Miller *v.* Young, 36 Ill. 354), and the extravagant puffing of goods, and the exaggerated declarations of auctioneers, and vague general representations as to the value of the subject-matter of sale (Anderson *v.* Hill, 12 Smed. & M. 679), are not treated as frauds, however false and deceptive they may be, provided the article be entirely open to the observation of the purchaser; for then he is supposed to trust his own judgment. 2 Kent Com. 485; 1 Story Eq. Jur. § 201; Atwood *v.* Small, 6 Clark & F. 232, 233; Vernon *v.* Keys, 12 East, 637; Ormrod *v.* Huth, 14 Mees. & W. 664.

8. See Com. *v.* Jackson, 132 Mass. 16.

to the purchaser who bought on the faith of it;[1] nor is a representation that a party is in good pecuniary circumstances, and able to pay notes given for the price of property, necessarily the representation of a fact, and not merely the expression of an opinion.[2] But whether a representation as to his responsibility, by a buyer asking credit, is a statement of fact or of opinion, is often a question for the jury, depending on the intent and understanding of the parties.[3]

**5. Seller's Liability for Fraud.**—(*a*) *When Caveat Emptor Inapplicable.*—The rule of *caveat emptor* does not apply when the seller induces a purchase on certain terms by wilful misrepresentation upon material points,[4] as well as to cases of wrongful concealment, exercise of force, and fraudulent conduct generally;[5] and the buyer may disaffirm a sale so procured.[6]

(*b*) *Reliance upon Representations.*—In order to avoid the sale on the ground of the seller's false representations, the party purchasing must have been deceived by the representations; and, in general, it must appear that the buyer trusted to the inducement which proved fraudulent, and bought on the strength of it.[7] But the buyer's right to rely upon the seller's representations is favored.[8] Important circumstances in determining the issue whether the buyer

1. Ellis *v.* Andrews, 56 N. Y. 83. And see Bishop *v.* Small, 64 Me. 12. For basis of paragraph, consult Benj. Sales (4th Am. Ed.), § 430.

2. Belcher *v.* Costello, 122 Mass. 188.

3. Morse *v.* Shaw, 124 Mass. 59. See Homer *v.* Perkins. 124 Mass. 431; Bigler *v.* Flickinger, 55 Pa. St. 279; Sledge *v.* Scott, 56 Ala. 202, 206. A statement that land was good oil-land has been held plainly an expression of opinion as to a matter unknown to both parties. Watts *v.* Cummins, 59 Pa. St. 84.

**Difficulty in Determining Character of Representation.**—No rule can adequately define all the circumstances in which representations either of fact or of opinion may become fraudulent and actionable. Jackson *v.* Collins, 39 Mich. 557, 561.

And it is often difficult to determine whether a statement is one of opinion or of fact. 1 Benj. Sales (Corb. Am. Ed.), p. 562, § 641, note 10, whence paragraph derived. Though where a person was indicted for obtaining, under false pretences, a note which he had bought at a low price by representing that the maker was insolvent, this was held a representation of fact. State *v.* Tomlin, 29 N. J. L. 13, 23; and see State *v.* Heifner, 84 N. Car. 751, for like ruling under an indictment for falsely representing that a mare was sound and there had never been anything the matter with her eyes.

**Misrepresentation of Facts Throwing Light on Value.**—So, while expressions of opinion as to value are not fraudulent, —Homer *v.* Perkins, 124 Mass. 431;—misrepresentations of fact which throw light on value are fraudulent,—Manning *v.* Albee, 11 Allen (Mass.), 520; see 1 Benj. Sales (Corb. Am. Ed.), § 641, note 10, p. 562, citing the authorities as given in support of the statements in paragraph, and here referring also to Smith *v.* Andrews, 8 Ired. (N. Car.) 6; and Pearce *v.* Blackwell, 12 Ired (N. Car.) 49, 60;—as where the seller of goods takes in payment therefor bonds at a certain value, on the faith of a false newspaper quotation shown him by the buyer.—Manning *v.* Albee, 11 Allen (Mass.), 520.

4. See Krumbhaar *v.* Birch, 83 Pa. St. 426, 428.

5. 2 Schuler Pers. Prop. (2d Ed.) § 604, whence paragraph derived. See, to like effect, Newmark on Sales, § 355, and note 11.

6. Regina *v.* Kenrick, 5 Q. B. 49; Paddock *v.* Strobridge, 29 Vt. 470; Manning *v.* Albee, 11 Allen (Mass.), 522; Story Sales (4th Ed.). §§ 378–380.

7. 2 Schouler Pers. Prop. (2d Ed.) § 605, referring to Smith *v.* Hughes, Law R. 6 Q. B. 597; Bennett's Benj. Sales, § 429; Morse *v.* Rathburn, 49 Mo. 81.

8. Redgrave *v.* Hurd, Law R. 20 Ch. D. 1; Collins *v.* Dennison, 12 Met. (Mass.) 549; Newmark on Sales, § 356.

relied upon the seller's alleged false representations [1] are found in the buyer's opportunity to be present, and examine the thing for himself before concluding the sale; [2] in the character of the thing, such as a patented article bought of an expert [3] by one not skilled in machines, where the qualities which may be well known to the seller must be taken by the buyer on trust; [4] or in the resort by the seller to some trick or artifice for the purpose of preventing or checking examination, or diverting the buyer from his probable line of inquiry; [5] and as any seller may make an express warranty,[6] so he is held liable for his false statements by way of inducement,[7] even though the buyer might have ascertained the falsehood by inquiry.[8]

**6. Seller's Concealment or Silence.**—(*a*) *Non-disclosure as Constituting Fraud.*—It is fraudulent for a seller to expose property for sale, knowing of incumbrances upon the title, yet concealing their existence; [9] and a party may sometimes be required to disclose such defects as under usage of trade are generally made known to customers in that particular calling.[10] But a mere unintentional concealment or omission on the part of the vendor to disclose material facts known to himself but not to the purchaser, where the latter has not equal access to such knowledge, must be accompanied with an intention to deceive, in order to be the proper foundation for an action for deceit.[11]

(*b*) *Seller's Silence.*—In general, the seller's silence does not avoid the contract for fraud, but comes within the protection of *caveat emptor*,[12] even though amounting to a passive acquiescence in the buyer's self-deception as to the quality or intrinsic value of

1. See Story Contr. (5th Ed.) p. 597, § 636.

2. Vandewalker *v.* Osmer, 65 Barb. (N. Y.) 556; Smith *v.* Richards, 13 Pet. (U. S.) 26; Bendurant *v.* Crawford, 22 Iowa, 40. See also Story Sales (4th Ed.), p. 158, § 169; Salem India Rubber Co. *v.* Adams, 23 Pick. (Mass.) 256.

3. **Sales by Experts.**—Story Sales (4th Ed.), p. 159, § 170; Story Contr. (5th Ed.), p. 600, § 638; Story Eq. Jur. § 198; 1 Pothier Obl. n. 17–20, and note (a); Atwood *v.* Small, 6 Clark & F. 232; Lomi *v.* Tucker, 4 Car. & P. 15; De Sewhanberg *v.* Buchanan, 5 Car. & P. 343; Power *v.* Barham, 4 Ad. & E. 473; 6 Nev. & M. 62; 7 Car. & P. 356; Foster *v.* Swasey, 2 Wood & M. (U. S.) 217; Smith *v.* Babcock, 2 Wood & M. (U. S.) 246; and see Gifford *v.* Carroll, 29 Cal. 589.

4. Page *v.* Dickerson, 28 Wis. 694; Kendall *v.* Wilson, 41 Vt. 567.

5. Smith *v.* Hughes, L. R. 6 Q. B. 597; Roseman *v.* Canovan, 43 Cal. 110. See Story Sales (4th Ed.), p. 158, § 169; Hazard *v.* Irwin, 18 Pick. (Mass.) 95; Newark on Sales, § 356.

6. But confidence should not be placed in the seller's statements not amounting to warranty. Manning *v.* Albee, 11 Allen (Mass.), 522; Walker *v.* Pue, 57 Md. 156.

7. For representations as to the value of coal stock regarded as inducing purchase, see Booth *v.* Smith, 117 Ill. 370.

8. Bank of Woodland *v.* Hiatt, 58 Cal. 234; Pennock *v.* Stygles, 54 Vt. 226; Redgrave *v.* Hurd, L. R. 20 Ch. D. 1. For basis of paragraph, see 2 Schouler Pers. Prop. (2d Ed.) § 604.

9. Sweetman *v.* Prince, 62 Barb. (N.Y.) 256; Story Sales (4th Ed.), § 383.

10. Horsfall *v.* Thomas, 1 Hurl. & C. 90; Jones *v.* Bowden, 4 Taunt. 847; Smith *v.* Hughes, L. R. 9 Q. B. 597. See Story Sales (4th Ed.), § 304, as cited in 2 Schouler Pers. Prop. (2d Ed.) § 604.

11. Stevens *v.* Fuller, 8 N. H. 463; Hanson *v.* Edgerly, 29 N. H. 343; Howard *v.* Gould, 28 Vt. 523; Kintzing *v.* McElrath, 5 Pa. St. 467; Harris *v.* Tyson, 24 Pa. St. 347; Laidlaw *v.* Organ, 2 Wheat. (U. S.) 178. See 2 Kent Com. 484, 490; Benj. Sales (4th Am. Ed.), p. 540, § 482, note (q), where cases in note are thus cited; Fisher *v.* Budlong, 10 R. I. 527, 528.

12. Newmark on Sales, § 355.

the subject of the negotiation.[1] But there are circumstances under which the seller's silence amounts to concealment, and carries with it the legal consequences of positive misrepresentation, because it is the seller's duty to speak out;[2] as on a sale of fodder upon which poison has been spilled;[3] or in the case of the issuance of a prospectus or advertisement which gives a false impression by artful concealment;[4] or of the wilful hiding of some internal defect which renders the thing worthless.[5]

**7. Puffers or By-bidders at Auctions.**—(*a*) *Employment Fraudulent.*—The employment of puffers,[6] or by-bidders, engaged to bid in behalf of the vendor in order to force up the price against the public, has been repeatedly held to be fraudulent,[7] so that any party misled by such fictitious bid so procured may refuse to complete the contract, or claim relief against any purchase closing upon his offer thus increased;[8] and the rules against puffing apply to sheriffs' sales,[9] and to sales under an order of court, as well as to ordinary sales.[10]

**1.** Smith *v.* Hughes, L. R. 6 Q. B. 579. See Campbell on Sales, 513.

**2.** 2 Schouler Pers. Prop. (2d Ed.) § 604.

**3.** French *v.* Vining, 102 Mass. 135.

**4.** Oakes *v.* Turquand, L. R. 2 H. L. 325.

**5.** Paddock *v.* Strobridge, 29 Vt. 420; Maynard *v.* Maynard, 49 Vt. 297; Croyle *v.* Moses, 90 Pa. St. 450. *Compare* Beninger *v.* Corwin, 24 N. J. L. 257; Cassell *v.* Herron, 5 Clark, 250. See, for source of statements and authorities, 1 Benj. Sales (Corb. Am. Ed.) p. 635, § 732, note 5.

**6.** Concerning this subject, consult full discussion in art. AUCTIONS AND AUCTIONEERS, 1 Am. & Eng. Encyc. Law, 989, 997.

**7. England.**—Bexwell *v.* Christie, 1 Cowp. 395 (leading case); Howard *v.* Castle, 6 T. R. 642. And see Crowder *v.* Austin, 3 Bing. 368; Rex *v.* Marsh, 3 Younge & J. 331; Thornett *v.* Haines, 15 Mees. & W. 367; Wheeler *v.* Collier, Moody & M. 123; Green *v.* Bauerstock, 14 Com. B. N. S. 204; 32 L. J. Com. P. 180; Gilliat *v.* Gilliat, Law R. 9 Eq. 60.

**United States.**—See Towle *v.* Leavitt, 23 N. H. 360; s. c., 55 Am. Dec. 195; Curtis *v.* Aspinwall, 114 Mass. 187, 191; s. c., 19 Am. Rep. 332; Nat. Fire Ins. Co. *v.* Loomis, 11 Paige (N. Y.), 431; Trust *v.* Delaplaine, 3 E. D. Smith (N. Y.), 219; Wolfe *v.* Luyster, 1 Hall (N. Y.), 146; Fisher *v.* Hersey, 17 Hun (N. Y.), 370; Donaldson *v.* McRoy, 1 Browne (Pa.), 346; Pennock's Appeal, 14 Pa. St. 446; Staines *v.* Shore, 16 Pa. St. 200; s. c., 55 Am. Dec. 492; Yerkes *v.* Wilson, 8 Pa. St. 9; Miller *v.* Baynard, 2 Houst. (Del.) 559; Moncrieff *v.* Goldsborough, 4 Har. & McH. (Md.) 282; s. c., 1 Am. Dec. 407; Woods *v.* Hall 1 Dev. Eq. (N. Car.) 411; McDowell *v.* Sims, 6 Ired. Eq. (N. Car.) 278; s. c., 57 Am. Dec. 595; Baham *v.* Bach, 13 La. 287; s. c., 33 Am. Dec. 561; Latham *v.* Morrow. 6 B. Mon. (Ky.) 630; Darst *v.* Thomas, 87 Ill. 222; Peck *v.* List, 23 W. Va. 338; s. c., 48 Am. Rep. 398; Veazie *v.* Williams, 3 Story (U. S.), 611; 8 How. (U. S.) 134.

**Generally,** see 2 Kent Com. 537, 539; 1 Story Eq. Jur. § 293; and for chief source of authorities on this head, Benj. Sales (4th Am. Ed.), p. 526, § 470, and note (k); 1 Benj. on Sales (Corbin's Am. Ed.), p. 624, § 717, note 48.

**8.** See Morehead *v.* Hunt, 1 Dev. Eq. (N. Car.) 35; Nat. Bank *v.* Sprague, 20 N. J. Eq. 159; Story Sales (4th Ed.), p. 580, § 482; 2 Schouler Pers. Prop. (2d Ed.) § 640. But *compare* Latham *v.* Morrow, 6 B. Mon. (Ky.) 630.

**9.** Donaldson *v.* McRoy, 1 Browne (Pa.), 340; Lee *v.* Lee, 19 Mo. 420.

**10.** Dimmock *v.* Hallett, L. R. 2 Ch. 21, 29; but see Shimmin *v.* Bellew, L. R. 1 Eq. 289. Allowance of one puffer to prevent sacrifice in chancery sales: Green *v.* Bauerstock, 14 Com. B. N. S. 204; but see 30 & 31 Vict. c. 48; Jones *v.* Quinn, 2 L. R. Ir. 516; Mortimer *v.* Bell, L. R. 1 Ch. 10; Heatley *v.* Newton, L. R. 19 Ch. D. 326; and consult 2 Schouler Pers. Prop. (2d Ed.) § 640; Benj. Sales (4th Am. Ed.), p. 531, § 474; Flint *v.* Woodin, 9 Hare, 618; Veazie *v.* Williams, 3 Story (U. S.), 632; 8 How. (U. S.) 134.

*Exceptions.*—But exceptions have been made where it did not appear that the purchaser was induced by the puffing to bid more than he had previously determined, or than the value of the property;[1] or where none of the real bidders were influenced in their judgment by the sham bids;[2] or if the bid next preceding the successful bid was genuine.[3]

(*b*) *Good Faith as Criterion.*—Many of the American cases hold that the owner may employ a puffer, if he does it *bona fide*, to prevent a sacrifice of the property by its sale under a given price,[4] but that the sale is fraudulent and void if a number of sham bidders are employed by the owner to enhance the price by a pretended competition.[5]

(*c*) *Limiting Bids.*—The seller may limit the price in advance, as the lowest for which the goods are to be sold,[6] or may openly reserve the right to bid at the auction for himself;[7] but he is bound to let the property go to the highest outside bidder where the sale was published as being "without reserve,"[8] or where the last bid before the purchaser's was a real one, and his judgment, and that of other real bidders, had not been misled by the sham bidders.[9]

1. See Jennings *v.* Hart, 1 Russ. & Ches. (N. S.) 15; Tomlinson *v.* Savage, 6 Ired. Eq. (N. Car.) 530.

2. Veazie *v.* Williams, 3 Story (U. S.), 611.

3. Nat. Bank *v.* Sprague, 20 N. J. Eq. 159, 165; Veazie *v.* Williams, 3 Story (U. S.), 811; but see Curtis *v.* Aspinwall, 114 Mass. 187, 197; s. c., 19 Am. Rep. 332.

4. See Phippen *v.* Stickney, 3 Metc. (Mass.) 387; Wolfe *v.* Luyster, 1 Hall (N. Y.), 146; Steele *v.* Ellmaker, 11 S. & R. (Pa.) 86; Pennock's Appeal, 14 Pa. St. 446; Moncrieff *v.* Goldsborough, 4 Har. & McH. (Md.) 282; Morehead *v.* Hunt, 1 Dev. Eq. (N. Car.) 35; Woods *v.* Hall, 1 Dev. Eq. (N. Car.) 411; Reynolds *v.* Dechaums, 24 Tex. 174; Latham *v.* Morrow, 6 B. Mon. (Ky.) 630; Walsh *v.* Barton, 24 Ohio St. 28; Lee *v.* Lee, 19 Mo. 420; Veazie *v.* Williams, 3 Story (U. S.), 622, 623. The proviso is sometimes made that the price be afterwards raised by real bidders and the purchaser be not misled. Story Sales (4th Ed.), p. 581, § 482; and see Bramley *v.* Alt, 3 Ves. 622; Connolly *v.* Parsons, 3 Ves. 625.

5. 2 Kent Com. 538, 539; Veazie *v.* Williams, 3 Story (U. S.), 622, 623; Benj. Sales (4th Am. Ed.), p. 531, § 474; and see Nat. Fire Ins. Co. *v.* Loomis, 11 Paige (N. Y.), 431; Baham *v.* Bach, 13 La. 287; Troughton *v.* Johnson, 2 Hayw. (Tenn.) 28; Jenkins *v.* Hogg, 2 Const. (S. Car.) 821; Tomlinson *v.* Savage, 6 Ired. Eq. (N. Car.) 430.

False bids made by the auctioneer, though without the seller's authority, also vitiate the sale. Veazie *v.* Williams, 8 How. (U. S.) 134. Secret signals, Conover *v.* Walling, 2 McCart. (N. J.) 173.

**Restoration of Property by Rescinding Purchaser.**—It is said to be the duty of the purchaser wishing to avoid a sale for puffing, to restore the property purchased as soon as the frand is discovered. Staines *v.* Shore, 16 Pa. St. 200; McDowell *v.* Simms, 6 Ired. Eq. (N. Car.) 278; Tomlinson *v.* Savage, 6 Ired. Eq. (N. Car.) 430. Otherwise he confirms the sale. Backentoso *v.* Stahler, 33 Pa. St. 251; Veazie *v.* Williams, 3 Story (U. S.), 611, 631. See Story Sales (4th Ed.), p. 581, § 482, note 1; Benj. Sales (4th Am. Ed.), p. 527. § 470, note (*k*).

6. See Steele *v.* Ellmaker, 11 S. & R. (Pa.) 86; Towle *v.* Leavitt, 23 N. H. 360; Bush *v.* Cole, 28 N. Y. 261. And see Bateman on Auct. 126, 137, 140; Warlow *v.* Harrison, 29 L. J. Q. B. 14.

7. Dimmock *v.* Hallett, L. R. 2 Ch. 21; Mainprice *v.* Westley, 6 Best & S. 420; Staines *v.* Shore, 16 Pa. St. 200.

8. See Robinson *v.* Wall, 2 Phill. Eq. (N. Car.) 372; Thornett *v.* Haines, 15 Mees. & W. 367; Warlow *v.* Harrison, 1 El. & E. 295; Story Sales (4th Ed.), p. 583, § 482; 2 Schouler Pers. Prop. (2d Ed.) § 641. *Compare* Dimmock *v.* Hallett, L. R. 2 Ch. 21.

9. Veazie *v.* Williams, 3 Story (U. S.), 611. See Benj. Sales (4th Am. Ed.), pp. 526, 527, § 470, note (*k*).

(*d*) *Number of Puffers or By-bidders.*— The English chancery practice, prior to legislation requiring it to conform in sales of land to the legal rule,[1] allowed one puffer in a chancery sale in order to prevent a sacrifice;[2] but later decisions, which discredit puffing irrespective of legislation, hold that the auction is fraudulent where there are two by-bidders, counting the auctioneer as one;[3] and that, where the auctioneer and the seller's agent bid up the property, and some of the pretended bids were merely announced by the auctioneer without being made at all, the purchaser thus induced to bid a higher price might recover the deposit made on account of the sale, with interest and costs, notwithstanding the sellers reserved the right of bidding as a condition of the sale.[4]

1. Stat. 30 and 31 Vict. c. 48; Jones *v.* Quinn, 2 L. R. Ir. 516.

2. See Green *v.* Bauerstock, 14 C. B. (N. S.) 204; Flint *v.* Woodin, 9 Hare, 618; Veazie *v.* Williams, 3 Story (U. S.), 611, 632; 8 How. (U. S.) 134; Benj. Sales (4th Am. Ed.), p. 531, § 474.

3. Mortimer *v.* Bell, L. R. 1 Ch. 10.

4. Heatley *v.* Newton, L. R. 19 Ch. D. 326. See 2 Sch. Pers. Prop. (2d Ed.) § 640.

If the auctioneer, in disregard of instructions limiting the price in advance as the lowest for which the goods shall be sold, closes a bargain, instead of adjourning the auction or withdrawing the goods, he is responsible to his principal for the consequences. Steele *v.* Ellmaker, 11 S. & R. (Pa.) 86; Towle *v.* Leavitt, 23 N. H. 360; Bush *v.* Cole, 28 N. Y. 261; and see Bateman on Auct. 126, 137, 140; Warlow *v.* Harrison, 29 L. J. Q. B. 14. And so the seller may openly reserve the right to bid at the auction for himself. Dimmock *v.* Hallett, L. R. 2 Ch. 21; Mainprice *v.* Westley, 6 Best & S. 420; Staines *v.* Shore, 16 Pa. St. 200.

The courts are also disposed to let a sale stand whenever the seller has, without open announcement of his intention, merely put in the last bid and the auctioneer has knocked the goods down to him. 2 Schouler Pers. Prop. (2d Ed.) § 641, whence matter under this head is mainly derived. But it is a seller's duty to let the property go to another where the sale was published as being "without reserve." 2 Schouler Pers. Prop. (2d Ed.) § 641; Story Sales (4th Ed.), p. 583, § 482. Since such a sale implies that there shall be an acceptance of the highest *bona fide* bid from among the public competitors. See Robinson *v.* Wall, 2 Phill. Eq. (N. Car.) 372; Thornett *v.* Haines, 15 Mees. & W. 367; Warlow *v.* Harrison, 1 El. & E. 295. *Compare* Dimmock *v.* Hallett, L. R. 2 Ch. 21. Inadequacy of price: Livingstone *v.* Byrne, 11 Johns. (N. Y.) 555. Effect of prior private warranty: Hopkins *v.* Tanqueray, 15 C. B. 130, 136.

**Auctioneer's Fraudulent Action.**— The auctioneer should make no private arrangements with any bidder for signalling bids,—Conover *v.* Walling, 2 McCart. (N. J.) 173;—nor smuggle into the auction for one person the goods of another,—2 Schouler Pers. Prop. (2d Ed.) § 642;—nor give any advantages to one over another fair and open bidder,—Conover *v.* Walling, 2 McCart. (N. J.) 173; Thomas *v.* Kerr, 3 Bush (Ky.), 619; Pattison *v.* Josselyn, 43 Miss. 373. But he has discretion to refuse to receive the bid of a party if his rejection is made in good faith and under proper circumstances,—Holder *v.* Jackson, 11 Up. Can. Com. P. 543; Benj. Sales (4th Am. Ed.), p. 530, § 472, note (*p*);—as the bid of a minor,—Kinney *v.* Showdy, 1 Hill (N. Y.), 544;—or of an irresponsible person,—Hobbs *v.* Beavers, 2 Ind. 142; Den *v.* Zellers, 2 Halst. (N. J.) 153. See 2 Schouler Pers. Prop. (2d Ed.) § 641, note 3, on which work most of the matter under this head is based. And the practice has been justified in some States of deciding a contested bid by putting up the property again at the last price obtained. Conover *v.* Walling, 2 McCart. (N. J.) 173. And see McMasters *v.* Comm'rs, etc., 1 La. Ann. 11;—while it is not absolutely fatal to the auction that more was offered than the amount for which the property was cried off,—2 Schouler Pers. Prop. (2d Ed.) § 642.

"**Mock Auctions**" are not upheld either at law or in equity. See Bateman on Auct. 3, 142; Musgrove *v.* Robinson, 8 Car. & P. 469.

**8. Buyer's Rescission.**—(*a*) *Declining to Carry Out Contract.*—The defrauded buyer may, if he acts within a reasonable time [1] after discovering the fraud, repudiate the transaction by declining to complete the purchase; [2] as by refusing to accept the goods if they are not yet delivered; [3] or, if they are already delivered, he may return them or take equivalent steps; [4] or, if they have been paid for, he may offer to return them in unchanged condition as a basis for recovering back the price: [5] and so, whatever the stage of execution which the contract has reached, the buyer may rescind for the seller's fraud.[6]

1. See Collins *v.* Townsend, 58 Cal. 608.

2. See 2 Schouler Pers. Prop. (2d Ed.) § 605.

**Buyer's Choice of Remedies.**—It is not essential, however, for the buyer, upon discovery of the fraud, to take steps to rescind the contract, for he "has his election to rescind the sale and return the property, or to retain the property and prosecute his claim for damages either by an original action or as a counter-claim to an action against him for the purchase-money brought by the party committing the fraud (Whitney *v.* Allaire, 4 Denio (N. Y.), 556; Lilly *v.* Randall, 3 Colo. 298)." Herefort *v.* Cramer, 7 Colo. 483. Thus, where a seller is given by the purchaser authority to select and ship to him a stock of staple groceries at 15 or 20 per cent less than he could buy them elsewhere, and subsequently the seller selects, puts up bills, and ships to the purchaser a stock of groceries, part of which is spoiled, unsalable, and worthless, and the seller fraudulently makes out a bill with prices above the current prices for staple goods, and the purchaser is thereby deceived and defrauded, the purchaser is not restricted to his right to rescind the contract on the discovery of the fraud; but he may retain the goods, and, in an action to recover the contract price, have allowed the damages to which he is entitled on account of the fraud and misrepresentations of the seller. Cavender *v.* Roberson, 33 Kan. 626. The opinion in this case cites to the effect that the buyer is not restricted to his right to rescind the contract and return the goods. Weybrick *v.* Harris, 31 Kan. 92; Lord *v.* French, 61 Me. 420; and Wheeler & Wilson Mfg. Co. *v.* Thompson, 33 Kan. 491.

3. But an acceptance of goods under a contract induced by the seller's fraud leaves the buyer still at liberty to rescind upon discovering the fraud. Dutchess Co. *v.* Harding, 49 N. Y. 321.

4. See Am. Wine Co. *v.* Brasher, 13 Fed. Rep. 595.

5. See 2 Schouler Pers. Prop. (2d Ed.) § 605.

6. Prentiss *v.* Russ, 16 Me. 30; Garland *v.* Spencer, 46 Me. 528; Farris *v.* Ware, 60 Me. 482; Poor *v.* Woodburn, 25 Vt. 234; Downer *v.* Smith, 32 Vt. 1; Gates *v.* Bliss, 43 Vt. 299; Matteson *v.* Holt, 45 Vt. 336; Getchell *v.* Chase, 37 N. H. 110; Butler *v.* Northumbetland, 50 N. H. 39, 49; Manahan *v.* Noyes, 52 N. H. 232; Coolidge *v.* Brigham, 1 Metc. (Mass.) 547; King *v.* Eagle Mills, 10 Allen (Mass.), 551; Kimball *v.* Cunningham, 4 Mass. 502; Perkins *v.* Bailey, 99 Mass. 61, 62; Waters Pat. Heater Co. *v.* Smith, 120 Mass. 444; Kinney *v.* Kiernan, 2 Lans. (N. Y.) 492; Voorhees *v.* Earl, 2 Hill (N. Y.), 292; Wheaton *v.* Baker, 14 Barb. (N. Y.) 494; Farrell *v.* Corbett, 4 Hun (N. Y.), 128; Van Lieuw *v.* Johnson, 4 Hun (N. Y.), 415; Dows *v.* Griswold, 4 Hun (N. Y.), 550; Anthony *v.* Day, 52 How. Pr. (N. Y.) 35; Baker *v.* Lever, 67 N. Y. 304; Lowry *v.* McLane, 3 Grant (Pa.), 333; Croyle *v.* Moses, 90 Pa. St. 250; Hooper *v.* Strasburger, 37 Md. 390, 391; Jemison *v.* Woodruff, 34 Ala. 143; Pierce *v.* Wilson, 34 Ala. 596; Merritt *v.* Robinson, 35 Ark. 483; Buchanan *v.* Harvey, 12 Ill. 336; Foulck *v.* Eckert, 61 Ill. 448; Hall *v.* Fullerton, 69 Ill. 448; Warren *v.* Tyler, 81 Ill. 15; Gutling *v.* Newell, 9 Ind. 572; Shaw *v.* Barnhart, 17 Ind. 183; First Nat. Bank *v.* Yocum, 11 Neb. 328; Blen *v.* Bear River, etc., Co., 20 Cal. 602; Gifford *v.* Carvill, 29 Cal. 589; Cruess *v.* Fessler, 39 Cal. 336; Morrison *v.* Logh, 39 Cal. 381; Bank of Woodland *v.* Hiatt, 58 Cal. 234; Collins *v.* Townsend, 58 Cal. 608; Chengivo *v.* Jones, 3 Wash. (U. S.) C. C. 359; Daggett *v.* Emerson, 3 Story (U. S.), 700; Cushwa *v.* Forest, 4 Cranch (U. S.), 37; Pence *v.* Langdon, 99 U. S. 578; Murray *v.* Mann, 2 Exch. 538; Street *v.* Blay, 2 Barn. & Ad 456; Clarke *v.* Dickson, El. B. & E. 148; 27 L. J. Q. B. 223; Queen *v.* Saddlers' Co, 10 H. L. Cas. 420, 421. See Kerr on Fraud & M. (1st Am. Ed.) 328, 329, and, for sources of statements, and authorities, Benj. Sales (4th Am. Ed.), p. 496, § 452; 2 Schouler Pers. Prop. (2d Ed.) § 605; 1 Benj. Sales

(*b*) *When Goods Need Not be Returned.*—But the buyer is under no obligation to return goods which are of no value to either party, as, counterfeit bonds [1] or worthless stock,[2] or which have been necessarily destroyed in the test required to discover the fraud;[3] nor is he debarred, as against the defrauding party, from dispensing with a strict tender and observance of formalities if he has not exercised acts of ownership while delaying.[4]

(*c*) *Possibility of Restoring Matter to Statu Quo.*—And it has been held, in effect, that where the contract has been induced by fraud, it is not necessary that the buyer should absolutely tender what he has received, though he ought to give notice of his intention to rescind and his unwillingness to abide by the contract,[5] and ought, further, to be in a situation upon the trial to put the other party in the situation in which he was at the time of the discovery of the fraud.[6]

(*d*) *When Right of Repudiation Lost.*—Yet a buyer is bound to rescind for fraud at the earliest practicable moment.[7] And he loses the right of repudiation if, upon discovering the fraud, he deals with the article as his own or keeps it unreasonably long;[8] though, in affirmance of the contract, he may still sue and recover damages.[9]

(*e*) *Purpose to Rescind Must be Clearly Signified.*—So, the buyer must clearly signify his purpose to rescind for the fraud;[10] and a mere negotiation for the settlement, or an offer to trade back, is not sufficient:[11] but the defrauded vendor cannot set up negligence of the buyer in permitting or discovering the fraud, as a defence to a suit for rescission.[12]

**9. Return of Property.**—(*a*) *When Necessary.*—If the property purchased is of any value whatsoever, and not entirely worthless, it must be returned by the buyer before he can rescind;[13] or he

(Corb. Am. Ed.), p. 592, § 674, note 25.

1. Brewster *v.* Burnett, 125 Mass. 68.

2. Pence *v.* Langdon, 99 U. S. 578.

3. Smith *v.* Love, 64 N. Car. 439; Pacific Guano Co. *v.* Mullen, 66 Ala. 582.

4. 2 Schouler Pers. Prop. (2d Ed.) § 605, declaring and supporting the law on this matter in the manner stated.

5. Am. Wine Co. *v.* Brasher, 13 Fed. Rep. 595, 603.

6. Am. Wine Co. *v.* Brasher, 13 Fed. Rep. 595, 603.

Sometimes the duty of placing in *statu quo* is satisfied where the judgment in the suit will accomplish this result. Allerton *v.* Allerton, 50 N. Y. 670; and see Whitcomb *v.* Denio, 52 Vt. 382. And the fact that the contract is partly executed will not of itself prevent a rescission unless it has gone so far that the subject-matter, or the greater part of it, has disappeared. 2 Schouler Pers. Prop. (2d Ed.) § 605, referring also to Van Trott *v.* Wiese, 36 Wis. 439; Potter *v.* Taggart, 54 Wis. 395; Hendrickson *v.* Hendrickson, 51 Iowa, 68.

7. Whether a contract is rescinded for fraud within a reasonable time, has been held a mixed question of law and fact, which may be left to the jury. Whitcomb *v.* Denio, 52 Vt. 382.

8. 2 Schouler Pers. Prop. (2d Ed.) § 605, whence paragraph derived.

9. Clarke *v.* Dickson, El. B. & E. 148; Clarke *v.* Neufville, 46 Ga. 261; Matteson *v.* Holt, 45 Vt. 336; Story Sales (4th Ed.), §§ 385, 458a.

10. Gates *v.* Bliss, 43 Vt. 299.

11. Gates *v.* Bliss, 43 Vt. 299; and see McCulloch *v.* Scott, 13 B. Mon. (Ky.) 172.

12. Baker *v.* Lever, 67 N.Y. 304; Jackson *v.* Collins, 39 Mich. 557, 561; Bank of Woodland *v.* Hiatt, 58 Cal. 234; Kendall *v.* Wilson, 41 Vt. 567, 571. See 1 Benj. Sales (Corbin's Ed.), p. 592, § 674, note 25, and p. 595, § 677, note 31.

13. 1 Benj. Sales (Corbin's Ed.),p. 592,

must make an offer to return the goods, not only if they are of any value to the seller, but if their loss would be any injury to him.[1] But the vendee is not obliged to return the goods, or to offer to return them, if they prove to be utterly worthless.[2]

(*b*) *When Not Necessary.*—And, generally, in cases of rescission, a tender need not be made where the thing received is completely valueless, as in the instance of forged securities;[3] nor where the suit is against a third person who has possession, with notice, of the property sought to be reclaimed.[4] And depreciation of the property will not destroy the right to rescind,[5] though an offer to return property, made on Sunday, has been held insufficient.[6]

§ 674, note 26; and see, generally, following cases there cited: Perley *v.* Balch, 23 Pick. (Mass.) 283; Getchell *v.* Chase, 37 N. H. 106, 110; Weeks *v.* Robie, 42 N. H. 316, 322; Willoughby *v.* Moulton, 47 N. H. 205; Sanborn *v.* Batchelder, 51 N. H. 426, 434; Manahan *v.* Noyes, 52 N. H. 232; Downer *v.* Smith, 32 Vt. 1, 7; Farrell *v.* Corbett, 4 Hun (N. Y.), 128; Van Lieuw *v.* Johnson, 4 Hun (N. Y.), 415; Dows *v.* Griswold, 4 Hun (N. Y.), 550, 556; Jemison *v.* Woodruff, 34 Ala. 143; Bacon *v.* Brown, 4 Bibb (Ky.), 91; Shaw *v.* Barnhart, 17 Ind. 183; Rose *v.* Hurley, 39 Ind. 77; Haase *v.* Mitchell, 58 Ind. 213; Jennings *v.* Gage, 13 Ill. 610; Smith *v.* Bitterham, 98 Ill. 188; Merritt *v.* Robinson, 35 Ark. 483; Morrison *v.* Lods, 39 Cal. 381; Fitz *v.* Bynum, 55 Cal. 459.

1. See Perley *v.* Balch, 23 Pick. (Mass.) 283; Thayer *v.* Turner, 8 Metc. (Mass.) 552.

2. Poulton *v.* Lattimore, 9 Barn. & C. 259; Knapp *v.* Lee, 3 Pick. (Mass.) 457; Dickinson *v.* Hall, 14 Pick. (Mass.) 217; Perley *v.* Balch, 23 Pick. (Mass.) 283; Conner *v.* Henderson, 15 Mass. 322; Shepherd *v.* Temple, 3 N. H. 455; Becker *v.* Vroman, 13 Johns. (N.Y.) 302; Donelson *v.* Young, 1 Meigs (Tenn.), 155; Taft *v.* Wildman, 15 Ohio, 123. See Story Sales (4th Ed.), p. 526, § 427, note 3.

3. Smith *v.* Smirh, 30 Vt. 139; Brewster *v.* Burnett, 125 Mass. 68; Royce *v.* Watrous, 7 Daly (N. Y.), 87; 73 N. Y. 597; Dill *v.* O'Ferrell, 45 Ind. 268; Hess *v.* Young, 59 Ind. 379.

4. Stevens *v.* Austin, 1 Metc. (Mass.) 557.

5. Veazie *v.* Williams, 8 How. (U. S.) 134, 158; Neblett *v.* McFarland, 92 U. S. 101, 104.

6. Merritt *v.* Robinson, 35 Ark. 483. *Compare* Pence *v.* Langdon, 99 U. S. 578. See, for basis of paragraph, 1 Benj. Sales (Corbin's Ed.), p. 531, § 606, note 1, and pp. 592, 593, § 674, note 26.

**Unchanged Condition of Goods.**—The buyer cannot rescind the contract without offering, not only to return the goods, but to return them in as good condition as when they were obtained (subject to the use required in order to make proper trial), and as soon as he knows of their insufficiency. Story Sales (4th Ed.), p. 524, § 427. And hence he must not keep them for an unreasonable time, or make any improper use of them, as by successively bailing dye-stuff,—Hopkins *v.* Appleby, 1 Stark. 477;—or offer them for sale, or mingle them with his own property,—Campbell *v.* Fleming, 1 Ad. & E. 40;—or otherwise exercise any rights of ownership over them,—Towers *v.* Barrett, 1 T. R. 133; Fisher *v.* Samuda, 1 Camp. 190; Okell *v.* Smith, 1 Stark. 107; Groning *v.* Mendham, 1 Stark. 257; Milner *v.* Tucker, 1 Car. & P. 15; Cash *v.* Giles, 3 Car. & P. 407; Street *v.* Blay, 2 Barn. & Adol. 464; Grimaldi *v.* White, 4 Esp. 95; Parker *v.* Palmer, 4 Barn. & Ald. 387; Poulton *v.* Lattimore, 9 Barn. & C. 259; Thurston *v.* Blanchard, 22 Pick. (Mass.) 20; Kimball *v.* Cunningham, 4 Mass. 502; Boorman *v.* Johnson, 12 Wend. (N. Y.) 506; Sands *v.* Taylor, 5 Johns. (N. Y.) 395; Hoadley *v.* House, 32 Vt. 129. But see to the contrary, as to need of returning goods, Rutter *v.* Blake, 2 Har. & J. (Md.) 350; Patteshall *v.* Tanter, 3 Ad. & E. 103; Fielden *v.* Starkin, 1 H. Black. 17. And this ability to restore the thing purchased, unchanged in condition, is so indispensable to the exercise of the right to rescind that the purchaser cannot rescind if he has innocently changed that condition while ignorant of the fraud. West Bank *v.* Addie, L. R. 1 Sc. App. 145, as stated in Benjamin on Sales (4th Am. Ed.), p. 497, § 452, note (*b*). which is the basis of the foregoing matter, and here refers also to Mixer's Case, 4 De Gex & J. (Am. Ed.) 586, and note (1); Rawlins *v* Wickham, 3 De Gex & J. (Am. Ed.) 322;

**10. Ratification of Contract.**—(*a*) *Acts Affecting.*—A contract of sale induced by fraud is merely voidable, and not void; so that if, after discovery of the fraud, the buyer indicates his acquiescence in the sale,[1] by express words or by any unequivocal act, such as treating the property as his own,[2] his option will be determined, and he cannot afterwards reject the property;[3] and mere delay may also have the same effect,[4] if, while deliberating, the position of the vendor has been altered.[5] Nor will the result be affected by the buyer's subsequent discovery of a new and confirmatory incident in the fraud.[6]

**11. Affirmance of Sale.**—The defrauded buyer may, instead of rescinding the contract, stand to the bargain, even after he has discovered the fraud, and recover damages therefor, or recoup in damages, if sued by the vendor;[7] for the affirmance of a contract by the vendee, after discovery of the fraud, merely extinguishes his right to rescind, while his other remedies remain unimpaired.[8]

**12. Fraud and Warranty.**—(*a*) *Difference and Assimilation.*—Warranty differs from fraud in being founded on a contract, instead of being essentially a tort.[9] And while representations in a sale, sufficient of themselves to constitute a warranty, will not be deprived of that character by the fact that they were falsely and fraudulently made,[10] yet one who alleges fraud in a complaint cannot at the trial elect to prove breach of warranty merely, nor recover damages for *assumpsit* as when the suit was grounded in tort;[11] but the buyer may elect to sue in tort or contract, where

Weeks *v.* Robie, 42 N. H. 316; Butler *v.* Northumberland, 50 N. H. 39, 40; Sanborn *v.* Batchelder, 51 N. H. 426; Manahan *v.* Noyes, 52 N. H. 232; 2 Chitty Contr. (11th Am. Ed.) 1082, and cases cited in note *a*.

1. Acquiescence will waive the right to avoid. Kimball *v.* Cunningham, 4 Mass. 502; Downer *v.* Smith, 32 Vt. 1, 8; Weeks *v.* Robie, 42 N. H. 316; Leaming *v.* Wise, 73 Pa. St. 173; Thompson *v.* Lee, 31 Ala. 292, 303; Evans *v.* Montgomery, 50 Iowa, 325, 337; Grymes *v.* Sanders, 93 U. S. 55, 62.

2. Campbell *v.* Fleming, 1 Ad. & E. 40.

3. Ormes *v.* Beadel, 2 De Gex, F. & J. 336; Evans *v.* Montgomery, 50 Iowa, 425; 2 Chitty Contr. (11th Am. Ed.) 1037.

4. Gifford *v.* Carvill, 29 Cal. 592; Collins *v.* Townsend, 58 Cal. 608, 614; and see Herrin *v.* Libbey, 36 Me. 357; Willoughby *v.* Moulton, 47 N. H. 205; Burton *v.* Stewart, 3 Wend. (N. Y.) 239; Parmlee *v.* Adolph, 28 Ohio St. 10, 17; Hall *v.* Fullerton, 69 Ill. 448; Rawson *v.* Harger, 48 Iowa, 269, 274; Evans *v.* Montgomery, 50 Iowa, 325, 337; Blen *v.* Bear River, etc., Co., 20 Cal. 602.

5. Clough *v.* London, etc., R. Co., L. R. 7 Ex. 26; Whitcomb *v.* Denio, 52 Vt. 382, 390; Baker *v.* Lever, 67 N. Y. 304; and see Leaming *v.* Wise. 73 Pa. St. 173; Dayton *v.* Monroe, 47 Mich. 193.

6. Campbell *v.* Fleming, 1 Ad. & E. 40. But *compare* Pierce *v.* Wilson, 34 Ala. 596, 609. See, for basis of foregoing matter, Benjamin on Sales (4th Am. Ed.), p. 497, § 452; 1 Id. (Corbin's Ed.) p. 593, § 675.

7. Benjamin on Sales (4th Am. Ed.), p. 497, § 452, note (*a*), stating authorities as given in next note. See also Herefort *v.* Cramer, 7 Colo 483; Cavender *v.* Roberson, 33 Kan. 626; Newmark on Sales, § 358.

8. Herrin *v.* Libbey. 36 Me. 357; Whitney *v.* Allaire, 4 Denio (N. Y.). 454; Van Epps *v.* Harrison, 5 Hill (N. Y.), 68; Johnson *v.* Luxton, 9 Jones & S. (N. Y.) 481; Lexow *v.* Julian, 14 Hun (N. Y.), 152; Ramsey *v.* Warren, 17 Hun (N.Y.), 111; Krumm *v.* Beach, 25 Hun (N. Y.). 293; Miller *v.* Barber, 66 N. Y. 558; Weimer *v.* Clement, 37 Pa. St. 147; Peck *v.* Brewer, 48 Ill. 55; Faulck *v.* Eckart, 61 Ill. 318; Lilley *v.* Randall, 3 Cal. 298.

9. 2 Schouler Pers. Prop. (2d Ed.) § 606.

10. Carter *v.* Abbott, 33 Iowa, 180; Rose *v.* Hurley, 39 Ind. 77.

11. Ross *v.* Mather, 51 N. Y. 108, dis-

either remedy would be justified by the facts:[1] and in the practice of some States, a count for false misrepresentation may be joined with a count for breach of warranty.[2]

(*b*) *Scienter and Damages.*—The *scienter*, or knowledge of the material fact, which in actions upon the warranty need not appear,[3] must be distinctly shown in actions based on fraud;[4] while the damages usually recoverable for breach of warranty may be greatly enhanced in case fraud is set up and proved.[5]

**13. Damages.**—For fraudulent representations, the measure of damages is, in general, the difference between the actual and represented value.[6] But the buyer has also been permitted to recover, in a suitable case, consequential damages on the principle laid down for breach of contract,[7] and to bring his cross-action for fraud in affirmance of the sale, and recoup damages when the seller sues for the price;[8] so that when sued by the trustee of a bankrupt seller for the price, the buyer may set off a claim for unliquidated damages for a fraudulent misrepresentation inducing him to purchase.[9]

approving Williamson *v.* Allison, 2 East, 446.

**1.** 2 Schouler Pers. Prop. (2d Ed.) § 606, on which paragraph based, and which here refers also to Salem India-rubber Co. *v.* Adams, 23 Pick. (Mass.) 256; Kingsbury *v.* Taylor, 29 Me. 508; Hillman *v.* Wilcox, 30 Me. 170; Mahurin *v.* Harding, 28 N. H. 128; Pierce *v.* Carey, 37 Wis. 232; Benjamin on Sales (4th Am. Ed.), p. 1059, § 904, note (*n*).

**2.** Lassiter *v.* Ward, 11 Ired. (N. Car.) 443.

**3.** Williamson *v.* Allison, 2 East, 446; Bartholomew *v.* Bushnell, 20 Conn. 271; Carley *v.* Wilkins, 6 Barb. (N. Y.) 557; Tyre *v.* Cansey, 4 Harr. (Del.) 425; Benjamin on Sales (4th Am. Ed.), p. 1059, § 904, note (*n*), citing authorities given in note.

Nor need the knowledge be proved, even if charged in the declaration. House *v.* Fort, 4 Blackf. (Ind.) 293; Massie *v.* Crawford, 3 Mon. (Ky.) 218. See Ross *v.* Mather, 51 N. Y. 108.

**4.** Kingsbury *v.* Taylor, 29 Me. 508; Pike *v.* Fay, 101 Mass. 134; Bartholomew *v.* Bushnell, 20 Conn. 271; Clark *v.* Bamer, 2 Lans. (N.Y.) 67; Vail *v.* Strong, 10 Vt. 457.

**5.** 2 Schouler Pers. Prop. (2d Ed.) § 606, which is partial basis of paragraph; and see Mullett *v.* Mason, L. R. 1 Com. Pl. 558; Packard *v.* Black, 32 Vt. 9; Cate *v.* Cate, 50 N. H. 146; Jeffrey *v.* Bigelow, 13 Wend. (N. Y.) 518; Fultz *v.* Wicoff, 25 Ind. 321; Ruff *v.* Jarrett, 94 Ill. 475; Herring *v.* Skages, 62 Ala. 180; Benjamin on Sales (4th Am. Ed.), p. 1058, § 904; 2 id. (Corbin's Ed.) p. 1162, § 1362, note 15, making many citations given in paragraph.

**6.** Durst *v.* Burton, 2 Lans. (N.Y.) 137; Stiles *v.* White, 11 Metc. (Mass.) 356.

**7.** Walker *v.* Moore, 10 Barn. & C. 421; Fox *v.* Mackreth, 2 Cox, 322; Clunez *v.* Pezzy, 1 Camp. 8; Dimmick *v.* Lockwood, 10 Wend. (N. Y.) 142; Jeffrey *v.* Bigelow, 13 Wend. (N.Y.) 518. See Story Sales (4th Ed.), § 458; Long on Sales (Rand's Ed.), pp. 479, 480; Page *v.* Parker, 40 N. H. 47, 72.

**8.** Perley *v.* Balch, 23 Pick. (Mass.) 283; Star Glass Co. *v.* Morey, 108 Mass. 573; Garland *v.* Spencer, 46 Me. 528; Weimer *v.* Clement, 37 Pa. St. 147.

**9.** Jack *v.* Kipping, L. R. 9 Q. B. Div. 113, as stated in 2 Schouler Pers. Prop. (2d Ed.) § 606, whence foregoing matter derived. And not only will *assumpsit* lie, after rescission of a contract induced by fraud, for the recovery of the purchase-money, if it has been paid,—Whitcomb *v.* Denio, 52 Vt. 382; Wood *v.* Sheldon, 42 N. J. L. 421;—but the defence of fraud may be set up where the buyer of mining stock proving to be worthless is sued on a non-negotiable note given for the price, —Woodland *v.* Hiatt, 58 Cal. 234.

**General Rule.**—" The rule for the estimation of damages resulting from fraudulent representations in the sale of both real and personal property is the same. It is to ascertain the difference between the value of the property as it actually existed on the day of sale, and its value as it was represented to be." Herefort *v.* Cramer, 7 Colo. 483, quoting Wright *v.*

**14. Fraud of Agent.**—(*a*) *View Adverse to Principal's Liability.*—Where the buyer is defrauded by the seller's agent, as in a sale of stock by corporation officers, he may rescind the contract, by refusing to perform or otherwise, if he can restore the principal party to his former situation;[1] but according to various earlier English cases and some recent American authorities,[2] while action for deceit or other tort may be brought against the guilty agent personally, such suit cannot be maintained against the innocent principal.[3]

(*b*) *Rule Favoring Principal's Liability.*—Yet the prevalent rule in this country is that a principal who retains the benefits of the contract after learning of the fraud, instead of rescinding and making restitution, cannot claim to be an "innocent principal," even if he has not authorized the wrong or participated therein, and has not avowedly adopted the contract;[4] so that though not perhaps technically liable for deceit, he exposes himself to liability for all the legal consequences flowing from the fraud, so far as that fraud was an element in procuring the sale.[5] And the later *English* cases also hold that the principal in a sale is answerable for the fraud of his agent committed in the course of the principal's business and for the principal's benefit.[6]

(*c*) *Innocent Agent of Defrauding Principal.*—Where, on the other hand, a party instructs an agent, through whom he makes a sale, to represent goods as sound, knowing the contrary but suppressing the truth, the agent's innocence in making the statement does not shield the principal seller from liability in damages for the fraudulent misrepresentation.[7]

Roach, 57 Me. 600, which cites Stiles *v.* White, 11 Metc. (Mass.) 356; Sedg. Dam. (5th Ed.) 333, 655, 658, and referring also to Miller *v.* Barber, 66 N. Y. 568; Page *v.* Wells, 37 Mich. 415; and White *v.* Smith, 54 Iowa, 233.

1. 2 Schouler Pers. Prop. (2d Ed.) § 607, whence paragraph mainly derived.

2. Kennedy *v.* McKay, 43 N. J. L. 288; and see Krumm *v.* Beach, 25 Hun (N.Y.), 293; 86 N. Y. 311.

3. Western Bank *v.* Addie, L. R. 1 H. L. Cas. 146; Udell *v.* Atherton, 7 Hurl. & N. 172. But see Barrick *v.* Eng., etc., Bank, L. R. 2 Ex. 259; Oakes *v.* Turquand, L. R. 2 H. L. 325.

**Where Principal is Innocent Vendor.**—A principal is an innocent vendor where he neither authorized any representations to be made nor artifice to be used by his agents in effecting the sale of a horse which he knew to be lame and balky. Decker *v.* Fredericks, 47 N. J. L. 469, 472; referring to doctrine of Kennedy *v.* McKay, 14 Vroom (43 N. J. L.), 288. See statement in Newmark on Sales, § 354.

4. See 2 Schouler Pers. Prop. (2d Ed.) § 607.

5. Fogg *v.* Griffin, 2 Allen (Mass.), 1; Fitzsimmons *v.* Joslin, 21 Vt. 129; Concord Bank *v.* Gregg, 14 N. H. 331; New York, etc., R. Co. *v.* Shuyler, 34 N. Y. 30; Durst *v.* Burton, 47 N. Y. 167; Mundorff *v.* Wickersham, 63 Pa. St. 87; Crump *v.* U. S. Mining Co., 7 Gratt. (Va.) 352; McClellan *v.* Scott, 24 Wis. 81. See Story Agency, § 308; Schouler Dom. Rel. (2d Ed.) § 636; 2 Kent Com. 616, 621. Nor is there discrimination as against suits founded in the agent's tort. 2 Schouler Pers. Prop. (2d Ed.) § 607, which is basis of paragraph.

6. Mackay *v.* Commercial Bank, Law R. 5 P. C. 394; Swire *v.* Francis, Law R. 3 App. C. 106; Houldsworth *v.* City of Glasgow Bank, Law R. 5 App. C. 317; Weir *v.* Bell, 3 Ex. D. 238.

7. Ludgater *v.* Love, 44 L. T. (N. S.) 694, and cases cited.

Two joint owners of a chattel are held jointly liable for the fraudulent representations of one of them in negotiating a sale of the chattel on their joint behalf. White *v.* Sawyer, 16 Gray (Mass.), 586.

**III. BUYER'S FRAUD.** – (A) VARIETIES. — **1. Buyer's Fraudulent Devices.**—(*a*) *Extent of.*—The fraud which makes a sale voidable,[1] except against a further innocent purchaser,[2] may embrace any of the infinite phases of deceit.[3]

(*b*) *Instances of.*—These fraudulent devices may be the inducement to the contract; as, in the cases of misrepresentations of pecuniary standing,[4] forged recommendations,[5] and the like.[6] Nor does the felonious character of the original transaction, as where it amounts to the obtaining of goods by criminally false pretences, make any difference in the protection accorded to the innocent purchaser.[7] Or they may touch the consideration given for the property, as, where worthless securities are transferred for the price of goods,[8] or payment is made in fictitious bills,[9] checks which will be dishonored for want of funds,[10] counterfeit money,[11] or stolen property.[12] And so the fraud may arise from the intent of the vendee;[13] as, from a preconceived design not to pay for the goods, which, if distinctly shown, is, by the weight of American authority, deemed sufficient ground for the vendor to avoid the sale, although there were no false representations or fraudulent pretences.[14]

**2. Misrepresentations of Credit.**—(*a*) *Effect of.*—If a person, in the purchase of an article, makes false representations concerning his

1. See Somes *v.* Brewer, 2 Pick. (Mass.) 184; s. c., 13 Am. Dec. 406; Rowler *v.* Bigelow, 12 Pick. (Mass.) 307; s. c., 23 Am. Dec. 607.

2. See Old Dom. S. S. Co. *v.* Burckham, 31 Gratt. (Va.) 664; Barnard *v.* Campbell, 58 N. Y. 73; s. c., 17 Am. Rep. 208.

3. Grant on Fraud. Vendees; 7 South. Law Rev. (N. S.) 562.

4. Luckey *v.* Roberts, 25 Conn. 486; and see Devoe *v.* Brandt, 53 N. Y. 462; Ensign *v.* Hoffield (Pa.), 4 Atl. Rep. 189.

5. Mowrey *v.* Walsh, 8 Cow. (N. Y.) 238.

6. Grant on Fraud. Vendees; 7 South. Law Rev. (N. S.) 563, whence most of paragraph derived.

7. Cochran *v.* Stewart, 21 Minn. 435; Williams *v.* Given, 6 Gratt. (Va.) 268.

It is otherwise by statute in *England.* See Moyse *v.* Newington, Law R. 4 Q. B. Div. 32; s. c., 28 Eng. Rep. 674; Lindsay *v.* Cundy, Law R. 1 Q. B. Div. 357, affirmed as Cundy *v.* Lindsay, L. R. 3 App. Cas. 459; s. c., 24 Eng. Rep. 345; Keeper *v.* Harbeck, 3 Duer (N. Y.), 389.

8. Manning *v.* Albee, 11 Allen (Mass.), 520.

But the mere giving of securities which prove valueless, in payment for stock, does not constitute such a fraud as to prevent a recovery by a purchaser who brought action against the company for refusing to transfer the stock on its books. Protection Life Ins. Co. *v.* Osgood, 93 Ill. 69.

9. White *v.* Garden, 10 Com. B. 919; Cochran *v.* Stewart, 21 Minn. 435.

10. Hawse *v.* Crowe, Ryan & M. 414; Bristol *v.* Wilsmore, 1 Barn. & C. 514; Hodgson *v.* Barrett, 33 Ohio St. 63.

Or where a party is induced to exchange a certificate of deposit presumably good for a worthless certificate. Sallund *v.* Johnson, 27 Minn. 455.

11. Arnott *v.* Cloudas, 4 Dana (Ky.), 300; Williams *v.* Given, 6 Gratt. (Va.) 268; Green *v.* Humphrey, 50 Pa. St. 212.

12. Titcomb *v.* Wood, 38 Me. 563; Lee *v.* Portwood, 41 Miss. 109; Arendale *v.* Morgan, 5 Sneed (Tenn.), 703.

Or they may concern the amount paid for the goods; as, where the price is depressed by deterring bidders or combining to stifle competition at an auction sale. See Kearney *v.* Taylor, 15 How. (U. S.) 494; Phippen *v* Stickney, 3 Metc. (Mass.) 387; Fuller *v.* Abrahams, 3 B. & B. 116. Or by misleading the seller as to the existence of private information. Fox *v.* Mackreth, 2 Bro. Ch. 420; Turner *v.* Harvey, Jacob, 178; Bench *v.* Sheldon, 14 Barb. (N. Y.) 66.

13. Intent to dispose of large part of goods bought to secure a creditor as ground for rescission: see Wallmer *v.* Lehman (Ala.), 4 South. Rep. 643; as noted, 27 Cent. L. J. 395.

14. Stewart *v.* Emerson, 52 N. H. 301; as stated in 2 Schouler Pers. Prop. (2d Ed.) § 608, which also cites Donaldson *v.* Farwell, 93 U. S. 631.

solvency and means of payment, he acquires no title or right of possession to the thing bought,[1] and the vendor would be justified in retaking the property, provided he could do so without force;[2] or if he could not retake the property sold, he could either bring an action of *assumpsit* to recover its value, or an action on the case to recover damages for the deceit.[3]

(*b*) *Recommendation by Third Party.*—So, where the buyer obtains credit upon the verbal or written recommendation of some third party, such purchaser must be held responsible for the extent of the recommendation, the same as if he had made it himself;[4] and if it be false in material points, and this be known to the buyer, the seller may, upon obtaining knowledge of such falsehood, rescind the sale and recover the goods so long as they remain in the hands of the buyer or have not passed from him upon any new and valuable consideration.[5]

(*c*) *Communication of Representations.*—But to justify avoidance of the sale and retaking of the goods, the representations must have been made to the vendor, or for the purpose of being communicated to him, and not merely to a stranger, without any intent to influence the vendor.[6]

(*d*) *Writing Required to Charge Third Party.*—And under the Statute of Frauds, in order to charge a third party, the representation or assurance made by him must be in writing.[7]

(*e*) *Requisites of Representations.*—Where the representations are made by the buyer himself, or implied from his conduct, it is necessary that they should be false, and known by him to be such; that they concern a material point; and that they should be relied

1. Story on Sales (4th Ed.), § 172a, whence rest of paragraph also derived. See also Newmark on Sales, § 360, note 1, referring to following leading or recent decisions on this subject: Representations as to credit, see Lyon *v.* Briggs, 14 R. I. 222; s. c., 51 Am. Rep. 372; Genesee County Sav. Bank *v.* Mich. Barge Co., 52 Mich. 164. Buyer's false representations of ability to pay: Cain *v.* Dickinson, 60 N. H. 371. Representations through mercantile agency: Deickerhoff *v.* Brown, 21 (Md.) Reporter, 583, citing Victor *v.* Henlein, 33 Hun (N. Y.), 549. Concealing indebtedness: Newell *v.* Randall, 32 Minn. 171; s. c., 50 Am. Rep. 562. Failure to disclose extent of borrowed capital: Deickerhoff *v.* Brown, 21 (Md.) Reporter, 583.

2. Hodgedon *v.* Hubbard, 18 Vt. 504; Johnson *v.* Peck, 1 Wood & M. (U. S.) 334; Mason *v.* Crosby, 1 Wood & M. (U. S.) 342.

3. Hawkins *v.* Appleby, 2 Sandf. (N. Y.) 421.

Where the vendee of merchandise, in answer to a question by the vendor, falsely understates the amount of his debts, although he claims that he stated only his merchandise debts and not money loaned to him, the vendor is entitled to rescind the contract and take back the goods as against a mortgagee to whom they were conveyed to secure that loan money. Collins *v.* Cooley (N. J. Eq.), 14 Atl. Rep. 574; as noted, 27 Cent. L. J. 298.

4. Fitzsimmons *v.* Joslin, 21 Vt. 129; and see Story Sales (4th Ed.), § 165a, citing also Ladd *v.* Lord, 36 Vt. 194.

5. Fitzsimmons *v.* Joslin, 21 Vt. 129. Liability of third party for misrepresentations of credit: Story Contr. (5th Ed.) pp. 605, 608, § 642.

6. Hill *v.* Curley, 8 Hun (N. Y.), 636; Van Kleeck *v.* Leroy, 37 Barb. (N.Y.) 544.

7. See Browne Statute of Frauds, §§ 181 *et seq.*; Lyde *v.* Bernard, 1 Mees. & W. 101; Haslock *v.* Ferguson, 7 Ad. & E. 86; Devaux *v.* Steinkeller, 6 Bing. (N. Car.) 84; Wade *v.* Tatton, 25 L. J. C. P. 240. Consult full discussion of this subject, with review of cases, in Coop *v.* Churchman, 107 Ind. 67.

on by the seller, and be successful in inducing the sale:[1] and it is for the jury to determine whether the representations were intended and understood as statements of facts, so as to amount to a fraud, or as mere expressions of opinion or judgment.[2]

**3. Inducing Sale to Insolvent.**—(*a*) *Liability of Buyer for.*—Where the buyer's fraud consists in inducing by false representations a sale of goods to an insolvent third person, from whom the misrepresenting party afterwards obtains them, the seller may bring suit for the price directly against the latter party, as though he had bought the goods in his own name.[3] And the liability of the party so procuring the goods is based on the assumption either of a fraudulent conspiracy rendering each participant liable,[4] or that the nominal purchaser was only a secret agent for the misrepresenting party, who finally bought the goods;[5] yet it is held that even though the creditor of a firm in failing circumstances, who causes the third party to sell such firm, on his own misrepresentations, goods on credit, which he afterwards obtains in payment of his pre-existing debt, becomes directly liable for his fraud, still he cannot be treated as incapacitated from purchasing the goods.[6]

(*b*) *Merely False Statement as to Another's Solvency.*—But a merely false statement as to another person's solvency[7] falls within the protection of a section in Lord Tenterden's Act,[8] whereon are

1. See Gregory *v.* Schaenell, 55 Ind. 101.

2. Morse *v.* Shaw, 124 Mass. 59. *Compare* Morse *v.* Dearborn, 109 Mass. 593; Stubbs *v.* Johnson, 127 Mass. 219.

**Failure to Disclose Extent of Borrowed Capital.**—Mere failure, upon the part of a purchaser, to disclose the fact that the greater part of his capital in trade is borrowed money, is not such a false and fraudulent representation as will justify an attachment. Deickerhoff *v.* Brown, 21 (Md.) Reporter, 583.

**Statements to Mercantile Agency.** — Where the seller is informed of the financial standing of his customer by a mercantile agency, and no other representations are made, it is considered the more reasonable rule that it must be clearly shown, in order to render the sale fraudulent, that the accused buyer made the statements to the agency with the fraudulent intent to use such agency as an instrument in accomplishing a fraud upon his vendor or some other dealer. Deickerhoff *v.* Brown, 21 (Md.) Reporter, 583, citing Victor *v.* Henlein, 33 Hun (N. Y.), 549.

**Misleading Answers to Inquiries.** — A firm of dealers in raw hides shipped to tanners a carload of raw hides, in accordance with certain correspondence between them. Before the goods had left the custody of such firm, one of its members sent an agent to the place of business of the tanners. He saw one of the tanners and was informed by him that they were in good financial conditon, which he reported to his firm. Not being fully satisfied, the firm again sent the agent to inquire, and he on this occasion saw another member of the tannery concern, and, from the conversation, inferred that the goods would be paid for in cash: upon which report the goods were sent and received by the tanners. Yet three weeks later they failed, owing three times the amount of their assets. It was held that the goods had been obtained by fraudulent representations, and that the sellers could avoid the sale and reclaim the goods, even from execution creditors of the buyers. Ensign *v.* Hoffield (Pa.), 4 Atl. Rep. 189.

3. Biddle *v.* Levy, 1 Stark. 20; Hill *v.* Perrott, 3 Taunt. 274; and see Phelan *v.* Crosby, 2 Gill (Md.), 462; State *v.* Schulein, 45 Mo. 521.

4. 2 Schouler Pers. Prop. (2d Ed.) § 672.

5. Thomas *v.* Davenport, 2 Smith's L. C. 347; Meyer *v.* Amidon, 23 Hun (N. Y.), 553. See, for sources of paragraph, Benjamin Sales (4th Am. Ed.), p. 491, § 445; 1 id. (Corbin's Ed.) p. 586, § 666.

6. State *v.* Schulein, 45 Mo. 521.

7. 2 Schouler Pers. Prop. (2d. Ed.) § 612.

8. 9 Geo. IV. c. 14, § 6; and see Lyde *v.* Bernard, 1 Mees. & W. 101.

based similar statutes in some of the United States,[1] and which requires one's representations, concerning the character or credit of another party, to be in writing and signed by himself, in order to charge him personally.[2]

**4. Design Not to Pay for Goods.**—(*a*) *As Fraud Authorizing Avoidance of Sales.*—Even in the absence of fraudulent misrepresentations or false pretences,[3] the doctrine established by a preponderance of authority in the courts of this country[4] is that a purchase of goods by one who intends at the time not to pay for them[5] is such a fraud as will entitle the vendor to avoid the sale.[6]

1. See Browne Stat. Frauds, § 181, note 2; 1 Chitty Contr. (11th Am. Ed.) 581; 2 Kent Com. 488, 489, 490 n.

2. Haslock *v.* Ferguson, 7 Ad. & E. 86; and see Devaux *v.* Steinkeller, 6 Bing. (N. Car.) 84 (partner's representation of firm's credit); Wade *v.* Tatton, 25 L. J. C. P. 240 (both verbal and written representations); Benjamin Sales (4th Am. Ed.), p. 491, § 446; 1 id. (Corbin's Ed.) p. 586, § 667. Consult also Swan *v.* Phillips, 8 Ad. & E. 745; Turnley *v.* McGregor, 6 Maule & S. 46; Pasley *v*, Freeman, 3 T. R. 51. For extended discussion of subject, see Cook *v.* Churchman, 107 Ind. 67.

3. The existence of these elements in statements as to financial standing, made as inducements to the sale, render it still more readily impeachable as against the insolvent. See Hoffman *v.* Noble, 6 Metc. (Mass.) 68; s. c., 39 Am. Dec. 611; Jordan *v.* Parker, 56 Me. 557; 2 Schouler Pers. Prop. (2d. Ed.) § 608; Wilson *v.* White, 80 N. Car. 280.

4. Donaldson *v.* Farwell, 93 U. S. 631.

5. Consult also, on this subject, Lee *v.* Simmons, 65 Wis. 523; Carnahan *v.* Bailey, 28 Fed. Rep. 519; Hanchett *v.* Mansfield, 16 Ill. App. 407; Catlin *v.* Warren, 16 Ill. App. 418; Thompson *v.* Taylor, 15 Phila. (Pa.) 250.

6. **Maine.**—Burrill *v.* Stevens, 73 Me. 395; s. c., 40 Am. Rep. 366.

**Vermont.**—Redington *v.* Roberts, 25 Vt. 694, 695.

**New Hampshire.**—Stewart *v.* Emerson, 52 N. H. 301 (leading case).

**Massachusetts.**—Rowley *v.* Bigelow, 12 Pick. (Mass.) 307, 311, 312; s. c., 23 Am. Dec. 607; Wiggin *v.* Day, 9 Gray (Mass.), 97; Dow *v.* Sanborn, 3 Allen (Mass.), 181, 182; Kline *v.* Baker, 99 Mass. 253, 255.

**Connecticut.**—Thompson *v.* Rose, 16 Conn. 71, 81; Ayres *v.* French, 41 Conn. 142, 153, 155.

**Rhode Island.**—Mulliken *v.* Millar, 12 R. I. 296.

**New York.**—King *v.* Phillips, 8 Bosw. (N. Y.) 603; Ash *v.* Putnam, 1 Hill (N. Y.), 302; Cary *v.* Hotailing, 1 Hill (N. Y.), 311; Bigelow *v.* Heaton, 6 Hill (N. Y.) 44, Meacham *v.* Collignor, 7 Daly (N. Y.), 402; Byrd *v.* Hall, 2 Keyes (N. Y.), 646; Schufeldt *v.* Schnitzler, 21 Hun (N. Y.), 462; Mitchell *v.* Worden, 20 Barb. (N. Y.) 253; Buckley *v.* Archer, 21 Barb. (N. Y.) 585; Barnard *v.* Campbell, 65 Barb. (N. Y.) 286; Nichols *v.* Pinner, 18 N. Y. 295; Hall *v.* Naylor, 18 N. Y. 588, 589; Nichols *v.* Pinner, 23 N. Y. 264; Hennequin *v.* Naylor, 24 N. Y. 239; Paddon *v.* Taylor, 44 N. Y. 371; Devoe *v.* Brandt, 53 N. Y. 462; Wright *v.* Brown, 67 N. Y. 1.

**New Jersey.**—Stoutenborough *v.* Konkle, 15 N. J. Eq. 33.

**Delaware.**—Mears *v.* Waples, 3 Houst. (Del.) 581; 4 Houst. (Del.) 62.

**Maryland.**—Powell *v.* Bradlee, 9 Gill & J. (Md.) 220, 248, 278; Peters *v.* Hilles, 48 Md. 506; Dellone *v.* Hull, 47 Md. 112.

**Alabama.**—Loel *v.* Flash, 66 Ala. 526.

**North Carolina.**—See Wilson *v.* White, 80 N. Car. 280; Des Farges *v.* Pugh, 93 N. Car. 31; s. c., 53 Am. Rep. 446.

**Kentucky.**—Wood *v.* Yeatman, 15 B. Mon. (Ky.) 271; Lane *v.* Robinson, 18 B. Mon. (Ky.) 623.

**Tennessee.**—Baldwin *v.* Frankland, 8 Lea (Tenn.), 67; s. c., 41 Am. Rep. 630.

**Missouri.**—Bidault *v.* Wales, 19 Mo. 36; 20 Mo. 546; Fox *v.* Webster, 46 Mo. 181.

**Arkansas.**—Taylor *v.* Mississippi Mills (Ark.), 1 South. Rep. 283.

**Wisconsin.**—Rice *v.* Cutler, 17 Wis. 362.

**Ohio.**—Talcott *v.* Henderson, 31 Ohio St. 162.

**Iowa.**—Oswego Starch-factory *v.* Lendoum, 57 Iowa, 573; s. c., 42 Am. Rep. 53.

**Michigan.**—See Shipman *v.* Seymour, 40 Mich. 274, 283.

**Illinois.**—Allen *v.* Hartfield, 76 Ill. 358.

**Nevada.**—Klopenstein *v.* Mulcahy, 4 Nev. 296.

**California.**—Seligman *v.* Kalkman, 8 Cal. 207; Bell *v.* Ellis, 33 Cal. 620.

(*b*) *Concealment of Insolvency, etc., Insufficient.*—And such preconceived design [1] may appear from subsequent insolvency; [2] but the mere knowledge or concealment of this, and absence of any reasonable expectation of inability to pay, are insufficient as proof of the fraudulent intent.[3]

(*c*) *Fraudulent Conduct as Showing Intent.*—Yet though failure to disclose insolvency is not alone conclusive evidence of intent not to pay for property bought on credit,[4] such intent may be proved by evidence of other fraudulent purchases as part of the same scheme of fraud; or by the secreting of the property bought, as soon as obtained, or by turning it over to another creditor; or by evidence of admissions, or of subsequent conduct indicating a design to defraud; or by other circumstances.[5]

(*d*) *Intent Never to Pay.*—But to avoid a sale, the purchaser must intend never to pay for the goods;[6] so that it is not sufficient if he did not intend to pay for them at the time agreed upon.[7]

**Federal Courts.**—Parker *v.* Byrnes, 1 Low (U. S.), 539, 542; Biggs *v.* Barry, 2 Curt. U. S.) 262; Davis *v.* Stewart, 8 Fed. Rep. 803.

**Other Courts.**—Foot *v.* Jones, 1 Alb. L. J. 123; Ferguson *v.* Carrington, 9 Barn. & C. 59; Davis *v.* McWhirter, 40 Up. Can. Q. B. 598.

**Generally.**—See, for sources of statements, and authorities, Bump on Purch. by Insol.; 6 South. L. Rev. (N. S.) 481, 485; Benjamin Sales (4th Am. Ed.), § 440, note (*e*); 1 id. (Corbin's Ed.) p. 577, § 656, note 18; 2 Schouler Pers. Prop. (2d. Ed.) § 608; Grant on Fraud. Vendees, 7 South. L. Rev., (N. S.) 563–565; Story Sales (4th Ed.), § 176.

1. As to subsequently conceived determination, see Dows *v.* Rush, 28 Barb. (N. Y.) 157.

2. See Grant on Fraud. Vendees; 7 South. L. Rev. (N. S.) 564.

3. **Maine.**—Cross *v.* Peters, 1 Greenlf. (Me.) 378.

**Vermont.**—Hodgeden *v.* Hubbard, 18 Vt. 504; Redington *v.* Roberts, 25 Vt. 694, 695.

**Massachusetts.**—Rowley *v.* Bigelow, 12 Pick. (Mass.) 307.

**Connecticut.**—Morrill *v.* Blackman, 42 Conn. 324.

**New York.**—Andrew *v.* Dieterich, 14 Wend. (N. Y.) 31; Lloyd *v.* Brewster, 4 Paige (N. Y.), 537; Ellison *v.* Bernstein, 60 How. Pr. (N. Y.) 145; Johnson *v.* Monell, 2 Abb. App. Dec. (N. Y.) 470; Fish *v.* Payne, 7 Hun (N. Y.), 586; Byrd *v.* Hall, 2 Keyes (N. Y.), 646; Fish *v.* Payne, 14 N. Y. 586; Hennequin *v.* Naylor, 24 N. Y. 139.

**Pennsylvania.**—Rodman *v.* Thalheimer, 75 Pa. St., and cases cited; Biddle *v.* Black, 99 Pa. St. 380.

**Delaware.**—Mears *v.* Waples, 3 Houst. (Del.) 581; 4 Houst. (Del.) 62.

**Maryland.**—Powell *v.* Bradlee, 9 Gill & J. (Md.) 220.

**Mississippi.**—See Klein *v.* Rector, 57 Miss. 538.

**Ohio.**—Talcott *v.* Henderson, 31 Ohio St. 162.

**Michigan.**—See Shipman *v.* Seymour, 40 Mich. 274.

**Wisconsin.**—Garbutt *v.* Bank, 22 Wis. 384.

**Federal Courts.**—Biggs *v.* Barry, 2 Curt. (U. S.) 259; Conyers *v.* Ennis, 2 Mason (U. S.), 236.

**Other Courts.**—See Lockwood *v.* Doane, Ch. L. N. May 19, 1883, p. 295; *Ex parte* Whittaker (*In re* Shackleton), L. R. 10 Ch. 446; Ontario Copper Co. *v.* Lightning-rod Co., 29 Up. Can. C. P. 491.

**Generally.**—See, for source of statements, and authorities, Benjamin Sales, (4th Am. Ed.), p. 483, § 440, note (*e*).

4. See Burrill *v.* Stevens, 73 Me. 395; Redington *v.* Roberts, 25 Vt. 686; Schuyfeldt *v.* Schutzler, 21 Hun (N. Y.), 462, Nichols *v.* Pinner, 18 N. Y. 295; Wright *v.* Brown, 67 Hun (N. Y.), 4; Belding *v.* Frankland, 8 Lea (Tenn.), 67; Talcott *v.* Henderson, 31 Ohio St. 162; Garbutt *v.* Bank, 22 Wis. 384; Klopenstein *v.* Mulcahy, 4 Nev. 296.

5. Wiggin *v.* Day, 9 Gray (Mass.), 97; Jordan *v.* Osgood, 109 Mass. 462; Parker *v.* Byrnes, 1 Low. (U. S.) 539, 542; Davis *v.* McWhirter, 8 Up. Can. Q. B. 598; 2 Kent Com. 484. See, for the source of paragraph, 1 Benj. Sales (Corbin's Ed.), p. 577, § 656, note 18.

6. Story Sales (4th Ed.), § 176, whence paragraph derived.

7. Bidault *v.* Wales, 20 Mo. 546; Mitchell *v.* Worden, 20 Barb. (N. Y.)

(*e*) *Need of Deceptive Artifice Sometimes Declared.*—And some of the cases hold that there must be "artifice intended and fitted to deceive," [1] and that the buyer's intention not to pay for the goods, and concealment of his own insolvency, do not constitute such a fraud as will make the sale void.[2]

253; Buckley *v.* Artcher, 21 Barb. (N. Y.) 585.

1. Smith *v.* Smith, 21 Pa. St. 367.

2. Smith *v.* Smith, 21 Pa. St. 367; Backentoss *v.* Speicer, 31 Pa. St. 324. And see Hamer *v.* Fisher, 58 Pa. St. 453; Rodman *v.* Thalheimer, 75 Pa. St. 232; Kline *v.* Baker, 99 Mass. 253; Wilson *v.* White, 80 N. Car. 280; Bell *v.* Ellis, 33 Cal. 620. See, for source of paragraph, Benjamin on Sales (4th Am. Ed.), p. 482, § 440, note (*e*); 1 id. (Corbin's Ed.) p. 576, § 656, note 18.

**Various Statements of Doctrines.**—The foregoing propositions reduce the law on this subject to as definite a form as seem possible. How various are the ways in which the doctrines upon this subject are stated will be seen by the following abstracts of opinions in successive leading cases.

According to *Burrill* v. *Stevens*, 73 *Me.* 395; *s. c.*, 40 *Am. Rep.* 366, it is the admitted doctrine of the *English* cases, and is sustained by most of the courts in the *United States* (See Stewart *v.* Emerson, 52 N. H. 301, discussing the question at length, and reviewing many authorities), that the obtaining of property by a purchase upon credit, with an intention, of the purchaser, never to pay for the same, constitutes such a fraud as will entitle the seller to avoid the sale, although there are no fraudulent misrepresentations or false pretences. (Otherwise in *Pennsylvania*: Smith *v.* Smith, 21 Pa. St. 367; Backentoss *v.* Speicher, 31 Pa. St. 324.) But to constitute the fraud there must be a preconceived design not to pay for the goods; and a mere intent not to pay for the goods when the debt becomes due is not enough. A design not to pay according to the contract is not equivalent to an intention never to pay for the goods, and does not amount to an intention to defraud the seller outright, although it may be evidence of such a contemplated fraud.

Nor, according to the italicized case, is it enough to constitute the fraud that the buyer is insolvent, and knows himself to be so, at the time of the sale, and conceals the fact from the seller, and has not reasonable expectations that he can never pay the debt, though some courts have gone so far as to denominate that a fraud which will avoid the sale; and it has been so held in bankruptcy courts, in some instances, as between a vendor and the assignee of the vendee. See Davis *v.* Stewart, 3 McCrary (U. S.), 174; s. c., 8 Fed. Rep. 803. But it would not generally be enough to prove the fraud, for the inquiry is not whether the vendee had reasonable grounds to believe he would pay the debt at some time and in some way, but whether he intended in point of fact not to pay it.

Nor, furthermore, according to Burrill *v.* Stevens, 73 Me. 395; s. c., 40 Am. Rep. 366, is it enough that after the purchase the vendee conceives the design, and forms a purpose not to pay for the goods, and successfully avoids paying for them; but the only intent that renders the sale fraudulent is a positive and predetermined intention never to pay for the goods, entertained and acted upon at the time of going through the form of a sale. See Cross *v.* Peters, 1 Greenlf. (Me.) 378; Biggs *v.* Barry, 2 Curt. (U. S.) 259; Parker *v.* Byrnes, 1 How. (U. S.) 539; Rowley *v.* Bigelow, 12 Pick. (Mass.) 307; 23 Am. Dec. 607.

According to *Belding* v. *Frankland*, 8 *Lea* (*Tenn.*), 67; *s. c.*, 41 *Am. Rep.* 630, it is now settled, both in *England* and *America*, that if a person purchase goods with the fraudulent intention of not paying for them, the vendor may disaffirm the sale, although the goods be delivered, and revest the property in him and recover them by action against the vendee. See Load *v.* Green, 15 Mees. & W. 216; Stewart *v.* Emerson, 52 N. H. 301; Kline *v.* Baker, 99 Mass. 253; Cary *v.* Hotailing, 1 Hill (N. Y.), 311. But the mere insolvency of the purchaser, without more, will not suffice to avoid the sale. See *Ex parte* Whittaker, L. R. 10 Ch. App. 446; Nichols *v.* Pinner, 18 N. Y. 300; Rowley *v.* Bigelow, 12 Pick. (Mass.) 307; s. c., 23 Am. Dec. 607. Yet, according to the italicized case (*supra*), the fraudulent intent may be deduced from the facts and circumstances, without any actual representations; full knowledge by the purchaser, of his insolvency, being always a controlling element. See Hennequin *v.* Naylor, 24 N. Y. 139; Thompson *v.* Rose, 16 Conn. 71; Talcott *v.* Henderson, 31 Ohio, 162; s. c., 27 Am. Rep. 501. And while silence is not fraud, concealment of insolvency, with no reasonable expectation of paying, has

**5. Proof of Design Not to Pay.**—(*a*) *Direct Evidence Rarely Attainable.*—The fraudulent purpose of the vendee not to pay for the goods can rarely be proved by direct evidence, such as declara-

sometimes been held to render a sale fraudulent. Davis *v.* Stewart, 3 McCrary (U. S.), 174; s. c., 8 Fed. Rep. 803; 24 Alb. L. J 615. So that the vendor is entitled to recover the property from the vendee's voluntary assignee. *Ibid.* But see Burrill *v.* Stevens, 73 Me. 395; s. c., 40 Am. Rep. 366. 367. So, according to the same italicized case, it seems to have been even held that the receipt of goods by an insolvent, with design not to pay for them, would avoid the sale, although he had no such design when he ordered them. Pike *v.* Wieting, 49 Barb. (N. Y.) 314. [But see, *contra*, Burrill *v.* Stevens, 73 Me. 395; s. e., 40 Am. Rep. 365, 368, and cases cited.]

According to *Des Farges* v. *Pugh*, 93 *N. Car.* 31; *s. c.*, 53 *Am. Rep.* 446, it is well settled that property in goods does not pass by a sale which the vendor has been fraudulently induced to make, unless he declines to assert his right to disaffirm the contract; in which case the property does not pass: for the sale is voidable, and the vendor has his election to sue for the price, or bring trover or detinue under the former practice, or claim and delivery under the present system in vogue in many of the States. See Donaldson *v.* Farmer, 93 U. S. 61; Wilson *v.* White, 80 N. Car. 280. But it is held, apparently in accordance with the current of authority, that the mere fact that the buyer of property is, to his own knowledge, insolvent at the time of his purchase, and conceals that fact from the vendor, is not ground for relief to the vendor, though it is otherwise if he actually misleads the vendor. See Morrison *v.* Shuster, 1 Mackey (D. C.), 190; Kelsey *v.* Harrison, 29 Kan. 143; Talcott *v.* Henderson, 31 Ohio St. 162; s. c., 27 Am. Rep. 501. "Mere insolvency cannot be treated as fraud; there must be fraudulent intent:" Bigelow Fraud, pp. 16, 37). And the principle to be deduced from the authorities is said, in the italicized case, to be, that, in addition to the mere fact of concealment of his insolvency on the part of the buyer, he must be shown to have done some such act attending the sale, or soon thereafter, as shows that at the time of the sale he had the preconceived design of not paying for the goods (see Wilson *v.* White, 80 N. Car. 280), or to have practised some deceit which threw the vendor off his guard and induced him to part with his goods.

According to *Lee* v. *Simmons*, 65 *Wis.* 523, the doctrine is declared to be now established, by a preponderance of authority, that a party not intending to pay, who induces the owner to sell him goods on credit by fraudulently concealing his insolvency and his intent not to pay for them, is guilty of a fraud, which entitles the vendor, if no innocent party has acquired an interest in them, to disaffirm the contract and recover the goods. Donaldson *v.* Farwell, 93 U. S. 631; Des Farges *v.* Pugh, 93 N. Car. 31; s.c., 53 Am. Rep. 446, 448; Brower *v.* Goodyer, 88 Ind. 572; and see Byrd *v.* Hall, 2 Keyes (N. Y.), 647; Johnson *v.* Morrell, 2 Keyes, (N. Y.), 655; Noble *v.* Adams, 7 Tannt. 59; Kilby *v.* Wilson, Ryan & M. 178; Bristol *v.* Wilsmore, 1 Barn. & C. 513; Stewart *v.* Emerson, 52 N. H. 301; also Henshaw *v.* Bryant, 4 Scam. (Ill.) 97; Patton *v.* Campbell, 70 Ill. 72; Donaldson *v.* Farwell, 5 Biss. (U. S.) 451; Seligman *v.* Kalkman, 8 Cal. 207; Bidault *v.* Wales, 19 Mo. 36; Dow *v.* Sanborn, 3 Allen (Mass.), 181; O'Donald *v.* Constant, 82 Ind. 212. In other words, a purchase on credit, with a preconceived design not on the buyer's part, formed at or before the purchase, not to pay for the thing bought, constitutes a species of fraudulent concealment. 2 Pom. Eq. Jur. § 906; Brower *v.* Goodyer, 88 Ind. 572. And, according to the italicized case, where a person orders goods, knowing himself to be insolvent, without disclosing his insolvency, and with the preconceived purpose of not paying for the goods at all or, at most, only a very small per cent, and with the further preconceived purpose of having them swell his assets for the benefit of those he intends to make his preferred creditors, the purchase is fraudulent, and the vendor, upon discovering the fraud, may rescind the contract, and take the goods as against the vendee.

**Failure to Disclose Known Insolvency.**—Although where personal property is purchased on credit, with the intent then existing not to pay for it, the title does not pass to the vendee. Yet a purchase of goods on credit, by a merchant who knows himself to be insolvent, but who intends to pay, and has reasonable expectations of being able to pay, is not fraudulent, although the fact of the insolvency is not known or disclosed to the vendor. Carnahan *v.* Bailey, 28 Fed. Rep. 619.

tions to that effect; but it is usually established by circumstances from which the jury may infer the intent.[1]

(*b*) *False Rating.*—In regard to the circumstance which has been relied on as indicating fraud, that the purchasers suffered a false rating of their financial condition and resources, calculated to give them credit, to be carried on the books of a mercantile agency, such conduct on the part of an insolvent purchaser, who three days after receiving the goods made an assignment for the benefit of creditors, has been held sufficient to warrant a verdict against the assignee.[2] But where it is not shown that the purchasers had any connection with the making or publication of the statement, or that it was false when it was made, although such evidence, along with other *indicia* of fraud, is proper to be submitted to a jury, yet if it stood alone it would hardly be sufficient to justify a verdict for the vendor.[3]

**6. Remedies Where Design Not to Pay.**—(*a*) *Disaffirmance and Reclamation.*—A debt is created by fraud where one, intending not to pay for goods, induces their owner to sell them on credit; and the purchaser in such case takes only a defeasible title. And on discovery of the fraud, the vendor may disaffirm the contract and reclaim the goods, provided they have not passed into the hands of *bona fide* purchasers.[4]

(*b*) *Dishonest Intention as Prerequisite.*—But to avoid the sale on the ground of fraud, a dishonest intention must exist at the time in the mind of the vendee—an actual intention to cheat, or to do an act, the necessary result of which will be to defraud the seller.[5]

(*c*) *Possession Recoverable Against Assignee for Creditors.*—If the vendor may recover possession of the goods against the vendee, when they are purchased with the fraudulent intention of not paying for them, he has the same right against an assignee under a voluntary assignment for the benefit of creditors who stand in the shoes of the assignor.[6]

1. Taylor *v.* Mississippi Mills (Ark.), 1 So. Rep. 283.

2. Lindauer *v.* Hay, 61 Iowa, 663.

3. Taylor *v.* Mississippi Mills, 1 So. Rep. 283, with note 285. For in this class of actions, according to this case, the final test is a preconceived intention to get the goods without paying for them, and not a mere legal or constructive fraud. But the court, sitting in the place of a jury, is authorized to find that the buyers never intended payment where it was further admitted that they were at the time of the purchase hopelessly insolvent, and could not have expected to pay for the goods; that they represented themselves to be solvent, when in fact they owed over twenty thousand dollars, and falsely asserted that they were in the habit of discounting their bills before maturity, and stipulated for the privilege of so discounting the bills given on the particular purchase.

4. Taylor *v.* Mississippi Mills (Ark.), 1 So. Rep. 283.

5. Taylor *v.* Mississippi Mills, 1 So. Rep. 283, citing *Ex parte* Whittaker, L. R. 10 Ch. App. 446; Donaldson *v.* Farwell, 93 U. S. 631; Biggs *v.* Barry, 2 Curt. (U. S.) 259; Stewart *v.* Emerson, 52 N. H. 301; Hoffman *v.* Noble, 6 Metc. (Mass.) 68; Cross *v.* Peters, 1 Greenl. (Me.) 376; Nichols *v.* Pinner, 18 N. Y. 295; Merritt *v.* Robinson, 35 Ark. 483; Bridgeford *v.* Adams, 45 Ark. 136.

6. Belding *v.* Frankland, 8 Lea (Tenn.), 67; s. c., 41 Am. Rep. 630, 632, referring to Nichols *v.* Michael, 23 N. Y. 264, and Davis *v.* Stewart, 3 McCrary (U. S.), 174; s. c., 8 Fed. Rep. 803. For, according to

**7. Depressing Price.**—(*a*) *Concealment of Facts Enhancing Price.*—The courts have frequently to deal with the concealment, by the buyer, of facts within his knowledge, which would enhance the price of the commodity or property sold; as, the suppression of a rise in foreign markets or a treaty of peace;[1] of the existence of a valuable mine on the land sold;[2] of a death which decidedly increased the value of a reversionary interest;[3] or of a fatal illness which had a like effect on an insurance policy.[4]

(*b*) *Such Concealment Not of Itself Fraudulent.*—And it is generally held that such mere concealment will not of itself make the sale fraudulent, and therefore liable to avoidance; for the buyer is not bound to disclose information which the seller could as well have obtained,[5] unless a special trust were either expressly or impliedly reposed in the former by the latter.[6]

(*c*) *Misleading Words or Deceitful Conduct.*—But it is laid down that the least word dropped to mislead the seller will justify the avoidance of the sale.[7] And in any case where the buyer procures an article at an unreasonably low price, his actual misrepresentations and deceitful conduct inducing that result are likely to vitiate the transaction at the instance of the injured party;[8] as where the buyer, though under no duty to disclose his knowledge that lost sheep had been advertised by the finder, said that he did not suppose the seller would ever find them:[9] though a buyer has

the case first cited, the rule is general, in absence of a statute or fixed statutory policy to the contrary, that a title or equity good against a party will be equally good against an assignee under an assignment to secure pre-existing debts (see Turner *v.* Pettigrew, 6 Humph. [Tenn.] 440; Brown *v.* Van Lier, 7 Humph. [Tenn.] 239; Farwell *v.* Heelit, Amb. 726; Haggerty *v.* Palmer, 6 Johns. Ch. [N. Y.] 437; Keeler *v.* Field, 1 Paige [N.Y.], 312; Harding *v.* Metz, 1 Tenn. Ch. 610); and, *a fortiori*, against an assignee by operation of law, as an assignee in bankruptcy, who in this class of cases has been held to take only the defeasible title of the bankrupt purchaser, and must yield to the vendor upon a prompt disaffirmance of the contract (Donaldson *v.* Farwell, 93 U. S. 631).

1. See Laidlaw *v.* Organ, 2 Wheat. (U. S.) 178 (leading case).

2. Fox *v.* Mackreth, 2 Bro. Ch. 420. See Story Sales (4th Ed.), p. 163, § 174, so citing authorities in paragraph, and also referring here to Harris *v.* Tyler, 24 Pa. St. 347; 2 Kent Com. 484, 490.

3. Turner *v.* Harvey, Jacob, 178.

4. Jones *v.* Franklin, 2 Moody & R. 348. See Camp. Sales, 512; and *compare* Story Contr. (5th Ed.) p. 608, § 643, and pp. 611, 613, § 646.

5. Fox *v.* Mackreth, 2 Bro. Ch. 420; Kintzing *v.* McElrath, 5 Pa. St. 467; Harris *v.* Tyson, 24 Pa. St. 347; Butler's Appeal, 26 Pa. St. 63; Livingston *v.* Peru Iron Co., 2 Paige (N. Y.), 390; Smith *v.* Beatty, 2 Ired. Eq. (N. Car.) 456; also cited in Benj. Sales (4th Am. Ed.), pp. 492, –495, §§ 447–451, which refers also to Laidlaw *v.* Organ, 2 Wheat. (U. S.) 178; Stevens *v.* Fuller, 8 N. H. 463; Howard *v.* Gould, 28 Vt. 523; Paddock *v.* Strobridge, 29 Vt. 470; Fisher *v.* Budlong, 10 R. I. 525, 527, 528; Brown *v.* Montgomery, 20 N. Y. 287; 2 Kent Com. (12th Ed.) 483.

6. Story Sales (4th Ed.), § 175; and see Dambmann *v.* Schulting, 75 N. Y. 55, 62, cited in 1 Benjamin on Sales (Corbin's Ed.), pp. 587, 588, § 668, note 24. *Compare*, according to that authority, Carpenter *v.* Danforth, 52 Barb. (N. Y.) 581; Board of Tippecanoe Co. *v.* Reynolds, 44 Ind. 509; Fisher *v.* Budlong, 10 R. I. 525.

7. Turner *v.* Harvey, Jacob, 178; and see Laidlaw *v.* Organ, 2 Wheat. (U. S.) 178.

8. 2 Schouler Pers. Prop. (2d Ed.) § 611; and see Story Sales, § 175; 2 Kent Com. 482, n.

9. Bench *v.* Shelden, 14 Barb. (N. Y.) 66; 1 Benjamin Sales (Corbin's Ed.), p. 588, § 668, note 24, referring also to Prescott *v.* Wright, 4 Gray (Mass.), 461,

been held not liable to an action of deceit for misrepresenting the seller's chance of sale, or the probability of his getting a better price than that offered.[1]

**8. Stifling Competition.**—(*a*) *As Rendering Auction Sale Fraudulent.*—Upon the same principle that the employment of puffers at auction sales, to enhance the price of goods and delude the purchaser, is discouraged, so, on the other hand, an auction sale is deemed fraudulent, and not binding, if the purchaser, by his conduct, deter others from bidding;[2] as where the buyer dissuades others from bidding against him, on the pretence that he has been wronged by the seller, and that the article put up is rightfully his own;[3] or effects the same object by falsely representing himself as looking after the interests of the owners;[4] or by exaggerating the extent of the encumbrances on the property.[5]

**9. Combinations of Bidders.**—(*a*) *Discountenanced by the Law.*—The law generally discountenances combinations or agreements on the part of purchasers, the objects and effects of which are to chill a sale at auction and stifle competition,[6] by denying, to any party to such agreement or combination, any benefit from the sale.[7]

464; Howard *v.* Gould, 28 Vt. 523; Paul *v.* Hadley, 23 Barb. (N. Y.) 521; Smith *v.* Countryman, 39 N. Y. 655, 670, 681; Dambmann *v.* Schulting, 75 N. Y. 55, 62; Hadley *v.* Clinton Co., 13 Ohio St. 502; s. c., 82 Am. Dec. 454.

1. Vernon *v.* Keys, 12 East, 632; 4 Taunt. 488. See Story Sales (4th Ed.), p. 161, 172; and explanation in Camp. Sales, 513.

2. See, for sources of statements and authorities on this subject, Benjamin on Sales (4th Am. Ed.), p. 490, § 444, and note (*c*); 1 id. (Corbin's Ed.) p. 585, § 666, note 21; Freeman's Ex. § 297; 2 Schouler Pers. Prop. (2d Ed.) § 639.

3. Fuller *v.* Abrahams, 3 B. & P. 116; and see Raynes *v.* Crowder, 14 Up. Can. C. P. 111; People *v.* Lord, 6 Hun (N.Y.), 390; Jackson *v.* Morter, 82 Pa. St. 291.

4. Slater *v.* Maxwell. 6 Wall. (U. S.) 268; Cocks *v.* Izard, 7 Wall. (U. S.) 559.

5. Jackson *v.* Morter, 82 Pa. St. 291.

**Further Illustrations.** — And though where the buyer at an execution sale procured the goods at an undervaluation by truthfully representing that he was buying for the benefit of the debtor, it was held that the sale could not be avoided on that account;—Dick *v.* Cooper, 24 Pa. 217;—yet an agreement by one, for a consideration, not to bid against the buyer, whereby the latter obtains the property at a reduced price, is fraudulent;—Morris *v.* Woodward, 25 N. J. Eq. 32;—Gardiner *v.* Morse, 25 Me. 140; Slingluff *v.* Eckel, 24 Pa. St. 472;—and a sale has been avoided because the buyer had persuaded a rival bidder to withdraw his bid out of favor;—Gardiner *v.* Tucker, 6 R. I. 551.

6. See AUCTIONS AND AUCTIONEERS, 1 Am. & Eng. Encyc. of Law, 997; consult also James *v.* Fulerad, 5 Tex. 512; s. c., 55 Am. Dec. 743; Mitchell *v.* Smith, 4 Dall. (Pa.) 269; s. c., 2 Am. Dec. 417; Farr. *v.* Simms, Rich. Eq. (S. Car.) 122; s. c., 24 Am. Dec. 346.

7. Newman *v.* Meek, 1 Freem. Ch. 441; Rodgers *v.* Rodgers, 13 Grant (Ont.), 143; Gardiner *v.* Morse, 25 Me. 140; Pike *v.* Balch, 38 Me. 302; Phipper *v.* Stickney, 3 Metc. (Mass.) 387, 388; Fenner *v.* Tucker, 6 R. I. 551; Jones *v.* Caswell, 3 Johns. Cas. (N. Y.) 29; s. c., 2 Am. Dec. 134; Troup *v.* Wood, 4 Johns. Ch. (N. Y.) 228, 254; Doolin *v.* Ward, 6 Johns. (N. Y.) 194; Wilbur *v.* Howe, 8 Johns. (N. Y.) 444; Thompson *v.* Davies, 13 Johns. (N. Y.) 112; Meech *v.* Bennett, Hill & D. (N. Y.) 192; Trust *v.* Delaplaine; 3 E. D. Smith (N. Y.), 219; Gulick *v.* Ward, 5 Halst. (N. J.) 87; Dick *v.* Lindsay, 2 Grant Cas. (Pa.) 431; Slingluff *v.* Eckel, 24 Pa. St. 472; Woods *v.* Hudson, 5 Munf. (Va.) 423; Martin *v.* Rantell, 5 Rich. (3 Car.) 541; Hamilton *v.* Hamilton, 2 Rich. Eq. (S. Car.) 355; s. c., 46 Am. Dec. 58; Johnson *v.* La Motte, 6 Rich. Eq. (S. Car.) 347; Haynes *v.* Crutchfield, 7 Ala. 189; Dudley *v.* Little, 2 Ohio, 505; s. c., 15 Am. Dec. 575; Wooton *v.* Hinkle, 20 Mo. 290; Hook *v.* Turner, 22 Mo. 333; Loyd *v.* Malone, 23 Ill. 43; s. c., 74 Am. Dec. 179; Pratt *v.* Oliver, 1 McLean (U. S.),

(*b*) *When Rule Inapplicable.*—But this rule does not apply to sales made to a buyer,[1] in behalf of an association of bidders shown to be formed for honest and just purposes,[2] not conflicting with the rights and interests of the seller;[3] as in the case of a union of several persons, formed by reason of the magnitude of the sale[4] or because the quantity offered to a single bidder exceeds the amount which any one individual might wish to purchase on his own account;[5] and the purpose of the arrangement is, not to depress the obtainable price below the fair market value of the property offered for sale, but to enable each of the parties to purchase a part of the property instead of the whole lot;[6] or where auction property is bought in for co-owners, partners, or a company, and the parties authorize one person to bid for it on behalf of all.[7]

**10. Chilling Bids at Judicial Sales.**—(*a*) *As Ground for Vacating Sale.*—The principles governing devices and combinations to prevent competition apply not only to ordinary auction sales, but also to execution and other judicial sales.[8] And whatever the mode by which the bidding is stifled or the price depressed, the sale will be vacated on proper proceedings instituted for that purpose;[9] as, on motion, or, better, by bill in equity.[10]

295; Cocks *v.* Izard, 7 Wall. (U. S.) 559. See, for source of text, and authorities, Benjamin on Sales (4th Am. Ed.), p. 490, § 444 note (*c*); and *compare* Story Sales (4th Ed.), § 484; Brown Sales, § 484; Chitty Contr. (11th Ed.) § 320, notes; 1 Story Eq. Jur. § 293.

1. According to the works cited in the notes, and the authorities therein collected.

2. Smith *v.* Greenlee, 2 Dev. (N. Car.) 126; s. c., 18 Am. Dec. 564; and Phippen *v.* Stickney, 3 Metc. (Mass.) 387. *Compare Re* Careews's Estate, 26 Beav. 187; 4 Jur. (N. S.) 1290; Gallin *v.* Emas, 1 Colly. C. C. 244; 8 Jur. 507.

3. Story Sales (4th Ed.), § 484.

4. Smith *v.* Greenlee, 2 Dev. (N. Car.) 126; s. c., 18 Am. Dec. 564.

5. Smith *v.* Greenlee, 2 Dev. (N. Car.) 126; s. c., 18 Am. Dec. 564.

6. Phippen *v.* Stickney, 3 Metc. (Mass.) 387, 388; Benj. on Sales (4th Am Ed.), p. 490, § 444, note (*c*); and see 1 id. (Corbin's Ed.) p. 585, § 666, note 21; Story Sales (4th Ed.), § 484; 2 Schouler Pers. Prop. (2d Ed.) § 639; Chitty Contr. (11th Ed.) 320, 321, notes; 1 Sugden Vend. & P. (7th Am. Ed.) 16, and notes; Gardiner *v.* Morse, 25 Me. 140; Dexter *v.* Shepherd, 117 Mass. 480; Wolfe *v.* Luyster; 1 Hall (N. Y.), 146; Maire *v.* Garrison, 83 N. Y. 14; Nat. Bank *v.* Sprague, 20 N. J. Eq. 159; Small *v.* Jones, 1 W. & S. (Pa.) 128; Dick *v.* Cooper, 24 Pa. St. 217; McMinn *v.* Phipps, 3 Sneed (Tenn), 196; Allen *v.* Stephanes, 18 Tex. 658; Switzer *v.* Skiles, 3 Gilm. (Ill.) 529; s. c., 44 Am. Dec. 723; Jenkins *v.* Frink, 30 Cal. 586; Kearney *v.* Taylor, 15 How (U. S. 494, 519–521; Slater *v.* Maxwell, 6 Wall. (U. S.) 268; Crooke *v.* Dairs, 5 Grant (Ont.), 317; Brown *v.* Fisher, 9 Grant (Ont.) 423.

7. Nat. Bank *v.* Sprague, 20 N. J. Eq. 159; 2 Schouler Pers. Prop. (2d Ed. § 639.

8. See Freeman on Ex. § 293, whence this and next paragraph derived.

9. Jones *v.* Portsmouth, etc., R. Co., 32 N. H. 544; Hamburg M. Co. *v.* Edsall, 1 Halst. Ch. (N. J.) 249; Edsall *v.* Hamburg M. Co., 1 Halst. Ch. (N. J.) 658; Carson *v.* Law, 2 Rich. Eq. (S. Car.) 296; Hamilton *v.* Hamilton, 2 Rich. Eq. (S. Car.) 355; s. c., 46 Am. Dec. 58; Pattison *v.* Joselyn, 43 Miss. 373; Mills *v.* Rogers, 2 Litt. (Ky.) 217; Stockton *v.* Owlings, Litt. Sel. Cas. (Ky.) 256; Martin *v.* Blight, 4 J. J. Marsh. (Ky.) 491; Seymour *v.* M. & C. T. Co., 10 Ohio, 476; Wooton *v.* Hinkle, 20 Mo. 290; Stewart *v.* Nelson, 25 Mo. 309; Miltenberger *v.* Morrison, 39 Mo. 71; Stewart *v.* Severance, 43 Mo. 322; Griffith *v.* Judge, 49 Mo. 536; White Crow *v.* White King, 3 Kan. 276; Vantrees *v.* Hyatt, 5 Ind. 487; Forelander *v.* Hinks, 6 Ind. 448; Arnold *v.* Cord, 16 Ind. 177; Fleming *v.* Hutchinson, 36 Iowa, 519.

10. Slater *v.* Maxwell, 6 Wall. (U. S.) 268; Cocks *v.* Izard, 7 Wall. (U. S.) 559; Dudley *v.* Little, 2 Ohio, 504.

(*b*) *Title of Purchaser at Law.*—And though in several States a purchase obtained by the prevention of competition can be asserted at law, and the document drawn in pursuance thereof is regarded as a valid transfer of the legal title,[1] yet the majority of the decisions sustain the view that the title of the fraudulent purchaser is void in his hands, and, hence, capable of being resisted not less successfully at law than in equity.[2]

(*c*) *Combination of Capital Authorized.*—But there may be, in the case of execution sales, a conjunction of circumstances in which competition would be diminished, rather than increased, by prohibiting the aggregation of capital;[3] and the union of two or more persons in purchasing at an execution sale seems never to be condemned unless the court conceives that its object is to prevent competition rather than to engage in the joint prosecution of an honorable business enterprise.[4]

(B) PROTECTION OF BONA FIDE PURCHASERS.—**1. Doctrine on Subject.**—Where the party disposing of goods has obtained his title thereto by fraudulent representations or artifices, he can nevertheless make a valid sale of the goods to a *bona fide* purchaser for a valuable consideration, so as to deprive the original owner of his power to reclaim them.[5]

**2. Prevalence of Exemption.**—This protection of the *bona fide* purchaser from a vendee who has effected a sale by fraudulent devices or with fraudulent designs[6] is widely and almost universally recognized in this country.[7]

1. Love *v.* Powell, 5 Ala. 58; Castillo *v.* Thompson, 9 Ala. 937; Myers *v.* Sanders, 9 Dana (Ky.), 507; Taylor *v.* King, 6 Munf. (Va.) 366; Hill *v.* Whitfield, 3 Jones (N. Car.) L. 320.

2. Jones *v.* P. C. R. Co., 32 N. H. 554; Crary *v.* Sprague, 12 Wend. (N. Y.) 41; Hogg *v.* Wilkins, 1 Grant Cas. (Pa.) 409; Abbey *v.* Dewey, 25 Pa. St. 416; Underwood *v.* McVeigh, 23 Gratt. (Va.) 409; Martin *v.* Ranlett, 5 Rich. (S. Car.) 541; Brodie *v.* Seagraves, 1 Taylor (N. Car.), 146; Kerner *v.* Allen, 31 Iowa, 578; Fleming *v.* Hutchinson, 36 Iowa, 519; Aldrich *v.* Maitland, 4 Mich. 205.

3. Freeman on Ex. § 297, whence paragraph derived.

4. Brisbane *v.* Adams, 3 N. Y. 129; Bradley *v.* Kingsley, 43 N.Y. 534; Young *v.* Snyder, 3 Grant Cas. (Pa.) 151; Buckner *v.* Chambliss, 30 Ga. 652; Young *v.* Smith, 10 B. Mon. (Ky.) 293; Stewart *v.* Severance, 43 Mo. 322; Switzer *v.* Skiles, 3 Gilm. (Ill.) 529; s. c., 44 Am. Dec. 723; Jenkins *v.* Frink, 30 Cal. 586.

5. Story Sales (4th Ed.), § 200, citing following cases: Hollingsworth *v.* Napier, 3 Caines Cas. (N. Y.) 182; Mowry *v.* Walsh, 8 Cowen (N.Y.), 238; Wheelwright *v.* Depeyster, 1 Johns. (N. Y.) 471; Root *v.* French, 13 Wend. (N. Y.) 570; s. c., 28 Am. Dec. 428; Trott *v.* Warren, 2 Fairf. (Me.) 227; Cross *v.* Peters, 1 Greenl. (Me.) 376; Buffington *v.* Gerrish, 15 Mass. 156; Conyers *v.* Ennis, 2 Mas. (U. S.) 236; Biddle *v.* Levy, 1 Stark. 20; Hill *v.* Perrott, 3 Taunt. 274; Noble *v.* Adams, 7 Taunt. 59; Smedley *v.* Gooden, 3 Maule & S. 191; Bradbury *v.* Anderton, Mees. & Ros. 490.

6. See "Conversion by Purchase," 15 Am. L. Rev. 387; Benj. Sales (4th Am. Ed.), § 433, note (*i*); 1 id. (Corbin's Ed.) § 649, note 15; 2 Schouler Pers. Prop. (2d Ed.) § 609; Newmark on Sales, § 204.

7. **Maine.**—Neal *v.* Williams, 18 Me. 391; Ditson *v.* Randall, 33 Me. 202; Titcomb *v.* Wood, 38 Me. 563; Lee *v.* Kimball, 45 Me. 172, criticised in 58 N. Y. 77.

**New Hampshire.**—Kingsbury *v.* Smith, 13 N. H. 109; Willoughby *v.* Moulton, 47 N. H. 205.

**Connecticut.**—Thompson *v.* Rose, 16 Conn. 71; Lynch *v.* Beecher, 38 Conn. 490; Williamson *v.* Russel, 39 Conn. 406.

**Massachusetts.**—Rowley *v.* Bigelow, 12 Pick. (Mass.) 307; s. c., 23 Am. Dec. 607; Hoffman *v.* Noble, 6 Metc. (Mass.) 68; s. c., 39 Am. Dec. 611; Easter *v.* Allen,

**3. Grounds of Exemption.**—The exemption is generally placed on the ground that the fraudulent purchaser has a voidable or defeasible title, which, before its annulment by the vendor, the defrauding buyer can transmit to a *bona fide* purchaser who is without knowledge or notice of the fraud, as a title unimpeachable for an infirmity with which such innocent third party is not concerned ;[1] and less frequently it is based on the estoppel of the original vendor to dispute the apparent ownership or authority he has conferred by a sale on the vendee who has defrauded him, and the superior equity of the honest purchaser over such original vendor who has enabled the fraud to be committed.[2] But in many of the cases, particularly the earlier ones, the protection of the *bona fide*

8 Allen (Mass.), 7; Moody *v.* Blake, 117 Mass. 23; s. c., 19 Am. Rep. 394.

**New York.**—Mowrey *v.* Walsh, 8 Cowen (N. Y.), 238; Root *v.* French, 13 Wend. (N. Y.) 570; s. c., 28 Am. Dec. 428; Andrews *v.* Dietrich, 14 Wend. (N. Y.) 34; Saltus *v.* Everett, 20 Wend. (N. Y.) 267; s. c., 32 Am. Dec. 541; Hoffman *v.* Carew, 22 Wend. (N. Y.) 318; Caldwell *v.* Bartlett, 3 Duer (N. Y.), 341; Keyser *v.* Harbeck, 3 Duer (N. Y.), 373; Beaver *v.* Lane, 6 Duer (N. Y.), 232; Malcom *v.* Loveridge, 13 Barb. (N. Y.) 372; Hunter *v.* Hudson River, etc., Co., 20 Barb. (N. Y.) 493; Dows *v.* Rush, 28 Barb. (N. Y.) 157; Stevens *v.* Hyde, 32 Barb. (N. Y.) 171; Dows *v.* Greene, 32 Barb. (N. Y.) 490; Craig *v.* Marsh, 2 Daly (N. Y.), 61; Meacham *v.* Collignon, 7 Daly (N. Y.), 402; Williamson *v.* Mason, 12 Hun (N. Y.), 97; West Transp. Co. *v.* Marshall, 4 Abb. App. Dec. (N. Y.) 575; Holbrook *v.* Yose, 6 Bosw. (N. Y.) 104, 111; Williams *v.* Birch, 6 Bosw. (N. Y.) 299; Smith *v.* Lynes, 1 Seld. (N. Y.) 46; Ash *v.* Putnam, 1 Hill (N. Y.), 307; Fassett *v.* Smith, 23 N. Y. 252; Crocker *v.* Crocker, 31 N. Y. 507; Paddon *v.* Taylor, 44 N. Y. 371; Devoe *v.* Brandt, 53 N. Y. 462; Barnard *v.* Campbell, 65 Barb. (N. Y.) 286; s. c., 58 N. Y. 73; 17 Am. Rep. 208; Stevens *v.* Brennan, 79 N. Y. 254.

**Pennsylvania.**—Thompson *v.* Lee, 3 W. & S. (Pa.) 479; Sinclair *v.* Healey, 40 Pa. St. 417.

**Delaware.**—Mears *v.* Waples, 3 Houst. (Del.) 581; 4 Houst. (Del.) 62, following Hall *v.* Hinks, 21 Md. 406, 418.

**Maryland.**—Powell *v.* Bradlee, 9 Gill & S. (Md.) 220; Hall *v.* Hinks, 21 Md. 406.

**Virginia.**—Williams *v.* Given, 6 Gratt. (Va.) 268; Wickham *v.* Martin, 13 Gratt. (Va.) 427; Old Dom. S. S. Co. *v.* Burckhardt, 31 Gratt. (Va.) 664.

**Georgia.**—Nicol *v.* Crittenden, 55 Ga. 497; Kern *v.* Thurber, 57 Ga. 162.

**Mississippi.**—Lee *v.* Portwood, 41 Miss. 109.

**Alabama.** — Larkins *v.* Eckwurzel, 42 Ala. 322.

**Tennessee.** — Arendale *v.* Morgan, 5 Sneed (Tenn.), 703; Hawkins *v.* Davis, 5 J. Baxter (Tenn.), 698; 8 J. Baxter (Tenn.), 506; Gage *v.* Epperson, 2 Head (Tenn.), 669.

**Kentucky.**—Arnott *v.* Cloudas, 4 Dana (Ky.), 300; Wood *v.* Yeatman, 15 B. Mon. (Ky.) 271.

**Ohio.**—Dean *v.* Yates, 22 Ohio St. 388; Combes *v.* Chandler, 33 Ohio, 178.

**Illinois.**—Jennings *v.* Gage, 13 Ill. 110; Brundagee *v.* Camp, 21 Ill. 230; Chicago Dock Co. *v.* Foster, 48 Ill. 507; Ohio, etc., R. Co. *v.* Kerr, 49 Ill. 458; Van Duzer *v.* Allen, 90 Ill. 499; Holland *v.* Swain, 94 Ill. 154; McNab *v.* Young, 81 Ill. 11; Henson *v.* Westcott, 82 Ill. 224; Dickson *v.* Evans, 84 Ill. 451.

**Indiana.**—Sharp *v.* Jones, 18 Ind. 314; s. c., 81 Am. Dec. 359; Bell *v.* Cafferty, 21 Ind. 411; Claflin *v.* Cottman, 77 Ind. 58.

**Minnesota.** — Cochran *v.* Stewart, 21 Minn. 435.

**Iowa.** — Hutchinson *v.* Watkins, 17 Iowa. 475.

**Wisconsin.**—Shufeldt *v.* Pease, 16 Wis. 689; Rice *v.* Cutler, 17 Wis. 362; Singer Co. *v.* Sammons, 49 Wis. 316.

**Kansas.**—Wilson *v.* Fuller, 9 Kan. 76.

**Missouri.**—Wineland *v.* Coonce, 5 Mo. 296.

**California.**—Paige *v.* O'Neal, 12 Cal. 483; Sargent *v.* Sturm, 23 Cal. 359; s. c., 83 Am. Dec. 118.

1. See Rowley *v.* Bigelow, 12 Pick. (Mass.) 307; s. c., 23 Am. Dec. 607; Old Dom. S. S. Co. *v.* Burckhardt, 31 Gratt. (Va.) 664; Story Sales (4th Ed.), § 200.

2. See Barnard *v.* Campbell, 65 Barb. (N. Y.) 286; s. c., 55 N. Y. 456; 58 N. Y. 73; 17 Am. Rep. 208; Newmark on Sales, § 203.

purchaser of chattels from a fraudulent vendee is simply asserted, without any definite ground being given therefor:[1] while in others it is treated as an exception to ordinary rules, and the transfer to the fraudulent vendee is declared to be void, so that he has no title to convey; but yet the innocent purchaser is said to acquire the property, because he has parted with value and is ignorant of the fraud.[2]

1. Trott *v.* Warren, 11 Me. 227; Sparrow *v.* Chesley, 19 Me. 79; Ditson *v.* Randall, 33 Me. 202; West. Transp. Co. *v.* Marshall, 4 Abb. App. Dec. (N. Y.) 575; Thompson *v.* Lee, 3 W. & S. (Pa.) 479; Sinclair *v.* Healey, 40 Pa. St. 417; Powell *v.* Bradlee, 9 Gill & J. (Md.) 220; Gibson *v.* Moore, 7 B. Mon. (Ky.) 92; Chicago Dock Co. *v.* Foster, 48 Ill. 507; Ohio, etc., Co. *v.* Kerr, 49 Ill. 458; Sargent *v.* Sturm, 23 Cal. 359; s. c., 83 Am. Dec. 118.

2. Mowrey *v.* Walsh, 8 Cowen (N. Y.), 238; Root *v.* French, 13 Wend. (N. Y.) 570; Hall *v.* Hinks, 21 Md. 417. See Grant on Fraud. Vendees, 7 South. L. Rev. (N. S.) 560; Newmark on Sales, § 204.

**Fraudulent Buyer's Want of Title.**— The idea that the fraudulent buyer gains no title to the goods in the first place (controverted in Newmark on Sales, § 200) seems to pervade many of the American cases, even those of recent date. Thus, we find it but lately laid down that the "rule is well settled that, when a sale of personal property is procured by fraud, the ownership of the property is not changed unless the seller in some way afterwards ratified the sale." Amer *v.* Hightower, 70 Cal. 440.

In support of this position it is said: "In Ash *v.* Putnam, 1 Hill (N. Y.), 303, Judge Cowen states the rule as follows: 'When a sale is procured by fraud, no title passes to the vendee. The vendor still retains his right in the goods unless, after discovering the fraud, he assented to and ratified the act of sale positively, or by such delay in reclaiming the goods as would authorize a jury to infer assent;' and he cites Root *v.* French, 13 Wend. (N. Y.) 570; s. c., 28 Am. Dec. 428. The same doctrine is reasserted in Cary *v.* Hotailing and in Olmsted *v.* Hotailing, 1 Hill (N. Y.), 311, 317. In Massen *v.* Bovet, 1 Denio (N. Y.), 73, Judge Beardsley says: 'Fraud destroys the contract *ab initio*, and the fraudulent purchaser has no title;' citing Chit. Cont. (Amer. Ed. 1842) 406, 678–681. See also Hodgeden *v.* Hubbard, 18 Vt. 504.

In Thurston *v.* Blanchard, 22 Pick. (Mass.) 18, Shaw, C. J., held that 'If a purchase of goods is effected by means of fraudulent representations on the part of the vendee, the vendor may maintain trover for the goods against the vendee, without a previous demand.' In Benjamin on Sales (2d Ed.), 342, speaking of a sale which the buyer was fraudulently induced to make, it is said: 'This contract is *voidable* at the election of the vendor, not void *ab initio*.' It follows therefore that the vendor may affirm and enforce it, or may rescind it. He may sue in *assumpsit* for the price, and this affirms the contract; or he may sue in trover for the goods and their value, and this disaffirms it. [This statement of the law is authority for a very different view from that taken by the court.]

In Butler *v.* Collins, 12 Cal. 457, which was an action to recover damages of the defendant, as for a trespass and conversion of goods, this court reviewed the authorities, and announced the law to be that 'The ownership of goods is not changed when the claim to such ownership is based upon a fraudulent contract.' It was held that when the defendant, intending to deceive the plaintiff, got from him a bill of sale for goods under the representations that it was only to serve as a temporary security for the compliance by the plaintiff with an engagement to furnish certain securities on previous indebtedness, and at this time intended to refuse to receive such security, or give plaintiff the advantage of such new contract, the possession of the goods thus obtained was fraudulent and the bill of sale void. 'It is as much a trespass,' the court said, 'to take possession under such circumstances as without color of contract.' And it was further said: 'This being so, the civil remedies of the party defrauded are clear, viz., trover or replevin in the *detinet*, or trespass or replevin in the *cepit*, at his election. The testimony offered and rejected was to the effect that the bill of sale and the possession of the property were obtained from the plaintiff by fraud and misrepresentations; and that as soon as he discovered the fraud, he repudiated and rescinded the sale. This was competent testimony and should have been received.'

**4. Doctrine of the Voidable or Defeasible Title.**—(*a*) *In this Country.*—In this country, the rule is well settled, in many of the States,[1] that when there is a contract of sale, and an actual delivery pursuant to it, a title to the property passes, but voidable and defeasible as between the vendor and vendee if obtained by false and fraudulent representations;[2] and the vendor can therefore reclaim his property as against the vendee, or any other person standing upon his title, but not against a *bona fide* purchaser without notice of the fraud.[3]

*Grounds of Doctrine.*—The ground of exception in favor of the latter is[4] that he purchased of one having a possession under a contract of sale, and with a title to the property, though defeasible and voidable as between the original parties, on the ground of fraud;[5] but as the second purchaser takes without fraud, and without notice of the fraud of the first purchaser, he takes a title freed from the taint of fraud.[6]

It would seem that in both the cases the question would be whether the party obtaining the bill of sale was a fraudulent bailee or a fraudulent purchaser in the full sense. See Alexander *v.* Swackhamer, 105 Ind. 81; s. c., 55 Am. Rep. 180; Neff *v.* Landis, 110 Pa. St. 204.

It may be profitable to compare with the foregoing opinion the following intermediate view of this subject: 'Undoubtedly the law is, where a party has received any valuable consideration upon the sale of property, he cannot rescind the contract for fraud without first returning to or offering to return to the purchaser the consideration received, whatever it may be. The title of the fraudulent purchaser is subject to be divested at the election of the seller within any reasonable time after the fraud is discovered. When a sale is thus rescinded for fraud, it is as though no sale of the property had been made; and in that event the original taking will be regarded as a tortious taking without the consent of the vendor, and the title at once becomes reinvested in him as though it had never been divested. Until the contract is rescinded, it is obvious that both the title and right of possession remain in the fraudulent purchaser.' Doane *v.* Lockwood, 115 Ill. 490.

1. See Newmark on Sales, § 203.

2. Rowley *v.* Bigelow, 12 Pick. (Mass.) 307; s. c., 23 Am. Dec. 607; "Conversion by Purchase," 15 Am. L. Rev. 386.

3. Rowley *v.* Bigelow, 12 Pick. (Mass.) 307; s. c., 23 Am. Dec. 607 (1832); and see Kingsbury *v.* Smith, 13 N. H. 109 (1842); Williams *v.* Given, 6 Gratt. (Va.) 268 (1849); Keyser *v.* Harbuck, 3 Duer (N. Y.), 373 (1854); Titcomb *v.* Wood, 38 Me. 563 (1854); Mears *v.* Waples, 3 Houst. (Del.) 581 (1868); 4 Houst. (Del.) 62 (1869); Old Dom. S. S. Co. *v.* Burckhardt, 31 Gratt. (Va.) 604 (1879).

The doctrine of the voidable or defeasible title of the first fraudulent purchaser has also been recognized or adopted in Neal *v.* Williams, 18 Me. 391; Willoughby *v.* Moulton, 47 N. H. 205; Thompson *v.* Rose, 16 Conn. 71; Williamson *v.* Russel, 39 Conn. 406; Kern *v.* Thurber, 57 Ga. 172; Lee *v.* Portwood, 41 Miss. 109; Arendale *v.* Morgan, 5 Sneed (Tenn.), 703; Hawkins *v.* Davis, 5 Baxt. (Tenn.) 698; Wilson *v.* Fuller, 9 Kan. 76; Sharp *v.* Jones, 18 Ind. 314; s. c., 81 Am. Dec. 359; Shufeldt *v.* Pease, 16 Wis. 689; Rice *v.* Cutler, 17 Wis. 362; Cochran *v.* Stewart, 21 Minn. 435; Paige *v.* O'Neal, 12 Cal. 483. Consult Grant on Fraud. Vendees; 7 South. L. Rev. (N. S.) 551, 552; Story Sales (4th Ed.). § 200; Smith Mer. Law, 629.

4. See Newmark on Sales, § 203.

5. Rowley *v.* Bigelow, 12 Pick. (Mass.) 307; s. c., 23 Am. Dec. 607; Grant on Fraud. Vendees, 7 South. L. Rev. (N. S.) 550. The case was one of a fraudulent purchase of corn, in contemplation of insolvency. See, further, Caldwell *v.* Bartlett, 3 Duer (N. Y.), 341; Keyser *v.* Harbeck, 3 Duer (N. Y.), 373; Stevens *v.* Hyde, 32 Barb. (N. Y.) 180; Paddon *v.* Taylor, 44 N. Y. 371.

6. Rowley *v.* Bigelow, 12 Pick. (Mass.) 307; s. c., 23 Am. Dec. 607; and see Hoffman *v.* Noble, 6 Metc. (Mass.) 68; s. c., 39 Am. Dec. 611 (1843); Moody *v.* Blake, 117 Mass. 13; s. c., 19 Am. Rep. 394 (1874, 1875); Grant on Fraud. Vendees, 7 South. L. Rev. (N. S.) 551. *Compare* Thurston *v.* Blanchard, 22 Pick.

(*b*) *In England.*—So, in England, the result of the authorities is declared to be[1] that, whenever goods are obtained from their owner by fraud, we must distinguish whether the facts show a sale to the party guilty of the fraud, or a mere delivery of the goods into his possession, induced by fraudulent devices on his part.[2] In other words, we must ask whether the owner intended to transfer both the property in the goods and the possession of them, to the defrauding person, or to turn over nothing more than the bare possession.[3] In the former case, and in that alone, there is a contract of sale, however fraudulent the device, and the property passes.[4]

(*c*) *Seller's Option to Affirm or Disaffirm.*—This contract is voidable at the election of the vendor, not void *ab initio*;[5] and the vendor may therefore affirm and enforce it by suing in *assumpsit* for the price,[6] or he may disaffirm and rescind it by suing in trover for the goods or their value.[7]

(*d*) *Transfer to Innocent Third Person.*—But in the meantime, and until he elects, if his vendee transfer the goods in whole or in part, whether the transfer be of the general or of the special property in them, to an innocent third person for a valuable consideration, the rights of the original vendor will be subordinate to those of such innocent third person.[8]

**5. Doctrine of Estoppel and Superior Equity.**—(*a*) *Statement of.*—In *New York*, and in some other States, the predominant view is that the innocent purchaser from a fraudulent buyer has not a perfect title, but a superior equity to the original vendor, based on the estoppel of the latter from setting up his rights after having conferred on his vendee the apparent ownership of the goods.[9]

(*b*) *Apparent Ownership of Original Buyer.*—This principle is founded upon the idea that, where one trusts a party with the possession and apparent ownership[10] of property, voluntarily parting

(Mass.) 18; George *v.* Kimball, 24 Pick. (Mass.) 241.

1. Benjamin on Sales (4th Am. Ed.), § 433; and see Old Dom. S. S. Co. *v.* Burckhardt, 31 Gratt. (Va.) 664.

2. See Barker *v.* Dinsmore, 72 Pa. St. 427; s. c., 13 Am. Rep. 679; Alexander *v.* Swackhamer, 105 Ind. 81; s. c., 55 Am. Rep. 180.

3. Benjamin on Sales (4th Am. Ed.), § 433; Grant on Fraud. Vendees, 7 South. L. Rev. (N. S.) 557. See also, to same effect, Neff *v.* Landis, 110 Pa. St. 204.

4. See Rowley *v.* Bigelow, 12 Pick. (Mass.) 312; s. c., 23 Am. Dec. 607.

5. See Titcomb *v.* Wood, 38 Me. 561–563; Rowley *v.* Bigelow, 12 Pick. (Mass.) 307, 312; s. c., 23 Am. Dec. 607; Hewitt *v.* Clark, 91 Ill. 605.

6. See Butler *v.* Hildreth, 5 Metc. (Mass.) 49; Stewart *v.* Emerson, 52 N. H. 301.

7. But see Kellogg *v.* Turpie, 2 Bradwell (Ill.), 55.

8. Benjamin on Sales (4th Am. Ed.), § 433; Old Dom. S. S. Co. *v.* Burckhardt, 31 Gratt. (Va.) 664; Grant on Fraud. Vendees, 7 South. L. Rev. (N. S.) 557. See also, to same effect, Neff *v.* Landis, 110 Pa. St. 204.

9. Barnard *v.* Campbell, 65 Barb. (N. Y.) 286; affirmed on appeal, 55 N. Y. 456; motion for reargument denied, 58 N. Y. 73; s. c., 17 Am. Rep. 201. See Grant on Fraud. Vendees; 7 South. L. Rev. (N. S.) 558; Combes *v.* Chandler, 33 Ohio St. 184; Cochran *v.* Stewart, 21 Minn. 435.

10. On the effect of apparent authority, see Saltus *v.* Everett, 20 Wend. (N. Y.) 279; s. c., 32 Am. Dec. 541; Malcom *v.* Loveridge, 13 Barb. (N. Y.) 372; Dows *v.* Rush, 28 Barb. (N. Y.) 157; Craig *v.* Marsh, 2 Daly (N. Y.), 61; Combes *v.* Chandler, 33 Ohio St. 184.

with the possession in the form of a sale, he puts it in the power of his vendor to deceive an innocent purchaser, and therefore he cannot enforce his rights against one whom that party has deceived,[1] provided the latter has acted all the while in entire good faith, and paid his money for the property.[2]

(*c*) *One of Two Innocent Persons, etc.*—In such instances, it is considered, the equitable rule applies,[3] that, where one of two innocent persons must suffer loss by reason of the fraud or deceit of another, the loss should fall upon him by whose act or omission the wrongdoer has been enabled to commit the fraud.[4]

(*d*) *Exceptions to Rule as to Taking only Title Transferred.*—And while it is the general rule of law that a purchaser of property takes only such title or interest as his seller possesses and is authorized to transfer,[5] yet there are exceptions to this rule in the cases of negotiable paper, bills of lading transferred by consignees, and sales in market overt in England, as well as against those who have voluntarily conferred upon others the usual evidences of ownership of property, or seeming power to deal with it and dispose of it.[6]

(*e*) *Nature of Estoppel Raised.*—In the last-named instance the law raises an equitable estoppel[7] against the vendor, and declares that the apparent title or authority which he has caused to exist shall, so far as concerns persons acting upon the faith of it and parting with value thereon, stand for and be regarded as the real title and authority.[8]

(*f*) *Superior Equity of Honest Purchaser.*—In such a case, the superior equity[9] of the honest purchaser is allowed to overcome the legal rights of the owner, and it is said to be the only instance

1. Barnard *v.* Campbell, 65 Barb. (N. Y.) 290, 291, citing the charge of the judge at the trial.

2. Barnard *v.* Campbell, 65 Barb. (N. Y.) 290, 291. See Grant on Fraud. Vendees, 7 South. L. Rev. (N. S.) 558.

3. See Moyce *v.* Newington, L. R. 4 Q. B. D. 32; s. c., 28 Eng. Rep. 674; Babcock *v.* Lawson, 4 Q. B. D. 394, 400; Matthews *v.* Discount Corp., L. R. 4 C. P. 228; Hiort *v.* Bott, L. R. 9 Exch. 86; Camp. Negl. (2d Ed.), 128; Vickers *v.* Hertz, L. R. 2 H. L. 115; Camp. Sales, 35.

4. Barnard *v.* Campbell, 55 N. Y. 459. This doctrine was first applied in Root *v.* French, 13 Wend. (N. Y.) 572; s. c., 28 Am. Dec. 428; which is cited in Moyce *v.* Newington, L. R. 4 Q. B. D. 32; s. c., 28 Eng. Rep. 674; was criticised in Ash *v.* Putnam, 1 Hill (N. Y.), 306; but is adopted in Malcolm *v.* Loveridge, 13 Barb. (N. Y.) 372; Kingsbury *v.* Smith, 13 N. H. 109; Cochran *v.* Stewart, 21 Minn. 438; White *v.* Garden, 10 C. B. 926; Somes *v.* Brewer, 2 Pick. (Mass.) 202; s. c., 13 Am. Dec. 406; George *v.* Kimball, 24 Pick. (Mass.) 241. See Grant on Fraud. Vendees, 7 South. L. Rev. (N. S.) 558, 559; Newmark on Sales, § 199.

5. See Broom's Leg. Max. 452; Whister *v.* Foster, 14 C. B. (N. S.) 248; Fawcett *v.* Osborn, 32 Ill. 425; s. c., 83 Am. Dec. 278.

6. Barnard *v.* Campbell, 55 N. Y. 460.

7. See also Ash *v.* Putnam, 1 Hill (N. Y.), 307; Moore *v.* Metrop. Nat. Bank, 55 N. Y. 41; Dows *v.* Kidder, 84 N. Y. 121; Combes *v.* Chandler, 33 Ohio St. 184.

8. Barnard *v.* Campbell, 55 N. Y. 460.

9. See also Root *v.* French, 13 Wend. (N. Y.) 570; s. c., 28 Am. Dec. 428; Andrew *v.* Dietrich, 14 Wend. (N. Y.) 34; Kingsbury *v.* Smith, 13 N. H. 109; Titcomb *v.* Wood, 38 Me. 561; Cochran *v.* Stewart, 21 Minn. 435; Babcock *v.* Lawson, L. R. 5 Q. B. D. 284; s. c., 29 Eng. Rep. 296. *Compare* Ash *v.* Putnam, 1 Hill (N. Y.), 306.

in which our law divests the title to property without the owner's consent or default.[1]

(*g*) *Incorporation of Idea of Voidable or Defeasible Title.*—But the idea of the voidable or defeasible title of the fraudulent vendee has become blended with the doctrine just stated;[2] and mention is therefore made of the superior equity of a purchaser of property from one who has acquired a title defeasible at the election of the former owner and vendor, to that of such owner seeking to reclaim his property.[3]

**6. The Modern English Doctrine.**—(*a*) *Property Formerly Regarded as Not Passing.*—In England, the property in goods was for a long time considered not to pass by a sale which the vendor had been fraudulently induced to make.[4] But the declarations to this effect were in most instances not essential to the decision of all cases, and the rights of innocent third parties had not intervened.[5]

(*b*) *Later Doctrine of Voidable Title.*—But the later doctrine, which has recently become firmly established, is that the property does pass in such cases, and that the contract of sale is not entirely and utterly void from the beginning, in which event it would not be binding on the defrauding vendee, but merely voidable at the option of the defrauded vendor, and therefore valid until rescinded by him.[6]

(*c*) *Goods in Hands of Bona Fide Purchaser.*—This modern view has received special recognition in cases where, before the rescission of the contract on the ground of fraud, the goods had passed into the hands of a *bona fide* purchaser.[7]

(*d*) *Statement of Rule.*—Hence it has become the English rule that, where a vendor, by a false and fraudulent misrepresentation which may be the means of effecting a contract of sale, obtains possession of a chattel, with the intention by the vendor to trans-

1. Barnard *v.* Campbell, 65 Barb. (N. Y.) 288, 289; Grant on Fraud. Vendees; 7 South. L. Rev. (N. S.) 559; Newmark on Sales, § 198.

2. See Grant on Fraud. Vendees, 7 South. L. Rev. (N. S.) 560.

3. Barnard *v.* Campbell, 58 N. Y. 75; s. c., 17 Am. Rep. 208. See Newmark on Sales, § 203.

4. Martin *v.* Pewtress, 4 Burr. 2478; Read *v.* Hutchinson, 3 Camp. 352; Gladstone *v.* Hadwen, 1 Maule & S. 517; Noble *v.* Adams, 7 Taunt. 59; Earl of Bristol *v.* Wilsmore, 1 Barn. & C. 514 (and see Loughman *v.* Barry, 6 I. R. C. L. 457); Duff *v.* Budd, 3 Brod. & B. 177; Stephenson *v.* Hart, 4 Bing. 476; Irving *v.* Motley, 7 Bing. 543; Ferguson *v.* Carrington, 9 Barn. & C. 59.

5. Benjamin on Sales (4th Am. Ed.), §§ 433, 439.

6. Load *v.* Green, 15 Mees. & W. 216; Powell *v* Hoyland, 6 Ex. 67; Stevenson *v.* Newnham, 13 C. B. 285; Oakes *v.* Turquand, L. R. 2 App. C. 325; Reese River Silver-mining Co. *v.* Smith, L. R. 4 App. C. 64 (affirming L. R. 2 Ch. 604); Clough *v.* London, etc., R. Co., L. R. 7 Ex. 26; Morrison *v.* Univ. Marine Ins. Co., L. R. 8 Ex. 197 (reversing L. R. 8 Ex. 40).

7. White *v.* Garden, 10 Com. B. 919 (which first established the exemption of the *bona fide* purchaser from a fraudulent vendee, the decision, rendered in 1851, following the remark of Parker, B., in Load *v.* Green, 15 Mees. & W. 216, which was made in explanation of Parker *v.* Patrick, 5 T. R. 175, decided in 1793. See Grant on Fraud. Vendees, 7 South. L. Rev. [N. S.] 556); Kingsford *v.* Merry, 11 Ex. 577; Pease *v.* Gloahee, L. R. 1 P. C. 220; Attenborough *v.* London, etc., Dock Co., L. R. 3 C. P. D. 450; Moyce *v.* Newington, L. R. 4 Q. B. D. 35; Babcock *v.* Lawson, L. R. 4 Q. B. D. 394; s. c., 28 Eng. Rep. 831, affirmed in L. R. 5 Q. B. D. 284; s. c., 29 Eng. Rep. 296.

fer both the property and possession, the property vests in the vendee until the vendor has done some act to disaffirm the transaction ;[1] and the legal consequence is that, if, before the disaffirmance, the fraudulent vendee has transferred either the whole or a partial interest in the chattel to an innocent transferee, the title of such transferee is good against the vendor.[2]

(C) WHO ARE BONA FIDE PURCHASERS. — **1. Who are Purchasers.** — (*a*) *Those Giving Partial or Qualified Interest.* — The term "purchasers," as used in its relation to sales of personal property, fraudulent or otherwise, includes not only those who buy the whole interest in a chattel, but those who acquire a partial, limited, or qualified interest merely ;[3] hence it embraces not only outright vendees, but also pledgees,[4] and those who buy as agents, such as brokers,[5] factors,[6] and others who act for principals.[7]

(*b*) *Carrier or Custodian Treated as Purchaser.*—In many of the cases, the action of trover or replevin is brought against the master of the vessel,[8] or other carrier[9] or custodian[10] of the goods, who has either refused to deliver them to the plaintiff on demand[11] or had previously delivered them to one of the contending par-

1. Kingsford *v.* Merry, 11 Exch. 577 (1856), which was reversed (1 Hurl. & N. 503) on a changed aspect of the facts, but without impairment of the principle enunciated. See Higgins *v.* Burton, 26 L. J. 342; Pease *v.* Gloahee, L. R. 1 P. C. 220; Grant on Fraud. Vendees, 7 South. L. Rev. (N. S.) 556.

2. Kingsford *v.* Merry, 11 Exch. 577; Pease *v.* Gloahee, L. R. 1 P. C. 220; 3 Moore P. C. (N. S.) 566 (1866).

**Recent Applications of Principles.** — These principles have recently been held applicable where the agent of a Spanish wine-merchant was induced by the fraudulent representations of three persons acting in collusion, and in pursuance of the contract handed them the bills of lading therefor, whereupon they deposited the wines with the defendant, and obtained dock warrants therefor, which they pledged to the plaintiff to secure advances. Attenborough *v.* London & St. Katherine's Dock Co., L. R. 3 C. P. D. 450; 47 L. J. C. P. 763 (1878). And where plaintiff made advances to parties on certain flour, which was warehoused in his name, to parties to whom it was to be delivered as soon as they sold it to others, upon condition of returning the proceeds, and such parties procured a delivery order by fraudulent representations of a sale, and gave it to defendants, with whom they had pledged the flour, and who thus obtained possession of it and sold it to reimburse their advances. Babcock *v.* Lawson, L. R. 4 Q. B. D. 394; s. c., 48 L. J. Q. B. 524; s. c., 28 Eng. Rep. 831; affirmed, L. R. 5 Q. B. D. 284; s. c., 49 L. J. Q. B. 408; s. c., 29 Eng. Rep. 296 (1879). See Grant on Fraud. Vendees, 7 South. Law Rev. (N. S.) 557.

3. See Pease *v.* Gloahee, L. R. 1 P. C. 220.

4. Attenborough *v.* London, etc., Dock Co., L. R. 3 C. P. D. 450; Babcock *v.* Lawson, L. R. 4 Q. B. D. 394; s. c., 28 Eng. Rep. 831; affirmed in L. R. 5 Q. B. D. 284; s. c., 29 Eng. Rep. 296; Thrall *v.* Lathrop, 30 Vt. 307; Arendale *v.* Morgan, 5 Sneed (Tenn.), 703; Carpenter *v.* Hale, 8 Gray (Mass.), 157.

5. Fowler *v.* Hollins, L. R. 7 Q. B. 616; s. c., 3 Eng. Rep. 238; affirmed in L. R. 7 Eng. & Ir. App. 757, or 14 Eng. Rep. 138.

6. Newcomb-Buchanan Co. *v.* Baskett, 14 Bush (Ky.), 658.

7. Grant on Fraudulent Vendees, 7 South L. Rev. 565.

8. Hall *v.* Hinks, 21 Md. 406; Mears *v.* Waples, 3 Houst. (Del.) 581; Caldwell *v.* Bartlett, 3 Duer (N. Y.). 341; Western Transp. Co. *v.* Marshall, 4 Abb. App. Dec. (N. Y.) 575.

9. Old Dom. S. S. Co. *v.* Burckhardt, 31 Gratt. (Va.) 664.

10. As a dock company. Attenborough *v.* London, etc., Dock Co., L. R. 3 C. P. D. 450.

11. Attenborough *v.* London, etc., Dock Co., L. R. 3 C. P. D. 450.

ties.[1] And in such instances it often happens that the goods are held for the party claiming to be the innocent purchaser, or surrendered to him;[2] in which event the bailee of the goods might, as a nominal defendant, stand in the place of an innocent purchaser, and his responsibility therefore be determined by that of the party he represented,[3] although the ground for treating such bailee like a *bona fide* purchaser has sometimes been that he incurred liability as from an outstanding bill of lading.[4]

**2. Good Faith and Notice.**—(*a*) *Taint of Fraud or Collusion.*—To secure exemption, it is necessary that the purchaser from a fraudulent vendee should have acted *bona fide*, or, as it is usually expressed, should be a purchaser in good faith, for value and without notice;[5] and if the title of the second purchaser is tainted with fraud, the court will not be particular to inquire into its genuine character;[6] while where such later purchaser himself recommended the absconding vendee, it has been held that collusion could be shown, and subsequent similar acts of these parties might be introduced in evidence.[7]

(*b*) *Notice of Circumstances to Put on Inquiry.*—But to constitute good faith, there must be an absence, not alone of participation in the fraud or collusion with the vendee,[8] but also of knowledge or even notice of the fraud,[9] or of facts and circumstances calculated to put an ordinarily prudent business man on inquiry so that he would ascertain the truth.[10]

(*c*) *Burden of Proof.*—And it has been generally held that the burden of proof to show good faith and purchase for value, as against the defrauded seller, is upon the party claiming to be a *bona fide* purchaser.[11]

(*d*) *Purchaser with Notice.*—One who buys, with notice of the fraud of his vendor in obtaining the property, is not a *bona fide* purchaser, and is liable, not only to lose the goods, but, if he sells, to pay their value;[12] while a *bona fide* purchaser from a fraudulent

1. Pease *v.* Gloahee, L. R. 1 P. C. 220.
2. Keyser *v.* Harbeck. 3 Duer (N. Y.), 373; Hall *v.* Hinks, 21 Md. 406.
3. Grant on Fraudulent Vendees, 7 South. L. Rev. (N. S.) 565, 566. Frequently the *bona fide* purchaser is the plaintiff. See White *v.* Garden, 10 C. B. 919; Attenborough *v.* London, etc., Dock Co., L. R. 3 C. P. D. 450; Pease *v.* Gloahee, L. R. 1 P. C. 220.
4. Caldwell *v.* Bartlett, 3 Duer (N. Y.), 341.
5. Grant on Fraud. Vendees, 7 South. L. Rev. (N. S.) 567.
6. Lynch *v.* Beecher, 38 Conn. 490.
7. Allision *v.* Matthieu, 3 Johns. (N. Y.) 235.
8. Grant on Fraud. Vendees, 7 South. L. Rev. (N. S.) 568; and see Lynch *v.* Beecher, 38 Conn. 490; Allison *v.* Matthieu, 3 Johns. (N. Y.) 235.
9. Meacham *v.* Collignon, 7 Daly (N. Y.), 402; Rateau *v.* Barnard, 3 Blatchf. (U. S.) 244; Stearns *v.* Gage, 79 N. Y. 102; Dows *v.* Kidder, 84 N. Y. 121.
10. Cochran *v.* Stewart, 21 Minn. 435; Caldwell *v.* Bartlett, 3 Duer (N. Y.), 353; Devoe *v.* Brandt, 53 N. Y. 462; Loeb *v.* Flash, 65 Ala. 526; 2 Schouler Pers. Prop. (2d Ed.) § 609, so citing these cases; as, inadequacy of consideration: Green *v.* Humphrey, 50 Pa. St. 212; but *compare* Kern *v.* Thurber, 57 Ga. 175.
11. Devoe *v.* Brandt, 53 N. Y. 462; McLeod *v.* First Nat. Bank, 42 Miss. 99; Lynch *v.* Beecher, 38 Conn. 490; Porter *v.* Parks, 49 N. Y. 564; 2 Schouler Pers. Prop. (2d Ed.) § 609, so citing foregoing cases. But see, *contra*, Mears *v.* Waples, 3 Houst. (Del.) 581.
12. Meacham *v.* Collignon, 7 Daly (N. Y.), 402; Stearns *v.* Gage, 79 N. Y. 102;

purchaser, who learned of the fraud before the whole price was paid, is protected against the defrauded vendor only to the extent of the amount paid before notice of the fraud, and not as to subsequent payments.[1]

**3. Consideration of Transfer.**—(*a*) *Absolute Purchase Not Essential.*—While a prime requisite to exemption is that the purchase shall be for value, yet there need not be an absolute purchase of the goods and payment therefor:[2] so that consignees making advances are protected;[3] and so are banks or private persons advancing money on the goods,[4] and taking as security documents of title like bills of lading, warehouse receipts, dock warrants, etc.[5]

(*b*) *Incurring Liability.*—The incurring of liability may also be sufficient;[6] as where bills of exchange are accepted to release property from attachment by creditors of the fraudulent vendee,[7] or bills of lading issued by the master of a vessel;[8] although it has been held that the liability must be incurred on the faith of the apparent ownership of the fraudulent vendee,[9] and that the giving of notes for the price will not constitute one a *bona fide* purchaser for value until he makes payment on the notes.[10]

(*c*) *Payment of Pre-existing Debt.*—The sufficiency of the payment of a pre-existing debt as a consideration for the transfer is maintained in some of the States;[11] but perhaps more generally the opposite view prevails,[12] upon the ground that there has been no change induced in the position of the second purchaser by

Rateau *v.* Bernard, 3 Blatchf. (U. S.) 244.

1. Dows *v.* Kidder, 84 N. Y. 121; 1 Benjamin on Sales (Corbin's Ed.), § 649, note 15, p. 571, whence paragraph derived.

**Effect of Further Transfers.**—A person who has obtained goods fraudulently cannot secure his title by selling them to a *bona fide* purchaser and then repurchasing them. Schutt *v.* Large, 6 Barb. (N. Y.) 373. But a *bona fide* purchaser, from one who sells to defraud his creditors, holds the property purged of the fraud, and can make a valid sale even to a person who has knowledge of the fraudulent purpose of the first vendor (Story Sales [4th Ed.], § 200, whence paragraph derived), since otherwise the innocent buyer, though having a perfect title himself, might encounter great difficulty in finding a purchaser, after the fraud in the original transaction had become known. Brown Sales, § 599; Groutt *v.* Hill, 4 Gray (Mass.), 361, 368, 369; Trull *v.* Bigelow, 16 Mass. 406.

2. See Grant on Fraud. Vendees, 7 South. L. R. (N. S.) 569.

3. Mears *v.* Waples, 3 Houst. (Del.) 581 Hall *v.* Hinks, 21 Md. 406.

4. Hoffman *v.* Noble, 6 Metc. (Mass.) 68; s. c., 39 Am. Dec. 611.

5. Dows *v.* Rush, 28 Barb. (N. Y.) 157; Atterborough *v.* London, etc., Dock Co., L. R. 3 C. P. D. 450; and see Chicago Dock Co. *v.* Foster, 48 Ill. 507; Ohio, etc., R. Co. *v.* Kerr, 49 Ill. 458.

6. See Grant on Fraudulent Vendees, 7 South. L. R. (N. S.) 569, 570.

7. Wood *v.* Yeatman, 15 B. Mon. (Ky.) 271.

8. Caldwell *v.* Bartlett, 3 Duer (N. Y.), 341.

9. Barnard *v.* Campbell, 38 N. Y. 73.

10. Matson *v.* Melchor, 42 Mich. 477; 1 Benjamin on Sales (Corbin's Ed.), § 649, note on p. 571.

11. Shufeldt *v.* Pease, 16 Wis. 685; Rice *v.* Cutler, 17 Wis. 362; Butters *v.* Haughwoot, 42 Ill. 18. See also Titcomb *v.* Wood, 38 Me. 563; Pease *v.* Gloahee, L. R. 1 P. C. 220.

12. See Grant on Fraudulent Vendees, 7 South. L. R. (N. S.) 570; 1 Benjamin on Sales (Corbin's Ed.), note on p. 570, citing Weaver *v.* Barden, 49 N. Y. 286; Barnard *v.* Campbell, 58 N. Y. 73, 76; Stevens *v.* Brennan, 79 N. Y. 254, 258; Poor *v.* Woodburn, 25 Vt. 235; Hyde *v.* Ellery, 18 Md. 496, 501; Pope *v.* Pope, 40 Miss. 516; Fletcher *v.* Drath, 66 Mo. 126; Sargent *v.* Sturm, 23 Cal. 359; s. c., 83 Am. Dec. 118.

reason of the ostensible proprietorship conferred on his vendor,[1] and that, unlike one who has parted with money, he can be restored to his former condition, and the debt revived, by setting aside or rescinding the transfer.[2]

(*d*) *Attaching Creditors, Assignees for Insolvents, Execution Creditors, etc.*—Under this view, the list of those not protected [3] includes an attaching creditor,[4] unless the debt was incurred subsequently to the fraud and upon the credit of the goods thus procured;[5] an assignee in bankruptcy,[6] or an assignee for the benefit of creditors;[7] a judgment creditor purchasing at his execution sale;[8] and a party taking personal property in performance of an executory contract of sale; as where the fraudulent purchaser of linseed transferred it to one who had previously bought it of him and paid for it.[9]

(*e*) *Additional Consideration.*—But the *bona fide* purchaser is protected if there is any other consideration besides previous indebtedness; as where notes are delivered up [10] or additional property given in exchange.[11]

**4. Fraudulent Possession.**—(*a*) *Doctrine and Illustrations.*—The protection given to an innocent purchaser who derives his title from a fraudulent vendee does not apply where, in the first transfer, possession alone is obtained by the fraud;[12] for such a purchaser stands on no better footing [13] than an ordinary bailee, who, by disposing of goods, commits a conversion, and can give no title.[14] And his liability is only enhanced by any manifestations of

1. See Root *v.* French, 13 Wend. (N. Y.) 570; s. c., 28 Am. Dec. 428; Barnard *v.* Campbell, 58 N. Y. 73; s. c., 17 Am. Rep. 208.

2. Farley *v.* Lincoln, 51 N. H. 577; and see Piper *v.* Elwood, 4 Denio (N. Y.), 195; Adams *v.* Smith, 5 Cowen (N. Y.), 280; Nelson *v.* Rockwell, 14 Ill. 375; Devoe *v.* Brandt, 53 N. Y. 462.

3. See Grant on Fraudulent Vendees, 7 South. L. R. (N. S.) 570.

4. Jordan *v.* Parker, 56 Me. 557; Fitzsimmons *v.* Joslin, 27 Vt. 129; Poor *v.* Woodburn, 25 Vt. 234; Hackett *v.* Callender, 32 Vt. 97; Field *v.* Stearns, 42 Vt. 106; Bradley *v.* Obear, 10 N. H. 477; Wiggin *v.* Day, 9 Gray (Mass.), 97; Buffington *v.* Gerrish, 15 Mass. 158. See also Oswego Starch-factory *v.* Lendrum, 57 Iowa, 573; s. c., 42 Am. Rep. 53; Naugatuck Cutlery Co. *v.* Babcock, 22 Hun (N. Y.), 481; Atwood *v.* Dearborn, 1 Allen (Mass.), 483; Whitman *v.* Merrill, 125 Mass. 127; American, etc., Exp. Co. *v.* Willsie, 79 Ill. 92; 1 Benjamin on Sales (Corbin's Ed.), note on page 571, citing many of cases given under this head; but *compare* Gilbert *v.* Hudson, 4 Me. 345.

5. Thompson *v.* Rose, 16 Conn. 71; Bradley *v.* Obear, 10 N. H. 477.

6. Montgomery *v.* Bucyrus Machine Works, 92 U. S. 257; Donaldson *v.* Farwell, 93 U. S. 631.

7. Farley *v.* Lincoln, 51 N. H. 579; Bussing *v.* Rice, 2 Cush. (Mass.) 48; Ratcliffe *v.* Langston, 18 Md. 383, 390 (suit in equity); Belding *v.* Frankland, 8 Lea (Tenn.), 67, 72; s. c., 41 Am. Rep. 630; 1 Benjamin on Sales (Corbin's Ed.), note on p. 571, citing many of the cases given. See, to the contrary, Gibson *v.* Moore, 7 B. Mon. (Ky.) 92; also consult Barrett *v.* Warren, 3 Hill (N. Y.), 350.

8. Mowry *v.* Walsh, 8 Cow. (N. Y.) 245; Devoe *v.* Brandt, 53 N. Y. 462; Sargent *v.* Sturm, 23 Cal. 359, 362; s. c., 83 Am. Dec. 118.

9. Barnard *v.* Campbell, 65 Barb. (N. Y.) 286; s. c., 55 N. Y. 456; s. c., 58 N. Y. 73, 17 Am. Rep. 208.

10. Paddon *v.* Taylor, 44 N. Y. 371.

11. Kingsbury *v.* Smith, 13 N. H. 109.

12. Grant on Fraudulent Vendees, 7 South. L. R. (N. S.) 560; and see Story Sales, §§ 200, 201; Old Dom. S. S. Co. *v.* Burckhardt, 31 Gratt. (Va.) 664.

13. See Conversion by Purchase, 15 Am. L. R. 388; Newmark on Sales, § 205.

14. See Galvin *v.* Bacon, 2 Fairf. (Me.) 28, 31; s. c., 25 Am. Dec. 258.

fraud which may accompany the transfer he makes of another's property;[1] as where the master of a vessel transshipped into another vessel at an intermediate port the goods he carried, and took from the master of the other vessel a bill of lading in his own name, which he transferred to his agents, who sold part of the cargo thereunder;[2] or where hides, intrusted to tan and return half the profits of their sale, are disposed of under an assumed name and with the aid of a fellow-conspirator.[3]

(*b*) *Statement of General Principle.* — The general principle is that where the vendor has acquired the mere possession of goods[4] by fraud,[5] or without the knowledge, connivance, or assent of the actual owner, as where he has stolen or found them;[6] or where, as a bailee or trustee, he holds them in a fiduciary capacity, with no express or implied right obtained from the owner to sell or otherwise dispose of them;[7] he cannot make a valid sale of them so as to divest the actual owner of his right to reclaim them from any person having possession of them, although such person may have bought them *bona fide*.[8]

**5. Mistaken Identity.**—(*a*) *Fraudulent Possession at Inception of Bailment.*—There is no right to hold or convey chattels where there is fraud at the inception of the bailment, when the possession is first obtained, instead of afterwards;[9] as where a sale is made to one party and possession obtained by another, who represents himself to be the purchaser,[10] or his servant,[11] or a sub-purchaser.[12]

(*b*) *False Personation Inducing Sale Rather than Delivery.*—Nor does the rule vary when the apparent sale, rather than the delivery, is procured by false personation; as where the buyer, to induce the sale, gives a false name or represents himself as the agent[13] or part-

1. Grant on Fraudulent Vendees, 7 South. L. R. (N. S.) 560.

2. Saltus *v.* Everett, 20 Wend. (N. Y.) 267; s. c., 32 Am. Dec. 541.

3. Fawcett *v.* Osborn, 32 Ill. 425; s. c., 83 Am. Dec. 278.

4. Possession without title gives no authority to sell. Decam *v.* Shipper, 35 Pa. St. 239; West. Transp. Co. *v.* Marshall, 4 Abb. App. Dec. (N. Y.) 575; Brower *v.* Peabody, 13 N. Y. 14; Dows *v.* Perrin, 16 N. Y. 325; Dows *v.* Greene, 24 N. Y. 638; Kinsey *v.* Leggett, 71 N. Y. 387; Dean *v.* Yates, 23 Ohio St. 388, 396. See these cases so cited in 1 Benjamin on Sales (Corbin's Ed.), § 649, note 16, p. 571.

5. Higgins *v.* Burton, 26 L. J. Ex. 342; Hardman *v.* Booth, 1 Hurl. & C. 803.

6. See Conversion by Purchase, 15 Am. Law Rev. 366, 375.

7. Story Sales, § 201, whence succeeding clause also derived.

8. See Hartop *v.* Hoare, 1 Wils. 8; 2 Strange, 1187; Kinder *v.* Shaw, 2 Mass. 398; Dame *v.* Baldwin, 8 Mass. 519; Towne *v.* Collins, 14 Mass. 500; Mowry *v.* Walsh, 8 Cow. (N. Y.) 238; Everett *v.* Coffin, 6 Wend. (N. Y.) 609; Williams *v.* Merle, 11 Wend. (N. Y.) 80; s. c., 25 Am. Dec. 604; Wheelwright *v.* Depeyster, 1 Johns. (N. Y.) 471; s. c., 3 Am. Dec. 345; Robinson *v.* Dauchy, 3 Barb. (N. Y.) 20; Chism *v.* Woods, Hardin (Ky.), 531; Sharp *v.* Parks, 48 Ill. 511.

9. See Grant on Fraudulet Vendees, 7 South. L. Rev. (N. S.) 571.

10. Lindsay *v.* Cundy, L. R. 1 Q. B. D. 348; s. c., L. R. 2 Q. B. D. 96; s. c., L. R. 3 App. Cas. 459; 24 Eng. Rep. 345.

11. Higgins *v.* Burton, 26 L. J. Ex. 342; Hardman *v.* Booth, 1 Hurl. & C. 803.

12. Kingsford *v.* Merry, 1 Hurl. & N. 503.

13. See Hamet *v.* Letcher, 37 Ohio St. 356; s. c., 41 Am. Rep. 519; and *compare* Stoddard *v.* Ham, 129 Mass. 283; s. c., 37 Am. Rep. 369.

Where one is induced, by a trick, to deliver the possession of his personal property to a person representing himself to be the agent of a well-known firm, and the delivery is made under the supposi-

ner of a firm in good standing.[1] And if the seller contract on the faith of a mistaken identity so caused, and trusting to the credit of the party falsely designated or represented, he is not held, upon discovering the fraud, to carry out the bargain with the impostor.[2]

(*c*) *Bargain With Buyer Personally.*—But if in any of these cases the bargain was with such buyer personally, without reference to any name or character he might assume,[3] the contract would be binding, especially if the buyer had paid the price and otherwise shown readiness to carry out his part of the bargain.[4]

(*d*) *Rights of Bona Fide Purchasers.*—And the rights of *bona fide* purchasers from the frandulent possessors would in either case be governed by the position of their immediate vendors.[5]

tion and agreement that the sale is to the firm, but it turns out that the pretended agent is a stranger to the firm, there is no actual sale, and the original owner will retain the title to the property, even as against a purchaser, in good faith, from such pretended agent or his vendee. Alexander *v.* Swackhamer, 105 Ind. 81; s. c., 55 Am. Rep. 180; stated in Newmark on Sales, § 205.

1. 2 Schouler Pers. Prop. (2d. Ed.) § 610; Grant on Fraudulent Vendees, 7 South. L. Rev. (N. S.) 561.

2. 2 Schouler Pers. Prop. (2d. Ed.) § 610, referring to Duff *v.* Budd, 3 Brod. & B. 177, and Stephenson *v.* Hart, 4 Bing. 496

The distinction made in cases of false personation, in which it is held that no title passes, arises out of the consideration that no contract is in such case made with the party personated, and none is contemplated with the false personator, so that the title remains in the vendor, and the transaction is wholly inoperative even as to third persons. Newmark on Sales, § 359, relying on Neff *v.* Landis, 110 Pa. St. 204.

3. Clough *v.* London, etc., R. Co., 7 Ex. 26; Duff *v.* Budd, 3 Brod. & B. 177.

4. 2 Schouler Pers. Prop. (2d. Ed.) § 610, whence paragraph derived.

5. See Grant on Fraudulent Vendees, 7 South. L. Rev. (N. S.) 561.

**Applications of Doctrines.**—These doctrines apply where a clerk personates his employer. Higgins *v.* Burton, 26 L. J. Ex. 342; Hardman *v.* Booth, 1 Hurl. C. 803. Or a broker induces a sale by the false and fraudulent representation that he is acting for a named principal. Fowler *v.* Hollins, L. R. Q. B. 616; s. c., 3 Eng. Rep. 338; affirmed in L. R. 7 H. L. 757; s. c., 14 Eng. Rep. 138. Or a person of no credit orders goods under a name and address closely resembling those of a respectable, established trader. Lindsay *v.* Cundy, L. R. 2 Q. B. D. 96 (reversing L. R. 1 Q. B. D. 348); affirmed in L. R. 3 App. Cas. 459; s. c., 24 Eng. Rep. 345. Or where the fraudulent buyers represent that they are dealers, and have orders for such goods, while one of them gives a false name also. Attenborough *v.* London, etc., Dock Co., L. R. 3 C. P. D. 450. Or where a person contracting for wool, and inducing its transportation to a distant point, procures its delivery from the railroad company and sells it to the firm to which he had, in effecting the original consignment, pretended to belong, by now representing himself as the son of the consignor. Barker *v.* Dinsmore, 72 Pa. St. 427; s.c., 13 Am. Rep. 687. Or where the fraudulent vendee represented himself as the agent of principals who turned out to be the *bona fide* purchasers of the goods from him. Keyser *v.* Harbeck, 3 Duer (N. Y.), 373; and *compare* parallel case of Hawkins *v.* Davis, 5 Baxt. (Tenn.) 698.

And so where both the sale and delivery are procured by false personation (Dean *v.* Yates, 22 Ohio St. 388; Moody *v.* Blake, 117 Mass. 23; s. c., 19 Am. Rep. 394), no title passes from the owner or reaches the *bona fide* purchaser. See Grant on Fraudulent Vendees, 7 South. L. Rev. (N. S.) 562.

In Moody *v.* Blake, 117 Mass. 23; s. c., 19 Am. Rep. 394, the firm represented refused to receive the goods, when the personator told the carrier he had sold them to defendant, and by his order they were sent to defendant's store.

If the seller knows that the buyer is an agent, but not whose agent he is, and takes his note for the goods, this does not prevent him from afterwards electing to make the principal his debtor. Merrill *v.* Kenyon, 48 Conn. 314. And where a party obtains goods by falsely representing that he was purchasing for himself and another jointly, such other may, by

**6. Criminally False Pretences.**—(*a*) *Rule in this Country.*—In this country,[1] it makes no difference in the application of the rule according protection to a *bona fide* purchaser, that the fraud of the first vendee is of such a character as to amount to the criminal offence of obtaining goods by false pretences;[2] for it is considered that the nature or degree of punishment which the law may attach to the fraudulent pretence or contrivance, cannot affect the title of the subsequent innocent purchaser:[3] but it was formerly held otherwise where the offence might amount to a statutory felony.[4]

(*b*) *English View.*—In England,[5] by statute,[6] the restoration of goods obtained by false pretences or larceny, to the owner or his representatives, is authorized upon conviction of the offender;[7] but prior to any enactment on the subject,[8] it was held that a *bona fide* purchaser, from one procuring goods under false pretences, was protected on the ground that fraud was different from larceny.[9] and under the existing enactment, the doctrine governing the subject is assimilated to that regulating the purchase of stolen goods in market overt;[10] and the title is held not to revest in the original vendor as against a *bona fide* purchaser who bought before the conviction of the offender.[11]

(*c*) *Transfer of Title as Well as Possession.*—There is no protection of the *bona fide* purchaser in this country, however, unless a sale is effected by the false pretences and the title is transferred, as well as the possession.[12]

(D) REMEDIES.—**1. Defrauded Vendor's Diligence in Rescission.**—(*a*) *Delay Pending Change in Buyer's Position, etc.*—The defrauded vendor may elect to disaffirm the contract and reclaim the property if the election is seasonably made and the goods reclaimed in proper time after the discovery of the fraud.[13] But such defrauded vendor

his subsequent acts, make himself liable as an original purchaser. Ellis *v.* Chemical Co., 64 Ga. 571. See statements of these cases in 2 Schouler Pers. Prop. (2d. Ed.) § 610. But though the person falsely represented may, if the goods came into his hands, adopt the transaction as his own, aud thus ratify the agency (Dalton *v.* Hamilton, 1 Hannay [N. B.], 442), yet, if he does, so he must adopt it wholly. Dalton *v.* Hamilton, 1 Hannay (N. B.), 422; as stated in 1 Benjamin Sales (Corbin's Ed.), §§ 649, 660.

1. See "Conversion by Purchase," 15 Am. L. Rev. 363, 389; Newmark on Sales, § 206.

2. Malcom *v.* Loveridge, 13 Barb. (N. Y.) 372; Keyser *v.* Harbeck, 3 Duer (N. Y.), 373; Williams *v.* Given, 6 Gratt. (Va.) 268; Cochran *v.* Stewart, 21 Minn. 435.

3. Williams *v.* Given, 6 Gratt. (Va.) 273.

4. Andrews *v.* Dietrich, 14 Wend. (N. Y.) 41; Robinson *v.* Dauchy, 3 Barb. (N. Y.) 20.

5. See "Conversion by Purchase," 15 Am. L. Rev. 363,388; Newmark on Sales, § 206.

6. 24 & 25 Vict. c. 96, § 100, re-enacting and extending 7 & 8 Geo. IV. c. 29, § 57.

7. See also 21 Henry VIII., c. 11.

8. See Keyser *v.* Harbeck, 3 Duer (N. Y.), 373.

9. Parker *v.* Patrick, 5 T. R. 175; explained in Load *v.* Green, 15 Mees. & W. 216.

10. See Horwood *v.* Smith, 2 T. R. 750.

11. Moyce *v.* Newington, L. R. 4 Q. B. D. 32; s. c., 48 Law J. Q. B. 125; 28 Eng. Rep. 674; and see Lindsay *v.* Cundy, L. R. 1 Q. B. D. 348, 357; s. c., 45 L. J. Q. B. 381; dissenting from Nickling *v.* Heaps, 21 L. T. R. 754.

12. See Williams *v.* Given, 6 Gratt. (Va.) 268.

13. Barnard *v.* Campbell, 58 N. Y. 75; s. c., 17 Am. Rep. 208. See Grant on Fraudulent Vendees, 7 South. L. Rev. (N. S.) 572.

would by delay lose the right against the wrongdoer if, in consequence of such delay, the position of the latter should be changed ;[1] and he could lose it altogether if, during the interval between the delivery of the goods and vesting of the defeasible title in the fraudulent purchaser and the disaffirmance of the sale by the original vendor, the goods had been sold to an innocent third party for a valuable consideration.[2]

(*b*) *Keeping Question of Ratification Open.*—But subject to these qualifications, the defrauded vendor has the right to his election to avoid the sale at any time after knowledge of the fraud, until he has affirmed the sale by express words or unequivocal acts, and may keep the question open so long as he does nothing to ratify the contract.[3]

**2. Requisites of Such Rescission.**—(*a*) *Seller's Election.*—It appears to be well settled that, where the seller is defrauded by the buyer, he may, upon discovering the fraud, elect to treat the contract as a nullity and bring his action for the recovery of the specific chattels, or trover for their value.[4]

(*b*) *Suit for Price Before Expiration of Credit.*—If the seller rescinds, however, he must rescind entirely, and he cannot treat part of the contract as valid and rescind the rest ;[5] and hence, if he has given credit for the price, he cannot rescind the credit and sue at once for the price, but should rescind the whole and sue in trover or replevin :[6] so that he cannot recover if, finding that he has been deceived, he sues on the contract before the expiration of the credit given ;[7] and though it is sometimes held that in such a case the seller might rescind the sale, and then waive the tort and sue *ex contractu* on an implied sale,[8] yet this right to waive the tort and sue in *assumpsit* is, by the weight of authority, limited to cases

1. Barnard *v.* Campbell, 58 N. Y. 75; s. c., 17 Am. Rep. 208; and see Clough *v.* London, etc., R. Co., L. R. 7 Ex. 26.

2. Barnard *v.* Campbell, 58 N. Y. 75; s. c., 17 Am. Rep. 208; and see Clough *v.* London, etc., R. Co., L. R. 7 Ex. 26; Camp. Sales, 526.

3. Clough *v.* London, etc., R. Co., L. R. 7 Ex. 26; Camp. Sales, 526; and see Morrison *v.* Univ; Marine Ins. Co., L. R. 8 Ex. 97.

A like rule governs contracts generally. See Tilton Safe Co. *v.* Tisdale, 48 Vt. 83; Lindauer *v.* Cochran, 54 Ga. 533; Hall *v.* Fullerton, 69 Ill. 448; and *compare* Wakefield, etc., Banking Co. *v.* Normanton Local Board, 44 L. T. R. (N. S.) 697.

**Illustrations.** — Thus, the privilege of rescission may be exercised during the progress of a trial growing out of the sale if the fraud is then for the first time developed. Clough *v.* London, etc., R. Co., L. R. 7 Ex. 26. And it will not be lost by a delay which is not indicative of an election not to rescind, and is not to the injury of the other party. Hodgson *v.* Barrett, 33 Ohio St. 63; s. c., 31 Am. Rep. 527, where there was a delay of four days in the presentment of a check given in payment for goods and dishonored for want of funds.

4. 2 Schouler Pers. Prop. (2d Ed.) § 613; and see Story Sales (4th Ed.), § 446.

5. 1 Benjamin on Sales (Corbin's Ed.), p. 569, § 649, note 14, whence paragraph derived. Consult, further, Newmark on Sales, § 395; Carnahan *v.* Hughes, 108 Ind. 225; Dietz *v.* Sutcliff, 80 Ky. 650.

6. Stewart *v.* Emerson, 52 N. H. 301, 321; Ryan *v.* Brandt, 42 Ill. 78; Moriarty *v.* Stofferan, 89 Ill. 528; Weed *v.* Page, 7 Wis. 503

7. Kellogg *v.* Turpie, 93 Ill. 265; and see Adler *v.* Fenton, 24 How. (U.S.) 407.

8. Roth *v.* Palmer, 27 Barb. (N. Y.) 652; Wigand *v.* Sichel, 3 Keyes (N. Y.), 120; and see McGoldrick *v.* Willets, 52 N. Y. 612, 620.

where the wrongful possessor of property has sold it, in which event an action may be brought for money had and received.[1]

(*c*) *Finality of Seller's Election.*—When, with knowledge of the facts, an election is made either to affirm or avoid the sale, such election is final, and the vendor cannot afterwards change his mind;[2] and the election to avoid is final where action is brought to rescind the sale and recover possession of the goods from the purchaser, with notice, claiming under the fraudulent vendee, although the seller afterwards proves his claim against the estate in bankruptcy of the first defrauding purchaser.[3]

(*d*) *Fraudulent Buyer's Expenses or Obligations.*—But a defrauded seller does not lose the right to rescind because the buyer has incurred expenses with respect to the property in carrying out the fraud;[4] nor is it necessary that the seller should make good such expenses,[5] even though he receives an advantage from them by rescission;[6] nor need he, as the defrauded party, give up the personal unsecured obligation of those who defraud him, as a condition of a suit for the fraud or of a defence based thereon,[7] where such document might be required to prove the false representations indorsed upon it.[8]

(*e*) *Right Confined to Defrauded Seller.*—Nor can any one else treat the contract as void if the defrauded vendor does not, as where he resells the property without taking steps to rescind the first sale;[9] and hence in such a case the second buyer from the original vendor could not claim an avoidance of the former sale, nor hold the property against the fraudulent vendee.[10]

(*f*) *Suit for Unrecovered Residue.*—And where the defrauded seller is able to recover only a portion of the property, he may maintain a suit for the value of the residue.[11]

(*g*) *Notice Not a Prerequisite to Suit.*—But where rescission is made for fraud, notice is not a prerequisite to suit for the goods.[12]

(*h*) *Burden and Scope of Proof.*—In an action of replevin by a vendor for goods sold, brought on the ground that the sale was procured by fraud, and has been rescinded by him, he has no burden of showing that the vendee bought from him the goods levied on, and that the vendee used means to deceive, and did deceive,

1. Kellogg *v.* Turpie, 93 Ill. 265; and cases cited.
2. Pence *v.* Langdon, 99 U. S. 578, 582.
3. Moller *v.* Tuska, 87 N. Y. 166; 1 Benjamin on Sales (Corbin's Ed.), p. 581, § 60, note 19, referring also to Morris *v.* Rexford, 18 N. Y. 552, 556; Powers *v.* Benedict, 88 N. Y. 605, 609.
4. 1 Benj. Sales (Corbin's Am. Ed.), p. 569, § 649, note 14, whence paragraph and succeeding matter derived.
5. See 2 Schouler Pers. Prop. (2d Ed.) § 613.
6. Guckenheimer *v.* Angevine, 81 N.Y. 394; and see Downer *v.* Smith, 32 Vt. 1; Grant *v.* Law, 29 Wis. 99.
7. But see Auger *v.* Thompson, 3 Ont. App. 19.
8. Dayton *v.* Morton, 47 Mich. 193, 195.
9. Brown *v.* Pierce, 97 Mass. 46.
10. Brown *v.* Pierce, 97 Mass. 46; and see Henry *v.* Daley, 17 Hun (N. Y.), 210; Rowley *v.* Bigelow, 12 Pick. (Mass.) 307, 312; s. c., 23 Am. Dec. 607.
11. Kinney *v.* Kiernan, 49 N. Y. 164; Powers *v.* Benedict, 88 N. Y. 605.
12. Oswego Starch-factory *v.* Lendrum, 57 Iowa, 573; s. c., 42 Am. Rep. 53; as stated in 2 Schouler Pers. Prop. (2d Ed.) § 613.

him, or that the vendee did not intend to pay for the goods when when he bought them.[1]

(*i*) *Demand of Goods Unnecessary.*—Where replevin is brought for fraud, and the jury find from the evidence that the defendant obtained the goods by a fraudulent purchase, a demand of the goods by the plaintiff previous to the action is unnecessary.[2]

**3. Restoration of Consideration by Defrauded Seller.**—(*a*) *Restoration as Prerequisite to Suit.*—Where the vendor would rescind a contract of sale on account of the fraud of the purchaser, it is his duty to restore what he has received in payment before he can sustain an action to recover the goods.[3]

(*b*) *When Offer of Restoration Unnecessary.*—But the defrauded vendors need not tender reimbursement to a collusive purchaser from the fraudulent vendee for advances made or expenditures incurred in furtherance of the fraud and in order to get possession of the property, as in meeting the government tax on whiskey lying in a bonded warehouse, although such vendors obtained the benefit of such payment on regaining possession of the property;[4] nor need a seller sued in conversion for the value of a horse, surrender an unsecured note given for the price where it is one of the documents which may be necessary to prove the false representations indorsed on such note.[5]

(*c*) *Doctrine Concerning Tender or Return of Notes.*—And, generally, where a party upon fraudulent representations has induced a

1. Farwell *v.* Hanchett (Ill.), 9 N. E. Rep. 58, 60, where it was laid down that it was incumbent upon the sellers to prove that the buyer used means to deceive or circumvent them, and that an instruction of like scope announced no other doctrine than that laid down by the court in the following cases: Walker *v.* Hough, 59 Ill. 375; St. Louis & S. E. R. Co. *v.* Rice, 85 Ill. 406; Grier *v.* Puterbaugh, 108 Ill. 602. In regard to the proposition that it must appear that the buyer did not intend to pay for the goods when he bought them, it was remarked: "We held in, Bowen *v.* Shuler, 41 Ill. 192, that a purchase of property, made with the intention not to pay for it, is a fraud as between the buyer and the seller, and passes no title." As to the latter proposition including the former, it was said: "When a man buys goods intending at the time not to pay for them, he must in some way lead the seller to believe that he does intend to pay for them; otherwise he could not obtain possession of them. By inducing such a belief in the mind of the seller, he deceives him, and uses means to deceive him. Buying without the intention of paying, involves the use of deceit."

2. Farwell *v.* Hanchett (Ill.), 9 N. E. Rep. 58, 60, 61, where Magruder, J., said: "It is well settled that if goods have been unlawfully obtained, proof of a demand by the true owner and a refusal to deliver them up is not necessary. Butters *v.* Haughwout, 42 Ill. 18; Bruner *v.* Dyball, 42 Ill. 34; Clark *v.* Lewis, 35 Ill. 417; Woodward *v.* Woodward, 14 Ill. 466; Hardy *v.* Keeler, 56 Ill. 152."

3. Morton *v.* Young, 3 Greenl. (Me.) 30; Cushing *v.* Wyman, 38 Me. 589; Evans *v.* Gale, 21 N. H. 240; Cook *v.* Gilman, 34 N. H. 556; Moody *v.* Brown, 58 N. H. 45; Benson *v.* Tilton, 58 N. H. 137; Wood *v.* Garland, 58 N. H. 154; Noyes *v.* Patrick, 58 N. H. 618; Spencer *v.* St. Clair, 57 N. Y. 9; Schiffer *v.* Dietz, 83 N. Y. 300; Gould *v.* Cayuga Co. Bank, 86 N. Y. 75; Warren *v.* Tyler, 81 Ill. 15; Heaton *v.* Knowlton, 53 Ind. 357; Haase *v.* Mitchell, 58 Ind. 213; Cates *v.* Bales, 78 Ind. 285; Fitz *v.* Bynum, 55 Cal. 459; Pope *v.* Pictou Steamboat Co., 2 Old. (Nova Sco.) 18. See 2 Chitty Contr. (11th Am. Ed.) 1092, note (*a*), and, for source of this and next paragraph, Benj. Sales (4th Am. Ed.), p. 496, § 457, note (*a*). Consult also Farwell *v.* Hanchett (Ill.), 9 N. E. Rep. 58.

4. Guckenheimer *v.* Angevine, 81 N.Y. 394, 396.

5. Dayton *v.* Morton, 47 Mich. 193, 195.

sale of goods on credit, giving his own note therefor, the vendor, upon discovering the fraud, may bring trover or replevin without first surrendering the note;[1] though he must be prepared to surrender it at the trial.[2] But where the vendee gives the notes of a third party upon a fraudulent representation as to the responsibility of the maker, the vendor must return the note to the vendee before suing, for the delay may result in injury to the vendee.[3]

(*d*) *Restoration After Bringing Action.*—Where plaintiff rescinds, for fraud, the contract under which he has sold goods, and fails to return the consideration, his action of replevin is premature: and although the statute may permit him to return the consideration after bringing action, and thus maintain his suit, yet he cannot do this when the fraud is contested; but in that case his action fails as premature.[4]

**4. Ratification or Affirmation.**—(*a*) *Suit for Price.*—The defrauded vendor may, at his option affirm, the contract by suing in *assumpsit* for the price of the goods.[5] But if credit has been given, the vendor must sue on the express contract or in tort: and he cannot maintain an action on the common counts until the term of credit has expired;[6] as he would thus be seeking to recover the value of the goods upon an implied contract to pay upon request, while the special count showed that the only contract was one to pay a certain price at a future day.[7]

1. But see, *contra*, Farwell *v.* Hanchett (Ill.), 9 N. E. Rep. 58, later stated.

2. Norton *v.* Young, 3 Greenl. (Me.) 33, note.

It is enough if the seller leaves the court to return the buyer's worthless note. 2 Schouler Pers. Prop. (2d Ed.) § 613; citing Nichols *v.* Michael, 23 N. Y. 364, and Coolidge *v.* Brigham, 1 Metc. (Mass.) 547. While, of course, an offer to return notes given for goods, if made before the trial, is sufficient. Nellis *v.* Bradley, 1 Sandf. (N. Y.) 560; Coghill *v.* Boring, 15 Cal. 214.

3. Norton *v.* Young, 3 Greenl. (Me.) 33, note.

4. Farwell *v.* Hanchett (Ill.), 9 N. E. Rep. 58, 61, where Magruder, J., said: "Where a party has received any valuable consideration on the sale of property, he cannot rescind the contract without first returning, or offering to return, to the purchaser, the consideration received, whatever it may be; nor can he rescind the contract as to one part and affirm it as to another part. The rescission, if made, must be full and embrace the entire contract. He cannot retain the consideration he has received, or a portion of it, and rescind as to a portion of the property he has sold, and recover that portion back. In case of fraud on the part of the vendee of chattels, where nothing but the note of the vendee is received, the vendor, to rescind the sale, must return the note; and this must be done before replevin is brought: otherwise the action is premature. Bowen *v.* Shuler, 41 Ill. 192; Moriarty *v.* Stofferan, 89 Ill. 528; Doane *v.* Lockwood, 115 Ill. 490. We do not understand the case of Doane *v.* Lockwood, *supra*, to hold that, when the action is replevin, the plaintiff can rescind a sale for fraud, by offering to return the note after suit brought, when the defendant denies the fraud, and when the question whether or not the sale was a fraudulent one is to be submitted to and passed upon by the jury."

5. Butler *v.* Hildreth, 5 Metc. (Mass.) 49; Stewart *v.* Emerson, 52 N. H. 301. Though this does not prevent him from setting up the fraud against the defendant's plea of a discharge in bankruptcy. Stewart *v.* Emerson, 52 N. H. 301; and see McBean *v.* Fox, 1 Bradw. (Ill.) 177.

6. Kellogg *v.* Turpie, 2 Bradw. (Ill.) 55.

7. Kellogg *v.* Turpie, 2 Bradw. (Ill.) 55, and cases cited; Benjamin on Sales (4th Am. Ed.), p. 475, § 433, notes (*h*) and (*h'*); id. p. 335, § 324, note (*d*), and p. 872, § 765, note (*z*); Ferguson *v.* Carrington, 9 Barn. & C. 69; Strutt *v.* Smith, 1 Cromp. M. & R. 312; Magrath *v.* Tinning, 6 Up. Can. Q. B. (O. S.) 484;

(*b*) *When Rescission Barred.*—Not only does a suit for the price affirm the sale,[1] so as to debar the seller from afterwards setting up the fraud[2] but taking security for the purchase-money after the discovery of the fraud has the same effect;[3] and it has been held that no different result will be accomplished by the vendor's abandonment of a suit for the price as prematurely brought, long after it was instituted, and a subsequent attempt to rescind by demanding the goods in controversy, which he had previously attached, and suing in trover for their value;[4] and that, if an action to enforce the contract is brought by mistake, through inadvertence or misunderstanding of counsel, while it may not have the effect of an estoppel, yet the presumption is that the suit was brought advisedly and by plaintiff's authority, and any circumstance to the contrary must be alleged by complainant.[5]

(*c*) *When Rescission Not Barred.*—Yet where the captain of a vessel sold a cargo without authority, and the owner at first brought *assumpsit*, but, discovering before trial that he had misconceived his remedy, discontinued the suit and brought trover, this latter form of action was sustained.[6] And it has been held that it is no affirmance of the fraud to levy an attachment upon the goods fraudulently purchased, and sell them thereunder with other goods of the buyer.[7]

**IV. Fraud on Creditors.**—(A) In General.—**1. Statutory Regulations.**—(*a*) *Scope of Enactments.*—The subject of fraud upon creditors[8] is largely regulated in this country by local enactments, generally founded upon the statutes of Elizabeth against fraudulent conveyances,[9] which were declaratory of the common law,[10]

Wakefield *v.* Gorrie, 5 Up. Can. Q. B. 159; Siliman *v.* McLean, 13 Up. Can. Q. B. 544; Sheriff *v.* McCoy, 27 Up. Can. Q. B. 597; Auger *v.* Thompson, 3 Ont. App. 19; Dellone *v.* Hull, 47 Md. 112; Bickwell *v.* Buck, 58 Ind. 354; but *compare* Dietz *v.* Sutcliffe, 80 Ky. 650 (and see Roth *v.* Palmer, 27 Barb. [N. Y.] 652; Jones *v.* Gregg, 17 Ind. 84). Consult also Newmark on Sales, § 359; Carnahan *v.* Hughes, 108 Ind. 225.

1. Adler *v.* Fenton, 24 How. (U. S.) 407; and see Bulkley *v.* Morgan, 46 Conn. 193; Stoutenburgh *v.* Konkle, 15 N. J. Eq. 33, 41; Marsh *v.* Pier, 4 Rawle (Pa.), 273; Dellone *v.* Hull, 47 Md. 112; Dibblee *v.* Sheldon, 10 Blatchf. (U. S.) 178.

2. 2 Schouler Pers. Prop. (2d Ed.) § 613, citing Stevenson *v.* Newnham, 13 C. B. 285; Story Sales (4th Ed.), §§ 446, 447; and Byard *v.* Holmes, 4 Vroom (N. J.), 119.

3. Joslin *v.* Cowee, 52 N. Y. 90.

4. Bulkley *v.* Morgan, 46 Conn. 393; and see Morford *v.* Peck, 46 Conn. 380; Butler *v.* Hildreth, 5 Metc. (Mass.) 49, 52; Kimball *v.* Cunningham, 4 Mass. 502, 505; Conihan *v.* Thompson, 111 Mass. 270, 272; Schiffer *v.* Dietz, 83 N. Y. 300; Mackinley *v.* McGregor, 3 Whart. (Pa.) 369; Emma Mining Co. *v.* Emma Co., 7 Fed. Rep. 424.

5. Emma Mining Co. *v.* Emma Co., 7 Fed. Rep. 424.

6. Peters *v.* Ballistier, 3 Pick. (Mass.) 495; 1 Benjamin on Sales (Corbin's Ed.), p. 581, § 660, note 19; and see distinction taken in Butler *v.* Hildreth, 5 Metc. (Mass.) 49. *Compare*, as to fraud of agents, Emma Mining Co. *v.* Emma Co., 7 Fed. Rep. 424; Dalton *v.* Hamilton, 1 Hann. (N. B.) 422.

7. Dean *v.* Yates, 22 Ohio St. 388; as stated in 2 Schouler Pers. Prop. (2d Ed.) § 613.

8. Consult, generally, concerning fraudulent sales as to creditors, Walden *v.* Murdock, 23 Cal. 540; s. c., 83 Am. Dec. 135, and note 141; Newmark on Sales, § 341.

9. 13 Eliz. c. 5; 14 Eliz. c. 11, § 1; 29 Eliz. c. 5, § 2. See 2 Schouler Pers. Prop. (2d Ed.) § 616.

10. Cadogan *v.* Kennett, Cowp. 432. Or gave a more stringent force to its

and which cover all transfers made with design to delay, hinder, or defraud creditors.[1]

(*b*) *Protection of Subsequent Creditors.*—These enactments are sometimes deemed to protect subsequent creditors against fraudulent sales, as well as those having claims at the date of the fraudulent conveyance;[2] and it is declared to be settled that such subsequent creditors may, under certain circumstances, maintain an action to set aside a fraudulent conveyance, and are in any case entitled to share in the benefit of proceedings taken by creditors having claims at the date of the conveyance.[3]

(*c*) *Scope of Statute of Elizabeth.*—The original English enactment,[4] which, in its essential features, has been quite universally adopted in America,[5] declares void all conveyances of goods and chattels, as well as of lands and tenements, not made *bona fide* and upon good consideration, but in trust[6] for the use of the person conveying them, or made to hinder, delay, or defraud creditors;[7] and persons having action for tort against the seller have been deemed creditors, within this statute.[8]

**2. Subsequent Creditors.**—(*a*) *Where Transfer Not Fraudulent as to Existing Creditors.*—While some authorities hold that a transfer fraudulent as to existing creditors may be avoided by subsequent

doctrines. Story Sales (4th Ed.), p. 619, § 512; and see 2 Kent Com. 515; Whitmore *v.* Woodward, 28 Me. 392; Whittlesy *v.* McMahon, 10 Conn. 138, 141; Wilt *v.* Franklin, 1 Binn. (Pa.) 502, 514, 523; Avery *v.* Street, 6 Watts (Pa.), 247, 248; O'Daniel *v.* Crawford, 4 Dev. (N. Car.) 197, 203; Hudnal *v.* Wilder, 4 McCord (S. Car.), 295, 297; Adams *v.* Broughton, 13 Ala. 731, 739; Doyle *v.* Sleeper, 1 Dana (Ky.), 531, 533; Meeker *v.* Wilson, 1 Gall. 419; Hamilton *v.* Russell, 1 Cranch (U. S.), 316.

1. Westmoreland *v.* Powell, 59 Ga. 256. See, for chief basis of paragraph, Benjamin on Sales (4th Am. Ed.), pp. 540, 541, § 483. Consult also Campb. Sales, 80.

2. Graham *v.* Furber, 14 C. B. 410; 23 L. J. C. B. 51.

3. Spirett *v.* Willows, 3 De Gex, J. & S. 293, and Am. notes; Bank *v.* Rattenburg, 7 Grant (Ont.), 383; Bonacina *v.* Leed, 3 Low. Can. 446; McLane *v.* Johnson, 43 Vt. 48; Carter *v.* Grimshaw, 49 N. H. 100. See, for basis of paragraph, Benjamin on Sales (4th Am. Ed.), pp. 540, 541, § 483, referring also to Robson Bankruptcy (Ed. 1881), p. 153, and 2 Sugd. Vend. & Pur. (8th Am. Ed.) note *t*.

4. Stat. 13 Eliz. c. 5, made perpetual by 29 Eliz. ch. 5. See Campb. Sales, 80.

5. 1 Story Eq. Jur. §§ 352, 353; 2 Kent. Com. 515; Robinson *v.* Holt, 39 N. H. 537; Story Contr. (5th Ed.) p. 620, § 650.

6. Trust is the cover of fraud. Twyne's Case, 3 Coke, 80; 1 Smith's L. C. 1; Story Sales (4th Ed.), p. 630, § 519; Young *v.* Heermans, 66 N. Y. 374; Franklin *v.* Claflin, 49 Md. 24; Edwards *v.* Stinson, 59 Ga. 443; Jones *v.* King, 86 Ill. 225. See, for basis of foregoing matter, Benjamin on Sales (4th Ed.), pp. 541, 542, § 484, and note (*u*).

7. Story Sales (4th Ed.), p. 619, § 512. Where in a sale of chattels the title is passed, it cannot, so far as respects creditors, be transferred again to the seller by a mere acknowledgment in writing that the property is his, without a valuable consideration therefor. Story Sales (4th Ed.), p. 627, § 517, *a*; George *v.* Stubbs, 26 Me. 243.

8. Scott *v.* Hartman, 26 N. J. Eq. 89; Cooke *v.* Cooke, 43 Md. 522, 531; Gebhart *v.* Merfeld, 51 Md. 322, 325; Corder *v.* Williams, 40 Iowa, 582; so cited in 1 Benjamin on Sales (Corbin's Ed.), p. 637, § 733, note 53.

**Avoiding Support of Bastard Child—Creditor.**—A sale made with the intent to avoid liability for the support of a bastard child is a sale with intent to hinder, delay, and defraud creditors; for one who has a right to recover for such support is a creditor, and within the protection of the statutes. Schuster *v.* Stout, 30 Kan. 529, citing Bump Fraud. Conv. 486, 489; and Damon *v.* Bryant, 2 Pick. (Mass.) 411.

creditors,[1] all agree that, if not fraudulent as to existing creditors, subsequent creditors can avoid it only by showing that it was made with a view to incurring liabilities or embarking in a hazardous business which gives rise to their debts.[2]

(*b*) *Where Transfer Fraudulent as to Existing Creditors.*—And most of the cases hold that, even where the transfer is fraudulent as to existing creditors, to enable a subsequent creditor to set it aside there must be special circumstances, such as continued possession by the debtor whereby he obtained the credit, or the fact that the transfer was made on the eve of starting in a hazardous business;[3] for the rule is said to be that a transfer is void only against those it was intended to defraud, and that subsequent creditors cannot ordinarily come within that description.[4]

**3. Defeating Executions.**—(*a*) *Mere Intention of Defeating Executions Does Not Make Sale Fraudulent.*—It was at one time attempted to lay down rules that particular things were indelible badges of fraud;[5] but every case must actually stand upon its own footing; and the court or jury must consider whether, having regard to all the circumstances, the transaction was a fair one and intended to pass the property for a valuable consideration;[6] and it is well settled that the mere intention to defeat the execution of a creditor will not avoid a sale as fraudulent if it be made *bona fide* for a valuable consideration.[7]

1. See preceding subdivision of subject.

2. Thacher *v.* Phinney, 7 Allen (Mass.), 146; Winchester *v.* Charter, 12 Allen (Mass.), 606, 609; Wadsworth *v.* Williams, 100 Mass. 126, 130; Day *v.* Cooley, 118 Mass. 524, 527; Dood *v.* Adams, 125 Mass. 398; Carpenter *v.* Carpenter, 25 N. J. Eq. 194; Kirksey *v.* Snedecor, 60 Ala. 192; Sexton *v.* Wheaton, 8 Wheat. (U. S.) 229; Mattingly *v.* Nye, 8 Wall. (U. S.) 370; Smith *v.* Hodges, 92 U. S. 183; Graham *v.* Railroad Co., 102 U. S. 148, 153; 1 Am. Lead. Cas. 1.

3. 1 Benjamin on Sales (Corbin's Ed.), p. 637. § 733, note 53, whence this and preceding paragraphs derived.

4. Shand *v.* Hanley, 71 N. Y. 319; Arrowsmith *v.* O'Sullivan, 44 N. Y. Super. Ct. 573; Snyder *v.* Christ, 39 Pa. St. 499, 506; Mullen *v.* Wilson, 44 Pa. St. 413; Monroe *v.* Smith, 79 Pa. St. 459; Harlan *v.* Maglaughlin, 90 Pa. St. 293, 297; Dorley *v.* McKiernan, 62 Ala. 34; Lehmberg *v.* Biberstein, 51 Tex. 457; Lloyd *v.* Bunce, 41 Iowa, 660; Sanders *v.* Chandler, 26 Minn. 273.

5. Hale *v.* Metr. Omnibus Co., 28 L. J. Ch. 777.

6. Hale *v.* Metr. Omnibus Co., 28 L. J. Ch. 777; Jones *v.* Nevers, 2 Pugs. & Bur. (N. Bruns.) 627; Lang *v.* Stockwell, 55 N. H. 561; Cutting *v.* Jackson, 56 N. H. 253; Solomon *v.* Moral, 53 How. Pr. (N. Y.) 342.

7. **England.**—Wood *v.* Dixie, 7 Q. B. 892; Riches *v.* Evans, 9 Car. & P. 940; Hale *v.* Metr. Omnibus Co., 28 L. J. Ch. 777; Alton *v.* Harrison, L. R. 4 Ch. 622; Spencer *v.* Slater, L. R. 4 Q. B. D. 13; Boldero *v.* London Loan & Discount Co., L. R. 5 Ex. D. 47.

**Canada.**—Farish *v.* McKay, 5 Up. Can. Q. B. 461; Clark *v.* Morrell, 21 Up. Can. Q. B. 596; Hooker *v.* Jarvis, 6 Up. Can. Q. B. (O. S.) 439; Armstrong *v.* Moodie, 6 Up. Can. Q. B. (O. S.) 538; Dalglish *v.* McCarthy, 19 Grant (Ont.), 578.

**New Brunswick.**—Conner *v.* Miller, 1 Kerr, 302; Kinnear *v.* White, 2 Kerr, 235; Hayward *v.* White, 2 Kerr, 304; Doak *v.* Johnson, 2 Kerr, 319.

**Connecticut.**—Ingraham *v.* Wheeler, 6 Conn. 277.

**New York.**—Hauselt *v.* Vilmar, 2 Abb. N. C. (N. Y.) 222; Stacey *v.* Deshaw, 7 Hun (N. Y.), 449; Ford *v.* Johnston, 7 Hun (N. Y.), 563; Archer *v.* O'Brien, 7 Hun (N. Y.), 591; Dudley *v.* Danforth, 61 N. Y. 626; Bostwick *v.* Burnett, 74 N. Y. 317.

**Illinois.**—Morris *v.* Tilson, 81 Ill. 607; Francis *v.* Rankin, 84 Ill. 169; Nimmo *v.* Kuykendall, 85 Ill. 476; Matthews *v.* Jordan, 88 Ill. 602; Story *v.* Agnew, 2 Bradwell, 353.

(*b*) *Chattel Mortgage and Confession of Judgment.*—Nor is it a fraud to mortgage personal property for money actually lent to the mortgagor, even with a design to defeat the expected execution of a judgment creditor;[1] nor to confess a judgment in favor of one creditor for the purpose of giving him a preference over another who is on the eve of issuing execution on a judgment previously obtained.[2]

**4. Fraudulent Preferences by Insolvents.**—(*a*) *Policy of Bankruptcy and Insolvency Laws Against.*—Sales, as well as other contracts, will be avoided as fraudulent against creditors when made in contravention of the policy of the laws governing bankruptcy and insolvency, designed to secure an equal ratable distribution of the debtor's property among his creditors;[3] for a tacit stipulation is imported, in all agreements between an insolvent and his creditors, that it shall not be competent for any one of them, without the knowledge of the rest, to secure any benefit or andvantage in which the others have no share.[4]

(*b*) *Buyer's Dealing with Goods After or Before Final Possession.*—And it is now perfectly well settled that, if the insolvent vendee comes into actual final possession of the goods he has purchased, he cannot rescind the contract and return the goods to the unpaid vendor;[5] for such an exclusion of the goods from the common mass of assets would be a fraudulent preference in favor of the vendor,[6] even if accomplished by the buyer before he has committed an act of bankruptcy:[7] but if the buyer has left anything undone for the perfect transfer of the property to himself, he may

**Iowa.**—Gray *v.* McAllister, 50 Iowa, 497.

1. Darville *v.* Terry, 6 Hurl. & N 807; 30 L. J. Ex. 355.

2. Holbird *v.* Anderson, 5 T. R. 235; Beards *v.* Wheeler, 11 Hun (N. Y.), 539; Evans *v.* Hamilton, 56 Ind. 34. See, for basis of foregoing matter, Benj. Sales (4th Am. Ed.), p. 545, §§ 487, 488. As to questions between execution creditor and trustee in bankruptcy, under British enactments, consult Campb. Sales, 127–134.

3. Benj. Sales (4th Am. Ed.), p. 572, § 498, whence paragraph derived. See, further, Campb. Sales, 88, 91.

4. Leicester *v.* Rose, 4 East, 372; Britten *v.* Hughes, 5 Bing. 460; Higgins *v.* Pitts, 4 Ex. 312; Wilson *v.* Ray, 10 Ad. & E. 82; Howden *v.* Hay, 11 Ad. & E. 1033; Coleman *v.* Waller, 3 Younge & J. 212; Wells *v.* Girling, 1 B. & B. 447; Mallalieu *v.* Hodgson, 16 Q. B. 689; 20 L. J. Q. B. 339; Danglish *v.* Tennent, L. R. 2 Q. B. 49; 36 L. J. Q. B. 10; Elliott *v.* Richardson, L. R. 5 C. P. 744; and see jackson *v.* Duchaire, 3 T. R. 551; Nunes *v.* Carter, L. R. 1 P. C. 342; Armour *v.* Phillips, 4 Up. Can. Q. B. 152; Kerr *v.* Coleman, 6 Up. Can. Q. B. 218; Hersee *v.* White, 29 Up. Can. Q. B. 232; Feehan *v.* Lee, 10 Up. Can. Com. Pl. 385; Ross *v.* Elliott, 11 Up. Can. Com. Pl. 221; Tuer *v.* Harrison, 14 Up. Can. Com. Pl. 449; Gottwalls *v.* Mulholland, 15 Up. Can. Com. Pl. 62; Bank of Toronto *v.* McDougall, 15 Up. Can. Com. Pl. 475; *In re* Caton, 26 Up. Can. Com. Pl. 308; Brooks *v.* Taylor, 26 Up. Can. Com. Pl. 443; Shaving *v.* Meunier, 7 Low. Can. 250; Withall *v.* Young, 10 Low. Can. 149; Kalus *v.* Hergert, 1 Ont. App. 75.

5. Barnes *v.* Freeland, 6 T. R. 80.

6. But see Dixon *v.* Baldwin, 5 East, 175.

7. Barnes *v.* Freeland, 6 T. R. 80; as stated in Benj. Sales (4th Am. Ed.), pp. 573, 574, §§ 499–502, which is the basis of the present paragraph, and here refers also to Neate *v.* Ball, 2 East, 123: Richardson *v.* Goss, 3 Bos. & P. 119; Heineckey *v.* Earle, 8 El. & B. 410; 28 L. J. Q. B. 79. The earlier cases were to the contrary. Atkins *v.* Barwick, 1 Stra. 165; 10 Mod. 432; Fortes, 353; Salts *v.* Field, 5 T. R. 211; and see Alderson *v.* Temple, 4 Burr. 2235; Harman *v.* Fisher, Cowp. 117; James *v.* Griffin, 2 Mees. & W. 623–639.

decline to complete it to the prejudice of his vendor;[1] or, if the transit into his possession remains incomplete, he may refuse to take the goods into his custody, and thus leave to his vendor the right of stoppage *in transitu*, if it can be exercised before the assignees obtain control of the goods.[2]

**5. Preferences Not Fraudulent.**—(*a*) *Where Honest Intention to Pay Debt.*—An insolvent debtor may, in the absence of fraudulent design, prefer one creditor to another, either by judgment or deed, or in any mode except by an assignment in trust, although the effect of such preference may be to delay a creditor not preferred, or even to prevent his obtaining payment at all;[3] and in such cases the transaction is not invalidated by the statute prohibiting fraudulent transfers and conveyances, provided the intent was honest and the motive was to pay the preferred debt:[4] so that a husband may thus prefer his wife,[5] and a corporation its directors,[6] and the debtor may in good faith even carry his preference so far as to pay one debtor in full, and thus exhaust his whole property, leaving nothing for others equally meritorious, who are without remedy for such action.[7]

(*b*) *Under Assignment Acts and Late National Bankrupt Law.*—So although some of the various assignment laws of the States render preferences void, yet as interpreted this applies only to a preference in the assignment itself, or a preference given where both seller and buyer contemplate that an assignment will be speedily made,[8] and the interpretation of the late National Bankrupt Act was similar.[9]

1. Nicholson *v.* Bower, 1 El. & E. 172; 28 L. J. Q. B. 97; and see Richardson *v.* Goss, 3 Bos. & P. 119; *Ex parte* Cote, 9 Ch. 27.

2. See Atkins *v.* Barwick, 10 Stra. 165; 10 Mod. 432; Fortes, 353; Saltz *v.* Field, 5 T. R. 211; Smith *v.* Field, 5 T. R. 402; James *v.* Griffin, 2 Mees. & W. 623; Whitehead *v.* Anderson, 9 Mees. & W. 529; Siffken *v.* Wray, 6 East, 371; Bartram *v.* Farebrothers, 4 Bing. 579; Heineckey *v.* Erle, 6 El. & B. 410; 28 L. J. Q. B. 79; Bolton *v.* Lancashire, etc., R. Co., L. R. 1 C. P. 431; 35 L. J. C. P. 137; also Van Casteel *v.* Booker, 2 Ex. 691, 706; 18 L. J. Ex. 9, 14; Grout *v.* Hill, 4 Gray (Mass.), 361, 367.

3. York County Bank *v.* Carter, 38 Pa. St. 446, 453; Benj. Sales (Corb. Am. Ed.), p. 644, § 739, note 59, whence paragraph derived.

4. York County Bank *v.* Carter, 38 Pa. St. 446, 453; and see Gaus *v.* Renshaw, 2 Pa. St. 36; Covanhovan *v.* Hart, 21 Pa. St. 495; Maibury *v.* Brooks, 7 Wheat. (U. S.) 556; 11 Wheat. (U. S.) 78; Tompkins *v.* Wheeler, 16 Pet. (U. S.) 118.

5. Ferguson *v.* Spear, 65 Me. 277; Brigham *v.* Fawcett, 42 Mich. 542.

6. Smith *v.* Skeary, 47 Conn. 47, 54.

7. Clarke *v.* White, 12 Pet. (U. S.) 178, 200. See, further, Dudley *v.* Danforth, 61 N. Y. 626; Whitehead *v.* Woodruff, 11 Bush (Ky.), 209; Eldridge *v.* Phillipson, 58 Miss. 270; Hill *v.* Bowman, 35 Mich. 191; Beurmann *v.* Van Buren, 44 Mich. 496, 499; Fleischer *v.* Dignon, 53 Iowa, 288; Gage *v.* Cheesbro, 49 Wis. 486, 494; Butler *v.* White, 25 Minn. 432; Blennerhassett *v.* Sherman, 105 U. S. 100, 117.

8. 1 Benj. Sales (Corb. Am. Ed.), p. 676, § 781, note 64, whence paragraph derived.

9. See, generally, the following recent cases: Lincoln *v.* Wilbur, 125 Mass. 249; James *v.* Mech. Bank, 12 R. I. 460; Hanselt *v.* Vilmar, 76 N. Y. 630; Guernsey *v.* Miller, 80 N. Y. 181; Getman *v.* Oswego Bank, 23 Hun (N. Y.), 498; Frazier *v.* Fredericks, 24 N. J. L. 162; Bentz *v.* Rockey, 69 Pa. St. 71, 76; 1 Am. L. Cas. 56, 61; Zahn *v.* Fry, 10 Phila. (Pa.) 247; Jones *v.* Syer, 52 Md. 211; Dance *v.* Seaman, 11 Gratt. (Va.) 778; Sipe *v.* Earman, 26 Gratt. (Va.) 563, 566; Eldridge *v.* Phillipson, 58 Miss. 276; Fraser *v.* Thatcher, 49 Tex. 26; Scott *v.* Alford, 53 Tex. 82; Gardner *v.* Commercial Bank, 95 Ill. 298; Van Patten *v.* Burr, 52 Iowa, 518; Grant

(*c*) *General Doctrine.*—The general doctrine upon this subject is that a conveyance giving a preference to one creditor over others "is not fraudulent, though the debtor be insolvent and the creditor be aware at the time that it will have the effect of defeating the collection of other debts."[1] But to avoid the conveyance, there must be a real design on the part of the debtor to prevent the application of his property, in whole or in part, to the satisfaction of his debts; for "A creditor violates no rule of law when he takes payment or security for his demand, though others are thereby deprived of all means of obtaining satisfaction of their own equally meritorious claims."[2]

**6. Valid Sales by Insolvents and Purchases from Them.**—(*a*) *Validity of Sale in Good Faith, etc.*—An insolvent debtor may sell his property, or he would not be able to apply his property to pay his debts;[3] and if the transaction be an honest one, in good faith, and for a valuable consideration, it matters not how many creditors may be thereby prevented from reaching the property.[4]

(*b*) *Protection of Innocent Purchaser.*—So an innocent purchaser, even from one who sells with intent to defraud his creditors, is protected, as he stands on the same footing with one who has purchased property to which the seller has obtained title by fraud.[5]

**7. Between Whom Fraudulent Transfers Valid.**—(*a*) *Between the Parties and Against all Except Creditors.*—Transfers in fraud of creditors are, according to the weight of authority, valid between the parties and against all save creditors;[6] and this doctrine rests on the ground that the court will not allow either party to call his own act fraudulent.[7]

(*b*) *No Relief on Contract Founded in Fraud.*—But there are cases which hold that the fact of the fraud may be shown, so that as a

*v.* Nat. Bank, 97 U. S. 80; Rogers *v.* Palmer, 102 U. S. 263; Auffm'ordt *v.* Raisin, 102 U. S. 620; Barbour *v.* Priest, 103 U. S. 293; Blennerhassett *v.* Sherman, 105 U. S. 100; Gottwalls *v.* Mulholland, 15 Up. Can. Com. P. 62; 3 Er. & App. 194; Gordon *v.* Young, 12 Grant Ch. (Ont.) 318; Rish *v.* Sherman, 21 Grant Ch. (Ont.) 250.

1. Dana *v.* Stanford, 10 Cal. 278.

A sale of a stock of goods for which the purchasers agree to pay off certain creditors of the vendor in full, certain others in part, and the balance as the seller may direct, is, in the absence of fraud, valid. Greene, etc., Co. *v.* Marshall (Wis.), 39 N. W. Rep. 767; as abstracted in 27 Cent. L. J. 510.

2. Dana *v.* Stanford. 10 Cal. 278; as quoted in Ross *v.* Sedgwick, 69 Cal. 247, referring also to Randall *v.* Buffington, 10 Cal. 491; Wheaton *v.* Neville, 19 Cal. 46; and Covanhovan *v.* Hunt, 21 Pa. St. 495.

3. 1 Benj. Sales (Corb. Ed.), p. 643, § 739, note 59.

4. Wood *v.* Shaw, 29 Ill. 444; Miller *v.* Kirby, 74 Ill. 242, 246; Bowden *v.* Bowden, 75 Ill. 143, 147; Erb *v.* Cole, 31 Ark. 554.

5. 1 Benj. Sales (Corb. Ed.), p. 643, § 739, note 59, citing Farrell *v.* Colwell, 30 N. J. L. 123; Atwood *v.* Impson, 20 N. J. Eq. 150, 155; Scott *v.* Heilager, 14 Pa. St. 238; Massie *v.* Enyart, 32 Ark. 251; Kellogg *v.* Aherin, 48 Iowa, 299.

Concerning protection of *bona fide* purchaser, see Bush *v.* Collins, 35 Kan. 535; McKee *v.* Bussick, 8 Colo. 392.

6. Mudge *v.* Oliver, 1 Allen (Mass.), 74; Harvey *v.* Varney, 98 Mass. 118; Evans *v.* Herring, 27 N. J. L. 243; Ruckman *v.* Ruckman, 32 N. J. Eq. 259; Telford *v.* Adams, 6 Watts (Pa.), 429, 434; Boyle *v.* Rankin, 22 Pa. St. 168, 170; Phipps *v.* Boyd, 54 Pa. St. 342; Gary *v.* Jacobson, 55 Miss. 204 (reviewing cases); Ybarra *v.* Lorinzana, 53 Cal. 197; Allison *v.* Hogan, 12 Nev. 38; Maher *v.* Swift, 14 Nev. 324; Brooks *v.* Martin, 2 Wall. (U. S.) 70.

7. 1 Benjamin on Sales (Corbin's Ed.), p. 674, § 779, note 63; whence foregoing matter derived.

result the party seeking relief upon a contract founded in fraud will fail;[1] and these decisions are founded on the principle expressed by the maxim *In pari delictu melior est conditio possidentis.*[2]

**8. Voluntary Assignments.**—(*a*) *At Common Law.*—At common law, an insolvent debtor may make a voluntary assignment of his goods for the benefit of all his creditors, or of any number thereof;[3] and the mere fact that such assignment may operate to the injury of a particular creditor does not invalidate it, but, in the absence of fraud, the excluded creditor can only satisfy his debt out of the surplus.[4]

(*b*) *Assignment with Preferences.*—So, also, at common law, an insolvent debtor may assign or transfer his property to a particular creditor, for the purpose of giving him a preference of payment over all others,[5] provided such assignment or transfer be for a legal and valuable consideration, and be not manifestly excessive as a security for the debt;[6] but in many of the States the rule is changed by statute.[7]

(*c*) *Effect of Statute of Bankruptcy.*—And where there is a statute of bankruptcy, it supersedes an arrangement which may be made between the debtor and creditor in contravention of its policy and provisions.[8]

**9. Assent of Creditors.**—(*a*) *Not Ordinarily Necessary at Time of Assignment.*—It is not ordinarily necessary that the creditors should be technically parties to an assignment, or give an express

1. Church *v.* Muir, 33 N. J. L. 318; but see Nellis *v.* Clarke, 20 Wend. (N. Y.) 24; 4 Hill (N. Y.), 424.

2. Church *v.* Muir, 33 N. J. L. 318. See, for basis of paragraph, 1 Benjamin on Sales (Corbin's Ed.), p. 674, § 779, note 63; here also referring to Burleigh *v.* White, 64 Me. 23.

3. Story Sales (4th Ed.), p. 622, § 514, whence subdivision derived; and see Story Contr. (5th Ed.) p. 620, § 651.

4. Holbird *v.* Anderson, 5 T. R. 235; Pickstock *v.* Lyster, 3 Maule & S. 371; Haven *v.* Richardson, 5 N. H. 113; Stevens *v.* Bell, 6 Mass. 342; Ingraham *v.* Wheeler, 6 Conn. 277; Murray *v.* Riggs, 15 Johns. (N. Y.) 571; Halsey *v.* Whitney, 4 Mason (U. S.), 211; Burd *v.* Smith, 4 Dall. (U. S.) 85; Clark *v.* White, 12 Pet. (U. S.) 178; Tompkins *v.* Wheeler, 16 Pet. (U. S.) 106.

5. Story Sales (4th Ed.), p. 622, § 514; and see Story Contr. (5th Ed.) p. 620, § 651.

6. King *v.* Watson, 3 Price, 6; Pickstock *v.* Lyster, 3 Maule & S. 371; Buffum *v.* Green, 5 N. H. 71; Johnson *v.* Whitwell, 7 Pick. (Mass.) 74; Wall *v.* Lakin, 13 Metc. (Mass.) 167; Stevens *v.* Bell, 6 Mass. 339; Deforest *v.* Bacon, 2 Conn. 683; Bates *v.* Coe, 10 Conn. 280; Hendricks *v.* Robinson, 2 Johns. Ch. (N. Y.) 307, 308; Nicoll *v.* Mumford, 2 Johns. Ch. (N. Y.) 529; Grover *v.* Wakeman, 11 Wend. (N. Y.) 194; Leitch *v.* Hallister, 4 N. Y. 211; Wilt *v.* Franklin, 1 Binn. (Pa.) 502; Waters *v.* Comly, 3 Harr. (N. J.) 117; Bruce *v.* Smith, 3 Harr. & J. (Md.) 499; King *v.* Trice, 3 Ired. Eq. (N. Car.) 567; Moffat *v.* McDowell, 1 McCord Eq. (S. Car.) 434; Stover *v.* Herrington, 7 Ala. 142; U. S. *v.* Bank, 8 Rob. (La.) 262; Ford *v.* Williams, 3 B. Mon. (Ky.) 550; Fasset *v.* Traber, 20 Ohio, 540; Brown *v.* Minturn, 2 Gall. (U. S.) 557; Marbury *v.* Brooks, 7 Wheat. (U. S.) 556; Brashear *v.* West, 7 Pet. (U. S.) 608; 2 Kent Com. 531, 532.

7. See Berry *v.* Cutts, 42 Me. 455; Mass. Insolvent Act of 1838; Stats. Conn. 1838; Varnum *v.* Camp, 1 Greenl. (Me.) 326; Garr *v.* Hill, 1 Stock. Ch. (N. J.) 210; Brown *v.* Holcomb, 1 Stock. (N. J.) 297; Brown *v.* Lee, 7 Ga. 267; Prince Dig. 164; Stats. Ohio 1838; Bryan *v.* Burbin, 26 Mo. 423.

8. Binus *v.* Towsey, 3 Nev. & P. 91; Davies *v.* Acocks, 2 Cromp. M. & R. 461; Knight *v.* Ferguson, 5 Mees. & W. 389; Halsey *v.* Whitney, 4 Mason (U. S.), 210, 211.

assent thereto at the time it is made;[1] for if they subsequently sign it, or expressly assent to it, or receive the benefit of it, it is good against all persons, except intervening attaching creditors.[2]

(*b*) *Assent Presumed to Absolute Assignment.*—And if the assignment be absolute, their assent will be presumed, though not if it be conditional, as, that the creditors shall release their debts.[3]

(*c*) *Secret Preferences.*—But secret preferences, made to particular creditors, to induce them to join in a general assignment, are regarded as frauds upon other creditors who execute the instrument ignorant thereof.[4]

**10. Assignment Exacting Release.**—(*a*) *Not Necessarily Fraudulent.*—An assignment will not be rendered fraudulent by the mere fact that it is conditional, and requires a general release of liability from the creditors,[5] or that it does not purport to convey all the property of the debtor, or reserves the ultimate surplus to him.[6]

(*b*) *Question of Tendency to Delay and Defraud Creditors.*—Upon the question whether an assignment, on condition that a release should be given, is not in violation of the statute concerning fraudulent conveyances, and does not tend to delay and defeat the claims of creditors, there has been embarrassing conflict of opinion in the courts;[7] and the rule which at one time seemed finally to be settled, that such a condition does not invalidate the assignment,[8] has been rendered subject to various qualifications.[9]

1. Story Sales (4th Ed.), p. 622, § 514; whence subdivision derived; and see Story Contr. (5th Ed.) p. 620, § 652. So creditors may acquire a preference *in invitum* by an attachment, which, if prior in time, may prevail over an assignment, as neither is considered a constructive fraud upon the other. Cadogan *v.* Kennett, Cowp. 432; Hatch *v.* Smith, 5 Mass. 42; Halsey *v.* Whitney, 4 Mason (U. S.), 213; Marbury *v.* Brooks, 7 Wheat. (U. S.) 566; 11 Wheat. (U. S.) 78.

2. Halsey *v.* Whitney, 4 Mason (U. S.), 210, 215; Marbury *v.* Brooks, 7 Wheat. (U. S.) 556; 11 Wheat. (U. S.) 78; Hastings *v.* Baldwin, 17 Mass. 552. *Compare* Widgery *v.* Haskell, 5 Mass. 144. But see Brashear *v.* West, 7 Pet. (U. S.) 608; Ellison *v.* Ellison, 6 Ves. 656.

3. Thompson *v.* Leach, 2 Vent. 198; Estwick *v.* Cailland, 2 T. R. 381; Pickstock *v.* Lyster, 3 Maule & S. 371; Small *v.* Marwood, 9 Barn. & C. 300; Deforest *v.* Bacon, 2 Conn. 633; Austin *v.* Bell, 20 Johns. (N. Y.) 442; Searing *v.* Brinkerhoff, 5 Johns. Ch. (N. Y.) 329; North *v.* Turner, 9 S. & R. Pa.) 244; Galt *v.* Dribell, 10 Yerg. (Tenn.) 146; Adams *v.* Blodgett, 2 Wood. & M. (U. S.) 233; Halsey *v.* Whitney, 4 Mason (U. S.), 210; Marbury *v.* Brooks, 7 Wheat. (U. S.) 556; 11 Wheat. (U. S.) 78.

4. 1 Story Eq. Jur. § 378, and cases there cited; Spurrit *v.* Spiller, 1 Atk. 105; Chesterfield *v.* Jaussen, 1 Atk. 352; Smith *v.* Bromley, Dougl. 696, note.

5. Story Sales (4th Ed.), p. 624, § 516, whence paragraph derived; and see Story Contr. (5th Ed.) p. 621, § 652.

6. But see Austin *v.* Bell, 20 Johns. (N. Y.) 442.

7. See, in favor of the view that such an assignment is void, Searing *v.* Brinckerhoff, 5 Johns. Ch. (N. Y.) 329; Hyslop *v.* Clarke, 14 Johns. (N. Y.) 459; Harris *v.* Summer, 2 Pick. (Mass.) 129; Widgery *v.* Haskell, 5 Mass. 144; Ingraham *v.* Geyer, 13 Mass. 146;—and to the contrary, Hatch *v.* Smith, 5 Mass. 42; Lippincott *v.* Barker, 2 Binn. (Pa.) 174; King *v.* Watson, 3 Price, 6.

8. Halsey *v.* Whitney, 4 Mason (U. S.), 230; Story Sales (4th Ed.), p. 624, § 516, whence paragraph derived, here referring also to 2 Kent Com. 533, 534, and notes; Small *v.* Marwood, 9 Barn. & C. 300; Goss *v.* Neale, 5 Moore, 29; Goodrich *v.* Downs, 6 Hill (N. Y.), 438; Barney *v.* Griffin, 4 Sandf. (N. Y.) 552; Porter *v.* Williams, 5 Seld. (N. Y.) 142; D'Ivemois *v.* Leavitt, 23 Barb. (N. Y.) 63; Hindman *v.* Dill, 11 Ala. 689; Grimshaw *v.* Walker, 12 Ala. 101; Austin *v.* Johnson, 7 Humph. (Tenn.) 191; Ely *v.* Hair, 16 B. Mon. (Ky.) 203; Brown *v.* Knox, 6 Mo. 302; Ramsdell *v.* Sigerson, 2 Gilm. (Md.) 78; Stewart *v.* Spencer, 1 Curt. (U. S.) 157.

9. See Story Contr. (5th Ed.) pp. 622–

**11. Effect of Special Agreement.**—(*a*) *With Indorser of Buyer's Note.*—Where a party purchased cattle with the proceeds of a note drawn by himself, and made an agreement with the indorser to keep the cattle and pay off the note, or else turn the cattle over to the indorser, there was no fraud in law to prevent the indorser from claiming as against an execution creditor who had levied on the cattle; and whether there was fraud in fact, was for the jury to find.[1]

(*b*) *Retaining Ownership on Transfer of Stock.*—But a transfer of stock by which the title passes to the grantee, but accompanied by a secret agreement that the grantor should remain the owner and receive the dividends, is fraudulent as to the creditors of the grantor.[2]

(*c*) *Promise to Use Property so as to Confer Pecuniary Benefit.*—A transfer of personal property, however, accompanied by an actual, immediate, and continued change of possession, has been held not fraudulent as to creditors because made in consideration of a promise by the transferee to use the property in a certain manner, which would confer pecuniary profit on the transferee.[3]

**12. Hurried Sales Under Peculiar Circumstances.**—(*a*) *Hasty Sale to Creditor for His Debt and Cash.*—A sale has been held valid where it was made by a failing debtor, who had refused an offer for his goods because the money was to be put in the hands of a trustee for his creditors, but thereafter made haste to sell it for the same price to a creditor, who knew of his condition, the consideration being paid partly by extinguishing the creditor's debt and partly in cash which was used to pay other creditors.[4]

(*b*) *Variety of Peculiar Features.*—But a verdict finding a sale to be invalid will not be disturbed where the good faith and validity of the sale of a stock of millinery by a failing debtor is challenged by the creditors, and it is shown that the vendee, who was a lawyer and real-estate agent residing in a distant city and unacquainted with the millinery business, purchased all the property of the insolvent vendors for 50 per cent of the cost price, without taking an inventory of the same; and it appears that no money was paid by the vendee, but that the sale was made upon a long and unusual credit, the vendee giving his negotiable, unsecured, non-interest-bearing notes due in six, twelve, and eighteen months thereafter; and it is also shown that the sale was hurriedly made, in anticipation that

624, § 653; while the contrary doctrine is stated to be supported by the weight of authority. Bump Fraud. Conv. (2d Ed.) 427, citing the cases.

1. Wall *v.* Wall (Pa.), 3 Atl. Rep. 25.

2. Hirsch *v.* Norton, 115 Ind. 341; 27 Cent. L. J. 270.

**Sale on Unusual Credit.**—The sale of all the property of an insolvent debtor, upon a long and unusual credit, the necessary effect of which, as well as of the intent shown by the other terms agreed on and methods employed, is to hinder and delay creditors in the collection of their claims, will be held void, although there may be an honest intention of the debtor to finally pay his entire indebtedness. Roberts *v.* Radcliff, 35 Kan. 502. Concerning sale on unusually long credit, see also Spaulding *v.* Adams, 63 Iowa, 437.

3. Lewis *v.* Hopping, 67 Cal. 541.

4. Carter *v.* Coleman, 84 Ala. 256; as noted in 27 Cent. L. J. 19.

the principal creditors were about to levy upon the goods and enforce the collection of their claims, and it was further shown that the vendors continued in the possession and control of the goods after the alleged sale, claiming to have been employed by the vendee.[1]

**13. Admissibility of Vendor's Declarations.**—(*a*) *Inadmissible Where Entirely Apart from Sale.*—Declarations made by a vendor wholly, separate and apart from the sale of goods made to a creditor in payment of a debt, are not competent evidence.[2]

(*b*) *Admissible Where Combination to Defraud, or Where They Form Part of Res Gestæ.*—But if a combination between a vendor and vendee to defraud other creditors is first shown, or if the declarations are connected with the transaction in such a way as to show that they are part of the *res gestæ*, such statements are admissible.[3]

**14. Protection of Bona Fide Purchasers.** — (*a*) *Need of Valuable Consideration Passing Before Notice.*—Where an insolvent and failing merchant makes a sale of all his goods and merchandise for the purpose of defrauding his creditors, no one can, as against attaching creditors, claim title to the property thus fraudulently disposed of, except a purchaser for a valuable consideration actually passed before notice of the fraud.[4]

1. Roberts *v.* Radcliff, 35 Kan. 502.

2. Rogers *v.* Thurston (Neb.), 27 Cent. L. J. 207, with note, 289.

Concerning sellers statements, see also Gallagher *v.* Williamson, 23 Cal. 331; s. c.. 83 Am. Dec. 114, and note, 117.

3. Rogers *v.* Thurston (Neb.), 27 Cent. L. J. 287. In this case there was no charge of conspiracy between the purchasing creditors and the seller to defraud the other creditors of the latter; but it was remarked by Maxwell, J., who delivered the opinion of the court, that, even if there were, the common design must be first shown before the statements or declarations made by one of them, in the absence of the others, can be given in evidence against the others. People *v.* Parish, 4 Denio (N. Y.), 153; Williamson *v.* Com., 4 Gratt. (Va.) 547; State *v.* Simons, 4 Strob. (N. J.) 266; Reg. *v.* Mears, 1 Eng. L. & Eq. 581; State *v.* Ripley, 31 Me. 386; Glory *v.* State, 13 Ark. 236.

**Evidence of Oral Admissions.**—In the same opinion, it was said: "Evidence of oral admissions in any case is to be received with great caution. While the statements of a person prejudicial to his own interest are admissible in evidence against him, yet the repetition of oral statements is always subject to great imperfection. The party making the admission may not have correctly expressed his meaning, or he may have spoken jestingly or without due consideration; and even if his meaning was correctly expressed, he may have been misunderstood, or a slight alteration of the words, without any design to misrepresent, may entirely vary the effect of the statement. Hence, while courts holding [hold] that such evidence is admissible in a proper case, [they] receive it with great caution. 1 Phil. Eq. Ev. (4th Ed.) 479, and notes." After quoting from Judge Redfield, in 1 Greenlf. Ev. (12th Ed.), § 200, the opinion proceeds: "But in no case can admissions made by a vendor after he has parted with his title, and not connected with the transaction, be admissible against his vendee. This precise question was before this court in Simpson *v.* Armstrong, 20 Neb. 513, where it is said: 'The only theory upon which testimony of this kind is admissible is that it becomes a part of the *res gestæ*, being so nearly connected therewith as to be spontaneous and unpremeditated, and therefore free from sinister motives, thus giving a reliable explanation of the principal transaction—the subject of the inquiry.' It is further held, in the case, that declarations made to a creditor two weeks before the sale, as to the value of a stock of goods, and of which a subsequent purchaser had no notice, are not admissible to show fraud."

4. Bush *v.* Collins, 35 Kan. 535.

(*b*) *Effect of Notice Before Payment of Entire Consideration.*—Even where a further purchaser in such a case has no actual or constructive notice of the fraud at the time of the purchase, but subsequently, and before the payment of all the consideration of his purchase, has actual notice thereof, he can only be protected to the extent of the money actually paid, or the security or property actually appropriated by the seller as payment.[1]

(*c*) *From Seller Retaining Possession.*—To constitute a subsequent purchaser in good faith, from a seller retaining possession of personal property, under the *Colorado* Statute of Frauds and Perjuries,[2] such person must have made the purchase not only for a valuable consideration, but without notice of any claims of prior purchasers.[3]

**15. Transfer for Pre-existing Debt.**—(*a*) *When Invalid.*—Generally, a fraudulent vendee cannot, as against the creditors of the fraudulent vendor, sell, assign, or transfer the property to a third person who has notice of the fraud; nor can such vendee transfer or assign the property even to a person who has no such notice where such transfer or assignment is merely to pay a pre-existing debt of the fraudulent vendee.[4]

(*b*) *When Valid.*—But such fraudulent vendee may make a valid sale of the property to a *bona fide* purchaser without notice of the fraud, or may, with the consent of the fraudulent vendee, and probably without his consent, make a valid transfer or assignment of such property to a creditor of the fraudulent vendor, either in payment or partial payment of a *bona fide* debt of the fraudulent vendor, or as security for such debt, and whether such creditor has notice or not of the prior fraudulent sale.[5]

1. Bush *v.* Collins, 35 Kan. 535, holding that, if notice of the fraud is after payment of a part of the purchase-money, the purchaser is entitled to reimbursement only for the money paid or the security or property actually appropriated by the seller as payment, since such a buyer is not to be regarded as a purchaser for a valuable consideration as to the purchase-money not paid.

2. See Colo. Gen. Stats. § 1523.

3. McKee *v.* Bassick. 8 Colo. 392.

**Creditor's Knowledge, etc.**—The circumstances that the creditors knew of a sale, and practically conceded that the purchase was in good faith, have been held in no manner to operate as a waiver so as to relieve the purchaser from compliance with the peremptory terms of a statute raising a conclusive presumption of fraud from want of the requisite change of possession,—Bassinger *v.* Spungler, 9 Colo. 175, where it is said that the "statute being peremptory, the purchaser's failure to comply therewith placed the creditors of his vendor in the condition mentioned in the case of Perrin *v.* Reed [35 Vt. 2], *supra*, where it was held that a creditor, with full knowledge of such a transaction, 'has notice of a sale that in law is void as to him;' or, as held in Lawrence *v.* Burnham [4 Nev. 361], *supra*, 'Whether the creditor has knowledge of such a sale or not is of no consequence.'"

4. Dolan *v.* Van Demark, 35 Kan. 304.

5. Dolan *v.* Van Demark, 35 Kan. 304, citing Butler *v.* White, 26 Minn. 432; Boyd *v.* Brown, 17 Pick. (Mass.) 453; Murphy *v.* Moore, 3 Hun (N. Y.), 95; Stark *v.* Ward, 3 Pa. St. 328; Webb *v.* Brown, 3 Ohio St. 246, (3d Ed.), 499, 500.

**Goods Worth only the Debt, and Transferred only to Satisfy it.**—A conveyance to a creditor, of goods worth only the debt, which was made only to satisfy such debt, and not to defraud other creditors, is valid against such creditors; and the debtor may testify that such was the object. Brown *v.* Lessing (Tex.), 783; as noted in 26 Cent. L. J. 612. See also Jefferson C. S. Bank *v.* Eborn, 84 Ala. 529; 27 Cent. L. J. 222.

(B) BILLS OF SALE ACTS.—**1. English Bills of Sale Acts.**—(*a*) *Design and Effect of.*—In England, legislation providing for the registration of bills of sale,[1] which is designed to prevent the evils arising from secret bills of sale,[2] has rendered obsolete much of the law concerning fraudulent transfers of chattels.[3]

(*b*) *Requirements of.*—Under the enactments regulating this subject, bills of sale and various other instruments of a similar character must contain a statement of the consideration, and must be attested and registered in a prescribed manner;[4] or the transfer, if not absolutely void, will be voidable by specified persons, as representatives in bankruptcy or insolvency, and execution creditors.[5]

(*c*) *Recording of Bills of Sale in United States.*—In the United States, however, there are, as a rule, no statutory requirements as to the registration of absolute bills of sale, except that a few States declare that if possession is retained by the vendor, it shall be evidence of fraud unless the bill of sale is recorded.[6]

**2. Effect of Non-compliance.**—(*a*) *Void, Under Act of* 1878, *Against Particular Classes of Persons.*—Under the English enactment of 1878,[7] so far as it may be in force since the Amendment Act of 1882, bills of sale, as defined in the act, must be duly attested and registered within a prescribed period after execution, and must set forth the consideration for which they were given, or, as affecting chattels in the possession or apparent possession of the person by or for whom the bill of sale is made, they will be fraudulent and void against four classes of persons: (1) The grantor's trustee in bankruptcy or insolvency;[8] (2) his assignee in any assignment for the benefit of creditors; (3) sheriff's officers and others seizing

**Affirmative Proof Requisite.**—Where a party purchased property from another, applying it to the payment of his debt, but, before its delivery, the vendor's creditors attached it, and the purchaser sued for its recovery, it was held that, if the creditors claim existed prior to the alleged sale, the purchaser must show affirmatively that the vendor was indebted to him and the property was sold to him at a reasonable value, before a presumption will arise that the sale was *bona fide*. Pollak *v.* Searcy, 84 Ala. 259; as stated in 27 Cent. L. J. 25.

**Knowledge of Intended Fraud.**—Knowledge by a preferred creditor, that a transfer of property to him by an insolvent firm was made to hinder and delay their creditors, does not amount to a participation in the intended fraud when he accepted the transfer in good faith and solely to save a *bona fide* debt. Sexton *v.* Anderson (Mo.), 8 S. W. Rep. 564.

1. Bills of Sale Acts 1878, 41 & 42 Vict. c. 31; and Amdt. Act of 1882, 45 & 46 Vict. c. 43; Superseding Bills of Sale Acts of 1854, 17 & 18 Vict. c. 36; and Bills of Sale Act of 1866, 29 & 30 Vict. c. 96.

2. See Preamble Bills of Sale Act of 1854, 17 & 18 Vict. c. 36; Camp. Sales 108.

3. Under Stat. 13 Eliz. c. 5. See Benjamin on Sales (4th Am. Ed.), p. 546, § 489.

4. Bills of Sale Act 1878, § 10.

5. Act of 1878, § 10; Amdt. Act of 1882, §§ 8–10, 12.

6. Benjamin on Sales (4th Am. Ed.), p. 775, § 675, note (*d*), whence foregoing matter derived.

7. Bills of Sale Act 1878, § 8.

8. But the liquidator of a company is not deemed an assignee in bankruptcy or insolvency, because he acts not only for creditors, but for contributors and for the company. *Re* Marine Mansions Co., 4 Eq. 401.

Rule in bankruptcy contained in this section does not apply, under the Judication Act, to administration, by the court, of an insolvent's estate. *Re* Knott, L. R. 7 Ch. D. 549, note; *Re* D'Epinaul, L. R. 20 Ch. D. 217; and see *Re* Withernsea Brick-works Co., L. R. 16 Ch. D. 337, 341.

under execution; and (4) all persons on whose behalf process of execution has issued.[1]

(*b*) *Absolutely Void Under Later Act.*—Under the Amendment Act of 1882, bills of sale to which the act applies (embracing at least those given by way of mortgage) are absolutely void if they fail to comply with the requisites as to attestation, registration, and statement of consideration.[2]

(*c*) *Formerly Valid Between Parties, or Voidable only.*—But neither the statute of Elizabeth nor the earlier bills of sale acts rendered the contract void between the parties;[3] and without any enumeration of the persons who remain unaffected by the contract, as in the Act of 1878, it would not be competent for either party to impeach the provisions of such a contract on the ground that it was intended as a fraud on creditors;[4] while even as to creditors, such conveyances are not void but voidable at the election of the creditor, and if, before such impeachment of the bill of sale, the the transferee makes a conveyance to a *bona fide* third person for a valuable consideration, the title of the latter will not be disturbed.[5]

**3. Documents Included.**—(*a*) *Inventories and Receipts.*—The expression "bill of sale" in the existing enactments[6] is declared to include bills of sale, assignments, transfers, declarations of trust without transfer, inventories of goods with receipt thereto attached,[7] or receipts for purchase-money of goods,[8] and other assurances of personal chattels;[9] but inventories and receipts, to be within the act, must operate as assurances, that is, must be documents on which the title of the transferee of the goods depends.[10]

1. Benjamin on Sales (4th Am. Ed.), pp. 555, 556, § 492; and see Richards *v.* James, L. R. 2 Q. B. 285, 291, and Chapman *v.* Knight, L. R. 5 C. P. D. 308; stated in Camp. Sales, 125, 126.

2. Bills of Sale Act 1878; Amendment Act 1882, §§ 8–10, 12; 45 & 46 Vict. 43.

See, for source of paragraph, Benjamin on Sales (4th Am. Ed.), p. 569, § 496; id. p. 555, § 492.

A bill of sale, being a security for a debt, becomes void when the debtor has been released by a discharge in bankruptcy. Thompson *v.* Cohen, L. R. 7 Q. B. 527; Cole *v.* Kernott, L. R. 7 Q. B. 534; and see Collyer *v.* Isaacs, L. R. 19 Ch. D. 342.

3. Davis *v.* Goodman, L. R. 5 C. P. D. 20, 128; Camp. Sales, 115. It was also good, under the statute of Elizabeth, as against strangers not creditors, so that a sheriff, seizing the goods on execution, must put in evidence the writ,—Doe *v.* Roberts, 2 Barn. & Ald. 367; Bessey *v.* Windham, 6 Q. B. 166; Geave *v.* Wentworth, 6 Q. B. 173, note;—and even the judgment,—White *v.* Morris, 11 C. B. 10, 15; 21 L. J. C. P. 185.

4. Bessey *v.* Windham, 6 Q. B. 166; Doe *v.* Roberts, 2 Barn. & Ald. 367; and see Philpotts *v.* Philpotts, 10 C. B. 85; 20 L. J. C. P. 11.

5. Morewood *v.* South Yorkshire R. Co., 3 Hurl. & N. 799; 28 L. J. Ex. 1141.

See, for basis of much in paragraph, Benjamin on Sales (4th Am. Ed.), p. 571, § 497.

But the assignee for value of a bill of sale is not protected unless he has renewed the registration within the time prescribed by the act. Karet *v.* Kosher Meat Supply Assoc., L. R. 2 Q. B. D. 361.

6. See Benjamin on Sales (4th Am. Ed.), pp. 547–549, § 490; Campb., Sales 109.

7. See Marsden *v.* Meadows, L. R. 7 Q. B. D. 80.

8. See Allsop *v.* Day, 7 Hurl. & N. 547; *Ex parte* Cooper, L. R. 10 Ch. D. 313.

9. Bills of Sale Act of 1878, § 4.

10. Marsden *v.* Meadows, L. R. 7 Q. B. D. 80.

And an inventory of goods, with a receipt for the purchase-money, given by a sheriff who had seized goods under a writ of execution, is not a bill of sale requiring registration;[1] while, prior to the latest acts, a receipt for money given by a husband to the trustee of his wife's settlement, for the purchase of his household goods and effects, stated to be contained in the inclosed inventory, was held not to be a bill of sale.[2]

(*b*) *Other Specified Documents.*—Other documents specified as embraced by the act under the term "bill of sale" are, powers of attorney, authorities or licenses to take possession of personal chattels as security for any debt,[3] and also any agreement, whether intended or not to be followed by the execution of any other instrument, by which a right in equity to any personal chattels[4], or to any charge or security thereon, shall be conferred.[5]

**4. Documents Not Included.**—But the documents embraced by the expression "bill of sale," in the act, do not include assignments for the benefit of creditors, marriage settlements, transfers or assignments of any ship or vessel, or any share thereof,[6] transfers of goods in the ordinary course of business of any trade or calling,[7] bills of sale of goods in foreign ports[8] or at sea, bills of lading, India warrants, warehouse-keepers' certificates, warrants or orders for the delivery of goods, or any other documents used in the ordinary course of business as proof of the possession or control of goods, or authorizing or purporting to authorize, either by indorsement or by delivery, the possessor of such document to transfer or receive goods thereby represented.[9]

Such as an actual transfer of the property, or an agreement therefor, or a muniment of title taken as a record of the transaction. L. R. 7 Q. B. D. 80.

1. Marsden *v.* Meadows, L. R. 7 Q. B. D. 80, following Woodgate *v.* Godfrey, L. R. 5 Ex. D. 24; L. R. 4 Ex. D. 59, decided under the Act of 1854. There the receipt was held surplusage, as the claimant had previously a complete title to the goods.

2. Allsop *v.* Day, 7 Hurl. & N. 457; 31 L. J. Ex. 105; Byerly *v.* Prevost, L. R. 6 C. P. 144; but see *Ex parte* Odell, L. R. 10 Ch. D. 76; *Ex parte* Cooper, L. R. 10 Ch. D. 313. See Benjamin on Sales (4th Am. Ed.), pp. 547, 548, § 490.

3. See Benj. Sales (4th Am. Ed.), p. 547, § 490; Campb. Sales, 110, 111; *Ex parte* Hewitt, L. R 16 Ch. D. 522.

Attornment clause of mortgage deeds not such license or authority under act of 1854. *In re* Stockton Iron Co., L. R. 10 Ch. D. 335.

4. This provision is declaratory of the law as laid down before the act. *Ex parte* Mackay, 8 Ch. 643; *Ex parte* Conning, 16 Ex. 414.

5. Bills of Sale Act of 1878, § 4.

6. See Merchant Shipping Act of 1854, 17 and 18 Vict. c. 104, §§ 55, 57, 81.

The exception covers a ship built for a foreigner, and which therefore could not be registered as a British ship. Union Bank *v.* Lenanton, L. R. 3 C. P. D. 243.

7. See *Ex parte* Northwestern Bank, 15 Eq. 69; *Ex parte* Conning, 16 Ex. 414; Merchant Banking Co. *v.* Spoffen, 11 I. R. Eq. 586; *Ex parte* Watson, L. R. 5 Ch. D. 35.

8. Including *Scotland.* Coot *v.* Jecks, 13 Eq. 597.

9. Bills of Sale Act of 1878, § 4; Benj. Sales (4th Am. Ed.), pp. 547–549, § 490.

Agreement for hire and conditional purchase of furniture on instalments, *held*, not bill of sale under act of 1854. *Ex parte* Crawcour, L. R. 9 Ch. D. 419. And an agreement, in consideration of an immediate advance, to execute "on request" a bill of sale of personal chattels, is not a bill of sale requiring registration,—Campb. Sales, 123;—nor is the bill of sale given on demand in pursuance of such prior agreement, although given on the eve of bankruptcy, an act of bankruptcy or a fraudulent preference,—*Ex parte* Houran, L. R. 12 Eq. 598; *Ex parte* Izard, L. R. 9 Ch. 275.

**Bills of Sale Given by Way of Security.**—The Amendment Act of 1882, which dispenses with any statement of consideration, and even, perhaps, attestation and registration, applies by its terms only to bills of sale given by way of security for the payment of money, that is, by way of mortgage (act of 1882, § 3), and not to any debentures issued by any mortgage, loan, or other incorporated company, and secured upon the company's capital, stock, or goods, chattels, and defects. Act of 1882, § 17; Benj. Sales (4th Am. Ed.), p. 568, § 496.

**Mortgage with Attornment Clause.**—Attornments, instruments, or agreements (except mining leases) giving a power of distress as security for debts or advances, and reserving rent therefor, or to pay interest thereon, are deemed bills of sale of personal chattels, which may be seized thereunder. Bills of Sale Act of 1878, § 6. And every mortgage deed containing an attornment clause must be registered, in order to render that clause valid as against the trustee in bankruptcy, or the execution creditor. *Ex parte* Jackson, L. R. 14 Ch. D. 733; Robson Bankruptcy (Ed. 1881), 543.

Proceeds of distress for rent levied under an attornment clause are applicable to payment of principal as well as of interest in absence of contrary provision in deed. *Ex parte* Harrison, L. R. 18 Ch. D. 127, failing to follow Hampson *v.* Fellows, 6 Eq. 575. For under an attornment clause the mortgagee is under the same liability to account as a mortgagee in possession. *In re* Stockton Iron Co,, L. R. 10 Ch. D. 335; *Ex parte* Jackson, 14 Ch. D. 725; and see *Ex parte* Punnett, L. R. 16 Ch. D. 226; *Ex parte* Isherwood, 46 L. T. (N. S.).

An exception is made of mortgages of an estate or interest in land which the mortgagee being in possession shall have demised to the mortgagor as his tenant at a fair and reasonable rent. Bills of Sale Act of 1878, § 8. And independently of statutory provision on the subject, it has been held that an attornment clause in a mortgage, which does not satisfy this criterion, is void, as a fraud on the bankruptcy law,—*Ex parte* Williams, L. R. 7 Ch. D. 138; *Ex parte* Jackson, L. R. 14 Ch. D. 725; Campb. Sales, 78, 111;—though, where the rent fixed is a real and not a fictitious one, as tested mainly by a comparison of its amount with the fair letting value of the property (*In re* Stockton Iron Co., L. R., 10 Ch. D. 335), a *bona fide* tenancy is created, and the mortgagee is then entitled to exercise all the rights of a landlord, including the right to distrain;—*In re* Stockton Iron Co., L. R. 10 Ch. D. 335.

**Agreement to Give Bill of Sale.**—An agreement to execute "on request" a bill of sale of personal chattels, given in consideration of an immediate advance, is not a bill of sale requiring registration under the act (Campb. Sales, 123), and thus is practically an evasion of the act unless it can be considered as an agreement which may be followed by the execution of another instrument, and which gives a right in equity to any personal chattels, or whereby any charge or security therein is conferred. Bills of Sale Act of 1878, § 4. But yet a bill of sale given upon demand, and in accordance with such a previous agreement, it is not held, although given on the eve of bankruptcy, an act of bankruptcy or a fraudulent preference. *Ex parte* Homan, L. R. 12 Eq. 598; *Ex parte* Izard, L. R. 9 Ch. 275. And the transaction is valid unless it can be inferred, from the circumstances, that the giving of the bill of sale is purposely postponed until the trader is in a state of insolvency, in order to prevent the destruction of his credit, which would result from registering the bill of sale. *Ex parte* King, L. R. 3 Ch. D. 256.

It has been decided, however, that such a postponement purposely made would be evidence of an intention to commit an actual fraud against the general creditors, —*Ex parte* Fisher, L. R. 7 Ch. 636, 645; and see *Re* Gibson, L. R. 8 Ch. D. 230; *Ex parte* Kilner, L. R. 13 Ch. D. 245;—and that, where the bill of sale has been postponed, the burden lies upon the holder to show the *bona fides* of the transaction as well as the fact of a prior agreement, —*Ex parte* Kilner, L. R. 13 Ch. D. 245. See, for statements of foregoing cases, Campb. Sales, 123, 124.

**Equitable Assignment.**—If an agreement to give a bill of sale upon request, or upon any other condition subsequent, is relied on as an equitable assignment of the goods (Campb. Sales, 125; on which paragraph is based) the non-registration of the agreement on a bill of sale has been held an insuperable objection to the title of the person relying on the agreement, as against the execution creditor or trustee in bankruptcy. *Ex parte* Mackay, L. R. 8 Ch. 643; *Ex parte* Conning, L. R. 16 Eq. 414. And any transaction which is relied on as an equitable assignment must, in order to be valid against the execution creditor, be registered as a bill of sale. Edwards *v.* Edwards, L. R. 2 Ch. D. 291. But there is said to be great difficulty in supporting the proposition that an agreement to assign upon request can be a good equi-

**5. Personal Chattels.**—(*a*) *What Term Includes.*—The expression "personal chattels," as used in the English act of 1878, is declared to mean [1] goods, furniture, and other articles capable of complete transfer by delivery, and (when separately assigned or charged)[2] fixtures and growing crops.[3]

(*b*) *What Term Does Not Include.*—But it is declared not to include chattel interests in real estate, nor fixtures (except trade machinery, as afterwards defined),[4] when assigned together with a freehold or leasehold interest in any land or building to which they are affixed; nor growing crops when assigned together with any interest in the land on which they grow;[5] nor shares or interests in the stock, funds, or securities of any government, or in the capital or property of incorporated or joint-stock companies; nor choses in action, nor any stock or produce upon any farm or lands, which by agreement or custom ought not to be removed therefrom.[6]

(*c*) *Apparent Possession.*—(1) *Provisions Concerning.*—Personal chattels are deemed, under the *English* enactment, to be in the "apparent possession" of the person making or giving a bill of sale, so as to require registration of the instrument, so long as they

table assignment so as to confer any immediate right in security,—See Shaw *v.* Foster, L. R. 5 H. L. 321;—though there is authority for declaring that, as soon as the request is made, an equitable assignment is effected,—*Ex parte* Izard, L. R. 9 Ch. 271, 275. See statements of these cases in Campb. Sales, 125.

1. See Act of 1878, § 4.

2. See Menx *v.* Jacobs, L. R. 7 H. L. 481; Campb. Sales, 20, 21.

3. Under the Act of 1854, growing crops were held not to be chattels (Branton *v.* Griffits, L. R. 2 C. P. D. 212; L. R. 1 C. P. D. 349), but to become personal chattels upon severance, and hence subject to the provisions of the act. *Ex parte* Nat. Merc. Bank, L. 16 Ch. D. 104.

4. See Bills of Sale Act of 1878, § 5.

It seems that any mortgage of trade machinery must be registered as a bill of sale, whether the machinery is separately assigned or not.

See, as to law prior to act, Mather *v.* Fraser, 25 L. J. Ch. 361; Waterfall *v.* Penistone, 6 El. & B. 876; 26 L. J. Q. B. 100.

5. See, further, Bills of Sale Act of 1878, § 8.

6. Bills of Sale Act of 1878, § 4.

For basis of most of foregoing matter, see Benj. Sales (4th Am. Ed.), p. 549, § 490.

As to cases in which personal chattels assigned under a bill of sale to which the act of 1882 applies, are liable to seizure by the grantee, see § 7 of that act (45 and 46 Vict. c. 96).

**After-acquired Property.**—Under the Amendment Act of 1882, every bill of sale to which the act applies is to be void, except as against the grantor, in respect to any personal chattels comprised in the bill of sale, and not specifically described in a schedule annexed thereto,—Bills of Sale Act 1878; Amendment Act 1882, § 4;—or of which the grantor was not the "true owner" at the time of the execution of such instrument,—Bills of Sale Act 1878; Amendment Act 1882, § 5;—though exception is made of growing crops actually growing at the time when the bill of sale was executed, and fixtures, plant, or trade machinery substituted for others described in the schedule,—Bills of Sale Act 1878; Amendment Act 1882, § 6. And the object of these provisions is to prevent a person from contracting to assign after-acquired property, to the detriment of his creditors.—Benj. Sales (4th Am. Ed.), p. 569, § 496;—for under the earlier acts, such assignments of property which might at any time during the continuance of the security be upon the debtor's premises, were held to operate so as to give a title to stock in trade acquired after the date of the bill of sale,—Leatha n *v.* Amor, 26 Week. R. 739; 47 L. J. Q. B. 581; Lazarus *v.* Andrade, L. R. 5 C. P. D. 318. But the charge must relate to specified property (Belding *v.* Read, 3 Hurl. & C. 955; *Re* D'Epineuil, L. R. 20 Ch. D. 758; see Campb. Sales, 45–47), in accordance with the rule laid down in equity on the subject,—Holroyd *v.* Marshall, 10 H. L. Cas. 191; Campb. Sales, 43; and see Collyer *v.* Isaacs, L. R. 19 Ch. D. 351.

remain or are in or upon any house, mill, warehouse, building, works, yard, land, or other premises occupied by him,[1] or are used or enjoyed by him in any place whatsoever, notwithstanding that formal possession thereof[2] may have been taken by or given to any other person.[3]

(2) *Bailee's Possession, etc.*—And possession by a bailee on behalf of the grantor has been held to be his possession, although the grantee had attempted to get access to the goods, and had not succeeded on account of the refusal of the owner of the house where the goods lay;[4] but it is otherwise if the bailee hold on behalf of some third party:[5] and so goods in the actual visible possession of the sheriff under an execution are not in the apparent possession of the grantor.[6]

(3) *Furniture, Agricultural Implements, etc.*—Nor are goods in a furnished house which at the time of bankruptcy is in the occupation of a third party as tenant of the debtor,[7] or agricultural implements which have been let by the debtor on hire[8] in the apparent possession of the debtor;[9] but furniture settled as the separate property of the wife, if assigned by the husband who was previously complete owner of the furniture, and remaining in his house, is in his apparent possession within the meaning of the Bills of Sale Act.[10]

1. Actual *de facto* occupation is meant,—Robinson *v.* Briggs, L. R. 6 Ex. 1;—and if the grantor does not personally occupy the premises, the goods are not in his apparent possession,—Gough *v.* Everard, 2 Hurl. & C. 1;—though occupation by him as a servant to the grantee is sufficient,—Pickard *v.* Marriage, L. R. 1 Ex. D. 364;—and where the goods were in the house of the grantor, of which he had a key, but did not sleep there, though he went in and out as he pleased, this was held to amount to a personal occupation by him,—Seal *v.* Claridge, L. R. 7 Q. B. D. 516.

2. If more than formal possession is taken, the clause is inapplicable. Gough *v.* Everard, 2 Hurl. & C. 12; *Ex parte* Lewis, 6 Ch. 626. Requisites of such possession: See *Ex parte* Jay, 9 Ch. 697; *Ex parte* Homan, 10 Eq. 63; Emmanuel *v.* Bridges, L. R. 9 Q. B. 286; Seal *v.* Claridge, L. R. 7 Q. B. D. 516; Ancona *v.* Rogers, L. R. 1 Ex. D. 285; *Ex parte* Fletcher, L. R. 5 Ch. D. 809; Smith *v.* Wall. 18 L. T. (N. S.) 182; Davies *v.* Jones, 10 Week. R. 779. Growing crops: See *Ex parte* Arnison, L. R. 3 Ex. 56; Gough *v.* Everard, 2 Hurl. & C. 12; Branton *v.* Griffits, L. R. 1 C. P. D. 355; Sheriden *v.* McCartney, 11 I. R. C. L. 506.

3. Bills of Sale Act of 1878, § 4.

4. Ancona *v.* Rogers, L. R. 1 Ex. D. 205. *Compare* Furby *v.* Finlayson, 24 Week. R. 370; Campb. Sales, 120.

5. Market Banking Co. *v.* Spoffen, 11 I. R. Eq. 587.

6. *Ex parte* Saffery, L. R. 16 Ch. D. 668, disapproving *Ex parte* Mutton, 14 Eq. 178.

See, for basis of most of foregoing matter, Benj. Sales (4th Am. Ed.), pp. 550, 551, § 490.

7. *Ex parte* Morrison, 28 Week. R. 524.

8. Lincoln Wagon Co. *v.* Mumford, 41 L. T. (N. S.) 655.

9. Campb. Sales, 120.

10. Fowler *v.* Foster, 28 L. J. Q. B. 210; Ashton *v.* Blackshaw, L. R. 9 Eq. 510; Campb. Sales, 121.

The period to which the apparent possession is referred was formerly "the time of bankruptcy," which was construed to mean the commission of the act of bankruptcy, to which the title of the trustee in bankruptcy would relate back (*Ex parte* Attwater, L. R. 5 Ch. D. 27; 25 Week. R. 206; Campb. Sales, 112, 123); but under the existing enactment, the time is that of filing the petition for bankruptcy or liquidation. Act of 1878, § 8.

**Possession More than Formal.** — The mere fact of the goods remaining in the debtor's house or upon his premises will not invalidate an unregistered bill of sale, if possession is taken which is not merely formal, but actual, complete, and notorious. Campb. Sales, 122. Thus, where the grantee of a bill of sale takes possession of the goods and advertises them for

**6. Attestation.**—(*a*) *Provisions Concerning.*—Under the Act of 1878,[1] prior to the repeal of the provision (affecting at least bills of sale not absolute) by the Amendment Act of 1882,[2] it was provided that the execution of every bill of sale should be attested by a solicitor of the supreme court, and that the attestation should state that, before the execution of the bill of sale, the effect thereof had been explained to the grantor by the attesting solicitor.[3]

sale as the goods of the giver of the bill, sold under a bill of sale, sufficient is done to take the goods out of his possession under the act, although the goods still remain in the house of the debtor. Emmanuel *v.* Bridges, L. R. 9 Q. B. 287. *Compare* Gough *v.* Everard, 2 Hurl. & C. 1; Smith *v.* Wall, 18 L. T. (N. S.) 182. And so where a receiver, appointed under authority of the court, in an action for specific performance of an agreement to execute a bill of sale, takes possession of the goods in a public-house and serves the customers, there is no apparent possession of the late proprietor, even if the Bills of Sale Act would otherwise have applied to the case. Taylor *v.* Eckersley, L. R. 5 Ch. D. 740; Campb. Sales, 122. But it is not sufficient to send in broker's men who remain in the house without in any way interfering with the continued use of the furniture as before, by the giver of the bill of sale, and his family,—*Ex parte* Jay, L. R. 9 Ch. 697; *Ex parte* Hooman, L. R. 10 Eq. 65;—nor will it be sufficient if, in addition to the broker's man being in the house, placards are posted announcing a sale of the furniture, but containing nothing to show that the sale is not made by the maker of the bill of sale himself,—*Ex parte* Lewis, L. R. 6 Ch. 627;—nor is it of any avail to placard a house with notices that possession has been taken, if possession has *de facto* not been taken,—*Re* Henley, L. R. 5 Ch. D. 809;—though actual visible possession by a sheriff's officer excludes the apparent possession of the debtor,—*Ex parte* Safery, 16 Ch. D. 668;—and when possession is taken by broker's men under a bill of sale, the apparent possession is determined as soon as a commencement is made of packing up and carrying away the goods,—*Ex parte* Jay, L. R. 9 Ch. 697. See statements of these cases in Campb. Sales, 122.

**Reputed Ownership.**—The Amendment Act of 1882 appears to repeal the provision of the act of 1878 to the effect that chattels comprised in a bill of sale which has been and continues to be duly registered under the act, should not be deemed to be in the possession, order, or disposition of the grantor of the bill of sale, within the meaning of the Bankruptcy Act of 1869,—see Bills of Sale Act of 1878, § 20, and Amendment of 1882, § 15;—and thus restores the authority of cases previously decided,—see Freshney *v.* Carrick, 1 Hurl. & N. 653; Reynolds *v.* Hall, 4 Hurl. & N. 519; Badger *v.* Shaw, 2 El. & E. 472; Spackman *v.* Miller, 12 C. B. (N. S.) 659; *Ex parte* Harding, 15 Eq. 223; Stansfield *v.* Cubitt, 2 De Gex & J. 222;—and revives, at least as to bills of sale given by way of mortgage, the doctrine of reputed ownership. Benj. Sales (4th Am. Ed.), p. 552, §§ 490, 491.

As to distinction between "apparent possession" under the Bills of Sale Act of 1878, and reputed ownership under the Bankruptcy Act, see Williams on Bankruptcy (Ed. 1876), p. 123; Campb. Sales, 119, 120,—whereby the property of a bankrupt trader, divisible among his creditors, includes goods and chattels (embracing business debts, but not other choses in action) in his possession, order, or disposition, by the consent and permission of the true owner, and of which the bankrupt is reputed owner, or whereof he has taken upon himself the sale or disposition as owner;—Bankruptcy Act of 1869, 32 and 33 Vict. c. 71, § 15, subs. 5. Under the Bills of Sale Act of 1854, it was also held, in the absence of any provision like that of the Amendment Act of 1882, that where the grantor was a trader, goods comprised in a bill of sale, although registered, remained, until demand, in his order and disposition, and, in the event of his bankruptcy, vested in his trustee. Benj. Sales (4th Am. Ed.), p. 552, § 490.

1. Bills of Sale Act of 1878, § 10.

2. Bills of Sale Act 1878, Amendment Act 1882, § 10, 45 & 46 Vict. c. 43.

3. Benjamin on Sales (4th Am. Ed.), pp. 560, 561, 562, § 494. Under the Act of 1882, every bill of sale to which the act applies must be duly attested by one or more creditable witnesses, not parties thereto,—Amdt. Act of 1882, §§ 8 and 10;—and these last words are merely declaratory of the law before the act,—Seal *v.* Claridge, L. R. 7 Q. B. D. 516; and see Freshfield *v.* Reed, 9 Mees. & W. 404.

(*b*) *Rulings Concerning.*—And it was held thereunder that the solicitor acting for both parties was a competent attesting witness,[1] and so was the solicitor acting for the grantee,[2] but that the grantee himself, although a solicitor, could not be the attesting witness;[3] and that, though the attestation clause must state that the bill of sale had been explained to the grantor by the attesting solicitor, yet no such explanation need in fact have been given, and its omission would not invalidate the bill of sale;[4] while want of attestation was held not to render the bill of sale void as between grantor and grantee.[5]

**7. Registration.**—(*a*) *Provisions Concerning.*—The papers filed for registration under the Act of 1878 comprise the bill of sale, with every schedule or inventory annexed thereto or referred to therein, and a true copy of the same, together with an affidavit of the time when such bill of sale was made or given, and of its due execution and attestation, and a description of the residence and occupation of the person making or giving the same, or against whom process issued, and of every attesting witness to such bill of sale.[6] And these papers are to be presented to the registrar, and filed with him, within seven clear days after the making or giving of such bill of sale, in like manner as a warrant of attorney in any personal action given by a trader is required to be filed.[7]

(*b*) *Subsequent Bill of Sale.*—Where a subsequent bill of sale is executed within or on the expiration of seven days after the execution of a prior unregistered bill of sale, it is absolutely void under the Act of 1878 so far as it comprises all or any part of the personal chattels previously included, or given as a security for the debt already secured, unless it is proved to the satisfaction of the court having cognizance of the case to have been given, not for evasive purposes, but to correct some material error in the prior bill of sale.[8] And the object of this provision is to check the prac-

1. Vernon *v.* Cooke, 49 L. J. C. P. 767.

2. Penwarden *v.* Roberts, L. R. 9 Q. B. D. 137.

3. Seal *v.* Claridge, L. R. 7 Q. B. D. 516, following Freshfield *v.* Reed, 9 Mees & W. 404.

4. *Ex parte* Nat. Merc. Bank, L. R. 15 Ch. D. 32; Campb. Sales, 115; and see Hill *v.* Kirkwood, 20 Week. R. 358; *Ex parte* Balland, L. R. 21 Ch. D. 543; *In re* Hewer, L. R. 21 Ch. D. 871.

5. Davis *v.* Goodman, L. R. 5 C. P. D. 20, 128. But the 8th section of the Act of 1882 now renders all bills of sale to which the act applies, not conforming thereto, absolutely void. See Benjamin Sales (4th Am. Ed.), pp. 561, 569, §§ 494, 496.

6. Bills of Sale Act of 1878, § 10, subs. (2).

7. Under the Act of 1882, the time for registration of bills of sale to which the act applies is seven clear days, if the bill of sale is executed in *England*; but otherwise seven clear days after the bill of sale would have reached England in course of post, if posted immediately after execution. Amdt. Act of 1882, § 8. Provision is also made for the local registration of abstracts of bills of sale to which the act applies, in addition to the registration in London, under the Act of 1878–9; (§ 11), and the right to inspect and take extracts from registered bills of sale is defined and limited (§ 16). See Benjamin on Sales (4th Am. Ed.), pp. 561, 569, §§ 494, 496. Registration unnecessary when goods have been seized on execution within the time allowed for registration. Markles *v.* Hartley, 1 Best & S. 1; 30 L. J. Q. B. 92; and see Banbury *v.* White, 2 Hurl. & C. 300; 31 L. J. Ex. 258. *Ex parte* Kahen, L. R. 21 Ch. D. 871; 46 L. T. (N. S.) 856.

8. Bills of Sale Act of 1878, § 9.

tice which prevailed extensively under the earlier acts,[1] of executing successive bills of sale, each within the period then allowed for registration;[2] so that as a result the security, remained valid, and yet the bill of sale was kept off the register.[3] But the provision does not affect a subsequent bill of sale executed after the expiration of the seven days.[4]

(*c*) *Bill of Sale Subject to Defeasance or Condition.*—If the bill of sale is made or given subject to any defeasance or condition,[5] or declaration of trust[6] not contained in the body thereof, it is provided by the Act of 1878 that such defeasance, condition, or declaration shall be deemed to be part of the bill, and be written on the same paper or parchment and truly set forth in the copy filed before registration, or the registration will be void.[7]

Transfer or assignment of a registered bill of sale need not be registered. id. § 10; and see Horne *v.* Hughes, L. R. 6 Q. B. D. 676; Campb. Sales, 117, adding further charge.

1. The giving and taking of a fresh bill of sale was held, prior to the existing enactment, not to be conclusive evidence of a scheme to defraud the creditors. Campb. Sales, 124; Hollingsworth *v.* White, 10 Week. R. 619; Ramsden *v.* Lupton, L. R. 9 Q. B. 17; Smale *v.* Burr, L. R. 8 Com. P. 64. *Ex parte* Harris, L. R. 8 Ch. 48.

2. See Campb. Sales, 114.

3. See Smale *v.* Burr, L R. 8 Com. P. 64; Ramsden *v.* Lupton, L. R. 9 Q. B. 17.

In bankruptcy, these contrivances had been held invalid as a fraud on the bankruptcy laws. *Ex parte* Stevens, 20 Eq. 786; *Exp.* Furber L. R. 6 Ch. D. 181; *Exp.* Payne, L. R. 11 Ch. D. 539; *Exp.* Cohen, L. R. 7 Ch. 20; Campb. Sales, 124.

4. Carrard *v.* Meek, 50 L. J. Q. B. 187; 29 Week. R, 244. See Benjamin Sales, (4th Am. Ed.) p. 560, § 493.

5. As a prior parol agreement, not appearing in the bill of sale, by which the debt was to be paid off in weekly instalments. *Exp.* Southam, 17 Eq. 578. But not a memorandum merely stipulating for a more onerous position of the grantor than appears. *Exp.* Collins, L. R. 10 Ch. 367; Campb. Sales, 118.

6. Between the grantor and the grantee, but not between the grantee and a stranger to the grantor. Robinson *v.* Collingwood, 17 C. B. (N. S.) 777; 34 L. J C. P. 18.

7. Act of 1878, § 10, subs. 3; Benjamin on Sales (4th Am. Ed.), p. 566, § 495, referring also to *Exp.* Collins, L. R. 10 Ch. 367; *Exp.* Odell, L. R. 10 Ch. D. 76; *Exp.* Popplewell, L. R. 21 Ch. D. 73.

**Renewal of Registration.**—The registration of a bill of sale must be renewed at least once in five years, or the registration becomes void,—Act of 1878, § 11;—although in the mean time the bill of sale has been transferred to a third person,—Karet *v.* Kosher Meat Supply Assoc., L. R. 22 Q. B. D. 361; *Exp.* Webster, 21 Ch. D. 136. See Benjamin on Sales (4th Am. Ed.), p. 567, § 495.

**Proof of Registration.** — Under the enactment of 1878, it is provided that any copy of a registered bill of sale, and affidavit purporting to be an office copy thereof, shall be *prima facie* evidence thereof, and of the fact and date of registration as shown thereon. Bills of Sale Act of 1878, § 16. But under the former act it was held that the production of a bill of sale, with certificates upon it that a document purporting to be a copy of a bill of sale, dated, erc., indorsed with the above names, was registered, etc., was no evidence that an affidavit had been filed complying with the requirements of the statute. Mason *v.* Wood, L. R. 1 C. P. D. 63. And see Halkett *v.* Emmott, 20 Week. R. 632; 47 L. J. Q. B. 436. Though it was sufficient to produce a certified copy of the filed documents, including the affidavit, as well as of the entry in the office book of the filing. Grindell *v.* Brandon, 6 C. B. (N. S.) 698; Bath *v.* Sutton, 27 L. J. Ex. 388. See Campb. Sales, 117.

**Priority from Date of Registration.** — In case two or more bills of sale are given, comprising in whole or in part any of the same chattels, they are given priority, according to the Act of 1878, in the order of the dates of their registration respectively as regards such chattels. Bills of Sale Act of 1878, § 10: and under this provision, priority is given by registration, whether or not bankruptcy or execution has supervened. Conelly *v.* Steer, L. R. 7 Q. B. D. 520; Lyons *v.*

**8. Description of Residence and Occupation.**—(*a*) *Object of Provisions.*—The objects of the forms and requisites prescribed in regard to the description of the residence and occupation of the grantor and witnesses are not to gratify the curiosity of strangers,[1] but to afford to creditors and parties interested a true idea of the position in life of the persons so identified, and thus enable those concerned to trace out such persons and ascertain the *bona fides* of the transaction.[2]

(*b*) *Fatal Misdescriptions.*—Any misdescription[3] or non-description[4] in these particulars will therefore vitiate the bill of sale:[5] so that it is held insufficient to describe, as "gentleman" only, a clerk in the audit office,[6] or an attorney's clerk,[7] or a silk-buyer;[8] though such a description has been held sufficient where the party had no occupation.[9] And it is also held insufficient to describe, as accountant, a clerk of an accountant, though he occasionally worked for himself.[10]

(*c*) *Immaterial Errors.*—But the requirements of the statute have been held satisfied despite a clerical error in the date,[11] or in

Tucker, L. R 7 Q. B. D. 523, reversing L. R. 6 Q. B. D. 660. See Camp. Sales, 118. The effect of the provision is to alter the law as laid down in Meux *v.* Jacobs, L. R. 7 H. L. 481, and cases which followed that decision. See also Richards *v.* James, L. R. 2 Q. B. 285; Edwards *v.* English, 7 El. & B. 564; *Exp.* Cochrane, L. R. 3 Ch. D. 324; L. R. 4 Ch. D. 23; *Exp.* Payne, L. R. 11 Ch. D. 539; *In re* Artistic Color Co. L. R. 21 Ch. D. 510; Camp. Sales, 125, 126.

But it is undetermined whether the holder of a second bill of sale will lose the priority given by registration, if he has had notice of a prior unregistered bill of sale at the time when he advanced his money. According to the doctrine of Le Neve *v.* Le Neve, 2 Lead. Cas. in Eq. (Ed. 1877) 32. See Edwards *v.* Edwards, L. R. 2 Ch. D. 291; Maxwell Stat. (Ed. 1875) 233. And Graves *v.* Tofield, L. R. 14 Ch. D. 563, whence suggested that priority not thus lost; Benjamin on Sales (4th Am. Ed.). p. 567. § 495.

1. Larchin *v.* Northwest. Dep. Bank, L. R. 10 Ex. 64; Murray *v.* Mackenzie, L. R. 10 Com. P. 628; Campb. Sales, 115.

2. Hewer *v.* Coxe, 3 El. & E. 433, 436; Briggs *v.* Boss, L. R. 3 Q. B. 268-270; Jones *v.* Harris, L. R. 7 Q. B. 160; Larchin *v.* Northwest. Dep. Bank, L. R. 10 Ex. 64; Murray *v.* Mackenzie, L. R 10 Com. P. 628; Blaiberg *v.* Parke, L. R. 10 Q. B. D. 90.

3. Larchin *v.* Northwest. Dep. Bank, L. R. 10 Ex. 64; Murray *v.* Mackenzie, L. R. 10 Com. P. 628. The description "of the city of Cork, law clerk," has been held insufficient. *In re* Harris, 10 Ir. R. Ch. 100.

4. Or equivalent indefiniteness. Hatton *v.* English, 7 El. & B. 94; Dryden *v.* Hope, 3 L. T. (N. S.) 280; *Ex parte* Hooman, L. R. 10 Eq. 63; Campb. Sales, 116.

5. Benjamin on Sales (4th Am. Ed.), p. 562, § 494, giving succeeding illustrations. But error in Christian name of grantor, unimportant if he can be identified from the entire description given; *Ex parte* M'Hattie, L. R. 10 Ch. D. 398.

6. Allen *v.* Thompson, 1 Hurl. & N. 15; 25 L. J. Ex. 249.

7. Tuton *v.* Sanoner, 3 Hurl. & N. 280; 27 L. J. Ex. 293; Beales *v.* Tennent, 29 L. J. Q. B. 188.

8. Adams *v.* Graham, 33 L. J. Q. B. 71.

9. Sutton *v.* Bath. 3 Hurl. & N. 382; 27 L. J. Ex. 388; Nicholson *v.* Cooper, 3 Hurl. & N. 384; Morewood *v.* South Yorkshire R. Co., 3Hurl. & N. 798; 28 L. J. Ex. 114; London Loan Co. *v.* Chace, 12 C. B. (N. S.) 730; 31 L. J. C. P. 314; Grant *v.* Shaw, L. R. 7 Q. B. 700; Brodrick *v.* Scale, L. R. 6 C. P. 98; Smith *v.* Cheese, L. R. 1 C. P. D. 60; Castle *v.* Dounton, L. R. 5 C. P. D. 56; *Ex parte* Wolfe, 44 L. T. (N.S.) 321; aff'd as *Ex parte* Chapman, 45 L. T. (N. S.) 265.

Burden of proof of an occupation cannot be said to lie on party seeking to impeach bill of sale. Castle *v.* Dounton, L. R. 5 C. P. D. 57; Campb. Sales, 116.

10 Larchin *v.* Northwest. Dep. Bank, L. R. 10 Ex. 64; but see Briggs *v.* Boss, L. R. 3 Q. B. 268; 37 L. J. Q. B. 101.

11. Lamb *v.* Bruce, 24 Week. R. 645.

the spelling of the name,[1] or an error in the Christian name,[2] and where the description was that of a "government clerk," [3] or of a "foreman tailor's cutter" who also took in lodgers.[4]

**9. Statement of Consideration.**—(*a*) *Rules Concerning.*—The rules deducible from the decisions concerning the requirement of the Bills of Sale Act of 1878, that the consideration of the transfer should be stated, are declared to be these : [5]

(1) *Small inaccuracy immaterial if statement not merely colorable.*—The first question to be determined in each case is whether the

1. Gardner *v.* Shaw, 24 L. T. (N. S.) 319.

2. Corbett *v.* Rowe, 25 Week. R. 59; *Ex parte* M'Hattie, L. R. 10 Ch. D. 398.

3. Grant *v.* Shaw, L. R. 7 Q. B. 700.

4. *Ex parte* Nat. Dep. Bank, 26 Week. R. 624. See statements of these cases in Campb. Sales, 116, 117.

**Residence of Witness.**—The residence of the witness has been held sufficiently stated by giving his place of business, without describing the place where he sleeps,—Attenborough *v.* Thompson, 2 Hurl. & N. 559; 27 L. J. Ex. 23; Blackwell *v.* England, 8 El. & B. 56; 27 L. J. Q. B. 124;—or by giving his private place of abode, without his place of business, —Yardley *v.* Jones, 4 Dowling, P. C. 45; —or where a residence is described as "New Street, Blackfriars, in the County of Middlesex," without adding the "City of London,"—Hewer *v.* Cox, 3 El. & E. 428; 30 L. J. Q. B. 73; see Blount *v.* Harris, 27 Week. R. 202 ("Acton, City of London");—or as "in the County of Chester," though, in fact, situate within the county of the city of Chester,—*Ex parte* M'Hattie, L. R. 10 Ch. D. 398;—or as "Hanley, in the County of Stafford," although it was proven that Hanley was a borough of 40,000 inhabitants, where it was also shown that hundreds of letters addressed Hanley only reached the attesting witness,—Briggs *v.* Boss, L. R. 3 Q. B. 268; 37 L. J. Q. B. 101; and see Blackwell *v.* England, 8 El. & B. 541; 27 L. J. Q. B. 124; *Re* Ham, 10 I. R. Ch. 100; 1 L. T. (N. S.) 467 (identification of attesting witness which satisfies statute: Routh *v.* Roublot, 1 El. & E. 850);—but directors attesting the seal of a company are not witnesses whose residences it is necessary to state,—Shears *v.* Jacobs, L. R. 1 C. P. 513; 35 L. J. C. P. 281; Deffell *v.* White, L. R. 2 C. P. 144.

See, for basis of statements and authorities, Benjamin on Sales (4th Am. Ed.), pp. 564, 565, § 494.

**Description in Affidavit.**—As a general rule, the description of the grantor's residence and occupation should be repeated in the affidavit,—Hatton *v.* English, 7 El. & B. 94; 26 L. J. Q. B. 161; Pickard *v.* Bretts, 5 Hurl. & N. 9; 29 L. J. Ex. 18; *Ex parte* Webster, L. R. 22 Ch. D. 136;—but it is allowable, by a reference to the bill of sale, to supplement the description given in the affidavit, though not to supply a description omitted,—Jones *v.* Harris, L. R. 7 Q. B. 157, 164; see also Banbury *v.* White, 2 Hurl. & C. 300; Foulger *v.* Taylor, 5 Hurl. & C. 202; Campb. Sales, 116;—while a variance between the description given in the bill of sale, and that given in the affidavit, is fatal,—Murray *v.* Mackenzie, L. R. 10 C. P. 625; see Benjamin on Sales, (4th Am. Ed.), p. 563, § 494.

The description of the residence and occupation required is the description thereof at the date of the affidavit, and not at the time of making or giving the bill of sale,—Bulton *v.* O'Neill, L. R. 4 C. P. D. 354, dissenting from London, etc., Loan Co. *v.* Chace, 12 C. B. (N. S.) 730; but see *Ex parte* Kahen, 46 L. T. (N. S.) 856; L. R. 21 Ch. D. 871;—and an affidavit describing the grantor's residence and occupation to the "best of the belief of the witness" has been held sufficient,—Roe *v.* Bradshaw, L. R. 1 Ex. 106; 35 L. J. Ex. 71;—and so has an affidavit describing a trading company as "The Glucose Sugar & Coloring Company," and giving the address of its principal office,—Spears *v.* Jacobs, L. R. 1 C. P. 513; 35 L. J. C. P. 241. See statements of these cases in Benjamin on Sales (4th Am. Ed.), p. 565, § 494.

Where there are two attesting witnesses, the affidavit must give the description of both,—Picard *v.* Marriage, 24 Week. R. 886;—and an affidavit stating that the grantor was "until lately" a commercial traveller, insufficiently describes his occupation; Castle *v.* Dounton, L. R. 5 C. P. D. 57. These cases are so stated in Campb. Sales, 116.

5. Benjamin on Sales (4th Am. Ed.), p. 559, § 495; and see Benjamin on Sales (4th Am. Ed.), pp. 556, 558, § 492, also *Ex parte* Popplewell, L. R. 21 Ch. D. 73; Campb. Sales, 113.

consideration stated in the bill of sale is, in substance and in truth, the consideration received by the grantor,[1] or whether the statement is a merely colorable one, rendering the bill of sale void as a sham transaction;[2] and in the former event a small inaccuracy will not be sufficient to avoid a bill of sale otherwise valid.[3]

(2) *Consideration Need Not Pass at the Time of Execution of Bill of Sale.*—In the absence of fraud, it is not essential that the consideration stated to be paid should pass from the grantee to the grantor at the time of the execution of the bill of sale; but the grantee may retain the whole or deduct a part of the amount stated, in satisfaction of a pre-existing debt due to himself from the grantor,[4] or may apply it, with the consent and by the direction of the grantor, in discharge of debt actually due from the grantor to third persons.[5]

(3) *Collateral Agreement as to Application of Consideration.*—A collateral agreement as to the application of consideration does not require to be set out in the bill of sale.[6]

(4) *Retention of Part of Consideration to Cover Interest.*—The retention of a part of the consideration stated to meet debts of the grantor due after the date of the execution of the bills of sale, either to third persons or to the grantee, as interest on his loan, will invalidate the bill of sale.[7]

(5) *Expenses Incurred in Preparing Bill of Sale.*—The expenses incurred in the preparation of the bill of sale, not being a debt actually due from the grantor at the time of the execution of the bill of sale, the grantee is not entitled to deduct from them the amount of the consideration stated to be paid.[8]

**10. American Enactments.**—(*a*) *Recording of Bills of Sale.*—In several of the United States, as well as in Canada, there are statutory provisions for recording bills of sale, in order counteract the evidence of fraud derived from retention of possession.[9]

(1) *Provisions in Maryland.*—Thus, in Maryland, it is provided

1. See *Ex parte* Winter, 44 L. T. (N. S.) 323, affirmed as *Ex parte* Ord. 43 L. T. (N. S.) 637; *Ex parte* Challinor, L. R. 16 Ch. D. 260.

2. *Ex parte* Nat. Merc. Bank, L. R. 15 Ch. D. 42; *Ex parte* Charing Cross Bank, L. R. 16 Ch. D. 35; *Ex parte* Challinor, L. R. 15 Ch. D. 260; *Ex parte* Bolland, L. R. 21 Ch. D. 543; *Ex parte* Winter, 44 L. T. (N. S.) 323; and see Collis *v.* Tuson, 46 L. T. (N. S.) 387.

3. *Ex parte* Winter, 44 L. T. (N. S.) 323; *Ex parte* Nat. Merc. Bank, L. R. 15 Ch. D. 42 (questioning *Ex parte* Carter, L. R. 12 Ch. D. 908, where a bill of sale was held void for a mistake as to the amount of the consideration, and the party to whom it was paid, and a mis-recital of the dates of the several advances).

4. Credit Co. *v.* Potts, L. R. 6 Q. B. D. 295; Carrard *v.* Meek, 50 L. J. Q. B. 187.

5. Hamlyn *v.* Betteley, L. R. 5 C. P. D. 327; Carrard *v.* Meek, 50 L. J. Q. B. 189; *Exp.* Firth, L. R. 19 Ch. D. 419. *Compare Exp.* Berwick, 43 L. T. (N. S.) 576; 29 Week. R. 292.

6. *Exp.* Nat. Merc. Bank, L. R. 15 Ch. D. 42.

7. *Exp.* Charing Cross Bank, L. R. 16 Ch. D. 35; *Exp.* Rolph, L. R. 19 Ch. D. 98. Consideration, *held*, not truly stated where it sets forth whole amount of loan, without deducting commission. Hamilton *v.* Chaine, L. R. 7 Q. B. D. 319.

8. *Exp.* Firth, L. R. 19 Ch. D. 419 (practically overruling, on this point, *Exp.* Challinor. L. R. 19 Ch. D. 260); *Exp.* Balland, L. R. 21 Ch. D. 543.

9. See Benjamin on Sales (4th Am. Ed.), p. 775, § 675, note (*d*).

that "No bill of sale or mortgage of personal property shall be valid, except as between the parties, unless the bargainee or vendee or mortgagee . . . shall make the affidavit required to be made by mortgager of real estate, and such affidavit may be made at any time before recording, etc.;"[1] and either a record as thus prescribed, or a delivery of possession to the vendee, renders the sale good as to third persons.[2]

(2) *Provisions in Iowa.*—So, in Iowa, it is enacted that no sale or mortgage of personal property, where the vendor or mortgagor retains actual possession thereof, is valid against existing creditors or subsequent purchasers without notice, unless a written instrument conveying the same is executed, acknowledged, . . . and filed for record, etc.;[3] and if there is no record and the vendor retains possession, the sale is void, and the good faith of the parties does not change the result,[4] even though the possession is retained for the purpose of completing the article,[5] but if the act is complied with, of course possession may be retained:[6] or if the property is in the possession of a lessee, it may so remain after the sale;[7] and, in general, the statute does not apply when the property is at the time of sale in the possession of a third person, who retains it after the sale the same as before,[8] though it has been held that there was not a sufficient change of possession under the statute as against a subsequent mortgagee, where cattle, after temporary separation, were allowed to run at large as before, under charge of the vendor's son.[9]

**11. Registration and Change of Possession.**—(*a*) *Canadian Provisions Concerning.*—In Canada, the statute provides that every sale of goods and chattels, not accompanied by an immediate delivery and followed by an actual and continued change of possession of the goods and chattels sold, shall be in writing, . . . and such conveyance and affidavit shall be registered . . . within five days from the executing thereof; otherwise the sale shall be absolutely void as against the creditors of the bargainor, and as against subsequent purchasers or mortgagees in good faith.[10]

(1) *Rulings Concerning.*—But it is held, under the enactment, that

1. Md. Rev. Code of 1878, p. 391, tit. XXIV, art. XLIV, § 54. The affidavit referred to is an indorsed oath or affirmation that the consideration of the mortgage is true and *bona fide* as therein set forth, etc. Md. Rev. Code of 1878, p. 391, tit. XXIV, art. XLIV, § 35.

2. Bruce *v.* Smith, 3 Har. & J. (Md.) 499; Hudson *v.* Warner, 2 Har. & G. (Md.) 415; Thompson *v.* Baltimore, etc., R. Co., 28 Md. 396; Price *v.* Pitzer, 44 Md. 521; Kreuzer *v.* Cooney, 45 Md. 582.

See, for basis of paragraph, Benjamin on Sales (4th Am. Ed.), p. 778, § 675, note (*d*).

3. Iowa Code, § 1923.

4. Prather *v.* Parker, 24 Iowa, 26 Boothby *v.* Brown, 40 Iowa, 104.

5. See Hesser *v.* Wilson, 36 Iowa, 152 (retention of a buggy).

6. Kuhn *v.* Graves, 9 Iowa, 303.

7. Hickok *v.* Buel, 51 Iowa, 655.

8. Hickok *v.* Buel, 51 Iowa, 655; Case *v.* Burrows, 54 Iowa, 679.

9. Sutton *v.* Ballou, 56 Iowa, 517.

See, for sources of paragraph, Benjamin on Sales (4th Am. Ed.), pp. 779, 780, § 975, note (*d*); 1 Benjamin on Sales (Corbin's Ed.), p. 647, § 740, note 60. Consult also Smith *v.* Champney, 50 Iowa, 174.

10. Rev. Stats. Ont. (1877) c. 119, § 5; formerly Con. Stats. Up. Can. c. 45, § 4.

for a sale of timber, to be cut by the vendor, to be valid as against creditors of the vendor, there must be an actual delivery to the vendee, after the timber is cut down, followed by an actual and continued change of possession,[1] as in other sales.[2] Nor is the delivery of keys of itself sufficient;[3] nor the marking and setting aside of sheep left on the farm of the vendor.[4]

**12. Fraudulent Chattel Mortgages.**—(*a*) *Retention of Possession under Conditional Bill of Sale Where Transaction in Good Faith.*—If a conveyance or bill of sale be conditional on its face, and by its terms possession is not to be surrendered until such condition is performed, the contract is binding against the creditors if it be in other respects *bona fide* and for a valuable consideration;[5] and so if the transaction be *bona fide* and merely by way of mortgage or collateral security.[6]

(*b*) *Statutory Provisions Concerning Record, etc.*—And in many of the States, it is declared by statute, practically in affirmance of the common law, that a mortgage shall not be considered as fraudulent, although possession is retained by the mortgagor, provided that record thereof be duly made;[7] for the record is considered constructive notice of the transaction to the creditors.[8] Although if

1. McMillan *v.* McSherry, 15 Grant (Ont.), 133.

2. See Taylor *v.* Com. Bank, 4 Up. Can. Com. Pl. 447; Wakefield *v.* Lynn, 5 Up. Can. Com. Pl. 410; Porter *v.* Flintoft, 6 Up. Can. Com. Pl. 335; Kissock *v.* Jarvis, 8 Up. Can. Com. Pl. 393; Williams *v.* Rapalja, 8 Up. Can. Com. Pl. 249; Perrin *v.* Davis, 9 U. C. C. P. 147; Grand Trunk R. Co. *v.* Lees, 9 U. C. C. P. 249; Patton *v.* Foy, 9 Up. Can. Com. Pl. 512; Feehan *v.* Bank of Toronto, 10 Up. Can. Com. Pl. 32; Turner *v.* Mills, 11 Up. Can. Com. Pl. 366; Boynton *v.* Boyd, 12 Up. Can. Com. Pl. 334; Canada Loan Co. *v.* Page, 30 Up. Can. Com. Pl. 1; Corneill *v.* Abell, 31 Up. Can. Com. Pl. 107; McMaster *v.* Garland, 31 Up. Can. Com. Pl. 320; Burnham *v.* Waddell, 28 Up. Can. Com. Pl. 263; 3 Ont. App. 288; Hodgkins *v.* Johnson, 5 Up. Can. Com. Pl. 449; Bank of Toronto *v.* Eccles, 10 Up. Can. Com. Pl. 282; Fraser *v.* Gladstone, 11 Up. Can. Com. Pl. 125; Williams *v.* McDonald, 7 Up. Can. Q. B. 381; Heward *v.* Mitchell, 11 Up. Can. Q. B. 625; Howell *v.* McFarlane, 16 Up. Can. Q. B. 469; McDonald *v.* Weeks, 8 Grant (Ont.), 294.

3. People's Loan Co. *v.* Bacon, 27 Grant (Ont.), 294.

4. Doyle *v.* Lasher, 16 Up. Can. Com. Pl. 263.

See, for basis of foregoing matter, Benjamin on Sales (4th Am. Ed.), p. 781, § 675, note (*d*).

5. Story Sales (4th Ed.), p. 627, § 518, whence paragraph derived.

6. Martindale *v.* Booth, 3 Barn. & Ad. 498; Edwards *v.* Harben, 2 T. R. 595; Marshall *v.* Lloyd, 2 Mees. & W. 450; Stewart *v.* Lombe, 1 Brod. & B. 510, 512; Kidd *v.* Rawlinson, 2 Bos. & P. 59; Armstrong *v.* Baldock, Gow, 35; Haskell *v.* Greely, 3 Greenl. (Me.) 425; Holbrook *v.* Baker, 5 Greenl. (Me.) 109; Haven *v.* Low, 3 N. H. 13; Ash *v.* Savage, 5 N. H. 545; Holmes *v.* Crane, 2 Pick. (Mass.) 610; Glover *v.* Austin, 6 Pick. (Mass.) 220; Flagg *v.* Dryden, 7 Pick. (Mass.) 52; Adams *v.* Wheeler, 10 Pick. (Mass.) 169; Patten *v.* Smith, 4 Conn. 450; Lewis *v.* Stevenson, 2 Hall (N. Y.), 63; Bissell *v.* Hopkins, 3 Cowen (N. Y.), 166; Dawes *v.* Cope, 4 Binn. (Pa.) 258; Croft *v.* Townsend, 3 Desaus. Eq. (S. Car.) 229; Bucklin *v.* Thompson, 1 J. J. Marsh. (Ky.) 223; Letchur *v.* Norton, 4 Scam. (Ill.) 575; Watson *v.* Williams, 4 Blackf. (Ind.) 26; Blystone *v.* Burgett, 10 Ind. 28; D'Wolf *v.* Harris, 4 Mason (U. S.), 515; Clayborne *v.* Hill, 1 Wash. (U. S.) 177; 2 Kent Com. 529, 530. *Compare* Russell *v.* Fillmore, 15 Vt. 130; Smith *v.* Acker, 23 Wend. (N. Y.) 653; Clow *v.* Woods, 2 S. & R. (Pa.) 278.

7. Story Sales (4th Ed.), p. 629, § 518, whence paragraph derived.

8. Bullock *v.* Williams, 16 Pick. (Mass.) 33; Forbes *v.* Parker, 16 Pick. (Mass.) 462; Shurtleff *v.* Willard, 19 Pick. (Mass.) 202; Mass. Gen. Stats. ch. 151, §

the mortgagor remains in possession, and there is no record of the mortgage, it seems that a subsequent purchaser or attaching creditor, having actual notice of the existence of the mortgage, acquires no rights against the mortgagee guiltless of fraud;[1] while a mortgage of chattels, by the terms of which the mortgagor is permitted to retain possession of such chattels, and to sell and dispose of them as his own, is deemed fraudulent and void.[2]

(C) CHANGE OF POSSESSION.—**1. Question of Fraud for Jury.**—(*a*) *Doctrine in England.*—In England, it is a question of fact for the jury whether the transfer of the goods was *bona fide* or fraudulent;[3] that is, made "with the end, purpose, and intent to delay, hinder, or defraud creditors;"[4] even where the vendor remains in possession.[5]

(*b*) *Doctrine of Federal Courts.*—But in this country, it has been the established law in the Federal courts, though recently departed from, that an absolute bill of sale is itself a fraud in law unless possession accompanies and follows the instrument;[6] and it has even been held that the sale would not be rendered valid by the

1; and see Lee *v.* Huntoon, 1 Hoff. Ch. (N. Y.) 458; Camp *v.* Camp, 2 Hill (N. Y.), 628; Otis *v.* Sill, 8 Barb. (N.Y.) 102; N. Y. Laws, sess. 56, ch. 279; Stat. Conn. 1838, pp. 72, 73; Rev. Stat. Vt. 1839, p. 317; Stat. Ga., Dec. 26, 1827; Stat. Va., Dec. 1792, Feb. 1819; Stat. Ky., Dec. 13, 1820, Feb. 22, 1837, Feb. 1, 1839; Stat. Tenn. 1831; Ind. Rev. Stat. 1838, p. 470. Consult 2 Kent Com. 530, *n*; Smith *v.* Moore, 11 N. H. 55; Hall *v.* Snowhill, 2 Greenl. (Me.) 8; Winsor *v.* McClellan, 2 Story (U. S.), 492.

1. Stowe *v.* Meserve, 13 N. H. 46; Sanger *v.* Eastwood, 19 Wend. (N. Y.) 514; Gregory *v.* Thomas, 20 Wend. (N. Y.) 17. *Contra*, Travis *v.* Bishop, 13 Metc. (Mass.) 304; and see Dennis *v.* Lincoln, 13 Metc. (Mass.) 200.

2. Griswold *v.* Sheldon, 4 Comst. (N. Y.) 580; Ford *v.* Williams, 3 Kern. (N. Y.) 575; Edgell *v.* Hart, 13 Barb. (N. Y.) 380; 5 Seld. (N. Y.) 213; and see Collins *v.* Myers, 16 Ohio, 547; Freeman *v.* Rawsen, 5 Ohio St. 1; Harman *v.* Abbey, 7 Ohio St. 218.

3. Benjamin on Sales (4th Am. Ed.), 542, § 482, whence paragraph derived; but see (according to same authority) Edwards *v.* Harben, 2 T. R. 587; Steel *v.* Brown, 1 Taunt. 382; and *compare* Macdona *v.* Swiney, 8 I. R. C. L. 73, 84–86.

4. So in *Canada*: Wright *v.* Moody, 6 Up. Can. Com. Pl. 502; Fowler *v.* Hendry, 7 Up. Can. Com. Pl. 350; Cook *v.* Hendry, 7 Up. Can. Com. Pl. 354.

Other American cases sustain the same view. Hollacher *v.* O'Brien, 5 Hun (N. Y.), 277; Stacy *v.* Deshaw, 7 Hun (N. Y.), 449; Johnson *v.* Carley, 53 How. Pr. (N. Y.) 326; Brooks *v.* Weaver, 3 Alb. L. J. 283; McDonalds *v.* Titus, 6 Alb. L. J. 127; Holden *v.* Burnham, 63 N. Y. 74; Powell *v.* Powell, 71 N. Y. 71; Ferris *v.* Irons, 83 Pa. St. 179; Nichol *v.* Crittenden, 55 Ga. 497; Mattingley *v.* Wulke, 2 Bradw. (Ill.) 169; Bushnell *v.* Wood, 85 Ill. 88; Nimmo *v.* Kuykendall, 85 Ill. 476; Sibley *v.* Tie, 88 Ill. 287; Bradley *v.* Coolbaugh, 91 Ill. 148; Harris *v.* Burnes, 50 Cal. 140; O'Brien *v.* Chamberlain, 50 Cal. 284.

The burden of proving the fraud in such case is upon the party alleging it. Elliott *v.* Stoddard, 98 Mass. 145; Tompkins *v.* Nichols, 53 Ala. 197; Hamilton's Adm. *v.* Blackwell, 60 Ala. 545; Jewett *v.* Cook, 81 Ill. 260; Morgan *v.* Olvey, 53 Ind. 6; Ebb *v.* Cole, 31 Ark. 554.

5. But it has been held that if there be nothing but the absolute conveyance, without the possession, that, in point of law, is fraudulent. Edwards *v.* Harben, 2 T. R. 587; and see Paget *v.* Perchard, Esp. 205; Martin *v.* Podger, 2 W. Bl. 702.

Also in this country: Ingalls *v.* Herrick, 108 Mass. 351, 354; Coolidge *v.* Melvin, 42 N. H. 510; Putnam *v.* Osgood, 52 N. H. 154; Rothschild *v.* Rowe, 44 Vt. 389; Young *v.* McClure, 2 W. & S. (Pa.) 147; Garman *v.* Cooper, 72 Pa. St. 32.

6. See Hamilton *v.* Russell, 1 Cranch (U. S.), 309, 316; 2 Kent Com. 521. *Compare* Warner *v.* Norton, 20 How. (U. S.) 448, 460.

*bona fides* of the transaction between the parties and the fact that possession remained with the vendor for justifiable purposes.[1]

(*c*) *General Tendency of Later Decisions.*—Yet the tendency for many years past, both in *England* and *America*, has been to consider the question of fraud as one of fact for the jury, under the instruction of the court,[2] and to hold that, where possession of the goods does not accompany the instrument of transfer, the transaction is *prima facie* fraudulent, but open to proof of circumstances which may show an innocent purpose;[3] and such is the prevailing doctrine in most of the United States.[4]

**2. Retention of Possession.**—(*a*) *Conclusiveness as Proof of Fraud.*—Retention of possession of chattels by the seller[5] is, in the *United States*, evidence more or less conclusive of fraud upon the rights of third parties.[6] But the main point of difference is whether such retention is only *prima facie* evidence or fraud *per se*,[7] and while the general principle favored in England and America is that possession affords only *prima facie* evidence of fraud, which may be sustained or rebutted by proof of other circumstances,[8] yet the stricter doctrine has prevailed in the Federal courts, and in some of the States, that an absolute bill of sale, unaccompanied by a corresponding change of possession, is of itself a fraud in law.[9]

1. The Romp. Olc. Am. 196; 2 Kent Com. (12th Ed.) p. 520, note.

Same effect under *Missouri* statute. Allen *v.* Massey, 17 Wall. (U. S.) 351; but see Warner *v.* Norton, 20 How. (U. S.) 448, 460.

And like views are maintained in various States. Benjamin on Sales (4th Am. Ed.), p. 546, § 489; 1 Benjamin on Sales (Corbin's Ed.), pp. 644, 645, § 740, note 60, whence paragraph derived.

2. Warner *v.* Norton, 20 How. (U. S.) 448, 460, substantially overruling Hamilton *v.* Russell, 1 Cranch (U. S.), 310.

3. Warner *v.* Norton, 20 How. (U. S.) 448, 460; and see Robinson *v.* Elliott, 22 Wall. (U. S.) 513, 523.

4. See 1 Benjamin on Sales (Corbin's Ed.), pp. 641–643, § 738, note 58, whence paragraph derived.

**Voluntary Transfer.**—In some of the States, a voluntary transfer is conclusively fraudulent, so that, if debts existing at the time of a gift or voluntary transfer of the debtor's property remain unpaid, the creditors may avoid such gift or transfer, although the donor may have reserved ample property to pay all his debts. Haston *v.* Kutner, 31 N. J. Eq. 697; Kirksey *v.* Snedecor, 60 Ala. 192, 197; Choteou *v.* Jones, 11 Ill. 300, 318; Hatfield *v.* Merod, 82 Ill. 113; 1 Am. Lead. Cas. 37, 39; and see Irwin *v.* Freeman, 13 Grant Ch. (Ont.) 465, 470.

But the general rule is that, whether a gift of property is fraudulent or not, is a question of fact,—1 Benj. Sales (Corb. Am. Ed.), p. 637, § 733, note 53, whence matter on this head derived;—and if the donor reserves sufficient property to pay his debts, and no actual intent to defraud creditors appears, the gift will be sustained though the donor becomes insolvent before he has paid the gifts existing at the time of the gift,—see Salmon *v.* Bennett, 1 Conn. 525; 1 Am. Lead. Cas. 32, and notes; Holden *v.* Burnham, 63 N. Y. 74; Merrell *v.* Johnson, 96 Ill. 224, 230; Patterson *v.* McKinstry, 97 Ill. 41; Pratt *v.* Curtis, 2 Low. Dec. (U. S.) 87; Smith *v.* Voeges, 92 U. S. 183.

5. According to Newmark on Sales, § 361.

6. See Benj. Sales (4th Am. Ed.), § 675, note *d*, reviewing the cases; Fairfield Bridge Co. *v.* Nye, 60 Me. 372; Coburn *v.* Pickering, 3 N. H. 415; Rothchild *v.* Rowe, 44 Vt. 389; Ingalls *v.* Herrick, 108 Mass. 351; Clow *v.* Woods, 5 S. & R. (Pa.) 275; Capron *v.* Porter, 43 Conn. 283; Robbins *v.* Oldham, 1 Duv. (Ky.) 28; Gilbert *v.* Decker, 53 Conn. 401.

7. 2 Schouler Pers. Prop. (2d Ed.) § 615. No presumption of fraud: Jones *v.* Simpson, 116 U. S. 609.

8. But see Pregnall *v.* Miller, 21 S. Car. 385; s. c., 53 Am. Rep. 684, 685.

9. Newmark on Sales, § 361, referring to 2 Kent Com. 520, 532; Story Sales (4th Am. Ed.), §§ 510–529; Benj. Sales (4th Am. Ed.), § 675, note (*d*); 2 Schouler Pers. Prop. (2d Ed.) § 616, which cites

(*b*) *English Rule.*—It is the established English rule that if a *bona fide* sale is made of goods seized under an execution and the buyer suffers the debtor to continue in possession of the goods, still they are protected against subsequent execution if the circumstances under which the debtor has the possession are known in the neighborhood;[1] and in general, that the continued possession by the vendor, of goods sold, is a fact to be considered by the jury as evidence of fraud, but is not in law a fraud *per se*;[2] while the notoriety of the sale is a strong circumstance to rebut the presumption of fraud, even where the vendor retains possession.[3]

(*c*) *Views Held in the United States.*—In this country, the general rule is, likewise, that the transaction is merely *prima facie* fraudulent where possession of the goods does not accompany the act or instrument of transfer;[4] but in various States, and at least until recently in the Federal courts,[5] the doctrine is maintained that such want of change of possession creates a conclusive presumption of fraud.[6]

(*d*) *Statutory Provisions Concerning.*—Statute provisions on this subject exist in various States; as, in *New York, Maryland, Delaware, Missouri, Indiana, Iowa, Minnesota, Wisconsin, Nebraska,* and *California.*[7]

(*e*) *Retention as Evidence of Fraud.*—The doctrine that possession retained by the vendor[8] is merely evidence of fraud[9] is maintained in most of the United States.[10]

Stats. 13 Eliz. ch. 5, and 27 Eliz. ch. 4; Stats. 17 and 18 Vict. ch. 36; and Edwards *v.* Harben, 2 Term Rep. 587. Concerning concurrent possession: reference is made to Brown *v.* Keller, 43 Pa. St. 104; s. c., 82 Am. Dec. 554, and to Hall *v.* Parsons, 17 Vt. 271;—and concerning pre-existing debt, etc., to Sargent *v.* Sturn, 23 Cal. 350; s. c., 83 Am. Dec. 118, and note 122; Pregnall *v.* Muller, 21 S. Car. 385; s. c., 53 Am. Rep. 684, 685; and Dolan *v.* Van Demark, 35 Kan. 304.

1. Latimer *v.* Batson, 4 Barn. & C. 652; Leonard *v.* Baker, 1 Maule & S. 251; Watkins *v.* Birch, 4 Taunt. 328; Jezeph *v.* Ingram, 8 Taunt. 838. But see, against concurrent possession, Wordall *v.* Smith, 1 Camp 332; Ranney *v.* Moody, 6 Up. Can. Com. Pl. 471.

2. Martindale *v.* Booth, 3 Barn. & Ad. 498, and cases cited; Hazelinton *v.* Gill, 3 T. R. 620, note (*a*); Lady Arundel *v.* Phipps, 10 Ves. Jr. 145; Lindon *v.* Sharp, 6 M. & G. 895–898; Pennell *v.* Davidson, 18 C. B. 355. See review of authority of Edwards *v.* Harben, 2 T. R. 587, in Story Sales (4th Ed.), pp. 631–634, §§ 520–522.

3. Latimer *v.* Batson, 4 Barn. & C. 652; Kidd *v.* Rawlinson, 2 Bos. & P. 59; Cole *v.* Davis, 1 Ld. Raym. 724; Macdona *v.* Swiney, 8 I. R. C. L. 73.

See, for basis of foregoing matter, Benj. Sales (4th Am. Ed.), pp. 543–545, §§ 486, 487.

4. Warner *v.* Norton, 20 How. (U. S.) 448, 460.

5. Hamilton *v.* Russell, 1 Cranch (U. S), 309; U. S. *v.* Hove, 3 Cranch (U. S.), 73; Meeker *v.* Wilson, 2 Gall. (U. S.) 419; U. S. *v.* Conyngham, 4 Dall. (U. S.) 358; Phettiplace *v.* Sayles, 4 Mason (U. S.), 321, 322; and see Conard *v.* Atl. Ins. Co., 1 Pet. (U. S.) 449; Bissell *v.* Hopkins, 3 Cow. (N. Y.) 189, and cases there collected; Story Sales (4th Ed.), pp. 634, 635, § 524; Story Sales (4th Ed.), pp. 627, 628, § 518, and p. 635, § 525, for alleged distinction that change of possession not required if sale conditional or transfer by way of mortgage or collateral security.

6. See 1 Benj. Sales (Corb. Ed.), p. 644 *et seq.*, § 740, note 60, whence paragraph derived.

7. 2 Schouler Pers. Prop. (2d Ed.) § 615; Newmark on Sales, § 361, referring to Harter *v.* Donahoe (Cal.), 9 Pac. Rep. 651; Bassinger *v.* Spangler, 9 Colo. 175; O'Gara *v.* Lowry, 5 Mont. 427; McKee *v.* Bassick Min. Co., 8 Colo. 392.

8. Or mortgagor. Jones Chat. Mortg. § 320.

9. See 1 Benj. Sales (Corb. Ed.), pp. 641, 642, § 738, note 58; Warner *v.* Norton, 20 How. (U. S.) 448, 460; Davis *v.* Turner, 4 Gratt. (Va.) 422 (full discussion). *Compare* Story Sales (4th Ed.), pp. 635–637, § 526.

10. **Alabama.**—Hobbs *v.* Bibb, 2 Stew.

(Ala.) 54; Millard *v.* Hall, 24 Ala. 209, 219; Wyatt *v.* Stewart, 34 Ala. 716, 721; Mayer *v.* Clark, 40 Ala. 259, 269; Maggs *v.* Benedicks, 49 Ala. 512; Crawford *v.* Kirksey, 50 Ala. 590; 55 Ala. 282, 285.

**Arkansas.**—Hempstead *v.* Johnson, 18 Ark. 123, 134; George *v.* Norris, 23 Ark. 121, 128.

**Georgia.**—Peck *v.* Land, 2 Kelly, 1; Carter *v.* Stanfield, 8 Ga. 49; Goodwyn *v.* Goodwyn, 20 Ga. 600; Collins *v.* Taggart, 57 Ga. 355.

**Indiana.**—Nutter *v.* Harris, 9 Ind. 88; Kane *v.* Drake, 27 Ind. 29; Rose *v.* Colter, 76 Ind. 590; Case *v.* Winship, 4 Blackf. (Ind.) 425.

**Kansas.**—Phillips *v.* Rietz, 16 Kan. 396, 400; Denny *v.* Faulkner, 22 Kan. 89. And see Frankhouser *v.* Ellett, 22 Kan. 127, 146; Wolfley *v.* Rising, 8 Kan. 297.

**Louisiana.**—Keller *v.* Blanchard, 19 La. An. 53; Miltenberger *v.* Parker, 17 La. An. 254; Richardson *v.* Cramer, 28 La. An. 357; Spivey *v.* Wilson, 31 La. An. 653: Devonshire *v.* Gathreaux, 32 La. An. 1132.

**Maine.**—See Cutter *v.* Copeland, 18 Me. 127; Vining *v.* Gilbreth, 39 Me. 496; Sawyer *v.* Nichols, 40 Me. 212; McKee *v.* Garcellon, 60 Me. 165, 168; Fairfield Bridge Co. *v.* Nye, 60 Me. 372, 377; Farrar *v.* Smith, 64 Me. 74; Reed *v.* Reed, 70 Me. 504.

**Massachusetts.**—Bartlett *v.* Williams, 1 Pick. (Mass.) 288; Shumway *v.* Rutter, 7 Pick. (Mass.) 56; Carter *v.* Willard, 19 Pick. (Mass.) 1, 11; Packard *v.* Wood, 4 Gray (Mass.), 307, 311; Rourke *v.* Bullens, 8 Gray (Mass.), 549; Veazie *v.* Somerby, 5 Allen (Mass.), 280, 289; Burge *v.* Cone, 6 Allen (Mass.), 412; Brooks *v.* Powers, 15 Mass. 244; Lanfear *v.* Sumner, 17 Mass. 110, 113; Ingalls *v.* Herrick, 108 Mass. 351; Dempsey *v.* Gardner, 127 Mass. 381; Harlow *v.* Hall, 132 Mass. 232.

**Michigan.** — Molitor *v.* Robinson, 40 Mich. 200; McLaughlin *v.* Lange, 42 Mich. 81; Webster *v.* Bailey, 40 Mich. 641; Carpenter *v.* Graham, 42 Mich 191; Webster *v.* Anderson, 42 Mich. 554; Jackson *v.* Dean, 1 Doug. (Mich.) 519; Bagg *v.* Jerome, 7 Mich. 145; Natch *v.* Fowler, 28 Mich. 205.

**Minnesota.**—Blackman *v.* Wheaton, 13 Minn. 326; Vose *v.* Stickney, 19 Minn. 367, 369.

**Mississippi.**—Rankin *v.* Holloway, 3 Smed. & M. (Miss.) 614; Comstock *v.* Rayford, 12 Smed. & M. (Miss.) 369; Carter *v.* Graves, 6 How. (Miss.) 9; Summers *v.* Roas, 42 Miss. 749; Hilliard *v.* Cagle, 46 Miss. 300; Ketchum *v.* Brennan, 53 Miss. 596.

**Nebraska.** — Robison *v.* Uhl, 6 Neb. 328; Morgan *v.* Bogne, 7 Neb. 429; Densmore *v.* Tomer, 11 Neb. 118; Miller *v.* Morgan, 11 Neb. 121.

**New Hampshire.**—Coburn *v.* Pickering, 3 N. H. 415, 424; Trask *v.* Bowers, 4 N. H. 309; Almy *v.* Wilbur, 2 Wood & M. (U. S.) 371, 388; but *compare* Coolidge *v.* Melvin, 42 N. H. 510; Lang *v.* Stockwell, 55 N. H. 561; Cutting *v.* Jackson, 56 N. H. 253.

**New Jersey.**—Hall *v.* Snowhill, 14 N. J. L. 8; Miller *v.* Pancoast, 29 N. J. L. 250; Parr *v.* Brady, 37 N. J. L. 201; Runyon *v.* Groshen, 12 N. J. Eq. 86.

**New York.**—Hanford *v.* Artcher, 4 Hill (N. Y.), 271; Thompson *v.* Blanchard, 4 N. Y. 303; Ball *v.* Loomis, 29 N. Y. 412, 415; Mitchell *v.* West, 55 N. Y. 107; May *v.* Walter, 56 N. Y. 8; Tilson *v.* Terwilliger, 56 N. Y. 273; Blant *v.* Gabler, 77 N. Y. 461; Steele *v.* Benham, 84 N. Y. 634.

**North Carolina.**—Rea *v.* Alexander, 5 Ired. (N. Car.) 644; Boone *v.* Hardie, 83 N. Car. 470.

**Ohio.**—Rogers *v.* Dare, Wright (Ohio), 136; Burbridge *v.* Seeley, Wright (Ohio), 359; Barr *v.* Hatch, 3 Ohio, 327; Hornbeck *v.* Van Metre, 9 Ohio, 153; Collins *v.* Meyers, 16 Ohio, 547, 552.

**Oregon.**—Moore *v.* Floyd, 4 Oreg. 101; McCully *v.* Swackhamer, 6 Oreg. 438.

**Rhode Island.**—Anthony *v.* Wheatons, 7 R. I. 490, 498; Sarle *v.* Arnold, 7 R. I. 582, 587.

**South Carolina.**—Terry *v.* Belcher, 1 Bail. (S. Car.) 568; Smith *v.* Henry, 2 Bail. (S. Car.) 118. But a transfer to pay a debt will be void unless possession is given. Fulmore *v.* Burrows, 2 Rich. Eq. (S. Car.) 96.

**Tennessee.**—Grubbs *v.* Greer, 5 Coldw. (Tenn.) 160; Darwin *v.* Handley, 3 Yerg. (Tenn.) 502; Young *v.* Pate, 4 Yerg. (Tenn.) 164; Maney *v.* Killough, 7 Yerg. (Tenn.) 443; Galt *v.* Dibrell, 10 Yerg. (Tenn.) 146; Tenn. Nat. Bank *v.* Ebbert, 9 Heisk. (Tenn.) 153; Camey *v.* Camey, 7 Baxt. (Tenn.) 204.

**Texas.**—Gibson *v.* Hill, 21 Tex. 225; Green *v.* Banks, 24 Tex. 508; Thornton *v.* Tandy, 39 Tex. 544; Kerr *v.* Hutchins, 46 Tex. 384; Scott *v.* Alford, 53 Tex. 82, 92

**Virginia.**—Davis *v.* Turner, 4 Gratt. (Va.) 422, overruling earlier decisions; Forkner *v.* Stewart, 6 Gratt. (Va.) 197; Dance *v.* Seaman, 11 Gratt. (Va.) 778; Lipe *v.* Earman, 26 Gratt. (Va.) 563; Balt., etc., R. Co. *v.* Glenn, 28 Md. 287, 324, discussing Virginia law.

**Wisconsin.** — Sterling *v.* Ripley, 3 Chand. (Wis.) 166; Whitney *v.* Brunette,

(*f*) *Retention as Constituting Fraud.*—The doctrine that sales are void as to creditors of the seller, and purchasers from him, until delivery is made, and that want of such change of possession, if unexplained, constitutes fraud in itself,[1] was established in the Federal courts[2] in some of the United States.[3]

(*g*) *Retention Prima Facie Fraudulent.*—(1) *Maine Doctrine—Ohio.*—In Maine, the retention of possession is *prima facie* evidence of fraud,[4] but not conclusive; and it is for the jury to determine the good faith of the transaction.[5]

3 Wis. 621; Smith *v.* Welch, 10 Wis. 91; Grant *v.* Lewis, 14 Wis. 487; Bullis *v.* Borden, 21 Wis. 135; Williams *v.* Porter, 1 Wis. 422.

1. 1 Benjamin on Sales (Corbin's Ed.), p. 644 *et seq.*, § 740, note 60; Jones Chat. Mort. § 319. *Compare* Story Sales (4th Ed.), pp. 637, 639, § 526; Bump Fraud. Conv. pp. 68–73.

2. Hamilton *v.* Russell, 1 Cranch (U. S.), 309, 316; The Schooner Romp, Olc. Adm. 196, 253; Allen *v.* Massey, 17 Wall. (U. S.) 351,—until a recent date. See Warner *v.* Norton, 20 How. (U. S.) 448, 460;—and still prevails in *Ontario*, Ramsey *v.* Moody, 6 Up. Can. Com. Pl. 471; and Williams *v.* Rapelje, 8 Up. Can. Com. Pl. 186.

3. **California.**—Wood *v.* Bugby, 29 Cal. 466; O'Brien *v.* Chamberlain, 50 Cal. 285; Watson *v.* Rodgers, 53 Cal. 401; Grum *v.* Bainey, 55 Cal. 254.

**Colorado.**—McCraw *v.* Welch, 2 Col. 284.

**Connecticut.** — Swift *v.* Thompson, 9 Conn. 63, 69; Osborne *v.* Tuller, 14 Conn. 529; Kirtland *v.* Snow, 20 Conn. 23; Lake *v.* Morris, 30 Conn. 201; Norton *v.* Doolittle, 32 Conn. 411; Hall *v.* Gaylor, 37 Conn. 550; Hatstat *v.* Blakeslee, 41 Conn. 301; Mead *v.* Noyes, 44 Conn. 487.

**Delaware.**—Perry *v.* Foster, 3 Harr. (Del.) 293; Burman *v.* Herring, 4 Harr. (Del.) 458; Taylor *v.* Richardson, 4 Houst. (Del.) 300.

**Florida.**—Gibson *v.* Love, 4 Fla. 217. 238; Wilson *v.* Lott, 5 Fla. 305, 325; Smith *v.* Hines, 10 Fla. 285, 295.

**Illinois.**—See Davis *v.* Ransom, 18 Ill. 396; Thompson *v.* Yeck, 21 Ill. 73; Ketchum *v.* Watson, 24 Ill. 591; Walker *v.* Collier, 37 Ill. 362; Young *v.* Bradley, 68 Ill. 553; Broadwell *v.* Howard, 77 Ill. 305; Strauss *v.* Minzesheimer, 78 Ill. 492; Thompson *v.* Wilhite, 81 Ill. 456; Lefever *v.* Mires, 81 Ill. 456; Ticknor *v.* McClelland. 84 Ill. 471, 474; Allen *v.* Carr, 85 Ill. 388; Rogier *v.* Williams, 92 Ill. 187; McCann *v.* Meyer, 4 Bradw. (Ill.) 376; Thornton *v.* Davenport, 1 Scam. (Ill.) 296.

**Iowa.**—See Prather *v.* Parker, 24 Iowa, 26; Hesser *v.* Wilson, 36 Iowa, 152; Boothby *v.* Brown, 40 Iowa, 104; Sutton *v.* Barlow, 46 Iowa, 517; McKay *v.* Clapp, 47 Iowa, 318; Smith *v.* Champney, 50 Iowa, 174; Hickok *v.* Buell, 51 Iowa, 655.

**Kentucky.**—Bradley *v.* Buford, Sneed (Tenn.), 12; Robbins *v.* Oldham, 1 Duv. (Ky.) 28; Allen *v.* Johnson, 4 J. J. Marsh. (Ky.) 235; Brummel *v.* Stockton, 3 Dana (Ky.), 135; Anthony *v.* Wade, 1 Bush (Ky.), 110; Morton *v.* Ragan, 5 Bush (Ky.), 334; Woodrow *v.* Davis, 2 B. Mon. (Ky.) 298; Kendall *v.* Hughes, 7 B. Mon. (Ky.) 368. 370.

**Maryland.**—Gough *v.* Edelen, 5 Gill (Md.), 101; Green *v.* Treiber, 3 Md. 28.

**Missouri.**—Claflin *v.* Rosenberg, 42 Mo. 439, 448; 43 Mo. 593; Lesem *v.* Nerriford, 44 Mo. 23; Bishop *v.* O'Connell, 56 Mo. 158; Burgert *v.* Borchart, 59 Mo. 80. Wright *v.* McCormick, 67 Mo. 426; Stern *v.* Henley, 68 Mo. 262; Cator *v.* Collins, 2 Mo. App. 225; Basse *v.* Thomas, 3 Mo. App. 472; Franklin *v.* Gnunnersell, 11 Mo. App. 306, 313; Allen *v.* Massey, 17 Wall. (U. S.) 351.

**Nevada.** — Lawrence *v.* Burnham, 4 Nev. 361, 366; Gray *v.* Sullivan, 10 Nev. 416.

**Pennsylvania.**—Dames *v.* Cope, 4 Bin. (Pa.) 258; Clow *v.* Woods, 5 S. & R. (Pa.) 275; Babb *v.* Clemson, 10 S. & R. 428; Shaw *v.* Levy, 17 S. & R. 99; McKibben *v.* Martin, 64 Pa. St. 352, 356; Bentz *v.* Rockey, 69 Pa. St. 71; Miller *v.* Garman, 69 Pa. St. 134; Garman *v.* Cooper, 72 Pa. St. 32.

**Vermont.**—Rockwood *v.* Collamer, 14 Vt. 141; Stephenson *v.* Clark, 20 Vt. 624; Houston *v.* Howard, 39 Vt. 54; Daniels *v.* Nelson, 41 Vt. 161; Pettingill *v.* Elkins, 50 Vt. 431; Weeks *v.* Prescott, 53 Vt. 57, 72; Hildreth *v.* Fitts, 53 Vt. 684, 687.

4. So in *Ohio.* Rogers *v.* Dare, Wright, 136; Collins *v.* Myers, 26 Ohio, 547; Thorne *v.* First Nat. Bank, 37 Ohio St. 527.

5. Bethel Steam-mill Co. *v.* Brown, 57

(2) *Doctrine in New Hampshire.*—And in New Hampshire, the rule is that, if there is any secret trust reserved to the vendor, the sale is void as to creditors; and retention of possession is *prima facie* evidence of a secret trust;[1] while it is for the court to say whether the explanation given of the retention is sufficient in law to rebut this presumption.[2]

(3) *Doctrines of Massachusetts, Rhode Island, and New Jersey.*—In Massachusetts, retention is *prima facie* evidence of fraud, but is susceptible of explanation, which is for the jury to determine;[3] and the Rhode Island rule is that non-delivery is *prima facie* evidence of fraud;[4] while in New Jersey, retention by the vendor is no longer considered conclusive evidence of fraud;[5] but the rule undoubtedly is that such possession is *prima facie* evidence of fraud, which may be explained.[6]

(*h*) *Inconclusive Presumption of Fraud.*—(1) *Alabama Doctrine.*—In Alabama, if the vendor retains possession after the sale, it raises a presumption of fraud, which may be overthrown by the finding of the jury that such retention is consistent with good faith and the absolute disposition of the property.[7]

(2) *Indiana Doctrine.*—And in Indiana, it is provided that "Every sale made by a vendor, of goods in his possession or under his control, unless the same be accompanied by immediate delivery, and be followed by an actual change of possession of the things sold, shall be presumed to be fraudulent and void as against the creditors of the vendor or subsequent purchasers in good faith, unless it

Me. 9; Fairfield Bridge Co. *v.* Nye, 60 Me. 372, 377; Shaw *v.* Wilshire, 65 Me. 485. See, further, Vining *v.* Gilbreth, 39 Me. 496; Sawyer *v.* Nichols, 40 Me. 212; McKee *v.* Garcellon, 60 Me. 165, 168; Farrar *v.* Smith, 64 Me. 74; Reed *v.* Reed, 70 Me. 504.

1. Paul *v.* Crooker, 8 N. H. 288; French *v.* Hall, 9 N. H. 145; Clarke *v.* Morse, 10 N. H. 236; Kendall *v.* Fitts, 22 N. H. 1, 7; Clapp *v.* Rogers, 38 N. H. 435, 438; Coolidge *v.* Melvin, 42 N. H. 510; Cutting *v.* Jackson, 50 N. H. 252; Putnam *v.* Osgood, 32 N. H. 148, 154; Lang *v.* Stockwell, 55 N. H. 561.

2. Coburn *v.* Pickering, 3 N. H. 415, 428 (leading case); Trask *v.* Bowers, 4 N. H. 309; Coolidge *v.* Melvin, 42 N. H. 510; Lang *v.* Stockwell, 56 N. H. 561; Cutting *v.* Jackson, 56 N. H. 253; Crawford *v.* Forristall, 57 N. H. 102; 58 N. H. 114; Plaisted *v.* Holmes, 58 N. H. 293, 619; Sumner *v.* Dalton, 38 N. H. 295; Stow *v.* Taft, 38 N. H. 445.

See, for source of foregoing matter, Benjamin on Sales (4th Am. Ed.), pp. 775, 779, § 675, note (*d*); and consult also 1 id. (Corbin's Ed.) p. 645, § 740, note 60 (misplacing decisions).

3. Bartlett *v.* Williams, 1 Pick. (Mass.) 288; Shumway *v.* Ritter, 8 Pick. (Mass.) 443; Shurtleff *v.* Willard, 19 Pick. (Mass.) 202; Hardy *v.* Potter, 10 Gray (Mass.), 89; Brooks *v.* Powers, 15 Mass. 244; Ingalls *v.* Herrick, 108 Mass. 351.

4. Sarle *v.* Arnold, 7 R. I. 582; Anthony *v.* Wheatons, 7 R. I. 490; Goodell *v.* Fairbrother, 12 R. I. 233; Mead *v.* Gardiner, 13 R. I. 257; Beckwith *v.* Burrough, 13 R. I. 294.

See, for statements and authorities, Benjamin on Sales (4th Am. Ed.), pp. 776, § 675, note (*d*).

5. As declared in the early case of Chumar *v.* Wood, 1 Halst. 155.

6. See Miller *v.* Shreeve, 5 Dutch. 253; Sherron *v.* Humphreys, 1 Grenlf. (Me.) 220; Hall *v.* Snowhill, 14 N. J. L. 8; Miller *v.* Pancoast, 29 N. J. L. 250; Runyon *v.* Groshon, 12 N. J. Eq. 86. So cited in Benjamin on Sales (4th Am. Ed.), p. 777, § 675, note (*d*); 1 id. (Corbin's Ed.) p. 642, § 738, note 58.

7. Hobbs *v.* Bibb, 5 Stew. (Ala.) 54; Bank *v.* Borland, 5 Ala. 539; Mayer *v.* Clark, 40 Ala. 259; Millard's Adm. *v.* Hall, 42 Ala. 219; Maog *v.* Benedicks, 49 Ala. 512; Crawford *v.* Kirksey, 55 Ala. 282; Balling *v.* Jones, 67 Ala. 508,

shall be made to appear that the same was made in good faith, etc.;[1] and it is thereunder held that the retention of possession does not raise a conclusive presumption of fraud as to creditors, but simply throws the burden of proving good faith upon the purchaser,[2] and that, though ordinarily the question of good faith is for the jury, yet where an instrument evidencing a sale is, on its face, fraudulent, the court may pass upon it as a matter of law.[3]

(*i*) *Retention Fraud per se.*—(1) *Kentucky Doctrine.*—The Kentucky doctrine is that the retention of possession by the vendor is fraud *per se*.[4] But the court has more than once expressed its dissatisfaction with the rule;[5] and the rule does not apply to sales of property not in a condition to be removed, such as growing crops,[6] nor to purchasers or creditors with actual notice of the sale.[7]

(2) *Illinois Doctrine.*—And in Illinois, the rule that, when the possession is permitted to remain with the vendor, it is fraud *per se*,[8] is maintained, with the qualification that it is inapplicable when the property is of such a nature that it is incapable of being moved:[9] while, after an honest delivery to the vendee, he may re-deliver the article to the vendor, provided he can show a good reason for so doing;[10] but the general doctrine is held not to extend to judicial sales.[11]

(*j*) *Possession Coupled with Power to Sell.*—(1) *Retention by Seller Constitutes Fraud.*—Possession, coupled with power to sell goods retained, by the seller, constitutes fraud.[12]

1. Ind. Rev. Stats. of 1881, § 4911.

2. Case *v.* Winship, 4 Blackf. (Ind.) 425; New Albany Ins. Co. *v.* Wilcoxson, 21 Blackf. (Ind.) 355; Nutter *v.* Harris, 9 Ind. 91; Kane *v.* Drake, 27 Ind. 29; Rose *v.* Cotter, 76 Ind. 590.

3. Jenners *v.* Doe, 9 Ind. 461.

See, for source of foregoing matter, Benjamin on Sales (4th Am. Ed.), pp. 778, 779, § 675, note (*d*).

4. Bradley *v.* Buford, Sneed (Tenn.), 12; Brummel *v.* Stockton, 3 Dana (Ky.), 135; Morton *v.* Ragan, 5 Bush (Ky.), 334; Robbins *v.* Oldham, 1 Duv. (Ky.) 28; Cummings *v.* Briggs, 2 Duv. (Ky.) 87. See also Anthony *v.* Wade, 1 Bush (Ky.), 110; Allen *v.* Johnson, 4 J. J. Marsh. (Ky.) 235; Woodrow *v.* Davis, 2 B. Mon. (Ky.) 298; Kendall *v.* Hughes, 7 B. Mon. (Ky.) 368, 370.

5. Daniel *v.* Morrison, 6 Dana (Ky.), 185; Enders *v.* Williams, 1 Metc. (Ky.) 252.

6. Robbins *v.* Oldham, 1 Duv. (Ky.) 29; Cummings *v.* Griggs, 2 Duv. (Ky.) 87; Morton *v.* Ragan, 5 Bush (Ky.), 335.

7. Vanmeter *v.* Estill, 78 Ky. 456; Jones Chat. Mortg. § 319, note.

8. Laid down in Thornton *v.* Davenport, 1 Scam. (Ill.) 296; Thompson *v.* Yeck, 21 Ill. 73.

9. Davis *v.* Ransom, 18 Ill. 396; Wright *v.* Grover, 27 Ill. 426; Hart *v.* Wing, 44 Ill. 141; Simmons *v.* Jenkins, 76 Ill. 479; Webster *v.* Granger, 78 Ill. 230; Lefever *v.* Mires, 81 Ill. 456; Johnson *v.* Holloway, 82 Ill. 334; Ticknor *v.* McClelland, 84 Ill. 471; Allen *v.* Carr, 85 Ill. 388; Goodheart *v.* Johnson, 88 Ill. 58; Richardson *v.* Rardin, 88 Ill. 124; Dunlap *v.* Epler, 88 Ill. 82; Greenebaum *v.* Wheeler, 90 Ill. 296; Dunning *v.* Mead, 90 Ill. 376; Rozier *v.* Williams, 92 Ill. 187. As grain in a warehouse: Broadwell *v.* Howard, 77 Ill. 305. See also Ketchum *v.* Watson, 24 Ill. 591; Walker *v.* Collier, 37 Ill. 362; Straus *v.* Minzesheimer, 78 Ill. 492; Thompson *v.* Wilhite, 81 Ill. 356; McCann *v.* Meyer, 4 Bradw. (Ill.) 376.

10. Wright *v.* Grover, 27 Ill. 426.

His action simply creates a presumption against him which is susceptible of explanation. Wright *v.* Grover, 27 Ill. 426.

11. Hanford *v.* Obrecht, 49 Ill. 146.

See, for basis of foregoing matter, Benjamin on Sales (4th Am. Ed.), pp. 778, 779, § 675, note (*d*); 1 Benjamin on Sales (Corbin's Ed.), p. 647, § 740, note 60.

12. Southard *v.* Benner, 72 N.Y. 424; Harmon *v.* Hoskins, 56 Miss. 142; Joseph *v.* Levi, 58 Miss. 843; Freeman *v.* Rawson, 5 Ohio St. 1; Bamet *v.* Fergus, 51 Ill. 58; Robinson *v.* Elliot, 22 Wall. (U. S.) 515, 524.

(2) *Sale as Agent for Buyer.*—But if the seller in possession sells the goods as agent and for the benefit of the buyer, the transaction will be valid.[1]

(3) *Fraud a Question of Fact.*—And the question of fraud in every such case is one of fact.[2]

(*k*) *Conclusive Presumption of Fraud.*—(1) *Connecticut Rule.*—The rule in Connecticut is that the retention of the possession of the property by the vendor, after the sale, raises a conclusive presumption of fraud which cannot be overcome by evidence of the honesty of the transaction;[3] but as a rule, it is for the jury to say whether there has been a retention of possession.[4]

(2) *Pennsylvania Doctrine.*—The Pennsylvania doctrine is that retention of possession is fraud in law wherever the subject of transfer is capable of delivery and no honest and fair reason can be assigned for retention of possession by the vendor;[5] and that where, considering the nature of the property, there is evidence from which the jury could infer that there had been all the actual and continued change of possession practicable, the question should be submitted to them:[6] but that where a change of possession is confessedly practicable, and has not been made, such retention is a fraud in law, irrespective of the actual intent of the parties;[7] though in judicial sales a change of possession is not necessary to give validity to the sale.[8] But the possession of the

1. Goodheart *v.* Johnson, 88 Ill. 58.

2. Weber *v.* Armstrong, 70 Mo. 217; Hewson *v.* Tootle, 72 Mo. 632; Scott *v.* Alford, 53 Tex. 82, 95; Hughes *v.* Cory, 20 Iowa, 399; Gay *v.* Bidwell, 7 Mich. 519; Brett *v.* Carter, 2 Low. Dec. (U. S.) 458.

*Contra:* Griswold *v.* Shelden, 4 N. Y. 501; Edgell *v.* Hart, 9 N. Y. 2, 6; Russell *v.* Winne, 57 N. Y. 591, 595; Tennessee Bank *v.* Ebbert, 9 Heisk. (Tenn.) 153, 159; Collins *v.* Meyers, 16 Ohio St. 547.

See, for basis of foregoing matter, 1 Benjamin on Sales (Corbin's Ed.), p. 643, § 738, note 58.

3. Wells *v.* Camp, 14 Conn. 219; Osborne *v.* Tuller, 14 Conn. 529; Meade *v.* Smith, 16 Conn. 346; Crouch *v.* Currier, 16 Conn. 505; Kirtland *v.* Shaw, 20 Conn. 23; Lake *v.* Morris, 30 Conn. 201; Norton *v.* Doolittle, 32 Conn. 405; Hall *v.* Gaylor, 37 Conn. 550; Hatstat *v.* Blakeslee, 41 Conn. 301; Capron *v.* Porter, 43 Conn. 383; Seymour *v.* O'Keefe, 44 Conn. 128; Mead *v.* Noyes, 44 Conn. 487; Elmer *v.* Welch, 47 Conn. 56; Hall *v.* Sigsworth, 48 Conn. 258.

4. Lake *v.* Morris, 30 Conn. 201; Webster *v.* Peck, 31 Conn. 495.

See these statements supported in Benjamin on Sales (4th Am. Ed.), p. 777, § 675, note (*d*). In Hull *v.* Hull, 48 Conn. 250, the court makes an important exception to the application of the rule.

5. Clow *v.* Woods, 5 S. & R. (Pa.) 275; McKibbin *v.* Martin, 64 Pa. St. 352.

6. Clow *v.* Woods, 5 S. & R. (Pa.) 275.

7. Babb *v.* Clemson, 10 S. & R. (Pa.) 419; Shaw *v.* Levy, 17 S. & R. (Pa.) 99; Dawes *v.* Cope, 4 Binn. (Pa.) 258; Young *v.* McClure, 2 W. & S. (Pa.) 147; Hullings *v.* Guthrie, 4 Barr (Pa.), 124; Haynes *v.* Hundicker, 26 Pa. St. 588; Dunlap *v.* Boumonville, 26 Pa. St. 712; Born *v.* Shaw, 29 Pa. St. 288; Dewart *v.* Clement, 48 Pa. St. 413; Barr *v.* Reitz, 53 Pa. St. 256; Davis *v.* Bigler, 62 Pa. St. 242; McKibbin *v.* Martin, 64 Pa. St. 352; Haak *v.* Linderman, 64 Pa. St. 499; Miller *v.* Garman, 69 Pa. St. 71; Garman *v.* Cooper, 72 Pa. St. 37; Worman *v.* Kramer, 73 Pa. St. 378; Bond *v* Bronson, 80 Pa. St. 360; Maynes *v.* Atwater, 88 Pa. St. 496; Bismarck Bldg. Assoc. *v.* Bolster, 92 Pa. St. 123; Parks *v.* Smith, 94 Pa. St. 46; Pearson *v.* Carter, 94 Pa. St. 156; Thompson *v.* Paret, 94 Pa. St. 275; Barr *v.* Boyle, 96 Pa. St. 31; Dougherty *v.* Haggerty, 96 Pa. St. 515; Crawford *v.* Davis, 99 Pa. St. 576.

8. Lothrop *v.* Wightman, 5 Wright (Pa. St.), 297; Myers *v.* Harvey, 2 Pa. St. 478; Walter *v.* Gemant, 13 Pa. St. 515; Craig's Appeal, 77 Pa. St. 448; Maynes *v.* Atwater, 88 Pa. St. 496; Smith *v.*

buyer must be exclusive, and not concurrent in the assignor and assignee;[1] though continued possession of the seller, under a lawful contract to hold the property as the buyer's bailee, will protect the property against the seller's creditors.[2] And where the property is in the possession of a third person, no delivery or notice seems to be necessary.[3]

**3. Delivery Required by Statute.**—(*a*) *In Delaware and Nevada.*—In Delaware, the statute requires delivery.[4]

And in Nevada, it also requires delivery as against creditors and subsequent purchasers.[5]

(*b*) *Missouri Rule.*—In Missouri, the present rule, which is the result of statutory enactments,[6] is that delivery of the goods must be made in a reasonable time to the vendee when they are in the control of the vendor; otherwise the sale will be conclusively presumed fraudulent as to creditors and subsequent purchasers.[7]

**4. Manual Possession or Notice to Custodian.**—(*a*) *Rule Requiring.*—Under the well-established rule that the delivery of possession is necessary in a transfer of personal chattels, as against every one but the vendor,[8] it is held, in *Massachusetts*, that a sale of goods is void as against an attaching creditor of the seller until delivery;[9] and that the sale of chattels in the custody of a third person

Crisman, 91 Pa. St. 428; Bisbing *v.* Third Nat. Bank, 93 Pa. St. 79.

See, for basis of foregoing matter, Benjamin on Sales (4th Am. Ed.), pp. 777, 778, § 675, note (*d*); 1 Benjamin on Sales (Corbin's Ed.), p. 640, 737, note 57, and p. 646, § 740, note 60.

1. Babb *v.* Clemson, 10 S. & R. (Pa.) 428; McKibbin *v.* Martin, 64 Pa. St. 352, and see Young *v.* McClure, 2 W. & S. (Pa.) 150; McBride *v.* McClelland, 6 W. & S. (Pa.) 94; Boyle *v.* Rankin, 22 Pa. St. 168; Winslow *v.* Leonard, 24 Pa. St. 14, 18; Garman *v.* Cooper, 72 Pa. St. 32, 36; McMarlan *v.* English, 74 Pa. St. 296; Evans *v.* Scott, 89 Pa. St. 136.

2. Smith *v.* Crisman, 91 Pa. St. 428.

See, for basis of paragraph, 1 Benjamin on Sales (Corbin's Ed.), p. 646, § 740, note 60.

3. Linton *v.* Butz, 7. Pa. St. 89; Worman *v.* Cramer, 73 Pa. St. 378, 385; Woods *v.* Hull, 81 Pa. St. 451; but see Trumick *v.* Smith, 63 Pa. St. 18.

4. Del. Laws of 1874, p. 356, ch. 62, § 4; Taylor *v.* Richardson, 4 Houst. (Del.) 300. See also Perry *v.* Foster, 3 Har. (Del.) 293; Burman *v.* Herring, 4 Har. (Del.) 458.

5. Comp. Laws (1873), § 292; Conway *v.* Edwards, 6 Nev. 190. See also Lawrence *v.* Burnham, 4 Nev. 361; Gray *v.* Sullivan, 10 Nev. 416.

6. Wagner's Stats. of 1865. 281, § 10.

7. Claflin *v.* Rosenberg, 42 Mo. 439, 448; 43 Mo. 593; Bishop *v.* O'Connell, 56 Mo. 158; Burgert *v.* Borchert, 59 Mo. 80; Wright *v.* McCormick, 67 Mo. 626; State *v.* Bell, 2 Mo. App. 102; Bosse *v.* Thomas, 3 Mo. App. 472.

See, for basis of foregoing matter, Benj. Sales (4th Am. Ed.), pp. 778, 780, § 675, note (*d*); 1 Benj. Sales (Corb. Am. Ed.), pp. 646, 647 § 740, note 60; referring also to Stern *v.* Henlay, 68 Mo. 262; Cator *v.* Collins, 2 Mo. App. 225; Allen *v.* Massey, 17 Wall. (U. S.) 351.

8. Lanfear *v.* Sumner, 17 Mass. 110, 113.

9. Lanfear *v.* Sumner, 17 Mass. 110, 113 (1821); followed in Shumway *v.* Ritter, 7 Pick. (Mass.) 56 (1828); Carter *v.* Willard, 19 Pick. (Mass.) 1, 11 (1837); Packard *v.* Wood, 4 Gray (Mass.), 307, 311 (1855); Rourke *v.* Bullens, 8 Gray (Mass.), 549 (1857).

It has even been held that no title passes, as against a subsequent *bona fide* purchaser, by an oral sale, of a boat moored in the water, without some further action to take possession,—Veazie *v.* Somerby, 5 Allen, 280, 289 (1862);—or as against a creditor of the vendor, who was permitted to retain the custody of a horse, which she sold for a fair price to her son, and gave him a bill of sale thereof,—Dempsey *v.* Gardner, 127 Mass. 381 (1879); and see Harlow *v.* Hall, 132 Mass. 232 (1882).

would not pass the property as against a creditor of the seller, in the absence of delivery of manual possession or notice to the custodian.[1]

(*b*) *Slight Evidence of Actual Delivery Sufficient.*—But to relieve the harshness of the rule, very slight evidence of actual delivery has been allowed to protect the rights of the purchaser.[2] So that if the seller retains possession in a changed character, as warehouseman or bailee under an express agreement, such as one to do work upon the property sold, or to take care of it, or to remove it to the premises of a third person, in all these instances the property will be protected against creditors of the seller in possession, or purchasers from him.[3]

**5. Substantial and Visible Change of Possession Required.**—(*a*) *Vermont Doctrine.*—The law is well settled in Vermont that there must be a substantial and visible change of possession to protect property from attachment by the creditors of the vendor;[4] but what facts constitute such a change of possession must necessarily depend upon the circumstances of each case.[5]

(*b*) *Province of Court and Jury.*—It is always a question of fact; and if there is any evidence in the case tending to show such a change of possession, it should, under proper instructions, be submitted to the jury;[6] while it is only in cases where there is no conflict in the evidence, or where, admitting all to be true which the testimony tends to show, the facts would be legally insufficient, that the court is justified in withdrawing the subject-matter from the consideration of a jury, and passing upon it as a matter of law.[7]

**6. Actual and Continued Change of Possession Required.**—(*a*) *In New York.*—In New York, it is provided that "Every sale made

1. Burge *v.* Cone, 6 Allen (Mass.), 412 (1863).

Notice to third person in possession of the property is essential to perfect the sale. Tuxworth *v.* Willard, 9 Pick. (Mass.) 347; Carter *v.* Willard, 19 Pick. (Mass.) 1; Hardy *v.* Potter, 10 Gray (Mass.), 89; Whitney *v.* Lynch, 16 Vt. 579.

2. 1 Benj. Sales (Corb. Am. Ed.), p. 645, § 740, note 60, whence matter under this head derived.

3. Phelps *v.* Cutler, 4 Gray (Mass.), 137; Green *v.* Rowland, 16 Gray (Mass.), 58; Stinson *v.* Clark, 6 Allen (Mass.), 340; Cushing *v.* Breed, 14 Allen (Mass.), 376; Ingalls *v.* Herrick, 108 Mass. 351; Thorndike *v.* Bush, 114 Mass. 116; Russell *v.* O'Brien, 127 Mass. 349; Hobbs *v.* Carr, 27 Mass. 532.

4. The general rule upon this subject is that the vendee must acquire the open, notorious, and exclusive possession of the property; and this implies that the vendor is divested of the use, possession, or employment of the property. Rothschild *v.* Rowe, 44 Vt. 389. But this is not required in the case of exempt property,—George *v.* Bassett, 54 Vt. 217; and see Foster *v.* McGregor, 11 Vt. 595; Jewett *v.* Guyer, 38 Vt. 218; Leavitt *v.* Jones, 54 Vt. 423;—nor of the increase of animals,—Leavitt *v.* Jones, 54 Vt. 423; see also Kendall *v.* Sampson, 12 Vt. 515; Rideout *v.* Burton, 27 Vt. 383; Wilder *v.* Stafford, 30 Vt. 399; Fish *v.* Clifford, 54 Vt. 344.

5. Rothschild *v.* Rowe, 44 Vt. 389.

6. Rothschild *v.* Rowe, 44 Vt. 389.

7. Rothschild *v.* Rowe, 44 Vt. 389. See Benjamin on Sales (4th Am. Ed.), pp. 775, 776, § 675, note (*d*).

When the vendee acquires the title to the land on which the chattels are situated, it is not necessary to remove them; but this does not authorize him to permit the vendor to remain upon the premises and control the chattels. Weeks *v* Preston, 53 Vt. 57; and see Murray *v.* Chadwick, 52 Vt. 293; Chase *v.* Snow, 52 Vt. 525; Hildreth *v.* Fitts, 53 Vt. 684.

by a vendor, of goods and chattels in his possession or under his control, etc., unless the same be accompanied by an immediate delivery, and the followed by an actual and continued change of possession of the things sold, . . . shall be presumed to be fraudulent and void as against the creditors of the vendor, . . . or subsequent purchasers in good faith, unless it shall be made to appear, on the part of the persons claiming under such sale, . . . that the same was made in good faith and without any intent to defraud such creditors or purchasers."[1] And after much uncertainty as to the rule,[2] it seems now to be settled that, though the retention of possession by the vendor is presumptive evidence of fraud, yet if the jury find that the retention was made in good faith, and with no intent to defraud, the sale will be upheld;[3] and this provision is held to extend to sales on execution.[4]

(*b*) *In Minnesota and Nebraska.* — In Minnesota, the statute, which is similar to that of New York, and is substantially copied in Nebraska,[5] provides that "Every sale made by a vendor, of goods and chattels in his possession or under his control, and every assignment of goods and chattels, unless the same is accompanied by an immediate delivery and followed by an actual and continued change of possession, . . . shall be presumed to be fraudulent and void as against the creditors of the vendor or assignor, or subsequent purchasers in good faith, unless those claiming under sale of assignment make it appear that the same was made in good faith, and without any intent to hinder, delay, or defraud such creditors or purchasers."[6]

(*c*) *In Wisconsin.*—And in Wisconsin, under a statute almost identical in terms, a want of delivery and of change of possession raises a presumption of fraud.[7]

1. 3 Rev. Stats. (7th Ed.) p. 2328, part II, ch. VII, tit. 2, § 5.

2. See Sturtevant *v.* Ballard, 9 Johns. (N. Y.) 337; Bissell *v.* Hopkins, 3 Cow. (N. Y.) 166, 188; Smith *v.* Acker, 23 Wend. (N. Y.) 653; Butler *v.* Van Wyck, 1 Hill (N. Y.), 438, 450.

3. Hanford *v.* Artcher, 4 Hill (N. Y.), 271; Stout *v.* Rappelhagen, 51 How. Pr. (N. Y.) 75; Southard *v.* Pinckney, 5 Abb. N. C. (N. Y.) 184; Ostrander *v.* Fay, 3 Abb. App. Dec. (N. Y.) 431; 2 Keyes (N. Y.), 587; Van Buskirk *v.* Warren, 4 Abb. App. Dec. (N. Y.) 457; Hollacher *v.* O'Brien, 5 Hun (N. Y.), 277; Schoomaker *v.* Vervalen, 9 Hun (N. Y.), 138; City Bank *v.* Westbury, 16 Hun (N. Y.), 458; Tate *v.* McCormick, 23 Hun (N. Y.), 218; Betz *v.* Connor, 7 Daly (N. Y.), 550; Ford *v.* Williams, 24 N. Y. 359; Ball *v.* Loomis, 29 N. Y. 412; Miller *v.* Lockwood, 32 N. Y. 293; Mitchell *v.* West, 55 N. Y. 107; May *v.* Walter, 56 N. Y. 8; Tison *v.* Terwilliger, 56 N. Y. 273; Southard *v.* Benner, 72 N. Y. 424; Burnham *v.* Brennan, 74 N. Y. 597; Husted *v.* Ingraham, 75 N. Y. 251; Blant *v.* Gabler, 77 N. Y. 461; Mumper *v.* Rushmore, 79 N. Y. 19; Steele *v.* Benham, 84 N. Y. 634.

4. Fonde *v.* Gross, 15 Wend. (N. Y.) 628; Gardenier *v.* Tubbs, 21 Wend. (N. Y.) 169; Stinson *v.* Wrighley, 86 N. Y. 332.

See, for basis of foregoing matter, Benjamin on Sales (4th Am. Ed.), p. 777, § 675, note (*d*); 1 Benjamin on Sales (Corb. Ed.), p. 641, § 738, note 58. *Compare* Story Sales (4th Ed.), p. 639, § 526.

5. Neb. Comp. Stats. 1881, p. 287, ch. 32, § 11; Uhl *v.* Robinson, 8 Neb, 223; Densmore *v.* Tomer, May 23, 1883.

6. Minn. Stats. 1878. p. 543, c. 41, tit. 3, § 15; Blackman *v.* Wheaton, 13 Minn. 326; Benton *v.* Snyder, 22 Minn. 247; Camp *v.* Thompson, 25 Minn. 175.

7. Wis. Rev. Stats. (1878) p. 655, ch. cv., § 2310; Grant *v.* Lewis, 14 Wis. 187; Osen *v.* Sherman, 27 Wis. 505; Blakeslee *v.* Rossman, 43 Wis. 116; Wheeler *v.* Koust, 46 Wis. 398.

(*d*) *Nature and Requisites of Such Change.*—(1) *California.*—In California, the statute provides that "Every sale made by a vendor, of goods and chattels in his possession or under his control, unless the same be accompanied by an immediate delivery, and be followed by an actual and continued change of possession of the things sold, . . . shall be conclusive evidence of fraud as against the creditors of the vendor, . . . or subsequent purchasers in good faith." [1] And under this provision it is held to have been intended that the vendee should immediately take and continuously hold the possession of the goods purchased in the manner, and accompanied with such plain and unmistakable acts of possession, control, and ownership as a prudent *bona fide* purchaser would do in the exercise of his rights over the property, so that all persons might have notice that he owned and had possession of the property; [2] but the acts that will constitute a delivery will vary in the different classes of cases, being largely dependent upon the character and quantity of the property sold, as well as the circumstances of each particular case: [3] and whether the possession is actual and continued as against a creditor, must ordinarily be determined by the jury. [4]

(2) *In General.*—In general, it is said to be now well settled [5] that a change of location of the property is not in all cases essential, on the sale of a chattel, to constitute a valid delivery as against third persons, but that due regard must be had to the character of the property, the nature of the transaction, the position of the parties, and the intended use of the property; [6] and a transfer of personal property, accompanied by an actual, immediate, and continued change of possession, [7] is not fraudulent as to creditors because

See, for basis of foregoing matter, Benj. Sales (4th Am. Ed.), p. 780, § 675, note (*d*).

1. Cal. Civil Code, § 3440.

2. Lay *v.* Neville, 25 Cal. 552.

3. Lay *v.* Neville, 25 Cal. 552.

4. Hesthal *v.* Myles, 53 Cal. 623.

For basis of foregoing matter, see Benj. Sales (4th Am. Ed.), p. 780, § 675, note (*d*), referring generally also to Godchaux *v.* Mulford, 26 Cal. 323; Ford *v.* Chambers, 28 Cal. 113; Woods *v.* Bugbey, 29 Cal. 466; Regli *v.* McClure, 47 Cal. 612; Parks *v.* Barney, 55 Cal. 239; Grum *v.* Barney, 55 Cal. 254; Williams *v.* Lerch, 56 Cal. 330; Davis *v.* Drew, 58 Cal. 152; Stephens *v.* Hallstead, 58 Cal. 193.

5. See Newmark on Sales, § 361.

6. Cessora *v.* Nimick, 113 Pa. St. 70. See also Chase *v.* Garrett (Pa.), 1 Atl. Rep. 912.

Concerning delivery of animals and chattels generally, see Williams *v.* Lerch, 56 Cal. 330;—symbolical delivery as good transfer of possession,—Sharp *v.* Carroll, 66 Wis. 62;—delivery not practicable,—Kingsley *v.* White, 57 Vt. 565 (discussing cases);—delivery unnecessary where logs on low, wet land,—Kingsley *v.* White, just cited;—nailing up holes in corn-crib,—Pope *v.* Cheeney, 68 Iowa, 562 (citing cases and discussing requisites);—transfer of coal-pits,—Tognini *v.* Kyle, 17 Nev. 209; s. c., 45 Am. Rep. 442;—no change of custody or situation of cattle,—James *v.* Fulkerth (Cal.), 7 Pac. Rep. 768;—property in possession of bailee,—Steele *v.* Miller (Pa.), 1 Atl. Rep. 434; s. c., 21 The Reporter, 92; see also Campbell *v.* Hamilton, 63 Iowa, 293;—notice to custodian,—Lufkins *v.* Collins (Cal.), 7 Pac. Rep. 95;—storer of goods stating that they belonged to seller,—Wing *v.* Peabody, 57 Vt. 19.

7. See, generally, Stevens *v.* Irwin, 15 Cal. 503; Godchaux *v.* Mulford, 26 Cal. 316; Bassinger *v.* Spangler, 9 Colo. 175; O'Gara *v.* Lowry, 5 Mont. 427: consult also Morton *v.* Doolittle, 32 Conn. 405.

Circumstances stated under which it was properly left to the jury to say whether, upon the alleged sale of a horse,

made in consideration of a promise by the transferee to use the property in a certain manner, which would confer pecuniary profit on the transferer.[1]

there had been a sufficient change of possession,—McElroy *v.* McElvy (Pa.), 14 Atl. Rep. 242; as noted in 27 Cent. L. J. 178;—no change of possession; absolute changed to conditional sale,—Wagner *v.* Com. (Pa.), 19 The Reporter, 696;—bill of sale not enough,—Comaita *v.* Kyle (Nev.), 19 The Reporter, 345;—exempt property,—Benton *v.* Brown, 68 Cal. 11; —insufficiency of stencilling of vendee's name on sides of railroad cars,—Rafferty *v.* McKenna (Pa.), 1 Atl. Rep. 546;—insufficiency of selecting, marking, charging, etc.,—Davis *v.* Meyer (Ark.), S. W. Rep. 95 (n.), 96;—retaining old sign, etc.,—Brown *v.* Kimmel, 67 Mo. 430; Bassinger *v.* Spangler, 9 Colo. 175;—business carried on under same name,—Wolf *v.* Kahn, 62 Miss. 814;—wagon left in seller's possession, etc.,—Parker *v.* Muwell, 60 N. H. 30;—horse, etc., kept in barn of seller's house,—Ziegler *v.* Handrick, 106 Pa. St. 57;—leaving carpets in brother's house,— Evans *v.* Scott, 89 Pa. St. 136;—brother's control of furniture in lodging-house,— Ross *v.* Sedgwick, 69 Cal. 247;—employment of vendor in subordinate capacity, —O'Gara *v.* Lowry, 5 Mont. 427; Godchaux *v.* Mulford, 29 Cal. 325;—employment of vendor's brother,—Steele *v.* Miller (Pa.), 1 Atl. Rep. 434; s. c., 21 The Reporter, 92, citing Billingsley *v.* White, 59 Pa. St. 464, 467; McKibbin *v.* Martin, 64 Pa. St. 352; see also Goldstone *v.* Numan (Cal.), 19 The Reporter, 680;—brother driving team sold,—O'Gara *v.* Lowry, 5 Mont. 427;—sale by husband to wife,— Leavitt *v.* Jones, 54 Vt. 423; s. c., 41 Am. Rep. 849;—insolvent father's sale, to daughter, of mare kept on farm for a time,—McClure *v.* Torney, 107 Pa. St. 414;—sufficient change of possession, though day's delay, etc.,—O'Gara *v.* Lowry, 5 Mont. 427;—bill of sale Saturday and possession taken early Sunday morning,—Kleinschmidt *v.* McAndrews, 117 U. S. 292.

1. Bassinger *v.* Spangler, 9 Colo. 175; Newmark on Sales, § 361, citing Perrin *v.* Reed, 35 Vt. 2; Lawrence *v.* Burnham, 4 Nev. 361. Belief of vendee that price to be used in settling debts,—St. Louis Coffin Co. *v.* Rubelman, 15 Mo. App. 280;—creditor's concession that purchase in good faith,—Lewin *v.* Hopping, 67 Colo. 541, fully discussing subject of fraudulent transfer.

**Hay Hauled to Warehouse.**—Where the mortgagor of hay hauled it to a warehouse at the request of the mortgagee, in whose name it was stored, and afterwards transferred it to the mortgagee by bill of sale, it was held that the transfer was sufficient, under *California* law, as to the creditors of the mortgagor and vendor. Byrnes *v.* Hatch (Cal.), 19 Pac. Rep. 505; as noted in 27 Cent. L. J. 610.

**Horses Returned to Pasture and Resold.** —But where the purchaser of horses removed them to another pasture, but soon returned them, and the seller afterwards took the horses from the pasture and contracted with a third party for their pasturage, and sold some of them and had sufficient control of them to have sold all of them, it was held that, under *California* law, the original sale was not valid as against the creditors of the seller. Ruddle *v.* Givens (Cal.), 18 Pac. Rep. 427.

**Mere Formal Delivery.**—Where a sale of chattels is made, and the bill of sale executed, and a mere formal delivery of possession to the vendee made, and the chattels remain in possession of the vendor under a lease thereof, such sale, as a matter of law, is, in *Pennsylvania*, fraudulent as to creditors. Betz *v.* Franz (Pa.), 13 Atl. Rep. 940; as noted in 27 Cent. L. J. 19. Indeed, to pass title to personal property as against an attaching creditor of the vendor, there must be a delivery actual or constructive; and without it the vendee cannot maintain replevin. McNaughton *v.* Leonard (Me.), 13 Atl. Rep. 584; as noted in 27 Cent. L. J. 132.

**Property Left with Seller.**—Where the purchaser of personal property left it with the seller, and the latter, afterwards being insolvent, assigned all his property to one of his creditors, who assumed all his liabilities and took possession of his assets, but this property was not included in the schedule, it was held that the sale thereof was valid as to the assignee. Oro, etc., Co. *v.* Starr (Cal.), 18 Pac. Rep. 242.

**English View.**—In England, the leading cases seem to favor the principle that the mere fact of the vendor retaining possession after sale will, of itself, in every such case, render the sale invalid. See Twyne's Case, 3 Coke, 80; Edwards *v.* Harben, 2 Term Rep. 587.

**American Views.**—But this doctrine, to its full extent, has never been followed in all of the American courts. Pregnall *v.* Miller, 21 S. Car. 385; s. c., 53 Am. Rep. 684, 685.

**7. Effect of Want of Change of Possession.**—(*a*) *Difference Dependent on Statutes.*—Decisions made under the statutes of Elizabeth, or of those States which allow the want of an immediate delivery and an actual change of possession to be explained and accounted for, are not to be cited as authoritative expositions of the law in those States where the statutes make such want raise a conclusive presumption of fraud.[1]

(*b*) *Colorado View.*—Thus, in Colorado, sales and assignments of goods and chattels are conclusively presumed to be void as against creditors and subsequent purchasers, unless the same be accompanied by an immediate delivery and be followed by an actual and continued change of possession of the things sold or assigned.[2]

(*c*) *Pennsylvania View.*—But by the reason of the absence of such statutory provisions, the courts in Pennsylvania are able to recognize, in certain cases, a constructive delivery of personal chattels, followed by a constructive or concurrent possession, and

In *Massachusetts*, it is held that such retention is only *prima facie* evidence of fraud, and may be explained by testimony,—Pregnall *v.* Miller, 21 S. Car. 385; s. c., 53 Am. Rep. 684, 685;—in other words, that the character of such possession is a question of fact,—Pregnall *v.* Miller, 21 S. Car. 385; s. c., 53 Am. Rep. 684, 685.

So it is also ruled in *New Hampshire, Connecticut, New York, North Carolina, Georgia, Mississippi, Texas, Wisconsin, Arkansas, Ohio,* and *Tennessee.* See 1 Chitty Contr. (11th Ed.) 571, 572, note, and cases there cited.

But in some of the other States, a contrary doctrine is held. Pregnall *v.* Miller, 21 N. Car. 385; s. c., 53 Am. Rep. 684, 686.

**Exempt Property.**—The rule that sales of personal property are void as against the seller's creditors unless followed by an actual and continued change of possession, is not, as matter of law, inapplicable even though the property was of the class exempt from execution in the hands of the seller, as the right of exemption is a personal privilege, which is waived if not claimed by the debtor. Barton *v.* Brown, 68 Cal. 11.

**South Carolina Decisions.**—In South Carolina, the cases at first seemed to hold that retention of possession was a badge of fraud, not conclusive, but *prima facie* (see citations in next note); but if the testimony proved that the sale was founded upon a valuable consideration, the sale could not be impeached except by positive fraud—want of *bona fides.* Terry *v.* Belcher, 1 Bail. (S. Car.) 568; Gurrett *v.* Rhame, 9 Rich. (S. Car.) 407; Quignard *v.* Aldrich, 10 Rich. Eq. (S. Car.) 253.

Subsequently, a distinction was drawn between a sale where a present consideration was advanced, and a sale upon a pre-existing debt (Smith *v.* Henry, 1 Hill [S. Car.], 16); and the former was left under the principle just stated, while the latter was held fraudulent as a conclusive presumption of law (Smith *v.* Henry, 1 Hill [S. Car.], 16); the retention of possession being regarded in law as the inducement to the sale and the cause of the preference given to the particular creditor. Smith *v.* Henry, 1 Hill (S. Car.), 16.

But the stringent rule thus laid down was afterwards modified as to a sale upon a pre-existing debt, with possession retained under a contract of hire. Jones *v.* Blake, 2 Hill Ch. (S. Car.) 636; followed in Pringle *v.* Rhame, 10 Rich. (S. Car.) 74.

And it seems now to be the law, as recently declared, that in every case where possession is retained, if it is not retained as a benefit to the debtor, but under an independent and subsequent *bona fide* contract, it is open to explanation. Pregnall *v.* Miller, 21 S. Car. 385; 53 Am. Rep. 684, 687.

1. Woods *v.* Bugbey, 29 Cal. 479.

2 Colo. Gen. Stats. § 1523.

Decisions upon substantially the same statute are found in *California, Nevada, Montana, Vermont,* and *Connecticut,*—Bassinger *v.* Spangler, 9 Colo. 175;—but there appears to be different statutory provisions in *Pennsylvania, New York, Michigan, Maine, Massachusetts,* and *New Hampshire,*—Bassinger *v.* Spangler, 9 Colo. 175.

to make the validity of a sale depend upon the *bona fides* of the transaction.[1]

**8. Delivery Required.** — (*a*) *Impossibility Not Exacted.* — It has been laid down that it was not intended, by statutory provisions requiring a prescribed change of possession in transfers of property, to make a sale void as against the creditors and purchasers of the vendor unless the vendee should perform in every case what might in some cases be an impossibility.[2]

(*b*) *Variation with Circumstances.*—The acts that will constitute a delivery will vary with the different classes of cases, and will depend very much upon the character and quantity of the property sold, as well as the circumstances of each particular case.[3]

(*c*) *Distinction Between Ponderous and Light Articles.*—A distinction is made between ponderous articles, as a block of granite or a stack of hay, and articles of small bulk, as a parcel of bullion [4] or a stack of grain.[5]

(*d*) *Nature of Required Acts of Possession, Control, and Ownership.*—But it was declared that it was intended that the vendee should immediately take and continuously hold the possession of the goods purchased in the manner, and accompanied with such plain and unmistakable acts of possession, control, and ownership, as a prudent, *bona fide* purchaser would do in the exercise of his rights over the property.[6]

**9. What Constitutes Delivery.**—(*a*) *On What Matter Depends.*—What constitutes a delivery [7] depends upon the character of the property sold and the circumstances of each particular case.[8]

(*b*) *Manual Possession Not Necessary.*—For the purpose of a delivery, it is not necessary that the property should pass into the actual possession of the buyer; but when property is so situated that the buyer is entitled to and can rightfully take possession of

1. Bassinger *v.* Spangler, 9 Colo. 175.

The validity of the same transaction, if tested under one statute, may be decided upon the weight of testimony as to whether or not there existed therein fraud in fact; while the other statute requires the submission of the further issue in all cases, whether certain acts have been performed, the omission of which constitutes fraud in law and conclusively avoids the sale. Bassinger *v.* Spangler, 9 Colo. 175.

2. Lay *v.* Neville, 25 Cal. 545.

3. Lay *v.* Neville, 25 Cal. 545.

Where the purchase of a chattel is in good faith and for a valuable consideration, it is not essential in all cases that there be an immediate and actual change of possession in order to protect it against the creditors of the vendor; but such change of possession only is required as the nature and character of the property, and the relation and situation of the parties to the property, make reasonable. Chase *v.* Garrett (Pa.), 1 Atl. Rep. 912. See also Cessna *v.* Nimick, 113 Pa. St. 70.

4. See quotation of case last cited in O'Gara *v.* Loury, 5 Mont. 427.

5. Bassinger *v.* Spangler (Colo.), 10 Pac. Rep. 809, 818.

A purchaser of 2000 sacks of grain cannot reasonably remove them all immediately, and the purchaser of a kiln of brick cannot remove the brick while hot. Bassinger *v.* Spangler (Colo.), 10 Pac. Rep. 809, 818.

6. Lay *v.* Neville, 25 Cal. 545.

So that all persons might have notice that he owned and had possession of the property. Lay *v.* Neville, 25 Cal. 545.

7. Williams *v.* Lerch, 56 Cal. 330.

8. See Chaffin *v.* Doub, 14 Cal. 384; Lay *v.* Neville, 25 Cal. 545.

it at his pleasure, he is considered as having actually received it as the statute requires.[1]

(*c*) *Goods in Third Person's Custody.*—Accordingly, it has been held that, if a vendor of goods in the care and keeping of a third person directs him to deliver them to the vendee, and the party holding the goods, on notice and application of the vendee, assents to retain the goods for him, it is a delivery sufficient to transfer the title and to satisfy the statute.[2]

(*d*) *Collecting Animals, and Turning Them Out to Pasture on Accustomed Range.*—So, by delivering a bill of sale of horses to the vendee, and giving direction to his agent to get the horses together and keep them for the vendee, the vendor transferred them to the vendee; and when the agent, in obedience to the direction which he had received, collected them together in his pasture for the vendee, and wrote to him that they were ready for him, and to come and take them, and the vendee employed the agent to take charge of them and winter them for him, this was an actual delivery of the property so far as the nature and condition of the property admitted of it.[3] When the agent, under this employment, turned the horses out to pasture on their accustomed range, and kept them exclusively for the vendee until they were taken on execution by a creditor of the vendor, the requisitions of the statute as to change of possession[4] were fully satisfied.[5]

(*e*) *Sheep Selected, Marked, and Left with Third Party to Hold for Vendor.*—So, where sheep were selected and marked, and left in the possession of a third party, who was desired, and who consented, to hold them for the vendor, this was held to be a sufficient delivery to complete the sale and pass the property as against the creditors of the vendor.[6]

(*f*) *Presentation of Delivery Order and Pointing Out of Cattle, etc.*—And it has been held that there was a delivery, as immediate and complete as the nature of the case would admit of, followed by an actual and continued change of possession, where the owner of a ranch, and of the cattle thereon, sold the cattle to a party, and gave him a bill of sale thereof, and, the day following the sale, the vendee went to the ranch and presented to the agent of the vendor, in charge of the ranch, an order from the vendor for the delivery of the cattle; whereupon the agent, after reading the order, pointed out the cattle where they were grazing on the ranch, and the vendee employed the agent to take charge of them on his account, which he did, remaining in charge of them until they were levied on.[7]

1. Williams *v.* Lerch, 56 Cal. 330; and see Garlick *v.* Bowers (Cal.), 4 Pac. Rep. 1138.
2. Means *v.* Williamson, 37 Me. 556.
3. Williams *v.* Lerch, 56 Cal. 330.
4. See Cal. Civ. Code, § 3440.
5. Williams *v.* Lerch, 56 Cal. 330.
In another case, it was stated to be clear that, if the vendee had collected together the cattle purchased by him, and marked them with his own brand, and let them go to pasture on their accustomed range, that would have constituted a good delivery and continued change of possession. Walden *v.* Murdock, 23 Cal. 533.
6. Barney *v.* Brown, 2 Vt. 374.
7. Montgomery *v.* Hunt, 5 Cal. 366.

(*g*) *Public, Continuous, and Substantial Possession.*—In *California*, where a conclusive presumption of fraud arises from the want of an immediate delivery, followed by an actual and continued change of possession,[1] the true rule of construction, approved as such,[2] is that delivery must be made of the property; that the vendee must take actual possession; and that such possession must be open and unequivocal, carrying with it the usual marks and indications of ownership by the vendee.[3] And this possession must be continuous—not taken to be surrendered back again; not formal, but substantial.[4]

(*h*) *Actual, Visible, and Continued Change of Possession.*—In *Connecticut*, it is declared that the rule of law which requires a change of possession is one of policy, whose object is the prevention of fraud, and which applies both to property attached and to property sold;[5] and that the policy which dictates it, and the prevention at which it aims, require its rigid application to every case where there has not been an actual, visible, and continued change of possession.[6]

(*i*) *Open, Notorious, and Unequivocal Possession—Colorado Doctrine.*—In Colorado, where there is a conclusive presumption of fraud in the absence of an immediate delivery followed by an actual and continued change of possession,[7] the rules of law laid down as a proper construction of the statute [8] are that the vendee must take the actual possession, and the possession must be open, notorious, and unequivocal; such as to apprise the community, or those who are accustomed to deal with the party, that the goods have changed hands, and that the title has passed out of the seller and into the purchaser.[9]

(*j*) *Determination of Character of Possession.*—This must be determined by the vendee using the usual marks or *indicia* of ownership, and occupying that relation to the thing sold which owners of property generally sustain to their own property.[10]

**10. Manual Change of Possession Unnecessary.**—(*a*) *Well-settled Rule.*—It is now well settled that a change of location of the property is not in all cases essential, on the sale of a chattel, to constitute a valid delivery as against third persons;[11] but that due regard must be had to the character of the property, the nature of the

1. Cal. Civ. Code, § 3440. See Harter *v.* Donahoe, 9 Pac. Rep. 651.

2. Godchaux *v.* Mulford, 26 Cal. 316. See Bassinger *v.* Spangler, 9 Colo. 175.

3. Stevens *v.* Irwin, 15 Cal. 503.

It must be such as to give evidence to the world of the claims of the new owner. He must, in other words, be in the usual relation to the property which owners of goods occupy to their property. Stevens *v.* Irwin, 15 Cal. 503.

4. Stevens *v.* Irwin, 15 Cal. 503. See Bassinger *v.* Spangler, 9 Colo. 175.

5. Norton *v.* Doolittle, 32 Conn. 405.

6. Norton *v.* Doolittle, 32 Conn. 405. See Bassinger *v.* Spangler, 7 Colo. 175.

7. Colo. Gen. Stats. § 1523.

8. In Bassinger *v.* Spangler (Colo.), 10 Pac. Rep. 809, 813.

9. Cook *v.* Mann, 6 Colo. 21.

10. Cook *v.* Mann, 6 Colo. 21.

The possession must be exclusive of the vendor. Cook *v.* Mann, 6 Colo. 21. And a concurrent or joint possession is not admissible. Cook *v.* Mann, 6 Colo. 21.

11. Cessna *v.* Nimick, 113 Pa. St. 70.

transaction, the position of the parties, and the intended use of the property.[1]

(*b*) *Sufficient Assumption of Control, etc.*—If the purchase be in good faith and for a valuable consideration, followed by acts intended to transfer the possession as well as the title, and the vendee assumes such control of the property as to reasonably indicate a change of ownership, the change of possession, as matter of law, cannot be declared insufficient.[2]

(*c*) *Formal Delivery of Iron Marked and Shipped.*—And a sale comes within the rule stated, and is not fraudulent in law, where a bill of sale was taken on all the iron then in the docks and yards of a company, of which a formal delivery was made, and the superintendent of the company was engaged by the buyer to mark all the iron with the initial of his firm, and to ship it away (which was commenced at once) as fast as cars could be brought up.[3]

**11. Concurrent Possession.** — (*a*) *In Pennsylvania.* — In Pennsylvania, where the statute does not make the want of the requisite change of possession create a conclusive presumption of fraud, there has been held a sufficient change of possession, on a sale of carpets by one brother to another, who paid for them and took a bill of sale of them, but allowed them to remain in the same situation as before, and to be used as before, in the house which they

1. Cessna *v.* Nimick, 4 Atl. Rep. 193. See also Lay *v.* Neville, 25 Cal. 545; Chase *v.* Garrett (Pa.), 1 Atl. Rep. 912.

2. See Haynes *v.* Hunsiker, 26 Pa. St. 58; Chase *v.* Ralston, 30 Pa. St. 539; Billingsby *v.* White, 59 Pa. St. 464.

No such change of possession as will defeat the fair and honest purpose of the parties is required. See Crawford *v.* Davis, 99 Pa. St. 576.

3. Cessna *v.* Nimick, 113 Pa. St. 70.

**Goods in Bailee's Custody.**—While it is the general rule that, to render a sale of goods valid against execution creditors, there must be a delivery accompanied and followed by a continuing possession in the vendee, yet, where it property sold is in possession of a bailee, the general rule does not apply; and a sale of such property is good without actual delivery if the vendor does not retake possession. Steele *v.* Miller, 21 Reporter, 92; s. c., 1 Atl. Rep. (Pa.) 434.

It is sufficient also if the vendee takes possession and leaves the property in the custody of the former bailee for a special purpose. Linten *v.* Butz, 7 Pa. St. 89; Worman *v.* Kramer, 73 Pa. St. 386; Woods *v.* Hull, 81* Pa. St. 451.

In general, where property sold in good faith is at the care and custody of a third person, notice to said third person of the sale is sufficient to constitute a delivery (Lupkins *v.* Collins [Idaho], 7 Pac. Rep. 95), as to subsequent purchasers or attaching creditors. See How *v.* Taylor, 52 Mo. 592; Cofield *v.* Clark, 2 Colo. 101; Dempsey *v.* Gardner, 127 Mass. 381, 383.

**Goods Capable of Manual Delivery.**—But the acts of ownership, on the part of the vendee in a bill of sale, sufficient to satisfy the Statute of Frauds of *Colorado* (Gen. Stats. Colo. 509, § 14, making insufficient change of possession conclusive evidence of fraud), must be of such a character as to afford reasonable notice to the public of a change of ownership. See Cook *v.* Mann, 6 Colo. 21.

And the statute admits of no excuse for leaving personal chattels, capable of manual delivery and removal, in the apparent possession of the vendor; nor does it admit of a construction whereby there may be a joint or concurrent possession in both vendor and vendee. Bassinger *v.* Spangler, 9 Colo. 175.

**Cattle Left in Same Custody.**—A sale of cattle is void against creditors, however, because of the want of an immediate delivery and actual and continued change of possession, where the custody of the herd of cattle remained in the same person after as before the sale, and they were not removed from the land of the vendor, where they had been grazing before their seizure by the sheriff. James *v.* Fulkerth (Cal.), 7 Pac. Rep. 768.

occupied jointly.[1] And the question to be submitted to the jury under such circumstances was declared to be whether the change of possession was actual and *bona fide*—not pretended, deceptive, and coliusive; and whether such change of possession was all that could have been expected, taking into view the character and situation of the property, and the relations of the parties.[2]

(*b*) *Vermont Rule.*—The rule laid down in Vermont is that a concurrent possession of personal property by the vendor and vendee, after the sale, renders the sale fraudulent *per se* as to the creditors of the vendor;[3] but that, to have that effect, the joint possession must appear to be of the same description, in the use, occupancy, and disposition of the property, as that of joint owners.[4]

(*c*) *Possession Given Before Attachment.*—The rule, in *Connecticut*, is that the retention of possession raises a presumption of fraud only in favor of attaching creditors who seize the property while it remains with the vendor, or of those who legally represent them, as in the case of trustees in insolvency.[5]

**12. Acts Indicating Change of Possession or Want of It.**—(*a*) *Purchaser Assuming Charge of Stores, etc.*—Although the seller of a stock of goods did not, after the completion of the sale, quit the storeroom containing the goods and from which they were not removed, yet the provisions of the *Colorado* statute[6] were satisfied, nevertheless,[7] where an inventory of the goods was taken, and the price paid, and the purchaser took immediate possession of the goods and the storeroom, assumed the lease, hired his clerks, one of whom was the former proprietor, changed the sign over the door, and then devoted his time and attention to the business.[8]

1. Evans *v.* Scott, 89 Pa. St. 136. As an actual change of possession could not be made without one brother turning the other out of doors, which was unnecessary. Evans *v.* Scott, 89 Pa. St. 136.

2. Evans *v.* Scott, 89 Pa. St. 136. See statement of this case in Bassinger *v.* Spangler, 9 Colo. 175.

3. Hall *v.* Parsons, 17 Vt. 271.

4. Hall *v.* Parsons, 17 Vt. 271. See statement of this case in Bassinger *v.* Spangler, 9 Colo. 175.

5. Gilbert *v.* Decker, 53 Conn. 401.

In consistency with this limitation, it is also held that the rule does not apply to the sale or mortgage of goods that are exempt from execution. Patten *v.* Smith, 4 Conn. 455; Foster *v.* McGreggor, 11 Vt. 595.

Thus, where a horse was purchased in 1880, but remained in the seller's possession until February 7, 1885, when it was delivered to the buyer, this was held no such laches in assuming possession as to permit the attaching creditors of the seller to levy on said horse nine days after the delivery; for it was considered sufficient that possession was taken before the attachment. Gilbert *v.* Decker, 53 Conn. 401, following Calkins *v.* Lookwood, 16 Conn. 276; Hall *v.* Gaylor, 37 Conn. 550; citing also Bartlett *v.* Williams, 1 Pick. (Mass.) 288; Shumway *v.* Rutter, 8 Pick. (Mass.) 447; Kendall *v.* Sumpson, 12 Vt. 515; Blake *v.* Graves, 18 Iowa, 312; Cruikshank *v.* Coggswell, 26 Ill. 366; Clute *v.* Steel, 6 Nev. 335; Berry *v.* Ensell, 2 Gratt. (Va.) 333; Snyder *v.* Gee, 4 Leigh (Va.), 535; Coty *v.* Barnes, 20 Vt. 19; Wilson *v.* Leslie, 20 Ohio, 161; Brown *v.* Webb, 20 Ohio, 389; Frank *v.* Miner, 50 Ill. 445;—distinguishing Carpenter *v.* Meyer, 5 Watts (Pa.), 483; Gardener *v.* Tubbs, 21 Wend. (N. Y.) 169; Franklin *v.* Gummersell, 9 Mo. App. 84; Cheney *v.* Palmer, 6 Cal. 119; Watson *v.* Rogers, 53 Cal. 401.

6. Gen. Stats. § 1523.

7. According to Bassinger *v.* Spangler, 9 Colo. 175.

8. Cook *v.* Mann, 6 Colo. 21, where the purchaser personally managed the

(*b*) *Families of Parties Staying in Same House, etc.*—There is not, however, such actual, exclusive, and visible possession acquired by the purchaser of household goods and furniture as is essential to the validity of the transaction, in *Colorado*, where the families of both parties continued to reside in the same house, and there was a failure to perform other acts indicative of a change of ownership; though the purchaser made or kept up the fires in the furnace, as before, paid some of the household expenses, talked of his purchase with some of his neighbors, and recorded his bill of sale of the property, when the law did not require or authorize this.[1]

(*c*) *Stencilling Buyer's Name on Sides of Cars.*—Some actual possession other than the stencilling of the vendee's name on the sides of railroads cars must be proved, in *Pennsylvania*, to make a valid sale against judgment creditors.[2]

(*d*) *Actual Delivery, etc., Required.*—To make a sale of chattels effectual against subsequent purchasers, from the vendor or his attaching creditors, in *Arkansas* and various other States, there must have been an actual delivery, a visible and substantial change in the possession.[3]

(*e*) *Furnishing Bill of Parcels.*—Nor is importance to be attached to the fact that a bill of parcels was furnished; as this is like a bill of sale, and insufficient evidence of a complete sale unless accompanied by actual possession of the thing sold.[4]

business at the same stand, replenishing the stock when necessary, and assuming exclusive control of the business.

1. Bassinger *v.* Spangler, 9 Colo. 175. So held where the purchasers did not openly or visible assume the proprietorship of the residence in which the articles sold were situated, did not accept a lease of the house, but refused to pay the rent, and did not indicate, even by a sign upon the door, that the house was his place of residence. Bassinger *v.* Spangler, 9 Colo. 175.

2. Rafferty *v.* McKennan (Pa.), 1 Atl. Rep. 546.

And a sale, lease, or loan of rolling-stock, the title of which stands in the name of the vendor, lessor, or bailor until some condition is performed, is invalid, as to any subsequent judgment creditor or purchaser for a valuable consideration without notice, unless in writing, acknowleged and recorded, and each car marked plainly with the owner's, lessee's, bailee's, or assignee's name. Rafferty *v.* McKennan (Pa.), 1 Atl. Rep. 546.

**Retaining Sign.**—In *Missouri*, the sale of a stock of goods in a store has been held void because no *indicia* of a change of ownership were visible, as the sign of the former proprietor, who made the sale, was permitted to remain on the building, and the vendor was frequently at the store after the sale, and occasionally made sales of goods himself. The court held that the retention of the old sign amounted to a declaration that the seller was still proprietor of the store, and that it gave to the transaction an equivocal character. And it was further held that the change of possession, not having been such as the statute required, as appeared from the undisputed facts of the case, should have been declared fraudulent as a matter of law. Brown *v.* Kimmel, 67 Mo. 430; as stated in Bassinger *v.* Spangler, 9 Colo. 175, 816, which refers also to Woods *v.* Bugbey, 29 Cal. 466; Lawrence *v.* Burnham, 4 Nev. 361; Hull *v.* Sigsworth, 48 Conn. 258; Claflin *v.* Rosenberg, 42 Mo. 449; Perrin *v.* Reed, 35 Vt. 2; and Pierce *v.* Chipman, 8 Vt. 337.

3. Davis *v.* Meyer (Ark.), 1 S. W. Rep. 95.

Especially where the goods are not ponderous or bulky, but could have been easily delivered. See Ferguson *v.* Northern Bank, 14 Bush (Ky.), 555.

4. See Dempsey *v.* Gardner, 127 Mass. 381; McKee *v.* Garcelon, 60 Me. 165; Salomons *v.* Chesley, 57 N. H. 163.

(*f*) *Selecting, Packing, and Charging Goods, etc.*—And selecting out from a general stock the goods bargained away, packing them in unsealed, unmarked boxes, charging them to the party who has bargained for them, and rendering him an itemized bill of them, but without any transfer of them, is of no avail against parties to whom the vendor mortgaged the same goods, who had no notice of the prior sale, and who took possession of the goods;[1] and such parties thereby obtained the better title.[2]

**13. Continuance of Change of Possession.**—(*a*) *Vendor's Control Not Precluded.*—The word "actual," in the clause of the Statute of Frauds, referring to change of possession, was designed to exclude the idea of a mere formal change of possession, and, the word "continued," to exclude the idea of a mere temporary change.[3] But it never was the design of the statute to give such extension of meaning to this phrase "continued change of possession" as to require, upon penalty of a forfeiture of the goods, that the vendor should never have any control over or use of them.[4]

(*b*) *Continuance for all Time, etc., Not Required.*—The "continued change of possession" does not mean a continuance for all time, of this possession, or a perpetual exclusion of all use or control of the property by the original vendor.[5]

**14. Employment of Vendor.**—(*a*) *Insubordinate Capacity Not Necessarily Fraudulent.*—When there has been a sufficient actual or constructive delivery to the vendee, and he is in actual possession, the facts that the vendor is employed as a clerk or servant, in a capacity which holds out no indication of ownership, does not constitute such a concurrent possession as the law condemns.[6]

(*b*) *Vendor May Act as Vendee's Agent or Servant.*—Thus, it is said that the vendor may act as the agent or servant of the vendee in the management and disposal of the property, provided his

1. Davis *v.* Meyer (Ark.), 1 S. W. Rep. 95, and note on 96.

2. See Crawford *v.* Forristall, 58 N. H. 114; Allen *v.* Carr, 85 Ill. 388; Veazie *v.* Somerby, 5 Allen (Mass.), 280; Garman *v.* Cooper, 72 Pa. St. 32.

**Brother's Control of Furniture in Lodging-house.**—The keeper of a lodging-house was notified by her landlord that she must leave the premises by a certain time, but failed to do so, whereupon he sued her and obtained judgment of restitution and for treble rent against her. About the time of the judgment, but before execution, she transferred, by bill of sale, the furniture in the lodging-house to her brother, who then took possession and exercised control over the property, taking up his abode in the lodging-house and notifying the lodgers that he had bought the property. It was held that there was such an actual and continued change of possession of the property as would vest the title in him, notwithstanding the seller, being sick, remained for some time in the house, and the possession of the house could not be transferred. Ross *v.* Sedgwick, 69 Cal. 247.

3. Stevens *v.* Irwin, 15 Cal. 507. See O'Gara *v.* Lowry, 5 Mont. 427.

4. Stevens *v.* Irwin, 15 Cal. 507.

This construction, if made without exception, would lead to very unjust and very absurd results, as a vendor could never become trustee of the goods without their being forfeited or liable for his debts: thus, if a livery-stable keeper hired a horse to the original vendor, it would be liable for his debts; or if a boarder came into a room, the furniture might be liable for the debts if he once owned it. Stevens *v.* Irwin, 15 Cal. 507.

5. O'Gara *v.* Lowry, 5 Mont. 427; Stevens *v.* Irwin, 15 Cal. 507.

6. Billingsley *v.* White, 59 Pa. St. 464; McKibben *v.* Martin, 64 Pa. St. 352,

acts be done, not as owner, but as the agent or servant of the vendee.[1]

(*c*) *Proviso that Change of Possession Sufficiently Shown.*—If the change of possession is otherwise sufficiently shown, the mere fact of such agency is not, and never has been held to be, such a badge of fraud or evidence of retained possession as to render the sale invalid.[2]

(*d*) *Employment of Vendor's Brother.*—And the fact that, some time after the sale, the vendor's brother was employed in the store, and, while there, had charge of part of the property in controversy, in connection with other employees of the vendor, is at most very slight evidence of either concurrent or resumed possession.[3]

**15. Delay in Change of Possession.**—(*a*) *No Business Hours Covered by Delay.*—A sale of a stock of goods is not void, under a provision of the laws of *Montana*, that every sale made by a vendor, of goods and chattels in his possession or under his control, and every assignment of goods and chattels, unless the same be accompanied by the immediate delivery and followed by an actual and continued change of possession of the thing sold and assigned, shall be conclusive evidence of fraud as against the creditors of the vendor or the person making such assignments or subsequent purchasers in good faith,[4] where a bill of sale was made of the property on Saturday, the goods being miles away, and the buyers took possession of them very early Sunday morning, and remained in possession until the seizure of the goods under levy of an attachment next morning.[5]

(*b*) *Delivery Next Day Not Necessarily Fraudulent.*—Nor does the fact that property was sold one day, and not delivered to the purchaser until the day following, render the sale void as against

1. Billingsley *v.* White, 59 Pa. St. 464, 467.

2. Billingsley *v.* White, 59 Pa. St. 464, 467.

3. Steele *v.* Miller, 21 Reporter, 92; s. c., 1 Atl. Rep. (Pa.) 434.

So, the fact that the brother of the vendor drove the team sold, both before and after the sale, cannot be regarded as conclusive evidence against the continuity of possession in the purchaser. O'Gara *v.* Lowry, 5 Mont. 427.

**Doctrine Concerning.**—The employment of the vendor in a subordinate capacity is colorable only, and not conclusive, upon the question as to whether there has been an immediate delivery and an actual change of possession. Godchaux *v.* Mulford, 29 Cal. 325. See O'Gara *v.* Lowry, 5 Mont. 427.

He cannot be allowed to remain in the apparently sole and exclusive possession of the goods after the sale, for that would be inconsistent with such an open and notorious delivery and actual change as the statute exacts in order to exclude from the transaction the idea of fraud. Godchaux *v.* Mulford, 29 Cal. 325.

But the reason of the rule announced in the statute is satisfied if it be apparent to all the world that he has ceased to be the owner, and that another has acquired and openly occupied that position; that he has ceased to be the principal in the charge and management of the concern, and become only a subordinate or clerk. O'Gara *v.* Lowry, 5 Mont. 427; Godchaux *v.* Mulford, 29 Cal. 325.

4. Mont. Laws 1872, p. 394, § 15.

5. As it appeared that there was not a single hour in which business could be or was usually transacted that intervened between the execution and delivery of the bill of sale and the transfer of the possession of the property. Kleinschmidt *v.* McAndrews, 117 U. S. 292.

creditors, etc., under the *Montana* Statute of Frauds, if it appears in evidence that the delivery was impossible on the day of sale.[1] And it is properly a question for the jury to answer, whether the property was so situated and the parties so located at the time of the making of the sale, that instant delivery could not be made, and whether it was made as soon thereafter as practicable.[2]

**FREE.**—(1) Without constraint or compulsion;[3] (2) open to all;[4] (3) without compensation.[5]

**FREEHOLD.**—An estate of inheritance or for life in real property.[6]

1. O'Gara *v.* Lowry, 5 Mont. 427.

2. O'Gara *v.* Lowry, 5 Mont. 427.

So, where the property mortgaged consisted of hay, lying in swaths, winrows, and stacks, over three large fields of the mortgagor, and the possession of it had been given by constructive delivery to the mortgagees, who from thence continued to work on the hay during eight days, when it was attached for the vendor's debts, the court held that, if an actual and immediate delivery were constructed to mean a removal immediately from the premises, the requirement of the statute would in such cases be impossible of performance, and that time was necessarily required to gather and remove the hay. Chaffin *v.* Doub, 14 Cal. 384.

3. "Freely" means without constraint or compulsion. Accordingly, under a statute requiring the officer who takes an acknowledgment of a married woman to certify that on "a private examination, etc., she executed such conveyance freely and without any fear or compulsion of her husband," the omission to state that it was done freely is immaterial if the certificate set out that it was done without fear or compulsion. Meriam *v.* Harsen, 2 Barb. Ch. (N. Y.) 232; s. c., 4 Edw. (N. Y.) 70; Dennis *v.* Tarpenny, 20 Barb. (N. Y.) 371.

A man is prevented from freely exercising the right of suffrage when, in its exercise, any kind of constraint is put upon him by force, threats, intimidation or any other sort of duress, bodily or mental. United States *v.* Souders, 2 Abb. (U. S.) 462.

"**Free from average unless general.**"—These words in a policy of marine insurance limit the insurer's liability to cases of total loss, except where the loss arises from contribution towards a general average. Davy *v.* Milford, 15 East, 559; Hernandez *v.* Sun M. Ins. Co., 6 Blatchf. (U. S.) 317; Waln *v.* Thompson, 9 S. & R. (Pa.) 115; Bargett *v.* Orient Ins. Co., 3 Bosw. (N. Y.) 385; s. c., 22 Am. Dec. 136; Aranzamendi *v.* La. Ins. Co., 2 La. 432; Biays *v.* Chesapeake Ins. Co., 7 Cranch (U. S.), 315.

"**Free from mortality**" in a policy of insurance on live stock means free from death from natural causes, not from death by violence. Lawrence *v.* Aberdeen, 5 B. & Al. 107.

"**Freely to be possessed and enjoyed.**"—These words in a devise are words of perpetuity, and pass a fee. Burkhart *v.* Bucher, 2 Binn (Pa.), 455; s. c., 4 Am. Dec. 457; Campbell *v.* Carson, 12 S. & R. (Pa.) 54. *Contra*, Wheaton *v.* Andress, 23 Wend. (N. Y.) 452; Goodright *v.* Barron, 11 East, 220; Lloyd *v.* Jackson, L. R. 1 Q. B. 579. But in a devise to a wife, coupled with a direction to educate children and settle them in business, indicating an intention that the wife should take the entire estate to carry out the testator's wishes, they pass the fee. Lloyd *v.* Jackson, L. R. 1 Q. B. 571; s. c. in Exch. Cham., L. R. 2 Q. B. 209; s. c., 7 B. & S. 683.

4. Schools are not free to classes of persons who are denied admission to any of them, though admitted to others. Board of Education *v.* Tinnon, 26 Kan. 20.

5. This construction was put upon the word in interpreting the phrase "perpetual and free use of its right of way" in a contract by one railroad to grant the same to another. A. G. S. R. Co. *v.* S. & N. A. R. Co. (Ala.), 3 So. Rep. 286.

6. 4 Kent Com. 104; Bradford *v.* State, 15 Ind. 347; Gage *v.* Scales, 100 Ill. 221.

"An estate of freehold, *liberum tenementum*, frank-tenement, is defined by Britton to be 'the possession of the soil by a freeman.' And St. Germyn tells us that 'the possession of the land is called in the law of England the frank-tenement or freehold.' Such estate, therefore, and no other, as requires actual possession of the land, is, legally speaking, freehold." Hence, "It is such an

**FREEMAN.**—One not a slave; an allodial proprietor; a freeholder.[1]

estate in lands as is conveyed by livery of seisin, or in tenements of any incorporeal nature by what is equivalent thereto. . . . As, therefore, estates of inheritance and estates for life could not by common law be conveyed without livery of seisin, these are properly estates of freehold; and as no other estates are conveyed with the same solemnity, therefore no others are properly freehold estates." 2 Bl. Com. 104.

Where a man has acquired a small piece of leasehold along with a freehold, a devise of his freehold land will not pass the leasehold; but if he have both a freehold and a leasehold interest in the same land, the whole will pass under a devise of the freehold. Everything in which he has a freehold will pass. Mathews *v.* Mathews, L. R. 4 Eq. 279.

The lessee for a term of years, of four houses, assigned the term, by way of mortgage, to the owner in fee of the immediate reversion, who afterwards devised the houses as "my freehold houses," enumerating their numbers. *Held*, that the mortgage debt did not pass, but formed a part of the testator's personal estate. Bowen *v.* Barlow, L. R. 11 Eq. 454; s. c., 8 Ch. App. 171.

**Freeholders.**—A freeholder is one who holds a freehold estate, who owns lands in fee simple, in fee tail, or for life, or for some indeterminate period. Bradford *v.* State, 15 Ind. 347; State *v.* Ragland, 75 N. Car. 12. One having an estate in land at least for life. Simpson *v.* Coe, 3 N. H. 86. "As there are legal and equitable estates, there are legal and equitable freeholds." A mortgagor in possession is a freeholder within the meaning of an act requiring jurors to be such. State *v.* Ragland, 75 N. Car. 12. *Contra*, within the meaning of an act providing a stay of execution. Clippinger *v.* Creps, 2 Watts (Pa.), 45. A *cestui que trust*, for whose sole benefit an undivided interest in fee is held, is a freeholder. Godwin *v.* Board of Education, 38 Mich. 95.

A man may be a freeholder and not a householder; and where jurymen are required to be householders, it is not sufficient that they are freeholders. A householder is an occupier of a house; a housekeeper; a master of a family. Bradford *v.* State, 15 Ind. 347. In construing an act which required that certain appraisers be freeholders, it is said: "The certificate of the appraisers speaks of them as 'householders.' 'Householders' is an ambiguous expression. It may mean freeholders. Perhaps it has not necessarily this meaning, though it is evident that it was here used in that sense. The court . . . admitted oral evidence that, at the time of their appraisement, these appraisers owned real estate in L. Co. We see no objection to the introduction of this testimony" Exendim *v.* Morris, 8 Mo. App. 383.

"Freeholders in the county" does not imply residence in the county, and is an insufficient description of appraisers, who are by law required to have a freehold and reside in the county. Rix *v.* Johnson, 5 N. H. 530; s. c., 22 Am. Dec. 472.

1. Bouv. L. Dict.; Burr. L. Dict.

Anciently, one having a voice in public affairs. Hobbs *v.* Fogg, 6 Watts (Pa.), 557. And see dissenting opinion of Agnew, J., in McCafferty *v.* Guyer, 59 Pa. St. 116.

A member of a corporation, company, or city, possessing certain privileges. A member of a municipal corporation, having the right to vote at elections. Burr. L. Dict.; 3 Steph. Com. 196.

"Freemen," in a constitutional provision defining the right of suffrage, is confined to citizens of the male sex. Burnham *v.* Luning, 9 Phila. (Pa.) 241.

For an obsolete construction of the word, see Hobbs *v.* Fogg, 6 Watts (Pa.), 553, where it was held to exclude negroes.

**FREIGHT.**—(See also BILL OF LADING; CARRIERS OF GOODS; CARRIERS OF LIVE STOCK; INTERSTATE COMMERCE; RAILROAD COMPANIES; SHIPS AND SHIPPING.)


**I. Definition,** 901.

**II. Freight, at Common Law,** 902.

**III. Statutory Regulations of Freight,** 906.
1. *Generally*, 906.
2. *State Statutes Regulating Freight, as an Exercise of the Police Power*, 907.
3. *State Statutes Establishing Railroad Commissions*, 910.
4. *Charter Provisions Relating to Freight, as Contracts*, 914.
5. *State Freight Statutes as Affecting Interstate Commerce*, 918.
6. *State Freight Statutes as Denying the Equal Protection of the Laws*, 922.
7. *English Freight Statutes*, 923.
8. *Freight Statutes in the United States*, 923.
9. *Construction of Freight Statutes*, 925.

**IV. Effect Upon Purchasers, Lessees, Foreign and Consolidated Companies, of Limitations as to Freight,** 925.

**V. Connecting Carriers in their Relation to Freight.** (See also, *infra*, DISCRIMINATION.)

**VI. Legality of Rates,** 928.
1. *What are Lawful Freight Rates*, 928.
2. *What May be Included in Freight Charges*, 929
3. *Proportionate Freight for Long and Short Haul.* (See also, *infra*, DISCRIMINATION.)
4. *Authority of Agents as to Freight Contracts*, 933.

**VII. Remedies for Excessive Freight,** 934.
1. *Carrier's Obligation to Refund Excessive Freight*, 934.
2. *What Constitute Voluntary Payments of Excessive Freight*, 935.
3. *Statutory Penalties for Excessive Freight*, 938.
   (*a*) *Practice and Pleading*, 940.
   (*b*) *Miscellaneous*, 941.

**VIII. Discrimination in Freight,** 941.
1. *Generally*, 941.
2. *Definition of Discrimination*, 942.
3. *Goods of the Same Class Shipped Under Like Circumstances*, 945.
4. *Discrimination Based Upon the Character of Goods—Classification*, 946.
5. *Discrimination Based Upon the Quantity of Goods*, 949.
6. *Discrimination in Packed Parcels*, 953.
7. *Discrimination Between Different Consignors or Consignees*, 954.
8. *Discrimination Against Particular Localities*, 956.
9. *Discrimination Depending Upon the Distance Goods are Transported*, 959.
10. *Discrimination Depending Upon the Distance as Affected by Competition*, 961.
    (*a*) *In England*, 961.
    (*b*) *In the United States Generally*, 962.
    (*c*) *Under the Interstate Commerce Act*, 963.
11. *Discrimination Caused by Grouping of Places into Districts*, 965.
12. *Discrimination Between Connecting Carriers Depending Upon Distance*, 965.
13. *Discrimination Between Termini*, 967.
14. *Miscellaneous Discrimination*, 967.

**IX. Lien for Freight,** 969.
1. *Generally*, 969.
2. *When Carriers are Entitled to Lien*, 970.
   (*a*) *Agent's Authority to Contract*, 970.
   (*b*) *Effect of Mistake Upon Carrier's Lien*, 970.
   (*c*) *Effect of Notice Upon Carrier's Lien*, 971.
   (*d*) *Effect of Ownership of Goods Upon Carrier's Lien*, 973.
   (*e*) *Effect of Custom of Goods Upon Carrier's Lien*, 975.
3. *What is Included in the Lien*, 975.
4. *Lien as Affected by Set-off*, 977.
5. *Waiver of Carrier's Lien*, 978.
6. *Remedies Involving Carrier's Lien*, 978
7. *Sale to Enforce a Lien*, 979.
8. *Miscellaneous*, 979.

**X. Freight Pools,** *see* RAILROADS.

**I. DEFINITION.**—Freight is the compensation due the carrier for services in the transportation of goods or live-stock.[1] It is frequently used as a term of description of the goods themselves, but since this double meaning creates confusion, and no other word is a satisfactory substitute, it should only be employed in the sense first mentioned. It is to be distinguished from "toll," which is a tribute or custom paid for passage, not for carriage;[2] and from

1. This term, in its most extensive sense, is applied to all rewards or compensation paid for the use of ships, including the transportation of passengers; but, in the common acceptation of the term, it means the price for the actual transportation of goods by sea from one place to another. Angell on Carriers (5th Ed.), § 391; Beawes Lex Merc. 118; Abbott on Shipp. 405; 3 Kent Com. 219; Pothier Traité de Charte Partie, n. 1. See also Brown *v.* Harris, 2 Gray (Mass.), 359; Giles *v.* The Cynthia, 1 Pet. Adm. 206; Mulloy *v.* Backer, 5 East, 321.

2. "Toll" was first defined in cases relating to fairs and markets, and by Lord Coke as follows: "Toll to the faire or market is a reasonable summe of money due to the owner of the faire or market upon things tollable within the faire or market, as for stallage, picage, or the like." 2 Co. Inst. 220.

The right to demand it was then extended to towns, under the name of "murage," which was defined to be "A reasonable toll to be taken of every cart, wagne, horse laden, comming to that towne, for the inclosing of that towne with walls of defense." 2 Co. Inst. 222. Being a matter of private benefit to the owner of the fair or market, it could not be exacted unless specifically granted, or supported by a custom or prescription of sufficient duration to imply a grant. Cro. Eliz. 558; 2 Lutw. 1336; 2 Inst. 220; anon., 7 Mod. 12; Holloway *v.* Smith, 2 Str. 1171; Bacon Abr. tits. "Fair," "Market," "Toll;" Mayor *v.* Ward, 1 Wils. 107, 114, 115; Warrington *v.* Mosely, 4 Mod. 319; Olcott *v.* Banfill, 4 N. H. 537; Perrine *v.* Chesapeake, 9 How. (U. S.) 172.

The word "tolls," as originally applied to railroads, had a different signification from that which now attaches to it. The purpose of a railway as originally understood, was to afford a roadway or roadbed simply, leaving the public to furnish motive power and vehicles thereon; and for such use the companies were authorized to make a charge, which was denominated a "toll." Rex *v.* Severn, 2 B. & Ald. 646. The companies were subsequently authorized to act as transportation companies, or carriers, also, and to charge a toll for both kinds of service. Reg. *v.* Grand Junction Co., 4 A. & El. 16; Boyle *v.* Philadelphia Co., 54 Pa. St. 312. Finally, the legislatures made the right to use the motive power and vehicles exclusive in the railways, and imposed upon them the duty of transporting passengers and freight, and prescribed rates of compensation therefor, which rates were called "tolls." Boyle *v.* Philadelphia Co., 54 Pa. St. 312; Charters of the Louisville & Frankfort and Lexington & Frankfort R. Cos., Laws of Kentucky (1850, Dec. 21), ch. 121.

In the *English* act of 1845, the word "toll," it is enacted, shall include conveyance. C. 20, § 3.

"Freight" and "toll" are two distinct words. Freight "is not a price paid for the use of the road on which to transport one's own property, but is paid for the service of the company, and carriage of the property by it. Whereas, on the other hand, in the language of the learned Justice Strong, "The legal meaning of the word 'toll' is and always has been well defined. It is 'a tribute or custom paid for passage,' not for carriage—always something taken for a liberty or privilege, not for a service; and such is the common understanding of the word. Nobody supposes that tolls taken by a turnpike or canal company include charges for transportation, or that they are anything more than an excise demanded and paid for the privilege of using the way." Rorer on Railroads, vol. 2, p. 1346, where are cited Boyle *v.* Phila. & Reading R. Co., 54 Pa. St. 310, 313, 314; Penn. R. Co. *v.* Sly, 65 Pa. St. 205; State, Jersey City & Bergen R. Co. (prosecutors) *v.* Haight, 1 Vroom (N. J.), 447.

Accordingly, the Phila. & Reading R. Co.'s charter, prohibiting more than four cents toll per ton per mile for property transported, was held to allow freight in addition to the toll. Boyle *v.* R. Co., 54 Pa. St. 310. And a charter authorizing collection of freight and tolls was held to mean, by freight, the compensation for carriage of property, and, by toll, the payment for use of the railroad in those cases where the transporter placed his

"fare," which is only applied to passengers.[1] While the word "rates" has much the same signification, it is not in common use outside of *England*, if it is so there.

**II. FREIGHT, AT COMMON LAW.**—The principles upon which rest the respective rights of the carrier and his customers as to freight charges are recognized in the common law.[2] The obligation to receive and carry all goods offered for reasonable freight implies a duty to treat all shippers alike in establishing the rates of freight.[3] The origin of this obligation is found in the common-law conception of a common carrier, and the nature of his public duty.[4] This

own cars on the road. Penn. R. Co. *v.* Sly, 65 Pa. St. 205. And, in *New Jersey*, it was held in 1864 that a railroad cannot be assessed as a turnpike or toll-collecting company. State *v.* Haight, 1 Vroom (N. J.), 447.

1. So, "Freight, in its ordinary sense, does not include fare. By the term "fare" is meant that which is payable for a ticket and passage of a person, and the ordinary service of transportation or carriage of the person himself." Quoting Rorer on Railroads; vol. 2, p. 1347; Penn. R. Co. *v.* Sly, 65 Pa. St. 205, 211; Johnson Dict.; Webster Dict. The law relating to "Fares" will be treated under TICKETS AND FARES.

2. In Atchison, etc., R. Co. *v.* Denver, etc., R. Co., 110 U. S. 667; s. c., 16 Am. & Eng. R. R. Cas. 57, it was held that section 6 of article 15 of the Constitution of *Colorado*, giving equal rights to all in the transportation of persons and property by the railroads in the State, imposes no greater obligations upon the company than the common law would have imposed without it. Every common carrier must carry for all to the extent of his capacity, without undue or unreasonable discrimination either in charges or facilities. And that, as to the time and manner a railroad company will carry persons and property, and the price to be paid therefor, it is subject to legislative regulation; and in the absence of such regulation, it owes only such duties to the public or to individuals, associations, or corporations, as the common law, or some custom having the force of law, shall establish.

In Messenger *v.* Pennsylvania R. Co., 36 N. J. Law, 407, the court observes: "It never was denied that at common law every person under identical conditions had an equal right to the services of their commercial agents. It was one of the primary obligations of the common carrier to receive and carry all goods offered for transportation, upon receiving a reasonable hire. If he refused the offer of such goods, he was liable to an action unless he could show a reasonable ground for his refusal. Thus, in the very foundation and substance of business there was an inherent rule which excluded a preference of one consignor of goods over another. The duty to receive and carry was due to every member of the community, and in an equal measure to each. Recognizing this as a settled doctrine, I am not able to see how it can be admissible for a common carrier to demand a different hire from various persons for an identical kind of service under identical conditions. Such partiality is legitimate in private business; but how can it square with the obligations of a public employment? A person having a public duty to discharge is undoubtedly bound to exercise such office for the equal benefit of all; and therefore, to permit a common carrier to charge various prices, according to the person with whom he deals, for the same services, is to forget that he owes a duty to the community. The law that forbids him to make any discrimination in favor of the goods of A over the goods of B, when the goods of both are tendered for carriage, must, as it seems to me, necessarily forbid any discrimination with respect to the rate of pay for carriage. The rule that the carrier shall receive all the goods tendered loses half its value as a politic regulation if the cost of transportation can be graduated by special agreement so as to favor one party at the expense of the other." See, further, s. c., 37 N. J. Law, 531.

3. Palmer *v.* Grand Junction R. Co., 4 M. & W. 749; Messenger *v.* Pennsylvania R. Co., 36 N. J. Law, 407. See also cases cited in succeeding notes.

4. In Express Co. *v.* Maine Cent. R. Co., 57 Me. 188, the court observes: "Common carriers are bound to carry indifferently, within the range of their business, for a reasonable compensation, all freight offered. For similar, equal service they are entitled to the same compensation. They cannot legally make

principle does not, however, depend upon the fact that common carriers are usually corporations; which consideration has given additional force to the regulation of freight charges by statute. It is constantly pointed out that, whatever partiality may be legitimate in private business, the obligations arising from the public employment of common carriers, and the perogative franchises which they exercise as corporations by gift from the public, impose a *quasi* public duty which prevents their demanding a different hire from various persons for an identical kind of service under identical conditions.[1] But while the common-law principle

undue and unjust preferences, or make unequal or extravagant charges. The right to charge a toll is granted. But a toll implies uniformity of compensation for equality of service. The very definition of a common carrier excludes the idea of the right to grant monopolies or to give special or undue preference. They owe an equal duty to each citizen. They are allowed to impose a toll, but it is not to be so imposed as to specially benefit one and injure another. Such is the common law on the subject. The legislation of the State has been in accordance with these views."

1. In Scofield *v.* Lake Shore, etc., R. Co., 43 Ohio St. 617; s. c., 23 Am. & Eng. R. R. Cas. 612, the court, in an elaborate and careful review of the authorities, observes: "In some of the cases it is announced that upon the question of whether the law requires the common carrier to transport goods upon equal terms to all, or whether it only requires that all the rates shall be reasonable but not necessarily equal to all, has been determined differently by the courts in England and America. Ragan *v.* Aiken, 9 Lea (Tenn.), 609. But, be that as it may, the tendency and undoubted weight of authority is in favor of the doctrine that a common carrier is charged with a *quasi* public duty to transport merchandise on equal terms for all parties where the carrying for some shippers at a lower price than for others will create monopoly by injuring or destroying the business of those less favored."

In Sandford *v.* Catawissa, etc., R. Co., 24 Pa. St. 378, the court observed: "But wherever a charter is granted for the purpose of constructing a railroad, and the corporation is clothed with the power to take private property in order to carry out the object, it is an inference of law from the extent of the power conferred and the subject-matter of the grant, that the right is for the public accommodation. The right to take toll is the compensation to be received for the benefits conferred. If the public are entitled to these advantages, it results, from the nature of the right, that the benefits should be extended to all alike, and that no special privileges should be granted to one man or set of men and denied to others. The special stipulations inserted in charters for the purpose of securing these rights are placed there in abundant precaution, and affirm nothing more than the common right to equal justice, which exists independently of such provisions. Of this character is a declaration in the charter of the railroad company before us, which requires it to transport articles 'in the order in which' it 'shall be requested to transport the same;' so that equal and impartial justice shall be done to all owners of property who 'shall pay or tender the toll and freight due under this act.' The supposed necessity for such provisions in charters granted in this country and in England proves nothing more than that the lawmakers in both countries were aware of the difficulty in holding large corporations to those common obligations of justice which individuals feel bound to acknowledge without legislative enactment." Shipper *v.* Pennsylvania R. Co., 47 Pa. St. 338; Hayes *v.* Pennsylvania R. Co., 12 Fed. Rep. 309.

In McGowan *v.* Wilmington, etc., R. Co. (N. C.), 27 Am. & Eng. R. R. Cas. 64, the court observes: "That the legislature has power to compel railroad companies and other like common carriers to discharge the duties and obligations they owe to the public and individuals who travel on and ship freight over the road, by reasonable statutory regulations, and to compel a due observance of these by fines and penalties, is too well and thoroughly settled by judicial authority to admit of question. Because of their *quasi* public nature, their relations to the public, the fact that they hold themselves out to the world as ready to carry freight for shippers regularly for reasonable compensation, and, especially as to railroad corpo-

that the carriers' charges shall be just and reasonable has not been denied, some difference of opinion has been expressed upon a collateral question. It was early observed that "Charging another person too little is not charging you too much." [1] Some authority has therefore intimated that the common-law principle is complied with where the charge for the service rendered is reasonable, although another shipper is charged a lower rate.[2] The undoubted

rations, because they have and exercise franchises, rights, privileges, and advantages of the public, and granted by the public authority,—they are subject to legislative control. The legislature may reasonably regulate their methods of business, in a general way, so as to promote the public good, having due regard for their rights in all respects. They have rights, as well as the public, which the law protects. But to the extent that the exercise of their right by themselves concerns and affect the public, the latter, through its constitutional authority, must have a voice in such exercise of them. This court has repeatedly upheld the statute now under consideration, as a valid exercise of legislative authority." Branch *v.* Wilmington, etc., R. Co., 77 N. Car. 347; Katzenstein *v.* Railroad Co., 87 N. Car. 255.

The constitutionality of legislation compelling gas companies, water companies, telegraph companies, canal companies, bridge companies, and all other companies which have had the use of the power of eminent domain or other public aid, to supply the public with facilities for which this aid was granted, at reasonable rates, rests upon the same ground. The power of the State to regulate the charges of the company is especially clear where the company has the benefit of State aid in the form of the grant of a monopoly or exclusive right. Morawetz on Corporations (2d Ed.), par. 1075B; State *v.* Columbus Gas-light Co., 34 Ohio St. 532; Western Union Tel. Co. *v.* Axdell, 69 Ind. 199; State *v.* Bell Telephone Co., 36 Ohio St. 296.

1. The authorities are in some apparent conflict as to the rule at common law as to equality of charge for similar services. In an English case, Crompton, J., said that "The charging another person too little is not charging you too much." Garton *v.* B. & E. R. Co., 1 B. & S. 112, 154, 165. See also Baxendale *v.* R. Co., 93 E. C. L. R. 78.

2. It is laid down, in Mr. Schouler's note to Story on Bailments (§ 508), that at common law the carrier could favor individuals with an unreasonably low rate, or even carry their goods *gratis*. For this, some decisions on statutes are cited, and also Fitchburg R. Co. *v.* Gage, 12 Gray (Mass.), 393, which fully accords with the note to Story. And, in 1878, it was approved in *Florida*, in Johnson *v.* Pensacola & P. R. Co., 16 Fla. 623; s. c., 26 Am. Rep. 731; where it was held that plaintiff could not recover from a railroad company the excess paid by him beyond the rate charged to another shipper, plaintiff's own charge being reasonable. See also Menacho *v.* Ward, 27 Fed. Rep. 529; 24 La. Ann. 1; Avinger *v.* South Carolina R. Co. (S. Car. Sept., 1888), 7 S. E. Rep. 493.

But it is probable, as was said in the *Ohio* case of Scofield *v.* R. Co. in 1885, that this difference between the cases is more apparent than real; that the true common-law rule is that, where there is no prejudice done to the shipper by the lower rate to another, he cannot complain, nor recover the difference paid by himself. "But when the reduced rate is either intended to or has a natural tendency to injure the plaintiff in his business and destroy his trade, then a necessary exception is engrafted on the more general rule, and the plaintiff has then the right to insist that rates to all be made the same for goods shipped 'under like circumstances.'" Scofield *v.* R. Co., 43 Ohio St. 617; s. c., 23 Am. & Eng. R. R. Cas. 612. And see Ragan *v.* Aiken, 9 B. J. Lea (Tenn.), 609; s. c., 42 Am. Rep. 684.

The hire charged must be no more than a reasonable remuneration to the carrier; and as a consequence of this, it has been laid down, in Smith's Leading Cases (174), as a common-law rule that the charge to one, though a rival carrier, cannot be more than the charge to another for the same service. And though in Baxendale *v.* R. Co., 93 E. C. L. R. 78, Byles, J., one of the judges, said that he knew no common-law reason why a carrier may not charge less than what is reasonable to one person, the question has become of no moment in the *English* law, as 17 & 18 Vict. ch. 31, prohibits any unreasonable preference.

weight of authority, however, has proven the fallacy of this theory.[1] Therefore, while the reasonableness of a rate of freight is essential to its validity, the criterion must be equality of charges for identical services under identical conditions. Otherwise, such discrimination not only invests the carrier with a power which could not be conceded, but his exercise of it in combination with concentrated capital might extinguish all petty competition, monopolize business, and dictate the price of commodities to consumers.[2] It has further been pointed out that, where special

1. Chicago, etc., R. Co. *v.* Parks. 18 Ill. 400; People *v.* Chicago, etc., R. Co., 55 Ill. 95; Ormsby *v.* Union Pac. R. Co., 2 McCrary (U. S. C. C.), 48; New England Express Co. *v.* M. C. R. Co., 57 Me. 188; Shipper *v.* Pennsylvania R. Co., 47 Pa. St. 338; Sandford *v.* Catawissa, etc., R. Co., 24 Pa. St. 378; Messenger *v.* Pennsylvania R. Co., 36 N. J. Law, 407-412 (on appeal, 37 N. J. Law, 531); Dinsmore *v.* R. Co., 2 Fed. Rep. (U S. C. C. Ky.) 465; Hays *v.* Pennsylvania R Co., 12 Fed. Rep. (U.S.C.C.Ohio) 309; Discrimination Cases, in 10 Fed. Rep 210; Sinking Fund Cases, 99 U. S. 719; Goodridge *v.* Union Pacific R. Co., 35 Fed. Rep. 35.

2. In Hays *v.* Pennsylvania Co., 12 Fed. Rep. 309, decided in the United States Circuit Court for the Northern District of Ohio, the court observes: "The defendant is a common carrier by rail Its road, though owned by the corporation, was nevertheless constructed for public uses, and it is, in a qualified sense, a public highway. Hence, everybody constituting a part of the public, for whose benefit it was authorized, is entitled to an equal and impartial participation in the use of the facilities it is capable of affording. The discrimination complained of rested exclusively on the amount of freight shipped by the respective shippers during the year. Ought a discrimination resting exclusively on such a basis to be sustained? If so, then the business of the country is in some degree subject to the will of railroad officials; for if one man engaged in mining coal, and dependent on the same railroad for transportation to the same market, can obtain transportation thereof at from 25 to 50 cents per ton less than another competing with him in business, solely on the ground that he is able to furnish, and does furnish, the larger quantity of shipment, the small operators will sooner or later be forced to abandon the unequal contest and surrender to their more opulent rival. If the principle is sound in its application to rival parties engaged in mining coal, it is equally applicable to merchants, millers, dealers in lumber and grain, and to everybody else interested in any business requiring any considerable amount of transportation by rail. And it follows that the success of all enterprises would depend as much on the favor of railroad officials as upon the energies and capacities of the parties prosecuting the same. It is not difficult, with such a ruling, to forecast the consequences. The men who control railroads would be quick to appreciate the power with which such a hold would invest them, and, it may be, not slow to make the most of their opportunities, and perhaps tempted to favor their friends to the detriment of their personal or political opponents; or demand a division of the profits realized from such collateral pursuits as could be favored or depressed by discrimination for or against them; or else, seeing the augmented power of capital, organize into overshadowing combinations and extinguish all petty competition, monopolize business, and dictate the price of coal and every other commodity to consumers. We say these results might follow the exercise of such a right as is claimed for railroads in this case; but we think no such power exists in them. They have been authorized for the common benefit of every one, and cannot be lawfully manipulated for the advantage of any class at the expense of any others. Capital needs no such extraneous aid. It possesses inherent advantages which cannot be taken from it. But it has no just claims, by reason of its accumulated strength, to demand the use of the public highways, constructed for the common benefit of all, on more favorable terms than are accorded to the humblest of the land. And a discrimination in favor of parties furnishing the largest quantity of freight, and solely on that ground, is a discrimination in favor of capital, and is contrary to a sound public policy, violative of that equality of right guaranteed to every citizen, and a wrong to the disfavored party, for which the courts are competent to give redress."

stipulations are inserted in charters authorizing the naming of reasonable rates of freight not beyond a certain maximum, they are placed there in abundant precaution and affirm nothing more than the common right to equal justice which exists independently of them.[1] They are simply declaratory of what the common law is.[2] So too, the constitutional provisions, recently adopted in many of the States, and the various statutes regulating the carriers' charges, are simply declaratory of the common law.[3] At common law, the court is to judge of the reasonableness of freight charges; and where a franchise to take such toll as the company should think reasonable was granted, it was held that the restraint of such franchise to tolls reasonable in fact was a judicial, not a legislative, function.[4] (See also the cases under "Charter Provision relating to Freight as Contracts," *infra.*)

**III. STATUTORY REGULATIONS OF FREIGHT. — 1. Generally.**—Such being the doctrines of the common law as to the carriers' charges for freight, which form a basis for decisions and statutes

1. Sandford *v.* Catawissa, etc., R. Co., 24 Pa. St. 378.

2. Sandford *v.* Catawissa, etc., R. Co., 24 Pa. St. 378; Shipper *v.* Pennsylvania R. Co., 47 Pa. St. 338.

3. Atchison, etc., R. Co. *v.* Denver, etc., R. Co., 110 U. S. 667.

4. In Gard *v.* Callard, 6 M. & S. 70, the court said, when speaking of the toll involved, that "The question whether reasonable or not was a question for the court, and not for the jury." On a motion for a new trial, the court adopted as its own ruling the language of Coke that "what shall be deemed in law to be reasonable, shall be judged, all circumstances considered, by the judges of the law, if it comes judicially before them."

In Lowden *v.* Heirons, 2 Moore, 102, 113, the court said: "The specific sums to be demanded for tolls are not expressed in the charter. The tolls therefore which have been received subsequent to the grant are merely presumptive. Neither have they been uniform. The jury should have given their verdict according to the invariable or uniform custom. The judge could alone decide whether such tolls were or were not reasonable." See also Wright *v.* Bruister, 4 Barn. & Ad. 115; Piddington *v.* S. E. Co., 5 C. B. (N. S.) 111–121.

In the latter case, the court said: "I think the company were wholly unjustified in doubling the charge in this way. It is clear, upon the whole facts of the case, that the increased charge is made for the purpose of preventing people who are likely to send packages of the description in question, viz., carriers, from entering into competition with the company in the conveyance of goods—a thing which it has been over and over again decided that these companies cannot be permitted to do."

In Baxendale *v.* G. W. R. Co., 5 C. B. (N. S.) 330, 351, the court said: "Such being plainly the intention of the legislature, and this court having been constituted the tribunal by which any injustice or inequality in the working of the railway system as between the companies and the public is to be redressed, we must endeavor to prevent any injustice either in the rate of charge or the degree of accommodation afforded."

In Attorney-general *v.* Railroad Co., 35 Wis. 426, where the charter contained "a franchise to take such toll as the company should think reasonable" (p. 586), the court (p. 588) said: "We are of the opinion that the franchise is not one vesting in the corporation an absolute right of exacting whatever tolls it might see fit. The courts have authority to limit the right to reasonable tolls—to tolls reasonable, not in the arbitrary judgment of the corporation, but in fact. This is indeed, as against a great railroad company, not a very effective remedy. But the law gives the remedy to all aggrieved by the exaction of unreasonable tolls. . . . And [p. 589] the restraint of a franchise to take reasonable tolls, to tolls reasonable in fact, is a judicial, not legislative, function."

When the statute or charter has fixed a limit, the question whether that limit has been exceeded must be determined by the court. Campbell *v.* Marietta, etc., R. Co., 23 Ohio St. 168. See also the cases cited *infra, Charter Provisions relating to Freight as Contracts.*

on the subject, it will be proper to consider the legislation which has attempted to regulate them. In *England*, general statutes were passed, the object of which was to prevent railway companies from prejudicing or favoring particular parties, and to require them to charge equally to all persons for the same service rendered under the same circumstances.[1] The freight which may be lawfully charged is there further regulated by the special acts under which the company has been created.[2]

In the *United States*, Congress is vested with power to regulate interstate commerce, and has exercised it in the enactment of the Interstate Commerce Act, approved February 4, 1887.[3]

Prior to the passage of this act, many of the States had adopted constitutional provisions or enacted especial laws regulating the freight rates of railroads, and other laws have since been adopted. Such statutes were passed, however, in recognition of the restrictions imposed upon the States by the United States Constitution, or, where those restrictions were neglected, the legislation was declared unconstitutional. But many of the provisions of State statutes remain unaffected by the act of Congress. It is recognized, however, that the right of a State to regulate common carriers' charges is subordinate to certain important and established principles of constitutional law:

*First.* Such statutes are valid in so far as they are a proper exercise of the police power of a State.

*Second.* Such statutes cannot impair the obligation of the carrier's contract with the State where such a contract exists.

*Third.* Such statutes are invalid if they amount to a regulation of interstate commerce.

*Fourth.* Such statutes cannot deny to corporations the equal protection of the law.

**2. State Statutes Regulating Freight as an Exercise of the Police Power.**—It is an accepted doctrine of law that, under its inherent power, a government may regulate, where necessary for the public good, the conduct of its citizens towards each other, and the manner in which each shall use his own property. Where, therefore, an owner of property devotes it to a use in which the public has an interest, to the extent of that interest the owner's use of it may

1. See *infra*, this title, "English Statutes." See also Annotated Interstate Commerce Act, with annotations by Adelbert Hamilton, Esq., 27 Am. & Eng. R. R. Cas. App. (Edward Thompson, publisher, 1887), where the *English* statutes are quoted in full.

2. "For the purpose of ascertaining the tolls demandable in any instance, the special act of the company must be referred to. The rates vary very greatly; some companies on account of peculiarity of position, gradients, etc., being empowered to make much higher charges than others. They were settled according to no fixed principle, but according to the individual circumstances of each company. The tolls on goods are regulated according to a classification in which regard is had to the nature of the commodities, and a larger charge permitted for goods of a higher value than for such as are heavy and require a less degree of care and entail a smaller amount of responsibility." Redman's Law of Railway Carriers (2d. Ed.), p. 77.

3. See *infra*, this title, "Freight Statutes in the United States."

be controlled by law for the common good.[1] Whatever may be the limitations of this doctrine in its application to individuals, the principles upon which it rests acquire a peculiar force when railroads and other *quasi* public corporations are concerned.[2] Stat-

1. "Under the powers inherent in every sovereignty, a government may regulate the conduct of its citizens toward each other, and, when necessary for the public good, the manner in which each shall use his own property. It has, in the exercise of these powers, been customary in *England* from time immemorial, and in this country from its first colonization, to regulate ferries, common carriers, hackmen, bakers, millers, wharfingers, innkeepers, etc., and, in so doing, to fix a maximum of charge to be made for services rendered, accommodations furnished, and articles sold. Down to the time of the adoption of the XIV. Amendment of the Constitution of the United States, it was not supposed that statutes regulating the use, or even the price of the use, of private property necessarily deprived an owner of his property, without due process of law. Under some circumstances they may, but not under all. The amendment does not change the law in this particular: it simply prevents the State from doing that which will operate as such deprivation. When the owner of property devotes it to a use in which the public has an interest, he in effect grants to the public an interest in that use, and must, to the extent of that interest, submit to be controlled by the public, for the common good, as long as he maintains the use. He may withdraw his grant by discontinuing the use. Right of property, and to a reasonable compensation for its use, created by the common law, cannot be taken away without due process; but the law itself, as a rule of conduct, may, unless constitutional limitations forbid, be changed at the will of the legislature. The great office of statutes is to remedy defects in the common law as they are developed, and to adapt it to the changes of time and circumstances. The limitation by legislative enactment, of the rate of charge for services rendered in a public employment, or for the use of property in which the public has an interest, establishes no new principle in the law, but only gives a new effect to an old one." Munn *v.* Illinois, 94 U. S. 113. See also authorities cited in succeeding notes.

A power of government which actually exists is not lost by non-user. The fact, therefore, that the power of regulating the maximum rates of fare and freight was not exercised for more than twenty years after the incorporation of a company is unimportant Nor does it affect the cause that, before the power was exercised, the company had pledged its income as security for the payment of debts incurred, and had leased its road to a tenant that relied upon the earnings for the means of paying the stipulated rent. It could neither grant nor pledge more than it had, and its pledgee or tenant took the property subject to the exercise by the State of the same powers of regulation which might have been exercised over the company itself. Chicago, etc., R. Co. *v.* Iowa, 94 U. S. 155.

2. In Louisville, etc., R. Co. *v.* Railroad Commission, 19 Fed. Rep. 679; s. c., 10 Am. & Eng. R R. C. s. 1, the court observed: "Railroads have been created mainly for the accommodation of the public and to facilitate the business of the country. They are indispensable to the rapid and cheap transportation of commercial commodities. Under the fostering care and protection hitherto extended to them, they have expanded into huge proportions. With the beginning of this year, we had 125,000 miles of road, representing more than $5,000,000,000 of capital, giving employment to 500,000, and in the annual receipt of more than $800,000,000 of earnings. They permeate every part of this extended country, and in a large measure monopolize the entire inland carrying business. Everybody, from the very exigencies of business, is compelled to patronize them. In this regard, business men are left without any option. If unrestrained by wholesome legislation, the public would be very much at their mercy. They could, by unjust discriminations made under the name of drawbacks, rebates, or other disingenuous pretences, favor friends and oppress opponents, and so adjust and graduate their rates according to the exigencies of fluctuating markets, as to secure to themselves, or those who operate them, an undue proportion of advancing prices. It would therefore, in view of these obvious possibilities, be a humiliating confession to admit that there was no reserved power either in the court or the legislature to protect the public against such possible abuses. We do not hesitate to affirm the existence of such a power. Every owner of property, how-

utes passed in pursuance of the police power of the State, regulating these matters, establish no new principle in the law, but simply give a new effect to an old one.[1] It is accordingly settled that railroad companies are carriers for hire, engaged in a public employment affecting the public interest, and are, unless protected by their charters, subject to legislative control as to their rates of fare and freight.[2] The legislatures of the various States have the

ever absolute and unqualified his title, holds it subject to the implied liability that the use thereof shall not be injurious to the public. Rights of property, like social and conventional rights, are held subject to such reasonable limitations in regard to their enjoyment as shall prevent them from being injurious to the rights of others, and to such reasonable restraints and regulations, to be established by law, as the legislature may from time to time ordain and establish. It is on this principle, applicable alike to all kinds of property, generally denominated the 'police power' of the State, that the authority is found for such control over individuals and corporations, and over their property, as is necessary to insure safety to all and promote the public convenience and welfare. And in the exercise of this reserved authority, the legislature may require railroad corporations and persons operating railroads in the State to observe precautionary measures against accident, forbid unjust discrimination and extortionate charges, and, where there is no valid contract to the contrary, prescribe a reasonable maximum of charges for the services to be performed by them, and enforce the same by appropriate pains and penalties. There are many other things that may be lawfully exacted of them, which need not be recapitulated here. The legislature, however, cannot, under the pretence of regulation, deprive a corporation of any of its essential rights and privileges. In other words, the rules prescribed and the power exerted must be within the police power in fact, and not covert amendments to their charters in curtailment of their corporate franchises. Nor can the legislature, in the exercise of this power, make any regulation in contravention of the State or national constitution. Every statute which invades vested rights, inflicts punishment, or takes private property otherwise than by due process of law, impairs the obligation of valid contracts, or denies to any one or more persons the equal protection of the law, is unconstitutional and invalid."

1. Munn *v.* Illinois, 94 U. S. 113.

2. Chicago, B. & Q. R. Co. *v.* Iowa, 94 U. S. 155; Peik *v.* Chicago & Northwestern R. Co., 94 U. S. 176; Railroad Commissioners *v.* R. Co., 26 Am. & Eng. R. R. Cas. 29; Stone (R. R. Comrs.) *v.* Yazoo & Miss. Val. R. Co., 62 Miss. 607; s. c., 21 Am. & Eng. R. R. Cas. 6; Ill. Cent. R. Co. *v.* People, 95 Ill. 313; Mobile, etc., R. Co. *v.* Steiner, 61 Ala. 559.

In 1831, Chancellor Walworth said: "The legislature may also, from time to time, regulate the use of the franchise, and limit the amount of toll which it shall be lawful to take, in the same manner as they may regulate the amount of tolls to be taken at a ferry or for grinding at a mill, unless they have deprived themselves of that power by a legislative contract with the owners of the road. Beekman *v.* Saratoga & Schenectady R. Co., 3 Paige Ch. (N. Y.) 75.

In Stone *v.* Farmers' Loan & Trust Co., 116 U. S. 307; s. c., 23 Am. & Eng. R. R. Cas. 577, the court observes: "It is now settled in this court that a State has power to limit the amount of charges by railroad companies for the transportation of persons and property within its own jurisdiction unless restrained by some contract in the charter, or unless what is done amounts to a regulation of foreign or interstate commerce." Baltimore, etc., R. Co. *v.* Maryland, 21 Wall. (U. S.) 456; Chicago, etc., R. Co. *v.* Iowa, 94 U. S. 155; Peik *v.* Chicago, etc., R. Co., 94 U. S. 164; Winona, etc., R. Co. *v.* Blake, 94 U. S. 180; Ruggles *v.* Illinois, etc., R. Co., 108 U. S. 531; s. c., 11 Am. & Eng. R. R. Cas. 49. This power of regulation is a power of government, continuing in its nature; and if it can be bargained away at all, it can only be by words of positive grant, or something which is in law equivalent. If there is reasonable doubt, it must be resolved in favor of the existence of the power. . . . Such being the rule, and such its practicable operation, we return to the special provisions of the charter on which this case depends, and find, first, the authority given the corporation to carry persons and property. This of itself implies authority to charge a reasonable sum for the carriage. In this way the corporation was put in the same

right to pass appropriate laws prohibiting excessive freight charges and unjust discriminations, and such statutes are constitutional and valid;[1] and rates of freight established by the legislatures may be enforced by penalties.[2]

**3. State Statutes Establishing Railroad Commissions.**—For many reasons it is commonly recognized as impracticable to regulate, by an elaborate system of legislation, the duties of railroad companies to the State or nation in all the minute matters to which the police power could be properly extended. In analogy to the *English* system, railroad commissions were created in many of the States, and the Interstate Commerce Commission was established by Congress, to which bodies were delegated such authority as would permit the exercise through them of the necessary governmental control over these corporations. Such commissions, of course, exercise only the power given them by statute; and this will vary with the policy of the several States as indicated in these laws. Their decisions and reports are usually published, and contain much that is of interest and value upon questions of freight rates and railroad law in general; but, for obvious reasons, decisions of State commissions cannot be incorporated in this work.

position as a natural person would occupy if engaged in the same or like business. Its rights and privileges in its business of transportation are just what those of a natural person would be under like circumstances; no more, no less. The natural person will be subject to the legislative control as to the amount of the charge. So must the corporation be. That was decided in Baltimore, etc., R. Co. *v.* Maryland, 21 Wall. (U. S.) 456; Chicago, etc., R. Co. *v.* Iowa, 94 U. S. 155; Peik *v.* Chicago, etc., R. Co., 94 U. S. 164; Winona, etc., R. Co. *v.* Blake, 94 U. S. 180; Ruggles *v.* Illinois, etc., R. Co., 108 U. S. 531; s. c., 11 Am. & Eng. R. R. Cas. 49.

1. Olcott *v.* Supervisors, 16 Wall. (U. S.) 694; R Co. *v.* Richmond, 19 Wall. (U. S.) 584; Com'rs *v.* P. & O. R. Co., 63 Me. 279; Shipper *v.* Com., 47 Pa. St. 340; Blake *v.* Winona & St. Peter R. Co., 19 Minn. 418; Beekman *v.* R. Co., 3 Paige (N. Y.) Ch. 45; State *v.* Winona, etc., R. Co., 19 Minn. 434; Fuller *v.* Chicago & N. W. R. Co., 31 Iowa, 188; Hudson Co. *v.* State, 4 Zab. (N. J.) 718; McGregor *v.* Erie R. Co., 6 Vroom (N. J.), 89; Tilley *v.* Savannah, etc., R. Co., 5 Fed. Rep. 641; s. c., 1 Am. & Eng. R. R. Cas. 615; Chicago & Alton R. Co. *v.* People, 67 Ill. 11.

The act of the general assemply of the State of *Iowa* entitled "An act to establish reasonable maximum rates of charges for the transportation of freight and passengers on the different roads of this State," and dividing the railroads into classes according to business, establishing a maximum of rates for each of the classes, approved March 23, 1874, is not in conflict with Iowa Const., art. 1, sec. 4, which provides that "All laws of a general nature shall have a uniform operation," and that "The general assembly shall not grant to any citizen or class of citizens privileges or immunities which upon the same terms shall not equally belong to all citizens." Nor is it a regulation of interstate commerce where it affects a railroad situated within the limits of the State. The business of the railroad company is carried on there; and its regulation, like the regulation of the warehouses in Munn *v.* Illinois, 94 U. S. 113, is a matter of domestic concern." It is employed in State as well as in interstate commerce, and, until Congress acts, the State must be permitted to adopt such rules and regulations as may be necessary for the promotion of the general welfare of the people within its own jurisdiction, even though in so doing those without may be indirectly affected. Chicago, Bur. & Q. R. Co. *v.* Iowa, 94 U. S. 155.

2. Minnesota *v.* Winona, etc., R. Co., 16 Minn. 434; McGowan *v.* Wilmington & Weldon R. Co., 27 Am. & Eng. R. R. Cas. 64. See also authorities cited in preceding notes, and *infra*, this title, "Remedy for Over-charges."

It has been several times contended that statutes creating railroad commissions were unconstitutional as delegating a legislative power which belongs only to the legislature itself. But the decisions on this precise question are uniform in declaring such statutes to be constitutional.[1] Compelling railroad companies to

1. In Chicago, etc., R. Co. *v.* Dey (U. S. C. C. S. D. of Iowa, July 27, 1888), 4 Ry. & Corp. L. Journal, 465, a suit by a railroad company chartered in one State, in a Federal court, to restrain railroad commissioners of another State from putting in force a schedule of rates, is not a suit against a State within the meaning of the eleventh amendment of the Constitution of the United States, providing that the judicial power of the United States shall not extend to suits against one of the States by citizens of another State. The provision of the act of the *Iowa* legislature of April 5, 1888, to regulate railroad corporations and other common carriers, and to increase the powers and further define the duties of the State board of railroad commissioners, and to prevent and punish extortion and unjust discriminations, which authorizes said board to make and enforce a schedule of rates for railroad charges, are not unconstitutional as an attempted delegation of legislative power.

Equity will restrain the enforcement of a schedule of rates for railroad charges, fixed by legislative authority, when the rate prescribed will not pay the cost of necessary skilled service; the cost of the best appliances, and keeping the same in proper condition; interest on bonds; and then leave something for dividends. It is no defence, to a proceeding to restrain the enforcement of an unreasonable rate, that the plaintiff is a foreign corporation doing business in the State only as a matter of grace, and may retire when the business ceases to be profitable; or that it operates through other States, where no rates are fixed which will enable it to make profit. Nor is it any defence that the reduced rates may increase the volume of business and make it more remunerative than at present, as the court must determine rights upon existing facts.

The opinion of Brewer, J., in this case is an able and interesting decision sustaining the constitutionality of the Iowa statute prohibiting discrimination. It was urged that the statute was unconstitutional, because of an attempted delegation of legislative power; and the Granger cases, 94 U. S. 113–187, were cited to show that the power to fix rates of freight belongs to the legislature alone. That the Constitution of *Iowa* divided the government into three departments,—legislative, executive, and judicial,—and declared "that no person, charged with the exercise of powers properly belonging to one, shall exercise any functions appertaining to either of the others." By another section the legislative power was vested in a general assembly, consisting of two bodies, the Senate and the House, and no provision existed in the constitution for a railroad commission. The court observes: "Of course this question is pivotal; for if the legislature alone can fix rates, the railroad commission are exercising functions which do not belong to them; and if the rates proposed infringe upon the property rights of the complainant, it may insist that such unauthorized action of the commission be stayed. It is not always easy to answer an argument so simple and clear where each of the propositions is, in a general sense at least, confessedly true. I concede the force of the argument; and yet I do not think I should be warranted in sustaining the claim, and for these reasons: First. It is elemental that a law will not be declared unconstitutional unless its vice is obvious. As said by Chief Justice Waite, in the Munn case, *supra*: 'Every statute is presumed to be constitutional. The court ought not to declare one unconstitutional unless it is clearly so. If there is doubt, the express will of the legislature should be sustained.' Or, as has been elsewhere epigrammatically said, 'A doubt sustains the law.' Second. There is no inherent vice in such a delegation of power; nothing in the nature of things which would prevent the State, by constitutional enactment at least, from intrusting these powers to such a board; and nothing in such constitutional action which would invade any rights guaranteed by the Federal Constitution. So that after all the question is one more of form than of substance. The vital question with both shipper and carrier is that the rates shall be just and reasonable, and not by what body they shall be put in force. Third. While in a general sense, following the language of the supreme court, it must be conceded that the power to fix rates is

comply with the order of railroad commissioners regulating rates

legislative, yet the line of demarcation between legislative and administrative functions is not always easily discerned. The one runs into the other. The law books are full of statutes, unquestionably valid, in which the legislature has been content to simply establish rules and principles, leaving execution and details to other officers. Here it has declared that rates shall be reasonable and just, and committed what is, partially at least, the mere administration of that law to the railroad commissioners. Suppose, instead of a general declaration that rates should be reasonable and just, it had ordered that the rates should be so fixed as to secure to the carrier, above the cost of carriage, 3 per cent upon the money invested in the means of transportation, and then committed to the board of railroad commissioners the fixing of a schedule to carry this rule into effect: would not the functions thus vested in such board be strictly administrative? While of course the cases are not exactly parallel, yet the illustration suggests how closely administrative functions press upon legislative power, and enforce the conviction that that which partakes so largely of mere administration should not hastily be declared an unconstitutional delegation of legislative power. Fourth. The reasonableness of a rate changes with the changed condition of circumstances. That which would be fair and reasonable to-day, six months or a year hence may be either too high or too low. The legislature convenes only at stated periods—in this State once in two years. Justice will be more likely done if this power of fixing rates is vested in a body of continual session than if left with one meeting only at stated and long intervals. Such a power can change rates at any time, and thus meet the changing condition of circumstances. While of course the argument from inconvenience cannot be pushed too far, yet it is certainly a matter of inquiry whether, in the increasing complexity of our civilization, our social and business relations, the power of the legislature to give increased extent to administrative functions must not be recognized. Fifth. The decisions of the supreme court of the State as to whether such a delegation of power conflicts with the State constitution, must be accepted in the Federal courts as final. And a Federal court should not hurry to declare that unconstitutional which the State court may hold to be valid; especially when the supreme courts of some sister-States have already upheld similar enactments. Finally, whatever of direct authority upon the question exists sustains this delegation of power.

"In the recent case of State *v.* Railroad Co., 37 N. W. Rep. 782, the supreme court of *Minnesota* considered this question, and sustained a similar enactment. See also the case of State *v.* Railroad Co., 35 N. W. Rep. 118, and 36 N. W. Rep. 308, decided by the supreme court of *Nebraska*. In the case of Tilley *v.* Railroad Co., 5 Fed. Rep. 641; s. c., 1 Am. & Eng. R. R Cas. 615, Mr. Justice Woods, of the supreme court of the United States, sitting on the circuit, also considered the question in a carefully prepared opinion, and sustained a similar enactment. See also other cases cited in the opinion of the supreme court of Minnesota, *supra*. Beyond that in the case of Stone *v.* Trust Co , 116 U. S. 307. the validity of the act of the State of *Mississippi*, delegating like power to a board of railroad commissioners, was before the supreme court of the *United States*; and though this specific objection was made by counsel, to its validity, the act was sustained. True, no special reference was made to this question in the opinion, and it was intimated that there might be questions arising under portions of the act thereafter to be determined, so that possibly that case cannot be taken as an authoritative determination by that court of the question; still, as I said, all the authorities that have been cited, or that I have been able to find bearing upon this precise question, are in favor of the constitutionality of such a delegation of power. For these reasons I conclude that this contention of the complainant cannot be sustained."

Where the constitution of a State authorizes the general assembly to regulate railroad freight and passenger tariffs, and to prevent unjust discrimination, and to require reasonable and just rates of freight and passenger tariff, a law passed by such assembly establishing a board of railroad commissioners, and authorizing them to make reasonable and just rates of freight and passenger tariff, of which a schedule should be made for each railroad in the State, and providing adequate penalties for the enforcement of the rules and regulations of such commission, such an act will not be regarded as unconstitutional as a delegation of legislative powers. Georgia R. & Bkg. Co. *v.* Smith, 70 Ga. 694; s. c., 9 Am. & Eng. R. R. Cas. 385.

is due process of law.[1] Several decisions as to the general powers of such commissioners are cited in the notes.[2]

1. Chicago, etc., R. Co. *v.* Becker, 32 Fed. Rep. 849.

**Tennessee Act Appointing Commission, Invalid.**—The legislation must not interfere with the vested rights of the companies in their property or franchises; must not inflict punishment or take property otherwise than by due process of law, nor without compensation; must not deny the equal protection of the law; and must in all respects observe the constitutional guaranties prescribed for the protection of all citizens—railroad companies being, for such purposes, as much citizens as natural persons. Louisville & N. R. Co. *v.* R. Commis. of Tenn., 16 Am. & Eng. R. Cas. 1. In this case the U. S. C. C. held that the act of the general assembly of Tennessee of March 30, 1883, to establish a railroad commission, was invalid, because its provisions were too indefinite, vague, and uncertain to sustain a suit for the penalties imposed, and do not sufficiently define the offences therein declared. It leaves to the jury to say whether, upon the proof, the difference in rates amounted to discrimination, or whether the charges were unjust and unreasonable, thus making the guilt or innocence of the accused depend upon the finding of a jury, and not upon a construction of the act. It relegates the administration of the law to the unrestrained discretion of the jury, and there could be therefore no reasonable approximation to uniform results, but verdicts would be as variant as their prejudices, and inevitably lead to inequality and injustice. Nor is the uncertainty removed by attempts to prescribe a standard, which is indefinitely defined, and which allows discretion in the jury as to what is "fair and reasonable" profit for the road, and fixing a penalty according to the findings of different juries: so that companies cannot tell whether they are within or without the law, and verdicts will vary with different juries.

2. **Powers of Oregon Railroad Commission.**—Where the legislative authority of the State created a board of railroad commissioners, empowering it to examine into the affairs of railroad corporations doing business within the State, and required it to make a biennial report, with such suggestions "as to what changes in the classification of freights, or what change in the rate of freights or fares, are advisable for the public welfare," but conferred no express authority upon the board to regulate the price of freight, or to determine when freight charges were unreasonable, *held*, that the board had no jurisdiction to require a railroad company to refund to a shipper a sum of money alleged to have been exacted from him in excess of a reasonable charge for the shipment. Board of R. Com'rs *v.* Oregon R. & Nav. Co. (Oregon, Nov., 1888), 35 Am. & Eng. R. R. Cas. 542.

**Determination of Minnesota Railroad Commission Conclusive.**—Under Minnesota Gen. Laws, 1887, ch. 10, § 8, the determination of the Railroad and Warehouse Commission, as to what are equal and reasonable fares and rates for the transportation of persons and property by a railroad company, is conclusive; and in the proceedings by *mandamus* to compel compliance with the tariff of rates recommended and published by them, no issue can be raised or inquiry had on that question. State, *ex rel.* Railroad & Warehouse Commission *v.* Chi., Mil. & St. Paul R. Co. (Minn.), 37 N. W. Rep. 782. *Compare* Stone *v.* Natchez, etc., R. Co., 62 Miss. 646; s. c., 21 Am. & Eng. R. R. Cas. 17; Stone *v.* Trust Co., 116 U. S. 307.

**Nebraska Commission.**—The power to determine what is an unjust rate or charge, and the extent of the same, and to prevent unjust discrimination, carries with it the power to decide what is a just rate and charge, and authorizes the board to fix just and reasonable rates and charges. State *v.* Fremont, etc., R. (Neb.), 35 N. W. Rep. 118; s. c., 32 Am. & Eng. R. R. Cas. 426.

Under *Nebraska* act of 1887, the board of transportation has authority to determine, in the first instance, what are just and reasonable charges for the services rendered or to be rendered. State of Neb. *v.* Fremont, etc., R. Co., 35 N. W. Rep. 118; s. c., 32 Am. & Eng. R. R. Cas. 426.

**New York Commission.**—The railroad commissioners appointed under N. Y. Laws, 1882, c. 353, have no power to compel railroad companies to carry into effect the decisions of the commission, nor is there any power vested in the courts for that purpose. People *v.* N. Y., L. E. & W. R. Co., 104 N. Y. 58; s. c., 29 Am. & Eng. R. R. Cas. 480. The case is not analogous to those where statutory provisions make the order of the commissioners effectual by authorizing its enforcement. Among those cases is State *v.* Railroad, 37 Conn. 153.

**4. Charter Provisions Relating to Freight as Contracts.**—Where a carrier's charter contains a provision that the company may establish such rates of fare and freight as it may deem reasonable, or such rates as do not exceed a certain maximum, the question arises, Does the grant of such a privilege constitute a contract leaving to the carrier the adjustment of charges unrestrained by other limitations than that they shall be either reasonable or within the maximum? Although there has been some conflict of opinion, the question must be answered in the negative. The common-law rule that the carrier's charges shall be reasonable would in any event be read into a charter. The grant of a right to fix reasonable charges does not carry with it the power to declare what shall be deemed reasonable; such a privilege belongs to that class of powers the grant of which can only be made in express terms, every presumption being against it.[1]

1. In Stone *v.* Farmers' Loan & Trust Co., 116 U. S. 307; s. c., 23 Am. & Eng. R. R. Cas. 577 (rev'g, circuit court, s. c., 18 Am. & Eng. R. R. Cas. 416), the provisions of the charter authorized the company to fix, regulate, and receive the tolls and charges by them to be received for transportation. It was claimed that this constituted a contract with the State, which would exempt the company from the operation of a subsequent statute regulating the company's charges. Referring to the charter provisions above cited, the court observed: "This would have been implied from the rest of the charter if there had been any such provisions; and it is argued that, unless it had been intended to surrender the power of control over fares and freights, this section would not have been inserted. The argument concedes that the power of the company under this section is limited by the rule of the common law which required all charges to be reasonable. In Munn *v.* Chicago, etc., R. Co., 94 U. S. 113, and Chicago, etc., R. Co. *v.* Iowa, 94 U. S. 155, this court decided that, as to natural persons and corporations subject to legislative control, the State could, in cases like this, fix a maximum beyond which any charge would be unreasonable; and that such maximum, when fixed, would be binding on the courts in their adjudications, as well as on the parties in their dealings. The claim now is that the State has surrendered the power to fix a maximum for this company, and has declared that the courts shall be left to determine what is reasonable, free of all legislative control. We see no evidence of any such intention. Power is granted to fix reasonable charges; but what shall be deemed reasonable in law is nowhere indicated. There is no right specified, nor any limit set. Nothing whatever is said of the way in which the question of reasonableness is to be settled. All that is left as it was. Consequently, the power which the State had in the matter before the charter, it retained afterwards. The power to charge being coupled with the condition that the charge shall be reasonable, the State is left free to act on the subject of reasonableness within the limits of its general authority as circumstances may require. The right to fix reasonable charges has been granted, but the power of declaring what shall be deemed reasonable has not been surrendered. If there had been an intention of surrendering this power, it would have been easy to say so. Not having said so, the conclusive presumption is, there was no such intention." See also authorities cited in succeeding notes. *Compare* Sloan *v.* Pacific, etc., R. Co., 61 Mo. 24; Philadelphia, etc., R. Co. *v.* Bowers, 4 Houst. (Del.) 506; Hamilton *v.* Keith, 5 Bush (Ky.), 25.

Ruggles *v.* Illinois, 108 U. S. 526; s. c. 11 Am. & Eng. R. R. Cas. 49. An amendment was made to the charter of a railroad company in *Illinois*, providing that "The said company shall have power to make, ordain, and establish all such by-laws, rules, and regulations as may be deemed expedient and necessary to fulfil the purposes and carry into effect the provisions of this act, and for the well ordering, regulating, and securing the affairs, business, and interest of the company: provided that the same be not repugnant to the Constitution and laws of the United States, or repugnant to this act. The board of directors shall have power to establish such rates of toll for

But where property has been clothed with a public interest, the legislature may fix a limit to that which in law shall be reasonable

the conveyance of persons or property upon the same as they shall from time to time by their by-laws determine, and to levy and collect the same for the use of the said company." *Held*, that inasmuch as the power to establish rates was to be exercised through by-laws, and the power to make by-laws was restricted to such as should not be repugnant (among other things) to the laws of the State, the amendment did not release the company from restrictions upon the amount of rates contained in general and special statutes of the State. Followed in Ill. Cent. R. Co. *v.* Ill. 108 U. S. 541; 11 Am. & Eng. R. R. Cas. 55.

In Ruggles *v.* Illinois, etc., R. Co., 108 U. S. 526; s. c., 11 Am. & Eng. R. R. Cas. 49, the court observes: "There is nothing which even in the remotest degree indicates that a by-law fixing rates is to be of a different character from those regulating the other business of the company. When, therefore, in a section of the charter which expressly declares that no by-law shall be made that is in conflict with the laws of the State, we find that the rates of charge to be levied and collected for the conveyance of persons and property are to be regulated by by-laws, the conclusion is irresistible that only such charges can be collected as are allowed by the laws of the State. This implies that, in the absence of di. legislation on the subject, the power of the directors over the rates is subject only to the common law limitation of reasonableness; for in the absence of the statute or other appropriate indications of the legislative will, the common law forms part of the laws of the State, to which the corporate by-laws must conform. But since, in the absence of some restraining contract, the State may establish a maximum of rates to be charged by railroad companies for the transportation of persons and property, it follows that, when a maximum is so established, the rates fixed by the directors must conform to its requirements; otherwise, by-laws will be repugnant to the laws."

The Chicago & Northwestern R. Co. was, by its charter and the charters of other companies consolidated with it, authorized "to demand and receive such sum or sums of money for the transportation of persons and property, and for storage of property, as it shall deem reasonable." The Constitution of *Wisconsin* in force when the charters were granted provided that all acts for the creation of corporations within the State "may be altered or repealed by the legislature at any time after their passage." The *United States* supreme court held that the legislature had power to prescribe a maximum of charges for purely domestic transporting of persons or property. Peik *v.* R. Co., 94 U. S. 164.

*Quære*, whether the provision, in the charter of a railroad, fixing a maximum rate for freight and fares must be treated as such a contract with it on the part of the State as to prevent the legislature from passing a law regulating such freights and fares. Hines *v.* R. Co., 95 N. Car. 434.

Legislative purpose to part with right to regulate charges must appear in the charter by express terms or from necessary implication, and will not be presumed from mere inference. *Quære*, whether the legislature has the power, by contract or otherwise, to part with any of the essential powers of government; but if this can be done, it can only be done by a clearly expressed purpose to do so.

The charter of the Winona & St. Peter R. Co. provided that such company "shall be bound to carry freight and passengers, upon reasonable terms." *Held*, that this did not limit the power of the State to regulate the rates of charge." Winona & St. Peter R. Co. *v.* Blake, 19 Minn. 418; 94 U. S. 180.

Where a charter granted by a State authorized the company to "fix, regulate, and receive tolls and charges for transportation of persons and property, it was held that annexed to such a grant was the implied condition that the tolls and charges fixed should be reasonable; and that the legislature retained power to secure, through a commission established for the purpose, conformity by the company to the standard of reasonableness in its rates. Stone *et al.* (Com'rs) *v.* Natchez, Jackson & Columbus R. Co., 62 Miss. 646; s. c., 21 Am. & Eng. R. R. Cas. 17.

A statute appointing commissioners to fix the compensation to be paid by one railroad company to another for the drawing of its cars over the road of the company first named, does not infringe upon the right of the former company to regulate tolls on its road. Vermont & Mass. R. Co. *v.* Fitchburg R. Co., 9 Cush. (Mass.) 369. See Fitchburg R. Co. *v.* Gage, 12 Gray (Mass.), 393.

for its use, which will be as binding upon the courts as upon the people; if it has been improperly fixed, the legislature, not the courts, must be appealed to for the change.[1]

Where there is no statutory regulation of the subject, the courts will decide for railroad companies as they do for private persons when controversies arise what is reasonable.[2] When a charter of a company names a maximum of charges which shall not be exceeded, this does not constitute a contract with the company that it may charge whatever rates it chooses within the maximum, but is in effect a provision that, if the company shall exceed the limit, the exclusive right may be forfeited. The company is therefore subject to subsequent legislation establishing a commission to regulate railroad tariffs.[3] A franchise to take such tolls as the company should think reasonable does not vest an absolute discretion in the corporation, but the courts have authority to limit the right to reasonable tolls.[4] So where certain rates of toll and fare are fixed by the charter of a company, a subsequent act inflicting severe penalties upon the company for exceeding the charter rates is not a violation of the contract of the charter, and is not unconstitutional.[5] A statute which merely requires uniformity in the charges does not interfere with a power under a charter to fix freights within a maximum prescribed by such charter.[6]

1. Dow *v.* Beidelman (U. S. Sup. Ct., April 16, 1888), 34 Am. & Eng. R. R. Cas. 322; s. c., 2 Inters. Com. Rep. 56. See also Dow *v.* Beidelman, 49 Ark. 325; s. c., 31 Am. & Eng. R. R. Cas. 14.

2. Dow *v.* Beidelman, 34 Am. & Eng. R. R. Cas. 322; s. c., 2 Inters. Com. Rep. 56; Chicago, etc., R. Co. *v.* Iowa, 94 U. S. 155. See also Dow *v.* Beidelman, 49 Ark. 325; s. c., 31 Am. & Eng. R. R. Cas. 14.

3. Georgia R. & Bkg. Co. *v.* Smith, (U. S. Sup. Ct.) 35 Am. & Eng. R. R. Cas. 511; Georgia R. & Bkg. Co. *v.* Smith, 70 Ga. 694; s. c., 9 Am. & Eng. R. R. Cas. 385; Transportation Co. *v.* Sweetzer, 25 W. Va. 434; s. c., 22 Am. & Eng. R. R. Cas. 469.

But naming maximum rates was held not to give a charter right to the maximum named, in the following case: The 12th section of a charter was as follows: "That the said Georgia Railroad Company shall at all times have the exclusive right of transportation or conveyance of persons, merchandise, and produce over the railroad and railroads to be by them constructed, while they see fit to exercise the exclusive right: provided that the charge of transportation or conveyance shall not exceed fifty cents per hundred pounds on heavy articles and ten cents per cubic foot on articles of measurement, for every hundred miles, and five cents per mile for every passenger." *Held*, that the exclusive right granted by this section was the right of transportation or conveyance of persons, merchandise, and produce over the railroad and railroads to be by them constructed. The State did not contract with the company to guarantee to it the exclusive right to charge the maximum rates named. Hall, J., doubting as to the last point. Georgia R. Co. *v.* Smith, 70 Ga. 694; s. c., 9 Am. & Eng. R. R. Cas. 385.

4. Attorney-general *v.* R. Co., 35 Wis. 426.

5. Camden & Amboy R. Co. *v.* Briggs, 22 N. J. 623.

A charter provided "The board of directors shall have power to establish such rates of tolls for the conveyance of persons and property upon the same [the road] as they shall from time to time, by their by-laws, direct and determine, and levy and collect the same for the use of said company;" and, "in consideration of the grants, privileges, and franchises conferred," it is declared the corporation shall pay into the State treasury a certain per cent of its earnings. *Held*, the State, notwithstanding, had power to define, prohibit, and punish extortion. Ill. Cent. R. Co. *v.* People, 95 Ill. 313; s. c., 1 Am. & Eng. R. R. Cas. 188.

6. Freight Discrimination Cases, Hines *v.* Wil. & Wel. R. Co., 95 N. Car. 434.

These principles are subject to a qualification in that the right to regulate does not enable the legislature to practically prevent the collection of any freight; the power to regulate is not a power to destroy.[1] So, it has been held that a statute prohibiting all dis-

1. In Attorney-Gen. *v.* Germantown & Perkiomen Turnpike Road, 55 Pa. St. 466, the Pennsylvania legislature required the turnpike company to remove their gates. *Held*, the act was unconstitutional.

In Powell *v.* Sammons, 31 Ala. 552, Alabama Act 1854, Feb. 17, authorizing the toll-gates of any plank-road company to be thrown open, on the report of commissioners appointed by the probate court that such road was out of repair, was, as to the Central Plank-road Co., unconstitutional and void, because impairing the obligation of contract between the company and the State, and taking away vested rights without compensation, trial by jury, or due process of law.

In Stone *v.* Farmers' Loan & Trust Co., 116 U. S. 331, Waite, C.J., said: "Under pretence of regulating fares and freights, the State cannot require a railroad corporation to carry persons or property without reward; neither can it do that which in law amounts to a taking of private property for public use without just compensation, or without due process of law. What would have this effect we need not now say."

In 2 Morawetz on Private Corp. § 1075 c, it is said: "The power of the State to enact laws regulating the charges of railroad companies does not enable it to fix charges which are less than reasonable. Such legislation would be unconstitutional."

In Miller *v.* N. Y. & Erie R. Co., 21 Barb. (N. Y.) 519, the court said: "The power reserved to the legislature to alter, modify, or repeal the defendant's charter did not purport to authorize the assumption of their property without compensation. No power to do that could have been reserved, for none such could have existed. It would be preposterous to say that the legislature has the power to make any and every requisition upon the defendants as a condition of their retaining their corporate existence; to require them, for instance, to make donations to the towns through which their railroad may pass, or to any other body politic, or to individuals." In that case, the legislature attempted to require the building of a street, embankments, etc., at the railroad company's expense.

In *Ex parte* Koehler (U. S. C. C., Oregon District), 21 Am. & Eng. R. R. Cas. 52, Deady, J., said: "I am aware that in what are called the Granger Cases, 94 U. S. 155–187, it was practically held that the action of the legislature in fixing the maximum rate of compensation for certain railways was conclusive of the question, and could only be reviewed or reversed at the polls. But in none of these cases, as I read them, was the power of alteration or repeal reserved to the State, qualified, as in *Oregon*, so that it could not be used 'to impair or destroy any vested corporate right.' And the contention of the corporations in those cases was that, although the State had reserved to itself the right of repeal without qualification, still the court ought, in justice and right, to so limit its operation as not to allow it to interfere with vested rights, as was suggested by Mr. Chief Justice Shaw, in Commonwealth *v.* Essex Co., 13 Gray, 239. But the court refused to do so, and held, in effect, that, under the unqualified power of repeal reserved to the State, the legislature might deal with the subject as it pleased, even if it deprived the corporation of all right to compensation for services in the future, —and there was no appeal from its action except to the polls; and that, if the business and property of the shareholders was thereby destroyed or rendered valueless, they must blame themselves for engaging in a corporate enterprise under such precarious conditions;"—but held that, under the Oregon Constitution, above recited, the court were the final judges of what "impairs" the vested right of the corporation to a reasonable compensation for its services.

In Tilley *v.* Savannah, Florida & Western R. Co., 5 Fed. Rep. 661, Woods, C. J., said: "If the general assembly, in its passage, were acting within the scope of its constitutional power, no matter how cruel and unjust the law may be, the court cannot apply the remedy."

But in Railroad Commission *v.* Natchez, Jackson & Columbus R. Co., 62 Miss. 646; s. c., 21 Am. & Eng. R. R. Cas. 17, it was said that, under a charter authorizing a company from time to time "to fix, regulate, and receive tolls and charges by them to be received for transportation," the company was not under the absolute control of the legislature; that it had rights which must be respected.

crimination, just or unjust, was unconstitutional; it should confine its effect to unjust discrimination only.[1]

**5. State Freight Statutes as Affecting Interstate Commerce.**—That Congress alone possesses the power, under the Constitution, to regulate interstate commerce, is universally recognized. Until the passage of the Interstate Commerce Act, questions of the greatest nicety as to what powers the States had reserved to themselves constantly arose, in which the varying opinions upon the proper construction of the State statutes clearly demonstrated the necessity for such legislation. This act, however, is but the first step in the solution of a long and difficult problem, and necessarily leaves unprovided for what lies beyond its province or can only be taught by experience.

In the judicial construction of statutes affecting interstate commerce, the fact has often been mentioned that the line which separates the powers of the States from this exclusive power of Congress is narrow, and is defined with difficulty. Reference need only be had to cases construing statutes which have attempted to regulate such matters as ferries; bridges; the carriage of passengers upon railroads, steamboats, and other public conveyances; the taxation of railroads; telegraph companies; and, that with which we are more immediately concerned, statutes regulating the freight charges of common carriers.[2]

It has in some instances, and perhaps not unnaturally, been considered a fair inference, from the decisions in the Granger Cases,[3]

1. Chicago, etc., R. Co. *v.* People, 67 Ill. 11.

2. Louisville, etc., R. Co. *v.* Railroad Commission of Tennessee, 19 Fed. Rep. 679; s. c., 16 Am. & Eng. R. R. Cas. 1. See also INTERSTATE COMMERCE.

3. Munn *v.* Illinois, 94 U. S. 113; Chicago, etc., R. Co. *v.* Iowa, 94 U. S. 155; Peik *v.* Chicago, etc., R. Co., 94 U. S. 164; Chicago, etc., R. Co. *v.* Ackley, 94 U. S. 179; Winona, etc., R. Co. *v.* Blake, 94 U. S. 180; Stone *v.* Wisconsin, etc., R. Co., 74 U. S. 181; Shields *v.* Ohio, etc., R. Co., 95 U. S. 194.

In Louisville, etc., R. Co. *v.* Railroad Commissioners, 19 Fed. Rep. 679; s. c., 16 Am. & Eng. R. R. Cas. 1, the court observes: "It is, in our judgment, a grave misapprehension of these cases, to affirm that they support the legislation involved in this controversy. . . . The overshadowing question in those cases, obviously was that arising out of the claim of entire exemption from all legislative control over their business by the warehousemen and common carriers. This claim they based upon a supposed inviolability of their property rights; and the leading feature of the decision is that they had not been 'deprived of their property without due process of law,' by legislation regulating the maximum of charge they might make, because they had, like ferrymen, millers, etc., embarked their property in a business affected with the public interest, whereby it ceased to be *juris privati* only. The court said comparatively little upon the subject of interstate commerce in its relation to such legislation and it seems difficult, from the meagre report of the case on that point, to understand the language of the court on this topic. But when they are read in the light of previous and subsequent decisions on that special subject, there is no difficulty whatever in reaching a full understanding of its meaning. The decisions amount, we think, only to this: Where a warehouseman or common carrier is engaged in the storage of goods, or their carriage within a State, and exclusively within it, the rates of charges for such business are subject to legislative control by the State; and the fact that such legislation may indirectly and remotely affect commerce between the States does not invalidate it. Because if Congress has, by reason of this indirect and remote relation of such local business to interstate commerce, any right to as-

that the power of States to regulate freight charges within their own limits was an extensive one. It is now settled, however, by the United States supreme court, notwithstanding the cases referred to, that a statute of a State intended to regulate, or to tax or impose any other restriction upon, the transmission of persons or property or telegraphic messages from one State to another, is not within that class of legislation which the States may enact in the absence of legislation by Congress; and that such statutes are void even as to that part of such transmission which may be within the State.[1] While the right of a State to control the transportation of goods which are consigned and delivered within the limits of that State is not denied,[2] State statutes cannot regulate

sert control over what is primarily domestic commerce only, it is to be presumed, until Congress acts, that it does not intend to displace the right of a State to control its domestic commerce."

1. Gloucester Ferry Co. *v.* Comm. of Pa., 114 U. S. 196; s. c., 13 Am. & Eng. Corp. Cas. 365; reversing supreme court of Pennsylvania.

Works of a local character may be established and carried on by a State, although they affect indirectly interstate commerce—as, wharfage works—in the absence of interference by Congress. Ouachita & Miss. R. Packet Co. *v.* Scovell *et al.*, Appt's (U. S. Sup. C.), 1 Inter. C. Rep. 379; U. S. Rep. L. ed., bk. 30.

**State Corporation in Interstate Commerce** may have its powers increased by the United States Congress. Stockton *v.* Balto. & N. Y. R. Co., 1 Inter. C. Rep. 411 (U. S. C. C., New Jersey District); the Arthur Kill Bridge Case, Decker *v.* Balto. & N. Y. R. Co., 1 Inter. C. Rep. 434.

The power of Congress to regulate interstate commerce is exclusive when its subjects are national in character or admit only of one uniform system or plan of regulation. Robbins *v.* Shelby Co. Tax Dist., bk. 30 U. S., L. ed., 694; s. c., 16 Am. & Eng. Corp. Cas. 1; Phila., etc., Steamship Co. *v.* Com. of Pa., bk. 30 U. S., L. ed., 1200, 1 Inter. C. Rep. 308.

Where the power is exclusive, the failure of Congress to make express regulations indicates its will that the subject shall be left free from any restrictions or impositions. Robbins *v.* Shelby Co. Tax Dist., bk. 30 U. S., L. ed., 694; s. c., 16 Am. & Eng. Corp. Cas. 1; Gloucester Ferry *v.* Pa., bk. 29 U. S., L. ed., 158; s. c., 13 Am. & Eng. Corp. Cas. 365; Phila., etc., Steamship Co. *v.* Pa., 30 U. S., L. ed., 1200; 1 Inter. C. Rep. 308.

The regulation of fares and freight receivable for transportation of persons and goods between different States, and between the States and foreign countries, is within the power of Congress equally with the regulation of transportation itself. Phila., etc., Steamship Co. *v.* Com. of Pa., bk. 30, U. S., L. ed., 1200; 1 Inter. C. Rep. 308.

In carrying on foreign and interstate commerce, corporations, equally with individuals, are within the protection of the commercial power of Congress, and cannot be molested in another State by State burdens or impediments. Stockton *v.* Balto. & N. Y. R. Co. (U. S. C. C., N. J. Dist.), 1 Inter. C. Rep. 411.

The want of power of State railroad commissioners over interstate commerce may be decided by the court on appeal from the finding of the commissioners although the point was not made in the grounds of appeal. Railroad Commissioners *v.* Railroad Co., 22 S. Car. 220; 26 Am. & Eng. R. R. Cas. 29; Waller *v.* Cresswell, 4 S. Car. 353.

2. It was said in one case that the power of the State extended perhaps to shipments beginning and ending in the State, although the road lay partly without the State. Louisville & Nashville R. Co. *v.* Railroad Commissions, 19 Fed. Rep. 679; s. c., 16 Am. & Eng. R. R. Cas. 1.

The Interstate Commerce Act does not include or apply to all carriers engaged in interstate commerce, but only such as use a railway, or a railway and watercraft, "under common control, management, or arrangement for a continuous carriage or shipment" of property from one State to another; nor does it apply to the carriage of property by rail wholly within the State, although shipped from or destined to a place without the State, so that such place is not in a foreign country. *Ex parte* Koehler (U. S. Cir. Court, Oregon Dist.), 30 Fed. Rep. 867; 30 Am. & Eng. R. R. Cas. 71.

freight on goods consigned within the State to be delivered outside of it, or consigned outside of it to be delivered within the State.[1] Such legislation is not made valid by a theoretical subdivision of the amount of freight, and an application of the statute to the charges on that proportion of the distance within the State's limits.[2] It is as impossible for a State to make a regulation of in-

The fact that the owner of merchandise which is offered to a carrier for transportation from one point to another in the same State intends to have it further transported by a second carrier into another State, does not make such first transportation interstate commerce, or render the carrier subject to the control of the commission in respect to it, even though such first carrier may be informed of the ultimate destination of the merchandise. Missouri & Ill. R., Tie & Lumber Co. *v.* Cape, etc., Co., 1 Inter. C. Rep. 30. See also New Jersey Fruit Exch. Co. *v.* Central R., etc., Co., 2 Inter. C. Rep. 142; s. c., 34 Am. & Eng. R. R. Cas. 592.

1. It is now held, by the supreme court of the United States, that a State statute which affects to impose a penalty for unjust discrimination in charges for transportation of passengers or freight from a point within to one without the State is in so far void; that such a transportation is "commerce among the States," even as to that part of the voyage which lies within the State, and is beyond the jurisdiction of the State even in the absence of legislation by Congress. Wabash, St. Louis & Pacific R. Co. *v.* People of State of Illinois, 118 U. S. 557; s. c., 26 Am. & Eng. R. R. Cas. 1, decided October, 25, 1886. In this case, the cases of Munn *v.* Illinois, 94 U. S. 113; Chicago, B. & Q. R. Co. *v.* Iowa, 94 U. S. 155; and Peik *v.* Chicago & Northwestern R., 94 U. S. 164, were examined in regard to this question, and held, in view of other cases decided near the same time, not to establish a contrary doctrine. Mr. Justice Bradley filed a dissenting opinion, wherein Chief Justice Waite and Mr. Justice Gray concurred. This decision reversed that of the supreme court of Illinois, which is reported in 105 Ill. 236; s. c., 12 Am. & Eng. R. R. Cas. 10.

See also State *v.* Chicago & Northwestern R. Co., 72 Iowa, 162; 27 Am. & Eng. R. R. Cas. 15; Carton *v.* Ill. Cent. R. Co., 59 Iowa, 148; Com. *v.* Housatonic R. Co., 143 Mass. 264; 27 Am. & Eng. R. R. Cas. 31.

In Mobile & O. R. Co. *v.* Sessions, 28 Fed. Rep. 592, Hill, J., said of the ninth rule established by the *Mississippi* Railroad Commission,—which sought to control rates for carriage by any Mississippi company from without the State to a point within, or *vice versa*, so far as respected carriage in Mississippi,—that it related to interstate commerce and could not be enacted by the State.

In *South Carolina*, in 1884, it was held, in Railroad Commissioners *v.* R. Co., that the State could not confer on railroad commissioners the right to regulate freight where part only of the carriage was within that State, 22 S. Car. 220; 26 Am. & Eng. R. R. Cas. 29.

See also Kaesar *v.* Illinois Cent. R. Co., 5 McCrary (U. S.), 496; s. c., 16 Am. & Eng. R. R. Cas. 40; Mobile & Ohio R. Co. *v.* Sessions, 28 Fed. Rep. 592; Hardy *v.* Atchison, etc., R. Co., 32 Kan. 698; 18 Am. & Eng. R. R. Cas. 432; Louisville & Nashville R. Co. *v.* R. Com'rs of Tenn., 6 Am. & Eng. R. R. Cas. 317; 16 Am. & Eng. R. R. Cas. 1.

A contract with a railroad company to carry freight from a place in *North Carolina* to one without, at a fixed price for the entire distance, is not embraced by N. Car. Code, § 1966, even though in the price charged discrimination is made against the shipper; also, the State law could not govern it, as the carriage comes within interstate commerce. McLean *v.* Charlotte, etc., R. Co., 96 N. Car. 1; following McGwigan *v.* R. Co., 95 N. Car. 428. The failure of Congress to enact laws in the premises does not give the State power to do so.

In May 1886 it was held by the *Rhode Island* supreme court that the provisions of the Rhode Island statute prohibiting discriminations by common carriers in the transportation of merchandise are applicable to contracts made in Rhode Island for the carriage of merchandise to points outside of Rhode Island on the line of the road of the carrier so contracting in that State. Providence Coal Co. *v.* Providence & Worcester R. Co., 26 Am. & Eng. R. R. Cas. 42.

See also People *v.* Wabash, St. L. & Pac. R. Co., 104 Ill. 476; 7 Am. & Eng. Eng. R. R. Cas. 628; 105 Ill. 236; 12 Am. & Eng. R. R. Cas. 10 [Reversed on writ of error to U. S. supreme court, 118 U. S. 557.].

2. This right of the State to limit

terstate commerce by the exercise of its power over the corporation of its creation, as by any other power, if it permits them to engage in interstate commerce.[1] The transportation of property from one State to another is interstate commerce, whether the carriers engaged in moving it, or the vehicle on which it is borne, cross the line of the State or not.[2] It has been held that, where a railroad company within the State accepts goods destined for a point in another State, but contracts with the consignor that its responsibility shall cease when it carries the goods to another point within the State, and there delivers them to another carrier, the contract does not relate to commerce between States, but is one to be wholly performed within the State, and which may be controlled by the legislature of the State without any violation of the United States Constitution.[3] A State may enact police regulations which incidentally affect interstate commerce.[4]

the rates for transportation must be understood strictly with reference to its domestic commerce. By domestic transportation is meant that carried on exclusively within the boundaries of a State; and this definition cannot, for the purpose of enlarging State authority, be held to include so much of a transportation on a continuous shipment between two or more States as will cover the distance travelled within the limits of any one of those States; for the opposite construction would utterly destroy the exclusive power of Congress over the interstate transportation, and enable the States to restrict, obstruct, or impair freedom of commerce between the States, and abrogate the provision in the national Constitution, art. I., § 8, conferring on the Federal government exclusive power "to regulate commerce with foreign nations and among the several States and with the Indian tribes." Louisville & N. R. Co. *v.* Railroad Commission of Tennessee, 19 Fed. Rep. 679; s. c., 16 Am. & Eng. R. R. Cas. 1. Hence it was held in this case that an attempt by the State of *Tennessee* to control freights of commodities passing from State to State, on the theory of regulating the charges for the distances travelled within the State of Tennessee, was invalid, and that the Railroad Commissioners of Tennessee would be enjoined from attempting such control.

1. Louisville, etc., R. Co. *v.* Railroad Commission of Tennessee, 19 Fed. Rep. 679; s.c., 16 Am. & Eng. R.R.Cas. 1. See also authorities cited in preceding notes.

See also the State Freight Tax Case, 15 Wall. (U. S.) 232, in which it was held that an act of the Pennsylvania legislature was void so far as it sought to levy a tax on all freight carried through the State by any railroad company, or into it from any other State, or out of it into any other State. See also Gloucester Ferry Co. *v.* Pennsylvania, 114 U. S. 196, 204; Pickard *v.* Pullman Southern Car Co., 117 U. S. 34.

2. *Ex parte* Koehler (Receiver, etc.) (U. S. C. C., Oregon Dist.). 30 Fed. Rep. 867; 30 Am. & Eng. R. R. Cas. 71.

3. Where a railroad company within the State accepts goods destined for a point in another State, but contracts with the shipper that its responsibility shall cease when it carries the goods to another point within the State (*Iowa*) and there delivers them to another carrier, the contract does not relate to commerce between the States, but is one to be wholly performed within the State, and which may be controlled by the State legislature (Iowa) without any violation of the constitution of the United States. Heiserman *v.* Burlington, Cedar Rapids & Northern R. Co., 63 Iowa, 732; 16 Am. & Eng. R. R. Cas. 46.

And the U. S. C. C. in *Oregon* have decided that the Interstate Commerce Act only applies to such carriers as use a railway, or railway and water-craft, "under common control, management, or arrangement for a continuous carriage or shipment" from State to State; and does not apply to carriage wholly within the State, allthough the goods are shipped for or destined to a place without the State, so that such place is not a foreign country. *Ex parte* Koehler, 30 Fed. Rep. 867; s. c., 30 Am. & Eng. R. R. Cas. 71.

See also Missouri, etc., R. Tie & Lumber Co. *v.* Cape, etc., Co., 1 Inter. C. Rep. 30; New Jersey Fruit Exch. Co. *v.* Central R., etc., Co., 2 Inter. C. Rep. 142; New Jersey Fruit Exch. Co. *v.* Central R., etc., Co., 2 Inter. C. Rep. 84.

4. In R. Co. *v.* Fuller, 17 Wall. (U. S.)

**6. State Freight Statutes as Denying the Equal Protection of the Laws.**—A State legislature, in the exercise of its power of regulating fares and freights, may classify railroads according to the length of their lines; and if the same rule is applied to all railroads of the same class, there is no violation of the constitutional provision securing to all the equal protection of the laws.[1]

560, where the *Iowa* legislature enacted that each railroad should annually, in a month named by the act, fix its rates for the transportation of passengers, and of freight; that it should cause a printed copy of such rates to be posted in all its stations and depots; and that failure therein, or charging a higher rate than was posted, should subject offending company to certain penalities. *Held*, in the case of a railroad running through several States, including that where the State enactment above mentioned had been made, that the State enactment was but a police law, and therefore constitutional.

An *Arkansas* statute provided that a railroad company should not charge a greater sum for freight than that specified in bill of lading, and that the railroad should be liable in damages, to an amount equal to the freight charges for every day of the detention, for refusal to deliver goods upon payment of such charges. *Held*, that the act, being general and uniform in its operation upon all persons coming within the class to which it applied, was not unconstitutional as special legislation. *Held*, further, that such act was a police regulation for preventing delay in the delivery of freight, and did not illegally interfere with interstate commerce. Little Rock, etc., R. Co. *v.* Hanniford, 49 Ark. 291; 30 Am. & Eng. R. R. Cas. 67.

And it was also held that, where the weight of the goods carried is not specified in the bill of lading, it is the duty of the carrier to weigh the goods within a reasonable time after the receipt, and ascertain the amount of the charges, according to the rates specified in the bill of lading; and if it fail to do so and refuse to deliver the goods, it will be subject to the penalty for delay imposed by the act.

In Louisville & N. R. Co. *v.* R. Commission of Tennessee, 19 Fed. Rep. 679; s. c., 16 Am. & Eng. R. R. Cas. 1, Hammond, J., said: "While it does not appear by the report of these [Granger] cases, it is familiar to all who are informed about the general character of the discussions had over these questions, that the railroad companies have contended, at all times and in all places, that there is such a necessary corelation and interdependence between domestic commerce by rail within a State and that which is carried on among the States, and between local and through rates of charges for transportation and competitive rates from more or less distant points, that local rates cannot be regulated by the several States or any one of them, without disturbing disastrously all rates whatever, thereby seriously and directly affecting interstate commerce. It was undoubtedly in reply to this argument that the decisions were directed; and there is no denying that they close the argument and preserve the right of State control, notwithstanding any disturbance it may occasion rates for transportation between the States."

Rates of freight chargeable by a railroad company may be fixed by the State, even though the company's road is not entirely in the State, if the act contain a special clause restricting it so as not to relate to interstate commerce. Peik *v.* Chicago & N. W. R. Co., 94 U. S. 164.

1. Dow *v.* Beidelman, 34 Am. & Eng. R. R. Cas. 322 (U. S. Sup. Court, April 16, 1888).

If the classification made by the legislature operates uniformly, this court cannot decide whether it was the best which could have been made. Gray, J., said: "Whether the classification shall be according to the amount of passengers and freight carried, or of gross or net earnings during a previous year, or according to the simpler and more constant test of the length of the line of the railroad, is a matter within the discretion of the legislature."

*Arkansas* Act, April 4, 1887, providing maximum schedule of charges for carriage of passengers by railroads, and classifying railroads according to their length, operates uniformly on each class, and is not therefore special legislation within constitutional prohibition. Dow *v.* Beidelman, 49 Ark. 325; L. R. & Ft. S. R. Co. *v.* Hanniford, 49 Ark. 291. For the general rule as to uniformity, see State Bd. of Assessors *v.* Central R. Co., 48 N. J. L. 146.

Arkansas Act, Feb. 27, 1885, providing against collection or attempt at collection of charge greater than that specified in

**7. English Freight Statutes.**—In England, statutes regulating the freight charges of railroads and other common carriers have long been in successful operation. Their judicial construction forms a valuable guide where cognate questions arise here, but for many reasons it will be seen that this must be the extent of their usefulness. The Railway and Canal Traffic Act, 1854,[1] required railway and canal companies to afford all reasonable facilities, and prohibited the giving of any undue or unreasonable preference or advantage to or in favor of any particular person or company, or any particular description of traffic in any respect whatsoever. The act is said to have been intended to deal with three classes of evils—(1) want of reasonable facilities in receiving and forwarding traffic, (2) undue preference, and (3) the inharmonious working of different companies with respect to continuous traffic.[2] The decisions which have construed the various English statutes are incorporated in subsequent sections of this title.

**8. Freight Statutes in the United States.**—There are constitutional provisions [3] and statutes in many of the States, the terms of which

bill of lading, and providing that refusal to deliver on payment or tender of the specified charge shall impose liability on the company for an amount equal to the freight charges for every day's detention after such payment or tender, is general and uniform on all persons coming within the class to which it applies, and is not special legislation within the prohibition of Arkansas Constitution. Cooley Const. Lim. 481. It is a mere police regulation to enforce prompt delivery on payment or tender of freight charges, and does not interfere with or affect interstate commerce. L. R. & Ft. S. Co. *v.* Hanniford, 49 Ark. 291.

**1. English Statutes.**—Carriers Act, 1 Will. IV. cap. 68 (July 23, 1830); Railway and Canal Traffic Act, 17 and 18 Vict. cap. 31 (July 10, 1854); Regulation of Railways Act, 31 and 32 Vict. cap. 119 (1868); Regulation of Railways Act, 36 and 37 Vict. cap. 48 (July 21, 1873). See also 8 and 9 Vict. c. 20.

**2.** Redman Law of Railway Carriers (2d Ed.), p. 19; Southeastern R. Co. *v.* Railway Commissioners, 41 L. T. (N. S.) 760; 28 W. R. 464.

**3.** In Atchison, etc., R. Co. *v.* Denver, etc., R. Co., 110 U. S. 667; s. c., 16 Am. & Eng. R. R. Cas. 57, it was held that section 6 of article 15 of the Constitution of *Colorado*, giving equal rights to all in the transportation of persons and property of the railroads in the State, imposes no greater obligations upon the company than the common law would have imposed without it; every common carrier must carry for all to the extent of his capacity, without undue or unreasonable discrimination either in charges or facilities; and that, as to the time and manner a railroad company will carry persons and property, and the price to be paid therefor, it is subject to legislative regulation; but in the absence of such regulation, it owes only such duties to the public, or to individuals, association, or corporation as the common law, or some custom having the force of law, shall establish.

In his opinion in this case, Chief Justice Waite shows that the first constitutional provision for the government of railroads was that of *Illinois*, adopted July 2, 1870, section 12 of article 11 of which provided "Railways heretofore constructed, or that may hereafter be constructed, in this State are hereby declared public highways, and shall be free to all persons for the transportation of their persons and property thereon, under such regulations as may be prescribed by law. And the general assembly shall from time to time pass laws establishing reasonable maximum rates and charges for the transportation of passengers and freight on the different railroads of this State."

In the same year, an amendment was adopted to the Constitution of *Michigan*, covering substantially the same points.

In 1872, the Constitution of *West Virginia* was adopted, which, in these provisions, followed that of Illinois, with some additions.

In 1873, the Constitution of *Pennsylvania* was adopted; and sections 1 and 3 of article 17 provided as follows:

"Sec. 1. All railroads and canals shall

cannot be given in detail. That of *North Carolina*, passed in 1887, is set forth at length as an example.[1] The *Nebraska* Act of 1887 follows very closely the terms of the Interstate Commerce Act of the same year. References to statutes of *Illinois*,[2] *Iowa*,[3] *Maryland*,[4] *Massachusetts*,[5] *Mississippi*,[6] *Missouri*,[7] and *New Hampshire*[8] will be found in the notes.

be public highways, and all railroad and canal companies shall be common carriers. Any association or corporation organized for the purpose shall have the right to construct and operate a railroad between any points within this State, and to connect at the State line with railroads of other States. Every railroad company shall have the right, with its road, to intersect, connect with, or cross any other railroad, and shall receive and transport each the other's passengers, tonnage, and cars, loaded or empty, without delay or discrimination."

"§ 3. All individuals, associations, and corporations shall have equal right to have persons and property transported over railroads and canals, and no undue or unreasonable discrimination shall be made in charges for, or in facilities for, transportation of passengers or freight within the State, or coming from or going to any other State. Persons and property transported over any railroad shall be delivered at any station at charges not exceeding the charges for transportation of persons and property of the same class in the same direction to any more distant station; but excursion tickets may be issued at special rates."

Since that time, new constitutions have been adopted in Alabama, Arkansas, California, Colorado, Georgia, Louisiana, Missouri, Nebraska, and Texas.

In that of *Georgia*, authority was given the legislature to regulate fares and freight, and to prevent unjust discrimination; that of *Nebraska* substantially followed the provisions of the Illinois Constitution. In the other States, the provisions of the Constitution of Pennsylvania are included without any material change of phraseology; excepting *Colorado*, which omitted the words "And shall receive and transport each the other's passengers, tonnage, and cars, loaded or empty, without delay or discrimination."

**1. North Carolina Freight Act, 1887.**—North Carolina Act 1887 repeals Code, § 1966; and in lieu thereof provides: "It shall be unlawful for any railroad to collect, for the transportation of any freight of any description of the same class over its roads, a greater amount as toll or compensation for a short distance than for a longer distance in the same direction over its road; and any railroad company violating this section shall forfeit and pay the sum of $200, for each violation, to the party injured. Nothing in this act shall be taken in any manner as abridging the right of any railroad company from making special contracts with shippers of large quantities of freight to be of not less in quantity than one car-load.

"§ 2. Nothing in this act shall be construed to mean that said railroads may charge as much for a shorter distance as for a longer distance, the shorter being included within the longer; but they shall not be required to charge a proportionate rate per mile. But this shall not be construed to mean that more shall be charged for equal quantities in car-loads for a shorter distance than for a longer distance.

"§ 3. Nor shall the said railroads make any unjust discriminations in the rates of charges for toll or compensation for the transportation of passengers or freight of any description.

"§ 4. This act not to affect a certain suit, of Hines *v.* W. & W. R. Co."

North Carolina Code, § 1968, forbids pooling freights, or the allowance of rebates; and all persons, railroad officials or others, concerned in pooling freights, or in the allowance or acceptance of rebates, shall be guilty of a misdemeanor, and shall be fined not less than $1000 or imprisoned not less than 12 months.

**2. Illinois.**—Ill. Rev. Stat. (Cothrau's Ed.) 1887; Act of 1873, pp. 1167, 1168; § 4, Act of 1873; § 8 (as amended by Act of 1885) and § 10 of the Act of 1873.

**3. Iowa.**—Iowa Rev. Code (Miller), § 1292 *et seq.*; Laws of 1874, ch. 68 (Miller's Rev. Code 347); Laws of 1878, ch. 77 (Miller's Rev. Code, 348).

**4. Maryland.**—Md. Rev. Code 1878, p. 357; State *v.* Consol. Co., 46 Md. 13.

**5. Massachusetts.**—Gen. Laws, ch. 63, pp. 113 and 138; Mass Pub. Stat. 1882, ch. 112, § 180; Mass. Pub. Stat. 1882, chs. 94 and 225; Mass. Act 1885, ch. 338; Laws of 1875, 789.

**6. Mississippi.**—Miss. Act 1884; Laws, p. 31, § 1, *et seq.*

**7. Missouri.**—Mo. Rev. Stat. p. 146, art. 3; Mo. Act 1883 (Laws of Mo. p. 51); Mo. Act 1887 (Laws of Mo. p. 107).

**8. New Hampshire.**—Gen. Laws, ch. 163, § 2; N. H. Laws 1883, ch. 105.

**9. Construction of Freight Statutes.**—It has been held that the *Nebraska* statute, which is modelled upon the Interstate Commerce Act, is to be construed liberally to accomplish its purposes, because it is remedial.[1] The *North Carolina* statute is regarded as penal; but the rule that penal statutes must be strictly construed is not to be applied so rigidly as to defeat the clear intention of the legislature; and if the intention to impose the penalty clearly appears, that is sufficient, and it must prevail.[2] The *Illinois* statute making any discrimination in charges a penal offence, and providing for a forfeiture of all the franchises of the offending company for any wilful violation of the act, without any other penalty for the first offence, is in violation of the spirit of the constitutional provision which requires all penalties to be proportioned to the nature of the offence; and also of a constitutional provision which only authorizes the penalty of forfeiture of franchises and property "when necessary:" the statute should direct more gradual procedure.[3]

**IV. Effect upon Purchasers, Lessees, and Foreign Consolidated Companies, of Limitations as to Freight.**—Where a railroad is purchased in pursuance of a statute authorizing the sale,—in the absence of any provision of law to the contrary, the purchaser takes subject to the same restrictions and limitations, as to freight charges, as attached to the vendor.[4] The same principle has been applied

**New York.**—In Killmer *v.* N. Y. Cent., etc., R. Co., 23 Am. & Eng. R. R. Cas. 659, it was held that the New York legislature has reserved, in the general act for the formation of railroad companies, the right to regulate the question of freights.

1. State of Nebraska *v.* Fremont R. (Neb.), 35 N. W. Rep. 118; s. c., 32 Am. & Eng. R. R. Cas. 426.

2. Accordingly, *North Carolina* Code, § 1966, imposing penalty for charge of greater amount than for conveyance of other freight of the same class in the same direction over any portion of the same railroad of equal distance, was held to embrace transportation on the railroad or its branches. Freight Discrimination Cases (Hines *v.* Wil. & Wel. R. Co.), 95 N. Car. 434, citing Bacon's Abr., Tit. Statute 9, Rule 9: U. S *v.* Wilberger, 5 Wheat. 76; Potter's Dwarris on Stat. 245, and note 35; State *v.* Widgett, 85 N. Car. 539; Coble *v.* Shoffner, 75 N. Car. 43.

3. Chicago, etc., R. Co. *v.* People, 67 Ill. 11.

It would seem, from the remarks of the court in State of Minn. *v.* Winona, etc., R. Co., 19 Minn. 434, that it was considered that a statute regulating rates may legally declare that, if the rates be thereafter violated by a railroad company subject to the act, its charter may be forfeited; distinguishing Cooley Const. Lim. 292, where it is said that acts committed prior to the law cannot be made a cause of forfeiture.

It has been said that, where a State statute fixes rates of freight applying to cases of carriage beyond as well as to cases of carriage within the State, it is void altogether, Lou. & Nash. R. Co. *v.* R. Com. (U. S. C. Ct.), 19 Fed. Rep. 679; 16 Am. & Eng. R. R. Cas. 1, 39. *Compare* Cooley Const. Lim., p. *178.

4. Campbell *v.* Marietta & Cin. R. Co., 23 Ohio St. 168; Smith *v.* Pitts., Ft. W., etc., R. Co., 23 Ohio St. 17; Peters *v.* R. Co., 42 Ohio St. 275; Rogers, etc., Works *v.* Erie R. Co., 20 N. J. Eq. 379.

A company organized under a new constitution, purchasing a franchise granted before such constitution, cannot claim exemption from the new constitution because of such purchase. Owen *v.* St. L. & San F. R., 83 Mo. 454; 23 Am. & Eng. R. R. Cas. 371.

Individuals constructed a railroad from a coal mine to a railroad station, and sold the same to the railroad company. On the same day, the purchasing company turned it over to another railroad company, who operated it for three years in accordance with the contract between such original purchasers and the said individuals. *Held*, the second company, by taking the

where the original charter of the vendor did not allow such restrictions; but the company had subsequently received State aid, given on condition that a company accepting should be subject to freight restrictions.[1] And a company organized under laws limiting freight charges cannot escape them on the ground that it has purchased the privileges and franchises of a company whose existence antedates such laws.[2] Purchasers at a foreclosure sale under a mortgage, which purports to transfer a charter exempting a company from a reduction of rates below a certain standard, do not thereby succeed to such privilege; the right conferred is one to reorganize subject to laws then in force, and to restrictions of freight charges therein imposed.[3]

Lessees of railroads, and foreign corporations, as respects domestic business, are bound by the limitations of freight rates imposed by the charter of the lessor, or by the laws of the State where the foreign corporation operates;[4] and a company formed by the consolidation of several roads, chartered by different States, is subject to such laws when within the jurisdiction of one of such States which has enacted them.[5]

road and recognizing the rates of freight established by the contract of sale, adopted the contract, and were bound by its terms; and that the coal company could maintain action against them for a breach of it. Chi. & A. R. Co. *v.* Chi. V. & W. Coal Co., 79 Ill. 121.

Where a company leased its line to another, at a certain rate for all minerals, etc., transported, it was held that the owners of minerals transported could not, by injunction, compel the lessees to transport minerals on the terms agreed with the other company, the latter being a rent merely, and not a rate of toll or freight. Finnie *v.* Glasgow & S. R. Co., 2 Macq. App. Cas. (Scotch) 177.

1. Mobile & Montg. R. Co. *v.* Steiner, 61 Ala. 559.

2. Owen *v.* St. Louis, etc., Co., 83 Mo. 454; 25 Am. & Eng. R. R. Cas. 371; *citing* Louisville & N. R. Co. *v.* Palmes, 109 U. S. 244; s. c., 13 Am. & Eng. R. R. Cas. 380; Campbell *v.* R. Co., 23 Ohio St. 168.

3. Dow *v.* Beidelman, 49 Ark. 325; s. c., 31 Am. & Eng. R. R. Cas. 14; Dow *v.* Beidelman, 125 U. S. 680; s. c., 34 Am. & Eng. R. R. Cas. 322; Memphis, etc., R. Co. *v.* Commissioners, 112 U. S. 609; M. & L. R. Co. *v.* Berry, 41 Ark. 436.

4. McGregor *v.* R. Co., N. J. ; Fisher *v.* N. Y. Central R. Co., 46 N. Y. 644; Pennsylvania R. Co. *v.* Sly, 65 Pa. St. 205.

A corporation of one State, leasing and operating a railroad in another State, is, as to the leased road, subject to local legislation to the extent to which the lessor would have been subject had there been no lease; and is subject, like the lessor, to regulation of rates of freight transported wholly within the limits of the State of the lessor. Stone *v.* Ill. Central R. Co., 116 U. S. 347; s. c., 23 Am. & Eng. R. R. Cas. 597.

*North Carolina* Code, § 1966, prohibiting discriminations, embraces all railroads in their domestic business in that State, whether incorporated by the laws of the State or not; the object of the statute being to secure uniformity in charges for transporting freight by all railroads doing business in that State. Where a railroad corporation, chartered by another State, leases a railroad chartered in that State, it is bound to observe and obey all laws of that State regulating the business of domestic transportation. Where a railroad corporation is chartered by the laws of that State, and also of another State, it is completely subject to the laws of that State, except as otherwise expressly provided by its charter. Hines *v.* R. Co., 95 N. Car. 434.

Where illegal and excessive rates on a purchased road were charged by a railroad company in good faith, under the belief that it was empowered to purchase the said road, and to operate the same under its own favorable charter, which erroneous belief was induced by the wide powers conferred by its charter, the court will not decree forfeiture of the charter. State *v.* Consolidation Co., 46 Md. 3.

5. Certain *Wisconsin* railroad corpora-

**V. Connecting Carriers in Their Relation to Freight.**[1] — Where a carrier accepts goods to be transported by connecting companies to a destination beyond its line, at a stipulated rate of freight, and the consignor is subsequently charged a higher rate by such companies, the receiving carrier is responsible to him for the excess.[2] But where a connecting carrier pays illegal back

tions were consolidated with others of Illinois, on terms which, in effect, required that the consolidated company should, when operating in Wisconsin, be subject to its laws. It was held that Wisconsin could legislate for the company in that State, precisely as it could have legislated for its own original companies if no consolidation had taken place, respecting rates for domestic transportation of the character subject to the State jurisdiction. Peik *v.* Chicago & Northwestern R. Co., 94 U. S. 164.

A railroad forming a continuous line in two or more States, and owned and managed by a corporation whose corporate powers are derived from the legislature of each State in which the road is situated, is, as to the domestic traffic in each State, a corporation of that State, subject to State laws not in conflict with the Constitution of the United States. Stone *v.* Farmers' Loan & Trust Co., 116 U. S. 307; s. c., 23 Am. & Eng. R. R. Cas. 577. *Compare* Providence Coal Co. *v.* Providence, 26 Am. & Eng. R. R. Cas. 44; Scofield *v.* Lake Shore, etc., R. Co., 43 Ohio St. 571; s. c., 23 Am. & Eng. R. R. Cas. 612; McDuffee *v.* Portland, etc., R. Co., 53 N. H. 430; People *v.* Wabash, etc., R. Co., 104 Ill. 476; 106 Ill. 236. See also Horne *v.* Boston, etc., R. Co., 18 Fed. Rep. 50; but *compare* Wabash, etc., R. Co. *v.* Illinois, 118 U. S. 557; s. c., 26 Am. & Eng. R. R. Cas. 1.

The franchises to build or own and manage a railroad, and to take tolls thereon, are not necessarily corporate rights, and may be assigned; but the franchise to form or be a corporation and act in a corporate capacity is legislative, and not the subject of sale or transfer except by some positive provision of statute law pointing out the mode of transfer. Rogan *v.* Aiken (Tenn.), 9 Am. & Eng. R. R. Cas. 201.

The bill alleged that a particular railroad, with all its property, effects, and franchises, was sold under the proceedings by the State against delinquent railroads, and subsequently resold by the purchaser to an individual named, and by him to the defendant, who had continued to operate the road under the charter of the original corporation, and had charged and received from the complainants excessive freight. *Held*, upon demurrer, that the defendant was not the corporation, and that the bill was properly filed against him as an individual. Rogan *v.* Aiken (Tenn.), 9 Am. & Eng. R. R. Cas. 201.

**Charter Provisions as to Freight Confined to the State.** — The rate to which the Southern Pacific R. Co. was limited by its charter referred merely to the road authorized to be built and operated in Texas; and a charge of freight in excess of the limits prescribed by its charter, over a road which the company owns and operates out of Texas, would be no violation of the charter provisions, nor give rise to actions for charges in excess of the charter rates. Knight *v.* So. Pac. R. Co., 41 Texas, 406; and see Racine & Wis. R. Co. *v.* Farmers' Loan & Trust Co., 49 Ill. 331.

1. See also *infra*, this title, Discrimination.

2. Detroit & Bay City R. Co. *v.* McKenzie, 43 Mich. 609; s. c., 9 Am. & Eng. R. R. Cas. 15.

It was also held in this case that a variance in describing the defendant's undertaking as one for the carriage of the goods for the whole distance, is immaterial.

A railroad company received 100 bales of cotton to be transported over its own and connecting lines, and gave a bill of lading which contained the following provisions: "It is understood that railroads connecting with this line recognize the bill of lading, and will settle freight bill accordingly;" and "Rates and delivery guaranteed only from Ft. S. to W. Cotton $1.07 per 100 lbs." In an action by the shipper against the company which gave the bill of lading, to recover an overcharge of freight collected at W., and the greater part of which was made by connecting carriers, *held:* (1) That, by the contract of carriage, the defendant bound itself that not more than $1.07 per 100 lbs. should be collected of the plaintiff for transporting the cotton, over its own and connecting lines, to its destination, and the defendant is therefore liable for the whole amount of the overcharge; (2) that this liability is not affected by a stipulation, in the same contract, that the defendant shall not be held liable for dam-

charges and collects from the consignee, not only such charges, but illegal freight for itself, it is only liable to the penalty for its own excessive charge.[1]

**VI. Legality of Rates.—1. What are Lawful Freight Rates.**—Subject to the common-law condition that freight charges shall be reasonable, and to the further limitations which may be imposed by statute as already explained, the carrier is authorized to fix his charges for services.[2] He may refuse to accept a consignment of goods unless previously paid the price of their transportation, or, having conveyed them to their destination, may decline to deliver them until paid.[3] The carrier's refusal to undertake the transportation after tender or payment of the proper freight is ground for damages.[4] It is not necessary, to support an action for refusing to carry, that the satisfaction should have been tendered in the strict sense of that term as applied to antecedent debts. It is sufficient if the consignor was prepared to deal for ready money, and signified that willingness to the carrier: the money is not required to be paid down until the carrier receives the goods, which he is bound

ages to the cotton after it has left its own line, as such stipulation has no relation to that part of the contract which fixes and guarantees the rate of carriage. L. R. & F. S. R. R. *v.* Daniels, 49 Ark. 352; s. c., 32 Am. & Eng. R. R. Cas. 479; *citing* Killian *v.* Ashley, 24 Ark. 511, 517; Brandt Sur. & Guaranty, § 171.

1. While *Wisconsin* act of 1873 giving to injured parties three times the excess collected from them was in force, defendant, a Wisconsin company, received plaintiff's goods from another company in Wisconsin, paying as back charges thereon a greater sum than such other company could lawfully charge, and, on delivery of the goods to the plaintiff, collected from them the amount of such back charges, together with illegal charges for carriage upon its own road. *Held*, that plaintiff could recover from defendants only three times the excess in its charges for carriage on its own road, and not for the excess in the charges of the other company. Streeter *v.* Chicago, Mil. & St. P. R. Co., 40 Wis. 294.

It was held, in Wisconsin, that when goods are shipped by one company for delivery at a point on a connecting road, and charges at the highest rate to the junction equal the charges for the whole distance, the sum collected should be divided between the two companies on some equitable principle, to be determined by the courts in case their aid should be involved. Ackley *v.* Chicago, etc., R. Co., 36 Wis. 252. In this case, goods were shipped over a certain railroad to O., on the defendant's road. The charge for carriage on the first road to the junction equalled the charge for the whole transportation to O., and the defendant company, on receiving the goods from the first company, paid the full freight, and, having then carried the goods to O., demanded from plaintiff, not only the freight it had paid the first company, but further compensation for themselves. *Held*, that they could not do this; and in an action for recovery of the goods withheld by the defendant until payment of the extra charge, judgment was given for plaintiffs.

In Owen *v.* St. Louis, etc., R. Co., 83 Mo. 454; 25 Am. & Eng. R. R. Cas. 371, goods were received by a railroad company on the statement by the company's agent that his road had no authority to carry to the point of destination, which was on another railroad line; and separate bills of lading were issued, one for the defendant company to a junction, and one for the connecting company; and on receipt of the freight charges, the same were divided. *Held*, this was not a through contract, and defendant's rates were not to be considered as through rates in ascertaining whether the charge was excessive.

2. See *supra*, this title, Freight at Common Law and Statutory Regulations of Freight.

3. Pickford *v.* Grand Junction R. Co., 8 M. & W. 372; Story on Bailments, § 585.

See also *infra*, this title, Lien for Freight.

4. Woods Railway Law, vol. 1. p. 10.

to carry. Having thus once acquired lawful possession, he need not surrender them, where the carriage is dispensed with, unless first paid his freight.[1] But the carrier's right to sue for the freight does not accrue until delivery.[2]

Where a maximum of lawful charges is fixed by statute, charges in excess thereof are conclusively regarded as unreasonable; and in an action to recover the excess, evidence to prove the reasonableness of the excessive charge is not admissible.[3] Where a statute prohibits "average" charges of more than a certain rate, this will not prevent some charges from being greater than the average.[4]

The court cannot make a contract for the parties by prescribing the facilities which should be given to complaining express-companies, and the rates, times of payments, etc., therefor.[5]

Contracts as to freight charges and facilities, by common carriers owing certain public duties, will not be enforced where their enforcement would prevent the discharge of such duties.[6]

**2. What May be Included in Freight Charges.**—Where a maximum of lawful freight charges is fixed by statute or otherwise, questions sometimes arise as to what charges for incidental services, etc., are permitted. Charges for extra or special services not properly belonging to transportation, but needed in and about it, may sometimes be lawfully made.[7] The following are instances of such extra rates as have been held to be authorized: Transportation from depot to elevator, and charges for demurrage;[8] charges for the expense of stopping for all articles conveyed a less distance than four miles, when such charges were made under the author-

1. Pickford *v.* Grand Junction R. Co., 8 M. & W. 372.

2. Barnes *v.* Marshall, 18 Q. B. 785; 21 L. J. Q. B. 388.

See also *infra*, this title, LIEN FOR FREIGHT.

3. Heiserman *v.* Burlington, etc., R. Co., 63 Iowa, 732; 16 Am. & Eng. R. R. Cas. 46.

4. Hersh *v.* N. C. R. Co., 74 Pa. St. 181.

5. St. Louis, Iron Min. & Southern R. Co. *v.* Southern Express Co., 118 U. S. 3; 23 Am. & Eng. R. R. Cas. 545.

6. Chouteau *v.* Union R. Co., 4 West. Rep. 397 (St. Louis Ct. of Appeals). Hence, on application for specific performance of a contract by a railroad company, to carry across switches and over plaintiffs' private railroad to a factory, at same rates charged to others for similar services, it was held that the contract could not be enforced when the increase of the railroad business imposed on the railroad company public duties inconsistent with such contract. *Citing* Thomas *v.* R. Co., 101 U. S. 83; Pac. R. Co. *v.* Seely, 45 Mo. 212, 219; Marsh *v.* Fairbury, etc., R. Co., 64 Ill. 414; Peoria, etc., R. Co. *v.* Coal Valley Mining Co., 68 Ill. 489; State *v.* Hartford, etc., R. Co., 29 Conn. 538; New Eng. Exp. Co. *v.* Me. Cent. R. Co., 57 Me. 188, 196. Such a defence is to be carefully scrutinized, to prevent carriers from repudiating contracts under pretence of interference with public duty.

7. National Tube Works *v.* R. Co. (Pa., Jan., 1887), 6 Cent. Rep. 102; 28 Am. & Eng. Corp. Cas. 13.

8. Charges complained of as excessive were recognized by the court as being within the legal rate, the court reducing their apparent height by regarding expenses from depot to elevator and charges for demurrage as not a part of the real rate. Owen *v.* R. Co., 83 Mo. 454; 25 Am. & Eng. R. R. Cas. 371.

The fact that a railroad company for many years has paid the charge for hauling freight from wharves to its station does not bind it to continue that practice; and if not bound by contract, it may stop doing so at any time. Prov. Coal Co. *v.* Prov. & W. R. Co. (R. I.), 26 Am. & Eng. R. R. Cas. 42.

ity of the special act regulating the company's rates;[1] expenses necessarily incurred in the preservation of the consignment from extraordinary perils, not properly arising from their ordinary duty as common carriers;[2] the furnishing of food for live-stock where the owner has not provided for them;[3] when unexpected difficulties occur during the transit, and the consignor pays an additional sum to avoid delay, and for extra services, he cannot recover it as paid without consideration;[4] where extraordinary services were by statute made to authorize an extra charge, providing, maintaining, and working signalling and interlocking apparatus at a junction with a colliery siding were held to be such services, as also were the providing coal-chutes for unloading coal in wagons.[5]

The following are instances of extra freights which could not be properly collected: Station accommodations, the use of sidings, weighing, checking, clerkage, watching, and labelling are *prima facie* "services incidental to the duty or business of a carrier," within a statute;[6] as are also haulage and shunting, in marshalling the traffic from collieries, with services incidental to conveyance,[7] and

1. Pryce *v.* Monmouthshire R. Co., L. R. 4 App. Cas. 197; 49 L. J. Exch. 130.

2. Story on Bailments, 586.

3. Great Western R. Co. *v.* Swaffield, 43 L. J. Exch. 89; L. R. 9 Exch. 132.

4. Detroit & Bay City R. Co. *v.* McKenzie, 43 Mich. 609; 9 Am. & Eng. R. R. Cas. 15. In this case masts *en route* from Michigan to the Maine seacoast, *via* various roads, were detained by the breaking down of cars and some reloading; and on account of which, promise was made by plaintiff to pay $500, besides certain charges for assistance and repairs, and payment was made therefor, apparently by a transportation company at Buffalo. *Held*, that plaintiff could not recover back such extra money. *Citing* Moore *v.* Detroit Locomotive Works, 14 Mich. 266.

5. Dunkirk Colliery Co. *v.* Manchester, etc., R. Co., 2 Nev. & Mac. 402.

6. By an *English* act of 1863, "The maximum rates of charges to be made by the company for the conveyance of animals and goods, including the tolls for the use of their railways and wagons or trucks, and for locomotive power, and every other expense incidental to such conveyance (except a reasonable sum for loading, covering, and unloading the goods at any terminal station of such goods, and for delivery and collection, and any other services incidental to the duty or business of a carrier, where such services or any of them are or is performed by the company), shall not exceed" certain sums. *Held*, that station accommodation, the use of sidings, weighing, checking, clerkage, watching, and labelling, provided and performed by the company in respect of goods traffic carried by them as carriers, may be, and *prima facie* are, "services incidental to the duty or business of a carrier," within § 51. Whether they are so in any particular case is a question of fact for the railways commissioners to decide; and if found by them to be so, such services may be the subject of a separate reasonable charge, in addition to the rates prescribed. Hall *v.* London, etc., Co., L. R. 15 Q. B. D. 505; 22 Am. & Eng. R. R. Cas. 446. In this case, it was said that while, under the English Act of 1845 toll for the "use of the railway" includes the use of the stations, yet this was because of the interpretation clause of that act, which defined "railway" as including the works authorized by the special act; and that, where the special act required a different interpretation, these tolls would not include use of the stations.

7. Dunkirk Colliery Co. *v.* Manchester, etc., R. Co., 2 Nev. & Mac. 402.

A company which performs incidental services at terminus,—as, collecting or delivering goods,—may charge therefor; but services at the station, which properly belong to the railroad business, cannot be styled incidental services, and charged for as such, so as to make the railroad charges, in effect, above the maximum legal rates. Kempson *v.* Gr. W. R. Co., 1 Law T. Rep. 218.

The *English* commissioners refused to allow any difference in rates based on difference in cost of the goods staff at

the back haulage of empty wagons;[1] providing and working signalling and interlocking apparatus at colliery junction where the branch road belongs to the carrier and is used to some extent for general traffic;[2] the word "tolls," as used in the *English* statute, *prima facie* includes everything that the company do as carriers, and a carrier is not entitled to charge any sum as a "terminal charge" over and above the tolls authorized by its act, and such charge can only be made by previous agreement;[3] the cost of cleansing a cattle car in which a cow had been carried is not a service performed for the owner, within a clause permitting a charge "for any extraordinary services" in the conveyance of live-stock;[4] the danger from transportation of oil through a city should not materially affect rates;[5] delay in unloading coal at a particular station is not a cost which ought to make the through rate to that station higher.[6]

**3. Proportionate Freight for Long and Short Haul.**[7]—Where a statute or a railroad charter fixes a maximum of freight charges, it is usual to also name a limit of distance within which such charge shall be lawful; the maximum is commonly placed at so much for specified articles "for every hundred miles." This has resulted in a conflict of authority as to whether, where goods are transported for a less distance, the freight should be proportionately reduced. It has been held, in *Tennessee*, that the intention of the legislature was not to apportion the charges so that a carriage for a less distance than one hundred miles should earn proportionately less freight, but only to fix the maximum.[8] On the other hand,

depots, where the goods, as to which the rates of charge were complained of, were not handled by the company, but simply run into their depots onto sidings. Girardot *v.* Midland R. Co., 4 R. & Canal Tr. Cas. 292.

1. Where a railroad company was authorized to haul wagons, etc., at named maximum rates, and to charge beyond the maximum for extra services, by agreement with the owners of the goods, it was held that, in the absence of agreement, they had no lien for special charges, for hauling the goods, beyond maximum tolls, because of their return of the empty wagons. And the authority, to sell for tolls, given by 8 & 9 Vict. c. 20, § 97, did not therefore warrant a sale in this case for the special rates. And demand required (14 C. B. [N. S.] 132) before sale under that statute would not be fulfilled by demand for these illegal rates. Field *v.* Newport, etc., R. Co., 3 Exch. 409. Subject to some special exceptions, a lien at common law confers no right of sale. Thames Co. *v.* Derrich Co., 1 J. & H. 93.

2. Neston Colliery Co. *v.* L. & N. W. R. Co., 4 R. & Canal Tr. Cas. 257, distinguishing the case from that of Dunkirk Colliery Co. *v.* Manchester, etc., R. Co., 2 R. & Canal Tr. Cas. 402, where the siding was a private one and where an opposite decision was made. See Lancashire, etc., R. Co. *v.* Gidlow, 1 R. & Canal Tr. Cas. 9.

3. Pegler *v.* Monmouthshire R. Co., 30 L. J. Exch. 249; 6 H. & N. 644. See also Locke *v.* Northeastern R. Co., 21 Sol. Jour. 835.

4. Cox *v.* Great Eastern R. Co., 38 L. J. C. P. 151; L. R. 4 C. P. 181.

5. The danger from transportation of oil through the manufacturing city of Pittsburgh, when apportioned upon all the business, is deemed so unimportant as not to materially affect the rates which should be charged. Brady *v.* Pa. R. Co., 2 Inter. C. Rep. 78; 2 Inters. C. Rep. 132; 34 Am. & Eng. R. R. Cas. 603.

6. Belfast, etc., R. Co. *v.* Great Northern R. Co., 4 R. & Canal Tr. Cas. 159, If any charge can be made for the delay, it cannot be collected by adding it to the rates.

7. *Compare* with this section the authorities cited *infra*, this title, DISCRIMINATION IN FREIGHT.

8. In Rogan *v.* Aiken (Tenn.), 9 Am. & Eng. R. R. Cas. 201, the decision related to the *Tennessee* statute giving to

the supreme courts of *South Carolina*, *Alabama*, and *Georgia* have construed similar language as plainly requiring that the charge for less than the distance specified in the statute should be in the proportion of the charge for that distance.[1] Where the statute fixes a unit, it has been held, in *Texas*, that the same charge might be made, for the transportation of an amount less than the unit so fixed as that established for the unit itself.[2] Where a statute established a rate per ton per mile for transportation a specified distance, and left to the company the duty of naming a reasonable rate for a shorter carriage, it was held unreasonable, as a matter of law, to fix a higher rate for the shorter carriage than for the full specified distance; within the limit for the specified distance, the jury should determine the reasonableness of the rate.[3]

railroad companies in that State the privilege of carrying freight and passengers, "provided that the charge for transportation or conveyance shall not exceed 35 cents per 100 pounds on heavy articles, and 10 cents per cubic foot on articles of measurement, for every hundred miles, and five cents a mile for every passenger." *Held*, that the intention of the legislature was to confer on each company the right to charge, as a common carrier, for freight and passengers carried over its road, or any part of it; but that the intent was not to proportion the charges so that a carriage for a less distance than 100 miles should earn proportionately less freight, but only to fix the maximum.

1. In Knox *v.* Railroad Co., 5 S. Car. 22, the *South Carolina* statute authorized the company to charge "for the transportation of goods by weight, not exceeding 50 cents per 100 pounds per 100 miles." The court construed the language as plainly requiring that the charge for less than 100 miles should be in the proportion of the charge for the distance specified in the statute.

An *Alabama* statute provided that a company might, "for transportation of local freight, demand and receive not exceeding 50 cents more than the rate charged for the same description of freight over the whole line of the road." The supreme court of that State held that "rate" was the emphatic word of the sentence, and was employed in the sense of proportion; and that the 50 cents allowed was in addition to the rate per mile of the charge over the whole road." State, *ex rel. v.* Mobile & Montgomery R. Co., 59 Ala. 321; Mobile & Montgomery R. Co. *v.* Steiner, 61 Ala. 589. Stone, J., said: "We are aware that this may operate very oppressively on the railway corporation, when the transportation is over a short section of the road. The remedy is not with us." 59 Ala. 325.

2. The *Texas* Rev. Stat. art. 4257 provided that "Railroad companies may charge and receive not exceeding the rate of 50 cents per 100 miles, for the transportation of freight over their roads. . . . provided, that, when the distance from the place of shipment to the point of destination of any freight is fifty miles or less, a charge not exceeding 30 cents per 100 pounds may be made for the transportation thereof. *Held*, that a railroad, has under this statute, the right to charge, for less than 100 pounds, the same sum which it could charge for 100 pounds; 100 pounds being the unit fixed by the statute. Murray *v.* Gulf, Colo. & Santa Fe R. Co., 63 Texas, 407; 22 Am. & Eng. R. Cas. 464.

The charter of the Georgia Railroad & Banking Co. provided "that the charge of transportation or conveyance shall not exceed 50 cents per 100 pounds on heavy articles, and 10 cents per cubic foot on articles of measurement, for every 100 miles." *Held*, that the charge for less than 100 miles must be in proportion to that rate. Trippe, J., delivering the opinion, said that, although the majority of the court had no hesitation in the decision, he felt the question to be one of some difficulty; that the decision could be justified, however, by the existence of two other provisions in the charter, one allowing the farming out of portions of the road—which under the charter might be, for distances less than 100 miles, subject to the rates above mentioned," the other provision allowing the use of a section of the road, before completion of the whole road, "subject to the rates before mentioned." Arnold *v.* Georgia R., etc., Co., 50 Ga. 304.

3. Campbell *v.* M. & C. R. Co., 23 Ohio St. 168; Peters *v.* R. Co., 42 Ohio St. 283; 18 Am. & Eng. R. R. Cas. 492;

Where a statute limited rates for local carriage to a proportionate part of the rate for similar goods for the whole line of the railroad, this will not be construed to mean a proportionate part of the *pro rata* freight which the company receives where goods are carried over more than one railroad, but to mean a proportionate part of the charge for goods consigned at one terminus of the road and delivered at the other.[1]

**4. Authority of Agents as to Freight Contracts.**—Where tariffs of freight rates and passenger fares are established and posted by the president of a railroad company, and such freight and fares are received and appropriated by the company without objection, the legal presumption is that the president acted by authority of the company.[2] A company cannot avoid a freight contract, of a board of directors, to carry at specified rates for a fixed time.[3] Several instances showing the authority of local agents of railroad companies to make freight contracts are cited in the notes.[4] The

Smith *v.* Ft. W. & C. R. Co., 23 Ohio St. 10.

1. Mobile & Montg. Ave. R. Co. *v.* Steiner, 61 Ala. 597; Lotspeich *v.* Central R. & Bkg. Co. of Georgia, 73 Ala. 306; 18 Am. & Eng. R. R. Cas. 490. Hence complainant cannot contrast charges made against him with charges for goods carried over more than the one road.

In Camden & Amboy R. Co. *v.* Briggs, 21 N. J. 466 (1848), it was held that the restriction in the charter of the Camden & Amboy R. & T. Co., providing that they should not charge more than eight cents per ton per mile, applied to the whole line which they were authorized to perfect—that is, from New York to Philadelphia; that it did not apply merely to the railroad carriage, but also to the water conveyance. And it was also held that carriage by them over an auxiliary road from Trenton to Bordentown, authorized to be built by them and others, subject to the original acts of incorporation, came under the same restriction. Affirmed, by divided court, in 22 N. J. 623.

2. Hilliard *v.* Goold, 34 N. H. 230.

3. A board of directors authorized to "do all acts needful to carry into effect the objects for which it [the corporation] was created." may contract for transportation at specified rates for a fixed time; and the company cannot avoid carrying at the charges specified in the contract, on the ground that the period was in the future and for a fixed length of time. Cleveland & M. R. Co. *v.* Himrood Furnace Co., 37 Ohio St. 84; 3 Am. & Eng. R. R. Cas. 471.

4. Where a shipper applies to the local freight agent of a railroad company to get the rates upon a proposed shipment of a certain amount of grain to a given point, and the agent, acting by authority, gives him the rate, and he agrees to ship at that rate, and then goes to the master of trains of the company, and makes arrangement with him for the requisite number of cars per week for the purpose of making such shipment,—this amounts to a special contract on the part of the company to make the shipment at the rates named by the freight agent, and to furnish the cars in the manner agreed upon by the shipper and master of trains. Toledo, W. & W. R. Co. *v.* Roberts, 71 Ill. 540.

A local freight agent of a railroad company has no power, as such, to make a contract for the transportation of freight to a point beyond the terminus of the company's road. The authority of the local freight agent must be shown either specially, or be implied from former conduct or course of dealing. Citing Grover, etc., *v.* R. Co., 70 Mo. 672. Evidence of a prior oral contract is inadmissible where the written contract purports to cover the entire agreement. Turner *v.* St. Louis & San F. R. Co., 20 Mo. App. 632.

Although the station agent of defendant had no authority to contract for transportation beyond the terminus of its own line; yet when defendant had made other similar contracts prior to this, being represented by said station agent, which contracts had been recognized and carried out by defendant, this was "a course of dealing between plaintiff and defendant's agent, from which the authority of the agent to make the contract might be inferred." Besides, defendant's general

consignor of goods, as a general rule, has implied authority from the consignee to stipulate as to terms of transportation; having the power to make the delivery, he is presumed to have the authority necessary to carry it into effect.[1]

**VII. Remedies for Excessive Freight.—1. Carrier's Obligation to Refund Excessive Freight.**—It is settled that the carrier may be compelled, in an action for money had and received, to repay any excess over the freight which may lawfully be charged.[2] Many statutes impose upon the carrier, or specified officers of the company, a penalty, varying in different States in its severity, for the offence of exacting unlawful freight.[3] In an action for such penalties, the statutory procedure must of course be followed. These statutory penalties are recoverable in addition to the actual excess over the lawful rates, and the carrier is not permitted to allege that this would amount to a double punishment, the penalty alone being considered to be the punishment.[4]

freight agent, who has unquestioned right to make such contracts, recognized its validity in this case. White *v.* Mo. Pac. R. Co., 19 Mo. App. 400.

Where a contract for rebate or drawback was made with the railroad's agent, with knowledge on the shipper's part that the routine would bring the money to him through such agent, and to that routine the shipper gave assent, *held*, that the railroad agent became agent for the shipper for the purpose of receiving the money, whether the latter gave him distinct authority so to do or not; and a payment of the rebate to the agent would exonerate the company. Pittsb., F. W. & C. R. Co. *v.* Fawsett, 56 Ill. 513; 4 Am. R. Rep. 405. And an account of the drawbacks, approved by the proper officers, and a check in the agent's favor for the money, were held admissible in evidence in the company's behalf.

1. Ryan *v.* Mo., Kansas & Texas R. Co., 65 Tex. 13; 23 Am. & Eng. R. R. Cas. 703, *citing* Redf. on Car. § 52; Hutch. on Car. § 265.

2. Evershed *v.* London, etc., R. Co., 2 Q. B. Div. 254; 3 App. Cas. 1029: Great Western R. Co. *v.* Sutton, L. R. 4 R. L. Cas. 226; Heiserman *v.* Burlington, etc., R. Co., 16 Am. & Eng. R. R. Cas. 46; Fuller *v.* Chicago, etc., R. Co., 31 Iowa, 187; Fisher *v.* New York Central, etc., R. Co., 46 N. Y. 644; Mobile, etc., R. Co. *v.* Steiner, 61 Ala. 594; Smith *v.* Chicago, etc., R. Co., 43 Wis. 686; Graham *v.* Chicago, etc., R. Co., 53 Wis. 473. See also authorities cited in succeeding notes.

3. See *supra*, this title, Statutory Regulations of Freight.

4. Heiserman *v.* Burlington, C. & N. R. Co., 16 Am. & Eng. R. R. Cas. 46. In Fuller *v.* Chicago, etc., R. Co., 31 Iowa, 187, Beck, J., said: "The recovery of the penalty and overcharge will not be in the nature of a double punishment. The recovery of the overcharge is no punishment at all. . . . The penalty is the punishment." See also Fisher *v.* N. Y. C. & Hudson R. R. Co., 46 N. Y. 644; Gooch *v.* Stephenson, 13 Me. 371.

The inquiry as to the nature of the penalty is material in yet another point, viz., the right to sue for recovery of overcharge independently of the statutory suit to recover penalty. If the penalty be regarded as compensatory, of course no other action than the statutory one for the penalty can lie. And doubtless such is the case where the penalty is several times the amount of the overcharge, as in some States. But where it was to be within fixed limits, of $100 to $200, as in Iowa Act 1869, the limit precluded the idea of compensation, for the overcharge might be far beyond $200; and therefore the Iowa court held that the penalty was not compensatory, and did not deprive a person from recovering the excess; that he might recover such excess, and also the penalty.

Fuller *v.* Chicago & N. W. R. Co., 31 Iowa, 187; and see Salem Turnpike *v.* Hayes, 5 Cush. (Mass.), 458, where it was held that a statute, in giving a fine not exceeding $50, for the use of the corporation, in case of obstruction, etc., to the road, was not intended to take away any common-law remedies for such injury or obstruction.

A statute imposing penalties for charges in excess of a certain rate does not take

Where a consignor paid, under protest, freight charges in excess of those allowed by statute, it was held that the subsequent repeal of the statute did not prevent his recovery of damages, the measure of which was the amount paid in excess of the legal rate, with interest at least from the commencement of the action; but the right of action for the penalty falls with the repeal of the statute imposing the penalty. The principle involved was considered to be that rights of action, whether sounding in tort or in contract, which are not granted by a statute, but, while connected with the existence of the statute, result from the application of common-law principles, are not lost by the repeal of the statute.[1]

Although a statute has been held to be unconstitutional which left it to the jury to determine whether or not a charge was excessive and unreasonable, in order to ascertain whether a penalty is recoverable,[2] yet, where the action is merely for recovery of the illegal excess over reasonable rates, this is a question which is a proper one for a jury.[3]

*Mandamus* will not be permitted to be employed as a remedy for illegal freight charges if another remedy exists.[4]

One with whom a contract of carriage was made, even though not the owner of the goods, is entitled to sue for the recovery of excessive freight, under *Wisconsin* statutes.[5]

**2. What Constitute Voluntary Payments of Excessive Freight.**—In the view of many of the authorities, it is not essential, to the right of recovery for the excess of freight illegally charged, that the payment thereof should have been made under protest. The doctrine thus established is sometimes based upon the inequality of the contracting parties where the carrier controls the only outlet and thus compels his employment, rendering protest a useless form, and placing the consignor under compulsion or moral duress.[6]

away the injured party's action for damages. Mobile & Montg. R. Co. *v.* Steiner, 61 Ala. 594.

1. Graham *v.* Chicago, M. & St. P. R. Co., 53 Wis. 473; Smith *v.* Chicago & N. W. R. Co., 43 Wis. 686.

2. Louisville, etc., R. Co. *v.* Railroad Com. of Tennessee, 16 Am. & Eng. R. R. Cas. 1.

3. Peters *v.* Railroad Co., 42 Ohio St. 275.

4. State *v.* Montgomery & Mobile R. Co., 59 Ala. 321. And petition for *mandamus*, since it must be particular, is insufficient if it pray for a *mandamus* to compel carriage of bales of cotton, without stating the number of bales. State *v.* Montgomery & Mobile R. Co., 59 Ala. 321.

5. One with whom a contract for the carriage of goods is made, and who is described therein as the consignor, consignee, and sole owner, may maintain an action to recover an overcharge exacted by a carrier as a condition of the delivery of the goods, although he was not in fact the owner, and did not personally furnish and pay the overcharge. The plaintiff in such case is "a trustee of an express trust," within the meaning of § 2607, *Wisconsin* Rev. St. The court say they do not attempt to reconcile the conflicting decisions respecting the right of others than the owner, in general, to sue the carrier. Waterman *v.* Chicago, M. & St. P. R. Co., 61 Wis. 464; 18 Am. & Eng. R. R. Cas. 486. The consignor, or shipper, is also such a "trustee." Hooper *v.* C. & N. W. R. Co., 27 Wis. 91. See Allen *v.* Kennedy, 49 Wis. 549.

Under a statute enacted in Wisconsin, the persons injured by overcharge could only sue for the penalty in the discretion of the State railroad commissioner. Smith *v.* Chicago, etc., R. Co., 43 Wis. 686.

6. In a forcible opinion in Heiserman *v.* Burlington, etc., R. Co., 53 Iowa, 732; 16 Am. & Eng. R. R. Cas. 46, it was held

So, no protest is necessary in order to recover excessive freight where the statute expressly gives a right of action to enforce repayment of the excess. [1] It has been further held that, in an ac-

that the payment need not be made under protest, as it would be useless to protest. In Mobile & Montgomery R. Co. *v.* Steiner, 61 Ala. 595, the court said, in respect to an objection that the excess had been paid voluntarily: "Railroads have so expedited and cheapened travel and transportation, have so driven from their domain all competing modes of transportation, that the public is left no discretion but to employ them or suffer irreparable injury, in this age of steam and electricity. They have their established rates of charge, and these the shipper must pay or forego their facilities and benefits. To object or protest would be an idle waste of words. The law looks to the substance of things, and does not require useless forms or ceremonies. The corporation and the shipper are in no sense on equal terms; and money thus paid to obtain a necessary service is not voluntarily paid, as the law interprets that phrase. In the case of the Chicago & Alton Railroad Co. *v.* C., V. & W. Coal Co., 79 Ill. 121, the court, in reply to the objection that the money was voluntarily paid, said: 'It can hardly be said these enhanced charges were voluntarily paid by appellees. It was a case of life or death with them, as they had no other means of conveying their coals to the markets offered by the Illinois Central, and were bound to accede to any terms appellants might impose. They were under a sort of moral duress,'" etc. See, to same effect, Parker *v.* Gr. Wes. R. Co., 7 Man. & Gr. 253, where the action was *assumpsit* for money had and received: the court ruled that the action was well brought. See also Peters *v.* Marietta, etc., Co., 42 Ohio St. 275; 18 Am. & Eng. R. R. Cas. 492; 2 Greenl. Ev. 121; Caldwell *v.* Pedin, 3 Watts (Pa.), 327; Harmony *v.* Bingham, 2 Kerr (12 N. Y.), 99; Bos. & S. Glass Co. *v.* City of Boston, 4 Metc. (Mass.) 181; Chandler *v.* Sanger, 114 Mass. 364; Stephen *v.* Daniels, 27 Ohio St. 527; Tuttle *v.* Everett, 51 Miss. 27; Howe *v.* State, 53 Miss. 57; Robinson *v.* Ezzell, 72 N. Car. 231; First Nat. Bk. *v.* Watkins, 21 Mich. 483; Atwell *v.* Zeluff, 26 Mich. 118; McKee *v.* Campbell, 27 Mich. 497; Carew *v.* Rutherford, 106 Mass. 1; L. & I. R. Co. *v.* Pattison, 41 Ind. 312; Streeter *v.* R. Co., 40 Wis. 294; Chicago & Alton R. Co. *v.* Coal Co., 79 Ill. 121; Parker *v.* Gr. Wes. R. Co., 7 Man. & Gr. 253; R. Co. *v.* Gidlow, L. R. 7 Eng. & Irish App. Cas. 517; Philanthropic Assoc. *v.* McKnight, 35 Pa. St. 470; Wood *v.* Lake, 13 Wis. 84; Wheaton *v.* Hibbard, 20 Johns (N. Y.) 290; State Bk. *v.* Eusminger, 7 Blackf. (Ind.) 105.

In West Virginia Transp. Co. *v.* Sweetzer, 25 W. Va. 434; s. c., 22 Am. & Eng. R. R. Cas. 469, it was held that, if a person be engaged in buying oil in an oil-region and shipping it over a railroad, and there is no other outlet for this oil except over this railroad; and under these circumstances he agrees to pay to the railroad company more than its legal rates of charge for the freight of such oil, and does make such payments from time to time, in order that he may get his oil transported to market in the only manner in which he can transport it, though such payments are made after each shipment of oil has been made and the oil delivered, such payment is not to be considered as voluntary but under compulsion, and the excess may be recovered back in an action for money had and received; or it may be offset against the company's charge in *assumpsit* brought by the company against the shipper. And it was further held that express threats not to deliver in future were unnecessary in order to the existence of compulsion.

No protest was made in Railroad Co. *v.* Coal Co., 79 Ill. 121, but the shipments, which covered a period of four months, could only be made by the defendant railroad company, and it was held that the coal company could recover the overcharges. See also 1 Rorer on Railroads, 569–572; 1 Redf. on Railroads, (7 Ed.), 445–449.

1. Streeter *v.* Chicago, etc., Co., 40 Wis. 300.

**Mistake.**—A payment cannot well be said to be voluntary when it is made in consequence alone of a false view of the facts. A party making a payment in the mistaken belief that the sum paid was the true balance appearing due from an account before him, and not noticing a deduction therein, paid a larger sum than he intended, may recover the excess. Balto. & Ohio R. Co. *v.* Paunce, 6 Gill. (Md.) 68 See also National Tube Works *v.* Baltimore, etc., R. Co. (Pa.), 28 Am. & Eng. R. R. Cas. 18.

Action does not lie to recover back a voluntary payment by mutual mistake of law. Elliott *v.* Swartout, 10 Pet. (U.S.) 153.

tion to recover excessive freight, the plaintiff need not prove that he demanded repayment before instituting his action.[1] Where the arrangement between the parties contemplated periodical settlements, and, if the charges against the consignor were not paid at the end of each month, shipments would no longer be made, such payments will not be considered as voluntary.[2]

In other instances, payments made under actual protest have been held to be not voluntary, and to authorize a recovery of the excessive freight: where, for example, a carrier, having in his possession a large amount of valuable merchandise, exacted excessive freight as the condition of delivery to the owner.[3] Where a

1. West Virginia Transp. Co. *v.* Sweetzer, 25 W. Va. 434; 22 Am. & Eng. R. R. Cas. 469. Green, J., said: "I would say . . . that it seems to me that the presumption would always be that a railroad company would continue to charge its fixed rates, whether a shipper protested or not; and that, if any shipper refused to pay the rates demanded, the railroad company would refuse to transport its goods." And said that the burden of proving willingness to carry future goods of a regular shipper, notwithstanding refusal to pay the unlawful charges, was on the railroad company. In McGregor *v.* Erie R. Co., 35 N. J. L. 89, 113, it was said: "The courts will not be illiberal in allowing a person to act upon his reasonable apprehension of such refusal, when the circumstances fairly show that, unless he does submit to the illegal demand, his rights will be withheld." In that case the payment was under protest. *Held*, that, since the corporation had the power to refuse carriage, the payment was not voluntary. *Citing*, in support of the remark quoted, Valpy *v.* Manley, 1 M., G. & S. 594; Morgan *v.* Palmer, 2 B. & C. 729; Steele *v.* Williams, 8 Exch. 624. The shipments in the New Jersey case were continuous, the payments being made at the close of each day.

In the English case of Evershed *v.* R. Co., 2 Q. B. D. 254; 3 App. Cas. 1059, the statute forbade discrimination, but did not in express terms give action for recovery of inequality in charges. Plaintiff had been paying the higher rate, but on learning of the inequality; thereafter, paid some charges under protest and some without protest. *Held*, he could recover back the differences paid under protest; but those paid without protest he was not allowed to recover. Payments prior to knowledge of the discrimination he was not allowed to recover, because his agent did have knowledge, and thus he had constructive knowledge.

2. **Monthly Settlements.**—In Peters *v.* R. Co., 42 Ohio St. 275; s. c., 18 Am. & Eng. R. R. Cas. 492, it was held that the payments would not be considered voluntary so as to preclude recovery if the payments, by arrangement of parties, are made at the end of each month. The court said, p. 285, "The charges of each month were required to be paid at the end of the month, or future freight would not be carried." See also, as to periodical settlements, Swift *v.* U. S., 111 U. S. 22.

**Contract Price.**—In Lafayette & Ind. R. Co. *v.* Pattison, 41 Ind. 312, payments were made on shipments from time to time in excess of a rate fixed by contract: The railroad agent demanded freight at ordinary rates, and declined receiving the cars until payment, which was made under protest. *Held*, the payments were not voluntary, and might be recovered. See also *dictum* in R. Co. *v.* Lockwood, 17 Wall. (U. S.) 379.

3. Harmony *v.* Bingham, 2 Kernan (N. Y.), 99 (court of appeals); Harmony *v.* Bingham, 1 Duer (N. Y.), 209; Parker *v.* Bristol & Exeter R. Co., 6 Exch. 702; Ashmole *v.* Wainwright, 2 Q. B. 837.

Action for money had and received may be maintained under the circumstances above mentioned. Parker *v.* R. Co., 6 Exch. 602; Ashmole *v.* Wainwright, 2 Q. B. 837. See also Snowdon *v.* Davis, 1 Taunton, 358. It may be remarked, however, that in the first-named case, Pollock, B., said that he thought that that case, and also the case of Ashmole *v.* Wainwright, which it followed, were unsound for the reason that an action for money had and received must be for a definite sum; but he said that Parke, B., wished him to add that the doubt belonged exclusively to himself, and that the rest of the court were entirely satisfied with Ashmole *v.* Wainwright. In Astley *v.* Reynolds, 2 Salk. 916; 5 Geo. II.,

railroad company demands, on behalf of itself and of a connecting line, excessive freight, which is paid under protest, even though the company so collecting receives part of the amount as agent only, it has been held, in *England*, that the whole excess may be recovered from the company thus sued; and there, under such circumstances, the person thus compelled to pay excessive freight may recover, although he has not made the tender of any specific sum as a fair and reasonable charge.[1]

Illegal charges, paid under a mistake of facts as to distance, are recoverable.[2]

On the other hand, it has been held, in *New York*, that, where the statute does not fix the rate of freight, but suit is brought to recover the excess over what is reasonable at common law, if the rate has been continuously and voluntarily paid for a long time, there can be no recovery.[3] Where the payment was made after the goods had been carried and delivered, and without objection, protest, or notice of discontent, it was held, in *South Carolina*, that *assumpsit* would not lie to recover excessive freight.[4] The same doctrine was applied in a case arising in *Maryland*.[5]

**3. Statutory Penalties for Excessive Freight.**—It has been held, in several cases, that the statutory action for the recovery of the penalty therein named is an action sounding in tort, and not in contract.[6] A distinction is drawn where the apparent purpose of the statute is merely to recompense the party injured by the excessive

there was *assumpsit* for money extorted by duress of goods; but there a tender was made.

1. Parker *v.* R. Co., 6 Exch. 702.

2. National Tube Works *v.* Baltimore, etc., R. Co. (Pa.), 28 Am. & Eng. R. R. Cas. 13.

3. Where, during a period of many months, a shipper, with full knowledge of the facts, pays the carrier's charges without any complaint or remonstrance and in the absence of any statute rendering the charge unlawful, he cannot afterwards, on an allegation that the amount charged was unreasonable, recover the alleged excess. His payment must be considered voluntary. Killmer *v.* New York Central, etc., R. Co., 100 N. Y. 395; s.c., 23 Am. & Eng. R. R. Cas. 659.

The court said: "The company is doubtless better informed than the shipper as to what would be a compensatory or reasonable charge; but many of the facts which enter into the formation of a judgment on the question are accessible to the shipper, and it would not be in accordance with general principles of justice that he should be permitted to forbear all means of ascertaining the truth, and, after the lapse of years, for the first time open a question which he did not at the time of the transaction regard of sufficient importance to engage his attention." See also Evershed *v.* London, etc., R. Co., 2 Q. B. Div. 254; 48 L. J. Q. B. 22; L. R. 3 App. Cas. 1029.

Where payments were made from 1868 to 1872, inclusive, in excess of what the court determined to be the legal rates, it was held that the excesses could not be recovered back. Arnold *v.* Georgia R. & Bkg. Co., 50 Ga. 304.

4. Kenneth *v.* S. Car. R. Co., 15 S. Car. Law, 284.

5. In Potomac Coal Co. *v.* Cumb. & Pa. R. Co., 38 Md. 226 (1873), coal was shipped during the period 1864–1871. Afterwards the coal company—the shipper—sued the railroad company in *indebitatus assumpsit* to recover back a portion of the freight paid, on the ground that the rate of freight charged the coal company was illegal in that it exceeded the rates paid by other shippers. *Held*, that the money having been voluntarily paid under no mistake of facts, and there being no circumstances of duress, fraud, or extortion, the plaintiff was not entitled to recover.

6. Graham *v.* R. Co., 53 Wis. 473, approving of s. c., 49 Wis. 532, and Smith *v.* R. Co., 49 Wis. 443.

charge, and where the penalty imposed is evidently intended as a punishment. Where the statute provided that, in case of injury to live-stock in transportation, the carrier should be liable to the amount of double the injury in case of failure to pay after due notice, such statute was construed to be compensatory in character; but a statute imposing a penalty irrespective of delay in payment after notice, and in five times the amount of the illegal charge, or five times the amount of the damage, was held to be penal, and that the case fell within a section of the *Iowa* Code, limiting actions for statutory penalties to two years.[1] This limitation applies, however, only to an action for the penalty, and not to one brought for recovery of the excess over the lawful charge which is not barred until the lapse of five years.[2]

In *New York*, it has been said that a statutory penalty for excessive freight charges creates no liability founded upon contract, and does not give a right of action upon contract within the meaning of the code of that State.[3] In *North Carolina*, on the contrary, such a right of action is regarded as arising *ex contractu*, upon the principle, mentioned in Blackstone, that "Every person is bound and hath agreed to pay such particular sums of money as are charged upon him by the sentence or assessed by the interpretation of the law."[4]

Where an action was brought for the statutory penalty of five times the amount of damages, and the right to the penalty was held to be barred by the limitations in the statute, it was held that the claim for the penalty and that for compensatory damages must be regarded as a unit, and that the plaintiff would not be permitted to abandon the claim for the penalty and thereby save that for damages.[5] A contrary conclusion seems to have been reached in another case.[6] It has been held that the penalty imposed by stat-

1. Koons *v.* C. & N. W. R. Co., 23 Iowa, 493; Herriman *v.* Burlington, Cedar Rapids & N. R. Co., 57 Iowa, 187; s. c., 9 Am. & Eng. R. R. Cas. 339.

2. Heiserman *v.* Burlington, etc., Co., 63 Iowa, 732; s. c., 16 Am. & Eng. R. R. Cas. 46.

3. McCoun *v.* N. Y. Central, etc., R. Co., 50 N. Y. 176.

4. Katzenstein *v.* Raleigh & Gaston R. Co., 84 N. Car. 688; s. c., 6 Am. & Eng. R. R. Cas. 464; 3 Bl. Com. 160; Wilmington *v.* Davis, 63 N. Car. 582; Edenton *v.* Wool, 65 N. Car. 379.

In *Iowa*, the penalty was regarded as penal, and suit therefore barred as a criminal action in two years; whereas had it been looked on as compensatory, the suit would not have been barred before five years. Herriman *v.* Burlington, etc., R. Co., 57 Iowa, 187; s. c., 9 Am. & Eng. R. R. Cas. 339. But in that case it is to be remarked that a double punishment was provided, each with a separate proceeding, one for the school fund, one for the party injured. The nature of the "penalty" seems dependent on the provisions of the particular statute.

5. Herriman *v.* Burlington, etc., R. Co., 57 Iowa, 187; s. c., 9 Am. & Eng. R. R. Cas. 339.

6. In an action brought upon Miller's *Iowa* Code, 35 (ch. 77, § 13, Acts 17 Gen. Ass.), for treble damages for discrimination, the plaintiff cannot ask the supreme court for single damages on the defendant's appealing to that court; but if he fails for the penalty, he fails altogether, notwithstanding his right to recover single damages in some other proceeding. Bond *v.* Wabash, etc., R. Co., 67 Iowa, 712; s. c., 23 Am. & Eng. R. R. Cas. 608.

Where action originally brought to recover, for an exaction of excessive charges for the carriage of goods, the statutory penalty of three times the excess, was determined not to be maintainable by reason of the repeal of the statute, and the

ute is incurred where the prohibited charge is made; it is not necessary that it should have been actually paid.[1]

(*a*) *Practice and Pleading.*—In an action for the statutory penalty, the pleader must bring himself by clear language within the statute.[2] But good pleading does not require the pointing out of the particular provisions of the law violated.[3]

The venue may be laid, under the *Georgia* statute, in the county where the consignment was made, although payment was made in another county.[4]

prayer of the complaint was then changed in the court below so as to demand only the illegal excess, *held:* (1) That this was, in effect, an amendment of the complaint itself, and that the question whether the action would lie under such amended complaint was not *res adjudicata;* (2) that, as the excessive charges are alleged to have been made "wrongfully and fraudulently," the action may be regarded as still one in tort, and the amendment was allowable, for plaintiff has election between tort and *assumpsit. Citing* Wood *v.* Milwaukee & St. Paul R. Co., 32 Wis. 398; (3) that the cause of action at common law, now stated in the complaint, was not repealed or suspended by the statutes. *Citing* Steamship Co. *v.* Joliffe, 2 Wall. (U. S.) 450; Smith *v.* Chicago & Northwestern R. Co., 49 Wis. 443; s. c., 1 Am. & Eng R. R. Cas. 303.

1. Hines *v.* R. Co., 95 N. Car. 434.

**Notice under Texas Statute.**—Under Texas Rev. St., arts. 4257, 4258, and Acts of 1879 and 1883, each fixing a certain maximum of rates, and providing for recovery of a penalty for wilful discrimination in charging beyond such rates, if, for twenty days after notice to refund, the company should refuse,—such notice and refusal are only required where the suit for the penalty is for charging beyond the maximum; and if brought for penalty for charge within the legal rates, but in wilful discrimination as compared with others, the twenty days' notice and refusal are not required. Woodhouse *v.* Rio Grande R. Co., 3 So. West. Rep. 323.

**Alabama Statutes of 1873 and 1875.**—An Alabama statute of 1873 making railroad officers, overcharging, liable to the party injured in double the amount of the overcharge, was held not to be repealed by a statute of 1875 declaring that officers committing such wrong thereafter should be deemed guilty of misdemeanor, and, on conviction, should be fined not less than $100 nor more than $500 for each offence. Mobile & Montg. R. Co. *v.* Steiner, 61 Ala. 596.

2. Murray *v.* Gulf, etc., R. Co., 63 Texas, 407; 22 Am. & Eng. R. R. Cas. 464. In this case, the statute provided for penalty if on shipments of 100 pounds' weight there should be overcharge. The petition for the penalty stated the goods as follows: "One package containing two boxes of cannon-crackers, weighing no more than forty pounds, and one package containing eight boxes of firecrackers, weighing eight . . . pounds." *Held,* that since it did not appear by the petition that the goods were sent by one and the same shipment and bill of lading, nor even by the same person or by the same train, the case did not fall within the statute.

3. Burkholder *v.* Union Trust Co., 82 Mo. 572; 23 Am. & Eng. R. R. Cas. 656. Complaint in this case examined and, *held,* sufficient.

Where an action is brought for penalties, the manner in which they were incurred must be explicitly stated; and each count must show, either in itself or by explicit reference to the averments of preceding counts, what statute has been violated; and each count must also contain an averment that the acts complained of were contrary to the form of the statute. Crawford *v.* N. J. R. Co., 4 Dutch. (N. J.) 479.

In Christie *v.* Mo. Pac. R. Co. (Missouri, March 19, 1888), 7 S. W. Rep. 567, it was held that, in action for a rebate, it is not error, where the contract is not in writing, to deny defendant's motion to require plaintiff to make his petition more definite and certain by requiring him to state where and by what officers the alleged agreement was made; as it is not such a case as is contemplated by Mo. Rev. St. 1879, § 3529, providing motion to court to secure greater definiteness where pleading is indefinite.

4. Under *Georgia* act of 1869 providing for recovery of excess of payment by action in any county where the cause of action originated or where the contract was made or performed, a company may be sued in the county from which the articles were shipped, that being the place

A bill in equity against several defendants for a discovery, accounting, and repayment of alleged unlawful overcharges for freight, the liability therefor being purely legal and enforceable at law, cannot be sustained on the ground that one defendant is liable as the lessee of several short lines of railroad, and that, if complainant be compelled to resort to law for redress, he must sue each defendant for a fractional part of each overcharge.[1]

(*b*) *Miscellaneous.*—Where a statute imposing penalties for excessive freight charges was repealed by a new statute, containing essentially different provisions respecting rates and actions for overcharges, it was held that the old penalty was not continued by the imposition of the new one, and rights of action which had accrued respecting the old penalty, were not thereby saved.[2] Parties equally violating the law as to excessive freights can have no action based on the mutual illegality.[3] A freight statute has been held not to apply to a contract antedating the act.[4] A change of rates cannot affect existing contracts.[5]

**VIII. Discrimination in Freight.—1. Generally.**[6]—Discrimination is the legal term now in common use to describe a breach of

where the contract for shipment was made, although the payment was made in another county. Arnold *v.* Georgia R. & Bkg. Co., 50 Ga. 304.

1. Scott *v.* Erie R. Co., 34 N. J. Eq. 354; 16 Am. & Eng. K. R. Cas. 51.

**Action Against Receivers.**—Where the overcharge is for carriage over a road in the hands of a receiver,—since the road and its interests are in the custody of the law, the court appointing the receiver must be petitioned for leave to sue. 1 Rorer on Railroads, 570; *In re* McElrath, 2 Dillon (U. S.), 460.

2. Smith *v.* Chicago, etc., R. Co., 43 Wis. 686.

3. It was accordingly held that, where the agent of a railway company, in violation of chap. 68, Acts of the 15th *Iowa* General Assembly, collected from himself, as a shipper of goods, a rate of freight in excess of that provided by law, and paid the same over to the company, he was, equally with the company, a violator of the law, and that he could not recover from the company the penalty provided in said act for such illegal charges. To be "equally guilty" in such a case does not imply the same degree of guilt, nor guilt subjecting the wrongdoers to the same punishment, but only that both should be in fact partakers of the guilt. Steever *v.* Illinois Central R. Co., 62 Iowa, 371; s. c., 16 Am. & Eng. R. R. Cas. 53.

4. Chicago & Alton R. Co. *v.* Chicago, V. & W. Coal Co., 79 Ill. 121.

5. Railroad Co. *v.* Roberts, 71 Ill. 540.

6. The question of undue preference has arisen, in *England*, most frequently in connection with the liability of companies, under what is called the "equality clause" contained in 8 and 9 Vict. c. 20, § 9, and similar clauses in the special acts of the companies, by which it is provided that the tolls "shall be charged equally to all persons, and after the same rate, whether per ton or mile, or otherwise, in respect of all goods of the same description passing over the same portion of the same line of railway, under the same circumstances; and no reduction or advance in any such tolls shall be made, either directly or indirectly, in favor of or against any particular company or person using the railway. Redman's Law of Railway Carriers (2d Ed. 1880), p. 25.

**Principles Determined by English Cases.**—On reviewing the cases, the following general principles seem to have been established for the future guidance of the courts in deciding questions of undue preference:

1. That the fair interests of the railway itself are entitled to consideration; but this must be understood as confined to interests in their capacity of railway proprietors, and for that part of the line in regard to which the complaint is made, and not extended to their interests in distinct capacities, or in undertakings in regard to which they virtually stand in the relation of third parties.

2. That due regard must be had to the circumstances which cause the trouble or

the carriers' common-law or statutory duty to treat all customers alike. It is applied both to unlawful fares and to unlawful freight. Discrimination may also be practised in the facilities accorded to different consignors; such, for example, as the order in which goods are shipped, the opportunities afforded for shipment, the furnishing of necessary cars, and similar matters, which have already been treated under another title.[1]

So undeveloped is this branch of the law, owing to its recent growth, that it is difficult to classify the decisions or to reduce them to general principles. The cases commonly decide very practical questions relating to the traffic of common carriers, which has made it necessary to attempt herein an equally practical classification of what may be called discrimination cases.

**2. Definition of Discrimination in Freight.** — Discrimination in freight tariffs by railroad companies means to charge shippers unequal sums for carrying the same quantity of goods equal distances; that is, more in proportion for a short than for a long distance.[2] No conclusive inference is to be drawn either from the carriage at an unequal mileage rate or at an unequal profit per mile.[3] The fact that the higher charge is not unreasonable does not affect the fact of discrimination.[4] To charge one, by means of a rebate, a rate less than the regular fixed tariff rate is not discrimination; such a contract does not prevent every one else

expense of carrying to the company for one party, or in one case or set of circumstances to be greater than in another, provided perfect fairness be shown by the company in dealing with such differences. Hence, due attention will be paid by the court to reasons for preferential dues arising out of long distances, larger quantities, wholesale dealing with the company, and, generally, any other things which reduce the trouble and cost of carrying for one party as compared with another.

3. That preferences are unjust which are given for considerations wholly irrespective of circumstances which should make the inconvenience and expenditure for carrying preferred party's goods less than for others; so that preferences given to compete with other carriers, or to keep out competing lines which the preferred person threatens to promote, or to induce such person to employ the company on other lines or undertakings which they have in hand, or otherwise to benefit the company irrespective of the dues for carrying,—have met with no favor from the court.

4. That preferential tariffs to deprive persons or localities of the natural advantages of their position,—as, to enable sea-born to compete with land-born companies; to encourage the merchandise of a remote place, or of dealers at a distance, —are unreasonable. Redman's Law of Railway Carriers (2d Ed.), p. 37.

1. See CARRIERS OF GOODS, 2 Am. & Eng. Encyc. of Law.

2. Hines *v.* Railroad Co., 95 N. Car. 434.

*North Carolina* Code, § 1966, imposing penalty for greater charge over a railroad than for equal quantity of the same class of freight transported in the same direction over any portion of the same railroad, of equal distance, is to be construed to mean that the compensation charged shippers for carrying an equal quantity of the same class of freight, going in the same direction, must be equal in amount for equal distances, no matter on what part of the road, at any time, while its list of charges for carrying freight remains unchanged. Hines *v.* Railroad Co., 95 N. Car. 434. And the court say that if A ships ten, and B five, bales of cotton, A must for five of his ten be charged the same as B, and, as to his remaining bales, a like rate, to maintain equality.

3. Eng. commissioners, in Coal Co. *v.* Railway Co., 4 R. & Can. Tr. Cas. 191.

4 Samuels *v.* Louisville etc., R. Co., 31 Fed. Rep. 57; s. c., 30 Am. & Eng. R. R. Cas. 79.

from obtaining as low or even lower rates; but to charge one a higher rate than the lowest given to any one else is discrimination when it prejudices the one so charged.[1] A covenant not to allow to others a drawback from established rates on transportation, which the covenanting company agreed to allow to the covenantee, is against public policy, and void.[2] The discrimination law cannot be avoided by an agreement to pay full freight in the first instance, and to be repaid rebates.[3] The reasonableness of a freight charge is a question of fact; and, in general, what amounts to undue preference is a question of fact, and not of law.[4] A contract is void if it stipulates not to carry for persons in general.[5] Charges which a railroad company has statutory power to make, and which are intended or calculated to prevent, and do in fact prevent, the conveyance of traffic on the railway, are unlawful.[6] An agreement to carry at a fixed rate, lower than to others, is void. If violated by the company, no action lies thereon.[7]

Discrimination in rates, if fair and reasonable and founded upon grounds consistent with public policy, will be permitted.[8] The

1. McNees *v.* Mo. Pac. R. Co., 22 Mo. App. 224; Rorer on Railroads, 1227, 1375; Stewart *v.* Lehigh Val. R., 38 N. J. 505.

Discrimination intended to create a monopoly gives to all similar shippers the same privilege bestowed on the one meant to be favored. Schofield *v.* Lake Shore, etc., R. Co., 23 Am & Eng. R. R. Cas. 612.

A common carrier may contract to ship freight at a lower rate than the published tariff, but he cannot contract to deny the same reduced rate to other shippers. Christie *v.* Missouri Pac. R. Co. (Mo.), 32 Am. & Eng. R. R. Cas. 413.

2. But in this case the court held, further, that the contract was severable, and hence was not entirely void; that the agreement to allow the rebate to covenantee was valid; and since differences under like circumstances are void in *New Jersey*, all other similar shippers are entitled to have equally reasonable terms. Stewart *v.* Lehigh Valley R. Co., 38 N. J. 505. But where a company agreed to allow to a shipper the same drawbacks which other companies were paying him, this was held not to apply to past freight; moreover, as to past shipments, there would be no consideration to support a promise to pay drawbacks. Pitts., F. W. & C. R. Co. *v.* Fawcett, 56 Ill. 513.

3. Ind., D. & S. R. Co. *v.* Erwin, 118 Ill. 250; s. c., 27 Am. & Eng. R. R. Cas. 8. The court distinguish Toledo, Wabash & West. R. Co. *v.* Elliott, 76 Ill. 67, holding that a contract for a rebate of freight paid to a railway company was not in violation of the statute against unjust discrimination, for that was under a former statute relating only to discrimination between places, and not as between individuals, as does *Illinois* Act of 1873, by which case first cited was governed. Erie & Pac. Despatch *v.* Cecil, 112 Ill. 185, wherein Toledo, etc., R. Co. *v.* Elliott was followed, was decided, it is true, after the Act of 1873, but that act was then a recent one, and its provisions were not brought to the attention of the court.

4. Slate Co. *v.* Railway Co., 2 R. Cas. 73; Hutchinson Carriers, § 447.

5. Peoria & R. I. R. Co. *v.* Coal Co., 68 Ill. 489.

6. Young *v.* Gwendraeth, etc., R. Co., 4 Nev. & Mac. 247.

7. Vincent *v.* Chicago, etc., R. Co., 49 Ill. 33; Camblos *v.* Phila. & R. R. Co., 4 Brews. (Pa.) 563; Cumberland Valley R. Co.'s App., 62 Pa. St. 218.

8. Hersh *v.* Northern, etc., R. Co., 74 Pa. St. 181; Chicago, etc., R. Co. *v.* People, 67 Ill. 11; Fitchburg R. Co. *v.* Gage, 12 Gray (Mass.), 393; Ragan *v.* Aiken, 9 Lea (Tenn.), 684; s. c., 42 Am. Rep. 684.

"Mere inequality of charge does not conclusively show that there is an undue preference. The company may impose a scale of charges on goods of a particular character different from that on goods of another character, or on goods over one part of their line different from what is charged over another part of the same line, without a desire to favor any particular kind of traffic or any particular individual, but influenced only by a consideration of the expense of carriage. And a company will be justified in carrying

fair and reasonable interests of the carrier have been regarded;[1] and it has been held that advantages might be secured to individuals where it is made clearly to appear that, in entering into such agreements, the company have only the interests of the proprietors and the legitimate increase of the profits of the railway in view, and the consideration given to the company in return for the advantages is adequate, and the company are willing to offer the same facilities to all others upon the same terms.[2] Where the reasonableness of charges is in question, the principle is not what profit it may be reasonable for a company to make, but what is a reasonable charge to the person who is charged.[3] The carrier's obligation to treat all shippers alike does not forbid contracts for transportation at a less rate in special cases where, under the circumstances, the discrimination appears to be reasonable. The jury should judge, under the evidence, whether the preference given was a fair and reasonable one.[4]

Care should be taken that a decree intended to avoid discrimination should not itself cause other discrimination. It has accordingly been held that a decree would not be granted compelling the company to give to complainant the same favorable terms allowed to a preferred shipper, as that would cause two to be preferred beyond the general public.[5]

If unreasonable discrimination is made, an action lies, in favor of the person discriminated against, for the damages.[6] A claim for

goods for one person at a less rate than that at which they carry the same description of goods for another person if there are circumstances which render the cost to the company of carrying for the former less than the cost of carrying for the latter." Redman's Law of Railway Carriers (2d Ed. 1880), p. 33.

1. Ransome *v.* Eastern Counties R., 1 C. B. (N. S.) 437; Ransome *v.* Eastern Counties, 1 C. B. (N. S.) 135; 26 L. J. C. P. 91. See also Lees *v.* Lancashire, etc., R. Co., 18 Sol. Jour. 629; Nicholson *v.* Great West. R. Co., 28 L. J. C. P. 89; 5 C. B. (N. S.) 366. Approved, Ragan *v.* Aiken, 9 Lea (Tenn.), 609; s. c., 42 Am. Rep. 684.

2. Nicholson *v.* Great Westn. R. Co., 94 E. C. L. R. 366. In this case it was held that section 2 of the act was not contravened by a railway company carrying at a lower rate, in consideration of a guaranty of large quantities and full trainloads at regular periods, provided the real object of the company be to obtain thereby a greater remunerative profit by the diminished cost of carriage, although the effect may be to exclude from the lower rate those persons who cannot give a guaranty.

3. Hence, the court will not dissect the reports and accounts, so as to see whether a company which constructed its works at the risk attendant upon all such outlays, and which is still subject to natural and other risks, is receiving, in its income yielding an alleged profit of 15 per cent, an unreasonable amount, but will only consider the reasonableness of the charge to the patron. Canada Southern R. Co. *v.* International Bridge Co., L. R. 8 Appeal Cases, 723.

The fact that a company is receiving a greater dividend from its receipts than its charter allows, cannot be set up in a bill to restrain, etc., filed by a complainant, who suffered no greater injury than did the general public, and who seeks relief from discrimination. Cumberland Valley R. Co.'s Appeal, 62 Pa. St. 218.

4. Houston & Tex. Cent. R. Co. *v.* Rust, 58 Tex. 98. Such continues to be the law in *Texas* under Texas Constitution of 1876 and the statute of 1879. In this case, judgment below was reversed because the charge to the jury made inequality of rate the single question, leaving out all other facts of the case.

5. Chouteau *v.* Union R. & Transit Co., 4 West. Rep. 397.

6. McDuffee *v.* Portland, etc., R. Co., 52 N. H. 430.

pecuniary damages for discrimination in transportation presents a case at common law in which the defendants are entitled to a jury trial.[1]

**3. Goods of the Same Class Shipped Under Like Circumstances.**—Statutes regulating freight charges commonly provide that the freight shall be the same for goods of the same class conveyed under like circumstances. By goods of the same class is meant goods similar in those qualities which affect the risk and expense of carriage; by shipment under the same circumstances is meant that the goods are conveyed under like circumstances where the route, risk, and expense are, in the opinion of the jury, the same, otherwise not.[2] A difference in cost to the carrier makes a difference in circumstances.[3] It has been held that, to entitle one to recover for discrimination in rates for the carriage of goods, it must appear that the discrimination was made for a like service and under like conditions in all material respects; and the burden of proof is upon the plaintiff claiming damages under such statute for such discriminations, to show that the conditions of the shipment were like.[4] The discrimination must properly appear in the pleadings.[5]

1. Heck *v.* E. Tenn., etc., R. Co., 1 Inter. Com. Rep. (Off.) 495.

2. Willes, J., in Great Wes. R. Co. *v.* Sutton, L. R. 4 Eng. & Ir. App. Cas. 247, said: "For instance, bags of red wheat and bags of white wheat are of like description; and bags of cotton and bags of jute of like weight and value are of the like description, if there be no dissevering circumstances proved. But if it were superadded that one was really more risky or troublesome to carry than the other, the jury would hold that the goods were of different descriptions; and bags of silk may be suggested as an instance in which a jury would be sure so to hold. Cattle, which would be more troublesome and more exposed to risk than inanimate things, would be an instance of dissimilarity. So of horses, as less manageable than other cattle, and requiring special precautions. In the absence of a tariff, the question ought, I think, to be, in fact, whether the sort of thing was like or different for the purposes of carriage, that being the subject dealt with. The railway company might also make a distinction between the prices charged to all the world for articles not distinguished in this respect, because of there being great traffic in one and small in another; as, for instance, in the carriage of coals and the carriage of culm from a district in which the one was abundant and the other not so, to such an extent that the former employed a greater number of waggons with a less expensive staff, the price of carriage being proved to depend more upon the wages of the staff than upon the wear and tear of the waggons. There are cases in which custom, founded upon convenience, makes a distinction such as that between 'weight' goods and 'measurement' goods, . . . ; and I can conceive it possible that the same goods may be so differently packed as to pass from one class to the other, thus ceasing to be of a like description for the purpose of carriage, though their component particles and the structure of each fibre remain the same."

3. Denaby Main Colliery Co. *v.* Manchester, etc., R. Co. (English case), 26 Am. & Eng. R. R. Cas. 293. And there being nothing to show want of good faith, the company were not bound to prove that the allowances and rebates were adequately represented by the saving. See also Nitshill & Lesmahago Coal Co. *v.* Caledonian R. Co., 2 English Ry. & Can. Tr. Cas. 39; 27 Am. & Eng. R. R. Cas. 8, note. The difference may arise from difference in cost of working, or in original construction of the road. Richardson *v.* Midland R. Co., 4 Ry. & Can. Tr. Cas. 1.

4. Paxton *v.* Illinois, etc., R. Co., 6 Am. & Eng. R. R. Cas. 591. The complaint set out shipments by plaintiff and by another, respectively, from Manchester, Iowa, to Chicago, Ill., made during the same course of time, on which the other shipper aforesaid was allowed large rebates to amounts stated in complaint. *Held*, that, as complaint did not aver that the shipments were on like conditions, there could be no recovery.

5. In an action under *Illinois* Act, May

**4. Discrimination Based Upon the Character of Goods—Classification.**—It is evident that the carrier's charges may vary with the difference in size, weight, and value of the goods consigned. It is customary to regulate this difference by a classification of goods and the fixing of the same freight for all goods of the same class. Decisions which will illustrate the questions arising out of such classification, etc., and involving compressed and uncompressed cotton, soft and hard coal, Pearline and common soap, railroad ties and rough timber, lumber, saw logs, dried fruit and raisins, etc., are set out in the notes.[1] A violation of a freight statute

2, 1873, § 8, for unjust discrimination and extortion, by a railway company, it is necessary to aver that freights for which a certain tariff was charged were "of like quantity, of the same class," as those for which a less tariff was charged (Walker, C.J., and Schofield, J., dissenting); and that a schedule of reasonable tariff had been established by the commission board in accordance with that section; and that defendant had charged and received compensation in excess of such tariff. Walker, C.J., and Schofield, J., dissenting.

Chicago, B. & Q. R. Co. *v.* People, 77 Ill. 443. And a count describing respective freights as one carload of ponies and one carload of horses does not sufficiently show them to be of "like quantities of freight of the same class." Neither the numbers nor the weight of the animals is given; nor is there averment of the size or class of the cars containing them, or otherwise.

**1. Compressed and Uncompressed Cotton.**—It is insufficient proof of overcharge for carriage of uncompressed cotton to show that charge to the shipper by defendant for carriage of compressed cotton was 50 per cent less; compressed having only about one half the bulk of uncompressed cotton, and the distance, too, being much shorter. Lotspeich *v.* R. & Bkg. Co. of Ga., 73 Ala. 306; s. c., 18 Am. & Eng. R. R. Cas. 490.

**Soft and Hard Coal.**—The *English* commissioners held that a soft coal of low price and poor steam-producing power was not a competitor with a hard coal capable of making more steam, and of being stowed aboard ships in smaller compass than the other, and generally superior to it; at least not a competitor warranting interference with the rates complained of. But they evidently considered that change of prices, etc., might affect the relations of the two coals. Broughton, etc., Co. *v.* Gt. W. R. Co., 23 Am. & Eng. R. R. Cas. 645.

**Pearline and Common Soap.**—By the classification of the Southern Railway & Steamship Association adopted by the East Tennessee, Virginia & Georgia Railway Company on shipments of Pearline and common soap from New York to Atlanta, Ga., Pearline is in fourth-class freight, with a rate of 73 cents per hundred pounds, while common soap is in sixth class freight, with a class rate of 49 cents per hundred pounds; but a "special rate" is given common soap, of 33 cents per hundred pounds. *Held*, That Pearline, being competitive with common soap, the relative difference between the class rate of Pearline and this "special rate" on common soap is too great, and that Pearline must be placed in fifth-class freight, on shipments from New York to Atlanta by the defendant company, with a rate of 60 cents per hundred pounds, and also in the fifth class in the classification of the Southern R. & S. Association; and, further, that the relative difference in the rates on Pearline and common soap in such shipments must not exceed the difference of 60 cents per hundred pounds on Pearline and 33 cents on soap. Pyle *v.* East Tennessee, etc., R. Co., 1 Inter. Com. Rep. (Off.) 465; s. c., 32 Am. & Eng. R. R. Cas. 584.

**Railroad Ties and Rough Timber.**—Classification of railroad ties should correspond with that of other rough timber. Raising of same from sixth to fifth class of defendant's tariff, thus imposing on them a rate higher than for other lumber, is unjustifiable. Rates established in order to keep on the carrier's line material for which the road has use, or to keep the price low for its own advantage, cannot be justified. Producer of railroad material is entitled to sell it when he wishes, in the best available market. Common carriers are forbidden to attempt to prevent this by applying disproportionate or unreasonable rates. It was not just or reasonable that defendant railroad company should give a low special rate upon coarse lumber in other forms, to the ex-

can be accomplished by differences in classification, as well as by differences in tariff rates.[1] An assurance made by a carrier that, if one will locate upon the carrier's line, his property shall be taken as belonging to a specified class, cannot bind the carrier so as to compel a classification accordingly.[2]

A stipulation, at the time of the consignment of the goods, that the goods are intended for a specified purpose, and the charge is based upon this representation, is equally binding with that for reduced freight.[3] When oil is transported in tanks permanently

clusion of ties; and it was ordered to desist from such discrimination. Reynolds *v.* Western N. Y., etc., Co., 1 Inter. Com. Rep. (Off.) 393; Co-op. Ed. 685.

**Lumber.**—Farrar *v.* E. Tenn., etc., R. Co., 1 Inter. Com. Rep. (Off.) 480.

**Saw Logs.**—Barkholder *v.* Union Trust Co., 82 Mo. 572; s. c., 23 Am. & Eng. R. R. Cas. 656.

**Hub Blocks.**—Under a classification which puts lumber in carload lots in the sixth class, and unfinished wagon materials in the fifth class, it is held that hub blocks which are prepared as such to be sold to the manufacturers of hubs and of wheeled vehicles, but upon which only so much labor has been expended as is needful to put them in condition for seasoning, are to be regarded as the raw material, upon which the process of manufacture of hubs is not yet begun, just as boards are the raw material from which wagon boxes are made. The blocks belong, therefore, when not otherwise specified in the classification sheet, with lumber instead of with unfinished wagon materials. Hurlburt *v.* Lake Shore & Mich. So. R. Co., 2 Inter. Com. Rep. 81; 2 Inter. Com. Rep. 122; s. c., 34 Am. & Eng. R. R. Cas. 596.

**Dried Fruit and Raisins.**—Mixed carloads of freight are treated in different ways under the classifications employed in different parts of the country, resulting in much confusion and annoyance to shippers, especially upon traffic passing from one section to another. The immediate adoption of a uniform and reasonable rule is urgently recommended. Martin *v.* Southern Pac. R. Co., 2 Inter. Com. Rep. 1. It was held in this case that classification of dried fruit and raisins, both California products, in different classes, taking different rates of freight, works an injustice to shippers. In all matters of classification, clearness and simplicity should be aimed at, and irregularities and inconsistencies should be eliminated. As the various carriers of the whole country are all entitled to be heard before a general rule should be prescribed by the commission, the commission rest at present with the above recommendation.

1. Martin *v.* So. Pac. R. Co., 2 Inter. Com. Rep. 1; s. c., 34 Am. & Eng. R. R. Cas. 612.

2. A right to special rates cannot be made out in this way; the classification must have the same construction in favor of all persons. The law requires uniformity and impartiality in the dealings of a carrier with all persons. Hurlburt *v.* Lake Shore & Mich. So. R. Co., 2 Inter. Com. Rep. 81; 2 Inter. Com. Rep. 122; s. c., 34 Am. & Eng. R. R. Cas. 596.

7. Hurlburt *v.* Lake Shore, etc., R. Co., 2 Inter. Com. Rep. 81; 2 Inter. Com. Rep. 122.

The company are bound to adhere to the classification they promulgate, and they cannot, in favor of any particular class of customers, charge goods as falling within one class which they charge to another as falling within a different class; and any excess of charge from such a cause they will be bound to refund to the customer. Parker *v.* Great Western R. Co., 3 R. C. 562; 13 L. J. C. P. 105; Garton *v.* Bristol, etc., R. Co., 30 L. J. Q. B. 273; 1 B. & S. 112.

**Evidence as to Classification by Railway Officials.**—The railway officials who have made a classification cannot testify to their understanding of its construction. A classification sheet is put before the public for general information; it is supposed to be expressed in plain terms, so that ordinary business man can understand it, and, in construction with the rate sheet, can determine for himself what he can be lawfully charged for transportation. The persons who prepared the classification have no more authority to construe it than anybody else; and they must leave it to speak for itself. Hurlburt *v.* Lake Shore & Mich. So. R. Co., 2 Inter. Com. Rep. 81; 2 Inter. Com. Rep. 122; s. c., 34 Am. & Eng. R. R. Cas. 596.

3. A bill of lading provided, "Rate of freight to be $120 per car;" and under

fixed to car bodies, the tank is to be considered as part of the car; and for oil transported therein the charge for transportation should be the same by the hundred pounds that the carrier charges, for transportation between the same points, of barrels filled with oil and taken in carload lots. The carrier is guilty of unjust discrimination if the shipper in barrels is charged a higher rate.[1] The law does not forbid a carrier from obtaining cars from a shipper for the transportation of such shipper's freight over its line; but in every such instance, after deducting a reasonable rent published in the tariff as part of the rate and paid by the carrier to the consignors for the use of such cars, the rate must be exactly the same, and none other, as upon goods transported in the same service in the carrier's own cars; and in every such transaction, the carrier, at his peril, must see to it that a shipper furnishing his own cars receives no other or different rates than other shippers who use the cars of the carrier for a similar service.[2]

In determining what is a just and reasonable rate for a particular commodity, such as wheat, the situation, earnings, and expenses of the carrier, by comparison with those of other railroads, will be regarded.[3] A contract by a railroad company to carry corn at the

the head of "Description of Articles" was the following: "1 car horses, buggies, O. K., and seed oats. . . . For farm purposes. Pass man in charge," etc.; and written across the bill of lading was, "Read this contract." In an action by the shipper to recover the difference between the stipulated rate and the full freight, which he had been obliged to pay, the carrier answered that the stipulated rate was a reduced rate given only on articles to be used "for farm purposes;" and that, at the time the bill of lading was made out, the shipper falsely represented that they were to be so used; and it was with such understanding that both stipulations were inserted in the bill of lading, while in fact the articles were not to be used for "farm purposes." *Held*, the stipulation as to use was as binding as that for reduced price, and that shipper could not recover. Fry *v.* Louisville, etc., R. Co. (Ind.), 22 Am. & Eng. R. R. Cas. 442.

1. In the Standard Oil Cases, it was held that where, for a special traffic, e. g., the transportation of petroleum oils, a carrier provides rolling-stock for one method, but does not provide it for another for which it publishes rates, but the shippers are expected to provide the same, the terms on which such rolling-stock is to be provided should be uniform and be published with the rate sheets, and cannot lawfully be left to the subject of bargain and of different terms in the case of different shippers. When two methods for the transportation of an article of merchandise are nominally offered by the carrier, for only one of which it offers rolling-stock, and for the other of which the shipper must supply his own rolling-stock at considerable expense, it cannot be said that the result to the latter by the shipper is so far a matter of choice that he has no concern with the charges for transportation in the other mode. The man of small means being compelled to make this choice, by reason of the carrier's failure to supply rolling-stock for the other mode, has a right to insist that the charges for transportation in the two modes shall be relatively just and equal. Rice *v.* Louisville, etc., R. Co., 1 Inter. Com. Rep. (Off.) 503; s. c., 33 Am. & Eng. R. R. Cas. 560.

Carriage of oil in tank-car lots, compared with carriage of oil in barrel carload lots, and, *held*, that under the facts in this case, unlawful preference is shown in the tank oil shipments. Scofield *v.* Lake Shore & Mich. So. R. Co., 2 Inter. Com. Rep. 67; s. c., 34 Am. & Eng. R. R. Cas. 685.

2. Scofield *v.* Lake Shore & Mich. So. R. Co., 2 Inter. Com. Rep. 67; s. c., 34 Am. & Eng. R. R. Cas. 685.

3. The commission will consider the earnings and expenses of operation of the road, and will compare them and the rates for the commodity with the earnings and expenses and rates of roads most nearly similarly situated (selecting in this case certain more or less wheat-carrying

customary rates, and to grant a rebate to the shipper, is not illegal as being in violation of the law to prevent unjust discrimination; nor is it fraudulent as to the purchaser of the corn. A common carrier may contract to ship goods at a lower rate than the established tariff; but he cannot contract to deny the same reduced rate to other shippers.[1]

The question as to whether a carrier is guilty of discrimination who follows the system of allowing raw goods to be transported to the place of manufacture, and thence beyond after manufacture, at the same rate of freight charged for goods carried without stop is unsettled.[2]

**5. Discrimination Based Upon the Quantity of Goods.**—A railroad company is not bound to carry large and small quantities of the same kind of merchandise between the same points at the same price.[3] Transportation in large and in small quantities does not

roads); but a wheat-carrying road passing through a sparsely settled region, and depending for its revenues almost wholly on that one commodity, and having little local business, and its chief article of carriage being greatly subject to fluctuation in price and in amounts of the crops, making the carrier's business hazardous, can properly claim that these things cannot be ignored in determining the reasonableness of a rate. Also, the commission ought fairly to consider gradual reductions in rates, if such have occurred, both as to the commodity in question and others. "Rates are, and should be, to a considerable extent, so related to each other in the manner in which they are laid for the revenue of a railroad that the instances are very frequent in which a change of the freight upon one important article of commerce involves a consideration of the relative rates on other articles." Evans *v.* Oregon R. & Nav. Co., 1 Inter. Com. Rep. (Off.) 325.

1. Christie *v.* Missouri Pac. R. Co. (Mo.), 2 Inter. Com. Rep. (L. ed.) 22; s. c., 32 Am. & Eng. R. R. Cas. 413.

**2. Transits.**—*In re* St. Louis Millers' Association, before the Interstate Commission. Cooley, Chairman, said, respecting the system of allowing raw goods to be carried to place of manufacture, and thence on beyond after manufacture, at the rates allowed for goods carried without stop, as follows: "It may be questionable, perhaps, whether the so-called 'transits' have such validity in law that the companies issuing them are bound to give transportation according to their terms when the effect would be to discriminate in rates in favor of one or more localities against others. That question, however, is not brought before us by the petition, and could only be raised in some proceeding which would directly present it, and in which parties interested would have opportunity to be heard." *In re* St. Louis Millers' Assoc., 1 Inter. Com. Rep. (Off.) 20.

The commission reiterates that it has no authority to order or sanction the giving of special privileges. "Milling in transit" having long been permitted by common carriers to millers at certain points, and a large quantity of 'transits' being said to be out, which can be and are made use of to give millers at Minneapolis an advantage in rates over those at St. Louis, the commission cannot correct the wrong by giving or authorizing special rates to the St. Louis millers. *In re* St. Louis Millers' Assoc., 1 Inter. Com. Rep. (Off.) 20.

A petition was presented by a manufacturing corporation, which recited in substance that railroad companies had been accustomed to permit it, as it did other like manufacturers, to procure its raw material at a distance, manufacture its goods therefrom and then ship the goods to a market at the same aggregate rate for transportation of both raw material and manufactured goods as would be charged had there been no stoppage in transit and no manufacture; that this privilege of manufacturing in transit was valuable to the corporation and to the community in which its business was located, and wronged no one; and petitioner prayed that it might be sanctioned by the commission. But no authority to that effect having been conferred upon the commission, the petition was dismissed. *In re* Iowa Barb. Steel Wire Co., 1 Inter. Com. Rep. (Off.) 17.

3. Concord & Portsmouth R. Co. *v.*

cause the same amount of trouble and expense; thus, full train-loads on large trucks warrant a reduction in rates below those for light loads on small trucks.[1] A difference in charge cannot be sustained upon the general ground that the aggregate traffic of one town exceeded that of the other, it having been proved that the low rates to the large town were charged to all the inhabitants, however small the quantity of their traffic, and that there was nothing exceptional in the natural position of such large town to affect rates.[2] A *Welsh* canal company, required to charge uniform rates under like circumstances, was allowed to make favors in rates to a customer who guaranteed large quantities of goods, for long distances, in regular loads.[3]

Whatever considerations regarding the quantity of goods shipped may affect the question as to what amounts to discrimination under English decisions, in the *United States* the carrier seems to be held to a somewhat stricter accountability. Thus, it has been decided that discriminations in rates of freight, charged by a railroad company to shippers, based solely on the quantity of the goods shipped, without reference to any conditions tending to decrease the cost of transportation, are discriminations in favor of capital, are contrary to sound public policy, violative of that equality of rights guaranteed to every citizen, and a wrong to the injured party, for which he is entitled to recover from the railroad company the amount of freight paid by him in excess of the rates accorded by it to his most favored competitor, with interest on such sum.[4] A

Forsaith, 59 N. H. 122 47 Am. Rep. 181. The court said that the legislature, by enacting that "The rates shall be the same for all persons, and for like descriptions of freight between the same points," was explained by the provision requiring that "All persons shall have reasonable and equal terms." Evershed *v.* London & N. W. R. Co., 3 Q. B. D. 135 (*per* Bramwell, L.J.).

1. Richardson *v.* Midland R. Co., 4 Nev. & Mac. 7.

The total traffic of Burton, in a year, was 594,000 tons, and of Newark at the same time was 85,000 tons. Of Burton traffic, 534,000 tons were furnished by brewers; and of Newark traffic 8579 tons was furnished by brewers. *Held,* a reason for giving Burton brewers a less rate than Newark brewers. Richardson *v.* Midland R. Co., 4 Nev. & Mac. 1. The real reason for the decision was not the volume of traffic of the two places, respectively, but the fact that the Burton brewers sent their beer in larger trucks, requiring less handling, etc., than in the case of the Newark beer; and the Burton beer was sent in nearly full trucks, while the Newark beer did not make full loads.

2. Girardot *v.* Midland R. Co., 4 English R. & Canal Traffic Cases, 291.

3. Strich *v.* Swansea Canal Co., 111 E. C. L. 245; Nicholson *v.* G. W. R. Co., 4 C. B. (N. S.) 366.

4. Hays *v.* Penn. Co., 12 Fed. Rep. 309 (Baxter, C.J., U. S. C. C. N. D. Ohio). The case stated: The plaintiff were engaged in mining coal at Salineville, Ohio, for sale in the Cleveland market. They were wholly dependent on the defendant for transportation. The regular tariff between those points was $1.60 per ton, with a rebate of from 30 to 70 cents cents per ton to persons shipping over 5000 tons during a year; the amount of rebate being graduated according to the quantity shipped. Under this schedule, plaintiffs were required to pay higher rates on the coal shipped by them than were exacted from other and rival parties, who shipped larger quantities. The defendant claimed that the discriminations were made in good faith, to stimulate production and increase its tonnage, and were within the discretion confided by law to every common carrier. In an action to recover back the excess of tariff paid by plaintiff, *held,* that such discriminations were illegal, and that

contract of discrimination cannot be upheld simply because the favored shipper may furnish for shipment during the year a larger quantity of goods in the aggregate than any other shipper, or more than all others combined. Nor can the discrimination be by means of rebates; although the carrier's interests are to receive regard, yet a discriminating contract will not be upheld simply because largely profitable to the carrier.[1] A discrimination is not justified by an agreement with the favored shipper to give all the traffic to the railroad, and not to divert it to other routes, there being no agreement to send any definite quantity, in any specified time, nor in train-load lots; nor to prevent threatened competition where none exists.[2] A railroad company cannot support a discount, based on the quantity of freight received by any one shipper, on the principles which are applied among merchants whereby they give better prices in wholesale than in retail dealing. The cases are not analogous, since the naming of the quantity of freight that shall be compared to wholesale purchases must necessarily be altogether arbitrary, and the duty of impartial service which the company owes to the public will preclude special discriminations being determined by arbitrary tests.[3] An offer by a railroad company to give a dis-

plaintiffs were entitled to recover the amount paid by them in excess of the rate accorded to their most favored competitor, with interest thereon.

The court distinguished the case from that of Nicholson *v.* G. W. R. Co., 4 C. B. (N. S.) 366, in that in the latter case the company in whose favor the discrimination was made gave, in the judgment of the *English* court, an adequate consideration for the advantages conceded to it under and in virtue of its contract. It undertook to guarantee £40,000 worth of tonnage per year, for ten years, to the railroad company, and to tender the same for shipment, in fully loaded trains, at the rate of seven trains per week—circumstances which, the court considered, enabled the service to be performed at less expense. See, also, Menacho *v.* Ward, 27 Fed. Rep. 529; s. c., 23 Am. & Eng. R. R. Cas. 647.

1. Schofield *v.* Lake Shore & Mich. S. R. Co., 43 Ohio St. 571; s. c., 23 Am. & Eng. R. R. Cas. 612. See also Ragan *v.* Aiken, 9 Lea (Tenn.), 609.

A contract by which a railroad company agrees to charge a rate of not less than $2.40 per ton to all persons shipping less than 100,000 tons of coal per annum over its road, and to make a rate of $1.60 per ton to all shippers of 100,000 tons or over, is void, the discrimination being so gross as to be contrary to public policy. And it was held by Brewer, J., although with doubt, that the railroad company was not bound by its agreement to carry at $1.60 per ton, but that this stipulation, as well as the one to charge $2.40 for quantities below 100,000 tons, was void, the intent of the whole contract having been for a purpose which the law would not permit to be carried out; that the contract could not be disintegrated, and part declared to be good and the other part bad. Burlington, etc., R. Co. *v.* N. W. Fuel Co., 31 Fed. Rep. 652, citing remarks in Erie R. Co. *v.* Union Loco. & Exp. Co., 35 N. J. L. 246.

2. Slate Co. *v.* Festiniog R. Co., 2 Eng. Ry. & Can. Traffic Cas. 73; Holland *v.* Festiniog R. Co., 2 Eng. Ry. & Can. Traffic Cas. 278; Harris *v.* Railroad Co., 1 Eng. Ry. & Can. Traffic Cas. 97.

3. Providence Coal Co. *v.* Providence & Worcester R. Co., 1 Inter. Com. Rep. (Off.) 107. In a strong opinion in this case, Cooley, Chairman, showed clearly how quantity, merely as quantity, indicated nothing as to the relative cost of carriage.

On page 117, he used the following language: "A distinction in rates as between carloads and smaller quantities is readily understood and appreciated: but no such distinction is made in this offer; and a customer of the road who should receive all his coal by carload, or even by trainload would be excluded if he fell short in quantity."

At page 118, he said: "In what is said above, we do not mean to be understood as intimating that defendant is not saved something in cost and in labor by having

count to any consignee who within a year shall receive at any one station a specified amount of freight, which offer purports to be made to secure speedy dispatch, but is not conditioned on speedy dispatch being made, is void; and if a discount is made to one dealer in pursuance of it, all others will be entitled to a like discount. If the real consideration of the offer were to secure speedy dispatch, it should have been open to all who could accept it, regardless of quantity.[1]

But in *England*, an agreement amounting to discrimination, and based upon the quantity of goods transported, must exceed the fair regard which the company may pay to its own interests.[2]

the coal carried by it received in large quantities by single consignees. On the contrary, we readily agree that its service for large dealers is somewhat less, in proportion to quantity of freight transported, than is the like service performed for small dealers. We also agree that defendant may therefore seem to have an interest in restricting its dealings so far as possible to large dealers. But this is an interest that can only be consulted and acted upon in strict subordination to the rules of law; and one of the most important of those rules is that, in any discrimination between dealers, justice, if not a paramount consideration, shall at least be kept in view. The carrier cannot regard its own interests exclusively; if it could, it might at pleasure, by methods easily available, drive all small dealers off its line, and centre the whole trade in a few hands. The state of things that would result might be altogether for its interest and convenience, since it would then have fewer customers to deal with and fewer transactions for the same aggregate trade; but the wrong would be flagrant."

1. Providence Coal Co. *v.* Providence, 1 Worcester R. Co., 1 Inter. Com. Rep. (Off.) 107.

2. Thus, in Diphwys Casson Slate Co. *v.* Festiniog Ry. Co. (1874), 2 Eng. Ry. & Can. Tr. Cas. (N. & M.) 73, the *English* railway commissioners decided as follows: "A railway company, with the object of discouraging the construction of a competing line, carried slate for certain quarry-owners, who agreed to send all their slate over the railway company's line for a fixed number of years, at a less rate than they charged for the same service to the complainant quarry-owners, who were offered, but refused to bind themselves by, such an agreement. *Held*, that this was undue preference within the meaning of the R. & Canal Traffic Act, 1854, § 2, and would be enjoined. The commissioners observed: "Now, it is no advantage to the public that a district should be served by only one railway; and a trader ought not to forfeit his right under the statute because he objects to a condition which he may consider to be detrimental to the public interests no less than to himself."

In Ransome *v.* Eastern Cos. R. Co., 26 L. J. C. P. 91; 1 C. B. (N. S.) 437, a company had made an agreement with A to carry, for him, coals for three years, from Petersboro' to various places on their lines of railway at certain rates; B, a coal-merchant at Ipswich, sent coals (which had been brought to that port by C) to various places on the the same lines of railway, and the company charged him a larger sum per ton in proportion to the distance over which the coals were carried than they charged to A; the professed object of the difference being to enable A, whose coals came to Petersboro' by railway, to compete in the coal trade of the district with B, who had the advantage of having his coals brought to Ipswich by C. It was held an undue preference; and it was laid down that, in determining whether a company had given any undue and unreasonable preference, the courts may take into consideration the fair interests of the railway itself, and entertain such questions as whether the company might not carry larger quantities, or for longer distances, at lower rates per ton per mile than smaller quantities or for shorter distances, so as to derive equal profit to itself. Redman's Law of Railway Carriers (2d Ed.), p. 26.

A common carrier cannot charge a higher rate against shippers who refuse to patronize him exclusively. Its tendency is to coerce shippers from employing such agencies as may offer; and though reasonable deductions for quantities are, in proper cases, allowable, the manner of contracts in question fosters

**6. Discrimination in Packed Parcels.**—Packed parcels are single consignments which are made up of a number of smaller parcels intended to be ultimately distributed to various consignees. Since a different freight might evidently be properly charged if they were classed either as one consignment in the aggregate, or as so many separate consignments, it becomes important to determine which classification is the proper one; the more so because packed parcels are usually shipped by other common carriers, who are perhaps competitors in business. It has been held in *England*, that if packed parcels are in a common envelope, they are to be charged at a tonnage rate; and if there are loose parcels, directed by a common direction, from one consignor to one consignee, that is sufficient to subject them to the smaller charge and nothing more; but if the parcels delivered at the same time are directed to different persons, although consigned to one person, they may be charged for separately.[1] In a later case, however, where each parcel comprised in any consignment was distinctly labelled with a label showing that the carrier was the consignee, although each parcel was also labelled with the address of the person to whom it was ultimately to be delivered, it was held that the company was not entitled to charge for each parcel separately, but only after a tonnage rate, the same as was done when several parcels were included in one consignment to the same consignee simply, without any other addresses.[2] So, it has been held in the *United States*,

monopoly, and is not allowable. Menacho *v.* Ward, 27 Fed. Rep. 529; 23 Am. & Eng. R. R. Cas. 647.

The tendency of shippers to make too great a difference between shipments in less than carload lots, noted and condemned. But exceptionally high rates permitted in this case, one of oil shipments in less than car load lots, owing to phenomenal differences in expense of service rendered. Schofield *v.* Lake Shore, etc., E. Co., 2 Inter. Com. Rep. 67; s. c., 34 Am. & Eng. R. R. Cas. 685.

**Underbilling.**—Underbilling, a device by which a shipper pays for the transportation of a less quantity of freight than is actually carried, and thereby obtains a reduced rate upon the gross shipment, is forbidden by the Act to Regulate Commerce. Unjust discrimination results from underbilling, in that the favored shipper pays a less sum than is charged others for the same service. Common carriers are bound to exact equality in their service of the public. Organized action by carriers to prevent underbilling, commended; their duty to put an end to the practice, insisted upon. Carriers should be held, and in turn should hold every agent, responsible for the shipment of goods at exact weights and correctly classified. *Re* Underbilling, 1 Inter. Com. Rep. 633.

The "house weight," it appears, is now very habitually examined at the railroad company's offices in the West; and the delay and increased cost thereby occasioned is, say the commission, much more than compensated by the increased accurate amounts of weight thereby indicated. In *England*, the practice of underbilling was forbidden so early as 1845, the statute of that year imposing a penalty not exceeding £5 for each ton of underbillage. *Re* Underbilling, 1 Inter. Com. Rep. 633.

**Commissions to Agents.**—Commissions paid to soliciting agents, when divided with shippers, effect a breach of the law. *Re* Underbilling, 1 Inter. Com. Rep. 633.

1. Baxendale *v.* Eastern Cos. R. Co., 27 L. J. C. E. 137; 4 C. B. (N. S.) 63. In this case, however, the court seems to have proceeded upon the ground that the parcels had no marks upon the face of them showing that they were destined to one common consignee (*per* Williams, J.); and that therefore the number of different directions imposed additional trouble upon the company. Redman's Law of Railway Carriers (2d Ed.), p. 31 *et seq.*

2. Baxendale *v.* Southwestern R. Co., 35 L. J. Ex. 108; L. R. 1 Ex. 37.

In an action for money had and received to recover back charges alleged to have been improperly made on the plain-

that the charge of a railroad company for transporting packed parcels of the full sum which would be payably in the aggregate if they were not packed and were charged for severally cannot be rightfully imposed upon the public generally, or upon express-carriers or other middlemen.[1]

**7. Discrimination Between Different Consignors or Consignees.**—A contract by a railroad company to deliver all grain shipped in bulk over its road to a particular warehouse is void as against persons not parties to it.[2] Where grain had been shipped to a certain city, the carrier will not be permitted to charge one rate to

tiff, evidence was tendered at the trial, and received, to show that mercantile-houses were in the habit of despatching, to the railway, packed parcels, that is, parcels containing numbers of different parcels of different kinds of goods, and sent from and to different persons; that these packed parcels were so packed by these mercantile-houses for the accommodation of their own customers and friends, and that these facts were well known in the trade, and (inferentially) to the railway company, but that a lower charge was made for them than for parcels packed in the same manner by the plaintiff, who was a carrier, and who collected and packed parcels of the same sort in the way of his business. On exception that this evidence was insufficient without affirmatively showing that, as a fact, the defendants knew that these mercantile-houses did so pack the parcels, and, so knowing, made a difference in the charge, it was held in the court below, and affirmed in the House of Lords, that the evidence was admissible, and warranted the judge in telling the jurors that "There was evidence that parcels were carried by the defendants for other persons, containing goods of a like description and under like circumstances, at a rate less than such goods were carried by them for the plaintiffs." G. W. R. Co. *v.* Sutton, 4 Eng. & Ir. App. 226.

Where various parcels to different owners are packed by a parcel-carrier into one package, called "package," and others belonging to one owner are similarly packed, and called "inclosure," and the "packages" are charged at a higher rate than are the "inclosures," it is for the jury to say whether the risk is greater as to "packages" than as to "inclosures." Crouch *v.* Gt. N. R. Co., 33 Eng. L. & Eq. 573.

It is not overcharging to charge for separate packages of many different kinds, sent by a carrier to defendant carrier, as for so many separate packages shipped by separate people, even though a statute provides that articles sent in large aggregate quantities, although made up of separate parcels—such as bags of sugar, coffee, meal—shall not be deemed small parcels; and allowing higher rates for the small parcels: for the provision applies only to articles that were of such a nature that a large quantity was generally made up in separate packages. And under such a statutory provision, it is not excessive charge to charge for each of two parcels of coffee separately as small parcels, and not by the aggregate, as one parcel; although when the first was left, notice was given that plaintiff would probably send more, but the package was not received on any special terms. A certain rate "for all cotton and other wools, drugs, and manufactured goods" does not mean all goods on which human skill was employed, but those articles made in what are, in popular language, called "manufactories." Where a statute provided for equal rates to all for conveyance of merchandise, but provided further that the company might make agreements as to collection and delivery of merchandise, it was held that the company were not bound to extend the equality so as to entitle all persons, doing their own collecting and delivery, to certain fees or payments allowed the company's agents for such work. Parker *v.* R. Co., 88 E. C. L. R. 77.

1. A court of law, and not a court of equity, has primary cognizance of the question of the right of the railroad company, carrying packed parcels for a middleman, to charge him with any addition, however small, to what would otherwise be the regular charge for carrying the package in mass. The legal right on the latter point is not so clearly deniable as to warrant the summary decision of it against them by a court of equity. Cambios *v.* Pa. R. Co., 4 Brewst. (Pa.) 563,

2. Chicago, etc., R. Co. *v.* People, 56 Ill. 365.

one warehouse and a different rate to another in the same city.[1] In *Louisiana*, it has been held that a carrier may pro-rate with some consignors and not with others; that, as he is not bound to pro-rate with any, those who are denied the privilege cannot complain.[2] A contract, between a railroad company and a consignor, that coal should be carried at a certain rate, but, if other shippers received lower rates, the freight was to be correspondingly reduced, was defined to mean that lower rates were proportionately lower rates per ton per mile, and that the consignors might recover the difference where they were discriminated against.[3]

Discrimination may exist in charges for the cost of hauling to a station, loading, and unloading;[4] it cannot be justified by the fact that consignors have expended a large sum upon connecting branches.[5] It may exist in the charges made for switching upon sidings.[6]

An *English* railroad company which refused to a particular consignor permission to pay at the end of each month, although such privilege was accorded to other firms, replied, on complaint that this amounted to discrimination, that complainant had at a prior time taken advantage of the credit, and had withheld a large sum of money due, on the pretence that there had been, as to some other account, overcharges, and that a dispute still existed as to the legal rates between complainant and the railroad company; and it was held that the carrier was not therein guilty of discrimination.[7] A complaint against a railroad company for unjust dis-

1. Vincent *v.* Chicago R. Co., 49 Ill. 33.

2. Eclipse Towboat Co. *v.* Pontchartrain R. Co., 24 La. Ann. 1. In this case there had been pro-rating by defendant with several carriers. But those of them who conveyed by steamer lowered rates so greatly that defendant's share of the through rates became unprofitable; whereupon Morgan, one of the carriers, loaned him $250,000 under agreement that a *pro rata* distribution should be made as to Morgan and defendant, and that the other carriers must pay the rates charged to the general public. *Held*, to be a legal contract.

3. An agreement between a railroad company and A and B provided that A and B's coal should be carried for certain rates, and, if any others had theirs carried for lower rates, A and B were to have corresponding reduction. *Held*, that "lower rates" meant proportionately lower rates per ton per mile, and that the amount of the difference adverse to A and B might be recovered. And this was so, notwithstanding that a clause in the contract allowed the company to charge A and B as much as a certain E. Coal Co. should be charged from time to time, it not being in evidence what was the charge to the latter company. Glasgow & Sw. R. Co. *v.* Mackinnon, L. R. 11 H. of Lords, 386. See 27 Am. & Eng. R. R. Cas. 1.

4. Evershed's Case, L. R. 3 App. Cas. 1029 *et seq.*; Thompson *v.* R. Co., 2 Eng. R. & Canal Traffic Cases, 115.

5. Certain colliery lessees obtained low rates, (1) because the owner of the collieries had expended a large sum upon tramways to connect with the railway; (2) and obtained a still further reduction of rates by threats that the owner would construct another railway line from the collieries if the tenants' terms were not acceded to. *Held*, that neither reason justified the preference. *In re* Harris, 91 E. C. L. R. 693.

6. In *England*, a charge made for shunting, onto a siding, the property of the complainant quarry-owner, was held to be discrimination, no charge being made against other quarry-owners for shunting onto sidings belonging to the railroad company. Diphwys Casson Slate Co. *v.* Festiniog R. Co., 32 L. T. (N. S.) 271.

7. Skinnington Iron Co. *v.* N. E. R. Co., 3 Law T. Rep. 785. And one of the commissioners — Miller — went further, and in his opinion expressed himself

crimination against plaintiff in ordering its agents not to carry his goods except when prepaid, which fails to aver actual injuries to him from such order, does not state a cause of action.[1]

**8. Discrimination Against Particular Localities.**—It is evident that discrimination may as well be practised in fixing freight charges between certain localities as between certain consignors. This fact has been recognized in a number of decisions; and it has been so held with reference to the *Illinois* statute, since it contains no qualification.[2] In that State, one especial object of the legislation was the prevention of the lower rates at competitive points, which existed despite longer distances of haul. Railroad companies are not to use their power to benefit particular individuals or localities by arbitrary discriminations which cause injury to others in rival pursuits or rival positions.[3] Discrimination between individuals to enable them to compete with others,[4] or between localities for

thus: "As to credit, it would be absolutely impossible that this court should at any time, or under any circumstances, order a railroad company to give credit to a customer. I do not say that circumstances might not arise which would make it an undue prejudice to refuse credit to one customer while giving it to another; but it is not necessary to discuss that, because in this particular case I am of opinion that the company had a perfect justification for what they did."

1. An order to an agent as follows: "You are instructed to ship no lumber or merchandise of any description to Mr. [naming him] . . . except when all freight and charges are paid," and a request to a connecting road to make a like order, do not constitute libel, there being no malice imputed. Allen *v.* Cape Fear & Yadkin Valley R. Co. (N. Car.), 35 Am. & Eng. R. R. Cas. 532. Smith, C.J., said: "The order . . . is but the exercise of a right to demand of every one that, upon all freight conveyed, the charges must be paid in advance; and we do not perceive any legal wrong done to one to whom credit may not be given, because it is given to others; it may be because of their punctuality in paying bills whenever they are presented. The statute recognized the right, for it compels the company to furnish transportation, not generally, but 'on the due payment of the freight or fare legally authorized therefor' (Code, § 1963); and therefore the exaction of prepayment of freight for goods consigned to the plaintiff is but the assertion of a right which might be, if in fact it be not, enforced against all dealers."

2. The evidence showed carriage of the same kind and same amount of freight, to point A, 55 miles, at 16 cents per 100; to point B, 117 miles, at 10 cents per 100. No evidence was presented that the parties at A were injured by the discrimination, and it appeared that there was no business competition between the two points, and that there was a competing railway carrying to the more distant point. *Held*, that the railroad company was liable for infringement of the statute. The clause providing that "competition with any other railroad or means of transportation" at the point preferred shall be no defence, *held*, to mean competition for carriage, whether the goods themselves compete in the market or not. Cut rates by other roads at competitive points do not excuse unjust discrimination. Ill. Cent. R. Co. *v.* People, 12 N. E. Rep. 670; s. c., 24 Am. & Eng. R. R. Cas. 494.

3. And the complaint of some neighborhoods that they are so discriminated against cannot be avoided by merely showing that competition with other carriers has lowered the rates at the favored points, without showing circumstances of a reasonable nature, *e.g.*, less cost of a transportation in shipments to the favored points. Chicago, etc., R. Co. *v.* People, 67 Ill. 11.

4 *In re* Ransome, 87 Eng. Com. Law Rep. 452. In that case, the complainant was an Ipswich coal-merchant, whose coal came by sea, and which he shipped over defendant's road at rates higher than those charged to another patron, whose coal came to Ipswich by rail. *Held*, the fact that complainant in the sea-carriage had an advantage over the third party, did not justify the discrimination. Also, a scale of rates imposed less charges on coal from the more distant town of Peterborough than it

the same purpose, is illegal.[1] The desire to benefit a particular shipper, particular company, or a particular locality will not justify discrimination.[2] Rates and charges not unreasonably high of themselves can be so adjusted in their relation to each other as to give undue preference and unreasonable advantage. If a railway company, in establishing charges on different divisions and branches of its road, so adjusts them as to divert trade and business to one locality, which naturally, under an equitable adjustment, would go to another, such preference for one place and disadvantage to another is not excused or made lawful by the fact that some of such charges are not entirely voluntary, but result from competition between carriers.[3]

The spirit and purpose of the Interstate Commerce Act require that, when the circumstances and conditions will fairly admit of it, the charges to all points for a like service should be made relatively equal.[4] It is not a ground of complaint against the

did on coal from Ipswich—so as to enable Peterborough to compete with Ipswich. But when the district of competition between the two towns was passed, the tariff resumed its natural charges. *Held*, the discrimination against Ipswich was illegal.

1. In Skinningrove Iron Co. *v.* N. E. R. Co., 3 Law T. Rep. 785, the railroad company had charged a certain iron-mill at Grosmont a rate per ton per mile which was less than that charged to complainant. But the aggregate charge from Grosmont mill was higher than that from Skinningrove, where petitioner's mill was; also the evidence showed petitioners had a ready sale for their stock, and received no prejudice owing to the difference in favor of Grosmont. The difference between the aggregate rates of the two mills was not enough to pay the difference in expenses of hauling, etc. Under these circumstances, the English commissioners were all of opinion that a desire to benefit the particular mill, or the particular locality of Grosmont, was not a legal justification of any discrimination.

2. Rates to different ports in *England* whence goods are carried to Belfast, Ireland, must be relatively equal; and the railroad company cannot charge higher relative rates *via* one port so as to send the traffic to another port for sea-carriage by a certain ocean company. Ayr Harbour Trustees *v.* Glasgow & S. W. R. Co., 4 R. & Can. Tr. Cas. 90. See also authorities cited in preceding notes.

The Providence & Worcester Railroad Company has one terminus on the river in Providence, and another across the river in East Providence; the one in Providence having been first constructed, and the other later, and for the convenience of the company. From the Providence terminus to points reached from both, the distance is slightly the less. The company is not at liberty to make from Providence to such common points higher charges than from East Providence, in order to force the business to the latter terminus, and would be chargeable with unjust discrimination if it should do so. Providence Coal Co. *v.* Prov. & Wor. R. Co., 1 Inter. Com. Rep. (Off.) 107.

3. Raymond *v.* Chicago, etc., R. Co., 1 Inter. Com. Rep. (Off.) 230.

Red Wing and Lake City, on defendant's main line, are distant from Chicago 369 and 352 miles respectively, while Mazeppa, on a branch, is 392 miles distant from Chicago. Before the Interstate Commerce Act, the rates per hundred miles were, from the first-mentioned places, 15 cents; from Mazeppa, 17 cents. These have been reduced to 7½ cents and 12 cents. *Held*, the difference in the reduction will not cause the present Mazeppa rates to be declared unreasonable, without other evidence. Raymond *v.* Chicago, Mil., etc., R. Co., 1 Inter. Com. Rep. (Off.) 230.

4. Crews *v.* Richmond, etc., R. Co., 1 Inter. Com. Rep. (Off.) 401.

Where through rates and through bills of lading are afforded communities situated similarly to complaining town, it also must be given such through rates and bills. It is no excuse of the denial that once the merchants of the complaining town were offered rebates if they would ship by defendant *via* an undisclosed connecting line, rather than by

railroad company that it equalizes its rates as between small and large towns, even though the effect may be prejudicial to the large town, which before had been specially favored.[1] The relative reasonableness of rates between localities cannot be determined by one standard of comparison, but all the circumstances and conditions that affect the traffic must be considered ; such as the length and character of the haul, the cost of the service, the volume of business, the conditions of competition, the storage capacity, and the geographical situation at the different terminal points, and numerous other matters.[2]

what defendants considered the natural outlet to the terminus, and which alone defendant was willing to be responsible for. Harwell *v.* Columbus & West. R. Co., 1 Inter. Com. Rep. (Off.) 236; Co-op. 631; s. c., 31 Am. & Eng. R. R. Cas. 640.

1. Crews *v.* Richmond, etc., R. Co., 1 Int. Com. Rep. (Off.) 401; s. c., 32 Am. & Eng. R. R. Cas. 596.

A carrier is not compellable by law to give to the merchants of a town on its line the privilege of shipping their goods from the point of purchase to their own locality, and again from thence to the place at which the goods may be sold by them at the same rate which would have been charged had there been but one shipment from the point of purchase to the point of ultimate delivery. The fact that a refusal to give the through rate as for one shipment operates prejudicially to the town desiring the privilege, and favorably to another town, does not make the refusal operate as unjust discrimination when the carrier applies the same rule to all towns, and accords the privilege to none. Discrimination must consist in the doing for or allowing to one party or place what is denied to another; it cannot be predicated of an action which in itself is impartial. Crews *v.* Richmond & D. R. Co., 1 Int. Com. C. R. (Off.) 401; s. c., 32 Am. & Eng. R. R. Cas. 596. Cooley, Ch., said that the convenience of the public made it the duty of the carrier to give information of rates of connecting roads.

2. The fact that the export rates through Boston, and the rates on merchandise intended for coastwise points east of Portland, and the west-bound rates from Boston, have been made by the carriers the same as corresponding New York rates, in order to put Boston on an equality with New York and other seaboard cities wherever Boston is a competitor with those cities, is not controlling in determining the reasonableness of east-bound Boston local rates on a traffic in which there is no competition by other cities. In view of the longer haul to Boston than to New York; the greater cost of transportation to Boston; the very much greater volume of business to and from New York; the competition by water transportation by the Lakes, Erie Canal, and Hudson River, and also by several railroad lines; and the geographical and commercial advantages of New York,—the differentials on Boston local rates of 10 cents per hundred pounds on the first and second classes of merchandise, and of 5 cents per hundred pounds on the four other classes, between New York and Boston, on traffic originating west of Buffalo, have not been shown to be unjust or unreasonable, or to constitute unjust discrimination against Boston. Boston Chamb. of Com. *v.* Lake Shore, etc., R. Co., 1 Inter. Com. Rep. (Off.) 436; s. c., 32 Am. & Eng. R. R. Cas. 618. The commission said, *inter alia*: "Mathematical precision in the adjustment of rates is not always attainable nor necessary; and if the differences are not in fact unreasonable it cannot be material whether they are arrived at by one mode or another: and while the custom of arbitraries or fixed differences may not be an ideal method, it is simpler than fluctuating percentages; and so long as it is fair and equitable, it is amenable to no valid objection. The differences between New York and other competing cities are also fixed sums or arbitraries: at Philadelphia and Montreal, 2 cents per hundredweight lower on all classes; and at Baltimore, 3 cents per hundredweight lower on all classes. The fact of a fixed difference in rates to the seaboard cities is not peculiar, therefore, to New York and Boston." To this part, relating to "arbitraries," Walker and Morrison, commissioners, dissent.

Complaint having been made of the Chicago & Northwestern R. Co. respecting the higher rates per ton per mile from Chicago to points west of St. Peter,

**9. Discrimination Depending upon the Distance Goods are Carried.**—In determining the reasonableness of a carrier's freight charges for carrying goods different distances, it is evident that the considerations which should fix the rates for a specified distance do not necessarily multiply the rate by the distance for any further carriage. A rate per ton per mile for transportation to a destination near the place of consignment may be only fair compensation to the carrier, in view of the short carriage, the loading and unloading, etc.; while the transportation a much greater distance at the same rate per mile could not be justified. On the other hand, if the aggregate charge for the greater distance were not larger than for the less, there would be manifest discrimination. In *England*, unless perhaps the statutes of particular corporations so provide, there is no statutory regulation fixing rates of freight in proportion to the distance, except the general provisions that freight charges shall be just and reasonable. In the *United States*, however, this matter is regulated in various State statutes; and the Interstate Commerce Act provides as follows: "That it shall be unlawful, for any common carrier subject to the provisions of this act, to charge or receive any greater compensation in the aggregate for the transportation of passengers or of like kind of property, under substantially similar circumstances and conditions, for a shorter than for a longer distance over the same line, in the same direction, the shorter being included within the longer distance; but this shall not be construed as authorizing any common carrier, within the terms of this act, to charge and receive as great compensation for a shorter as for a longer distance."

In *England*, it has been held that a carrier may charge proportionately less freight per ton per mile for goods transported a given distance than it charges for a shorter haul;[1] and the court

Minn., than for points east of that point, it appeared that the rates east of St. Peter were kept down by competition on the Lakes, and from other railroads which crossed and recrossed. So that when at St. Peter the road was relieved from this, the rates rose, the result being that, with every mile of increase, the rate per ton per mile increased also, contrary to the ordinary experience that the rate per ton per mile decreases: thus, at St. Peter, 435 miles from Chicago, the rates from Chicago were 50 cents; while at Pierre, 781 miles from Chicago, the rates had risen to $1.50, the intermediate points between St. Peter and Pierre also showing increase growing with distance. But, *held*, that the portions of the road east and the portions west of St. Peter were not "similar," and therefore that the increase aforesaid was not shown to be illegal. Especially was this so since west of St. Peter the population grew scanty and the country was little cultivated, the volume of traffic light, the proportional cost of service great, snow blockades frequent in winter. Business Men's Association of Minnesota *v.* Chicago & Northwestern R. Co., 2 Inter. Com. Rep. 48.

Comparisons of rates charged by railroad companies under circumstances and conditions substantially dissimilar really prove nothing, and cannot be adopted as standards in arriving at the reasonableness and justness of rates. Business Men's Association of Minnesota *v.* R. Co., 2 Inter. Com. Rep. 48.

**Locality. Under Nebraska Statute.**—Under Nebraska Act 1887 prohibiting preferences or the reverse with respect to any "locality," the word "locality" means the territory unjustly discriminated against, and may be a village, city, county, or portion of the State. State *v.* Fremont, etc., R. Co., 35 N. W. Rep. 118; s. c., 32 Am. & Eng. R. R. Cas. 426.

1. Strich *v.* Swansea Canal Co., 111 E. C. L. R. 248. In *In re* Nicholson and G.

refused to restrain the imposition of lower rates between termini, in cases of transportation to a distant point beyond, than was charged for transportation merely between the termini, no damage to the complaining town appearing, notwithstanding the charter of the carrier contained an equality clause.[1]

The Interstate Commerce Act does not impair the general rule that, the farther goods are carried, while the aggregate charge increases, the freight per ton per mile diminishes; and, in the nature of things, joint rates on long hauls generally are, and as a rule should be, lower in proportion to distance than local rates on short hauls of the same commodity.[2] So, it was held in *Pennsylvania*, that a railroad company may discriminate in favor of longer distances, especially where the short distance is on a heavy up-grade.[3] Acceptance by the carrier, on through shipments, of a certain amount as its share of the long-distance freight for the transportation from one place to the destination, does not compel the making of the same rate on local shipments between the same points, when it appears that, if such charge were made, it would reduce the local freight below that fixed from points nearer to the destination.[4]

W. R. Co., 94 E. C. L. R. 248, the court said that, if they could see clearly that the difference imputed to the less comparative expense of a long haul was framed with a view and had the effect of preference, they would regard the pretension as to comparative costs as only a cloak, and hold the difference to be undue preference, in accordance with Ransome *v.* R. Co., 93 E. C. L. R. 135.

1. Atty.-gen. *v.* Birmingham, etc., R. Co., 2 Eng. R. Cas. (N. H. & C.) 124. See also Ransome *v.* Railway Co., 98 E. C. L. R. 709; Warwick, etc., Canal & Nav. Co. *v.* Canal Companies, 3 Eng. R. & Canal Cas. 113. *Compare* Denaby Main Colliery Co. *v.* Railway Co., 4 R. & Can. Tr. Cas. 28; Myers *v.* London, etc., R. Co., L. R. 5 C. P. 1.

**Through Rates on Connecting Lines, Under English Statute.**—Under the English Railways Clauses Consolidation Act 1845, a through rate made by agreement between two railway companies under § 87 does not come within the words "tolls to be charged equally to all persons" in § 90; and the part of the through rate apportioned to each company cannot be compared with the rate charged by such company in respect of the same distance on its own line only, as the circumstances under which the rates are made are not the same. Hull, etc., R. Co. *v.* Yorkshire, etc., Coal & Iron Co., 3 Law T. Rep. 451.

2. Farrar *v.* E. Tenn., etc., Co., 1 Inter. Com. Rep. (Off.) 480.

The method of testing the freight rates of a railroad by the rate per ton per mile is one by which these rates may be brought down to the narrowest point of scrutiny, and in this sense is valuable; but it is like looking at them with a microscope, for it ignores all other tests except that which it alone furnishes, and does not take into consideration any of the surrounding circumstances and conditions that enter into the making of the rate, no matter how compulsory or imperious these may be; and for this reason it cannot be considered a controlling rule in determining the reasonableness of rates. Business Men's Association of the State of Minn. *v.* Chicago, St. Paul, Minn. & O. R. Co., 2 Inter. Com. Rep. (L. Ed.) 41.

3. Hersh *v.* Northern Central R. Co., 74 Pa. St. 190.

4. The fact that railroad companies accept, on through shipments from Chicago to Boston, a certain sum as their share for the transportation of the freight from Schenectady to Boston, is no ground for compelling them to accept a like sum on local shipments from Schenectady to Boston, when it appears that this would be a reduction below the rates made from intermediate stations to Boston, on the same line, and apparently under similar circumstances and conditions. Whether a proportion of through rates less than the local rates over the same line can lawfully be accepted, is involved in a pending case, and is awaiting further

In order to secure goods which would otherwise go by a different route, a railroad company may discriminate in rates of freight in favor of persons living at a distance from its line; but its charges to others not similarly situated must be reasonable.[1]

**10. Discrimination Depending Upon Distance as Affected by Competition.**—(*a*) *In England.*—In England, it will be remembered that, unless perhaps the statutes of particular corporations so provide, there is no statutory regulation fixing rates of freight in proportion to the distance except the general provision that freight charges shall be just and reasonable. In that country, the question of how far a carrier is entitled to discriminate in his freight charges because of competition with other carriers is determined, not upon any express statutory provision, but by the general principles applied in all questions of discrimination.

In England, it has sometimes been said that the existence of competition with another carrier was a fair cause justifying a reduction in rates of freight to the persons able to take advantage of the competition, provided the interests of the road were the *bona fide* inducement of the reduction, and not a desire to prefer the persons favored. It is probably true that the decisions will not warrant so bold a statement; for while courts will always regard the proper interests of the carriers the decisions appear to require some lessening of the cost to the carrier in consideration of the reduction in rates.[2] The English rule has been thus stated: "It appears that competition between two railways, or by sea, or by canal, is a sufficient justification for a railway company reducing its fares to the public, who are affected by such competition and can take advantage of it; but that a railway company cannot, merely for the sake of increasing their traffic, reduce their fares in favor of individuals, unless there is a sufficient consideration for such reduction, which shall lessen the cost to the company of conveyance, or other services rendered by them to such individuals."[3]

evidence and argument. Thatcher *v.* Del. & Hud. Canal Co., 1 Inter. Com. Rep. 152.

Expense, unless exceptional, does not justify greater charge for longer haul, nor warrant commission to suspend § 4; and if exceptional, the difference must be susceptible of definite proof. *Re* Southern R. & S. Assoc. (Commission), 1 Inter. Com. Rep. 278. See also *Re* Petition of Texas & Pacific R. Co., 1 Inter. Com. (Co-op.) 30.

1. Ragan *v.* Aiken, 9 Lea (Tenn.), 609; s. c., 42 Am. Rep. 684.

In such case, a reasonable price is not made unreasonable by the lesser price for such freight secured by the low rate. Ragan *v.* Aiken, 9 Lea (Tenn.), 609; s. c., 42 Am. Rep. 687; Garten *v.* B. & E. R. Co., 1 B. & S. 112, 154, 165; McDuffee *v.* Portland & Roch. R., 52 N. H. 430; s. c., 13 Am. Rep. 72.

2. Strich *v.* Swansea Canal Co., 16 C. B. (N. S.) (111 E. C. L. R.) 243; Garton *v.* Bristol & Ex. R. Co., 1 Eng. R. & Can. Cas. (N. & M.) 218; Ransome *v.* Eastern Counties R. Co., 1 Eng. R. & Can. Cas. (N. & M.) 63; Foreman *v.* Great East. R. Co., 2 Eng. R. & Can. Cas. 202; Thompson *v.* London & N. R. Co., 2 Eng. R. & Can. Tr. Cas. 115; Harris *v.* Cockermouth, etc., R. Co. 1 Eng. R. & Can. Cas. 97; Budd *v.* Railway Co., 4 Eng. R. & Can. Cas. 393.

3. Note by the reporters in Thompson *v.* L. & N. R. Co., 2 R. & Can. Tr. Cas. (Nev. & Mac.) 121, *Citing* Strich *v.* Swansea Canal Co., 16 C. B. (N. S.) 245; Rawsome's Case, 1 R. & Can. Tr. Cas. 63; Oxlade's Case, 1 R. & Can. Tr. Cas. 72; Harris's Case, 1 R. & Can. Tr. Cas. 97; Nicholson's Case, 1 R. & Can. Tr. Cas. 121, 143; Garton *v.* B. & E. R. Co., 1 R. & Can. Tr. Cas. 218. See also Redman's

A railroad company has no right to give to some of its local shippers the benefit of competitive rates, while it refuses those rates to other shippers, upon some ground that is capricious, arbitrary, and unreasonable. The carrier cannot discriminate against an individual on account of his occupation or personal status. The fact of a shipper being a rival carrier does not avoid the rule.[1]

(*b*) *In the United States Generally.*—It may be an inference, from the *Iowa* statute, that the legislature intended, by the use of the words "like conditions and similar circumstances," to admit of a less rate at a competing than at a non-competing point, although the latter might involve the shorter carriage.[2]

Where there are two rival lines of steamboats on a river, plying between the same points and carrying goods for hire, both bearing the same relation to a railroad company, and both seeking its services to forward their goods to the same points of destination, and the company systematically discriminates against one by charging it a higher rate than the rate charged the other, it is liable in damages on the suit of the line thus discriminated against. The fact that the higher rate is not unreasonable does not affect the fact of discrimination.[3] A railroad company cannot discriminate in favor of some independent business of its own, or of any of its employees, as against other consignors.[4] A carrier cannot discriminate with respect to the origin of the traffic, with a view to prefer what comes to it over its own line above what comes to it over a rival line.[5]

It has been said, however, that courts ought not to interfere to prevent reduction in rates resulting merely from competition between rivals.[6] Railroad companies have an undoubted right to

Law of Railway Carriers (2d Ed.), chap. 3, p. 17.

1. Edwards *v.* R. Co., 11 C. B. (73 E. C. L. R.) 588; Pickford *v.* R. Co., 10 M. & W. 399; Sutton's Case, L. R. 4 H. L. 238. 249.

2. Note 21 Am. & Eng. R. R. Cas. 62.

3. Samuels *v.* Louisville, etc., R. Co., 31 Fed. Rep. 57, distinguishing Atchison, etc., R. Co. *v.* Denver, etc., R. Co. 110 U. S. 667.

4. Southern Exp. Co. *v.* St. Louis, etc., Co., 10 Fed. Rep. 869; Cumberland Valley R. Co.'s App., 62 Pa. St. 218.

5. Logan *v.* Central R. Co., 74 Ga. 684. See also Baxendale *v.* North Devon R. Co., 91 E. C. L. R. 324.

6. Denver & N. O. R. Co. *v.* Atchison, etc., R. Co., 12 Am. & Eng. R. R. Cas. 1. In this case, a decree had prohibited two companies from dividing freight charges between them in a manner discriminating against a third, a rival to one of them. Afterwards, the one so engaged in the competition offered carriage at nominal rates, whereby the company carrying for the two rivals secured almost the whole of the total charge for the through carriage over its own line and that of the company making the reduction. *Held*, that, since the proof showed the reduction to have been voluntarily made by the company making it, the court would not prohibit it. But the court said that such charge might be treated as discrimination if the object was to reduce the proportion receivable by the rival company so as to drive it out of the field and thus ultimately to avoid the decree.

In Ill. Cent. R. Co. *v.* The People, 121 Ill. 304, Schofield, J., said: "Undoubtedly the public are benefited by competition in carriage, but it must be a healthy competition. A competition carried on below a reasonably remunerative point, it is obvious, must sooner or later end in the bankruptcy of some or all of the parties. The public are, in the end, injured instead of being benefited by this; for if some of the parties are bankrupted, those not bankrupted thereafter have a monopoly, and, if all are bankrupted, the

enter into a just and fair arrangement whereby their business will be increased, although the effect may be to lessen the business of others. With a view to increasing the transportation over the railroad, they may extend more favorable terms to all shippers although other transporters thereby have their business diverted.[1]

(*c*) *Under Interstate Commerce Act.*—The question has arisen in various aspects, under the fourth section of the Interstate Commerce Act, as to how far competition between carriers creates such a difference in the "substantially different circumstances and conditions" which will justify a higher rate of freight for a shorter distance. It is settled that the carrier is the judge of the question in the first instance, but that the carrier's judgment is subject to the opinion of the commission and the courts, and the burden of proof is upon the carrier to justify a departure from the general rule prescribed by the statute. The existence of actual competition which is of controlling force, in respect to traffic important in amount, may make out the dissimilar circumstances and conditions entitling the carrier to charge less for the longer than for the shorter haul over the same line in the same direction, the shorter being included in the longer, in the following cases:

*First.* When the competition is with carriers by water which are not subject to the provisions of the statute.

*Second.* When the competition is with foreign or other railroads which are not subject to the provisions of the statute.

*Third.* In rare and peculiar cases of competition between railroads which are subject to the statute, when a strict application of the general rule of the statute would be destructive of legitimate competition.[2]

business is destroyed. A temporary reduction in prices below a reasonably remunerative point manifestly must tend to unsettle values, and, by producing a feeling of uncertainty and insecurity, injure trade affected by it far more than it benefited it."

The fact that there is competition in the carriage of persons or property to or from a particular place is a circumstance which justifies a common carrier, under section 4 of the Interstate Commerce Act, to charge less for a long haul to or from said place than for a short one included therein. *Ex parte* Koehler, receiver of the Oregon & Cal. R. Co., 31 Fed. Rep. 415; s. c., 21 Am. & Eng. R. R. Cas. 52.

1. Munhall *v.* Pennsylvania R. Co., 92 Pa. St. 150.

2. *Re* Louisville, etc., R. Co., 1 Inter. Com. Rep. 31; s. c., 29 Am. & Eng. R. R. Cas. 16; Martin *v.* Southern Pacific R. Co., 2 Inter. Com. Rep. 1; s. c., 34 Am. & Eng. R. R. Cas. 612. See also Boston & Albany R. Co. *v.* Boston & Lowell R. Co., 1 Inter. Com. Rep. (Off.) 160; s. c., 31 Am. & Eng. R. R. Cas. 655.

It is not sufficient justification that the traffic which is subjected to such greater charge is way or local traffic, and that which is given the more favorable rates is not; nor is it sufficient justification for such greater charge that the short-haul traffic is more expensive to the carrier, unless when the circumstances are such as to make it exceptionally expensive, or the long-haul traffic exceptionally inexpensive, the difference being extraordinary and susceptible of definite proof; nor that the lesser charge on the longer haul has for its motive the encouragement of manufactures or some other branch of industry; nor that it is designed to build up business or trade centres; nor that the lesser charge on the longer haul is merely a continuation of the favorable rates under which trade centres or industrial establishments have been built up. The fact that long-haul traffic will only bear certain rates is no reason for carrying it for less than cost at the expense of other traffic.

The prohibition of the statute is limited to cases in which the circumstances and conditions are substantially similar.[1] The fact that one railroad line competing for long-haul traffic is long and circuitous, and, in order to share in the traffic, is obliged, as against competitors having more direct lines and able to make more speedy transportation of freight, to make concessions in its charges will not make out the dissimilar circumstances and conditions of the act.[2] The fact that there is also possible water competition will not of itself make out such dissimilar circumstances and conditions. The real, not the possible, competition will be considered when such greater charges are in question.[3] Whether in any particular case there is that competition on the long haul that will justify a lower charge for the long haul than that charged for the short haul, under otherwise similar circumstances and conditions, must be determined on the facts of the particular case; keeping in mind that, where the matter is not clear, the object and policy of the law should prevail.[4]

The Interstate Commerce Act was not enacted to destroy competitition, and the rate per ton per mile is not always to be enforced if the destruction of competition would result.[5]

*Re* Louisville & Nashville R. Co., 1 Inter. Com. Rep. (Off.) 31; s. c., 29 Am. & Eng. R. R. Cas. 16. Reasserted: Martin *v.* So. Pac. R. Co., 2 Inter. Com. Rep. 1; s. c., 34 Am. & Eng. R. R. Cas. 612.

Rates obtained by competition, which produce a lower rate than the tariff calls for, are unjust, because they enable an intelligent shipper to obtain an advantage over one who has less information; and they are illegal because they show two rates to the same point, over the same line, at the same time. The tariff rates should not exceed the combination rates in any case. Martin *v.* So. Pac. R. Co., 2 Inter. Com. Rep. 1; s. c., 34 Am. & Eng. R. R. Cas. 612.

1. *Re* Louisville & Nashv. R. Co., 1 Inter. Com. Rep. (Off.) 31; s. c., 29 Am. & Eng. R. R. Cas. 16.

2. Boston & Albany R. Co. *v.* Boston & Lowell R. Co., 1 Inter. Com. Rep. (Off.) 160; s. c., 31 Am. & Eng. R. R. Cas. 655.

3. Boston & Albany R. Co. *v.* Boston & Lowell R. Co., 1 Inter. Com. Rep. (Off.) 160; s. c., 31 Am. & Eng. R. R. Cas. 655.

The mere fact that a point is situated upon a navigable stream, *held*, not sufficient of itself to justify the lesser charge for a longer haul to such a point. Competition by water, to be sufficient to justify an exception under section 4, should be actual: and not such as would be likely to arise if rates should be raised, of controlling force, and in respect to traffic important in amount. Harwell *v.* Columbus & W. R. Co., 1 Inter. Com. Rep. (Off.) 236 Co-op. 631; s. c., 31 Am. & Eng. R. R. Cas. 640.

4. Missouri Pacific R. Co. *v.* Texas, etc., R. Co., 31 Fed. Rep. 862; s. c., 31 Am. & Eng. R. R. Cas. 76.

5. Business Men's Assoc. *v.* Chicago, etc., R. Co., 2 Inter. Com. Rep. 41; s. c., 34 Am. & Eng. R. R. Cas. 724.

The departure, from the usual rule that the rate per ton per mile decreases with the increase of distance to be travelled, is not an illegality on those roads in the North-west whose lines in the Lake regions are affected by severe lake and other railroad competition resulting in very low rates in those portions of the roads, and the higher rates prevailing beyond being felt more and more as the miles of travel increase, causing the rate per ton per mile to increase with increase of distance. Business Men's Association *v.* Chicago, St. Paul, Minneapolis & Omaha R. Co., 2 Inter. Com. Rep. 41; s. c., 34 Am. & Eng. R. R. Cas. 724; Same *v.* Chicago & Northwestern R. Co., 2 Inter. Com. Rep. 48; s. c., 34 Am. & Eng. R. R. Cas. 711.

**Competition with Railroad not Subject to Interstate Commerce Act.**—When a carrier, acting in good faith, has adopted an exceptional rate, not unreasonable in itself, on a portion of its line, because that rate has been forced upon it by an independent State railroad company in direct competition with it, and not subject to the Act to Regulate Commerce, the reasonableness and justness of rates on other por-

**11. Discrimination Caused by Grouping of Places into Districts.**—It is a custom of carriers, originating perhaps in their own convenience, to group the towns of a considerable district, and to charge the same rate to all within the district. This custom has been commended, and it has been held that it does not necessarily constitute discrimination.[1] The fact that the rates of a railroad company are not established on a mileage basis, does not necessarily make out their illegality or injustice.[2]

**12. Discrimination Depending upon Distance as Between Connecting Carriers.**—The "same line" intended by the "long and short haul clause" of the Interstate Commerce Act is a physical line, and one piece of road may be part of several lines. If several lines join in making the tariff which constitutes the lesser charge on the long haul, while one or more of their number make the greater charge on the shorter haul, the case is within the statute, and those who make such greater charge must justify it.[3] Railroad companies over whose roads a fast freight line operates, and which divides its expenses and receipts, are responsible for its action in making and filing rates, and must, at their peril, see that its charges upon traffic over their roads are in conformity to law.[4] Violation of the "long and short haul clause" is not made out by showing that a carrier, when called upon by a consignor for through rates, names such as are greater for the shorter distance, and receives the amount for itself and its connections, when it appears that on its own line the charges are the greater for the long distance, and through charges by the shorter line are only made greater by the fact that

tions of the carrier's line, extending into a far interior region of the country where no such conditions exist, cannot be measured alone by the standard thus furnished, but must be governed by considerations which fairly and justly apply to them. Business Men's Assoc., Minn., *v.* Chic., St. Paul, etc., R. Co., 2 Inter. Com. Rep. (L. Ed.) 41; s. c., 34 Am. & Eng. R. R. Cas. 724.

**Canadian Competition.**—Canadian competition at the present time does not justify a higher charge from San Francisco to Denver than to Kansas City, it having been withdrawn at the latter point, and the Canadian road now working upon an agreement as to rates with the roads in the United States at all points where it formerly competed. Martin *v.* So. Pac. R. Co., 2 Inter. Com. Rep. 1; s. c., 34 Am. & Eng. R. R. Cas. 612.

**Slight Traffic Abandoned Because of Competition.**—The commission will not approve of lower charge for larger haul, under the suspension clause of section 4, merely because to the point reached by the long haul there is a slight traffic which must be abandoned owing to the competition if the low rates thereto are not allowed, the local rates on the other portions of the road being necessarily higher in order to meet as much of the interest on indebtedness as the poverty of the road would permit. *Re* Tariff of Columbia & W. R., 1 Inter. Com. Rep. (Off.) 626.

1. La Crosse Manfrs. etc., Union *v.* Chicago, etc., R. Co., 1 Inter. Com. Rep. (Off.) 629; Crews *v.* Richmond, etc., R. Co., 1 Inter. Com. Rep. 40; s. c., 32 Am. & Eng. R. R. Cas. 596; Business Men's Assoc. *v.* Chicago, etc., R. Co., 2 Inter. Com. Rep. 41; s. c., 34 Am. & Eng. R. R. Cas. 724. See also Budd *v.* London, etc., R. Co., 4 R. & Can. Tr. Cas. 393, following, under compulsion, Evershed's Case, 2 Q. B. D. 254. *Compare* Ransome *v.* Railway Co., 93 E. C. L. R. 135.

2. La Crosse Manfrs., etc., Union *v.* Chicago, etc., R. Co., 1 Inter. Com. Rep. (Off.) 629.

3. Boston & Albany R. Co. *v.* Boston & Lowell R. Co., 1 Inter. Com. Rep. (Off.) 158; s. c., 31 Am. & Eng. R. R. Cas. 655.

4. Boston & Albany R. Co. *v.* Boston & Lowell R. Co., 1 Inter. Com. Rep. (Off.) 158; s. c., 31 Am. & Eng. R. R. Cas. 655.

the connecting road, which has the shorter line, makes higher rates than the connecting road, which has the longer line.[1]

Under a provision in the state constitution forbidding railroad companies from making discrimination in rates, it has been held that such provision is not violated by refusing to give to a connecting road, whose connection is physical merely, the same arrangement as to through rates as that given to another connecting line, with which provision has been made for joint business at an established union junction.[2]

The provision of the *North Carolina* Code, regulating freight, extend to the branches of a railroad.[3] When the same carrier operates parallel lines, and for any cause accepts low rates upon one of them, it should provide sufficient corresponding advantages to the patrons of the other line to preserve the substantial equality contemplated by the statute.[4]

Through and continuous lines imply through rates, which must be reasonable rates. Where a railroad company forming part of a through line owns a controlling interest in the stock of the company forming the balance of the line, it cannot rid itself of responsibility for unjust charges by breaking the haul in two and calling the through line two carriers.[5]

1. Allan *v.* Louisville, etc., R. Co., 1 Inter. Com. Rep. (Off.) 199; (Co-op. Ed.) 621; s. c., 31 Am. & Eng. R. R. Cas. 630.

2. Atchison, etc., R. Co. *v.* Denver, etc., R. Co., 110 U. S. 66.

**Under Massachusetts Statute.**—Massachusetts Act, 1874, providing, under penalty, that "No railroad corporation shall charge or receive for the transportation of freight to any station on its road a greater sum than is at the time charged or received for the transportation of the like class and quantity of freight from the same original point of departure to a station at a greater distance on its road in the same direction" applies to the transportation by such a corporation, as, common carrier over its own road, and not over other railroads, for which it charges and receives nothing, except as collecting agent of the corporations owning such other roads. Com. *v.* Worcester & N. R. Co., 124 Mass. 561.

3. The words in *North Carolina* Code, § 1966, "transported in the same direction," mean the direction in which the freight is carried from the depot where the shipment is made, and embraces branches of the same road in that direction which are used in connection with and as a part of the same road. If the corporation uses two or more distinct roads not in connection, it may be that it could have a different class of charges for each of its roads. Hines *v.* Wilm. & W. R. Co., 95 N. Car. 434.

**Feeder of Interstate Road.**—A railroad company chartered by the state of Tennessee owns a short road wholly in that State, but has never owned any rolling-stock nor operated its road. The road was used and operated as a means of conducting interstate traffic in coal by companies owning connecting interstate roads. *Held*, that the short road thus used is one of the facilities and instrumentalities of interstate commerce, and the carriers using it are subject to the provisions of the act to regulate commerce. In respect to such traffic, the duties of such carriers to the public are the same without respect to ownership, corporate control, the authority or means of its construction. Heck *v.* E. Tenn., etc., R. Co., 1 Inter. Com. Rep. (Off.) 495; s. c., 33 Am. & Eng. R. R. Cas. 671.

4. Low charges upon one of two routes operated by the same carrier should not be made up by relatively high charges upon the other when the result disastrously affects the business of communities situated upon the latter line. Boards of Trade Union *v.* Chic., Mil., etc., R. Co., 1 Inter. Com. Rep. (Off.) 215. Some difference on account of greater distance, and increased operating expenses, and the conditions affecting the traffic may be reasonably permissible. But the mere fact, that the higher rates would be reasonable but for the parallel line, will not justify them.

5. Brady *v.* Pennsylvania R. Co., 2

**13. Discrimination Between Termini.**—The *English* Railway and Canal Traffic Act prohibits discrimination for transportation under the same circumstances "over the same portion of the line of railway." This phrase is now construed to mean, although it was at first held to the contrary, "passing between the same points of departure and arrival, and passing over no other part of the line."[1]

**14. Miscellaneous Discrimination.**—An action lies, in *New Hampshire*, for unreasonable discrimination practised in Maine contrary to the *Maine* law.[2] An injunction to prevent multiplicity of suits will sometimes be issued in discrimination cases.[3] A preliminary injunction will not be granted to compel a carrier to transport goods at the rates fixed by law; but it will issue to prevent a railway company, bound by law to transport goods, from entering into an agreement not to transport them at the rates fixed by law.[4] The practice of overcharging will not be restrained by a court of equity where the plaintiff suffers no injury beyond that of the general public.[5] A consolidated company existing under charters in several States may be restrained in one State from discrimination in traffic domestic to that State where the remedy at law would lead to multiplicity of action.[6] A penalty for discrimination in freight rates does not apply to discrimination in facilities: penal statutes must be strictly construed.[7]

Under the *English* statutes, prohibitory rates of freight are unlawful.[8]

Inter. Com. Rep. 78; s. c., 34 Am. & Eng. R. R. Cas. 603.

1. The *English* Act of 1854 prohibiting discrimination for transportation under the same circumstances, "over the same portion of the line of railway," in Manchester, etc., R. Co. *v.* Denaby Main Colliery Co., 4 Eng. R. & Can. Tr. Cas, 436, was held, by the Queen's Bench Division, Mathew, J., not to be interpreted so as to narrow the words in quotation down to cases where the termini of the transit correspond. But this was reversed by the court of appeal in 1884 (the master of the rolls, Cotton, L.J., and Lindley, L.J.); And the latter court held that the words "mean passing between the same points of departure and arrival, and passing over no other part of the line." The latter decision was also made in Finnie *v.* Glasgow R. Co., 2 Macqueen's H. L. Cas. 183, and by the court of sessions in *Scotland*, in Murray *v.* Glasgow R. Co., 3 App. Cas. 1029. The remedy under the English statutes is, where the termini are not the same, to apply for interdictment under sec. 2 of the Act of 1854 prohibiting preferences.

2. McDuffee *v.* Port. & Roch. R., 52 N. H. 430.

3. Where it appeared that the plaintiffs' business was such as to make them frequent shippers, and that a continuous series of shipments was necessary in conducting their business, and that a remedy sought by actions at law would lead to a multiplicity of suits,—*held*, the court will intervene by injunction to prevent a multiplicity of suits, and it is not a prerequisite that the plaintiffs should first have established their rights by an action at law. Scofield *v.* R. Co., 43 Ohio St. 571; s. c., 23 Am. & Eng. R. R. Cas. 612.

4. Rogers, etc., Works *v.* Erie R. Co., 20 N. J. Eq. 379.

5. Cumberland Valley R. Co.'s App., 62 Pa. St. 218.

6. Scofield *v.* Lake Shore, etc., R. Co., 43 Ohio St. 571; s. c., 23 Am. & Eng. R. R. Cas. 612.

And a State court or the United States circuit court may apply the State law to a business arrangement as to rates made with a connecting company whose line extends beyond the State, if the discrimination complained of is as to business wholly within the State. Missouri Pac. R. Co. *v.* Texas & Pac. R. Co. (U. S. C. C. E. D. Louisiana), 28 Am. & Eng. R. R. Cas. 1.

7. Bond *v.* Wabash, etc., R. Co., 23 Am. & Eng. R. R. Cas. 608.

8. Young *v.* Gwendreath Valley, etc.,

Differences in grade, compelling the use of shorter trains, will be considered where discrimination is alleged.[1] Discrimination may be practised in refusing to a consignor an opportunity to ship a full carload of mixed goods.[2] It would appear that an increase of speed and accommodations will justify an increase of charge.[3] The fact that the cars used in traffic to a certain locality are assured of a return load may justify an increase of freight;[4] as may also, perhaps, the fact that cars are of a peculiar construction, and only available for live-stock:[5] but the carrier cannot justify higher rates for hauling improved stock-cars because more valuable live-stock is transported.[6] Higher freight cannot be justified by a pretence that oil transported in barrels involves greater risk of fire than when shipped in oil-tank cars.[7]

R. Co., 4 R. & Can. Tr. Cas. 247; Brown *v.* Gt. W. R. Co., 3 R. & Can. Tr. Cas. 536 (*per* Brett, L.J.).

1. Broughton, etc., Co. *v.* Gt. W. R. Co., 4 Nev. & Mac. 192. See also Hersh *v.* Northern Central R. Co., 74 Pa. St. 190.

2. It is unlawful, under the Interstate Commerce Act, to refuse in local shipments the advantage of shipping two or more certain articles together so as to form one full carload, each article being charged the same proportionate rate allowable to it when the carload is composed entirely of such article, if such refusal will work a prejudice to such local shipper on account of mixed car-loads being allowed to a longer-distance or through shipper. Martin *v.* Southern Pac. R. Co., 2 Inter. Com. Rep. (Co-op.) 1; s. c., 34 Am. & Eng. R. R. Cas. 612.

Where coal was carried, in *England*, at a rate lower than the ordinary one because the coal was made up in entire trains at regular times, at less cost, on this account, to the railroad company, it was held that the difference made did not constitute discrimination. *In re* Oxlade, 87 E. C. L. R. 453.

3. City of Dublin Steam-packet Co. *v.* London, etc., R. Co., 4 R. & Can. Tr. Cas. 10.

4. Girardot *v.* Midland R. Co., 4 R. & Can. Tr. Cas. 291.

A higher charge for barrel shipments than for oil in tank-cars cannot be justified by the pretence that for the tank-cars there is greater probability of return loads. The return loads in the tank cars are either turpentine or cotton-seed oil. The turpentine region is only reached by some of the roads; and in that region are lumber, iron, and other heavy articles which can be transported in the cars used for the oil-barrels, but not in the tank-cars. In the Southwest, cotton-seed-oil-mills may or may not be found where the oil is shipped. And for some reason, not satisfactorily explained to the commission, the rates for cotton oil yield little profit. Hence, the argument based on return loads for tank-cars is of no value to the carrier. Rice *v.* Louisville & Nashville R. Co., 1 Inter. Com. Rep. (Off.) 503; (Co-op.) 722; s. c., 33 Am. & Eng. R. R. Cas. 560.

5. The commission were not afforded evidence precise enough to decide the particular controversy; but speaking of cases in general, they said, *per* Walker, C.: "It appears to the commission that the expense of hauling complainant's cars in one direction unloaded, as compared with the greater ability to load back the ordinary cattle-cars in use by the defendants, and the fact that a large percentage of the ordinary cattle-cars are so back-loaded upon the long hauls of the western roads, are considerations which justify a difference in charge against shippers who prefer to hire the improved stock-cars for the transportation of their live-stock."

Whether the particular difference in this case was excessive was determinable by a variety of considerations, viz., the number of cars required for carriage, which, being greater than the number of ordinary cars, would reduce the loss arising from the empty haul; larger length and weight of cars; wear and tear on tracks; placing in idleness the railroad company's own cars, etc.;—which circumstances were so vaguely stated to the commission that they retained the case for future investigation. Burton Stock-car Co. *v.* Chicago, etc., R. Co., 1 Inter. Com. Rep. (Off.) 132.

6. Burton Stock-car Co. *v.* Chicago, etc., R. Co., 1 Inter. Com. Rep. (Off.) 132.

7. Rice *v.* Louisville, etc., R. Co., 1 Inter. Com. Rep. (Off.) 503; (Co-op. Ed.) 722.

Preferences to goods shipped on the occasion of a public calamity,[1] or to poor persons from motives of private charity, or to persons attending corporate meetings do not constitute discrimination.[2]

Where facts are alleged in a complaint which constitute discrimination because charges are unreasonable, it is not incumbent upon the plaintiff to show what was a reasonable charge.[3]

**IX. LIEN FOR FREIGHT.—1. Generally.**—The consignee of goods is not entitled to a delivery of them until the carrier's freight is paid or tendered.[4] While a carrier may require the payment of freight in advance, and is not bound to carry except upon payment of his full charges for the transportation ;[5] yet if he receives the goods, as is the custom, without demand for prepayment, then this right is waived, and his reliance is only upon the lien which the law gives him on the goods, or upon the responsibility of the parties liable.[6] But in order to entitle the carrier, who has contracted to transport goods and to deliver them to the consignee, to his freight charges, a complete delivery must be made ; a carriage of the goods in safety to the place of delivery is not sufficient.[7]

It is well settled that a carrier, like other bailees, is entitled to a lien upon the goods transported, to secure him for the freight charges which are justly due for their transportation.[8] This lien is coextensive with the right to recover freight.[9] The lien of a common carrier on goods transported depends on the contract with the owner. Ordinarily, the law implies such a lien; and it will be held that, in delivering goods to be carried, the owner assents to the condition that the carrier may retain possession of the goods until his reasonable charges have been paid, although nothing may be said on the subject.[10] If the owner or consignee fails or refuses to receive the goods, the carrier may store them, and the warehouse charges become a lien upon them.[11] A carrier's lien takes precedence of any claims against the owner or consignee of the goods ;[12] but where the freight for goods which have arrived

1. Michigan Central R. Co. *v.* Burrows, 33 Mich. 6.

2. McDuffee *v.* Railroad, 52 N. H. 453.

3. Goodridge *v.* Union Pacific R. Co., 35 Fed. Rep. 35.

4. Langworthy *v.* New York, etc., R. Co., 2 E. D. Smith (N. Y.), 195.

5. Wyld *v.* Pickford, 8 M. & W. 443; Batson *v.* Donovan, 4 B. & Ald. 28; Knight *v.* Providence, etc., R. Co., 13 R. I. 592; s. c., 9 Am. & Eng R. R. Cas. 90.

Averment that plaintiff was ready and willing to pay is sufficient without actual tender of money. Pickford *v.* Grand Junction R. Co., 8 M. & W. 372.

6. Barnes *v.* Marshall, 83 E. C. L. R. 785.

A carrier need not be paid in advance unless he especially demands it. Wilson *v.* Railway Co., 56 Me. 60.

7. Western Trans. Co. *v.* Hoyt, 69 N. Y. 230; Angell on Carriers, § 282; Parsons on Shipping, 204.

8. This principle is recognized in nearly every case involving questions of the carrier's lien. See also Skinner *v.* Upshaw, 2 Ld. Raym. 752.

9. Dyer *v.* Grand Trunk R. Co., 42 Vt. 441; Evarts *v.* Kerr, Rice (S. Car.), 203; Hall *v.* Dimond, 63 N. H. 565.

10. Marsh *v.* Union Pacific R. Co. (C. C. Colorado), 6 Am. & Eng. R. R. Cas. 359.

11. The Eddy, 5 Wall.(U. S.) 481; Brittan *v.* Barnaby, 21 How. (U. S.) 527; Alden *v.* Carver, 13 Iowa, 253; Western Trans. Co. *v.* Barber, 56 N. Y. 544.

12. Potts *v.* N. Y. & N. Eng. R. Co., 131 Mass. 455; s. c., 3 Am. & Eng. R. R. Cas. 424; Rucker *v.* Donovan, 13 Kan.

is paid by the consignee, it is too late for stoppage *in transitu*, and the goods are then subject to attachment by the vendee's creditors.[1]

**2. When Carriers are Entitled to a Lien.**—(*a*) *Agent's Authority to Contract.*—As a general rule, the consignor, as the agent to whom the owner intrusts his goods to be delivered to the carrier, must be regarded as having authority to stipulate for the terms of the transportation.[2] So the initial carrier, when the bill of lading is silent upon the question, is impliedly authorized to select the connecting line;[3] and a carrier receiving goods for transmission over his own line, and consigned to a place beyond, has the apparent power to forward the same to the place of destination by any of the ordinary routes thereto. A second carrier receiving the goods in the usual and ordinary course of business, without notice of any special instructions to the first carrier, and transporting them to the place of destination, is entitled to demand the ordinary and usual freight therefor.[4]

(*b*) *Effect of Mistake upon the Carrier's Lien.*—A carrier receiving goods to be shipped over his own and successive lines of transportation, for delivery to a distant point, acts, in the absence of special instructions from the owner to the succeeding carriers, as his forwarding agent in giving directions to them as to the transportation of the goods;[5] and in case of a mistake made by the first carrier in directing the goods, or in the bills, by reason of which

251; 2 Kent, 541; Oppenheim *v.* Russell, 3 Bos. & Pul. 42

An officer holding process against the vendee may lawfully advance the freight charges to the carrier on taking possession of the goods, and, having so advanced them, is substituted to all the carrier's rights of possession as security therefor. Before his possession can be disturbed, he must be reimbursed the money by him thus advanced. Rucker *v.* Donovan, 13 Kan. 251.

The consignor's right of stoppage *in transitu* is indeed paramount to any lien created by usage or by agreement between the carrier and the consignee, for a general balance of account. Oppenheim *v.* Russell, 3 B. & P. 42; Jackson *v.* Nichol, 5 Bing. (N. C.) 508, 512; Potts *v.* Railroad Co., 131 Mass. 455; s. c., 3 Am. & Eng. R. R. Cas. 424.

The carrier's lien is superior to the right of an officer attaching the goods on *mesne* process or on execution. 3 Wood R. Law, 1581, note.

1. Langstaff *v.* Stix, 64 Miss. 171; 28 Am. & Eng. R. R. Cas. 85. Here the freight was paid, but the railroad agent, on opening his mail subsequently, found that he had instructions not to deliver the goods. *Held*, that this was too late.

As to stoppage *in transitu*, see authorities cited in note to 28 Am. & Eng. R. R. Cas. 87.

2. Ryan *v.* M. L. & T. R. Co., 65 Tex. 13; s. c., 23 Am. & Eng. R. R. Cas. 703; Red. Car. § 52; Hutch. Car. § 265.

If the agent exceeds his authority in unauthorizedly shipping goods, he himself, and not the consignor, is liable for the freight. Layng *v.* Stewart, 1 W. & S. (Pa.) 222.

3. Snow *v.* Ind., B. & W. R. Co. (Ind.), 28 Am. & Eng. R. R. Cas. 77.

4. Patten *v.* Union Pac. R. Co., 29 Fed. Rep. 590, disapproving Fitch *v.* Newberry, 1 Doug. (Mich.) 1. See also authorities cited in succeeding notes.

5. Briggs *v.* Boston & Lowell R. Co., 6 Allen (Mass.), 246, 250; Potts *v.* New York & New Eng. R. Co., 131 Mass. 455; 3 Am. & Eng. R. R. Cas. 424; Stevens *v.* Boston & Worcester R. Co., 8 Gray (Mass.) 266; Snow *v.* Ind., Bloom. & West. R. Co., Ind. ; 28 Am. & Eng. R. R. Cas. 77.

In the last case it was held that, if the bill of lading be silent in respect to the line by which the goods are to be forwarded, parol evidence will not be admitted to show that a special line was agreed upon; that, where it appears that goods were received for shipment under a written contract set out in the first para-

they are sent to the wrong place, the last carrier has a lien upon them for the freight earned by him, and also for the sums paid by him for the freight from the commencement of the transportation.[1]

(*c*) *Effect of Notice upon the Carrier's Lien.*—Where goods are carried by successive connecting carriers, the last carrier has a lien for his freight and also for the freight advanced by him to prior carriers,[2] and the consignee cannot set off against the lien the damage done to the goods by the prior carrier.[3]

When goods are delivered to a carrier for transportation over certain specified roads, and in disobedience to such direction the carrier delivers to a connecting carrier whose line does not form a part of the selected route,—if the second carrier knows of the wrong, he cannot recover freight charges, nor have a lien therefor,

graph of a complaint, there can be no recovery on a second paragraph counting simply upon a breach of the carrier's common-law duty;—and evidence of a prior verbal agreement is not in such case admissible, even under the second paragraph, for the bill of lading must control.

1. Bird *v.* Georgia R., 72 Ga. 655; s. c., 27 Am. & Eng. R. R. Cas. 39; Briggs *v.* Boston & Lowell R. Co., 6 Allen (Mass.), 246. The court distinguish this case from that of Robinson *v.* Baker, 5 Cush. (Mass.) 137, by the fact that in the latter case the first carrier was not forwarding agent of the plaintiff, nor vested with any authority as to the further transportation of the goods.

A factor who had bought goods for his principal residing at W., sent them by mistake to a third person residing at S., who received them in good faith and paid the freight. It was held that, in estimating damages in an action by the principal against this person for the conversion of the goods, the defendant was entitled to a deduction of the amount of the freight paid by him. Whitney *v.* Beckford, 105 Mass. 267, distinguishing the case from Robinson *v.* Baker, 5 Cush. (Mass.) 137. Colt, J., said: "But when the freight is earned in good faith, under a contract of transportation made with an agent of the owner, who, according to the usages of the business, is clothed with apparent authority by his principal, then the charges for freight will constitute a valid lien upon the property, although the agent, by an accidental or intentional departure from his instructions, sends the goods by a route not intended, or to the wrong place."

2. Wells *v.* Thomas, 27 Mo. 17; Lee *v.* Salter, Lalor's Supp. to Hill & Denio (163), Cooper *v.* Kane, 19 Wend. (N. Y.) 386; Galena, etc., R. Co. *v.* Rae, 18 Ill. 488; Briggs *v.* Boston, etc., R. Co., 6 Allen (Mass.), 246; Dawson *v.* Kittle, 4 Hill (N. Y.), 107; White *v.* Vann, 6 Humph. (Tenn.) 70; Steamboat *v.* Kraft, 25 Mo. 76; Travis *v.* Thompson, 37 Barb. (N. Y.) 236.

When several independent carriers successively receive goods for carriage, each is entitled to demand payment in advance, or to a lien on the goods for the carriage price; also, in such cases, each road is by mercantile custom entitled to pay the back charges, and to a lien on the goods for such charges. Knight *v.* Prov. & Worcester R. Co., 13 R. I. 572; s. c., 9 Am. & Eng. R. R. Cas. 90.

3. Bowman *v.* Hilton, 11 Ohio, 303.

The Providence, etc., R. Co. received, and paid the freight charges on certain lots of cotton shipped from Louisiana to Providence, and forwarded and delivered the same to the consignees. On delivery, the cotton was found to be badly damaged by water, and the consignees claimed the right to recoup the damage from the bill of freight and charges of the P. & W. R. Co. It appeared that the P. & W. R. Co. was not associated with the preceding carriers, and it did not appear where on the lines of transit the damage occurred. *Held*, that the recoupment could not be allowed. Knight *v.* Prov. & Worc. R. Co., 13 R. I. 572; s. c., 9 Am. & Eng. R. R. Cas. 90.

If the goods are damaged in other hands, but coming to the carrier in the course of transit in apparent good order, he may recover his freight and advances, and the owner must seek his redress either against the party in whose hands they were injured, or under his original contract of shipment. Bissel *v.* Price, 18 Ill. 408.

although he carries the goods.[1] It has been said that, to justify a lien on goods for freight, the relation of debtor and creditor must exist between the owner of the goods and the carrier, so that an action at law might be maintained for the payment of the debt sought to be enforced by the lien.[2] Where a connecting carrier has knowledge that a through contract has been made, and the price of transportation to the point of destination has been paid in advance, such carrier can assert no lien on the goods for transporting them over his line.[3] But where the first carrier makes an unauthorized guaranty, of which succeeding carriers have no knowledge or notice, the last carrier is entitled to a lien and the consignor is relegated to his remedy on the guaranty against the first carrier.[4]

Where, after partial delivery of the goods, the consignee notified the carriers to accept no more from a connecting line because of the damaged condition of the goods, the carrier disregarding such notice has no authority to receive the other goods, or to pay any back freight on them.[5]

Whether a carrier, transporting goods over a route different from that selected by the shipper, had knowledge that they were to go by a different line, is a question of fact for the jury; and the marks on the goods, with other circumstances, can be considered.[6]

1. Bird *v.* Georgia R. Co., 72 Ga. 655; s. c., 27 Am. & Eng. R. R. Cas. 39. A demand by the consignee for the goods, and refusal to deliver, would be a conversion.

2. In Fitch *v.* Newberry, 1 Doug. (Mich.) 1, one shipped goods at Burlington, on Lake Champlain, for Detroit, Mich., care of the New York & Michigan line, but at Troy they were diverted by the agents of another company and carried by a steamer of the rival company's to Detroit, to defendant, who had notice of the diversion, being one of the owners of the steamer. He refused to deliver the goods until payment of the freight from Troy to Detroit, and charges for storage. *Held*, that he had no lien for the same; that to justify a lien on goods for their freight, the relation of debtor and creditor must exist between their owner and the carrier, so that an action at law might be maintained for the payment of the debt sought to be enforced by the lien.

3. Marsh *v.* Union Pac. R. Co. (U. S. C. C. Colo. Dist.), 6 Am. & Eng. R. R. Cas. 359. The notice here held to exist was in this wise: Defendant's rule required prepayment on household goods, which the goods in this case were, and in fact $85 had been paid to the first carrier; and though it was contended that frequently advancements of cash as instalments for future freight were made, and hence the payment of the $85 might have been in that way, yet, taken in connection with the rule just mentioned, the court held it to be sufficient evidence to prove notice to the defendant of the prepayment on account of the freight.

4. Schneider *v.* Evans, 25 Wis. 241. See also to same effect, McMillan *v.* Mich. S. & N. I. R. Co., 11 Mich. 79, at p. 121.

Where there is no agreement between the carriers, the carrier last conveying must deliver to consignee on his tendering the sum stipulated for on shipment, provided it equal the regular charge of the latter, whether it does or does not include any charge for the former. Railroad Co. *v.* Marsh, 57 Ind. 505.

5. Knight *v.* Prov. & Worcester R. Co., 13 R. I. 572; s. c., 9 Am. & Eng. R. R. Cas. 90.

6. Bird *v.* Ga. R. Co., 72 Ga. 655; s. c., 27 Am. & Eng. R. R. Cas. 39. But in Patten *v.* Union Pac. R. Co., 29 Fed. Rep. 590 (U. S. C. C. Colo.), it was ruled that the fact that, when the second carrier received the goods from the first, they were loaded in an appropriately marked car of the particular railroad over which the first carrier was instructed to forward them, does not amount to implied notice to the second carrier of such instructions.

It has been held, in *Canada*, that the liability of a carrier for wilfully disregarding orders as to the route for shipment over connecting lines is only for nominal damages, although the consignor is thereby prevented from reaping the benefit of an especial contract for low rates with the connecting carriers, no notice of the terms of the contract having been given to the carrier held liable.[1]

(*d*) *Effect of Ownership of the Goods upon the Carrier's Lien.*—In *England*, it is said that the law is settled that a carrier acquires a lien for his freight which may be enforced against the real owner of the goods where the carrier has acquired them from a tortious holder.[2] This principle is adopted in analogy to the lien of an innkeeper upon the goods of the guest, and is explained upon the ground that the carrier, like the innkeeper, is obliged to receive the wrongdoer and his goods, and it is reasonable that his rights should be coextensive with his duties.[3] In the *United States*, there have been several decisions conceding to the innkeeper this right to a lien; but it has been held that a common carrier who innocently receives goods from a wrongdoer, without the consent of the owner, express or implied, has no lien upon them for their carriage against such owner.[4] A carrier receiving goods from a

1. Langdon *v.* Robertson, 13 Ont. 497; s. c., 30 Am. & Eng. R. R. Cas. 23, *citing* Die Elbinger Actien-Gesellschaft *v.* Armstrong, L. R. 9 Q. B. 473; Horne *v.* Midland R. Co., L. R. 8 C. P. 131; Grebert-Borguis *v.* Nugent, 15 Q. B. D. 85.

2. Yorke *v.* Grenaugh, 2 Ld. Raym. 867. Redman's Law of Railway Carriers (2d Ed.) 84.

See also Robinson *v.* Baker, 5 Cush. (Mass.) 137; Fitch *v.* Newberry, 1 Doug. (Mich.) 1; Buskirk *v.* Purington, 2 Hall (N. Y. Sup. Ct.), 561.

3. In Yorke *v.* Grenaugh, 2 Ld. Raym. 866, it was held that an innkeeper could assert a lien for the keep of a stolen horse against the rightful owner; and in that case, Chief Justice Holt cited the case of the Exeter carrier, who was held to have rightly detained stolen goods from their true owner until the latter paid him freight thereon for carriage upon shipment by the thief. Powell, J., concurred in the judgment as to the innkeeper, but denied the authority of the Exeter carriers' case. In King *v.* Richards, 6 Whart. (Pa.) 418, the court incidentally recognized the doctrine of the case of the common carrier.

See also authorities cited in preceding notes.

4. In Robinson *v.* Baker, 5 Cush. (Mass.) 137, the court observes: "Thus the case stands upon direct and express authorities. How does it stand upon general principles? In the case of Saltus *v.* Everett, 20 Wend. (N. Y.) 267, it is said: 'The universal and fundamental principle of our law of personal property is that no man can be divested of his property without his consent, and consequently that even the honest purchaser under a defective title, cannot hold against the true proprietor. There is no case to be found or any reason or analogy anywhere suggested in the books, which would go to show that the real owner was concluded by a bill of lading not given by himself, but by some third person, erroneously or fraudulently. If the owner loses his property, or is robbed of it, or it is sold or pledged without his consent, by one who has only a temporary right to its use, by hiring or otherwise, or a qualified possession of it for a specific purpose, as for transportation or for work to be done upon it, the owner can follow and reclaim it in the possession of any person, however innocent. Upon this settled and universal principle, that no man's property can be taken from him without his consent, express or implied, the books are full of cases, many of them hard and distressing cases, where honest and innocent persons have purchased goods of others apparently the owners, and often with strong evidences of ownership, but who yet were not the owners, and the purchasers have been obliged to surrender the goods to the true owners, though wholly without remedy for the money paid. There are other hard and distressing cases of advances made, honestly and fairly, by

tortious holder has no lien upon them against the owner. He may, if he choose, require payment of freight in advance. But a carrier receiving goods from one who, by the owner's act, has been clothed with an apparent authority, has a lien upon them as against such owner.[1]

auctioneers and commission merchants, upon pledge of goods by persons apparently having the right to pledge, but who in fact had not any such right, and the pledgees have been subjected to the loss of them by the claim of the rightful owner. These are hazards to which persons in business are continually exposed by the operation of this universal principle, that a man's property cannot be taken from him without his consent. Why should the carrier be exempt from the operation of this universal principle? Why should not the principle of *caveat emptor* apply to him? The reason, and the only reason, given is, that he is obliged to receive goods to carry, and should therefore have the right to detain the goods for his pay. But he is not bound to receive goods from a wrongdoer. He is bound only to receive goods from one who may rightfully deliver them to him; and he can look to the title, as well as persons in other pursuits and situations in life. Nor is a carrier bound to receive goods unless the freight or pay for the carriage is first paid to him; and he may in all cases secure the payment of the carrier in advance. In the case of King *v.* Richards, 6 Whart. (Pa.) 418, it was decided that a carrier may defend himself, from a claim for goods by the person who delivered them to him, on the ground that the bailor was not the true owner, and therefore not entitled to the goods. The common carrier is responsible for the wrong delivery of goods, though innocently done, upon a forged order. Why should not this obligation to receive goods exempt him from the necessity of determining the right of the person to whom he delivers the goods, as well as from the necessity of determining the right of the persons from whom he receives goods?' "

See also Fitch *v.* Newberry, 1 Doug. (Mich.) 1.

In Buskirk *v.* Purington, 2 Hall (N. Y. Superior Ct.), 561, property was sold upon a condition; the buyer failed to comply with the condition, but shipped the goods on defendant's vessel. Defendant insisted on his lien for freight, but in trover brought against him by the owner, *held*, that there was no lien.

See also The Anne, 1 Mason (U. S.), 512, where unauthorized persons carried a vessel out of her course, and entered a port by means of a pilot. *Held*, the pilot had no lien on the ship for his pilotage.

In Schmaling *v.* Thomlinson, 6 Taunt. 146 (1 E. C. L. R. 336), A, employed by defendant to transport goods to a foreign market, delegated the entire employment to the plaintiff, who performed it knowing A only. *Held*, in action for freight, etc., that there was no privity between plaintiff and defendant, A's employer, and that plaintiff could not look to defendant for compensation.

Where goods were shipped aboard a vessel, but with no color of authority, from the shipper, in the master to sell the same, a purchaser at an illegal sale for freight cannot set up the vessel's lien therefor when sued by the owner for the goods. And could the purchaser have set up the lien, he waived it by claiming, not under it, but as purchaser. Everett *v.* Saltus, 15 Wend. (N. Y.) 474.

1. Vaughan *v.* Providence & Worcester R. Co., 13 R. I. 578; s. c., 9 Am. & Eng. R. R. Cas. 41. In this case, cotton was forwarded from Louisiana to be delivered in Providence, R. I., "rates guaranteed to Providence." By the error of some intermediate carrier, the destination, Providence, was altered in the bill of lading to Chicopee, Mass., whence, by the owner's direction, the P. & W. R. Co., after paying charges, brought it to Providence. The owner refused to refund to the P. & W. R. Co. its charges for freight paid, and replevied the cotton. *Held*, that the P. & W. R. Co. had a lien on the cotton for its freight, and charges for back freight paid, including the freight to Chicopee. The owner's remedy was against the carrier by whose fault the goods were sent to Chicopee.

See also Briggs *v.* Boston & Lowell R. Co., 6 Allen (Mass.), 246.

But in Stevens *v.* Boston & Worcester R. Corporation, 8 Gray (Mass.), 262, it was held, in a case where the original shipper had no authority to ship, that the carrier has no lien for carriage of the goods against the rightful owner, even for freight which he has paid to a previous carrier, by whom the owner had

(*e*) *Effect of Custom on the Carrier's Lien.*—Carriers who advance to forwarding agents existing charges on goods, for freight, storage, etc., are entitled to be reimbursed by the consignee and owner of the goods, the amount so advanced: and this by the usage of trade.[1] One of several carriers over connecting lines need not pay antecedent charges unless he choose, even though it is customary to do so.[2]

**3. What is Included in the Lien.**—The lien for freight cannot be extended beyond charges which are strictly connected with the transportation.[3] A carrier cannot hold goods by virtue of a lien for an unpaid freight account.[4] A common carrier has no lien for a general balance of account.[5]

At the common law, general liens apart from possession are not favored. And where it is alleged that by a general usage or custom of trade the carrier would be entitled to a lien on specific goods for a general balance of account, it is held that there should be

directed them to be carried; *citing* Robinson *v.* Baker, 5 Cush. (Mass.) 137, where it was held that a common carrier who "innocently receives" goods from a wrongdoer, without the consent of the owner, express or implied, has no lien upon them for their carriage against such owner.

See also Clark *v.* R. Co., 9 Gray (Mass.), 231.

Nor does the fact that the carriage was beneficial to a certain point on the route, avail in favor of the carrier. Stevens *v.* R. Co., 8 Gray (Mass.), 266.

See also Nordemeyer *v.* Loescher, 1 Hilt. (N. Y.) 499.

1. White *v.* Vaun, 6 Humph. (Tenn.) 70; Knight *v.* Providence, etc., R. Co., 13 R. I. 572; s.c., 9 Am. & Eng. R. R. Cas. 90; Bissel *v.* Price, 16 Ill. 498.

See also authorities cited, *supra*, this title, EFFECT OF MISTAKE UPON THE CARRIER'S LIEN.

In Lee *v.* Salter, Lalor (N. Y.), 163, where the master of a vessel, receiving goods under bills of lading directing him to pay such charges as were noted at the foot, and the bill retained by him directed him to collect them of the consignees, *held*, that proof of a general custom which in such cases gave the forwarders a lien on the goods for their advances, and imposed on the carriers receiving them the duty of enforcing such lien for the benefit of the forwarders, was admissible in explanation of the contract of the master. Where in such case the master delivered the goods without payment of the charges, *held*, that the vessel-owners were liable to the forwarders. It is no defence to such an action that the goods were damaged on the voyage, by the act of God, to an amount exceeding that of the lien, provided they were still of sufficient value to satisfy it.

2. Baltimore, etc., R. Co. *v.* Adams Exp. Co., 22 Fed. Rep. 32, 404.

3. Steamboat *v.* Kraft, 25 Mo. 76; Lambert *v.* Robinson, 1 Esp. 119.

In Steamboat *v.* Kraft, 25 Mo. 76, the claim was for reimbursement to carrier of payment by it, on delivery to it of the goods, of former advances to owner by the person delivering, travelling expenses, lawyer's charges for collecting, etc. *Held*, there was no lien for reimbursement; so held notwithstanding usage on the Tennessee River, and throughout the United States, for freighters to advance to forwarding agents the existing charges upon the goods; for it would be odious to extend the usage to charges not connected with transportation.

The right of lien can only apply to goods, etc., in the possession of the company in their character of carriers, or in a capacity accessory thereto, and not to goods delivered to them in some independent capacity; as, where the company have a workshop for repairing engines,—repairing for strangers as well as themselves,—they would not be justified in detaining the engine of a customer in their possession for repair, in respect of a sum due to them for carriage. Kimmar *v.* Midland R. Co., 19 L. T. (N. S.) 387; Redman's Law of Railway Carriers (2d Ed.), 87.

4. Leonard's Exrs. *v.* Winslow, 2 Grant (Pa.), 139.

5. Rushforth *v.* Hadfield, 6 East, 519; Butler *v.* Woolcott, 2 B. & P. N. R. 65. See also Richardson *v.* Goss, 3 B. & P. 119.

very strong evidence of the usage, to induce a jury to infer the knowledge and adoption of it by the parties to the contract.[1] Under certain circumstances, notice by the carrier was regarded as insufficient to give such a lien.[2] In any event, a custom or usage for carriers to retain goods on a lien for a general balance of account between them and the consignees cannot affect the right of the consignor to stop the goods *in transitu.*[3]

A carrier of goods consigned to one person under one contract has a lien upon the whole for the freight and charges on the other part, and a delivery of part of the goods to the consignee does not discharge or waive the lien upon the rest without proof of an intention that this result shall follow;[4] and the goods may be retained even against a purchaser.[5]

No lien for demurrage exists at common law. A consignee is not presumed to assent to a rule establishing such a lien. If it exists at all as a legal right, it is confined to the maritime law.[6]

1. Rushforth *v.* Hadfield, 7 East, 224; McFarland *v.* Wheeler, 26 Wend. (N. Y.) 467; Hutchinson Carriers, § 477.

Very often a company have a general lien upon the goods of their customers by virtue of special agreements. Where a railway had such an agreement with a joint-stock company which was wound up, and the business carried on by an official liquidator, who continued to forward goods by the railway, it was held that the general lien would only attach to goods coming into the hands of the railway company while the joint-stock company was *sui juris,* and not to goods coming into their hands after the winding-up order. Wiltshire Iron Co. *v.* Great Western R. Co., 40 L. J. Q. B. 43, 308; L. R. 6 Q. B. 776; Redman's Law of Railway Carriers (2d Ed.), 87.

2. A carrier had given notice that all goods would be subject to a lien, not only for the freight of the particular goods, but also for any general balance due from their respective owners. Goods having been sent by the carrier, addressed to the order of J. S., a mere factor, *held,* that the carrier had not, as against the real owner, any lien for the balance due from J. S. Query whether, if the notice had been that all goods, to whomsoever belonging, should be subject to a lien for any general balance that may be due from the persons to whom they are addressed, he would have any right to retain the goods for the balance due from J. S. Wright *v.* Snell, 5 B. & Ald. 350. See also Kirkman *v.* Shawcross, 6 Term Rep. 14. *Compare* Oppenheim *v.* Russell, 3 B. & P. 47.

3. Oppenheim *v.* Russell, 3 B. & P. 42; Jackson *v.* Nichol, 7 Scott, 577. See also notes to Chase *v.* Westmore, Tu. L. Cas. Merc. L. 690 *et seq.*

4. Potts *v.* New York & New Eng. R. Co., 131 Mass. 455; s. c., 3 Am. & Eng. R. R. Cas. 424; Lane *v.* Old Col. R. Co., 14 Gray (Mass.), 143; New Haven & N. Co. *v.* Campbell, 128 Mass. 104; Fuller *v.* Bradley, 25 Pa. St. 120; Boggs *v.* Martin, 13 B. Mon. (Ky.) 239; Bernall *v.* Pim, 1 Gale (Exch.), 17; Sodergreen *v.* Flight, cited in 6 East, 622; Abbott on Shipping, 377.

5. Sodergreen *v.* Flight, cited in 6 East, 622; Boggs *v.* Martin, 13 B. Mon. (Ky.) 244.

6. Chicago, etc., R. Co. *v.* Jenkins, 9 Am. & Eng. R. R. Cas. 113. Nor will publication of a railroad rule providing for such lien create it, even though the shipper or consignee know of such rule. See also Falkenburg *v.* Clark, 11 R. I. 278.

The inconvenience to a railroad company, from goods being left in their freight cars standing in the public highway during the unreasonable delay of the consignee to remove the goods, constitutes only a claim in the nature of demurrage; and the company have no lien on the goods for the payment thereof. Crommelin *v.* N. Y. & Harlem R. Co., 1 Abbott N. Y. App. Dec. 472; Abbott on Shipping, 286; Birley *v.* Gladstone, 3 Maule & S. 205.

The admiralty courts now generally hold that, by the law merchant, a lien exists against the cargo in favor of the shipowner for detention of the ship by himself or others and which may be enforced against the consignee who accepts, although no such lien was stipulated in the bill of lading. Henry on Admiralty Jurisdiction, 172–177; The Hyperion's

Where the carrier receives goods without requiring payment of freight in advance, he has no right to demand the taking away of goods at the terminus before he is ready himself to deliver, and cannot claim demurrage.[1] A carrier cannot include, in his lien, charges for the keep of goods, unless he makes a tender to the consignee.[2]

If goods belonging to different owners are shipped with one bill of lading, the consignee cannot hold the goods of one for the charges upon the goods of the other; each owner is entitled to his goods upon payment of the proper charges.[3] The last of several connecting carriers cannot assert a lien to cover the payment of back freight where such charges have been in fact prepaid.[4] But such a lien has been permitted where the acceptance of freight in advance was the unauthorized act of an agent.[5]

**4. Lien as Affected by Set-off.**—In the *United States*, it is well settled that, if the goods are damaged in a manner for which the carrier is liable, the owner may deduct the amount of injury from the freight, or he may recoup the amount of damage when sued for the freight.[6] If the damage equal the freight, the carrier's lien is gone.[7] The *United States* statutes of set-off are in broader terms than the *English;* but in England, under a comparatively recent statute, such set-off is permitted.[8]

Cargo, 2 Low. (U. S.) 93; Donaldson *v.* McDowell, 1 Holmes (U. S.), 290; The Olive, 2 Fed. Rep. 607. Though the common-law rule is that the consignee is only responsible for detention by himself. Wordin *v.* Bemis, 32 Conn. 268; Cross *v.* Beard, 26 N. Y. 85; Gage *v.* Morse, 12 Allen (Mass.), 410; Henry Adm. Juris. 175. But a possessory lien for demurrage does not exist in carriage by land.

1. In East Tennessee, etc., R. Co. *v.* Hunt, 15 Lea (Tenn.), 261; 26 Am. & Eng. R. R. Cas. 293, n., the goods arrived at the destination, but for three or four days the car was not placed in position by the railroad company for unloading. The railroad agent refused to deliver without payment of the freight and of the charges for the use of the cars for said days. In replevin, *held*, that he had no right to do this, and could not demand either freight or demurrage till he was in a position to unload.

2. Somes *v.* Shipping Co., 8 H. L. 338; Lambert *v.* Robinson, 1 Esp. 119; Steamboat Co. *v.* Kraft, 25 Mo. 76; Western Transp. Co. *v.* Hoyt, 69 N. Y. 230.

3. Hale *v.* Barrett, 26 Ill. 195.

4. Travis *v.* Thompson, 37 Barb. (N. Y.) 236.

5. Wolf *v.* Hough, 22 Kan. 659.

6. Boggs *v.* Martin, 13 B. Mon. (Ky.) 239; Bartram *v.* McKee, 1 Watts (Pa.) 39; Leech *v.* Baldwin, 5 Watts (Pa.), 446; Humphreys *v.* Reed, 6 Whart. (Pa.) 435; Edwards *v.* Todd, 1 Scam. (Ill.) 462; Gleadell *v.* Thomson, 56 N. Y. 194; La Motte *v.* Angel, 1 Hawaiian, 136; Snow *v.* Carruth, 1 Sprague (U. S.), 324; Millard *v.* Dorr, 3 Mason (U. S.), 171. *Compare* Bowman *v.* Hilton, 11 Ohio, 303.

7. Dyer *v.* Grand Trunk R. Co., 42 Vt. 441; Humphreys *v.* Reed, 6 Whart. (Pa.) 435; Cutting *v.* G. T. R. Co., 13 Allen (Mass.), 381; Boston & Me. R. Co. *v.* Brown, 15 Gray (Mass.), 223.

8. The American statutes of set-off were expressed in wider terms than was the old English legislation on the subject, which applied only to liquidated demands. Under the former English practice, in action for freight, the defendant could not set up, by way of discount or set-off, that the goods were damaged, but was put to his cross-action. But under the *American* procedure, the damages sustained by goods in transportation may in all cases, whether the freight be agreed upon or not, be set up as a defence; and if such damages are equal to or exceed the freight, the defendant must recover: and in this point of view, the defence becomes essentially a cross-action. Shields *v.* Davis, 6 Taunt. 65; 1 Tidd Pr. 603; Dakin *v.* Oxley, 109 E. C. L. R. 667; Ewarts *v.* Kerr, Rice (S. Car.), 203; Sherman *v.* Whithers, Anthon N. P. (N. Y.) 166; Bartram *v.* McKee, 1 Watts (Pa.), 39; Humphreys

**5. Waiver of Carrier's Lien.**—If goods are unconditionally delivered, the lien for freight is waived by the carrier.[1] But delivery obtained tortiously is not a waiver of the lien.[2] If the consignee obtains the delivery of goods by fraudulent representations, the carrier does not lose his lien for the freight, but may disaffirm, and sue the consignee in replevin.[3]

**6. Remedies Involving Carrier's Lien.**—Trover lies for the value of goods illegally withheld under a claim of lien for freight.[4] When the consignee offers to pay the stipulated freight, a formal tender of the freight is not necessary to support trover if the carrier detains the goods for more.[5] Trover against a railroad company for a refusal to deliver goods wrongfully detained for freight may be brought in the county where the demand and wrongful refusal were made.[6] Replevin is also an available remedy.[7]

*v.* Reed, 6 Whart. (Pa.) 435; Leech *v.* Baldwin, 5 Watts (Pa.), 446; Gleadell *v.* Thomson, 56 N. Y. 194; Hill *v.* Leadbetter, 42 Me. 572; Edwards *v.* Todd, 1 Scam. (Ill.) 462; Snow *v.* Carruth, 1 Sprague (U. S.), 324; Kaskaskia Bridge Co. *v.* Shannon, 1 Gilm. (Ill.) 15.

The subject was carefully examined by Lee, C.J., who reviewed the English and American, cases in La Motte *v.* Angel, 1 Hawaiian, 136, and decision in accordance with the American practice rendered. And see, as to set-off in admiralty, Willard *v.* Dorr, 3 Mason (U. S.), 171.

1. Sears *v.* Willis, 4 Allen (Mass.), 212; Bailey *v.* Quinn, 22 Vt. 474; Bigelow *v.* Heaton, 4 Denio (N. Y.), 496; Bags of Linseed, 1 Black (U. S.), 108; Forth *v.* Simpson, 13 Q. B. 689; Kruger *v.* Wilcox, Tu. L. C. Merc. L. 676, 708.

But an agreement, either distinct or implied by usage, that the carrier still reserved his claim upon the goods for freight, will sustain his lien. The Eddy, 5 Wall. (U. S.) 481; Bags of Linseed, 1 Black (U. S.), 108.

If a warehouseman delivers goods upon receipt of the promissory note of the owner for charges, he loses his lien, which will not revive should the goods accidentally be returned to his possession. Hale *v.* Barret, 26 Ill. 195.

2. In Baggs *v.* Martin, 13 B. Mon. (Ky.) 239, it was held that, where goods were forwarded to a commission merchant by a steamboat, unloaded and placed on the wharf, and the bill of lading sent to the owner, who removed part of the goods without paying freight, that these facts did not amount to a delivery of all the goods nor a waiver of the lien for freight, unless it was so intended, of which a jury was to judge.

The act of unloading and placing the merchandise on a wharf does not indicate any intention to part with the possession of it before the payment of freight. "Indeed, the law is that the officers cannot detain the goods on board the boat until the freight is paid, as the merchant or consignee would then have no opportunity of examining their condition;"—*citing* Abbott on Shipping, 248.

3. Bigelow *v.* Heaton, 6 Hill (N. Y.), 43; Hays *v.* Riddle, 1 Sandf. (N. Y.) 248; Ash *v.* Putnam, 1 Hill (N. Y.), 302; 151 Tons of Coal, 4 Blatchf. (U. S.) 368; Wallace *v.* Woodgate, Ryan & M. 105; Bristol *v.* Wilsmore, 1 B. & C. 514.

A delivery made under the expectation that the freight will be paid at the time is not such a delivery as parts with the lien; and if the carriage were by sea, the carrier may afterwards libel the article *in rem*, in admiralty, for the freight. 151 Tons of Coal, 4 Blatchf. (U. S.) 368.

4. Fitch *v.* Newberry, 1 Doug. (Mich.) 1; Marsh *v.* Union Pac. R. Co. (U. S. C. C. Colo.), 6 Am. & Eng. R. R. Cas. 359; Adams *v.* Clark, 9 Cush. (Mass.) 215. As to value of furniture in use, withheld by railroad company, see Marsh *v.* Union Pac. R. Co. (U. S. C. C. Colo.), 6 Am. & Eng. R. R. Cas. 359.

5. Adams *v.* Clark, 9 Cush. (Mass.) 215; Isham *v.* Greenham, 1 Handy (Ohio), 357.

6. Bird *v.* Georgia Railroad Co., 72 Ga. 655; 27 Am. & Eng. R. R. Cas. 39.

7. Fitz *v.* Newberry, 1 Doug. (Mich.) 1; Dyer *v.* Grand Trunk R. Co., 42 Vt. 441.

**7. Sale to Enforce a Lien.**—The lien for freight cannot be enforced by a sale of the goods. The carrier must institute the necessary proceedings for the amount of the freight charges, and procure a decree of sale.[1] A carrier cannot, independently of statute, enforce his lien for freight by selling the goods.[2]

**8. Miscellaneous.**—A consignee is entitled to inspect the goods before he is bound to pay the freight.[3] He must be permitted a reasonable time in which to make payment of freight charges.[4] Where freight remains unpaid, the interest chargeable is according to the rate of interest in the country where the delivery was to be made.[5]

It has been held, in the maritime law, that the right to retain

1. Briggs *v.* Boston, etc., R. Co., 6 Allen (Mass.), 246; Rankin *v.* Packet Co., 9 Heisk. (Tenn.) 564; Doane *v.* Russell, 3 Gray (Mass.), 382; Hunt *v.* Haskell, 24 Me. 339; Fox *v.* McGregor, 11 Barb. (N. Y.) 41; Gray *v.* Palmer, 8 Wheat. (U. S.) 605; Chander *v.* Belden, 18 Johns. (N. Y.) 157; Jones *v.* Pearle, 1 Strange, 556; Field *v.* Newport, etc., R. Co., 3 H. & N. 409; Thames Iron Works Co. *v.* Patent Derrick Co., 29 L. J. Ch. 714; 1 J & H. 93.

In conversion against the carrier for the conversion, the measure of damages is the market value of the goods, deducting the amount of the lien. Briggs *v.* Boston, etc., R. Co., 6 Allen (Mass.), 246.

2. 2 Kent's Comm. 642; Lickbarrow *v.* Mason, 6 East, 21; Doane *v.* Russell, 3 Gray (Mass.), 382; Briggs *v.* Bos. & Low. R. Co., 6 Allen (Mass.), 246; Ind. R. Co. *v.* Herndon, 81 Ill. 143; Hunt *v.* Haskell, 24 Me. 339; Sullivan *v.* Park, 33 Me. 438; Lecky *v.* McDermott, 8 S. & R. (Pa.) 500.

And in Sayward *v.* Stevens, 3 Gray (Mass.), 97, where the bill of lading authorized the master of a vessel to sell if freight should not be paid within ten days after arrival, but constituted an entire contract so that no freight was due unless all the cargo was delivered, it was held that the loss of part by improper storage took away all liability for freight and deprived the captain of the power of sale.

Before a common carrier may sell, under *Colorado* statute, perishable freight to satisfy charges thereon, he must give the owner or consignee, or the agent of either of them, at least twenty-four hours' notice previous to such sale. Martin *v.* McLaughlin, 9 Colo. 153.

In a sea-case where goods were illegally sold for the discharge of a lien for the freight thereof, and the owner afterwards obtains the possession of them through one who had made the purchase, he is entitled to recover of the seller, in an action of trover, not the value of the goods sold, but merely whatever damages and loss he sustained, in regaining possession of his goods, over and above what was fairly due to the defendant. Hunt *v.* Haskell, 24 Me. 339.

The lien for transportation by sea from a port in one country to a port in another does not of itself alone authorize sale. The usual remedy is a libel before some tribunal, by whose decree the shipper's right may be protected. Sullivan *v.* Park, 33 Me. 438.

3. Brittan *v.* Barnaby, 21 How. (U. S.) 527; Lanata *v.* Grinnell, 13 La. Ann. 24; 3 Kent Com. 214. in the *Louisiana* case cited, it was held that the whole lot of goods (cheese) should have been placed separately from other goods upon the levee, subject to the inspection of the consignees upon their tendering the freight money to the captain of the vessel.

4. In a case decided by the exchequer court, and by the exchequer chamber on appeal, goods were shipped from London to Plymouth; but on arrival at Plymouth, they were tendered, shortly before noon, by the railroad porter to plaintiff's agent, who refused to pay the freight, whereupon the porter took it away, saying that it would be returned to London; and it was accordingly sent back to London at eight o'clock the next morning. About two hours afterwards, the plaintiff tendered at Plymouth the amount of the freight, and demanded the parcel. The jury found that the goods were sent back to London unreasonably soon. *Held*, by both courts, that the defendants were guilty of a breach of duty, even supposing their duty as carriers ended with the tender of the parcel. Gt. Western R. Co. *v.* Crouch, 3 Hurls. & Norman, 183.

5. Barker *v.* Havens, 17 Johns. (N. Y.) 238.

goods for the freight grows out of the usage of trade, and does not exist where the parties have, by their agreement, regulated the time and manner of paying the freight, especially where the cargo is to be delivered before the time fixed for such payment.[1] Both in *England* and in the *United States*, the lien of a factor is a personal privilege which is not transferrable; no question upon it can arise except between the principal and the factor, and the law is the same in reference to the rights of the common carrier.[2] In no case has the carrier the right to use the goods detained; perishable articles must be cared for to preserve them, livestock should be fed, and cows should be milked.[3]

X. **FREIGHT POOLS.**—Combinations among railroad companies regulating rates of freight and similar matters and known as "Pools" will be treated under the title RAILROADS.

**FREQUENT.**—To visit often; to resort to often or habitually.[4]

**FRESH.**—New; recent; recently produced; uncured.[5]

**FRESHET.**—A flood or overflowing of a river by means of rains or melted snow; an inundation.[6]

1. Chandler *v.* Belden, 18 Johns. (N.Y.) 157. See also Raymond *v.* Tyson, 17 How. (U. S.) 53, another instance of agreement impliedly waiving vessel's lien by reason of stipulations inconsistent with such lien. In this case, Wayne, J., said: "All of the authorities declare that the owner's consent to receive freight before the cargo is delivered, whether it shall be paid or not, is a waiver of a lien upon the cargo; and that such a waiver may be inferred from a time and place having been agreed upon for the payment of freight, which has no reference to the place where the cargo is to be discharged."

2. Ames *v.* Palmer, 42 Me. 197; Pearsons *v.* Tinker, 36 Me. 384.

3. Scarfe *v.* Morgan, 4 M. & W. 270.

**Lien for Freight upon Imported Goods, Under U. S. Statute.**—See Wyman *v.* Lancaster, 32 Fed. Rep. 720; Cleveland, etc., R. Co. *v.* McClung, 119 U. S. 454; s. c., 28 Am. & Eng. R. R. Cas. 70.

4. Webster, quoted in Green *v.* State, 109 Ind. 175; s. c., 35 Alb. L. J., 236. In this case it was held that a single visit to a gambling-house is not sufficient to sustain a conviction for frequenting it. So more than one visit is necessary to constitute the offence of frequenting an opium-den. State *v.* Ah Sam, 14 Oreg. 347. To sustain a conviction under a statute, for frequenting a street with an intent to commit a felony, it must be shown that the accused had been in the street more than once. Queen *v.* Clarke, 54 L. J. R. M. C. 66.

A man may frequent a house in which he himself resides. Leister *v.* Short, 1 Australian Jur. Rep. 151.

5. **Fresh Fish,** in a customs act, means "fish which have not been salted, or subjected to any of the known processes for curing them, such as pickling, smoking, or drying. But these words do not exclude fish which have been frozen either naturally or artificially; as all persons living in cold latitudes know, as a matter of common knowledge, that meats and fish are kept fresh by freezing; and so long as they are kept frozen, they retain substantially their natural juices and flavors, without the aid of antiseptics or desiccation, and are in condition for immediate use." Cross *v.* Seeberger, 30 Fed. Rep. 427.

**Fresh seed** is the product of the next preceding year—seed that will germinate and grow. Ferris *v.* Comstock, 33 Conn. 513.

For a use of this word to mean "new and additional" in connection with the word "taxes," see Watson *v.* Atkins, 3 B. & Ald. 647.

6. Webster, quoted in Stover *v.* Ins. Co., 3 Phila. (Pa.) 38. A freshet is not a storm within the meaning of a policy of insurance against loss by fire or storm. Stover *v.* Ins. Co., 3 Phila. (Pa.) 38.

An award respecting rights in relation to a dam, which makes an exception of "times of freshet," is bad for uncertainty. "The word 'freshet' varies in meaning in various rivers, in various years, in various seasons of the year. . . . In case of a suit, a jury could only decide

**FROM.**—A preposition of distance, which is sometimes exclusive and sometimes inclusive of its object.[1]

that the state of the water in the particular case before them did or not constitute a freshet; and this would necessitate constant litigation." Harris *v.* Social Mfg. Co., 9 R. I. 99.

1. In charter provisions fixing the *termini* of roads and railroads, "from" is generally inclusive in its signification, meaning "from within." A provision empowering a company to construct and operate a railroad "from the city of C. to any point in the town of E." authorizes its construction from any point within the city of C. McCartney *v.* C. & E. R. Co., 112 Ill. 611; s. c., 29 Am. & Eng. R. R. Cas. 326. "The words 'from' and 'at' have not, in general, an exclusive signification. . . . 'From' a town or district generally means from some indefinite place within that town or district. . . . The word is not always, and, indeed, in common conversation is seldom, exclusive of the place named. Thus, if I should say, I had just come from Philadelphia, no one would suppose I had spoken the truth if I had never been *in* Philadelphia." C. & C. Canal Co. *v.* Key, 3 Cranch (U. S.), 606. To the same effect are T. & A. R. Co. *v.* Adams, 3 Head (Tenn.), 596; Hazlehurst *v.* Freeman, 52 Ga. 246; Com. *v.* E. & N. E. R. Co., 27 Pa. St. 339; W. P. R. Co.'s App. 99 Pa. St. 155. *Contra*, N. E. R. Co. *v.* Payne, 8 Rich (S. Car.), 177, where the terminus of a road "from Charleston" was decided to be at the boundary of the city, and the road prevented from entering the city.

Upon the same principle, where an act provided for the alteration and repair of a road leading from the village of A. to to the bank of W. C. creek, the road was held to commence within the village, and repairs might be made within its boundaries. Smith *v.* Helmer, 7 Barb. (N. Y.) 416. So, where the object named as a terminus is a street, any part of the street may be taken. When an ordinance provides for the grading of C Street from D Street to K Street, and C Street was already graded to the middle of D Street from the other direction, it authorizes the grading from the middle of D Street. It is not limited to the line of D Street, nearest K Street. Pittsburgh *v.* Cluley, 74 Pa. St. 259.

In descriptions in conveyances, "from" is a term of exclusion, unless by necessary implication it is used in a different sense. Wells *v.* Jackson Iron Mfg. Co., 48 N. H. 538; Bonney *v.* Morrell, 52 Me. 252.

The offence of sailing from a port to engage in the slave trade is not committed unless the vessel sails out of the port. United States *v.* La Coste, 2 Mas. (U. S.) 129.

The word is given an inclusive meaning in a devise to be divided among the family of R. T., from S. downwards. In such a devise S. is included. "If any one spoke of the kings of England 'from William the Conqueror downwards,' he would certainly mean to include William the Conqueror." Lett *v.* Osborne, 51 L. J. R. Ch. D. 910.

"From" does not import "next immediately." A road may be said to lead from place to place, though it pass through intermediate places. Simpson *v.* Lewthwaite, 2 B. & Ad. 230.

An act imposing toll on coal and coke navigated, carried, or conveyed on a certain canal "from the place where the said canal shall cross the river A., or from any place within two miles thereof," and passing in the direction of C., does not apply to a voyage commencing more than two miles from the point mentioned. Brittain *v.* Cromford Canal Co., 3 B. & Al. 139.

An ordinance forbidding persons from an infected place to enter the town applies only to those who come immediately and directly from the place after the passage of the ordinance. Commrs. of Salsbury *v.* Powe, 6 Jones (N. Car.), 134.

An act giving mileage to coroners for every mile travelled "from the place of his abode to take the inquisition" does not entitle him to mileage for distance traversed in returning. King *v.* Justices of Oxfordshire, 2 B. & Al. 203.

An act inflicting a penalty upon any one "who shall buy, sell, or receive from any slave any commodity" without his master's consent, was violated by a sale to a slave. "From" cannot be an adjunct of "sell"—it must be applied to "buy" and "receive" only, and the act read, "sell any slave any commodity." Worrell *v.* State, 12 Ala. 732.

In a deed reserving the lime in the tract conveyed, and the use of a kiln, and the right to lay the necessary side tracks from the kiln to the railroad, the latter clause means from the locality of the kiln in such manner and to such an extent as to enable the use thereof for the

**FRONT.**—See note 1.

purposes of the reservation. Jones *v.* Fonda, 58 Vt. 453.

Under a contract by A to deliver, and by B to receive, "from one to three thousand bushels of potatoes" at P, A has a right to deliver any quantity between one and three thousand he may choose, and is not bound to make his election until the goods reach the place of delivery. Small *v.* Quincy, 4 Greenl. (Me.) 497.

**At and from.**—See AT.

"**From and after.**"—These words in a vise "from and after the decease of a devisee for life" do not necessarily indicate that the estate is not to vest until then. The death of the life tenant only marks the time of the vesting in possession. Vanderheyden & Crandall, 2 Den. (N.Y.) 19; Bailey *v.* Love (Md.), 11 Atl. Rep. 283.

"**From the date,**" and "**from the day of the date.**"—See DATE and DAY.

"**From a dwelling.**"—A larceny act described the crime to be the taking and carrying away, etc., "in a dwelling-house," and an indictment thereunder charged the crime "from a dwelling." These phrases were said not to equivalent, but as the latter was surplusage and mere matter of description, the sufficiency of the indictment was not affected by the variance. Moore *v.* State, 40 Ala. 49.

"**Heard from**" is not equivalent to "heard of." Under a statute granting a divorce where the husband has been absent three years without having been heard of, it is insufficient to prove that he has not been heard from in that time. Fellows *v.* Fellows, 8 N. H. 160.

"**From the person.**"—This expression in a statute of robbery includes "in the presence of," which is constructively from the person. Crews *v.* State, 3 Coldw. (Tenn.) 350; Turner *v.* State, 1 Ohio St. 422. It has, however, been held not to be necessary to constitute robbery within the meaning of a statute defining it to be "to steal and take from the person," etc., that there be an actual taking down from the person or from the immediate presence of the victim. If by force he is induced to tell where his property is, and his assailant goes into another room and takes it, the crime is committed.

"The preposition 'from' does not convey the idea of contact or propinquity of the person or property; it does not imply that the property is in the presence of the person. The thought of the statute, as expressed in the language, is that the property must be so in the possession or under the control of the individual robbed that violence or putting in fear was the means used by the robber to take it." State *v.* Calhoun, 72 Iowa, 432; s. c., 34 N. W. Rep. 194.

In an indictment for robbery, it is necessary to allege that the property was taken "from the person of another;" it is not sufficient to allege that it was taken from another person. Stegar *v.* State, 39 Ga. 583; People *v.* Beck, 21 Cal. 385; Kit *v.* State, 11 Humph. (Tenn.) 167.

**From thenceforth,** in an act of naturalization, giving powers of holding and alienating lands, is not retrospective. Fish *v.* Klein, 2 Meriv. 451.

This phrase indicates the beginning and not the duration of the operation of an act. See opinion of Eakin, J., in Wilson *v.* State, 35 Ark. 429.

"**From time to time,**" means "as occasion may arise," in a power to make assignments of convicts to a penal colony. Bryan *v.* Arthur, 11 A. & E. 117.

1. A corner lot has two fronts, at an angle with each other. A covenant, in a lease of a lot upon the corner of two streets, "to keep up the sidewalks in front of same" is not confined to the main front, but includes the sidewalk on the side street. Des Moines *v.* Darr, 31 Iowa, 89.

A city agreed to vacate a street running along a river, and open another street farther back from the river, and to take from the owners of the property fronting on the original street such portions of their lots as would be needed, and convey them in exchange "the premises in front of their respective lots." These premises were determined by extending the lines of the lots straight to the river, and not by drawing lines from the corners of the lots at right angles with the river. This interpretation was dictated by a consideration of the symmetry of the city, the courses of the streets, the facilities for bridges, and the convenience of business. Tracy *v.* Chicago, 24 Ill. 500.

Property divided from a street by a wall belonging to another person, and standing upon ground belonging to him, the only way to reach the street from which was by a public foot-path passing through the wall or by going around it, is not assessable for paving, sewering, etc., as "fronting, adjoining, or abutting on" the street. Lightbound *v.* Belington Social Board, 55 L. J. R. M. C. 94.

"Front on the river," "fronting on

**FRUIT.**—See note 1.

**FUGITIVE FROM JUSTICE.**—See EXTRADITION.

**FULL.**—Complete; ample; perfect; not wanting in any essential quality.[2]

**FUND.**—A sum of money available for the payment or discharge of liabilities; capital, as opposed to income or interest.[3]

the river," etc., are phrases which make the river a boundary, unless it would lead to an absurd result,—Morgan *v.* Livingston, 6 Mart. (La.) 224;—as where such a boundary would include four times the quantity of land conveyed,—Livingston *v.* Heerman, 9 Mart. (La.) 688.

1. "The term "fruit,' in legal acceptation, is not confined to the produce of those trees which, in popular language, are called fruit-trees, but applies also to the produce of oak, elm, and walnut trees;" it "denotes the produce not only of orchard, but of timber, trees." Bullen *v.* Denning, 5 B. & C. 847.

2. Mobile School Comrs. *v.* Putnam, 44 Ala. 537; Bentley *v.* Cleaveland, 22 Ala. 814. In the latter case, "complete" was said to be tautological in a rule requiring a full and complete answer.

An assignment stipulating for a full and sufficient release is not answered by a release conditioned upon the realizing of a certain percentage; the release should have been absolute. Agnew *v.* Dorr, 5 Whart. (Pa.) 131; s. c. 34 Am. Dec. 539.

A covenant in a charter-party to load a full and complete cargo is performed only by putting on board as much goods as the vessel is capable of carrying with safety. If the burden of the ship is described in the charty-party, but of smaller amount than it will actually carry, the covenant is not performed by loading the specified burden. Hunter *v.* Fox, 2 B. & Al. 421. What is a full cargo, under all the circumstances, is a question which can be solved only by the expert testimony of experienced shipmasters. Ogden *v.* Parsons, 23 How. (U. S.) 167.

Where a freighter covenanted by charter-party to load a "full and complete cargo" of sugar and molasses on board a ship at T., evidence of the custom at T. to load sugar in hogsheads and molasses in puncheons is admissible; and the custom having been proved, the loading of a full cargo so packed is a compliance with the contract. Cuthbert *v.* Cumming, 10 Ex. 809; s. c., 11 Ex. 405. A covenant to load a full and complete cargo, "say about 1100 tons," is construed to mean that, if the vessel is of less capacity than 1100 tons, the cargo must be full and complete, but, if it is of greater capacity, the owner will be content with a cargo of 1100 tons. In the latter case, it is a breach of the covenant to load less than 1100 tons. Morris *v.* Levison, L. R. 1 C. P. D. 155. See Am. & Eng. Encyclo. of Law, vol. 2, p. 734, n.

Where A contracted to supply 4000 tons of ice, annually, and, in case he could not lay up a "full supply," only to furnish such proportion of 4000 as the supply laid up was of a "full supply," this expression has reference to the capacity of A's icehouses. Kemp *v.* Knickerbocker Ice Co., 69 N. Y. 45.

In the seventh article of the laws of Oléron, which provided that a mariner taken ill on a voyage shall have full wages, or, if he dies, his wife or next of kin shall have them, "full wages" means the wages that he would have received had he completed the voyage. Sims *v.* Jackson, 1 Wash. (C. C.) 514.

Legacies to employees, of "six months' full salaries" are not free from tax on legacies. The expression "full salaries" means that the salaries are to be calculated without any incidental deductions by reason of either the custom of trade or the illness of the legatee, but it is not intended to relieve the legatees from the payment of any charge which the law casts upon them. Marcus *v.* Marcus 56 L. J. R. Ch. D. 830; s. c. 31 Solic Jour. 678.

Where a statute gives "full costs" the word "full" is superfluous. Full costs do not differ from costs. Irwine *v* Reddish, 5 B. & Al. 796; Hyde *v.* Mayor of Manchester, 12 C. B. 475.

"If a man be bound 'fully to account for all moneys received,' this means necessarily accounting and paying over." *In re* Botaford, 22 Up. Can C. P. 65.

**Full proof** is proof beyond a reasonable doubt; proof which is not the mere preponderance of evidence. It is "evidence which satisfies the minds of the jury, of the truth of the fact in dispute, to the entire exclusion of every reasonable doubt." Kane *v.* Insurance Co., 38 N. J. 450.

3. Rapalje *v.* L. L. Dict. "A fund is merely a name for a collection or an appropriation of money. It may be nothing

In the plural, "funds" means money;[1] it is also used in a wider sense as embracing stocks, bank notes, and every species of currency used in commercial transactions.[2]

As a verb, "fund" means to capitalize, with a view to the production of interest.[3]

**FUNERAL EXPENSES.**—See EXECUTORS AND ADMINISTRATORS.

**FURNACE.**—See FORGE.

**FURNISH.**—See note 4.

but a designation of one branch of the accounts of the state; or of a certain amount of money, when collected to be applied to a particular purpose. It may have no property and represent no investments; and what are called its revenues may include all the moneys appropriated or directed to be paid to it, or for its benefit, or that of the objects it represents." People *v.* N. Y. C. R. Co., 34 Barb. (N. Y.) 135.

In a statute exempting the "endowment or fund of any religious society" from taxation, these expressions do not include real estate. "Fund is a general term, including the endowment, while the endowment is that particular fund, or part of the fund of the institution, bestowed for its more permanent uses, and usually kept sacred for the purposes intended." State *v.* Lym, 32 N. J. 360.

"**The funds.**"—"'The funds,' standing alone and without context, means the funds provided by various acts of Parliament for the payment of the annuities granted by the government and forming part of the national debt." Under a bequest of "the whole of my fortune, now standing in the funds," "nothing but government annuities will pass unless the context or the state of things to which the will relates calls upon us to put a different construction on the words." Bank stock will not pass. Slingsby *v.* Grainger, 7 H. L. Cas. 273.

1. Doane *v.* Millville Mut. Ins. Co., 43 N. J. Eq. 533. "Funds for the payment of this note at its maturity have been placed in my hands, as trustee" written upon a note and signed, signifies that the writer has funds for the payment of the whole note, and makes him liable for the full amount of the note. Keystone Bridge Co. *v.* Button, 17 Blatchf. (C. C.) 407.

2. Hasbrook *v.* Palmer, 2 McLean (C. C.), 10, where a note payable in New York funds was held not to be negotiable. In a similar case (January *v.* Henry, 3 Mon. [Ky.] 8), it was said: "Philadelphia funds, . . . though in value equal to or greater than money in this State, are not money, but consist of notes, checks, or bills upon banks or individuals in Philadelphia, or of other means of procuring money there."

Under an act making it a fraud for a corporation to pay dividends when by so doing insufficient funds are left to meet its liabilities, "funds" include all the resources of the corporation, and not merely cash on hand. "That such is the restricted meaning of the word, and that it should be so construed in some cases, will be conceded. But it is quite clear that it has a broader meaning, and, in some cases, should be construed to include property of every kind when such property is specially contemplated as something to be used or applied in the payment of debts." Miller *v.* Bradish, 69 Iowa, 278.

3. Stephens' Exrs. *v.* Milnor, 24 N. J. Eq. 376.

4. An indictment for illegally selling and furnishing intoxicating liquor is sustained by proof of giving away. "The term 'furnish' is somewhat indefinite. Literally it would include both selling and giving away—and every other mode of putting spirits in the power of another. We could not probably give it this extensive signification. . . . Giving away is a mode of furnishing. . . . Furnishing may include other modes of affording it to others besides giving it away; but it clearly does include this." State *v.* Freeman, 27 Vt. 520.

A contract to "furnish" coal on the cars at a particular place is, in effect, an agreement to deliver the coal there to the vendee; although by the terms of the contract, it was to be weighed at another place, to which it was to be conveyed. Watson Coal & Min. Co. *v.* James (Iowa), 33 N. W. Rep. 622.

**FURNITURE.**—See EFFECTS; EXECUTION; EXEMPTION; HOUSEHOLD.[1]

1. This word has ordinarily presented itself for construction in bequests of furniture or household furniture. It "comprises everything that contributes to the use or convenience of the householder or ornament of the house. But I do not recall any case that has been determined on the word alone without other circumstances taken into consideration." Kelly *v.* Powlett, Amb. 605; Porter *v.* Tournay, 3 Ves. 311. "The term 'furniture' embraces everything about the house that has been usually enjoyed therewith." Endicott *v.* Endicott, 41 N. J. Eq. 93; Carnagy *v.* Woodcock, 2 Munf. (Va.) 234. The term will pass plate—Stuart *v.* Marquis of Bute, 11 Ves. 657; Porter *v.* Tournay, 3 Ves. 311; Kelly *v.* Powlett, Amb. 605; Endicott *v.* Endicott, 41 N. J. Eq. 93; Bunn *v.* Winthrop, 1 Johns. Ch. (N. Y.) 329;—china and linen,—Hele *v.* Gilbert, 2 Ves. Sr. 430; Kelly *v.* Powlett, Amb. 605; Endicott *v.* Endicott, 41 N. J. Eq. 93; —bronzes, statuary, and pictures,—Richardson *v.* Hall, 124 Mass. 221; Endicott *v.* Endicott, 41 N. J. Eq. 93; Kelly *v.* Powlett, Amb. 605; McMicken *v.* Directors of McMicken Univ. (Ohio), 2 Am. L. Reg. 489;—but books do not pass as furniture,—Porter *v.* Tournay, 3 Ves. 311; Bridgman *v.* Dove, 3 Atk. 176;—nor does a watch,—Gooch *v.* Gooch, 33 Me. 535;—nor coffee in a bag, wine in bottles, and brandy in a cask, laid in by the testator for the current use and consumption of himself and family,—Foxall *v.* McKenny, 3 Cr. C. C. 206;—nor tenants' fixtures, such as gas-fixtures, mantelpieces, stoves, kitchen dressers and shelves,—Fainey *v.* Grice, 10 Ch. Div. 13;—but a bequest of "all my household goods and furniture" was held to pass, among other things, liquors, books, empty barrels, scales, a backgammon board, and spyglass, in Carnagy *v.* Woodcock, 2 Munf. (Va.) 234.

A direction in a will that "the furniture, goods, and chattels" be not sold during the life of the testator's wife, but, at her death, be divided among the executors, did not include jewelry, coins, guns, pistols, tricycles, and scientific instruments, but was confined to those things "which were actually in the house or were necessary for the use and comfort of the testator's wife in the enjoyment of the life-interest which he gave her." Manton *v.* Tabois, 54 L. J. R. Ch. Div. 1008.

In a bequest of "fixtures and fixed furniture," the latter term is not synonymous with the former, and includes mirrors and book-cases fastened to the walls with nails and screws. Birch *v.* Dawson, 2 A. & E. 37.

A devise of "all my house—household furniture" passes all furniture used by the testatrix in a boarding-school in which she lived. "Without the assistance of a lexicon, a schoolboy would define a man's household, the place where he holds house, his home. That which supplies it is its furniture. The home is not confined to the particular room in which the master of the house sleeps, for it may include his rooms for guests and apartments he never enters. So, too, it may properly embrace a schoolroom." Hoopes's Est., 6 Phila. (Pa.) 364.

Under a bequest of "stock, plantation utensils, and household furniture," stills, a boiler, tubs of cider, tools, hogsheads, old iron, leather, and books passed. Kendall's Exr. *v.* Kendall, 5 Munf. (Va.) 272.

Furniture includes only what the testator had for domestic use, and not his stock in trade. Le Fanant *v.* Spencer, 1 Ves. Sr. 97; Stuart *v.* Marquis of Bute, 11 Ves. 675. But see Hele *v.* Gilbert, 2 Ves. S. 430.

In construing a mortgage of a drug store, fixtures, and furniture, it was said: "The word relates ordinarily to movable personal chattels. It is very general both in meaning and application; and its meaning changes, so as to take the color of, or to be in accord with, the subject to which it is applied. Thus, we hear of the furniture of a parlor, of a bed-chamber . . . of a ship, . . . etc. The articles, utensils, implements, used in these various connections, as also those used in a drug or other store, as the furniture thereof, differ in kind according to the purposes which they are intended to subserve; yet, being put and employed in the several places as the equipment thereof, for ornament or to promote comfort, or to facilitate the business therein done, and being kept or intended to be kept for those or some of those purposes, they pertain to such places respectively, and collectively constitute the furniture thereof." Fore *v.* Hibbard, 63 Ala. 401.

So, in a lease of a hotel and furniture, "The word 'furniture' includes that which furnishes or with which anything is furnished or supplied; whatever must be supplied to a house, a room, or the like, to make it habitable, convenient, or agreeable; goods, vessels, utensils, or other appendages necessary or convenient for housekeeping; whatever is added to the interior of the house or apartment for

**FURTHER.**—Future ; [1] additional.[2]

**FUTURE.**—See note 3.

use or convenience." Parol evidence is admissable to show what is necessary for use and convenience, etc. Bell's Admx. *v.* Golding, 27 Ind. 173.

A wooden statue of an elephant used as a sign in front of a store is included in the terms "furniture" and "signs and furniture" in chattel mortgages. Curtis *v.* Martz, 14 Mich. 506.

Ship's provisions are embraced in the term "furniture" in a policy of insurance. Brough *v.* Whitmore, 4 T. R. 206.

A magnificently jewelled mirror worth £4600 and a stereoscope are not furniture within the term as used in a schedule of dock rates. Southampton Dock Co. *v.* Hill, 14 C. B. (N. S ) 243.

In an action for damages alleged to be done to furniture, it is error to admit evidence of injuries done to coffee, sugar, and apples. Whitmore *v.* Bowman, 4 G. Greene (Iowa), 148.

The "furniture of a ship" includes "everything with which a ship requires to be furnished or equipped to make her seaworthy." Weaver *v.* The S. G. Owens, 1 Wall. Jr. (C. C.) 569.

1. A release by a lessor, of his lessee, from further liability does not apply to liability already accrued. O'Fallon *v.* Nicholson, 56 Mo. 238.

2. "Further" means additional and presupposes something to which an addition can be made. Where an agreement was made with counsel to pay him $1000, if successful in a case in a court of inferior jurisdiction, and, in case of an appeal, such further compensation for the further service as should be agreed upon, no further compensation could be due unless the previous compensation were first earned. Counsel having failed in the court below, the agreement was at an end; and services in the appellate court became the subject of an action on a *quantum meruit*. Hitchings *v.* Van Brunt, 38 N. Y. 335.

An increase of taxes is covered by a covenant in a lease by the tenant to pay all further and additional rates and taxes. Graham *v.* Wade, 16 East, 29.

"The terms 'item,' 'further,' 'moreover' are commonly used in the beginning of a new devise or bequest, without indicating any particular intention in the disposition of the property." Where a devise to A, in fee, is followed by, "Further, I wish to give to B. one other three-story brick house, etc.," the word "further" is not sufficient to cause a fee to pass in the latter devise. Burr *v.* Sim, 1 Whart. (Pa.) 252.

A testator ordered certain real estate to be sold, and, from the proceeds, $1000 to be given to S., and, "further out of the proceeds of said sale," $1000 to M. The fund being less than $2000, S. and M. took ratably. "The legacy to the society is not from the residue after payment of the legacy to S. The word 'further' is used in the sense of 'also,' and does not indicate that the legacy to the society is given from a fund from which another legacy has been taken." Sumner *v.* Am. Home. Mis. Soc. (N. H.), 10 Atl. Rep. 616.

A constitutional provision giving certain courts "such further civil and criminal jurisdiction as may be conferred by law" does not authorize the legislature to extend territorial limits of their jurisdiction, but confines the power to enlarging the subject-matter thereof. Landers *v.* Staten Island R. Co., 53 N. Y. 450.

Under an agreement in a lease that, in case the rent was not paid when due, the lessor might enter "without further notice or demand," no previous demand is necessary to entitle him to enter. The word "further" does not imply a previous demand; "for certainly one demand would be sufficient, without an agreement that no other demand should be required." The Fifty Associates *v.* Howland, 5 Cush. (Mass.) 214.

3. **Future earnings.**—Money to become due for labor and materials furnished under an entire contract not yet completed is "future earnings," within the meaning of an act making unrecorded assignments of future earnings invalid against trustee process. Somers *v.* Keliher, 115 Mass. 165.

**Future edition.**—The sixth edition of Kent's Commentaries in the hands of the printer and not yet published at the time of his death, passed under his will as a future edition, and not as "unsold Commentaries on hand." Hone *v.* Kent, 6 N. Y. 390.

**Future estate.**—An estate in expectancy; "An estate limited to commence in possession at a future day, either without the intervention of a precedent estate, or on the determination, by lapse of time or otherwise, of a precedent estate created at the same time." Leslie *v.* Marshall,

**FUTURE-ACQUIRED PROPERTY.**—(See also ASSIGNMENTS; CHATTEL MORTGAGES; EQUITABLE ASSIGNMENTS; EQUITABLE MORTGAGES; ESTATES; MORTGAGES; RAILROADS; REMAINDERS; REVERSIONS; WILLS.)


I. Definition, 987.
II. Lien on Future-acquired Property, 987.
1. *By Agreement*, 987.
2. *Statutory Lien*, 987.
3. *Judgment Lien*, 988.
4. *Execution Lien*, 989.
III. Pledge of Future-acquired Property, 989.
IV. Future-acquired Property Passing by Will, 989.
V. Assignment of Future Wages and Earnings, 991.
VI. Future-acquired Property by Accession, 991.
VII. Future-acquired Property by Increase, 991.
VIII. Future-acquired Property by Substitution, 991.


**I. Definition.**—Property acquired subsequent to a will, contract, mortgage, pledge, or other obligation made by the party entitled thereto, and which thereafter may come into his possession or under his control.

**II. Lien on Future-acquired Property.** — 1. *By Agreement.* — By agreement, a lien may be given on any property not in existence or owned by a person at the time of the agreement, to take effect when the property comes into existence or is obtained.[1]

2. *Statutory Lien on Future-acquired Property.*—In *California* and *Dakota*, an agreement may be made to create a lien upon property not yet acquired by the party agreeing to give the lien, or not yet in existence. In such case, the lien agreed for attaches, from the time when the party agreeing to give it acquires an interest in the thing, to the extent of such interest.[2]

31 Barb. (N. Y.) 564; Sayer *v.* Dufour, 11 Q. B. 338; 2 Bl. Com. 164.

**Future extensions or Branches.**—See BRANCH.

1. Coates *v.* Donnell, 16 J. & S. (N.Y.) 48; Barnard *v.* Norwich & Worcester R. Co. 4 Cliff. (U. S.) 351; Coe *v.* Hart, 6 Am. Law Reg. 27.

Whenever a person by a contract intends to create a lien upon personal property to be acquired by him, the lien attaches in equity upon the particular property as soon as he acquires a title thereto. Bibend *v.* Liverpool Ins. Co. 30 Cal. 78.

Thus, where a clause in a lease provides that the lessor shall have a lien upon all property at the time or which may hereafter be brought upon demised premises as security for the payment of rent, to be enforced in case of default in the same manner as a chattel mortgage, the clause is binding between the parties; it creates an equitable lien on the property of the lessee then upon the premises, and also upon property therafter brought thereon, which attaches as soon as the property is acquired by the lessee and brought upon the premises. Wesner *v.* Ocumpaugh, 71 N. Y. 113.

So, where R., being indebted to M. by two promissory notes, secured by deed of trust on certain lands, in consideration of M.'s forbearance in foreclosing made a contract with M. by which R. was to cultivate the land in cotton for one year, and to give M. one half of the cotton raised on the land, the same to be credited on the notes, giving a lien on the whole crop for the payment of the one half, and R. died during the year and his estate was declared insolvent, it was held that M. obtained an equitable lien on the cotton, which he could enforce in equity, and that, as between M. and the creditors of R. the former had the superior lien. Kirksey *v.* Means, 42 Ala. 426.

2. Deering's Codes & Stats. of Cal.

3. *Lien of Judgment on After-acquired Land.*—The common-law rule, and that adopted by the courts of most of the United States, is that lands purchased by the defendant after the entry of judgment, but aliened before execution, are bound by its lien.[1]

(1885), § 2883; Comp. Laws of Dakota (1887), § 4328.

1. Ridge *v.* Prather, 1 Blackf. (Ind.) 401; Baith *v.* Makeever, 4 Biss. (U. S. C. C.) 206; Kollock *v.* Jackson, 5 Ga. 153; Ralston *v.* Field, 32 Ga. 453; Handly *v.* Sydenstricker, 4 W. Va. 605; Stow *v.* Tifft, 15 Johns. (N. Y.) 464; Barron *v.* Thompson, 9 Rep. 766; Wales *v.* Bogur, 31 Ill. 464; State *v.* Taylor, 1 Minn. 275; Trustees *v.* Watson, 13 Ark. 74; Ridgeley's Exrs. *v.* Gartrell, 3 Har. & McH. (Md.) 449.

**Tennessee.**—The lien of a judgment upon the debtor's real estate, given by the act of 1831, ch. 90, § 7, attaches to land acquired by the debtor after the expiration of twelve months from the rendition of the judgment, and continues for the period of one year from the time the title may be acquired. Within that period it may be made effectual by a levy and sale of such after-acquired lands; and such levy and sale will overreach and void any intermediate alienation by the judgment debtor within that period. Davis *v.* Benton, 2 Sneed (Tenn.), 665.

**In Pennsylvania,** a judgment is not a lien upon lands subsequently purchased by the defendant and aliened before execution issued. Rundle *v.* Ethrein, 2 Yeates (Pa.), 23; Colhoun *v.* Snyder, 6 Binn. (Pa.) 135; *In re* Vandeventer, 2 Bro. (Pa.) 309; Water's Appeal, 35 Pa. St. 524; Dennison's Appeal, 1 Pa. St. 200.

In Colhoun *v.* Snyder, 6 Binn. (Pa.) 137, Tilghman, C.J., says: "The question in this case is whether a judgment is a lien on lands purchased by the defendant after the judgment and aliened before execution issued. I am well satisfied that, by the *English* common law, such lands are bound. But it seems to have been differently understood in this State."

In Water's Appeal, 30 Pa. St. 524, Woodward, J., says: "Notwithstanding the dissatisfaction that has been expressed with the doctrine of Colhoun *v.* Snyder, 6 Binn. (Pa.), 135, by several judges, it has been followed in a multitude of cases, and is too firmly rooted in our law to be shaken at this day."

But it has been decided, in Pennsylvania, that a judgment against the equitable estate which a vendee holds under articles of agreement for the sale and purchase of land, attaches to and inds the legal estate the instant it rests in the vendee. In all such cases, effect is given to the judgment lien, without revival, against a subsequently acquired interest of the debtor; and to this extent the principle settled in Colhoun *v.* Snyder, 6 Binn. (Pa.) 135, that judgments shall not bind subsequently acquired real estate, has been qualified, perhaps contravened. Water's App., 35 Pa. St. 524; Richter *v.* Selin, 8 S. & R. (Pa.) 425; Lynch *v.* Dearth, 2 P. & W. (Pa.) 101; Episcopal Academy *v.* Friezes, 2 Watts (Pa.), 16; Foster's App., 3 Pa. St. 80; Lyon *v.* McGuffey, 4 Pa. St. 128; Stephen's App., 8 W. & S. (Pa.) 186; Morrison *v.* Wurtz, 7 Watts (Pa.), 437; Slater's App., 28 Pa. St. 169; Roth *v.* Hennrich, 67 Pa. St. 128; Lloyd's App., 82 Pa. St. 485; Zeigler's App., 69 Pa. St. 471.

The Pennsylvania rule has been followed in the following cases in other States:

**Ohio.**—A judgment is not a lien upon after-acquired lands conveyed before levy. Roads *v.* Symmes, 1 Ohio, 281; s. c., 13 Am. Rep. 621; Stiles *v.* Murphy, 4 Ohio, 92.

**Iowa.**—A judgment will not operate as a lien upon after-acquired estate, under the laws of Iowa, until a levy is made. 1 G. Greene (Iowa), 131.

**Nebraska.** — Until levy of execution, the lien of judgment does not attach to lands acquired after its rendition so as to affect *bona fide* purchasers. Filley *v.* Duncan, 1 Neb. 134, but though not expressly, this case is practically, overruled by Colt *v.* Dubois (Neb.), 5 Rep. 659, where it is held that judgments attach on and bind lands purchased by the debtor subsequently to the judgment.

But the lien of the judgment attaches to after-acquired property from the time it is acquired by the debtor, but does not relate back to the date of the judgment. Cayce, Trustee *v.* Stovall, 50 Miss. 397; Moody *v.* Harper, 25 Miss. 484; Rolfe *v.* McComb, 2 Head (Tenn.), 559; Davis *v.* Benton, 2 Sneed (Tenn.), 665; Michaels *v.* Boyd, 1 Ind. 259.

4. *Execution Lien on Future-acquired Property.*—In a State where growing crops are liable to be seized and sold, they are bound by the execution lien ; while in States where they cannot be levied upon till gathered, they are not, before gathering, subject to such lien.[1]

**III. Pledge of Future Property.**—Until future property comes into existence and delivery of it is made to the pledgee, there can be no valid pledge of it. There can only be an agreement to pledge it, because there can be no delivery to make the pledge effectual.[2]

**IV. Future-aquired Property Passing by Will.**—By the rule of the common law, the testator must be seized of the lands devised at the time of making the will. He must have a legal or equitable title in the land devised. The devise is in the nature of a conveyance or the appointment of a particular estate ; and therefore, lands purchased after the execution of the will do not pass by it.[3] This rule has been altered by statute in *England*, and wills made or re-

1. Freeman on Executions, § 197; Lindley *v.* Kelly, 42 Ind. 294; Adams *v.* Tanner, 5 Ala. 740; Evans *v.* Lamar, 21 Ala. 333.

By the statutes of *Virginia* (Code. ch. 188, §§ 3 and 4) and *West Virginia* (Code of 1868, ch. 141, § 2), every writ of *fieri facias* issued shall be a lien from the time it is delivered to the sheriff or other officer, to be executed upon all the personal estate of or to which the judgment debtor is possessed or entitled. Puryear *v.* Taylor, 12 Gratt. (Va.) 401; Huling *v.* Cabell, 9 W. Va. 531.

Any property acquired by the defendant while the writ of execution is in force is bound by it. Shafner *v.* Gilmore, 3 Watts & S. (Pa.) 438; Buttan *v.* Leviscente, 16 Upp. Can. Q. B. 495.

Thus, if the defendant, while an officer has in his hand an execution against him, exchange horses with another, both horses are subject to the execution. Oschard *v.* Williamson, 6 J. J. Marsh. (Ky.) 558; s. c., 22 Am. Dec. 102; Groomes *v.* Dixon, 5 Strob. (S. Car.) 149.

2. Jones on Pledges, § 30. See Smithhurst *v.* Nelson, 14 N. J. Eq. 408; Gittings *v.* Nelson, 86 Ill. 591; Goodenow *v.* Dunn, 21 Me. 86.

Thus, there can be no valid pledge of a runaway slave or an anchor and chain lost overboard in a sound. Owen *v.* Kinsey, 7 Jones (N. Car.), 240.

But although there cannot be a pledge, technically speaking, of a chattel not in existence, there may be an hypothecation, so that, as soon as the chattel shall be produced, the lien will attach. Thus, where it was stipulated by a brickmaker that the lessees of a brickyard should retain the bricks to be made, as security for their advances to the brickmaker, it was held that the bricks became pledged as fast as they were manufactured. Macomber *v.* Parker, 14 Pick. (Mass.) 497.

Under the *Australian* act (No. 4 of 1855–6), " An act to give a preferable lien on wool from season to season . . ." a proprietor of sheep can make a valid pledge of the wool of his next clip, though no possession is given. Ayers *v.* South Australian Banking Co., L. R. 3 P. C. App. 548. See Smith *v.* Atkins, 18 Vt. 461.

One assuming to own personal property and pledging it, is estopped from afterward asserting that he did not own it when he pledged it; and a subsequent acquisition of title by the pledgor, as between the parties to the contract, inures to the benefit of the pledgee without any need of delivery or ratification of the pledge. Goldstein *v.* Hart, 30 Cal. 373.

The statutes in *California* and *Dakota* provide " that the increase of property pledged is pledged with the property;" and that of *Georgia*, " that all increase of property in pawn belongs to the pawner." Deering Codes & Stat. of Cal. (1885) § 2989; Dakota Code (1883), vol. 2, § 1760; Georgia Code (1882), § 2147.

3. 4 Kent Com. *510, 512; Langfred *v.* Pitt, 2 P. Wms. 629; Greenhill *v.* Greenhill, Prec. in Ch. 320; Potter *v.* Potter, 1 Ves. 437; McKinnon *v.* Thomp-

published since the year 1837 are regulaled by the Act 1 Vict. c. 26.[1]

In nearly all the American States, real estate acquired by testator after the making of his will passes thereby and in like manner as if title thereto were vested in him at the time of the making of his will, unless the contrary clearly appears to have been the intention of the testator; the statutes in some States providing that the will shall speak from the death of the testator, and in others as if the title were vested in him at the time of making the will.[2]

son. 3 Johns. Ch. (N. Y.) 307; Pistol *v.* Richardson, 3 Doug. (Mich.) 361; City of Philadelphia *v.* Davis, 1 Whart. (Pa.) 490.

1. 1 Jarman on Wills, ch. x. "Every will shall be construed, with reference to the real estate and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will." Act 1 Vict. c. 26, § 24.

2. *Alabama.*—Code of Alabama (1886), § 1948 (§ 2277). Also, when a testator, having executed a will devising real property, afterward makes a conveyance of his interest, and acquires a new estate therein, such new estate passes by his will to the original devisees, unless it appears that such conveyance was intended to operate as a revocation. Code of Alabama (1886), § 1960 (§ 2289).

*California.*—Deering's Codes & Stat. of California (1885), § 1312. Future interests pass by succession, will, and transfer in the same manner as present interests. Deering Code and Stats. of California (1885), § 699.

*Colorado.*—Gen. Stat. of Colorado (1883), § 3481.

*Connecticut.*—Gen. Stat. of Connecticut (1888), § 537.

*Dakota.*—Comp. Laws of Dakota (1887), § 3342.

*Illinois.*—Rev. Stat. of Illinois (1887), ch. 148, § 1.

*Indiana.*—Rev. Stat. (1888), §§ 2556, 2565.

*Kentucky.*—Gen. Stat. of Kentucky (1881), Will, § 1; § 16.

*Maryland.*—Rev. Code 1878, art. 49, p. 421.

*Massachusetts.*—Public Stat. Massachusetts (1882), pp. 750, 751, § 24.

*Mississippi.*—Rev. Stat. of Mississippi, ch. 46, § 126.

*Missouri.*—Rev. Stat. of Missouri (1879), ch. 71, § 3960.

*New Jersey.*—Revision 1709–1877, Wills 24, § 3.

*New York.*—Rev. Stat. of New York (1882), vol. 3, p. 2284, § 5.

*North Carolina.*—Battle's Revisal (1878), ch. 119, § 5, p. 847.

*Pennsylvania.*—Bright. Pur. Dig. (1883), Wills, pl. 23, p. 1713.

*South Carolina.*—Gen. Stat. of South Carolina (1882), § 1850.

*Tennessee.*—Code of Tennessee (1884), § 3005.

*Texas.*—2 Sayle's Texas Civil Stat. (1888), tit. 99, art. 4858.

*Utah.*—Comp. Laws 1876, ch. 2, p. 271.

*Virginia.*—Code of Virginia (1887), ch. CXII, § 2512.

*West Virginia.*—Rev. Stat. (1878), ch. 118, p. 911.

*Delaware.*—It must clearly and manifestly appear by the will to have been the intention of the testator that any estate right or interest in lands acquired after its making shall pass. Rev. Code of Delaware (1874), ch. 84, § 25, p. 513.

*Georgia.*—After-acquired property passes by the will if its provisions be sufficiently broad to embrace such property. Georgia Code (1882), § 2461.

In the following States, property acquired subsequent to the making of the will passes by it if such was the intention of the testator:

*Iowa.*—Rev. Code of Iowa (1884), § 2323.

*Kansas.*—Comp. Laws of Kansas (1885), § 6621, 6622.

*Maine.*—Rev. Stat. of Maine, ch. 74, § 5.

*Michigan.*—Howell Ann. Stat. Michigan (1882), § 5787.

*Minnesota.*—Rev. Stat. 1878, ch. 47, § 3, p. 567.

*Nebraska.*—Comp. Stat. of Nebraska (1885), ch. 23, § 125.

*Nevada.*—Gen. Stat. Nevada, 3019, § 20.

*New Hampshire.*—Gen. Laws (1878), ch. 193, § 2, p. 455.

*Ohio.*—Rev. Stat. of Ohio (1884), 5969.

**V. Assignments of Future Wages and Earnings.** (See EQUITABLE ASSIGNMENT).—The theory upon which future earnings or the results of future labor are sometimes allowed to be anticipated and appropriated to the payment or security of a present indebtedness is that they are connected with a contract or employment already in existence or are the fruits of advances made or supplies furnished to carry on the business out of which the future property or earnings arise; and then the pledge attaches not to such property or earnings from the moment of the contract, but from the moment they spring into existence by virtue of the contract of the parties that they shall do so. But this doctrine does not extend so far as to embrace the results of labor undefined in character and unrestricted in time, which arise out of an employment having no connection with the nature or object of the indebtedness, and having, in fact, no real or contemplated existence at the time the contract is entered into.[1]

**VI. Future-acquired Property by Accession.**—See ACCESSION, vol. 1, page 50 *et seq.*

**VII. Future-acquired Property by Increase.**—See ACCESSION, vol. 1, page 51 *et seq;* ANIMALS, vol. 1, page 572.

**VIII. Future-acquired Property by Substitution.**—See ACCESSION, vol. 1, page 59; Holly *v.* Brown, 14 Conn. 255.[2]

*Rhode Island.*—Pub. Stat. of Rhode Island (1882), ch. 182, § 1.

*Vermont.*—Gen. Stat. 1862, ch. 49, p. 377.

*Wisconsin.*—Rev. Stat. of Wisconsin, ch. 103, § 2279.

*Florida.*—The testator may only dispose of his right, title, and interest in possessions, remainder, or reversion at the time of the execution of the will. McClellan Dig. Laws of Florida (1881), p. 986.

1. Tripp *v.* Brownell, 12 Cush. (Mass.) 396; Cooper *v.* Douglass, 44 Barb. (N. Y.) 410. See also Mulhall *v.* Quinn, 1 Gray (Mass.), 105; Hartley *v.* Tapley, 2 Gray (Mass.), 565; Low *v.* Pur, 108 Mass. 347; Payne *v.* Mobile, 4 Ala. 333; Purcell *v.* Mather, 35 Ala. 570; Stowell *v.* Bair, 5 Bradw. (Ill.) 104; Lonner *v.* Allen, 64 Iowa, 725; McArthur *v.* Garmon, 71 Iowa, 34.

2. Where by a bill of sale, the grantor assigns to the grantee all chattels, effects, etc., which at any time during the continuance of the security may be brought into the premises in substitution for or in addition to the chattels, etc., therein at the time of the making of the bill of sale, all property subsequently brought upon the premises passes to the grantee. Lazarus *v.* Andrads, 43 L. T. Rep. (N. S.) 30; 5 C. P. D. 318.

So with growing crops. Clements *v.* Matthews, 47 L. T. Rep. (N. S.) 251.

A sale of fish hereafter to be caught in the sea does not pass title to the fish when caught. Low *v.* Pur, 108 Mass. 347.

**GAG.**—A word, a sentence, or a passage of two or more sentences, not in a drama, as composed by the author, but interpolated and uttered on the stage by a player.[1]

**GAIN.**[2]

**GALLON.**—The standard measure of capacity of liquids. It contains 231 cubic inches.[3]

**GAMBLING CONTRACTS.**


I. Definition, 993.
II. At Common Law, 993.
III. Statutory Provisions, 994.
IV. Money Lost at Play, 995.
V. Bets and Wagers, 995.
1. *Invalidity*, 995.
2. *Election Bets*, 996.
3. *Under Guise of Legal Contracts*, 997.
4. *Responsibility to Agents*, 998.
VI. Stakes and Stakeholders, 999.
1. *Responsibility of Stakeholders*, 999.
2. *Claim by Winner*, 1001.
3. *Action by Loser Against Winner*, 1001.
VII. Entrance Fees and Prizes, 1001.
VIII. Lottery Tickets, 1002.
IX. Wager Policies, 1002.
X. Cheating and Unfair Dealing, 1003.
XI. Effect of Licenses, 1003.
XII. Contracts in Furtherance of Gaming, 1003.
XIII. Speculative Dealings, 1004.
1. *Meaning of Terms*, 1004.
2. *Sales for Future Delivery*, 1004.
3. *Wagers on Rise and Fall of Prices*, 1005.
*a. Dealings in Differences*, 1005.
*b. Mutual Intent*, 1008.
*c. Evidence of Intent*, 1010.
4. *Option Contracts*, 1011.
5. *Responsibility to Brokers and Agents*, 1011.
6. *Recovery of Margins*, 1013.
7. *Responsibility of Agent*, 1014.
XIV. Loans for Gambling Purposes, 1015.
XV. Obligations and Securities for Gambling Considerations, 1017.
XVI. Transactions Out of Jurisdiction Where Suit Brought, 1020.
XVII. Action to Recover Back Money Paid, 1021.


1. Gags are not capable of being the subjects of literary property. But the communication of them by the actor to a rival of his managers, who is infringing the latter's rights of production, is a breach of confidence, from which a court of equity will not allow the rival manager to derive an advantage to the other's prejudice. Keene *v.* Wheatley, 5 Pa. L. J. R. 501, 523.

2. The advance in value of government bonds, over their costs, is not gains, profit or income, within the meaning of those terms as used in an income tax act. Gray *v.* Darlington, 15 Wall. (U. S.) 63.

Where, by the terms of the life policies of an insurance company, two-thirds of the surplus of receipts over payments in respect of such policies, were payable every five years to the policy holders, and the remainder, after the payment of the expenses of the business, to the stockholders, the two-thirds are not "gains and profits," within the meaning of an income tax act. Last *v.* London Assurance Co., 54 L. J. R., Q. B. D. 4.

A mutual insurance company is an association formed for the purpose of carrying on a business for the acquisition of gain, within the meaning of an act requiring the registration of such. Its object is none the less gain because the latter arises from a loss. A diminution of a loss is a gain. *In re* Padstow etc. Assurance Co., 51 L. J. R., Ch. D. 344.

3. N. H. Gen. Laws, ch. 122, § 3; N. J. Act of Mar. 17, 1881, P. L. 123; Sup. Rev. Stats. 1107; Neb. Comp. Stats. (1885) 626; Mo. Rev. Stats. (1879) § 7663; Ind. Rev. Stats. (1881) § 6551; Tenn. Code (1884) § 2685; Pa. Act 15 Apr. 1834, P. L. 535; Purd. Dig. (Pa.) 1705. This is the standard United States gallon which was communicated to the States in accordance with the resolution of congress of 17 June, 1836, and which is adopted by most of the States by statute, without description.

A gallon for beer measure contains 282 cubic inches. N. H. Gen. Laws, ch. 121, § 13. This is used to measure milk, in Minn. Stats. ch. 21, § 7.

**I. DEFINITION.**—All contracts between two or more persons, whereby they agree to risk their money or property upon a contingency or chance, which in the nature of things may or may not happen, and whereby the one party will be the gainer and the other a loser, are deemed to be gambling contracts.[1]

**II. AT COMMON LAW.**—At common law, as interpreted by the English courts, a wager made in respect to matters not affecting the feelings, interest or character of third persons, or the public peace, or good morals, or public policy, is valid, and can be recovered;[2] but if it involves a breach of the peace, or is calculated to wound the feelings, or the interest, or the character of third persons, or is in relation to a matter which is against good morals or public policy, it is illegal and void, and no action in affirmance of the contract can be maintained.[3] In the United States, while many

**1. Risk Upon a Chance.**—In Bell *v.* State, 5 Sneed (Tenn.) 507, the court, in discussing what constituted gaming as a criminal offence, declared it to be "an agreement between two or more persons to risk their money or property in a contest of chance of any kind where one may be gainer and the other loser." See, also, Portis *v.* State, 27 Ark. 360.

**Staking Upon a Chance.**—Dr. Wharton, in discussing this same question, says: (Whart. Cr. Law [8th ed.] § 1465 a.) "It is gaming for parties to stake money on chance. The chance must be the controlling factor in the game; it is not enough to say that wherever chance enters in any appreciable degree into a contest, then there is gaming. There is no contest—forensic, literary, artistic—in which chance does not so enter. A lawyer may lose his brief before beginning his speech, or an author may be misled by a wrong reference, on which he casually strikes, or an artist may find out that the colors he took due care in selecting turn out, from some casualty, not to stand. This, however, does not make a contest, in which lawyer, author or artist may be concerned, gaming. All competitive examinations are affected in some degree by chance; yet no comparative examination is gaming. So as to games of skill. In such games chance may have very little part; if so, playing these games, even for reward, is not gaming. It is otherwise when the game depends more largely on chance than on skill. Hence gaming is a penal offence, under the statutes making it such, and may be defined as a staking by agreement on chance."

**Hope of Gain Without Consideration.**—In Brua's Appeal, 55 Pa. St. 294, the court declared that "anything which induces men to risk their money or property without any other hope of return than to get for nothing any given amount from another, is gambling."

**Chance and Absence of Quid Pro Quo.**—It is evident from the foregoing authorities that the essential elements in gambling are the chance which controls the risk, and the absence of any *quid pro quo* in the dealings of the parties.

**2.** Thackoorseydass *v.* Dhondmull, 4 Moore Ind. App. 339; s. c., 6 Moore P. C. 300; 12 Jur. 315; Good *v.* Elliot, 3 T. R. 693.

**Wager on Price of Opium.**—A wager made in India relative to the price of opium on a future day, the proceeds of which formed part of the government revenue, and of which it was the interest of one party to the wager to raise and the other to depress the price, was *held* to be legal at common law. Thackoorseydass *v.* Dhondmull, 4 Moore Ind. App. 339; s. c., 6 Moore P. C. 300; 12 Jur. 315.

**3. Wages as to Sex.**—In DeCosta *v.* Jones, Cowp. 729, it was *held* that an action would not lie upon a voluntary wager between two indifferent persons upon the sex of a third person, apparently a man, having acted, and continuing to act, as such in various public characters, first, because such inquiry tended to indecent evidence, and, second, because it tended to disturb the peace of the individual and of society. In Roebuck *v.* Hammerton, Cowp. 737, it was *held* that a policy upon the sex of a person is a wagering policy, within 14 Geo. III, ch. 48. And in Ditchburn *v.* Gold-

decisions have followed the rule of the English common law,[1] there has been a very general disposition to hold that all wagering contracts are illegal and void, as against public policy.[2]

**III. STATUTORY PROVISIONS.**—Statutes prohibiting gaming have been enacted in England and throughout the United States.[3] In addition to these statutes, statutory enactments declaring all gaming contracts or agreements, and all securities for a gaming consideration void, and of no effect, have been generally adopted.[4]

smith, 4 Campb. 152, it was *held* that an action could not be maintained upon a wager whether an unmarried woman had had a child.

**Wagers Against Public Policy.**—In Gilbert *v.* Sykes, 16 East 150, the defendant had agreed to pay the plaintiff a guinea a day as long as Napoleon Bonaparte (then first consul of the French republic) should live, the wager having been made as a result of a convesation upon the probability of his coming to a violent death, by assassination or otherwise. The court *held* that the policy was void on the ground of immorality and impolicy. Similarly a wager as to the execution or acquittal of a prisoner, on trial on a criminal charge, is illegal at common law, as being against public policy. Evans *v.* Jones, 5 M. & W. 77.

**Wager on Election.**—In Allen *v.* Hearn, 1 T. R. 56, it was *held* that a wager between two voters with respect to the event of an election of a member to serve in parliament, made before the poll began, is illegal. See, also, Mount *v.* Waite, 7 John. (N. Y.) 434; Bunn *v.* Riker, 4 John. (N. Y.) 426.

**Wager as to Public Revenues.**—A wager respecting the amount of any branch of the public revenues is illegal, because it leads to an improper discussion and is contrary to sound policy. Atherfold *v.* Beard, 2 T. R. 610. But it has been *held* that the mere circumstance that a wager refers to the public revenue is not sufficient to establish its legality. Thackoorseydass *v.* Dhondmull, 12 Jur. 315; s. c., 4 Moore Ind. App. 339; 6 Moore P. C. 300.

**Wager as to Collection of Execution.**—In Colorado a wager as to whether an execution could be collected was *held* not to be gaming within the meaning of the statute, nor a wager upon a game; but the court declared it to be void as against public policy. Boughner *v.* Meyer, 5 Colo. 71; s. c., 40 Am. Rep. 139.

1. See Johnson *v.* Fall, 6 Cal. 359; Dewees *v.* Miller, 5 Harr. (Del.) 347; Bunn *v.* Riker, 4 John. (N. Y.) 426; Walker *v.* Armstrong, 54 Tex. 609; Harding *v.* Walker, 1 Hempst. (C. C.) 53; Sackett *v.* Davis, 3 McL. (C. C.) 101.

2. Gridley *v.* Dorn, 57 Cal. 78; s. c., 40 Am. Rep. 110; Lyon *v.* Culbertson, 83 Ill. 33; Love *v.* Harvey, 114 Mass. 80; Gregory *v.* Wendell, 40 Mich. 432; Wilkinson *v.* Tousley, 16 Minn. 299; Hoit *v.* Hodge, 6 N. H. 104; Kingsbury *v.* Kirwan, 77 N. Y. 612; Story *v.* Salomon, 71 N. Y. 420; Dickson's Exr. *v.* Thomas, 97 Pa. St. 278; Waugh *v.* Beck, 114 Pa. St. 422; Brua's Appeal, 55 Pa. St. 294; Edgell *v.* McLaughlin, 6 Whart. (Pa.) 170; Prichet *v.* North American Ins. Co., 3 Yeates (Pa.) 458; Rice *v.* Gist, 1 Strobh. (S. Car.) 82; Irwin *v.* Williar, 110 U. S. 499; Melchert *v.* Am. Union Tel. Co., 3 McCr. (C. C.) 521; s. c., 11 Fed. Rep. 193.

**In New Hampshire** the court has declared that the common law allowing action to be maintained upon a wager, in cases not contrary to public policy or prohibited by statute, has never been adopted in that State. Winchester *v.* Nutter, 52 N. H. 507.

3. **Horse Racing.**—Under these statutes horse racing has been *held* to be a game. Corson *v.* Neatheny, 9 Colo. 212; Tatman *v.* Strader, 23 Ill. 439; Shropshire *v.* Glasscock, 4 Mo. 536; s. c., 31 Am. Dec. 189.

**Policy Playing.**—It has also been *held* that the statutes include the species of gaming or dealing in chance known as "policy playing." People *v.* Noelke, 94 N. Y. 137; Wilkinson *v.* Gill, 74 N. Y. 63; Almy *v.* McKinney, 5 N. Y. St. Rep. 267.

4. By Car. II, ch. 7, § 3, it was declared that if any person should lose more than £100 at one sitting, such loser could not be compelled to make good the same, but the contract therefor and all judgments, etc., given therefor, should be utterly void and of no effect. This statute was virtually superseded by 9th Anne, ch. 14, which was adopted

**IV. Money Lost at Play.**—Any contracts for the payment of money lost at the card table or upon any game of chance, cannot be enforced;[1] but it has been held that where two persons won jointly from a third, and one of the winners received the entire amount won from the loser, the other can maintain an action against him for the half received to his use.[2]

**V. Bets and Wagers.—1. Invalidity.**—Although, as has already been stated, some decisions hold that bets and wagers are not void unless they contravene some rule of public policy,[3] the

in some of the American States. See Gough *v.* Pratt, 9 Md. 526; Wheelock *v.* Bobo, Harp. (S. Car.) 421; Atcheson *v.* Gee, 4 McCord (S. Car.) 211.

By that statute, "all notes, bills, bonds, mortgages, or other securities or conveyances whatsoever, given, granted, drawn or entered into or executed by any person or persons whatsoever, where the whole or any part of the consideration of such conveyance or security shall be for any money or other valuable thing whatsoever won by gaming or playing at cards, dice, tables, tennis, bowls, or other game or games whatsoever, and by betting on the sides of hands of such as do game at any of the games aforesaid, or for the reimbursing or repaying any money knowingly loaned or advanced for such gaming or betting as aforesaid, or loaned or advanced at the time and place of such play to any person or persons so gaming or betting as aforesaid, or that shall, during such play, so play or bet, shall be utterly void, frustrate, and of none effect." By the same statutes a right of action to recover the amount lost is conferred upon the loser if he brings suit within three months, or if he fails to sue within that time, any other person may sue and recover treble value; one-half of which went to the informer, and the other to the poor of the parish. Provision was also made for a bill for the discovery of all moneys won. But it is declared that any person who discovers the amount won by him and repays the same shall be indemnified from further prosecution.

By the statute of 5 & 6 Will. IV, ch. 41, so much of the statutes of Car. II and Anne as enacted that any note, bill or mortgage should be absolutely void, was repealed, and it was declared that every note, bill, or mortgage, which would, by virtue of the said acts, "have been absolutely void, shall be deemed and taken to have been made, drawn, accepted, given or executed for an illegal consideration, and the said several acts shall have the same force and effect which they would respectively have had if, instead of enacting that any such note, bill or mortgage should be absolutely void, such acts had respectively that every such note, bill or mortgage should be deemed and taken to have been made, drawn, accepted, given or executed for an illegal consideration."

The latest English statute, 8 & 9 Vict., ch. 109, § 10, declares "all contracts or agreements, whether by parol or in writing, by way of gaming or wagering, shall be null and void, and no suit shall be brought or maintained in any court of law or equity for recovering any sum of money or valuable thing alleged to be won upon any wager, or which shall be deposited in the hands of any person to abide the event upon which any wager shall have been made; provided always that this enactment shall not be deemed to apply to any subscription or contribution to, or agreement to subscribe or contribute for or towards any prize or sum of money to be awarded to the winner or winners of any game, sport, pastime or exercise."

**The American Statutes** practically follow the same lines, declaring either that obligations and securities given for a gaming consideration shall be absolutely void, or that they shall be deemed to have been given for an illegal consideration.

1. Cook *v.* Barnett, 25 Ga. 664; Conner *v.* Mackey, 20 Tex. 747; Kenney *v.* Brown, 3 Ridgw. P. C. 514.

2. Owen *v.* Davis, 1 Bail. (S. Car.) 315.

3. See Jeffrey *v.* Ficklin, 3 Pike (Ark.) 227; Johnson *v.* Fall, 6 Cal. 359; Harding *v.* Walker, 5 Harr. (Del.) 347; Beadles *v.* Bless, 27 Ill. 320; St. Ceran *v.* Sherman, 18 La. Ann. 520; Grayson *v.* Whatley, 15 La. Ann. 525; Bunn *v.* Riker, 4 John. (N. Y.) 426; Morgan *v.* Richards, 1 Brown (Pa.) 171; Walker *v.* Armstrong, 54 Tex. 609;

statutes now in force are couched in such terms, and have been so generally adopted, that no indebtedness alleged to have been created by way of a bet or wager, can be enforced in any of the courts.[1]

**2. Election Bets.**—A bet or wager upon the result of an election is void at common law, as being against public policy;[2] but in many of the States there are, in addition, statutes which prohibit such bets.[3] The fact that the bet was made after the election and after the parties had voted, does not render it valid;[4] nor does the fact that the parties to the bet were not electors.[5] All election bets are void whether upon the election of a president,[6] a state or local official,[7] or the nominee at a primary election.[8] If the bet is made in the form of a note payable in the event of

McElroy *v.* Carmichael, 6 Tex. 454; Dunman *v.* Strother, 1 Tex. 89; Sackett *v.* Davis, 3 McL. (C. C.) 100; Haskett *v.* Wootan, 1 N. & M. 180.

1. See Brewer *v.* Morgan, 13 Ala. 551; Corson *v.* Neatheny, 9 Colo. 212; Eldred *v.* Malloy, 2 Colo. 320; Wheeler *v.* Spencer, 15 Conn. 28; Tatman *v.* Strader, 23 Ill. 493; Nash *v.* Monheimer, 20 Ill. 215; Cain *v.* McHarry, 2 Bush (Ky.) 263; House *v.* McKenney, 46 Me. 94; Hayden *v.* Little, 35 Mo. 418; Evans *v.* Cook, 11 Nev. 69; Barker *v.* Mosher, 60 N. H. 73; Joseph *v.* Miller, 1 N. Mex. 621; Gibbons *v.* Gouveneur, 1 Den. (N. Y.) 170; Waters *v.* Hixenbaugh, 25 Pa. St. 131; Phillips *v.* Ives, 1 Rawle (Pa.) 36; Atchison *v.* Gee, 4 McCord (S. Car.) 211; Squires *v.* Whisken, 2 Campb. 140; Thorpe *v.* Coleman, 1 C. B. 990; Martin *v.* Hewson, 10 Ex. 737; Blaxton *v.* Pye, 2 Wils. 309.

2. Foreman *v.* Hardwick, 10 Ala. 316; Hill *v.* Kidd, 43 Cal. 615; Johnson *v.* Russell, 37 Cal. 670; Wheeler *v.* Spencer, 15 Conn. 28; Guyman *v.* Burlingame, 36 Ill. 207; Gordon *v.* Casey, 23 Ill. 70; Lockart *v.* Hullinger, 2 Ill. App. 145; David *v.* Ramson, 1 Iowa 383; Bevil *v.* Hix, 12 B. Mon. (Ky.) 140; Wroth *v.* Johnson, 4 Har. & McH. (Md.) 284; Ball *v.* Gilbert, 53 Mass. (12 Met.) 397; Cooper *v.* Brewster, 1 Minn. 94; Sisk *v.* Evans, 8 Mo. 52; Hickerson *v.* Benson, 8 Mo. 8; Ruckman *v.* Pitcher, 1 N. Y. 392; Like *v.* Thompson, 9 Barb. (N. Y.) 315; Rust *v.* Gott, 9 Cow. (N. Y.) 169; Yates *v.* Foot, 12 John. (N. Y.) 1; Vischer *v.* Yates, 11 John. (N. Y.) 23; Lansing *v.* Lansing, 8 John. (N. Y.) 354; Bunn *v.* Riker, 4 John. (N. Y.) 426; Brush *v.* Keeler, 5 Wend. (N. Y.) 250; Smyth *v.* McMasters, 2 Brown (Pa.) 182; McAllister *v.* Hoffman, 16 S. & R. (Pa.) 147; Wagonseller *v.* Snyder, 7 Watts (Pa.) 343; Lloyd *v.* Leisenring, 7 Watts (Pa.) 294; Stoddard *v.* Martin, 1 R. I. 1; Russell *v.* Pyland, 2 Humph. (Tenn.) 131; Machir *v.* Moore; 2 Gratt. (Va.) 257; Tarleton *v.* Baker, 18 Vt. 9; Allen *v.* Hearn, 1 T. R. 56.

3. See Givens *v.* Rogers, 11 Ala. 543; Stevens *v.* Sharp, 26 Ill. 404; Gordon *v.* Casey, 23 Ill. 70; Hizer *v.* State, 12 Ind. 330; Veach *v.* Elliott, 1 Ohio St. 139; Columbia Bank *v.* Haldeman, 7 Watts & S. (Pa.) 233.

4. Gardner *v.* Nolen, 3 Harr. (Del.) 420; Terrall *v.* Adams, 23 Miss. 570; Rust *v.* Gott, 9 Cow. (N. Y.) 169; Lansing *v.* Lansing, 8 John. (N. Y.) 354; Bunn *v.* Riker, 4 John. (N. Y.) 427; Brush *v.* Keeler, 5 Wend. (N. Y.) 250; Leval *v.* Myers, 1 Bail. (S. Car.) 486; Russell *v.* Pyland, 2 Humph. (Tenn.) 131.

5. Russell *v.* Pyland, 2 Humph. (Tenn.) 131.

6. Givens *v.* Rogers, 11 Ala. 543; McClurken *v.* Detrich, 33 Ill. 349; Stevens *v.* Sharp, 26 Ill. 404; Gordon *v.* Casey, 23 Ill. 70; Nudd *v.* Burnett, 24 Ind. 25; Craig *v.* Andrews, 7 Iowa 17; Sipe *v.* Finarty, 6 Iowa 394; Cooper *v.* Brewster, 1 Minn. 94; Sisk *v.* Evans, 8 Mo. 52; Leval *v.* Myers, 1 Bail. (S. Car.) 486; Danforth *v.* Evans, 16 Vt. 538. But in Smith *v.* Smith, 21 Ill. 244, it was *held* that a wager on the result of a presidential election in another State, made after the vote had been cast, was not against public policy.

7. Wroth *v.* Johnson, 4 Har. & McH. (Md.) 284; Clark *v.* Gibson, 12 N. H. 386; Waters *v.* Hixenbaugh, 25 Pa. St. 131.

8. Porter *v.* Sawyer, 1 Harr. (Del.) 517.

a candidate being elected, the note is void, and cannot be enforced.[1]

**3. Under Guise of Legal Contracts.**—Although parties to a gambling transaction may cover their wager under the guise of a legal contract, the outward form will not render the contract valid, and the courts will go behind it, and will deal with it according to its true nature. It has, accordingly, been held that where the price of goods was adjusted by a chance or contingency to happen in the future, and the amount paid was to increase or decrease according to the event, such contracts were to be deemed wagering contracts, and, therefore, void.[2] But a contract, otherwise

1. Givens *v.* Rogers, 11 Ala. 543; Guyman *v.* Burlingame, 36 Ill. 201; Gordon *v.* Casey, 23 Ill. 70; Lockart *v.* Hullinger, 2 Ill. App. 465; Nudd *v.* Barnett, 24 Ind. 25; Craig *v.* Andrews, 7 Iowa 17; Sipe *v.* Finarty, 6 Iowa 394; Cooper *v.* Brewster, 1 Minn. 94; Danforth *v.* Evans, 16 Vt. 538.

In Forena *v.* Hardwick, 10 Ala. 716, two persons bet the amount of a note payable by the one to the other; the note was delivered up by the loser, but he afterwards brought suit upon it against the winner. He obtained a judgment for the amount.

In Sisk *v.* Evans, 8 Mo. 52, a debtor who owed $5 agreed to make it $10 or nothing, according to the result of a presidential election. The debtor lost, and the creditor sued for the $10. He obtained a judgment for $5 only.

In Waters *v.* Hixenbaugh, 25 Pa. St. 131, a creditor bet with his debtor the amount of his claim upon a gubernatorial election. The creditor lost the bet, but notwithstanding brought a suit against the debtor for the amount of his claim. Judgment was given in his favor.

2. Davis *v.* Leonard, 69 Ind. 213; Hizer *v.* State, 12 Ind. 330; Craig *v.* Andrews, 7 Clark (Iowa) 17; Todd *v.* Caplinger, 4 Bush (Ky.) 139; Barham *v.* Livingston, 12 La. Ann. 618; Bates *v.* Clifford, 22 Minn. 52; McCullum *v.* Gourlay, 8 John. (N. Y.) 147; Harper *v.* Crain, 36 Ohio St. 338; s. c., 38 Am. Rep. 589; Lucas *v.* Harper, 24 Ohio St. 328.

**Speed of Horse.**—In Hall *v.* Bergen, 19 Barb. (N. Y.) 122, the plaintiff had purchased from the defendant the one-half interest in a mare. The contract provided that if the mare should make a certain speed over a specified course the price should be $800, but if she failed, the defendant should deduct or pay back to the plaintiff one-half of such sum, as the failure might detract from the market value of the mare. It was *held* that the contract was not a mere warranty of the qualities of the animal, but a forfeit, staked upon the trial of her speed, and that, therefore, it was in the nature of a stake or wager, and void by statute. See, also, Brodgen *v.* Marriott, 3 Bing. N. C. 88; s. c., 2 Scott 712.

**Tipster's Information.**—In Higgins *v.* Simpson, L. R. 2 C. P. 46, the plaintiff was a "tipster," that is, gave information as to the probable winner of horse-races. It had been agreed, upon advising the defendant as to the probable winner of a certain horse, that plaintiff should have £2 on the horse at 25 to 1, that is to say, that if the defendant backed the horse and won, the plaintiff should have £50, but if the horse lost, plaintiff should pay the defendant £2. It was *held* that this was a wager, although disguised as a contract to pay a reward for information.

**Sale of Goods.**—In Rourke *v.* Short, 5 El. & Bl. 194; s. c., 25 L. J., Q. B. 196; 2 Jur., N. S. 352, the plaintiff and the defendant were bargaining for a sale of goods, and a dispute arose as to the price of similar goods on a former sale. The plaintiff claimed that the goods sold by him on that occasion were invoiced 5s. 9d. per cwt., but the defendant claimed that the price was 6s. per cwt. It was agreed that if the plaintiff was wrong the goods sold should be charged at 3s. only, but that if the defendant was wrong he should pay 6s. It was *held* that the contract was one by way of wagering, within 8 & 9 Vict., ch. 109, § 18, and therefore could not be enforced.

**Sale of Land Regulated by Price of Produce.**—In Ferguson *v.* Coleman, 3 Rich. (S. C.) 99, land was sold under a contract by which the purchaser agreed to pay about $900 if cotton advanced 8 cents by a specified date, and $500 if

lawful, which has connected with it an agreement by which the liability of one of the parties is to be ascertained by chance, is not necessarily invalid.[1]

**4. Responsibility to Agents.**—It has been held that an agreement between a principal and his agent, that the agent shall make bets on horse-races, on behalf of his principal, is not a contract by way of gaming or wagering, and may, therefore, be enforced.[2] It has also been held that the employment of an agent to make a bet in his own money on behalf of his principal, implies the authority to pay the bet, if lost, and on the making of the bet that authority becomes irrevocable.[3] But an agent who, by his principal's authority, lays illegal bets with his principal's money, and losing, pays them without a subsequent express authority, cannot recover from the principal the amount of the money so paid.[4] If the agent fails to make the bets as instructed, and converts his principal's money to his own use, the principal can

not. It advanced before the date fixed, and the seller sued for the larger sum. He recovered.

**1. Price of Dinner.**—In Hussey *v.* Cricket, 3 Campb. 168, a dinner was ordered at a tavern by the authority of two persons, who had laid a wager of a rump and a dozen. It was *held* that if the winner paid the bill he might maintain an action against the loser to recover the amount.

**Supper to Shooting Parties.**—In Winchester *v.* Nutter, 52 N. H. 507, the two captains of a shooting party ordered an inn-keeper to serve supper to the party, and engaged to be responsible for it. It had been agreed that the event of the shooting contest should determine the liability for the supper. The court *held* that this agreement did not affect the inn-keeper's right of recovery.

**Sale of Goods.**—In Heironimus *v.* Harris, 14 B. Mon. (Ky.) 313, two individuals each purchased a watch on credit, and agreed in writing that both should be paid for by one of them according as a presidential election then pending might result. It was *held* that the seller might recover against the winner of the bet. See, also, Lurton *v.* Gilliam, 1 Scam. (Ill.) 577; Maulsby *v.* Wolf, 14 Ind. 457. *Compare* Duncan *v.* Cox, 6 Blackf. (Ind.) 270.

**Compromise by Tossing Penny.**—In Wilson *v.* Cole, 36 L. T. 702, plaintiff had agreed to take a lease of premises belonging to defendant, and to buy good-will and fixtures for £800, £25 thereof being paid as a deposit. Afterwards defendant offered the plaintiff £50 to buy off the bargain. The plaintiff refused this, and it was agreed that it should be settled by a toss whether the defendant should give the plaintiff £50 or £75. The defendant won the toss, and when plaintiff sued him for the £50 and for the £25 for deposit, pleaded that the contract of rescission was a wagering contract, and void. It was *held* that plaintiff was entitled to recover the £50 as consideration for the rescission, and also the £25 deposit.

2. Beeston *v.* Beeston, L. R., 1 Ex. Div. 13. In this case it is to be noted that the court expressly declared that the contract was not rendered void by 8 & 9 Vict., ch. 109, § 18.

**Betting Agent.**—In Oldham *v.* Ramsden, 44 L. J., C. P. 309; s. c., 32 L. T. 825, the plaintiff sued to recover money alleged to be received for the use of the defendant. At the trial the evidence showed that the plaintiff, a betting agent, was a member of a club, consisting of about fourteen hundred persons, in which there was a room wherein the members betted with one another, and that the plaintiff, at the request of the defendant, who was not a member of the club, made bets there with members on certain horse-races, which bets having been lost, the plaintiff paid. It was *held* that the plaintiff was entitled to recover the money he had so paid. See, also, Oulds *v.* Harrison, 10 Ex. 572; Bubb *v.* Yelverton, *In re* Ker, 24 L. T., N. S. 822. But see Beyer *v.* Adams, 3 Jur., N. S. 709; s. c., 26 L. J., Ch. 841.

3. Read *v.* Anderson, 10 Q. B. Div. 100; s. c., 52 L. J., Q. B. 214; 48 L. T. 74.

4. Clayton *v.* Dilly, 4 Taunt. 165.

recover, the statute applying only to contracts arising out of wagers actually made.[1]

**VI. STAKES AND STAKEHOLDERS.—1. Responsibility of Stakeholders.** —If stakes have been deposited by parties who have wagered upon an event, either of the parties may, before the determination of the event, give notice to the stakeholder of his intention to repudiate the wager, and if he do so, he will be entitled to the repayment of the stake deposited.[2] It has also been held in some cases that the stake cannot be recovered after the event has been ascertained ;[3] but many decisions hold that the depositor can recover from the stakeholder upon giving notice, so long as the money has not actually been paid over to the winner.[4] If the stakes have been paid over by the stakeholder before he receives notice of repudiation, such payment is a complete answer to any

1. Morgan *v.* Groff, 4 Barb. (N. Y.) 524; overruling 5 Den. (N. Y.) 364.

2. Perkins *v.* Clemm, 23 Ark. 221; Jeffrey *v.* Ficklin, 3 Ark. 227; Johnston *v.* Russell, 37 Cal. 670; Hardy *v.* Hunt, 11 Cal. 343; Petillon *v.* Hipple, 90 Ill. 420; Cleveland *v.* Wolff, 7 Kan. 184; Lewis *v.* Littlefield, 15 Me. 233; Fisher *v.* Hildreth, 117 Mass. 558; Humphreys *v.* Magee, 13 Mo. 435; Ryan *v.* Judy, 7 Mo. App. 74; Sutphin *v.* Crozer, 30 N. J. L. (1 Vr.) 237; Like *v.* Thompson, 9 Barb. (N. Y.) 315; Kelly *v.* Bartley, 1 Sandf. (N. Y.) 15; Barrett *v.* Neill, Wright (Ohio) 472; App *v.* Coryell, 3 P. & W. (Pa.) 494; McAllister *v.* Gallaher, 3 P. & W. (Pa.) 468; Siegel *v.* Funk, 3 Pitts. (Pa.) 28; Shain *v.* Searcy, 20 Tex. 122; Trimble *v.* Hill, L. R., 5. App. Cas. 342. Diggle *v.* Higgs, L. R., 2 Ex. Div. 422; Coombes *v.* Dibble, L. R., 1 Ex. 248; Manning *v.* Purcell, 7 De G M. & G. 55; Aubert *v.* Walsh, 3 Taunt. 227.

In Martin *v.* Newson, 10 Ex. 737, it was *held* that the act of 8 & 9 Vict., ch. 109, § 18, does not preclude a party who repudiates a wager, before the event is ascertained, from recovering from the stakeholders the amount of his deposit. See, also, Varney *v.* Hickman, 5 C. B. 271; s. c., 5 D. & L. 364.

3. See, also, Like *v.* Thompson, 9 Barb. (N. Y.) 315; Fowler *v.* Van Surdam, 1 Denio (N. Y.) 557; Yates *v.* Foot, 12 John. (N. Y.) 1.

4. Lewis *v.* Bruton, 74 Ala. 317; Wood *v.* Duncan, 9 Port. (Ala.) 227; Corson *v.* Neatheny, 9 Colo. 212; Wheeler *v.* Spencer, 15 Conn. 28; Dewees *v.* Miller, 5 Harr.(Del.) 347; Pearce *v.* Provost, 4 Houst. (Del.) 467; Alford *v.* Burke, 21 Ga. 46; Petillon *v.* Hipple, 90 Ill. 420; Doxey *v.* Miller, 2 Ill. App. 30; Burroughs *v.* Hunt, 13 Ind. 178; Adkins *v.* Flemming, 29 Iowa 122; Shannon *v.* Baumer, 10 Iowa 220; Hutchings *v.* Stilwell, 18 B. Mon. (Ky.) 776; Connor *v.* Ragland, 15 B. Mon. (Ky.) 634; Gilmore *v.* Woodcock, 70 Me. 494; McDonough *v.* Webster, 68 Me. 530; House *v.* McKenney, 46 Me. 94; Stacy *v.* Foss, 20 Me. 335; Whitwell *v.* Carter, 4 Mich. 329; Wilkinson *v.* Tousley, 16 Minn. 299; Perkins *v.* Eaton, 3 N. H. 152; Sutphin *v.* Crozer, 30 N. J. L. (1 Vr.) 257; Huncke *v.* Francis, 27 N. J. L. (3 Dutch.) 55; Moore *v.* Trippe, 20 N. J. L. (1 Spen.) 263; Allen *v.* Ehle, 7 Cow. (N. Y.) 496; Gram *v.* Stebbins, 6 Paige (N. Y.) 124; Forrest *v.* Hart, 3 Murph. (N. Car.) 458; Wood *v.* Wood, 3 Murph. (N. Car.) 172; Willis *v.* Hoover, 9 Oreg. 418; Conklin *v.* Conway, 18 Pa. St. 329; Bledsoe *v.* Thompson, 6 Rich. (S. Car.) L. 44; Bates *v.* Lancaster, 10 Humph. (Tenn.) 134; Perkins *v.* Hyde, 6 Yerg. (Tenn.) 288; McGrath *v.* Kennedy, 15 R. I. 209; West *v.* Holmes, 26 Vt. 530; Tarleton *v.* Baker, 18 Vt. 9; Trimble *v.* Hill, L. R., 5 App. Cas. 342; Diggle *v.* Higgs, L. R., 2 Ex. Div. 422; Hampden *v.* Walsh, L. R., 1 Q. B. Div. 189; Hastelow *v.* Jackson, 8 Barn. & C. 221; s. c., 2 M. & R. 209; Graham *v.* Thompson, 8 Ir. C. L. 64; Bate *v.* Cartwright, 7 Price 540; Smith *v.* Bickmore, 4 Taunt. 474; Lacaussade *v.* White, 7 T. R. 535; Cotton *v.* Thurland, 5 T. R. 405; Smith *v.* Field, 5 T. R. 402.

It must be noted, however, that there are a few decisions which *hold* that where the stake is deposited for a bet, which has been declared to be criminal, no action will lie for recovery. See Worthington *v.* Black, 13 Ind. 344;

demand by a depositor.[1] When the bet is made in the name of one person, and the stakes are deposited by him for the benefit of another, the person for whose benefit the stake has really been deposited may repudiate the wager and demand the return of the stake.[2] And if a number of persons have jointly contributed to the amount of the stake, each may, for himself, repudiate the contract, and recover the proportion which he contributed.[3] It has been held that a creditor of the depositor may, by attachment in the hands of the stakeholder, exercise the right of repudiation.[4] No particular form of notice of repudiation or rescission is necessary so long as the depositor distinctly objects to the payment of the deposit to the winner.[5] A demand for repayment by the depositor is necessary before he can maintain an action to recover it;[6] but if, after notice of avoidance, the stakeholder have paid the amount to the winner, such payment will operate as a waiver of the demand.[7] Interest can be recovered upon the amount staked only from the commencement of the suit, or from the date of the demand.[8]

In some States, a right of action is by statute conferred upon the depositor, although the stakeholder has paid over the money without notice.[9]

Davis *v.* Holbrook, 1 La. Ann. 176; Sutphin *v.* Crozer, 32 N. J. L. (3 Vr.) 462; Murdock *v.* Kilbourn, 6 Wis. 468.

1. Morris *v.* Philpot, 11 Ind. 447; Frybarger *v.* Simpson, 11 Ind. 59; Okerson *v.* Crittenden, 62 Iowa 297; Riddle *v.* Perry, 19 Neb. 505; App *v.* Coryell, 3 P. & W. (Pa.) 494; McAllister *v.* Gallaher, 3 P. & W. (Pa.) 468; West *v.* Holmes, 26 Vt. 530; Howson *v.* Hancock, 8 T. R. 575.

In Franklin *v.* Stoddart, 34 Minn. 247, the court *held* that a stakeholder could not take the property of the loser and deliver it to the winner, unless authorized by the loser, otherwise than by the bet.

2. Hardy *v.* Hunt, 11 Cal. 343; Ruckman *v.* Pitcher, 20 N. Y. 9; Pulver *v.* Burke, 56 Barb. (N. Y.) 390.

3. Ruckman *v.* Pitcher, 20 N. Y. 9; Pulver *v.* Burke, 56 Barb. (N. Y.) 390.

**Joint Wagers.**—In Humphreys *v.* McGee, 13 Mo. 435, it was *held* that the fact that others were interested with the depositor did not make it necessary for them to join in the suit. In Mytinger *v.* Springer, 3 W. & S. (Pa.) 405, it was *held* that a joint action would not lie at the instance of parties to a wager who deposited the stakes in the hands of the stakeholder.

4. Jennings *v.* Reynolds, 4 Kan. 110; Reynolds *v.* McKinney, 4 Kan. 94.

In Clark *v.* Gibson, 12 N. H. 386, it was *held* that the depositor's creditors cannot, without his assent, rescind the deposit, unless he be insolvent or in embarrassed circumstances.

5. Ivey *v.* Phifer, 11 Ala. 535.

**Performance of Condition.**—A notice not to pay until the performance of a condition is sufficient to render the stakeholder liable, if he pay before the performance of such condition. Ivey *v.* Phifer, 11 Ala. 535.

**Mode of Payment.**—A request to wait till the loser could see the winner, to arrange a particular mode of payment, is not a notice of avoidance. Frybarger *v.* Simpson, 11 Ind. 59.

**Notice by Agent.**—A notice from an agent is not sufficient, although he made the bet and deposited the money. The notice must come from the owner of the money himself. Reichly *v.* Maclay, 2 W. & S. (Pa.) 59.

6. Shackleford *v.* Ward, 3 Ala. 37.

In Willis *v.* Hoover, 9 Oregon 418, a demand of the stakeholder for the whole sum in his hands was *held* to be a good demand for the amount deposited for the plaintiff.

7. Shackleford *v.* Ward, 3 Ala. 37; Pearce *v.* Provost, 4 Houst. (Del.) 467; Alexander *v.* Mount, 10 Ind. 161; Ruckman *v.* Pitcher, 1 N. Y. 392.

8. Doxey *v.* Miller, 2 Ill. App. 30; Ruckman *v.* Pitcher, 13 Barb. (N. Y.) 556.

9. See Garrison *v.* McGregor, 51 Ill. 473; Adkins *v.* Flemming, 29 Iowa 122;

**2. Claim by Winner.**—The winner of a bet, which has been deposited in the hands of a stakeholder, is entitled to demand the return of his deposit in the same manner as the loser,[1] but he cannot claim payment upon the ground that he is the winner.[2]

**3. Action by Loser Against Winner.**—At common law the loser of a stake had no right of action against the winner, if the stake was paid over to him by the stakeholder before notice, but if notice of avoidance of the bet was given, and the stakeholder, notwithstanding, paid over the stakes to the winner, who received them in the knowledge of the fact that notice had been given, the loser was entitled to maintain an action against the winner to recover the amount of his deposit;[3] but if the winner had received payment of the whole deposit without knowledge of the fact that the loser had notified the stakeholder not to make payment, no right of action against the winner accrued.[4]

**VII. Entrance Fees and Prizes.**—A purse prize or premium offered to the winner at a lawful game is not a bet, stake or wager, within the meaning of a statute prohibiting the same, and may, in the absence of a statute prohibiting games or contests for bets or prizes, premiums or awards, be recovered from any person who agrees to contribute such purse, prize or premium to the winner.[5] Similarly, entrance fees paid by contestants to enable them to take part in a race or contest are not illegal, and cannot be recovered back under the statutes providing for

Mahony *v.* O'Callaghan, 38 N. Y. Super. Ct. (J. & S.) 461; Ruckman *v.* Pitcher, 1 N. Y. 392; Storey *v.* Brennan, 15 N. Y. 524; McKeon *v.* Caherty, 1 Hall (N. Y.) 300; s. c., 3 Wend. (N. Y.) 494; Simmons *v.* Borland, 10 John. (N. Y.) 468.

1. McLain *v.* Huffman, 30 Ark. 428; Gardner *v.* Grubb, 4 Houst. (Del.) 447; Stevens *v.* Sharp, 26 Ill. 404; Worthington *v.* Black, 13 Ind. 344; Hoit *v.* Hodge, 6 N. H. 104; Simmons *v.* Bradley, 27 Wis. 689; Egerton *v.* Furzeman, 1 Car. & P. 613.

2. McLain *v.* Huffman, 30 Ark. 428; Hayden *v.* Little, 35 Mo. 418; Rust *v.* Gott, 9 Cow. (N. Y.) 169; Corley *v.* Berry, 1 Bail. (S. Car.) 593; Hampden *v.* Walsh, L. R., 1 Q. B. Div. 189; Allport *v.* Nutt, 1 C. B. 974; s. c., 3 D. & L. 233; Beyer *v.* Adams, 26 L. J. Ch. 841; Savage *v.* Madder, 36 L. J. Ex. 178; s. c., 16 L. T. 600; Jones *v.* Carter, 8 Q. B. 134.

**Stakeholder as Winner's Bailee.**—If, however, the winner has received a chattel on a bet, and has merely left it with the stakeholder to take care of until he should call for it, the fact that the bet was illegal will not bar an action of trover against the stakeholder for its conversion. Allgear *v.* Walsh, 24 Mo. App. 134.

3. Leverett *v.* Stegall, 23 Ga. 257; Love *v.* Harvey, 114 Mass. 80; McKee *v.* Manice, 65 Mass. (11 Cush.) 357; West *v.* Holmes, 26 Vt. 530.

**Claim to be Winner.**—If one of the parties to a wager contends that he is the winner, demands the whole of the deposit from the stakeholder, and forbids its payment to the other party, but does not demand the return of his half of the deposit, he cannot maintain an action against the other party to the bet, although the latter may have received the whole deposit with knowledge that the plaintiff had forbidden its payment to him. Patterson *v.* Clark, 126 Mass. 531.

4. Morris *v.* Philpot, 11 Ind. 447.

5. Alvord *v.* Smith, 63 Ind. 58; Delier *v.* Plymouth Co. Agricultural Society, 57 Iowa 481; Misner *v.* Knapp, 13 Oregon 135; s. c., 57 Am. Rep. 6. See, also, Harris *v.* White, 81 N. Y. 532.

Subscriptions to a purse or prize may be enforced against the subscriber. *Ex parte* King, *Re* Watkins, 2 Mont. & A. 676; s. c., 2 Deac. 23.

actions for the recovery of illegal bets and wagers.[1] But if there be a statute which prohibits horse-racing for reward, and also the contributing or collecting of money or property for the purpose of making up a purse, plate or prize, entrance fees or premiums, the subscriptions and obligations given therefor are illegal and void.[2] Under the English statutes it has generally been held that if two persons agree to race, each depositing a certain stake, or if they agree that the horse of the loser shall become the property of the winner, in both of these cases, the contest is one for a bet or wager, and cannot be deemed a subscription to a prize for a lawful contest.[3]

**VIII. LOTTERY TICKETS.**—Lotteries, being a species of gambling, are now generally prohibited by special statutes which have been adopted by the different States. Under these statutes, no action can be maintained against the lottery-keepers for prizes claimed to have been won by the holder of a ticket;[4] and deeds of land executed for prizes in a lottery are void.[5] And if the lottery-keeper have entered into a contract with an agent for the sale of tickets, he has no remedy if the agent refuses to account for the proceeds.[6] Although the lottery be held in another State than that in which the agent sells the tickets, and is lawful under the statutes of the State where it is held, no recovery may be had against the agent if the sale of the tickets is prohibited by the laws of the State where the suit is brought.[7]

**IX. WAGER POLICIES.**—Although at the common law a policy of insurance might be obtained by anyone upon the life of another, whether he had an interest in the life insured or not,[8] by statute

1. Harris *v.* White, 81 N. Y. 532; Costello *v.* Curtis, 13 N. Y. Week. Dig. 20; Jordan *v.* Kent, 44 How. Pr. (N. Y.) 206.

2. Bronson Agricultural, etc., Assoc. *v.* Ramsdell, 24 Mich. 441; Comly *v.* Hillegass, 94 Pa. St. 132; s. c., 39 Am. Rep. 774.

3. Trimble *v.* Hill, L. R., 5 App. Cas. 342; Batson *v.* Newman, L. R., 1 C. P. 573; Coombes *v.* Dibble, L. R., 1 Ex. 248; Diggle *v.* Higgs, L. R., 2 Ex. Div. 422.

4. Funk *v.* Gallivan, 49 Conn. 124; s. c., 44 Am. Rep. 210; Clarke *v.* Havens, 1 A. K. Marsh. (Ky.) 198; Van Doren *v.* Staats, 3 N. J. L. (2 Penn.) 887.

5. Wooden *v.* Shotwell, 23 N. J. L. (3 Zab.) 465; s. c., 24 N. J. L. (4 Zab.) 789; Seidenbender *v.* Charles, 4 S. & R. (Pa.) 151; Ridgeway *v.* Underwood, 4 Wash. (C. C.) 129; Fisher *v.* Bridges, 3 El. & Bl. 642. But see White *v.* Prentiss, 3 Mon. (Ky.) 450, 510; Lewis *v.* Miner, 3 Denio (N. Y.) 103; Thomas *v.* Cronise, 16 Ohio 54.

6. Udall *v.* Metcalf, 5 N. H. 396; Rolfe *v.* Delmar, 7 Robt. (N. Y.) 80; Lemon *v.* Grosskopb, 22 Wis. 447.

7. Rolfe *v.* Delmar, 7 Robt. (N. Y.) 80.

**Ignorance of Prohibition.**—In Case *v.* Riker, 40 Vt. 482, it was *held* that where lottery tickets were sold in a State where the sale was legal to a citizen of Vermont, the purchaser might be sued for the recovery in Vermont, though the vendor knew that such tickets were designed to be sold by the purchaser in that State, but did not know that the sale of such tickets there was prohibited by law. See, also, McKnight *v.* Riesicker, 13 Pa. St. 328.

In Ormes *v.* Dauchy, 82 N. Y. 443; s. c., 37 Am. Rep. 583, the court *held* that in the absence of proof of the law of Virginia, a contract made in New York, where lotteries are illegal, to advertise a lottery to be drawn in Virginia, was not invalid.

8. Clendining *v.* Church, 3 Caines (N. Y.) 141; Buchanan *v.* Ocean Ins. Co., 6 Cow. (N. Y.) 318; St. John *v.*

such policies have been generally denounced and declared void.[1]

**X. Cheating and Unfair Dealing.**—Money won by cheating at any kind of game, whether allowed or forbidden, and paid by the loser without a knowledge of the fraud, may be recovered. A wager won by such undue means is not deemed to have been won in the view of the law, and, therefore, the money is treated as if it had been paid without consideration and by mistake.[2] As no title passes from the person defrauded, property obtained may be recovered even in the hands of a *bona fide* purchaser for value.[3]

**XI. Effect of Licenses.**—Although gaming-houses, horse-racing, or games of any kind may have been licensed by statute, that fact does not affect gambling contracts entered into in connection therewith. Such a statute does not confer the right to enforce a gaming debt.[4]

**XII. Contracts in Furtherance of Gaming.**—If a partnership be formed for gambling purposes, courts of equity will not give any aid in the adjustment of accounts between the partners.[5] The courts have also refused to enforce other contracts, which tend to promote a violation of the gaming laws, *e. g.*, a contract for services rendered in training a horse for a race,[6] or for the transmission of a telegraphic message intended to consummate

American Mut. L. Ins. Co., 2 Duer. (N. Y.) 419; Abbott *v.* Sebor, 3 John. Cas. (N. Y.) 39; Juhel *v.* Church, 2 John. Cas. (N. Y.) 333; Miller *v.* Eagle, L. & H. Ins. Co., 2 E. D. Smith (N. Y.) 26.

1. Ruse *v.* Mutual Ben. Ins. Co., 23 N. Y. 516; s. c., 26 Barb. (N. Y.) 556; Osgood *v.* Glover, 7 Daly (N. Y.) 367; Shepperd *v.* Sawyer, 2 Murph. (N. Car.) 26; Cammack *v.* Lewis, 82 U. S. (15 Wall.) 643; Paterson *v.* Powell, 9 Bing. 320; s. c., 2 M. &. S. 399.

2. Phalen *v.* Clark, 19 Conn. 421; Jones *v.* Inness, 32 Kan. 177; Hodge *v.* Sexton, 1 Hun (N. Y.) 576; s. c., 4 T. & C. (N. Y.) 54; Webb *v.* Fulchire, 3 Ired. (N. Car.) L. 485; Warden *v.* Plummer, 4 Jones (N. Car.) L. 524; Catts *v.* Phalen, 43 U. S. (2 How.) 376. But see Gregory *v.* King, 58 Ill. 169; Babcock *v.* Thompson, 20 Mass. (3 Pick.) 446.

3. Hodge *v.* Sexton, 1 Hun (N. Y.) 446; s. c., 4 T. & C. (N. Y.) 54.

4. Davis *v.* Goodman, 5 Cal. 329; Carrier *v.* Brannan, 3 Cal. 328; Bryant *v.* Mead, 1 Cal. 441; Scott *v.* Courtney, 7 Nev. 419; Ruckman *v.* Pitcher, 1 N. Y. 392; People *v.* Kelly, 3 N Y. Cr. Rep. 272; Ruckman *v.* Ryan, 1 Denio (N. Y.) 340; Gibbons *v.* Gouverneur, 1 Denio (N. Y.) 170; Monroe *v.* Smelly, 25 Tex. 586.

5. Anderson *v.* Powell, 44 Iowa 20; Whitesides *v.* McGraff, 15 La. Ann. 401; Watson *v.* Murray, 23 N. J. Eq. (8 C. E. Gr.) 257; Watson *v.* Fletcher, 7 Gratt. (Va.) 1; but see Nash *v.* Ash, 1 Eden 378.

**Accounting by Treasurer of Horse Fair.**—In Wilson *v.* Owen, 30 Mich. 474, four persons united in getting up a horse fair, where pools were to be sold on the races. Another person was appointed treasurer, and he refused to account for the money received by him, but the court compelled him to do so.

**Illegal Business.**—In an accounting between persons who had been engaged in the cigar and illegal liquor and gambling business, an accounting for the cigar trade only was ordered. Anderson *v.* Powell, 44 Iowa 20.

6. Mosher *v.* Griffin, 51 Ill. 184.

In Harris *v.* White, 81 N. Y. 532, a jockey sued his employer for wages. The defendant pleaded that the contract was in violation of the New York statute, which declares all wagers, bets, stakes, unlawful. The testimony showed that the agreement was to drive in races, for purses, prizes, or

a gaming contract,[1] or for the use of a "ticker" in a "bucket shop."[2] Although a contract for the supply of articles to be used in gaming cannot be enforced, if they are supplied with the knowledge of the purpose to which they are intended to be put, and directly in aid thereof, the sale is not invalidated by the mere knowledge of the seller that articles of the same nature are used in gambling.[3]

**XIII. SPECULATIVE DEALINGS.—1. Meaning of Terms.**—A sale "short" means a sale of that which the seller has not, but which he expects to buy in at a lower price than that for which he has sold it.[4] "Futures," as may readily be inferred, means sales for future delivery, and may either be absolute, or by way of option. "Differences," of course, means the difference arising between purchases and sales, while an "option" is the right to purchase or sell or not, as one of the parties may see fit. "Options" are divided into three classes, viz.: "calls," "puts" and "straddles." A "call" is an option or privilege to a buyer of goods to demand delivery at a specified price within a specified time.[5] A "put" is an option or privilege in a seller of goods to deliver them or not, as he sees fit, within a certain time at a specified price.[6] A "straddle" is a double privilege, or a "put" and "call" combined, under which one party has the option either to demand from the other or sell to him within a specified time, and at a specified price.[7]

**2. Sales for Future Delivery.**—A contract for the sale of goods to be delivered at a future day is valid, even though the seller has not the goods, or any other means of getting them than to go into the market and buy them.[8]

premiums, and the court *held* that a purse, prize or premium was not a bet or stake, within the meaning of the statute, and consequently that the plaintiff was entitled to recover.

1. Kiley *v.* Western Union Tel. Co., 39 Hun (N. Y.) 158.

2. Bryant *v.* Western Union Tel. Co., 17 Fed. Rep. 225.

3. Rose *v.* Mitchell, 6 Colo. 102; s. c., 45 Am. Rep. 520.

**Materials for Ten-Pin Alley.**—A contract for furnishing materials for a nine-pin alley will not be invalid, and the seller will be entitled to a lien if he did not know that the alley was to be used for gaming. Dorsey *v.* Langworthy, 3 Iowa 341.

4. See Appleman *v.* Fisher, 34 Md. 540; Maxton *v.* Gheen, 75 Pa. St. 166; Knowlton *v.* Fitch, 52 N. Y. 288.

5. See Kirkpatrick *v.* Bonsall, 72 Pa. St. 155; Pearce *v.* Foote, 113 Ill. 228; s. c., 55 Am. Rep. 414.

6. *Ex parte* Young, 6 Biss. C. C. 53.

7. Harris *v.* Tumbridge, 83 N. Y. 92; Storey *v.* Salomon, 6 Daly (N. Y.) 531.

8. Fortenbury *v.* State, 47 Ark. 188; Pixley *v.* Boynton, 79 Ill. 351; Miller *v.* Bensley, 20 Ill. App. 528, Tomblin *v.* Callen, 69 Iowa 229; Conner *v.* Robertson, 37 La. Ann. 814; s. c., 55 Am. Rep. 521; Rumsey *v.* Berry, 65 Me. 570; Clay *v.* Allen, 63 Miss. 426; Commiskey *v.* Williams, 20 Mo. App. 606; Kingsbury *v.* Kirwan, 77 N. Y. 612; Cooke *v.* Davis, 53 N. Y. 318; Yerkes *v.* Salomon, 11 Hun (N. Y.) 471; Seeligson *v.* Lewis, 65 Tex. 215; s. c., 57 Am. Rep. 593; Irwin *v.* Williar, 110 U. S. 499; Kirkpatrick *v.* Adams, 20 Fed. Rep. 287; Bartlett *v.* Smith, 13 Fed. Rep. 263; s. c., 4 McCrary (C. C.) 388; Cobb *v.* Prell, 15 Fed. Rep. 774; Gregory *v.* Wattowa, 58 Iowa 711; McIlvaine *v.* Egerton, 2 Robt. (N.Y.) 422; Stanton *v.* Small, 3 Sandf. (N. Y.) 230; Cassard *v.* Hinman, 1 Bosw. (N. Y.) 207; Smith *v.* Bouvier, 70 Pa. St. 325; Appleman *v.* Fisher, 34 Md. 540; Maxton *v.* Gheen, 75 Pa. 166.

**3. Wagers on Rise and Fall of Prices.**—*a.* DEALINGS IN DIFFERENCES.—Speculation in goods or property is, as already shown, lawful, but when contracts are made apparently for the purchase and sale of property, but in reality merely as a speculation in *prices*, the contracts are deemed to be unlawful and void. Thus, all contracts made between parties who have no intention of receiving or delivering the property, but intend merely to settle accounts by the payment of the "differences," are void, and will

The contrary doctrine announced by Lord Tenterden in Lorymer *v.* Smith, 1 B. & C. 1, and Bryan *v.* Lewis, R. & M. 386, has been distinctly and repeatedly overruled. See Benj. Sales, (3rd Am. ed.) §§ 541, 542, 82, 83; Kibblewhite *v.* McMorine, 5 M. & W. 462; Mortimor *v.* McCallan, 6 M. & W. 58.

**Speculation in Business.**—In Clark *v.* Foss, 7 Biss. (C. C.) 540, 554, the plaintiff brought suit upon a time contract for the delivery of grain. The court said: "Whatever might be the judgment of discreet men as to the propriety of such purely speculative transactions, undertaken by men in mercantile pursuits, I am unable to see, on general principles, an objection to them in point of law. The law does not undertake the Quixotic task of nicely governing men in all the relations of life and compelling them to do, under all circumstances, what is prudent and reasonable. The truth is, men are speculative creatures, as certainly as they are eating and sleeping ones. And, although it is undoubtedly true that much harm comes to the community from over-speculation, it is more than doubtful if the world would be better off without speculators; or, if it would be, that the law can do much in abolishing them. As a common thing, business men are prone to regard their own judgment of the market as a part of their capital, and to a certain extent they have a right to do so. It is only with the more manifest abuses of the privileges of citizens in their dealings with one another, and when the evil touches and infects the public welfare, that the law assumes to interfere. In the main, commercial transactions must be left to be regulated by the higher and more inexorable laws which govern the trading world. If the transactions disclosed in this case are illegal, then, undoubtedly, a great part of the banking and clearing-house transactions in our great commercial centers are illegal also. I am persuaded that to hold them so would be trenching too severely upon the business of the commercial world, without any corresponding benefit to be expected from it."

**Statutory Prohibition.**—In Fortenbury *v.* State, 47 Ark. 188, the defendant was indicted under a statute which declares "That the buying or selling, or otherwise dealing in what is known as futures, either in cotton, grain or anything whatsoever, with a view to profit, is hereby declared to be gambling." The defendant urged that this statute was in restraint of trade, but the court took the opposite view, saying: "Certainly the legislature did not intend to impose any restraints upon legitimate commerce, but only to destroy the parasite that infests it. Contracts for future delivery, if entered into in good faith, and with an actual intention of fulfillment, are as valid as any other species of contract. A farmer may sell and agree to deliver his wheat or his cotton for a stipulated price before it is harvested. Nay, one may sell goods to be delivered at a future day, which he has not in actual or potential possession, but which he intends to go into the market and buy. But this is not what is commonly known as dealing in futures. This phrase has acquired the signification of a mere speculation upon chances, where the grain, cotton or stocks dealt in exist only in imagination, and where no delivery is contemplated, but the parties expect to settle upon the difference in the market. When so limited by judicial interpretation, the statute is not inconsistent with public policy. It forbids and punishes wagering contracts; that is, contracts in which they stipulate that they shall gain or lose upon the happening of an uncertain event, in which they have no interest, except that arising from the possibility of such gain or loss. Fareira *v.* Gabell, 89 Pa. St. 89; Thompson *v.* Cummings, 68 Ga. 124; Flagg *v.* Baldwin, 38 N. J. Eq. 219."

not be enforced.[1] It must be kept in view, however, that the contemplation of a possibility of a settlement by payment of the differences between the contract price and the market value,

1. Fortenbury *v.* State, 47 Ark. 188; Lyon *v.* Culbertson, 83 Ill. 33; Beveridge *v.* Hewitt, 8 Ill. App. 467; Pickering *v.* Case, 79 Ill. 328; Whitesides *v.* Hunt, 97 Ind. 191; s. c., 49 Am. Rep. 441; First Nat. Bk. *v.* Oskaloosa P. Co., 66 Iowa 41; Gregory *v.* Wendell, 40 Mich. 432; Clay *v.* Allen, 63 Miss. 426; Cockrell *v.* Thompson, 85 Mo. 510; Williams *v.* Tiedemann, 6 Mo. App. 269; Johnson *v.* Kaune, 21 Mo. App. 22; Commiskey *v.* Williams, 2 West Rep. 604; Tantum *v.* Arnold, 42 N. J. Eq. 60; Flagg *v.* Baldwin, 38 N. J. Eq. 219; Kingsbury *v.* Kirwan, 77 N. Y. 612; affirming 43 Super. Ct. (J. & S.) 451; Cassard *v.* Hinman, 1 Bosw. (N. Y.) 207; Ball *v.* Davis. 1 N. Y. St. Rep. 517; Nichols *v.* Lumpkin, (N. Y.) 51 Super. Ct. (J. & S.) 88; Yerkes *v.* Salomon, 18 N. Y. Supm. Ct. (11 Hun) 471; Bigelow *v.* Benedict, 16 N. Y. Supm. (9 Hun) 429; Waugh *v.* Beck, 114 Pa. St. 452; North *v.* Phillips, 89 Pa. St. 250; Kirkpatrick *v.* Bonsall, 72 Pa. St. 155; Thompson's Estate, 15 Phila. (Pa.) 532; Dunn *v.* Bell, 85 Tenn. 581; McGrew *v.* City Produce Exchange, 85 Tenn. 572; Beadles *v.* Ownby, 16 Lea (Tenn.) 424; Seeligson *v.* Lewis, 65 Tex. 215; Lowry *v.* Dillman, 59 Wis. 197; Barnard *v.* Backhaus, 52 Wis. 593; Irwin *v.* Williar, 110 U. S. 499; Cobb *v.* Prell, 15 Fed. Rep. 774; Bartlett *v.* Smith, 13 Fed. Rep. 263; s. c., 4 McCrary (C. C.) 388; Hentz *v.* Jewell, 4 Woods (C. C.) 656.

**Gambling Distinguished from Speculation.**—In Kirkpatrick *v.* Bonsall, 72 Pa. St. 155, the court said: "We must not confound gambling, whether it be in corporate stocks, or merchandise, with what is commonly termed speculation. Merchants speculate on the future prices of that in which they deal, and buy and sell accordingly. In other words, they think of and weigh—that is, speculate upon—the probabilities of the coming market, and act upon this look-out into the future in their business transaction; and in this they often exhibit high mental grasp and great knowledge of business, and of the affairs of the world. Their speculations display talent and forecast, but they act upon their conclusions, and buy or sell in a *bona fide* way. Such speculation cannot be denounced. But when ventures are made upon the turn of prices alone, with no *bona fide* intent to deal in the article, but merely to risk the difference between the rise and fall of its price; no money or capital is invested in the purchase, but so much only is required as will cover the difference—a margin, as it is figuratively termed—then the bargain represents, not a transfer of property, but a mere stake or wager upon its future price. The difference requires the ownership of only a few hundreds or thousands of dollars, while the capital to complete an actual purchase or sale may be hundreds of thousands or millions. Hence, ventures upon prices invite men of small means to enter into transactions far beyond their capital, which they do not intend to fulfill, and thus the apparent business in the particular trade is inflated and unreal, and, like a bubble, needs only to be pricked to disappear, often carrying down the *bona fide* dealer in its collapse. Worse even than this, it tempts men of large capital to make bargains of stupendous proportions, and then to manipulate the market to produce the desired price. This, in the language of gambling speculation, is making a corner; that is to say, the article is so engrossed or manipulated as to make it scarce or plenty in the market at the will of the gamblers, and then to place its price within their power. Such transactions are destructive of good morals and fair dealing, and of the best interest of the community: If the articles be stocks, corporations are crushed and innocent stockholders ruined to enable the gambler in its price to accomplish his end. If it be merchandise, *e. g.*, grain, the poor are robbed and misery engendered."

**Dealing in Differences Contrary to Public Policy.** — In Cunningham *v.* Nat. Bk. of Augusta, 71 Ga. 400, the court *held* that dealing in "futures" was against public policy. An examination of the opinion, however, shows that the court enlarged the meaning of the term, and, instead of confining it to contracts for future delivery, treated it as virtually synonymous with dealing in differences. "But what," said BANFORD, J., who delivered the opinion of the court, "is the transaction termed 'futures'? It is this: One person says that I will sell you cotton at a

certain time in the future for a certain price. You agree to pay that price, knowing that the person you deal with has no cotton to deliver at the time, but with the understanding that, when the time arrives for delivery, you are to pay him the difference between the market value of that cotton and the price you agreed to pay, if cotton declines, and if cotton advances, he is to pay you the difference between what you promised to give and the advanced market price. If this is not a speculation on chances—a wagering and betting between the parties—then we are unable to understand the transaction. A betting on a game of faro, brag, or poker, cannot be more hazardous, dangerous or uncertain. Indeed, it may be said that these animals are tame, gentle, and submissive, compared to this monster. The law has caged them and driven them to their dens. They have been outlawed, while this ferocious beast has been allowed to stalk about in open mid-day, with gilded signs and flaming advertisements, to lure the unhappy victim to its embrace of death and destruction. What are the consequences of these speculations on 'futures'? The faithful chroniclers of the day have informed us, as growing directly out of these nefarious practices, that there have been bankruptcies, defalcations of public officers, embezzlements, forgeries, larcenies and death. Certainly no one will contend for one moment that a transaction fraught with such evil consequences is not immoral, illegal, and contrary to public policy."

**Apparent Contract Only Cover for Gambling.**—In Rumsey *v.* Berry, 65 Me. 570, the court said: "The mischief and illegality arises when the apparent contract is not the real one, when it is a mere cover for ulterior designs and such as are not authorized by law. A contract for the sale and purchase of wheat, to be delivered in good faith at a future time, is one thing, and is not inconsistent with the law; but such a contract entered into without an intention of having any wheat pass from one party to the other, but with an understanding that, at the appointed time, the purchaser is merely to receive or pay between the contract and the market price, is another thing, and such as the law will not sustain. This is what is called a settling of the differences, and as such is clearly and only a betting upon the price of wheat, as against public policy, and not only void, but deserving of the severest censure."

**Purchase and Sale of Warrants.**—In Gregory *v.* Wendell, 39 Mich. 337, 340, the court say: "A dealer has a clear right to sell and agree to deliver at some future time that which he then has not, but expects to go into the market and buy. And it is equally clear that the parties may mutually agree that there need not be a present delivery of the goods, but that such delivery may take place at some other time; and that there need not be an actual possession given, but a symbolical one, as by the delivery of warehouse receipts according to custom, is also beyond dispute. In these cases there is something actual and tangible sold, although not then owned or possessed by the vendor, or rather something actual and tangible agreed to be sold, as the agreement is more in the nature of a contract for a future sale. There is also an intention, and such is the agreement, that when the time agreed upon for delivery arrives, the property shall be actually delivered. This, as already said, may, as in the case of grain, be by a delivery of warehouse receipts, for the quantity and quality agreed upon, rather than for any particular lot. The vendee under such an agreement may, before the time for delivery to him has arrived, agree to sell or transfer his right to the goods, or under the contract to someone else, who, should he retain the same, would be entitled to receive possession thereof at the time agreed upon by the parties through whom he claims title. But where the parties, at the time of entering into an agreement for the purchase and sale, apparently, of goods for future delivery, agree that no title to any property shall pass and that nothing shall be delivered—no delivery made, or where, from the nature of the transaction and the manner and method of carrying on the business, it is apparent that such was the intention of the parties, although not expressed, but the agreement or understanding was, that, at the time fixed for delivery, they should settle upon a basis of the then market price of the commodity, by the losing party paying to the other the difference, such an agreement would be one the law would not recognize and enforce. It would not constitute a sale or an agreement to sell property of any kind, but one to specu-

without any delivery of the merchandise, is not sufficient to avoid the contract, if there is a *bona fide* intention to deliver.[1]

*b.* MUTUAL INTENT.—If the contract is, in form, legal, it is not enough that it is susceptible of an illegal use, and that one of the parties to it contemplated and designed such illegal use, if the other had a right to suppose, under the circumstances, that the contract was to have effect according to its apparent and lawful construction. To invalidate the contract there must be an intent on the part of both the parties to it, to gamble.[2]

late upon the prices that certain property would be likely to bring at some future day."

**Dealing in Margins.**—Evidence that a sum sued for was a balance arising out of dealings on the board of trade in margins on wheat, is not sufficient to show that the contracts were in the nature of gambling. Preston *v.* Cincinnati, etc., R. Co., 36 Fed. Rep. 54.

**Evidence of Intention.**—The intention of the parties may be shown by the nature of the transactions. Gregory *v.* Wendell, 39 Mich. 337, 340. Or by the financial condition of the parties, as where the transactions are for an amount which the purchaser is utterly unable to pay. Beadles *v.* McElrath, (Tenn.) 3 S. W. Rep. 152.

**Every Sale of Stocks "Short"** is not *ipso facto* a wager. Maxton *v.* Gheen, 75 Pa. St. 166.

**Actual Purchase on Margin.**—In Hatch *v.* Douglas, 48 Conn. 116; s. c., 40 Am. Rep. 154, the defendant wrote to the plaintiffs, who were stock brokers in New York: "I want to buy, say, one hundred shares Union Pacific stock on margin. Will you take $1,000 first mortgage N. Y. & Oswego R. R. and do it?" The plaintiffs replied that they would, and at once bought the stock, and soon after sold it at a profit. Other stocks were afterwards bought and sold by the plaintiffs for the defendant under the same arrangement, resulting in a final loss, exceeding the value of the security held, and the plaintiffs sued for the balance. *Held*, that the contract not being one for the mere payment of differences, but the defendant having through the plaintiffs, as his agents, actually purchased the stock, which was delivered to them, and which they were ready to transfer to him on payment of the purchase money, it was not a gaming contract. The court say: "There are in the transactions between these parties some of the elements which are usually found in a gaming contract. For instance, it is pretty evident that the parties did not contemplate that the stock should be actually transferred to the defendant; but he would have been satisfied with the receipt of the difference between the price paid and the price received, less interest and commissions, if the price advanced, and expected to pay that difference if the price declined. To that extent it was a contract for the payment of differences. But it was more than that. The defendant, through his agents, the plaintiffs, actually purchased the stock, and there was an actual delivery, not to the principal, but to the agents for the principal. The plaintiffs advanced the money and held the stocks in their hands as security. The plaintiffs were ready at any time to transfer the stock to the defendant on payment of the purchase money. The import of the finding is, and we must so regard it, that it was an actual and *bona fide* employment of the plaintiffs to purchase stocks, and not a mere formal employment designed to cover a betting operation. It does not appear that the plaintiffs assumed any risk. They were entitled to their commissions and interest on their advancements whether the stock went up or down. The most that can be said of them is, that they knew that the defendant was speculating, and that they advanced him money for that purpose. But that was neither illegal nor immoral." See, also, Bullard *v.* Smith, 139 Mass. 492; Quincey *v.* White, 63 N. Y. 370; overruling 5 Daly (N. Y.) 327.

1. Tomblin *v.* Callen, 69 Iowa 229; Kirkpatrick *v.* Adams, 20 Fed. Rep. 287; Gilbert *v.* Gauger, 8 Biss. (C. C.) 214.

2. Pixley *v.* Boynton, 79 Ill. 351; Miller *v.* Bensley, 20 Ill. App. 528; Frost *v.* Clarkson, 7 Cow. (N. Y.) 24; Sawyer *v.* Taggart, 14 Bush (Ky.) 727; Williams *v.* Tiedemann, 6 Mo. App. 269; Gregory *v.* Wendell, 40 Mich. 432; Wall *v.* Schneider, 59 Wis. 352; s. c., 48 Am. Rep. 520; Bangs *v.* Hornick,

30 Fed. Rep. 97; Bennett *v.* Covington, 22 Fed. Rep. 816; Kirkpatrick *v.* Adams, 20 Fed. Rep. 287; Clark *v.* Foss, 7 Biss. (C. C.) 540; Bartlett *v.* Smith, 4 McCrary (C. C.) 388; Lehman *v.* Strassberger, 2 Woods (C. C.) 554; Hentz *v.* Jewell, 20 Fed. Rep. 592.

**Uncommunicated Intention.**—In Lehman *v.* Strassberger, 2 Woods (C. C.) 554, the court said: "We must look at the contract for future cotton, as originally made, to determine its legality or illegality. Strassberger testifies, and in this he is uncontradicted, that it was the understanding between him and the Lehman Brothers that, in all sales or purchases of cotton by them for him for future delivery, no cotton should be actually received or delivered, but only the differences paid, except when special instructions were given to receive or deliver cotton; and the record shows that he did, on more than one occasion, elect to deliver cotton. If he reserved the option to receive or deliver, the contract was legal in all respects, even though he might have had a purpose in his own mind not to receive or deliver, and had communicated that purpose to his agents. The question is, did he communicate that purpose to the parties not named, with whom he contracted? There is no evidence that he did. On the face of his contract he binds himself to deliver cotton, and the other party binds himself to receive it. Now, what effect can the mental purpose of Strassberger to pay or to demand differences instead of delivering the cotton have upon the contract, when that purpose is unknown to the other contracting party? Here is no bet or wager. 'It cannot be a wager unless parties are cognizant of the facts.' Hibblewhite *v.* McMorine, 5 Mees. & W. 462."

**Intention of Buyer to Resell.**—"If A, desiring to engage in trade, enters into a contract with B for the purchase of an article for future delivery, and becomes bound to receive and pay for it, that is a real transaction, and is valid, whether made in the country or on 'change. What difference, then, is made in the nature or character of the transaction if, instead of intending to receive the article himself and pay for it, he intends to resell it, and thereby procure another to receive and pay for it in his stead? The material matter is that the contract shall be such that its performance can be enforced. If, in the case put, A does not, by reselling, procure another to perform the contract for him, he is bound to perform it himself." Sawyer *v.* Taggart, 14 Bush (Ky.) 727, 736.

**Mutuality of Contract.**—In Williams *v.* Tiedemann, 6 Mo. App. 269, the court said: "It is manifest that, in order to make a wager, both parties must intend it to be such. If one intends a *bona fide* sale or purchase, while the other means only a gambling risk upon prospective differences, there will be no propriety in depriving the former of the benefit of his contract because of a secret reservation in the latter. As every contract, to be enforced, must be upon the mutual understanding of the parties, so a contract to be denied enforcement because of its *illegitime* composition, must have been so contrived in the common interest of the makers, or, at least, in the interest of him who is to be precluded from its benefits."

**Custom of Board of Trade.**—In Roundtree *v.* Smith, 108 U. S. 269, the plaintiffs sued the defendant for commissions, and for advances made by them in settling certain transactions on the Chicago board of trade. The court *held* that, in the absence of evidence that the other parties to the contracts intended transactions only by way of gambling, the plaintiffs were entitled to recover. They also *held* that evidence that the greater part of the transactions on the board of trade were settled by way of differences was not admissible for the purpose of raising an inference that the transactions in question were by way of gambling. MILLER, J., who delivered the opinion of the court, said: "Evidence was given that a very large proportion of all the contracts made for the sale of produce at the board of trade of Chicago were settled by way of differences, and that nothing else was expected by the parties to them, and the number of these in proportion to the number of *bona fide* contracts, in which delivery was expected and desired, is said to be so large as to justify the inference that it was so in these cases. But since the plaintiff testifies that he had no such understanding; since nothing is proved of the intention of the other parties; and since the contracts were always in writing, we do not think the evidence of what other people intended by other contracts of a similar character, however numerous, is sufficient of itself to prove that the parties to these contracts intended to

*c.* EVIDENCE OF INTENT.—The law presumes that the true intention of the parties is that expressed upon the face of the contract, and also that men, in their business transactions, do not intend to violate the law or to make contracts for the enforcement of which the law refuses a remedy. Hence, when one party alleges that the contract is infected with an illegal intent, the burden of proof is imposed on him to establish this allegation,[1] and the intent of the parties is a question of fact for the jury.[2] A written contract is not conclusive upon the question of good faith, and the true intent may always be shown otherwise.[3]

violate the law, or to justify a jury in making such a presumption."

1. Pixley *v.* Boynton, 79 Ill. 351; Clay *v.* Allen, 63 Miss. 426; Rumsey *v.* Berry, 65 Me. 570; Teasdale *v.* McPike, 25 Mo. App. 341; Williams *v.* Tiedemann, 6 Mo. App. 269; Dykers *v.* Townsend, 24 N. Y. 57; Frost *v.* Clarkson, 7 Cow. (N. Y.) 24; Irwin *v.* Williar, 110 U. S. 499; Bangs *v.* Hornick, 30 Fed. Rep. 97.

**Presumption of Legality.**—In Bangs *v.* Hornick, 30 Fed. Rep. 97, the court directed a verdict for plaintiffs, on the ground that there was no evidence to show a mutual intent to gamble, but only of such intent on the part of the defendant. BREWER, J., before whom the case was tried, on a motion for a new trial, said: "Counsel for defendant say that it is the absolute duty of the court to denounce this transaction, unless it clearly appears that it was a valid and honest one. I think the duty of the court is precisely the reverse, and that it is the duty of the court to uphold it, unless it appears that it was an invalid and dishonest one. The defendant has given his note. The law presumes that there was a consideration, and an honest one, and unless he has shown the contrary he should abide by the contract he has made."

2. Ball *v.* Davis, 1 N. Y. St. Rep. 517; Bartlett *v.* Smith, 13 Fed. Rep. 267.

3. Fortenbury *v.* State, 47 Ark. 188; Cassard *v.* Hinman, 1 Bosw. (N. Y.) 207; Yerkes *v.* Salomon, 11 Hun (N. Y.) 471; Stewart *v.* Schall, 65 Md. 289; s. c., 57 Am. Rep. 327; Barnard *v.* Backhaus, 52 Wis. 593; Melchert *v.* American U. Tel. Co., 3 McCrary (C. C.) 521; *In re* Green, 7 Biss. (C. C.) 338.

The contrary ruling of DRUMMOND, J., in Porter *v.* Viets, 1 Biss. (c. c.) 177, does not appear to have been expressly overruled or dissented from, but must now be regarded as thoroughly discredited. The whole decisions treat the written contract merely as the outward form, or guise, under which the parties dealt, and the cases abound with instances where parol evidence has been admitted.

**Financial Standing and Magnitude of Transactions.**—The fact that the speculator's means are too narrow to enable him to have *bona fide* dealings of the magnitude of those in which he embarked may be given in evidence for the purpose of showing the intention of the parties to gamble. Ruchizky *v.* DeHaven, 97 Pa. St. 202; North *v.* Phillips, 89 Pa. St. 250; Beadles *v.* McElrath, (Tenn.) 3 S. W. Rep. 152; *In re* Green, 7 Biss. (C. C.) 338.

**Course of Business.**—The intent may also be shown by the business transactions which have taken place between the parties, as dealings covering a long series of years. Grizewood *v.* Blane, 11 C. B. 526.

**Board of Trade Dealings.**—If the transactions involved in the suit have taken place on a board of trade or stock exchange, evidence that a very large proportion of all the contracts made for the sale of produce, etc., thereat were settled by payment of differences, and that nothing else was expected by the parties to them, and the number of these in proportion to the number of *bona fide* contracts in which delivery was expected and desired, was extremely large, is not admissible for the purpose of raising a presumption that the transactions in question were by way of gambling. Roundtree *v.* Smith, 108 U. S. 269; Bennett *v.* Covington, 22 Fed. Rep. 816.

**Nature of Particular Transaction.**—The nature of the particular transaction and the fact that the parties have made no preparations for the delivery of the goods, nor, indeed, any effort to obtain

**4. Option Contracts.**—Option contracts, *i. e.*, contracts in which one party purchases the right at his option to demand and receive, or to deliver merchandise at a stated price, are not invalid *per se*,[1] whether they be "puts,"[2] "calls,"[3] or "straddles."[4] If, however, option contracts are used merely as a cover for gambling, and no intention exists on either side to actually deliver or receive the property, but both intend to settle by way of differences, the contract is void.[5]

**5. Responsibility to Brokers and Agents.**—If parties to speculative dealings intend merely to gamble in the rise and fall of prices, and the broker is privy to the unlawful design of the parties, and

them, may also be shown. Melchert *v.* American U. Tel. Co., 3 McCrary (C. C.) 521. Similarly, in speculative dealings in wheat, the fact that no wheat was offered or demanded may be taken into consideration. Lyon *v.* Culbertson, 83 Ill. 33.

**Sales "Short."**—The fact that goods were sold "short" is also evidence of the intent, though that fact does not necessarily establish the gambling character of the transaction. Maxton *v.* Gheen, 75 Pa. St. 168. See, also, Melchert *v.* American U. Tel. Co., 3 McCrary (C. C.) 521; Rumsey *v.* Berry, 65 Me. 570.

1. Kent *v.* Miltenberger, 13 Mo. App. 503; Story *v.* Salomon, 71 N. Y. 420; affirming 6 Daly (N. Y.) 531; Bigelow *v.* Benedict, 70 N. Y. 202; s. c., 26 Am. Rep. 573; affirming 9 Hun (N. Y.) 429; Kirkpatrick *v.* Bonsall, 72 Pa. St. 155; Union Bank *v.* Carr, 15 Fed. Rep. 438; Third Nat. Bank *v.* Harrison, 10 Fed. Rep. 243.

**Meaning of "Option."**—Some of the courts have used the word "option" very laxly. In many instances it has been applied to any contract which the parties intended to settle by payment of differences. This extended use of the word has led to what may seem to be a conflict in decisions. Thus, it has been laid down that optional contracts are void as against public policy, and the unwary might infer that this applied to "options" strictly so-called. An examination of the cases, however, reveals the fact that the language was applied to contracts under which the intention of the parties was to speculate in differences, and which therefore were invalid, no matter what their form was. See Pickering *v.* Case, 79 Ill. 328; Rudolf *v.* Winters, 7 Neb. 125; Melchert *v.* American U. Tel. Co., 3 McCrary (C. C.) 521.

2. Benedict *v.* Bigelow, 70 N. Y. 202; s. c., 26 Am. Rep. 573; affirming 9 Hun (N. Y.) 529; *Ex parte* Young, 6 Biss. (C. C.) 53.

3. Kirkpatrick *v.* Bonsall, 72 Pa. St. 155. See, also, Kent *v.* Miltenberger, 13 Mo. App. 503.

4. Harris *v.* Tumbridge, 83 N. Y. 92; s. c., 8 Abb. N. C. (Y. N.) 291; Story *v.* Salomon, 71 N. Y. 420; affirming 6 Daly (N. Y.) 531.

5. Melchert *v.* American Union Tel. Co., 3 McCrary (C. C.) 521; s. c., 11 Fed. Rep. 193; Kirkpatrick *v.* Adams, 20 Fed. Rep. 287; Union Bank *v.* Carr, 15 Fed. Rep. 438.

**Illinois Statute.**—Ill. Rev. St., ch. 38, § 130, provides that "Whoever contracts to have or give to himself or another the option to buy or sell at a future time any grain," etc., shall be fined, "and all contracts made in violation of this section, shall be deemed gambling contracts and void."

**Meaning of "Option."**—Under this statute the courts have been compelled to define and limit the term "option." It has accordingly been *held* that the true idea of an "option" is what are termed "puts" and "calls." Further the courts *hold* that the term does not include a contract in which the only option the seller has is as to the time of the delivery. Pearce *v.* Foote, 113 Ill. 228. Pixley *v.* Boynton, 79 Ill. 351; Gilbert *v.* Gangar, 8 Biss. (C. C.) 214. See, also, Tenney *v.* Foote, 4 Ill. App. 594.

**Substitution of Valid Contract.**—If, however, a contract has been made giving an option to take merchandise at a future date, or to pay the differences, and that contract is rescinded, and it is agreed that in consideration of the money paid on the option, the seller shall deliver the merchandise at the same time, the latter agreement is valid and binding. Webster *v.* Sturges, 7 Ill. App. 560.

brings them together for the very purpose of entering into an illegal agreement, he is *particeps criminis*, and cannot recover for services or losses incurred by himself on their behalf in carrying out the transaction.[1] If, however, a broker negotiated such a contract without being privy to the illegal intent of the principal parties to it, which renders it void, and being innocent of any violation of law, and not suing to enforce an unlawful contract, he has a meritorious ground for the recovery of commissions for services and advances.[2] In keeping with the decisions which hold that where merchandise has been bought by the broker on a margin, and is "carried" by him on behalf of his principal, the contracts are valid, a broker who has so bought and "carried," may recover from his principal commissions for his services and advances made by him.[3] Similarly, if he sell stocks "short,"

1. Fortenbury *v.* State, 47 Ark. 188; Nat. Bk. of Augusta *v.* Cunningham, 75 Ga. 366; Cunningham *v.* Nat. Bk., 71 Ga. 400; Thompson *v.* Cummings, 68 Ga. 124; McCormick *v.* Nickols, 19 Ill. App. 334; Stewart *v.* Schøll, 65 Md. 299; s. c., 57 Am. Rep. 327; Cyrus Portman, 1 City Ct. Sup. (N. Y.) 1; Dickson's Exr. *v.* Thomas, 97 Pa. St. 278; Fareira *v.* Gabell, 89 Pa. St. 89; Waugh *v.* Beck, 114 Pa. St. 422; Beadles *v.* Ownby, 16 Lea (Tenn.) 424; Barnard *v.* Backhaus, 52 Wis. 593; Irwin *v.* Williar, 110 U. S. 499; *Re* Green, 7 Biss. (C. C.) 338; Kirkpatrick *v.* Adams, 20 Fed. Rep. 287. In Cunningham *v.* Nat. Bk., 71 Ga. 400, the court virtually overruled Champion *v.* Wilson, 64 Ga. 184; Heard *v.* Russell, 59 Ga. 26; Warren *v.* Hewitt, 45 Ga. 501.

**Agent as Particeps Criminis.** — In Pearce *v.* Foote, 113 Ill. 228; s. c., 55 Am. Rep. 414, the plaintiff brought trover to recover a promissory note given for differences on transactions, on the board of trade. The testimony showed that the transactions had been carried out by the defendant's assignors as brokers for the plaintiff. The court *held* that the contracts were void as gambling contracts, and in answer to the claim that they could be enforced because plaintiff's assignors acted merely as agents for the defendant, said: "The suggestion that Hooker & Co. merely acted as the agents for plaintiff in these unlawful transactions may be rejected at once as having nothing in its support. There is, and can be, no such thing as agency in the perpetration of crimes or misdemeanors, or indeed in the doing of any unlawful act. All persons actively participating are principals. Treating all the parties engaged as principals, it is immaterial to which one the money or property lost was in fact paid or delivered,— whether to Hooker & Co., or to any of the parties on the board of trade with whom they may have made fictitious contracts and lost, and paying to either principal is, in law, paying to the 'winner.'"

2. Baldwin *v.* Flagg, 36 N. J. Eq. (9 Stew.) 48; Irwin *v.* Williar, 110 U. S. 499. In Roundtree *v.* Smith, 108 U. S. 269, it was said that brokers who had negotiated gambling contracts, suing, not on the contracts themselves, but for services performed and money advanced for defendant at his request, though they might under some circumstances be so connected with the immorality of the contract as to be affected by it, are not in the same position as a party sued for the original agreement. In the later case of Irwin *v.* Williar, 110 U. S. 499, the court seemed to indicate that this *dictum* is to be limited to cases where the broker is not instrumental in fulfilling the gambling intent of the principal.

3. See Baker *v.* Drake, 66 N. Y. 518; Wicks *v.* Hatch, 62 N. Y. 535; Knowlton *v.* Fitch, 52 N. Y. 288; Markham *v.* Jaudon, 41 N. Y. 235; Cunningham, *v.* Stevenson, 20 N. Y. Week. Dig. 82; Earl *v.* Howell, 14 Abb. N. C. (N. Y.) 474; Thacker *v.* Hardy, L. R., 4 Q. B. Div. 685; *Ex parte* Rogers, L. R., 15 Ch. Div. 207.

**Relation of Pledgor and Pledgee.**—In Markham *v.* Jaudon, 41 N. Y. 235, the court *held*, that under an ordinary contract for the purchase of stock by a broker on margin, which provided that the broker should carry the stock so purchased, the relation of broker and

and upon the failure of his principal to furnish him with the stock necessary to fill the contract, goes into the market and buys the stock necessary for that purpose, and delivers the same to the purchaser, he is entitled to recover from his principal the amount of his loss.[1]

As between the principal and his broker or agent, the burden of showing the illegality of the contract rests upon him who pleads such illegality in defence.[2]

**6. Recovery of Margins.**—Upon notice to his broker, the principal may recover back margins, if they have not been actually

customer is that of pledgee and pledgor, that a sale of the stock by the broker, without notice to the customer of the time and place of sale, is a conversion, and that oral proof of the usage of brokers in such cases is not admissible to add to or make part of the contract. The court said: "The customer employs the broker to buy certain railroad stocks for his account, and to pay for them, and to hold them subject to his order as to the time of sale. The customer advances ten per cent. of their market value, and agrees to keep good such proportionate advance according to the fluctuations of the market. Waiving for the moment all disputed questions, I state the following as the result of this agreement:—The broker undertakes and agrees: 1. At once to buy for the customer the stocks indicated. 2. To advance all the money required for the purchase, beyond the ten per cent. furnished by the customer. 3. To carry or hold such stocks for the benefit of the customer so long as the margin of ten per cent. is kept good, or until notice is given by either party that the transaction must be closed. An appreciation in the value of the stocks is the gain of the customer, and not of the broker. 4. At all times to have in his name or under his control, ready for delivery, the shares purchased, or an equal amount of other shares of the same stock. 5. To deliver such shares to the customer when required by him, upon the receipt of the advances and commissions accruing to the broker; or, 6. To sell such shares upon the order of the customer, upon payment of the like sums to him, and account to the customer for the proceeds of such sale. Under this contract, the customer undertakes: 1. To pay a margin of ten per cent. on the current market value of the shares. 2. To keep good such margin according to the fluctuations of the market. 3. To take the shares so purchased on his order, whenever required by the broker, and to pay the difference between the percentage advanced by him and the amount paid therefor by the broker. The position of the broker is two-fold. Upon the order of the customer, he purchases the shares of stocks desired by him. This is a clear act of agency. To complete the purchase, he advances from his own funds, for the benefit of the customer, ninety per cent. of the purchase money. Quite as clearly, he does not in this act as agent, but assumes a new position. He also holds or carries the stock for the benefit of the purchaser, until a sale is made by the order of the purchaser, or upon his own action. In thus holding or carrying, he stands also upon a different ground from that of a broker or agent, whose office is simply to buy and sell. To advance money for the purchase, and to hold and carry stocks, is not the act of a broker, as such. In so doing, he enters upon a new duty, obtains other rights, and is subject to additional responsibilities."

1. Logan *v.* Musick, 81 Ill. 415; Durant *v.* Burt, 98 Mass. 161; Maxton *v.* Gheen, 75 Pa. St. 166; Smith *v.* Bouvier, 70 Pa. St. 325; Bartlett *v.* Smith, 4 McCrary (C. C.) 388; Ashton *v.* Dakin, 4 H. & N. 867.

**Sale of Options.**—By the *Illinois* statutes, "options to sell or buy grain or other commodities at a future time" are declared to be gambling contracts, and therefore void. It has been *held* that this statute does not include differences which arise upon sales or purchases of grain or other commodities, where the seller has only an option as to the time of delivery, and that therefore the brokers may recover their commissions and advances. Pixley *v.* Boynton, 79 Ill. 351; Jackson *v.* Foote, 12 Fed. Rep. 37. But see McCormick *v.* Nichols, 19 Ill. App. 334.

2. Teasdale *v.* McPike, 25 Mo. App. 341.

paid by the former in pursuance of the illegal contract before he had notice not to pay, or was informed of such illegality,[1] and it would appear that the margin may be recovered back, even though it has been exhausted.[2]

**7. Responsibility of Agent.**—Although it has been the policy of the law to leave parties to an illegal transaction where it finds them, by refusing relief to either in respect thereof, it has, on the other hand, never regarded property or money employed therein, or produced thereby, as common plunder, to be seized or retained by others in no way interested in such business. Consequently, although an agent has taken an active part in gambling transactions on behalf of his principal, if he has received money belonging to the principal and accruing from such business, by way of profits upon dealings in differences, he cannot defend himself in a court of law against liability to account therefor, by showing such unlawful business and his connection therewith as such agent.[3]

1. Gram *v.* Stebbins, 6 Paige (N. Y.) 124.

2. Doxey *v.* Spaids, 8 Ill. App. 549; Commercial Bank *v.* Spaids, 8 Ill. App. 493.

**Cancellation of Contract.**—In Higgins *v.* McCrea, 23 Fed. Rep. 782, the principal was *held* to be entitled to recover back margins, when the broker had cancelled the original contracts for future delivery without the substitution of others as required by the rules of the board of trade, and without the previous knowledge or consent or subsequent ratification of the principal.

**Minor Principal.**—If the principal be a minor, he may, if the agent is *particeps criminis*, treat him as a principal, and recover back moneys advanced as margins and paid away by the broker. Waugh *v.* Beck, 114 Pa. St. 422; Ruchizky *v.* De Haven, 97 Pa. St. 202.

3. **Profits on Differences.**—In Norton *v.* Blinn, 39 Ohio St. 145, the plaintiff sued the defendant to recover from him the profit on certain dealings in wheat options. The defendant had acted as plaintiff's agent in carrying through the transactions, and on being asked to account for the profits pleaded in defence that the contracts were in the nature of gambling, and, therefore, could not be enforced against him. It was, however, *held* that the money was money belonging to the principal, and that the plaintiff must have judgment for it. The court said: "If the agent receiving such money had not been employed in conducting such business, it would seem to be quite plain, upon principles of purest morality, that he should account to his principal therefor; but where the sole employment of the agent was to manage and conduct the unlawful transactions, it seems to me, a much more difficult question arises. In the latter case the agent is a *particeps criminis*. In offences against trade, and the like, the law regulating the administration of penal justice does not recognize the relation of principal and agent, unless the agent be an innocent instrument merely. In such cases the guilty offenders against the law are all principals; hence, as between such, with some show of reason it might be said that the law will afford no redress by civil remedies. The rulings upon this question, however, have been so uniformly the other way, it becomes our duty to follow them, unless we find them totally repugnant to public policy and morality. Upon a careful examination of the authorities, we find no such repugnancy—indeed they commend themselves to our judgment. In the first place, the rule which denies civil remedies in such cases applies only to the parties to the illegal transaction. Public policy does not require that one engaged in an unlawful enterprise should, by pleading it, shield himself from liability for the wages of his employes, agents or servants. It is enough that the rule should be enforced as between those who have some interest in the enterprise as principals. In the second place, it is contrary to public policy and good morals to permit employes, agents or servants to seize or retain the property of their principal, although it may be employed

**XIV. LOANS FOR GAMBLING PURPOSES.**—If money is loaned for the specific purpose of being used by the borrower in gaming, in contravention of the law, and has been so used, it cannot be recovered back by the lender.[1] The mere fact that the lender,

in illegal business and under their control. No consideration of public policy can justify a lowering of the standard of moral honesty required of persons in these relations. And again, if parties to an illegal contract waive the illegality, and honestly account as between themselves, no other person can be heard to complain of such accounting. Hence, we think, that if in making such settlement one of the guilty parties should deliver property or money to an agent of another, to be delivered by the agent to his principal, such agent is bound to account therefor to his principal."

Among other authorities, the court cited Brooks *v.* Martin, 69 U. S. (2 Wall.) 70, in which it was *held* that after a partnership, contracted confessedly against public policy, has been carried out, and money contributed by one of the partners has passed into other forms, the results of the contemplated operation completed, a partner in whose hands the profits are cannot refuse to account for and divide them on the ground of the illegal character of the original contract. That case had reference to dealings in soldiers' scrip. It would appear, however, that the cases of Anderson *v.* Powell, 44 Iowa 20; Whitesides *v.* McGrath, 15 La. Ann. 401; Watson *v.* Murray, 23 N. J. Eq. (8 C. E. Gr.) 257, and Watson *v.* Fletcher, 7 Gratt. (Va.) 1, escaped the notice of the court and were not considered. Those cases distinctly *hold* that where the partnership has been formed for gambling purposes, the courts will not enforce any accounting between the partners.

1. Brittain *v.* Duling, 15 B. Mon. (Ky.) 138; Alfriend *v.* Hughes, 4 Bush (Ky.) 40; Levy *v.* Perkins, 4 Bibb (Ky.) 505; Collins *v.* Merrell, 2 Met. (Ky.) 163; Samson *v.* Whitney, 27 La. Ann. 294; Williamson *v.* Baley, 78 Mo. 636; White *v.* Buss, 57 Mass. (3 Cush.) 448; Terrall *v.* Adams, 23 Miss. 570; Gaslight & Coke Co. *v.* Turner, 5 Bing. N. C. 666; Cutler *v.* Welsh, 43 N. H. 497; Morgan *v.* Groff, 5 Denio (N. Y.) 364; Peck *v.* Briggs, 3 Denio (N. Y.) 107; Ruckman *v.* Bryan, 3 Denio (N. Y.) 340; Waugh *v.* Beck, 114 Pa. St. 422; Mordecai *v.* Dawkins, 9 Rich. (S. Car.) L. 262; Smith *v.* Harris, 3 Sneed (Tenn.) 553; Swift *v.* Adkins, 2 Lea (Tenn.) 137; Machir *v.* Moore, 2 Gratt. (Va.) 257; Bates *v.* Watson, 1 Sneed (Tenn.) 376; Taylor *v.* Bell, 2 Vern. 171; Cannan *v.* Bryce, 3 B. & Ald. 179; De Begnis *v.* Armistead, 10 Bing. 107; Foot *v.* Baker, 6 Scott, N. R. 301; s. c., 15 M. & G. 181; Langton *v.* Hughes, 1 Maule & S. 593; McKinnell *v.* Robinson, 3 M. & W. 434.

In McKinnell *v.* Robinson, *supra*, the lender brought *assumpsit* against the borrower to recover money lent to game with at an illegal game. It was *held* that the action could not be maintained. Lord Abinger, C. B., in giving the opinion of the court, referred to the case of Cannan *v.* Bryce, 3 B. & Ald. 179, as directly in point, and having reviewed the cases of Barjeau *v.* Walmsley, 2 Str. 1249; Robinson *v.* Bland, 2 Burr. 1077; Alcinbrook *v.* Hall, 2 Wils. 309; and Wettenhall *v.* Wood, 1 Esp. 18, said: "We think that, notwithstanding these authorities, the money lent cannot be recovered; for it is lent for the express purpose of a violation of the law and enabling the borrower to do a prohibited act; and the principle is now distinctly laid down in the case above cited, and may be considered as finally settled, that money so lent cannot be recovered."

**Knowledge of Lender.**—In Waugh *v.* Beck, 114 Pa. St. 422, the court declared: "As a general rule, money loaned for the specific purpose that it shall be used by the borrower to do an act in violation of law, and which has been soused, cannot be recovered back by the lender. It is not enough to defeat recovery by the lender that he knew of the borrower's intention to illegally appropriate the loan; he must know that the borrower is purposing the specific illegal use, and must be implicated as a confederate in the transaction."

**Loan of Poker Chips.**—Money loaned in "poker chips," and used at a game of chance, is not recoverable. Williamson *v.* Bailey, 78 Mo. 636.

**Loaned in Licensed House.**—Plaintiff and defendant were in a house of public entertainment playing at cards, for money, with each other and with other persons, with the consent and per-

in making a loan, is to receive payment of the gaming debt from the borrower, is not sufficient to vitiate the transaction, if the money lent is placed absolutely at the disposal of the borrower, without any stipulation that the gaming debt should be paid out of it.[1] If the money is advanced by a person other than the winner, to enable the borrower to pay gaming debts incurred, it would appear that the loan can be recovered, although the lender knew of the intended application of the money.[2]

mission of the proprietor or occupant of the house, who, to the knowledge of the parties, allowed such gaming and playing therein for his own profit and reward. Plaintiff, who was engaged in gaming, lent defendant a sum of money for the purpose of enabling him to engage and continue therein. *Held*, that the loan was an illegal contract, and that the money lent could not be recovered back, whether the occupant or keeper of the house was or was not licensed as an inn-keeper or common victualer. White *v.* Buss, 57 Mass. (3 Cush.) 448.

**1. Absolute Loan — Expectation of Payment.**—In Fox *v.* Hill, 4 H. & N. 359; 1 F. & F. 136, a deed containing covenants for the payment of £2,000, with interest, and purporting to be a security for the repayment of a loan to that amount, was declared upon, and the defence was that the debt was a mortgage deed within 9 Anne, ch. 14, and 5 & 6 Will. IV, ch. 41, as part of the consideration for it was money won in betting. It was *held* that the jury were properly directed that if they believed that there was no agreement of the parties that a betting debt taken from the defendant to the plaintiff advanced the £2,000 absolutely as a loan to the defendant as the lawful owner to dispose of it as he pleased, and the defendant gave the deed to secure that loan, then the deed was valid, though the plaintiff expected to be paid out of the loan.

**2.** Bangs *v.* Hornick, 30 Fed. Rep. 97; *Ex parte* Pyke, *In re* Lister, L. R., 8 Ch. Div. 754; Knight *v.* Cambers, 15 C. B. 561; s. c., 29 Eng. Law & Eq. 314. The loan may be recovered, although advanced to enable the borrower to pay an election bet. English *v.* Young, 10 B. Mon. (Ky.) 141; Greathouse *v.* Throckmorton, 7 J. J. Marsh. (Ky.) 16; Jones *v.* Sevier, 1 Litt. (Ky.) 50; Seeley *v.* Blanchard, 22 La. Ann. 409; Mooring *v.* Stanton, Mart. (N. Car.) 52; Alcinbrook *v.* Hall, 2 Wils. 309. But in White *v.* Yarbrough, 16 Ala. 109, and Mills *v.* Johnson, 23 Tex. 308, it was *held* that if the third person pay an election bet at the request of the loser, and the loser give his bill for the amount so paid, the bill is void.

**Advance by Betting Agent.**—In *Ex parte* Pyke, *In re* Lister, L. R., 8 Ch. Div. 754, a claim was made in bankruptcy under the following circumstances: The bankrupt employed an agent to back horses in certain races; the horses lost the races, and the bankrupt thereupon requested the agent to lend him the money necessary for the payment of the debts. The agent did so, and paid the bets, and for part of the money so advanced took promissory notes from the bankrupt, which he now claimed to prove. The court *held* that his claim must be allowed. JESSEL, M. R., said: "There could be no answer to such a claim, unless the debt thus arising is made void by some statute. It is said that the act 5 & 6 Will. IV, ch. 41, has that effect. The question, therefore, is whether the money thus lent by Barratt was 'knowingly lent or advanced for gaming or betting.' In my opinion it was not. When you look at the act, it is clear that what it means is money lent to carry out the illegal purpose of gaming or betting. If a number of men are round a gaming table, and one of them asks another to lend him money to game with, and he lends the money, that is money 'lent for gaming,' within the meaning of the act. And so, also, if money is lent to a man to enable him to make a bet, that is money 'lent for betting.' That this is what the act really contemplates is shown by the words which immediately follow,—'lent or advanced at the time and place of such play to any person or persons so gaming or betting.' The object of the act was to prevent gaming or betting from taking place, to deter people from committing the illegal act. But in the present case the mischief had been completed; the illegal act had been carried out before the money was lent. The money was advanced to enable the

**XV. OBLIGATIONS AND SECURITIES FOR GAMBLING CONSIDERATIONS.**—Obligations and securities given for gambling debts which are illegal, either as against public policy or because prohibited by statute, are invalid in the hands of the grantee,[1] or in the hands

borrower to pay the debts which he had already made and lost, which seems to me an entirely different thing from a loan of money to enable a man to make a bet."

1. Trammell *v.* Gordon, 11 Ala. 656; Roberts *v.* Taylor, 7 Porter (Ala.) 251; Fenno *v.* Sayre, 3 Ala. 458; Fuller *v.* Hutchings, 10 Cal. 523; Boughner *v.* Meyer, 5 Colo. 71; s. c., 40 Am. Rep. 139; Lowe *v.* Young, 59 Iowa 364; Duncan *v.* Cox, 6 Blackf. (Ind.) 270; Brittain *v.* Duling, 15 B. Mon. (Ky.) 138; Bevil *v.* Hix, 12 B. Mon. (Ky.) 140; Colyer *v.* Ransom, 4 Bibb (Ky.) 552; Payne *v.* Loudon, 3 Bibb (Ky.) 250; Chambers *v.* Simpson, 1 Mon. (Ky.) 112; Crawford *v.* Storms, 41 Miss. 540; Holman *v.* Ringo, 36 Miss. 690; Bettis *v.* Reynolds, 12 Ired. (N. Car.) 344; Cutler *v.* Welsh, 43 N. H. 497; Denniston *v.* Cook, 12 John. (N. Y.) 376; McGrath *v.* Kennedy, 15 R. I. 209; Atwood *v.* Weeden, 12 R. I. 293; Knight *v.* Gregg, 26 Tex. 506; Monroe *v.* Smelly, 25 Tex. 586; Connor *v.* Mackey, 20 Tex. 747; Norvell *v.* Oury, 13 Tex. 31; Herd *v.* Vincent, 1 Overt. (Tenn.) 369; *Ex parte* Bulmer, 13 Ves. 313; Woodson *v.* Barrett, 2 Hen. & Mun. (Va.) 80; Barnard *v.* Backhaus, 52 Wis. 593; Parsons *v.* Alexander, 5 El. & Bl. 263; Bond *v.* Swearingen, 1 Ham. (Ohio) 395; Harding *v.* Walker, Hemp. (U. S.) 53; Cook *v.* Stratford, 13 M. & W. 379; Kenny *v.* Browne, 3 Ridgw. P. C. 514; Sloman *v.* Kelly, 4 Y. & Coll. 169; Wilkinson *v.* L'Eaugier, 2 Y. & Coll. 363; Parker *v.* Alcock, Young 361.

**Indorsement of Note.**—In Roberts *v.* Taylor, 7 Porter (Ala.) 251, it was *held* that the indorsement of a promissory note was a contract, within the meaning of the statutes of Alabama against gaming, and is void as between the original parties to it.

**Conveyance of Land.**—In Trammell *v.* Gordon, 11 Ala. 656, a wager on an election was carried out by the execution of deed of a tract of land by the one better to the other, and the execution by the grantee to the grantor of promissory notes for the value of the land, payable when James K. Polk was elected president of the United States. The court *held* that the bet being forbidden by law, both the deed conveying the land and the notes were void; and, on the one hand, no recovery could be had on the notes, whilst on the other, the land could be recovered by appropriate proceedings.

**Restoration of Cash Paid.**—Part of the consideration of a conveyance was paid in cash and the residue was made up of a gaming deed. It was *held* that although the conveyance was void, equity would not set aside the deed in favor of a prior incumbrancer not in possession, and whose mortgage was not recorded, until the cash paid was reimbursed. Fenno *v.* Sayre, 3 Ala. 458.

**Assignment of Judgment.**—A loser at cards transferred a judgment against a third party in payment of his losses. The loser afterwards brought trover against the winner for the conversion of the judgment. It was *held* that, although trover will lie for a judgment, the loser had no remedy. Hudspeth *v.* Wilson, 2 Dev. (N. Car.) 372.

**Illegality of Part of Consideration.**—If some of the transactions which enter into the consideration of a note and mortgage are by way of gambling, the whole security is invalidated. Barnard *v.* Backhaus, 52 Wis. 593.

**Evidence of Gambling Propensity.**—Testimony that the maker of a note is uniformly given to gambling when drunk is not of itself admissible to show that a promissory note made by him was given for money lost at play. Thompson *v.* Bowie, 71 U. S. (4 Wall.) 463.

**Note for Money Advanced.**—If a third person, at the loser's request, pays the amount of a gambling debt, and the loser thereupon gives him a note or other obligation therefor, such note or obligation is not invalid. Jones *v.* Sevier, 1 Litt. (Ky.) 50.

**Bond Given in Compromise.**—A person owed considerable sums lost in betting on horse-races. In order that he might be allowed to fulfill racing engagements, a sum of money was paid and a bond given to distribute among his creditors on such debt. The amount of the cash and the bond together was less than half the amount of the debts. It was *held* that the bond was valid. Bubb *v.* Yelverton, L. R., 9 Eq. 471.

of a transferee with notice.[1] The validity or invalidity of such obligations, in the hands of *bona fide* holders, depends upon the source from which the illegality is derived; *i. e.*, whether the contract is void at common law, or by statute, and if by statute, upon its terms. At common law, and under those statutes which simply declare that gambling obligations shall be deemed to be given for an illegal consideration, they are, if negotiable, valid and enforcible in the hands of *bona fide* holders.[2] If, however, the statute declares obligations and securities given for gambling

**Effect of English Statutes.**—The act 8 & 9 Vict., ch. 109 §, 18, only invalidates the contract, and does not affect a security, but the statute 5 & 6 Will. IV, ch. 41, § 1, declares the consideration for gambling obligations to be illegal, and therefore, in the hands of the grantee or of a holder with notice, an obligation is void, although it is valid in the hands of a *bona fide* holder. Hay *v.* Ayling, 16 Q. B. 423.

1. Whitlock *v.* Heard, 16 Ala. 336; Finn *v.* Barclay, 15 Ala. 626; Givens *v.* Rogers, 11 Ala. 543; Williams *v.* Wall, 60 Mo. 318; Revier *v.* Hill, 1 Sneed (Tenn.) 405; Hay *v.* Ayling, 16 Q. B. 423; Steers *v.* Lashley, 6 T. R. 61.

**Transfer to Arbitrator to Settle Accounts.**—In Steers *v.* Lashley, 6 T. R. 61, a note given in settlement of stock-broking differences was transferred to a person who had acted as arbitrator to settle accounts between the maker and payee. The court *held* that the transferee took with notice, and that the contract was invalid in his hands. LORD KENYON said: "If the plaintiff had lent this money to the defendant to pay the differences, and had afterwards received the bill in question for that sum, then, according to the principle established in Petrie *v.* Hannay, 3 T. R. 418, he might have recovered. But here the bill, on which the action is brought, was given for these very differences; and therefore Wilson himself could not have enforced payment of it. The security was indorsed over to the plaintiff, he knowing of the illegality of the contract between Wilson and the defendant, for he was the arbitrator to settle their accounts; and under such circumstances he cannot be permitted to recover on the bill in a court of law."

**Claim by Guarantor of Check.**—A guarantor and indorser of a check, which was given, with his knowledge, in payment of a gambling debt, cannot, if he pays the check to the holder, recover therefor from the drawer or a prior indorser. Scollans *v.* Flynn, 120 Mass. 271. The Massachusetts statute declares all obligations and securities for gambling debts to be "void and of no effect," except in the hands of *bona fide* holders. The court say: "The question as to the validity of the security which the plaintiff seeks to enforce depends upon the nature of the debt which it was intended to secure and the plaintiff's knowledge of its illegal nature. If he had such knowledge, he was not a *bona fide* holder of the check, within the meaning of the statute."

2. Tindall *v.* Childress, 2 Stew. & P. (Ala.) 250; Haight *v.* Joyce, 2 Cal. 64; Boughner *v.* Meyer, 5 Colo. 71; s. c., 40 Am. Rep. 139; Adams *v.* Wooldridge, 4 Ill. 255; Jackson *v.* Foote, 12 Fed. Rep. 37; Hay *v.* Ayling, 16 Q. B. 423; Hawker *v.* Hallewell, 8 De G. M. & G. 357; 3 Sm. & G. 194.

**Invalidity Because Against Public Policy.**—In Boughner *v.* Meyer, 5 Colo. 71; s. c., 40 Am. Rep. 139, a wager was made upon the collection of an execution. The loser gave a check payable to the winner, which a *bona fide* indorsee now attempted to enforce. The court *held* that, as the Colorado statutes was directed solely against gaming, and only annulled obligations for money lost thereat, the bet was not within the statutory provision, but that it was illegal at common law as being in controvention of public policy; but that the plaintiff, being a *bona fide* holder, could enforce payment. The court say: "There is a distinction recognized by the authorities between the *status* of negotiable paper held by a *bona fide* purchaser, where the original consideration is by the courts adjudged to be illegal, and negotiable paper held under like circumstances, when the statute declares such paper to be void. In Vallett *v.* Parker, 6 Wend. (N. Y.) 615, the court says: 'Whenever the statute declares notes void, they are and must be so in the hands of every holder; but where they are adjudged by the

debts to be void, and of no effect, such obligations and securities are invalid, even in the hands of *bona fide* transferees, and, although they may be negotiable in their nature,[1] unless the obligor has precluded defence by stating that he had none to the assignee before purchase from the obligee.[2] If a new obligation, although by a stranger, is substituted for the original obligation, the invalidity of the original obligation attaches to its substitute, and the latter cannot be enforced.[3]

court to be so for failure or the illegality of the consideration, they are void only in the hands of the original parties, or those who are chargeable with or have had notice of the consideration.' To the same effect are Weed *v.* Bond, 21 Ga. 195; Glenn *v.* Farmer's Bank, 70 N. Car. 191; Bayley *v.* Taber, 5 Mass. 286; s. c., 4 Am. Dec. 457; Aurora *v.* West, 22 Ind. 88. . . To hold that such a wager is valid, is to encourage unwarranted intermeddling with the mandates of judicial tribunals. Although void as against sound policy, as it is not within the statutory prohibition, the check, in the hands of a *bona fide* holder, must be protected by the current of decisions; and, in accordance with the recognized policy of commercial law, negotiable paper, where the consideration arises from a wagering contract, will not be declared void in the hands of *bona fide* purchasers, unless so enacted by statute. Haight *v.* Joyce, 2 Cal. 64."

**Note Payable on Demand.**—A note payable on demand, which was given as security for a continuing option transaction, but was valid on its face, was bought in the regular course of business and for full value, twenty-three days after its date. The indorsee knew that the indorsers dealt in options, and suspected, but did not know that it had been taken on some option deal. It was *held* that the note had been negotiated within a reasonable time, and that the indorsee was a *bona fide* holder. Mitchell *v.* Catchings, 23 Fed. Rep. 710.

1. Ivey *v.* Nicks, 14 Ala. 564; Manning *v.* Manning, 8 Ala. 138; Chapin *v.* Dake, 57 Ill. 295; Trader's Bank of Chicago *v.* Alsop, 64 Iowa 97; Williams *v.* Judy, 8 Ill. 282; Thompson *v.* Moore, 4 Mon. (Ky.) 79; Pace *v.* Martin, 2 Duvall (Ky.) 522; Lucas *v.* Waul, 20 Miss. (12 Smed. & M.) 157; Harper *v.* Young, 112 Pa. St. 419; Unger *v.* Boas, 13 Pa. St. 601; Mordecai *v.* Dawkins, 9 Rich. (S. Car.) 262; Harmon *v.* Boyce, 2 Rep. Con. Ct. (S. Car.) 200; Root *v.* Merriman, 27 Fed. Rep. 909.

2. Ivey *v.* Nicks, 14 Ala. 564; Manning *v.* Manning, 8 Ala. 138; Waugh *v.* Beck, 114 Pa. St. 422; Griffith *v.* Sears, 112 Pa. St. 523.

**A Subsequent Parol Promise** of the maker of a note to pay it to the indorsee is void for want of consideration. Mordecai *v.* Dawkins, 9 Rich. (S. Car.) 262.

3. Brewer *v.* Morgan, 13 Ala. 551; Stone *v.* Mitchell, 7 Ark. 91; Warden *v.* Plummer, 4 Jones (N. Car.) 524; Cutler *v.* Welsh, 43 N. H. 497; Brown *v.* Watson, 6 B. Mon. (Ky.) 588. But see Bell *v.* Parker, 3 Dana (Ky.) 51.

**Bond by Judgment Debtor.**—The loser at a game of cards transferred a judgment to the winner, who took a bond from the judgment debtors, payable to himself, for the amount. He brought suit to recover the amount of the bond, but the defendants pleaded the statute against gaming. It was *held* that there could be no recovery. Warden *v.* Plummer, 4 Jones (N. Car.) 524.

**New Bond for Balance.**—In Stone *v.* Mitchell, 7 Ark. 91, the winner obtained a bond from the obligee by gaming, and collected part of it from the obligor; the obligor gave a new bond for the balance, and it was *held* that such new bond was invalid, as being without consideration.

**Repurchase of Property Lost.**—It was agreed by the owners of two horses that a horse race should take place between them; one of the owners staking a sum of money and the other his horse. The owner who had staked his horse lost the race, and the horse was given up to the winner. Afterwards the loser purchased the horse from the winner and gave his note therefor. It was *held* that the note was given for a gaming consideration, and void. Brown *v.* Watson, 6 B. Mon. (Ky.) 588. But in Bell *v.* Parker, 3 Dana (Ky.) 51, it was *held* that, when a loser of property at gaming has conveyed the same to the winner, and afterwards regained the

A court of equity will restrain the grantee from assigning or transferring an obligation or security which is tainted with illegality by being given upon a gambling consideration,[1] and will order the securities and obligations to be delivered up and cancelled,[2] or grant an injunction restraining their collection.[3] If a conveyance of lands has been made in satisfaction of a gambling debt, the court will set it aside.[4] Similarly, if a judgment has been recovered for a gambling debt, a court of equity will enjoin its collection, although the debtor may have failed to make his defence in the action at law.[5]

**XVI. TRANSACTIONS OUT OF JURISDICTION WHERE SUIT BROUGHT.**—If the transaction is legal and enforceable in the jurisdiction where the contract is made, and is intended to be performed, the courts of another jurisdiction will, *ex comitate*, enforce it, though, by the laws there in force, it is illegal and void.[6] To warrant a

possession by a new contract of purchase for a price to be paid in future, he cannot be relieved in equity from payment because of the illegality of the original consideration on which the property was delivered to the winner, when there is no proof that the price of the property was the actual bet, and that the delivery was a mere device to evade the law.

1. Roberts *v.* Taylor, 7 Porter (Ala.) 251; Barker *v.* Callihan, 5 Ala. 708; Lyle *v.* Lindsey, 5 B. Mon. (Ky.) 123; Tantum *v.* Arnold, 42 N. J. Eq. 60; Rucker *v.* Wynne, 2 Head (Tenn.) 617; Cathcart *v.* Blackwood, 3 Anstr. 537; Newman *v.* Franco, 3 Anstr. 519.

2. Tantum *v.* Arnold, 42 N. J. Eq. 60; Rucker *v.* Wynne, 2 Head (Tenn.) 617; Andrews *v.* Berry, 3 Anstr. 634; Newman *v.* Franco, 2 Anstr. 519; Wynne *v.* Callander, 1 Russ. 293; Woodroffe *v.* Farnham, 2 Vern. 291.

3. Taylor *v.* Roberts, 7 Porter (Ala.) 251; Barker *v.* Callihan, 5 Ala. 708; Lyle *v.* Lindsey, 5 B. Mon. (Ky.) 123; Rawden *v.* Shadwell, Ambl. 269; Earl of Milltown *v.* Stewart, 8 Sim. 371; 3 Myl. & C. 18; Lord Portarlington *v.* Soulby, 7 Sim. 28; Fiebrasse *v.* Brett, 1 Vern. 489. A transferee with notice may also be enjoined from enforcing payment. Barker *v.* Callihan, 5 Ala. 708.

In Rawden *v.* Shadwell, Ambl. 209, a bond was given for money won at play, and a part of it was paid; the court ordered the money to be repaid and relieved the complainant against the bond for the remainder.

4. Williams *v.* Talliferro, 1 Coldw. (Tenn.) 37; Johnson *v.* Cooper, 2 Yerg. (Tenn.) 524. But in Thomas *v.* Cronise, 16 Ohio 54, the court of chancery refused to set aside a deed executed upon the consideration of an election bet, and left the parties as it found them.

5. Cheatham *v.* Young, 5 Ala. 353; Mallett *v.* Butcher, 41 Ill. 382; Gill *v.* Webb, 4 Mon. (Ky.) 299; s. c., 2 Mon. (Ky.) 4; Gough *v.* Pratt, 9 Md. 526; Smither *v.* Keys, 30 Miss. 179; Lucas *v.* Waul, 12 Sm. & M. (Miss.) 157; Martin *v.* Terrell, 12 Sm. & M. (Miss.) 571; Lord Cremorne *v.* Bruen, 2 Moll. 496; Skipwith *v.* Strolher, 3 Rand. (Va.) 214. But *compare* Dunn *v.* Halloway, 1 Dev. (N. Car.) Ch. 322; Holland *v.* Pirtle, 10 Humph. (Tenn.) 167; Jones *v.* Jones, 2 Taylor (N. Car.) 110.

**Injunction Against Bona Fide Assignee.**—In Gough *v.* Pratt, 9 Md. 526, the court restrained an innocent *bona fide* assignee for value of a security given for money lost in gaming, from enforcing his claim even upon a judgment already obtained.

**Judgment by Confession.**—In Everitt *v.* Knapp, 6 John. (N. Y.) 331, the court, on motion to set aside a judgment of confession because the bond was given for a gaming debt, refused an issue, but declared the warrant of attorney void so as to leave the party his remedy on the bond by suit.

6. Champion *v.* Wilson, 64 Ga. 184: Thomas *v.* Davis, 1 B. Mon. (Ky.) 227; Scott *v.* Duffy, 14 Pa. St. 20; Quarrier *v.* Colston, 1 Ph. Ch. 147; King *v.* Kemp, 8 L. T., N. S. 255. But see Collins *v.* Merrill, 2 Met. (Ky.) 163; Flagg *v.* Baldwin, 38 N. J. Eq. 219.

**Money Lent.**—In Quarrier *v.* Colston, 1 Ph. Ch. 147, the plaintiff brought suit for the cancellation of an I O U,

recovery, however, the plaintiff must show that the contracts were valid by the law of the place where made,[1] or if the defendant, on his part, relies upon illegality under the *lex loci contractus*, he must prove what that law is.[2] If the statute of a State, where a wager is made and fulfilled, confers upon the loser a right of action to recover back the amount paid, such right will be enforced by the courts of any jurisdiction in which the winner is found.[3]

**XVII. Action to Recover Back Money Paid.**—By the common law, no right of action exists to recover back money which has been paid upon a gambling debt of any kind, the maxim "*In pari delicto potior est conditio defendentis*," being applicable.[4] But

given in Germany for money lent for the purpose of playing at public tables. The court *held* that as there was nothing to show that the public gaming tables where the money was lent were not lawful in the countries where they were held, it must be presumed that, being public, they were lawful, and dismissed the suit. See, also, King *v.* Kemp, 8 L. T., N. S., 255.

**New Jersey Rule.**—In New Jersey the courts have refused to enforce a contract which, although made and enforceable in New York, and presumably valid there, was illegal in New Jersey. In Flagg *v.* Baldwin, 38 N. J. Eq. 219, the plaintiff sued upon an obligation given as a margin upon certain stock-broking transactions which were carried out in New York. The court *held* that such obligation would not be enforced in New Jersey—at least against residents and citizens of that State—because its enforcement would violate the plain public policy of the State on the subject of gambling and betting, as evinced by the New Jersey statutes, and declared that in this respect such contracts were excepted from the rule of comity which requires the enforcement by the courts of contracts made in another, if valid by the *lex loci contractus*.

**Intention to Evade Law.**—If two citizens of a State leave it and go into another State or country, and there make a wager, no rule of comity requires the State of which the citizens are residents to enforce the contract, if the intention of the contracting parties was merely to evade the law. Tarleton *v.* Baker, 18 Vt. 1. In this case two citizens of Vermont went into Canada for the purpose of making a wager on a presidential election then pending in the United States. They made the wager, and deposited the money in the hands of a stakeholder, who was a citizen of Canada. It was *held* that the contract must be treated as illegal by the courts of Vermont, to the same extent that it would have been if made within the State.

1. Thatcher *v.* Morris, 11 N. Y. 137.

2. Champion *v.* White, 64 Ga. 184; Nichols *v.* Lumpkin, 51 N. Y. Super. (19 J. & S.) 88. In *Pennsylvania* the court *held* that money lent in New Jersey upon a presidential election may be recovered in a Pennsylvania court. Scott *v.* Duffy, 14 Pa. St. 18. The court say: "Wagers were not void at common law. . . . Many statutes have been made against them in England, but some are still good there. The statute of 9 Anne, ch. 14, is very broad in its terms; and, if such an one existed in New Jersey, it might, perhaps, help the plaintiff in error. It avoids all securities given for money won at play, or by gaming, or illegal bets, and prohibits the recovery of any money knowingly lent for such gaming or betting. . . . . But we have no evidence of any such statute existing in New Jersey; . . . nor have we any evidence that betting on elections is against the law of New Jersey. At common law, money loaned to be bet on a wager may be recovered." It is, therefore, to be inferred that the Pennsylvania court will presume a bet to be enforceable, if not prohibited by the common law, and if made in another jurisdiction in which the laws of Pennsylvania prohibition has no effect.

3. Flanagan *v.* Packard, 41 Vt. 561.

4. Tindall *v.* Childress, 2 Stew. & P. (Ala.) 250; Carrier *v.* Braman, 3 Cal. 328; Schlosser *v.* Smith, 93 Ind. 83; Woodcock *v.* McQueen, 11 Ind. 14; McHatton *v.* Bates, 4 Blackf. (Ind.) 63; Thrift *v.* Redmond, 13 Iowa 25; Graves *v.* Ford, 3 B. Mon. (Ky.) 115; Love *v.*

in most, if not all, of the States, there are statutes which confer upon the loser the right to recover back moneys and property lost at gambling.[1] If money is entrusted by an employer to his servant, and the servant loses the money at play or by betting, the employer may maintain an action against the winner to recover back the amount won as being paid without considera-

Harris, 18 B. Mon. (Ky.) 125; Downs *v.* Quarrels, 1 Litt. (Ky.) 49; Bingaman *v.* Cocks, 16 La. Ann. 249; Plummer *v.* Gray, 74 Mass. (8 Gray) 243; Stowell *v.* Guthrie, 2 Hayw. (N. Car.) 297; Anonymous, 2 Hayw. (N. Car.) 231; Welsh *v.* Cutler, 43 N. H. 561; Weyburn *v.* White, 22 Barb. (N. Y.) 82; McCullum *v.* Gourlay, 8 John. (N. Y.) 147; Pratt *v.* McIntosh, Wright (Ohio) 356; Cooper *v.* Rowley, 29 Ohio St. 547; Speise *v.* McCoy, 6 W. & S. (Pa.) 485; Anderson *v.* Harris, 1 Bailey (S. Car.) 315; Smith *v.* Slevins, 5 Sneed (Tenn.) 253; Allen *v.* Dodd, 4 Humph. (Tenn.) 131; West *v.* Holmes, 26 Vt. 530; Danforth *v.* Evans, 16 Vt. 538; Thistlewood *v.* Craccroft, 1 M. & S. 500; Howson *v.* Hancock, 8 T. R. 575.

**Payment in Work.**—If the loser agrees to pay his bet in work, and does work to the amount of his loss, he cannot maintain an action against the winner to recover for the work done. Jeff *v.* Wade, 4 Bibb (Ky.) 130; Mareaw *v.* Longly, 21 Me. 26.

1. See Samuels *v.* Ainsworth, 13 Ala. 366; Nelson *v.* Waters, 18 Ark. 570; Higdon *v.* Heard, 14 Ga. 255; Conner *v.* Ragland, 15 B. Mon. (Ky.) 634; Hickman *v.* Littlepage, 2 Dana (Ky.) 344; Low *v.* Blanchard, 116 Mass. 272; Grace *v.* McElroy, 83 Mass. (1 Allen) 563; Peyret *v.* Coffee, 48 Me. 319; Beals *v.* Thurlow, 63 Me. 9; Laytham *v.* Agnew, 70 Mo. 48; Moore *v.* Parker, 1 Murph. (N. Car.) 37; McDougall *v.* Walling, 48 Barb. (N. Y.) 364; Langworthy *v.* Broomley, 29 How. Pr. (N. Y.) 92; Betts *v.* Hillman, 15 Abb. Pr. (N. Y.) 184; Lewis *v.* Miner, 3 Denio (N. Y.) 103; McKeon *v.* Caherty, 2 N. Y. Super. Ct. (2 Hall) 299; Fowler *v.* Vansurdam, 1 Denio (N. Y.) 557; Pratt *v.* McIntyre, Wright (Ohio) 356; Hoss *v.* Layton, 3 Ohio St. 352; O'Keefe *v.* Weber, 14 Oreg. 55; Wheelock *v.* Bobo, Harper (S. Car.) 421; Atchinson *v.* Gee, 4 McCord (S. Car.) 211; Allen *v.* Dodd, 4 Humph. (Tenn.) 131; Sackett *v.* Davis, 3 McLean (C. C.) 100.

**Set-off.**—If the statute merely confers the right to sue for money lost, the loser cannot plead his claim by way of a defence or set-off in a suit against him. Bevins *v.* Reed, 2 Sandf. (N. Y.) 436.

**Who May Maintain Action.**—By the terms of the statutes generally adopted, a right of action is conferred solely upon the loser, during a period which is stated sometimes at six and sometimes at three months, and after that anyone who first sues is entitled to maintain the suit. See Moore *v.* Settle, 82 Ky. 187; Faris *v.* Kirtley, 5 Dana (Ky.) 460; Barnes *v.* Turner, 4 Metc. (Ky.) 114; Plummer *v.* Gray, 74 Mass. (8 Gray) 243; Babcock *v.* Thompson, 20 Mass. (3 Pick.) 446; Swaggerty *v.* Stokely, 1 Swan. (Tenn.) 38; Hoss *v.* Layton, 3 Ohio St. 353. But in some instances the right of recovery is not conferred upon the loser, but upon his his wife and children. Davis *v.* Orme, 36 Ala. 540; Higdon *v.* Heard, 14 Ga. 255; Dunn *v.* Bell, 85 Tenn. 581.

**Suit by Real Party in Interest.**—The person on whose behalf a wager is really made may maintain a suit to recover it from the winner, although the latter made the bet with somebody else, who was supposed to own the money. Doyle *v.* McIntyre, 71 Ga. 673. But see Haywood *v.* Sheldon, 13 John. (N. Y.) 88.

If money is deposited by one as agent for others, together with his own, upon an illegal wager, the depositor can only recover his own money back; he cannot sue, as a trustee, for the others. Culver *v.* Burke, 56 Barb. (N. Y.) 390; Ruckman *v.* Pitcher, 20 N. Y. 9; Yates *v.* Foot, 12 John. (N. Y.) 1; Vischer *v.* Yates, 11 John. (N. Y.) 23. If a wager is made by two or more jointly, each of the losers may maintain a separate action to recover the amount paid by him. Davis *v.* Orme, 36 Ala. 540; Morgan *v.* Lewis, 7 B. Mon. (Ky.) 243; Wood *v.* Owens, 2 Swan (Tenn.) 146.

**Action by Keeper of Faro-bank.**—In Brown *v.* Thompson, 14 Bush (Ky.) 538, the court *held* that the keeper of a faro-bank, who sued to recover losses against one who had won by betting against the bank, was not within the

tion, and under circumstances which confer no title upon the winner.[1] The right of action conferred by statute upon the loser is assignable in its nature, and may be enforced in a suit by an assignee.[2]

## GAME AND GAME LAWS.

I. Game—Definition, 1023.
1. *Property in Game*, 1024.
2. *Trespassing in Pursuit of Game*, 1025.
3. *Decoying and Enticing Away*, 1027.
II. Game Laws—Definition, 1027.
1. *Statutory Regulations*, 1028.
2. *Inter-State Traffic*, 1029.
3. *State Discrimination Against Non-Residents*, 1032.
a. *Fourteenth Amendment—No Violation of*, 1033.

**I. Game.—Definition.**—1. Game includes all sorts of birds and beasts that are objects of the chase.[3] 2. This term embraces hares, pheasants, partridges, grouse, heath or moor game, block game and bustards; and some of the provisions of the statutes are also directed to woodcock, snipe, quails, land-rails and conies.[4] 3. Game is birds and beasts of a wild nature, obtained by fowling and hunting.[5] 4. Animals pursued and taken by sportsmen are designated as game.[6] 5. Any one or more hares, pheasants, partridges, eggs of pheasants and partridges, woodcocks, snipes, rabbits, grouse, block or moor game, and eggs of grouse are game.[7]

spirit of the Kentucky statute, although his claim was within the letter, and accordingly refused to maintain his action.

1. Mason *v.* Waite, 17 Mass. 560; Corner *v.* Pendleton, 8 Md. 337; Caussidiere *v.* Beers, 2 Keyes (N. Y.)198; s. c., 1 Abb. Ct. App. Dec. 333; Burnham *v.* Fisher, 25 Vt. 514.

2. McDougall *v.* Walling, 48 Barb. (N. Y.) 364; Meech *v.* Stoner, 19 N. Y. 26; Hendrickson *v.* Beers, 6 Bosw. (N. Y.) 639; Brandon *v.* Pote, 2 H. Bl. 308; Brandon *v.* Sand, 2 Ves. Jr. 514. The case of Weyburn *v.* White, 22 Barb. (N. Y.) 82, was overruled by a subsequent case of McDougall *v.* Walling, 48 Barb. (N. Y.) 364.

In Louisiana the court *held*, in Grayson *v.* Whatley, 15 La. Ann. 525, that the obligation arising out of a contract to run a horse race is hereditable between the heirs of the contracting parties; but, as there was a *delectus personæ* in every aleatory contract, the contract could not be assigned by one of the parties without the consent of the other.

3. Wharton's Law Dict.

4. 1 and 2 Will. IV, ch. 32.

5. Bouvier's Law Dict.

6. Webster's Dict.

7. 25 & 26 Vict., ch. 114, § 1.

Many of the States statutes now include, not only game proper, but insectivorous and scavenger birds. For instance:

**Colorado** regulates the taking or killing of quail, wild turkey, curlew, plover, lark, dove, whip-poor-will, finch, thrush, sparrow, wren, martin, swallow, snowbird, bobolink, red-winged blackbird, crow, raven, turkey-buzzard, robin or any insectivorous bird; also, partridge, pheasant, prairie hen, prairie chicken or grouse. It also regulates the killing of elk, buffalo, deer, fawn, antelope, mountain sheep or bison. Gen. Laws (1877), ch. 41, § 1 *et seq.*

**Illinois** regulates the killing of wild buck, doe or fawn, wild turkey, pinnated grouse or prairie chicken, quail or ruffed grouse, wild goose, duck, trout, or other water fowl, or woodcock; also, as to killing any robin, bluebird, swallow, martin mosquito hawk, whip-poor-will, cuckoo, woodpecker, catbird, brown thrush, redbird, hanging bird, buzzard, sparrow, wren, humming bird, dove, goldfinch, mocking bird, bluejay, finch, thrush, lark, cherry bird, yellow bird, oriole or bobolink, and as to the robbing or destroying the nests of such birds; also as to the robbing of the nests of the game birds proper. Rev. Stat.(1885), ch. 61, § 1, *et seq.*

1. *Property in Game.*—There is no property in wild animals until they have been subjected to the control of man.[1] As to animals of chase, the English rule is that if the hunter starts and captures a beast on the land of another, the animal belongs to the owner of the land.[2] But by the civil law the captured animal belongs to the captor.[3] In the United States the rule seems to be that the animal belongs to the captor, corresponding to the rights of the hunter recognized by the civil law, even if the capture is effected by a trespass on another's land.[4]

No one has any property in the animals and the fowls denominated *game*, until they are reduced to possession.[5] Whilst this game is at large, the ownership, in Great Britain, is in the sovereign authority, or king.[6] In the United States, the ownership is in the people of the State, which is the repository of the sovereign authority, and no person has any property right to be affected. To hunt and kill game is a privilege granted by the State. The ownership of game is held by the sovereign authority in trust for all the people in the State. The question of individual enjoyment is one of public policy, and not of private right.[7]

**The Province of Ontario** regulates by statute the killing of deer, elk, moose, reindeer, or caribou; also, grouse, pheasants, prairie fowl or partridge, wild turkey or quail, woodcock, snipe, mallard, grey duck, black duck, summer ducks, ducks, swans or geese; also, the destroying the eggs of these birds. It also regulates the killing of hares and of fur-bearing animals. Davis *v.* McNair (Canada), 21 Cent. L. Jour. 480.

Game includes wild bees and fish. See Cooley on Torts (1880) 435. And doves. Com. *v.* Chace, 9 Pick. (Mass.) 15.

1. Amory *v.* Flyn, 10 Johns. (N. Y.) 102; Com. *v.* Chace, 9 Pick. (Mass.) 15.

2. Riggs *v.* Earl, 1 H. & N. 923; Blades *v.* Higgs, 12 C. B., N. S. 501.

3. Inst. 2, t. 1, § 12.

4. Cooley on Torts (1880) 436; and see 3 Am. & Eng. Ency. of L., title Chattels, 3b. note 4 *et seq.*

5. 2 Kent 416 *et seq.*

6. 2 Bl. Com. 409.

7. Magner *v.* People, 97 Ill. 320.

**By Custom of Hunters,** the first finder of a bee tree is entitled to it; that is, the bees and honey; but this custom finds no recognizance by the law of the land, and the finder will commit trespass if he enters upon the land of another to cut the tree down. Cock *v.* Weatherby, 5 S. & M. (Miss.) 333; Merrils *v.* Goodwin, 1 Root (Conn.) 209; Gillet *v.* Mason, 7 Johns. (N. Y.) 16.

One who finds game on his land cannot justify pursuing it onto the land of another. Dean *v.* Clayton, 7 Taunt. 489.

A party having hunted with dogs, which caught a hare on another's land, but which was not started on the land of the latter, is entitled to it. The owner of the land where the hare was caught has no title to it. Churchward *v.* Studdy, 14 East 249.

In some of the States the right to take fish is conferred upon the county or township authorities. Vinton *v.* Welsh, 9 Pick. (Mass.) 87; Cottrill *v.* Myrick, 12 Me. 222.

**In Massachusetts and Maine** the towns have the authority to exercise the power of taking fish for the common benefit of the people of the town. Those corporations can also sell or lease the right of fishing. Nickerson *v.* Brackett, 10 Mass. 212; Randolph *v.* Braintree, 4 Mass. 315. But the common law rule on the subject of common right in such fisheries prevails in the absence of any such legislation. Waters *v.* Lilley, 4 Pick. (Mass.) 145.

**In the New England States** the right of eminent domain is employed for the improvement of fisheries. Bristol *v.* Water Co., 42 Conn. 403.

Under the act of Virginia (March 4, 1884), one cannot acquire a right to oyster grounds which cannot be destroyed by subsequent acts of the legislature. Purcell *v.* Conrad, (Va.) 5 S. E. Rep. 545.

2. *Trespassing in Pursuit of Game.*—In the United States, in the new sections of the country, the owners of the land make no objection to hunters entering upon their premises in pursuit of wild beasts and game. This custom is not sanctioned by law, but, by the acquiescence of the owner, there is no complaint made for the trespass. But in going upon the lands of another with dogs, if the dogs attack domestic animals or do other injury to the owner of the land, the trespasser is responsible, and cannot plead, in defence, his ignorance of the vicious propensities of the dogs, because he is a trespasser *ab initio*, and the damage done by his dogs is a matter of aggravation.[1] One has no right, when he starts game, to follow it upon the lands of another.[2]

A party has a qualified property in wild animals, as when birds build in his trees, or when others burrow in his land, and have young ones there, and until such time as they can fly or run away. He has a qualified property in animals usually called game, so long as they continue within his liberty; but so soon as they depart into another's liberty his right of property ceases. 2 Bl. Com. 394.

The property of such animals, *feræ naturæ*, as are known as *game*, with the right of pursuing, taking and destroying them, is prerogative, and is vested in the king alone, and from him derived to such of his subjects as have the grants of a chase, a park, a free warren, or free fishery. The right thus vested in the subjects is an incorporeal hereditament, though the fruits and profits are of a personal nature. 2 Bl. Com. 410.

**The Civil Law.**—By the law of nature every person, from the ruler to the subject, has an equal right of hunting and killing all wild animals. Inst. 2, 1, § 12. But the civil law did not recognize a right for any party to hunt upon another's place but by the consent of the owner of the land. Inst. 2, 1, § 12.

**Qualified Property.** — The right of property in animals, such as deer, fish and several kinds of fowl, is qualified, and continues so long as one has dominion over them. While this qualified property continues, it is protected by law, like other property rights. 2 Kent's Com. 348.

It seems that the owner of land has property *ratione soli* in bees, although they have not been hived or reclaimed by him. Gillet *v.* Mason, 7 Johns. (N. Y.) 16; Ferguson *v.* Miller, 1 Cow. (N. Y.) 243; Idal *v.* Jones, 2 Dev. (N. Car.) 162. *Compare* Wallis *v.* Mease, 3 Binn (Pa.) 546.

1. Van Leuven *v.* Lyke, 1 N. Y. 515; Beckwith *v.* Shordike, 4 Burr. 2092.

2. Deane *v.* Clayton, 7 Taunt. 489.

When parties go together hunting, and while thus engaged commit a trespass, each is liable for the whole injury. Hume *v.* Oldacre, 1 Stark. 351.

It is a question as to whether taking fish in private waters is a trespass, when the public have been accustomed to take them. The entry upon the water causes no injury to the riparian owner. If the owner does not use the fishery for purposes of profit, and knows of the use by the public, it would seem this amounts to a license to enter, until the owner openly forbids others fishing therein. Cooley on Torts (1880) 332.

If a party sends out his dogs and his servants, and extends an invitation to other parties to join in the sport, but does not go himself, though the others do, he is responsible for the trespass they may commit, unless he distinctly desires them not to go on the lands where the trespass is committed. Baker *v.* Berkeley, 3 C. & P. 32.

If a hunted stag takes refuge in a barn, the owner of the hounds and his servants commit trespass by entering the barn, for which the owner of the hounds is responsible. Baker *v.* Berkeley, 3 C. & P. 32.

A party may justify a trespass, in following, with hounds, a fox, over the lands of another, if he does no more than enough to kill the fox. Gundry *v.* Feltham, 1 T. R. 334.

An owner of a dog, who knows of its vicious propensity for chasing and killing game, is liable, if the dog enters another's lands and destroys young pheasants which are being reared by a domestic hen. Read *v.* Edwards, 17 C. B., N. S. 245.

When the statute provides for a penalty for the taking of game, it

means live game. Kenyon *v.* Hart, 6 B. & S. 249.

A party was standing on his own land when a pheasant rose up on his land; he fired, and the bird fell dead upon the land of another. The first party entered and picked up the pheasant. *Held*, that this was not trespass, under the statute of 1 & 2 Will. IV, ch. 32, § 30, unless the facts were such as to show that the firing at the bird and the entry and picking up the bird all formed part of a continuous transaction. Kenyon *v.* Hart, 6 B. & S. 249.

Firing at game from a highway is a trespass in pursuit of game, and if two persons are thus jointly engaged they may be severally convicted. Mayhew *v.* Wardley, 14 C. B., N. S. 550.

A party on his own land fired at and killed a pheasant on another's land, and entered upon the other's land and picked up the bird. *Held*, trespass, the whole being one continuous transaction. Osbond *v.* Meadows, 12 C. B., N. S. 10.

The place of committing the trespass may be described in the conviction as certain land, without giving it a name, or setting it out with abuttals. Rex *v.* Mellor, 2 D. P. C. 173.

Parol evidence of what a party says before a magistrate, on the hearing of a case of trespass, under 1 & 2 Will. IV, ch. 32, § 30, is admissible, although, in fact, what he said was taken down, because this is not a case in which it is the magistrate's duty to take down what is said before him. Robinson *v.* Vaughton, 8 C. & P. 252.

**Under the Ohio Statute** of May 5th, 1877, ch. 8, § 33, t. 1, it is unlawful to shoot at or to kill wild ducks on the land of another person, although the party shooting is within the channel of a navigable river, when the owner of the land has set up, in a conspicuous place on the banks of the river, a sign forbidding parties to hunt on his premises. State *v.* Shannon, 36 Ohio St. 423.

**In the Larger Lakes** of the country, the riparian owner cannot forbid others to fish in them. The right to fish in Lake Winnipiseogee is a public right, and the public has a right to protect the passage of the fish up and down the rivers which form its outlets to the sea. The right to fish in this lake, and other large lakes, is in the public, and not in the riparian owners; just as much in the public as is the fishing in the tide-waters of the Piscataqua. State *v.* Franklin Falls Co., 49 N. H. 240; s. c., 6 Am. Rep. 513.

Those engaged in navigation must respect the right of fishery, and they will be liable for any damages which their vessels may cause to seines, oyster-beds, and the like. Cobb. *v.* Bennett, 75 Pa. St. 326; Marshall *v.* Steam Nav. Co., 3 B. & S. 732.

Trespass was brought for hunting and breaking of hedges. It appeared that a party started a fox on his own land, and his hounds pursued it into another man's lands. *Held*, that he might hunt and pursue the fox into another man's lands, because a fox is a noisome creature. Mitten *v.* Fandrye, Popham 161.

A man may justify an entry and a reasonable trespass upon another man's land for killing mischievous vermin, that is, wild animals not fit for food. Gundry *v.* Feltham, 1 D. & E. 334; Nicholas *v.* Badger, 3 D. & E. 259, note a.

**When the Property Vests.**—In hunting game, property vests in the pursuer when the animal is brought within the power of the hunter. The possession must be so far complete by means so that the animal cannot escape. So, if a party is in pursuit of game which he started and which he has actually in view, and then a second party sees the game and kills it, the property is in him who killed it, or in the latter. The mere pursuit did not vest any property in the hunter because he had acquired no possession. Buster *v.* Newkirk, 20 Johns. (N. Y.) 75; Pierson *v.* Post, 3 Cai. (N. Y.) 175.

An old statute of *New York* declares that any person who starts and pursues game, in the case of deer, in the counties of Suffolk and Queens, shall be deemed in possession of the same, so long as he continues in fresh pursuit thereof. 1 Rev. Stat. 883 (3rd ed).

Planting oysters in public waters is not such a special appropriation of such waters as will justify their removal as a nuisance; unless they interfere with public rights. In that case, no private person can legally interfere with them and convert them to his own use. State *v.* Taylor, 3 Dutch. (N. J.) L. 117.

In order to prevent the plaintiff's fowls from trespassing upon the defendant's land, the defendant, after giving the plaintiff notice of what he was going to do, placed poison in food upon his land, which the fowls ate and died. *Held* that, notwithstanding the notice, the defendant was not justified in the use of the means he had employed, and

3. *Decoying and Enticing Away.*—In England, especially, the disturbing, decoying, and enticing away game from another is actionable. Thus, an action lies for firing guns in close proximity to a decoy pond of another, with design to injure the owner by frightening away the wild fowls resorting thereto, by which the birds are driven away, to the detriment of the owner of the pond.[1]

**II. Game Laws.—Definition.**—Game laws regulate the killing or taking of birds and beasts, or game.

The English game laws are founded on the idea of restricting the right of taking game to certain classes, generally landlords. In 1831 the law was so modified as to enable any person to obtain a certificate or license to kill game on payment of a fee.

The laws relating to game in the United States are generally, if not universally, framed with reference to protecting the animals from indiscriminate and unreasonable havoc, leaving all persons free to take game, under certain restrictions as to the season of the year, and to the means of capture.[2]

was liable in damages. Johnson *v.* Patterson, 14 Conn. 1.

**According to the English Doctrine,** if the defendant started game on the plaintiff's land, but killed it on his own land, the plaintiff could recover damages, provided he, too, pursued the same; for, by the pursuit, he had not abandoned the right to the game. Sutton *v.* Moody, 2 Salk. 556; Churchward *v.* Studdy, 14 East 249. The same doctrine prevails as to fish under the English rule. Child *v.* Greenhill, Cro. Car. 554.

**An Information** for hunting on the inclosed lands of another party must allege want of consent of the owner and of the proprietor and of the agent in charge. Haltzgraft *v.* State, (Tex.) 5 S. W. Rep. 117.

**Indictment.**—Under the act of March 22, 1886, of *New Jersey*, relating to game-fish, an indictment is sufficient which alleges that the defendant killed the game-fish with "acid," without stating the kind of acid. But the indictment must aver that the acid was discharged into the water in sufficient quantities as to kill the fish therein, and that fish had died in consequence of the defendant's act. State *v.* American, etc., Co., (N. J.) 9 Cent. Rep. 495.

1. Keeble *v.* Hickeringill, 11 East 574, n. But it has been *held* that there can be no property in a rookery, on the ground that rooks are a kind of birds of a destructive nature, not known as an article of food, and not protected by statute; hence no one can have property in them, or establish any legal right to cause them to resort to his trees. Hannan *v.* Mockett, 4 D. & R. 518.

One in a boat on a public river, where the tide ebbs and flows, fires at fowls so near an ancient decoy on shore as to make the birds there fly away, though he did not fire into the decoy pond; this is evidence of a wilful disturbance of and damage to the decoy, for which the owner may maintain an action. Carrington *v.* Taylor, 11 East 571.

A party, whose game is enticed away from his land by a neighbor, is liable to an action for exploding combustibles, so as to become a nuisance to the latter, in order to frighten away the game from his land and prevent him from killing them, and enticing other game. Ibotson *v.* Peat, 3 H. & C. 644.

**Damages** may be had by the injured party for disturbing and injuring the right to, and enjoyment of, an ancient decoy. Carrington *v.* Taylor, 11 East 571; 2 Campb. 258. But no action is maintainable for frightening away game from a preserve, it not being a franchise, nor for disturbing a rookery. Hannan *v.* Mockett, 4 D. & R. 518.

2. Bouvier's Law Dict.

The right of property to *feræ naturæ* formerly vested in the king alone, and from him it was conferred on his subjects as grants of chase, a park, a free warren or free fishery. A *forest* is the same thing, in the hands of a subject, as a chase. A *chase* differs from a park

1. *Statutory Regulations.*—A statute enacted by the States for the protection of game is a public advantage, to which private interests must conform. The constitution of the United States does not prohibit such enactments for the protection of game, and they are constitutional.[1] The State, under its police power, may make regulations for the preservation of game and fish, restricting their taking and molestation to certain seasons of the year. The constitutional right to enact such laws has been expressly affirmed in regard to fish[2] and game.[3] In England, the policy of the common law was to regulate and control hunting and killing of game for its better preservation, and such authority of regulation belonged to the police power of the government.[4]

in that it is not inclosed, and also a man may have a chase in another man's ground as well as in his own. A park is an inclosed chase, extending only over one man's grounds. 2 Bl. Com. 38.

Under the former game laws of England, all persons, of whatever property or distinction, that kill game out of their territories without the king's license were guilty of encroaching upon the king's prerogative. These statutes are various. Formerly the qualifications for killing game were: (1) having freehold estate to a certain amount; (2) a leasehold for ninety-nine years; (3) being a person of superior degree, and (4) being the owner or keeper of a forest, park, chase or warren, and lastly, no person, by statute 28 Geo. II, ch. 12, however qualified, could expose game for sale. 4 Bl. Com. 175.

The game laws were introduced into Europe at the beginning of the feudal system. Feud. L. 2, t. 27, § 5.

The feudal oppression of game was modified by the *Charta de Foresta*, which was confirmed by parliament. 9 Hen III.

The English game laws were revised in 1831, and the qualifications of birth or estate was abolished. Any person may now kill game on his own land, or on the land of another who consents, by first taking out a license. To kill hares on his own inclosed lands does not require a license. 11 & 12 Vict., ch. 29, 30. For further regulations, see 1 & 2 Will. IV, ch. 32; 2 & 3 Vict. ch. 35; 9 Geo. IV, ch. 69; 7 & 8 Vict., ch. 29; 24 & 25 Vict., ch. 96, § 17.

1. Phelps *v.* Racey, 60 N. Y. 10; State *v.* Randolph, 1 Mo. App. 15.

2. Boonham *v.* Webster, 5 Mass. 266; Nickerson *v.* Brackett, 10 Mass. 212; Gentile *v.* State, 29 Ind. 409.

3. State *v.* Norton, 45 Vt. 258; Phelps *v.* Racey, 60 N. Y. 10; Magner *v.* People, 97 Ill. 320.

4. 4 Bl. Com. 174.

**Violation.**—Under the New Hampshire constitution, article 2 of the bill of rights, the killing of wild vermin at the time when and because they are pursuing and destroying domestic animals belonging to the defendant, is not a violation of a game preserving statute prohibiting the killing of wild animals of that kind during certain seasons of the year. Aldrich *v.* Wright, 53 N. H. 398.

**Maine Doctrine.**—When the State makes it an offence to kill deer at a certain season of the year, or to transport them from place to place during the prohibited time, it is not a violation of the statute to transport them from place to place during this time, provided the deer were killed before and in season. Allen *v.* Young, 76 Me. 80.

**New York Doctrine.**—One who controls game consignments from another State, for sale, is liable for penalty fixed by the New York game law for having such game in possession out of season, although the consignment was made to him at a proper time, and the game was stored in a refrigerator warehouse. N. Y. Game Assn. *v.* Durham, 51 N. Y. Super. Ct. 306.

**Missouri Doctrine.**—A statute prohibiting the killing or having in possession a certain kind of game within certain seasons is not unconstitutional, either as depriving one of his property without due process of law or as being in restraint of commerce. State *v.* Judy, 7 Mo. App. 524.

It is not a defence to a prosecution for selling game in violation of a State

2. *Interstate Traffic.*—A statute prohibiting the transportation from one State to another, of game lawfully killed, is in conflict with the federal constitution. A law which prohibits the killing of game at certain seasons of the year is valid; but if it allows game to be killed, and thereby become a subject of traffic and commerce, and then directly prohibits its transportation into another State, it is unconstitutional and void.[1] A State cannot prohibit and stop the passage or importation of lawful merchandise into its limits. Such a prohibition would not be a regulation of purely internal and domestic commerce, but a regulation affecting interstate commerce in an essential and vital point, which is a power given to congress. The right of a State to prohibit sales of commodities within its limits, which is a part of its police power, does not imply any right to prohibit the importation of them. The right to prohibit sales of articles of commerce and traffic by a State, arises only after the act of transportation has terminated, because the sales of things which the State may forbid are those within its jurisdiction.[2]

law forbidding that kind of game to be sold during specified months, to show that the game sold was brought from another State. Such a law is not invalid as being a regulation of commerce. State *v.* Randolph, 1 Mo. App. 15.

Under the game law, Nix. Dig. 334, § 3, 11, non-residents cannot be convicted upon the view of a justice. Schroder *v.* Ehlers, 2 Vroom (N. J.) 44.

The *New York* law of 1883, ch. 317, authorizes fish and game protectors to sue for penalties. *Held*, that the judgment, in an action brought by an individual under act of 1879, was a bar to an action brought by the fish and game protector for same cause. People *v.* Robbins, 39 Hun (N. Y.) 137.

**Mandamus** will issue to compel the district attorney, under the New York law, to sign the certificate required by the game law to enable the game protector to receive from the county treasurer the sum due him from the fund recovered. *Ex parte* Roberts, 40 Hun (N. Y.) 53.

**Massachusetts Doctrine.**—Under the Massachusetts statute of 1879, ch. 209, § 1, prohibiting the taking of birds between certain days, or if one buys or has in his possession, or offers for sale, such birds, he shall, upon conviction, be punished. But a person is not liable for having in his possession, offering for sale, or selling, birds taken or killed in another State. Com. *v.* Hall, 128 Mass. 410; s. c., 35 Am. Rep. 387.

A breeder of pheasants set pheasants' eggs under barn-yard hens in coops, cutting one wing of each bird to prevent escape and facilitate identification. He sold the cock pheasants to one of the public during the prohibited season, and was *held* liable for dealing in game without a license. Harnett *v.* Miles, 48 J. P. 455.

1. State *v.* Saunders, 19 Kan. 127.

2. Bowman *v.* Chi., etc., R. R. Co., 125 U. S. 465.

**Under the Illinois Law** of 1879, § 2, it is unlawful for any person to buy, sell, or have in possession for the purpose of sale, any of the wild fowls, birds and the like, at any time when trapping, netting or ensnaring of the same shall be unlawful, contrary to the provisions of the statute; this has reference only to wild fowls, birds, and the like, within the State. Under section 6 of this statute, the sale, exposing for sale, or having in possession for the purpose of selling, any of the animals, wild fowls or birds as set forth in section 1, after the expiration of five days next succeeding the first day of the season in which it shall be unlawful to kill, trap or ensnare such animals, wild fowls or birds, is made unlawful, and this without regard to the place where they were killed. This section applies to a person who has in his possession and who sells game killed in another State, and which has been transported into Illinois. This law does not contravene the third clause of § 8, art. 1 of the federal constitution, which confers upon congress power to regulate

interstate commerce. When such game enters the State and comes into the possession of a citizen of the State, the police power of the State attaches, and the sale may be prohibited, although such prohibition may discourage importations. If a State may constitutionally prohibit the killing and possession of game for sale during certain seasons, the prohibition of the transportation of game killed and possessed in violation of such regulation cannot be unconstitutional. Magner *v.* People, 97 Ill. 320.

**The New York Law** declares, 1871, ch. 721, that no person shall expose for sale, or kill, or have in his possession after it has been killed, certain game during a prohibited season. A defendant was indicted for having game in his possession during the prohibited time. The defence was that the game was either killed before the prohibited time or was received during the prohibited period from Minnesota or Illinois, where, at the time, such laws were not in force. *Held*, that the time when, or the place where, the game was killed, or when brought into the State, or where from, is not made material by the statute, and the court has no power to so make it, and the defendant was held liable. The law was declared constitutional, as to game acquired after its passage, to game killed in an open season, and to game brought from a State in which there existed no such prohibition. Such a statute does not conflict with the constitutional provision that no person shall be deprived of property without due process of law. Nor is the statute in conflict with the power given to congress to regulate commerce among the States. The fact that the defendant had invented a process of preserving game from one lawful period to another is immaterial, as it is not provided for in the act. Phelps *v.* Racey, 60 N. Y. 10.

**The English Law** is similar to this doctrine. In a case, wild fowls were shown to have been some of a consignment of dead plover, received by a poulterer from Holland, and it was *held* that its sale was prohibited by general language. It was said in this case that the true and only mode of protecting British wild fowl from indiscriminate slaughter, as well as of protecting other British interests, is by interfering indirectly with the proceedings of foreign persons. The main object is to prevent British wild fowl from being improperly killed, and sold under pretence of their being imported from abroad. Whitehead *v.* Smithers, 2 C. P. D. 553; s. c., 21 Eng. Rep. Moak, notes 458.

**Protection.**—A State has as much right to protect its game as it has to preserve the welfare of its citizens, and may prohibit the exhibition for sale within the State of commodities out of season, without any violation of the federal constitution. The prohibition of having in possession for sale game within the State, during certain periods of the year, is no regulation of commerce among the States. State *v.* Randolph, 1 Mo. App. 15.

**English Statutes.**—Under Geo. III statute, a party is not responsible, who, in the prohibited period, has in his possession game which was killed before that season. Simpson *v.* Irwin, 3 B. & Ad. 134.

Under 1 & 2 Will IV, a party is not liable to the penalty for making a contract in the close season for the delivery of game at any time. Porritt *v.* Baker, 10 Ex. 759.

**A Statute of Massachusetts** provides that whoever kills any game during a specified time, or during the prohibited time sells, buys, or has in his possession, or offers for sale, any of the specified game shall be liable to a penalty. *Held*, that this did not apply to game lawfully taken or killed in another State, which had been imported into Massachusetts. The court say: "The question presented is whether, in the absence of any explicit manifestation of the intent of the legislature, the words 'any of such birds' are to be construed in the larger sense, as meaning any woodcock, partridge or quail whatever, or in the more restricted sense as meaning any woodcock, partridge or quail taken or killed in this commonwealth within the times before mentioned. By the first alternative, the mere possession, in the first part of every year, of birds which had been lawfully taken or killed in another State, or even in this commonwealth, and at a time when it was lawful to kill them here, would be made a punishable offence; as if, for instance, woodcock killed in the autumn should be preserved in ice after the first of January for subsequent consumption. To adopt such a conclusion, when not imperatively required by the language of the act, would be inconsistent with the ordinary rules of construction of penal statutes." It was further *held* that the object of the statute was to protect the

birds named during the breeding seasons. This is accomplished by punishing the person who takes or kills such designated game in the State of Massachusetts during the prohibited period. But if the offender can prove that the game specified was transported to him from without the commonwealth he is thereby exonerated. By thus construing the statute it is divested from all constitutional difficulty. Com. *v.* Hall, 128 Mass. 410. This doctrine seems to be in conflict with the decision of *Illinois*, *New York* and *Missouri*, but is followed by the courts of the Province of *Ontario*, Canada.

**A Statute of Ontario** prohibits the killing of game during a certain season of the year, and provides that no person should have in his possession any of such game during said time. A dealer in Ontario was convicted before a police magistrate for having in his possession game shipped to him from the Province of Manitoba. On appeal it was *held* that such conviction was erroneous. It was *held* that the prohibition statute was only intended to prevent the killing of the animals or birds specified during the designated time in Ontario, and making unlawful the possession of such game taken in Ontario during the protected period. That all statutes of this kind are intended to protect the game in the State where passed; that, in the absence of language reasonably clear, the statutes should not be interpreted as applying to birds killed elsewhere. Davis *v.* McNair (Canada), 21 Cent. L. Jour. 480.

The *Illinois* decision says: "And it would seem to be a legal truism, if a State may constitutionally prohibit the killing and possession of game during certain seasons, the prohibition of the transportation of game killed and possessed in violation of such prohibition cannot be unconstitutional. There cannot be a constitutional right to transport property which cannot legally be brought into existence." Magner *v.* People, 97 Ill. 320, see p. 336.

**Michigan Doctrine.**—The Michigan law providing that quail can be killed during the months of November and December, and at no other time, and that no person shall sell or expose for sale, or have in possession for the purpose of selling or exposing for sale, "any of the kinds or species of birds protected by this act, after the expiration of eight days next succeeding the times limited and prescribed for the killing thereof," when construed with Act No. 68, Public Acts Mich. 1887, providing that in prosecutions for violation of the game laws, proof of the possession of the game named, at any time during the prohibited period, shall be *prima facie* evidence of a violation of the law, does not prohibit the having in possession and exposing for sale at any time, quail killed in another State and then shipped into Michigan for sale. Section 5 of an act entitled "An Act for the Protection of Game," making it a misdemeanor to sell or expose for sale, or to have in possession for the purpose of selling or exposing for sale, any of the kinds or species of birds or animals thus protected, after the expiration of eight days next succeeding the time limited for the killing of the same, is not unconstitutional, as not expressing its object in its title.

The articles interdicted are articles of food, and the interdiction is not because such food is unwholesome, and therefore detrimental to the public health, but the whole end and object of the legislation is to protect and preserve game in the State of Michigan. The revisions and amendments of the Michigan statutes have but one object, and that is to protect and preserve the game of Michigan. This law cannot be violated, either in letter or spirit, by importing game from other States to supply food to citizens of Michigan. Act No. 68 is a legislative construction of the game law under which a prosecution is had, and is in consonance with the view that it is not a violation of the law to have in possession and selling game imported into the State of Michigan from other States, or killed in this State when it was lawful to do so. It was right for the legislature to cast the burden of proof upon those having such game in their possession when the killing is by law prohibited, and fully protects the State from its evasion. People *v.* O'Neil, filed July 1, 1888.—Chi. L. News II, Sept. 15, 1888.

**The Imperial Act** of 39 & 40 Vict., ch. 29, § 2, provides that any person who shall wound, or attempt to kill or wound, or take any wild fowl, or use any instrument for the purpose of killing, wounding or taking any wild fowl, or shall have in his possession any of the game designated during a prohibited time, shall, on conviction, be made to pay a penalty. This act was construed as applying to a party who had for sale game imported from

3. *State Discrimination Against Non-residents.*—A State law providing for greater restrictions and severer penalties upon non-residents of the State than upon residents for hunting game and game-fish is not contrary to those clauses of the fourteenth amendment to the federal constitution which declares that no State shall abridge the privileges or immunities of citizens of the United States, or deprive any person of property without due process of law, or deny any person within its jurisdiction the equal protection of the law.[1] A State can prohibit citizens of another State from planting oysters in a river within its jurisdiction, where the tide ebbs and flows, and which right of planting oysters had been granted to its own citizens. Such a right is not a privilege or immunity of general, but of special citizenship. It does not belong, of right, to the citizens of all free

Holland. The court say: "It is said that it would be a strong thing for the legislature of the United Kingdom to interfere with the rights of foreigners to kill birds. But it may well be that the true and only mode of protecting British wild fowl from indiscriminate slaughter, as well as of protecting other British interests, is by interfering indirectly with the proceedings of foreign persons. The object is to prevent British wild fowl from being improperly killed and sold under pretence of their being imported from abroad." So the defendant was convicted for having in his control and possession certain game imported from Holland. This was decided in 1877. Whitehead *v.* Smithers, 2 C. P. Div. 553.

**A License Dealer,** who was prohibited by statute of 1 & 2 Will IV from having in his possession game after a certain period, was not liable for entering into a contract, made in the season, to deliver game out of a weir or breeding place of his own at any time of the year. Porritt *v.* Baker, 10 Ex. 759. And this statute also includes live birds within its provisions. Loome *v.* Turner, 13 C. B., N. S. 150. See further, Hall *v.* Knox, 4 B. & S. 515; Loome *v.* Bailey, 3 E. & E. 444; Evans *v.* Batterill, B. & S. 787.

**Importation and Sale.**—It was decided by the United States supreme court that sale is the object of importation of commodities, and is an essential ingredient of that intercourse of which importation constitutes a part. "It is as essential an ingredient, as indispensable to the existence of the entire thing, then, as importation itself. It must be considered as a component part of the power to regulate commerce. Congress has a right not only to authorize importation, but to authorize the importer to sell." Brown *v.* Maryland, 12 Wheat. (U. S.) 419. But it appears that this is not now the doctrine. A State cannot prohibit the transportation of legitimate articles of commerce into or through its territory; but under the police power of the State it can regulate the sale of such commodities within its own limits. In speaking of Brown *v.* Maryland, 12 Wheat. 419, the language is: "But it is not necessary now to express any opinion upon the point, because that question does not arise in the present case. The precise line which divides the transaction, so far as it belongs to foreign or interstate commerce, from the internal and domestic commerce of the State, we are not now called upon to delineate. It is enough to say, that the power to regulate or forbid the sale of a commodity, after it has been brought into the State, does not carry with it the right and power to prevent its introduction by transportation from another State." Bowman *v.* Chicago, etc., R. Co., 125 U. S. 465.

**The General Doctrine** of this decision is in accord with those of *New York*, *Illinois* and *Missouri*. It distinctly and clearly *holds* that a State cannot prohibit the introduction of legitimate articles of commerce into its territory, but under its police power may prohibit their sale after they are laid down in the State.

1. Allen *v.* Wickoff, 48 N. J. L. 90. This act was approved April 4, 1878, and is for the protection of game and game-fish. The court also decided that this act does not conflict with the constitution of New Jersey, art. 4, § 7, ¶ 4.

governments, but only to the citizens of the State. They own it by citizenship and domicile united.[1]

*a. Fourteenth Amendment.*—A law imposing a higher penalty on non-resident offenders against game laws than on resident offenders is no violation of the fourteenth amendment to the federal constitution.[2]

## GAMING.

I. Definition, 1033.
II. What Constitutes the Crime, 1034.
1. *The Game Must Contain an Element of Chance*, 1034.
2. *What Games are Within the Statute*, 1036.
3. *The Wager*, 1042.
*a. Who May Bet or Wager*, 1042.
*b. What Constitutes a Bet or Wager*, 1042.
(1) *Time and Manner of Betting*, 1042.
(2) *Value of the Thing Staked*, 1043.
4. *Publicity*, 1045.
III. Visiting Gaming Houses, 1052.
IV. Common Gamblers, 1052.
V. Jurisdiction, 1053.
VI. Indictment and Information, 1053.
1. *Information Permissible*, 1053.
2. *Alleging Names of Persons Playing*, 1053.
3. *Description of the Game*, 1054.
4. *Description of the Stake or Wager*, 1057.
5. *Averment of Place*, 1059.
6. *Joint Indictment*, 1061.
7. *Joinder of Offences*, 1062.
8. *Indictment Against Common Gambler*, 1062.
VII. Evidence, 1063.
VIII. Judgment, 1064.
IX. Punishment, 1064.

**I. DEFINITION.**—Gaming is properly defined as a contract between two or more persons by which they agree to play by certain rules at cards, dice or other contrivance, and that one may be the loser and another the winner.[3] Gaming consists of two

1. McCready *v.* Virginia, 94 U. S. 391; State *v.* Medbury, 3 R. I. 138; Paul *v.* Hazelton, 37 N. J. L. 106.
2. Allen *v.* Wickoff, 48 N. J. L. 90.
3. 1 Bouv. L. Dict. (15th ed.) 704.

**What is Gaming.**—In Bell *v.* State, 5 Sneed (Tenn.) 507, the court defined gaming to be "an agreement between two or more persons to risk their money or property in a contest or chance of any kind where one may be the gainer and the other loser." Substantially the same definition has been given by other courts, in Portis *v.* State, 27 Ark. 360; Harrison *v.* State, 4 Coldw. (Tenn.) 195; Eubanks *v.* State, 3 Heisk. (Tenn.) 490; State *v.* Smith, 2 Yerg. (Tenn.) 281.

Wharton says that "gaming is to stake money on a chance"; which definition, although stated in much fewer words, if we add "or property," contains all the essential elements of the offence. See Whart. Cr. L., § 1465.

Anything which induces men to risk their money or property without any other hope of return than to get for nothing any given amount from another, is gambling. Waugh *v.* Beck, 114 Pa. St. 422.

"While it is not possible that any definition of a word so flexible in meaning as this should be universally correct, still, in most circumstances and under most statutes, gaming is any sport or play carried on between two or more persons, depending on skill, chance, or the transpiring of an unknown future event on the result of which some valuable thing is, without consideration, to be transferred from the one to the other, or which in its course or consequences involves some other thing demoralizing or unlawful." Bish. on Stat. Crimes, § 861.

**"Gambling."**—The word "gaming" is synonymous with "gambling." Webst. Dict., "gamble," "game."

Mr. Bishop in his work on Statutory Crimes (§ 858), says: "In general, subject, possibly, to a few exceptions (see Spaight *v.* State, 29 Ala. 32; State *v.* Hall, 32 N. J. L. (3 Vr.) 158), yet not many, the words 'gaming' and 'gambling,' in our statutes, are similar in meaning, and either one comprehends the idea that, by a bet, by chance, by some exercise of skill, or by the transpiring of some event unknown until it occurs, something of value is, as the

distinct elements, namely, a game,[1] and a bet or wager of something of value upon the result of the game, or upon the accomplishment or happening of some act, circumstance or event in its progress or connected with it.[2]

Gaming, in and of itself, when not so public as to be a nuisance, is not repugnant to the principles of the common law,[3] but is altogether a statutory offence.[4]

**II. WHAT CONSTITUTES THE CRIME.—1. The Game Must Contain an Element of Chance.**—It may be laid down, as a general rule, that, under the statutes of the several States and jurisdictions defining and punishing the offence of gaming, the game which is played in the commission of the offence must

conclusion of premises agreed, to be transferred from a loser to a winner, without which latter element there is no gaming or gambling." Citing Evans *v.* Cook, 11 Nev. 69.

1. **A Game** is a thing played or done. State *v.* Gupton, 8 Ired. (N. C.) L. 271.

The word "game" embraces every contrivance or institution which has for its object to furnish sport, recreation or amusement; and when a stake is laid upon the chances of the game, it is gaming. People *v.* Weithoff, 51 Mich. 203; s. c., 4 Cr. L. Mag. 682.

2. **A Wager is Not a Game.**—"A wager is a bet or stake laid upon the result of the game. Bet and wager are synonymous terms, and are applied both to the contract of betting and wagering and to the thing or sum bet or wagered. For example, one bets or wagers, or lays a bet or wager, of so much upon a certain result; but these terms cannot properly be applied to the act to be done, or event to happen, upon which the bet or wager is laid. Bets or wagers may be laid upon acts to be done, events to happen, or facts existing or to exist. The bets or wagers may be illegal, and the acts, events or facts upon which they are laid may not be. Bets or wagers may be laid upon games and things that are not games. Everything upon which a bet or wager may be laid is not a game." Woodcock *v.* McQueen, 9 Ind. 14

3. State *v.* Sanford, (N. J.) 4 Cr. L. Mag. 221; U. S. *v.* Milburn, 4 Cr. C. C. 719; Bell *v.* Norwich, 3 Dy. 254, b.; 1 Russ. on Cr. (3d Eng. ed.) 455. See Hudleson *v.* State, 94 Ind. 426; s. c., 5 Cr. L. Mag 524.

"**At the Common Law,** gaming, as by playing at cards, dice, etc., when practiced innocently, and as a recreation, the better, as it was said, to fit a person for the business of life, was not unlawful; and the winner might even maintain a special *indebitatus assumpsit* for the stake won. When, however, such games became a cause of breach of the peace, so as to constitute a nuisance; or tended to immorality; or affected the interests or feelings of others; or exposed them to ridicule; or were against public policy; or were conducted by means of cheating or by fraud, as by playing with false cards, dice, etc., they were unlawful at common law." Bacon Abr., title GAMING; Archb. Crim. Pr. and Proc., title GAMING.

4. **One Act Completes the Crime.**—The offence of gaming is complete by playing once, and does not require a repetition of it. Swallow *v.* State, 20 Ala. 30; Cameron *v.* State, 15 Ala. 30.

**Each Act a Separate Offence.**—Every distinct act of betting on any gambling device, though at the same sitting, is a separate offence. Swallow *v.* State, 20 Ala. 30; Cameron *v.* State, 15 Ala. 383; Torney *v.* State, 13 Mo. 455; Buck *v.* State, 1 Ohio St. 61. *Compare* Heisler *v.* State, 20 Ga. 155; Wingard *v.* State, 13 Ga. 396.

**Betting on the Result of Other Bets.**—The dealer and exhibitor of a gaming bank bet A that A had made a bad bet. *Held*, that this did not justify a conviction of the dealer on a charge of betting at a gaming bank exhibited for the purpose of gaming. Askey *v.* State, 20 Tex. App. 443.

**In England.**—"Gaming," says Hawkins, "is permitted in England, upon every possible subject, excepting where it is accompanied by circumstances repugnant to morality or public policy, or where, in certain special cases, it is restrained by positive statutes." Hawks. P. C. b. 1, ch. 92, § 1.

contain a controlling element of chance or hazard.[1]

1. See Wortham *v.* State, 59 Miss. 179; State *v.* Bates, 10 Mo. 166; *In re* Lee Tong, 18 Fed. Rep. 253; s. c., 5 Cr. L. Mag. 67; State *v.* Smith, Meigs (Tenn.) 99; s. c., 33 Am. Dec. 132; Randolph *v.* State, 9 Tex. 521; 2 Whart. Cr. L., § 465. *Compare* Vicaro *v.* Com., 5 Dana (Ky.) 504.

**Games of Chance.**—Perhaps as good a discussion of what constitutes a game of chance as can be found, is in the case of State *v.* Gupton, 8 Ired. (N. C.) L. 271, wherein the court said: "Though our knowledge on such subjects is very limited, yet we believe that, in the popular mind, the universal acceptation of a 'game of chance' is such a game as is determined entirely or in part by lot or mere luck, and in which judgment, practice, skill or adroitness have honestly no office at all, or are thwarted by chance. As intelligible examples, the games with dice, which are determined by throwing only, and those in which the throw of the dice regulates the play, or the hand at cards depends upon a dealing with the face down, exhibit the two classes of games of chance. A game of skill, on the other hand, is one in which nothing is left to chance, but superior knowledge and attention, or superior strength, agility and practice, gain the victory. Of this kind of games, chess, draughts or chequers, billiards, fives, bowls and quoits may be cited as examples. It is true that, in these latter instances, superiority of skill is not always successful. The race is not necessarily to the swift Sometimes an oversight, to which the most skillful is subject, gives an adversary the advantage; or an unexpected puff of wind, or an unseen gravel in the way, may turn aside the quoit or the ball, and make it come short of the aim. But if those accidents were sufficient to make the games in which they may occur, games of chance, there would be no other test games of that character. But that is not the meaning of the statute, for, as before remarked, by the very use of those terms, the existence of other kinds of games, not of chance, is recognized. The incidents mentioned, whereby the more skillful may yet be the loser, are not inherent in the nature of the games. Inattention is the party's fault and his luck; and the other obstacles, though not perceived nor anticipated, are occurrences in the course of nature, and not chance. They are, indeed, sometimes inaccurately called so, as one hears 'chances of war' used to excuse losses by means not foreseen, but which might, and, though not of the usual course of things, ought to have been foreseen and provided against; for the art of war is surely a science, and the results of certain powers, movements and combinations may be almost mathematically calculated In the same manner, comparing small things with great, these are games of skill—purely such—although the better player may, in particular instances, fail to win from such causes as those mentioned—the want of attention or energy and not the blindness of chance. In that sense, ten-pins, as understood by us from the description in the case, is not a game of chance, but of skill, nothing in reference to chance, but, as in billiards, a just estimate of distances and angles, steadiness of hand and due application of strength, constitute, under ordinary circumstances, the judicious and successful player."

**What Games are Prohibited in Kentucky.**—It has been said that section 10 of the act of 1833, against gaming, cannot be restricted in its construction and operation to such games as have been specially prohibited or designated as unlawful, but applies to, and includes, all games at which money or property is lost or won. Vicaro *v.* Com., 5 Dana (Ky.) 504.

**In Missouri** the general laws, 1858, ch. 117, divides gambling into two classes, namely, by gambling devices used entirely for purposes of gambling, and gambling by means of any other device adapted to the playing of games, but not intended solely for gambling; section 3 finishes the first class, section 4 begins with the second. State *v.* Lewis, 12 Mo. 434.

**In New Jersey** no statute exists prohibiting wagers on indifferent subjects. Trenton Ins. Co. *v.* Johnson, 24 N. J. L. (4 Zab.) 576.

**In Oregon**, under section 1 of the act of 1876 (Sess. L., 39), is *held* to be included not only the games therein enumerated, but also any game played for anything of value, with any device or means suitable and convenient for that purpose; and in which the game depends largely on chance, or more on chance than skill. *In re*, Lee Tong, 18 Fed. Rep. 253; s. c., 5 Cr. L. Mag. 87.

**In Texas** it has been *held* that the words "or any other banking game," in

**2. What Games are Within the Statute.**[1]—The following games, sports or wagers, have been held to be within the statute against gaming, within the jurisdiction where the question was raised: baccarat,[2] bagatelle,[3] baseball,[4] billiards,[5] bowls,[6] cards, generally,[7] cock-fighting,[8] dice-throwing[9],

the statute against gaming, must be construed according to the intent of the legislature, and includes any banking-game, though not named in the act. Randolph *v.* State, 9 Tex. 521.

**Changing Name of Game.**—The statute cannot be evaded by calling the game or the stakes by some unusual name. State *v.* Leicht, 17 Iowa 28; State *v.* Cooster, 10 Iowa 453; State *v.* Maurer, 7 Iowa 406; Harless *v.* U. S., 1 Morr. (Iowa) 169; Smith *v.* State, 17 Tex. 191.

1. An Ohio Statute (1 S. & C. 664) makes it an offence for any person or persons to play at any games whatsoever, for money or property. See Carper *v.* State, 27 Ohio St. 572.

2. Jenks *v.* Turpin, 13 Q. B. Div. 505; s. c., 50 L. T. (N. S.) 808.

3. **In Virginia** betting on "bagatelle" is a violation of Virginia Code, ch. 198 § 4, prohibiting "any game, except bowls, chess," etc. Neal's Case, 22 Gratt. (Va.) 917.

4. **In Michigan** pools on baseball games are gaming, within the statute. People *v.* Weithoff, 51 Mich. 203; s. c., 47 Am. Rep. 557.

5. Sikes *v.* State, 67 Ala. 77; People *v.* Harrison, 28 How. (N. Y.) Pr. 247.

**Billiards.—In Alabama** a "billiard-table" within Alabama Code, § 4213, may be a table with or without pockets, on which billiards can be played. Sikes *v.* State, 67 Ala. 77.

A "game," within said section 4231, need not be what is technically called billiards, but it must be a kindred game, which is played with balls and cues, or some substitute for them. And "playing" means not mere sporting; it must be at least the beginning of a game. Sikes *v.* State, 67 Ala. 77. See People Sergeant, 8 Cow. (N. Y.) 138; State *v.* Bristow, 41 Tex. 146; Barker *v.* State, 12 Tex. 273.

**In Mississippi,** it seems that a different rule prevails. Wortham *v.* State, 59 Miss. 179.

6. **Bowls.**—A statute prohibited the use of a house without a license "for the purpose of playing at billiards, cards, dice, or any other unlawful game." This was *held* to include the game of "bowls." Com. *v.* Goding, 44 Mass. (3 Metc.) 130. See State *v.* Gupton, 8 Ired. (N. C.) L. 271, where bowls is mentioned as a game of skill.

7. Mitchell *v.* State, 55 Ala. 160; Jacobson *v.* State, 55 Ala. 151; State *v.* Albertson, 4 Blackf. (Ind.) 251; Eubanks *v.* State, 5 Mo. 450; Remington *v.* State, 1 Oreg. 281; Frisbie *v.* State, 1 Oreg. 264; Com. *v.* Terry, 2 Va. Cas. 77. See State *v.* Mann, 2 Oreg. 238; Howlett *v.* State, 5 Yerg. (Tenn.) 145.

**Gambling Device.—In Kansas** a pack of cards is not a gambling device, within the meaning of the act regulating crimes and punishments. State *v.* Hardin, 1 Kan. 474. In State *v.* Stillwell, 16 Kan. 24, however, this case was somewhat doubted, and it was *held* that it could be charged in the indictment that they were such, but a failure to do so would render the indictment bad. It was said: "Cards may or may not be a gambling device, just as they are used and intended to be used. A person may bet on a game of cards without betting on a gambling device, or on a game played by means of a gambling device. Suppose that A and B play merely for amusement, with a deck of cards kept merely for amusement, and C and D bet on the game, would anyone claim that C and D bet on a gambling device, or on a game played by means of a gambling device? And a person may play cards for money without betting on them. Suppose a person is hired to play cards for others to bet on, or for the purpose of showing his skill, or to teach others the tricks that may be performed with cards, would he not be playing for money, or for some other valuable consideration?"

8. Com. *v.* Tilton, 49 Mass. (8 Metc.) 232; Bagley *v.* State, 1 Humph. (Tenn.) 486; Johnson *v.* State, 4 Sneed (Tenn.) 614.

**Implements of Gaming.—Game Cocks** are not implements of gaming. Coolidge *v.* Choate, 52 Mass. (11 Metc.) 79.

9. Darling Jones *v.* State, 26 Ala. 155.

**Throwing Dice.**—Under an indictment for gaming, the defendant may be convicted on proof "that he and another each put up money and threw dice for it, by placing the dice in a box

dominoes,[1] betting upon election,[2]

and throwing three times each, the one throwing the highest number taking the money," although it is also shown "that the mode of procedure and of throwing the dice was the same as in the case of raffling for property." Darling Jones *v.* State, 26 Ala. 155.

**In Texas.**—Prior to the act of March 5, 1881, amendatory of articles 364-365 of the Penal Code, and which took effect ninety days after its passage, the throwing of dice was not *per se* in violation of any law of the state. Whitney *v.* State, 10 Tex. App. 377.

**1. Euchre with Dominoes.**—To authorize a conviction under an indictment for gaming, on proof that the defendant played a game of euchre with dominoes, it must be referred to the jury to decide: 1. Whether that game, when played with dominoes, is substantially the same as when played with cards; and, 2. Whether dominoes had become, at the time of the defendant's playing, a device or substitute for cards in playing euchre, or were in fact so used in that particular game in which the defendant participated. Harris *v.* State, 31 Ala. 362; s. c., 33 Ala. 373.

**In England** this rule does not prevail. Reg. *v.* Ashton, 1 El. & Bl. 286.

**2.** Givens *v.* Rogers, 11 Ala. 543; State *v.* Mahan, 2 Ala. 340; McClurkin *v.* Detrich, 33 Ill. 349; Morgan *v.* Pettit, 4 Ill. (3 Scam.) 525; Com. *v.* Kennedy, 15 B. Mon. (Ky.) 531; Com. *v.* Kirk, 4 B. Mon. (Ky.) 1; Com. *v.* Pash, 9 Dana (Ky.) 31; Doyle *v.* Comrs. of Baltimore County, 12 Gill & J. (Md.) 44; Sharkey *v.* State, 33 Miss. 353; Williams *v.* State, 20 Miss. (12 S. & M.) 58; Veach *v.* Elliott, 1 Ohio St. 139; Com. *v.* Wells, 110 Pa. St. 462; s. c., 1 Cent. Rep. 232; Quarles *v.* State, 5 Humph. (Tenn.) 561; State *v.* Cross, 2 Humph. (Tenn.) 301; State *v.* McLelland, 4 Sneed (Tenn.) 437. *Compare* State *v.* Smith, Meigs (Tenn.) 99; s. c., 33 Am. Dec. 132.

**Betting on Election—Betting by Proxy.**—On an indictment, under the statute of Mississippi, for betting on an election, it will not relieve defendant from the penalty imposed by the act, to show that he did not himself make the bet, but procured another to make it for him. Williams *v.* State, 20 Miss. (12 Smed. & M.) 58.

**Primary or Nominating.**—Statutes against betting at elections do not apply to primary or nominating elections. Com. *v.* Wells, 110 Pa. St. 462, s. c., 1 Cent. Rep. 232.

**Election in Another State.**—Under the Tennessee Statute of 1841, ch. 31, providing that "whoever shall bet on any election in this state shall be guilty," etc., it has been *held*, that neither betting in that state on an election in another state, nor betting on the result of an election in that state after it has transpired, are indictable under the statute. State *v.* McLelland, 4 Sneed (Tenn.) 437.

**The Mississippi** statute to suppress gaming, in which there is a provision against betting money upon the result of an election, extends to the betting of money in that state upon the result of an election held in another state. Sharkey *v.* State, 33 Miss. 353.

**Local Election.**—A bet upon the vote of a county in a general election, or of a precinct in a district or county election, is a bet upon an election, and within the statute. Com. *v.* Kennedy, 15 B. Mon. (Ky.) 531.

**Particular Candidate.**—The statute against betting on elections may be violated by betting on the vote of a particular candidate, as, that he will beat some other. Com. *v.* Pash, 9 Dana (Ky.) 31.

**Betting After Election.**—Betting upon the uncertain result of an election, whether made before or subsequent to the time of holding such election, has been *held* to be indictable. Miller *v.* State, 33 Miss. 356; Quarles *v.* State, 5 Hump. (Tenn.) 561. But betting on the result of an election, after the election has been consummated, is not within the Alabama statute of 1830 (Aik. Dig. 209, § 49; State *v.* Mahan, 2 Ala. 340); nor the Indiana statute (State *v.* Henderson, 47 Ind. 127; Woodcock *v.* McQueen, 11 Ind. 14; McHatton *v.* Bates, 4 Blackf. (Ind.) 63); nor the Missouri statute, Hickerson *v.* Benson, 8 Mo. 8; s. c., 40 Am. Dec. 115.

In the last case the court says: "We are not apprised of any rule of construction, or principle of public policy, which could warrant a court in declaring an election to be a game, within the meaning of our statute. It is apparent that if such construction could be placed upon this act, all wagers whatsoever, not only such as contravene principles of public policy and sound morality, but such as are made on subjects of entire indifference, and events in them-

equality,[1] faro,[2] foot-racing,[3] gift enterprise,[4] horse-racing,[5]

selves of no importance, might, with equal propriety, and for similar reasons, be embraced within its provisions. A horse-race has been *held* to be a game or gambling device, within the meaning of our statute; but an election is a political institution, essential to the existence and operation of our government, and recognized by the constitution and laws. It is difficult to see how such an institution could have been in the contemplation of the legislature when they enacted laws against games and gambling devices. There was, therefore, no error in the opinion of the circuit court on this point. The bet was, however, clearly against public policy, and consequently void at common law. Whether a bet be made previously to an election, on its event, or subsequently on some collateral matter connected with the canvass, repeated adjudications, both in England and in this country, declare such wagers illegal, upon principles of public policy and sound morality." See Rust *v.* Gott, 9 Cow. (N. Y.) 173; s. c., 18 Am. Dec. 497; Bunn *v.* Riker, 4 Johns. (N. Y.) 438; s. c., 4 Am. Dec. 292; Allen *v.* Hearn, 1 T. R. 56.

**1. "Equality"—Other Device.**—The words "or other device," in the act forbidding gaming (Laws of 1797, ch. 110), are not to be considered as too uncertain; and the game which is commonly called "equality" is a "device" prohibited by that act. U. S. *v.* Speeden, 1 Cr. C. C. 535.

**2.** State *v.* Doon, R. M. Charlt. (Ga.) 1; State *v.* Markham, 15 La. An. 498; Allen *v.* Watson, 2 Hill (S. C.) L. 319.

**Faro Table Taxed.**—The fact that a tax is imposed upon a faro-table does not authorize the use of it for the purpose of gaming. State *v.* Doon, R. M. Charlt. (Ga.) 1. But see Fagan *v.* State, 21 Ark. 390, as to when playing at faro is not unlawful. Under the California statute (Penal Code, § 330), one who merely bets at a game of faro is not guilty of gaming; nor is such person an accessory to the crime, as the intent in the two cases is quite different. *Ex parte* Ah Yem, 53 Cal. 246.

**Dealing Faro.**—It is not necessary that the state should prove the dealing of faro several times, in order to show a violation of the statute; once will be sufficient. State *v.* Markham, 15 La. An. 498. In Allen *v.* Watson, 2 Hill (S. C.) L. 319, the court say that faro will be presumed to be unlawful in every state.

**3.** Brown *v.* Berkeley, Cowp. 281. *Compare* Batty *v.* Marriott, 5 C. B. 818; Emery *v.* Richards, 14 Mees. & W. 728; Coombes *v.* Dibble, L. R., 1 Ex. 248, in which racing for a stake is *held* to be lawful.

**4. Presenting a Ticket to Every Customer** who purchases of the person presenting it a certain amount in value of goods, which ticket entitles the holder to one guess as to the number of beans contained in a glass globe exhibited, and the one guessing the nearest to be entitled to a valuable prize, is a game of chance or gambling, and subjects the person advertising it to penalty, under a statute declaring that "whoever writes, prints, advertises, or publishes in any way an account of any lottery, gift enterprise, or scheme of chance of any kind or descriptions, by whatever name, style or title the same may be denominated or known," shall be subject to a fine. Hudleson *v.* State, 94 Ind. 426; s. c., 5 Cr. L. Mag. 24.

**5.** Redman *v.* State, 33 Ala. 428; Dyer *v.* Benson, 69 Ga. 190; Garrison *v.* McGregor, 51 Ill. 473; Tatman *v.* Strader, 23 Ill. 493; Robb *v.* State, 52 Ind. 216; Wade *v.* Deming, 9 Ind. 35; State *v.* Ness, 1 Ind. 64; Cheesum *v.* State, 8 Blackf. (Ind.) 332; Cain *v.* McHarry, 2 Bush (Ky.) 263; Ellis *v.* Beale, 18 Me. 337; s. c., 36 Am. Dec. 726; Morgan *v.* Beaumont, 121 Mass. 7; People *v.* Weithoff, 51 Mich. 203; s. c., 47 Am. Rep. 557; Hasket *v.* Wootan, 1 Nott & McC. (S. C.) 180; Boynton *v.* Curle, 4 Mo. 599; Shropshire *v.* Glascock, 4 Mo. 336; VanValkenburgh *v.* Torrey, 7 Cow. (N. Y.) 252; Gibbons *v.* Gouveneur, 1 Den. (N. Y.) 170; McKeon *v.* Caherty, 1 Hall (N. Y.) 300; Watson *v.* State, 3 Ind. 123; Wood *v.* Wood, 3 Murph. (N. C.) L. 172; State *v.* Blackburn, 2 Coldw. (Tenn.) 235; Goldsmith *v.* State, 1 Head (Tenn.) 154; Fidler *v.* State, 7 Humph. (Tenn.) 508; State *v.* Fidler, 7 Humph. (Tenn.) 502; State *v.* Posey, 1 Humph. (Tenn.) 384; Huff *v.* State, 2 Swan (Tenn.) 279; State *v.* Catchings, 43 Tex. 654; King *v.* State, 3 Tex. App. 7; Higginson *v.* Simpson, L. R., 2 C. P. Div. 76; Beeston *v.* Beeston, L. R., 1 Ex. Div. 13; Tollett *v.* Thomas, L. R., 6 Q. B. 515. *Compare* State *v.*

keno,[1] lotto,[2] pico or peco,[3] poker,[4] pool,[5] the buying and selling of pools,[6]

Rorie, 23 Ark. 726; Harless *v.* U. S., 1 Morr. (Iowa) 169; Gamble *v.* State, (Md. App.) Md. L. Rec. 147; James *v.* State, (Md.) 20 Rep. 176; State *v.* Lemon, 46 Mo. 375; State *v.* Hayden, 31 Mo. 35; Harrison *v.* State, 4 Coldw. (Tenn.) 196; McElroy *v.* Carmichael, 6 Tex. 456; Shelton's Case, 8 Gratt. (Va.) 592; Rice *v.* State, 13 Wash. L. Rep. 407; Hirst *v.* Molesbury, L. R., 6 Q. B. 130; Coombes *v.* Dibble, L. R., 1 Ex. 248; Bentick *v.* Connop, 5 Q. B. 693; Challand *v.* Bray, 1 Dowl. P. R., N. S. 783; Evans *v.* Pratt, 4 Scott N. R. 378; Holmes *v.* Sixsmith, 7 Ex. 802.

**Place of Race—Betting on a Horse Race,** which is not run on a path kept according to the statutes for the purpose of turf-racing, is an indictable offence. A race-path, within the meaning of the statutes which legalize horse racing, is such as is kept under a license and the payment of an annual tax to the state. Huff *v.* State, 2 Swan (Tenn.) 279.

An indictment alleged an unlawful betting upon a horse race, which was not run "upon a path or track made or kept for the purpose of horse racing." *Held*, that this was not within the exemption of the act of 1833 against gaming, and was an indictable offence. State *v.* Blackburn, 2 Coldw. (Tenn.) 235; State *v.* Posey, 1 Humph. (Tenn.) 384.

Under the act of 1833, ch. 10, § 2, it is an indictable offence to race a horse on or along a public road, although no bet may have been made on the race. State *v.* Fidler, 7 Humph. (Tenn.) 502.

A party cannot be prosecuted under the act for betting on, and running a horse race along, a public road, as two distinct offences. Conviction for running is a good bar to a conviction for betting on the same identical race. Fidler *v.* State, 7 Humph. (Tenn.) 508.

**Pools on Horse Races** are "games," within the statute against gaming. People *v.* Weithoff, 51 Mich. 203; s. c., 47 Am. Rep. 557.

**Race in Another State.**—A sale, in Tennessee, of a pool on a horse race to be run on a track not in Tennessee, is in violation of the statute against gaming. Edwards *v.* State, 8 Lea (Tenn.) 411.

**Charter for Race Course.**—The fact that a charter has been granted for a race course will not authorize betting thereon. Cain *v.* McHarry, 2 Bush (Ky.) 263.

1. Miller *v.* State, 48 Ala. 122; Portis *v.* State, 27 Ark. 360; Trimble *v.* State, 27 Ark. 355; Brown *v.* State, 40 Ga. 689; New Orleans *v.* Miller, 7 La. An. 651; St. Louis *v.* Sullivan, 8 Mo. App. 455; U. S. *v.* Hornibrook, 2 Dill. C. C. 229.

2. Lowry *v.* State, 1 Mo. 722.

3. **Pico,** like keno, is a gambling device, within the mischief intended to be suppressed by a statute against gambling. Gantt's Ark. Dig., §§ 1557, 1560. Euper *v.* State, 35 Ark. 629.

4. State *v.* Mann, 2 Oreg. 238.

**"Poker," or "Draw Poker."**—In Virginia, the game of poker, or draw poker, is not a game of the like kind with faro, keno, etc., and does not come within the meaning of the statute. Code of 1873, ch. 194, § 1; Nuckolls *v.* Com., 32 Gratt. (Va.) 884.

**In Manitoba,** "poker" is not in itself an unlawful game. Reg. *v.* Shaw, (Man. Q. B.) 4 Man. L. Rep. 404.

5. Rodgers *v.* State, 26 Ala. 76; State *v.* Jackson, 39 Mo. 420; Edwards *v.* State, 8 Lea (Tenn.) 411; State *v.* Kelly, 24 Tex. 182; Tuttle *v.* State, 1 Tex. App. 364; Chiles *v.* State, 1 Tex. App. 27.

**Played on Ten-pin Alley.**—It is immaterial that it is played on a ten-pin alley instead of on a billiard table. Edwards *v.* State, 8 Lea (Tenn.) 411; State *v.* Kelly, 24 Tex. 182; Tuttle *v.* State, 1 Tex. App. 364; Chiles *v.* State, 1 Tex. App. 27.

**Licensed Table.**—Playing at "pool," either on a licensed or unlicensed billiard table, is gaming, under Pasch. Dig., art. 2050, if money is wagered on the game. Tuttle *v.* State, 1 Tex. App. 364. But see Chiles *v.* State, 1 Tex. App. 27.

**In Alabama.**—Under an indictment for betting "at a game of pool at a public place enumerated in § 3243 of the code," the defendant may be convicted, on proof that he played pool at a table regularly licensed for billiards, as a license to keep a billiard table does not authorize its use for the game of pool. Rodgers *v.* State, 26 Ala. 76.

6. People *v.* Weithoff, 51 Mich. 203; s. c., 1 Den. L. J. 186; 15 Chic. L. N. 404.

**Definition of Pool.**—A rather indefinite definition of "pool" is given by Mr.

"ramps"[1] rondo,[2] shooting matches,[3] sleight-of-hand games,[4] dealing in stocks and futures,[5]

JUSTICE MILLER, in Kilbourne *v.* Thompson, 103 U. S. 168. The "pool" in question was a "real estate pool." He said: "The word 'pool,' in the sense here used, is of modern date, and may not be well understood, but in this case it can mean no more than that certain individuals are engaged in dealing in real estate as a commodity of traffic." In Harris *v.* White, 81 N. Y. 532, it was said by FOLGER, J.: "There is no proof of what the buying of pools is; probably it is a device by which ordinary money can be got from others by taking the risk of losing one's own." Mr. Browne says (Common Words and Phrases), 324: "This modern 'pool' differs from that of Siloam in two particulars; it is always 'disturbed,' and nobody who descends into it ever comes out cured." Dyer *v.* Benson, 69 Ga. 609.

**On Horse Races.**—Pool selling on horse races is not gambling, within the statute. James *v.* State, (Md. App.) 20 Rep. 176.

1. See Bryan *v.* State, 26 Ala. 65.

2. Ramey *v.* State, 14 Tex. 409; Barker *v.* State, 12 Tex. 273.

**Rondo on Billiard Table.**—The word "billiards," as used in the statute, is to be understood in its usual acceptation, and the license of a billiard table does not authorize betting on the event of a game of rondo played on a billiard table. Barker *v.* State, 12 Tex. 273.

But it has been *held* in Arkansas and Texas that "rondo" is not a gambling game, within the statute prohibiting banking games. State *v.* Hawkins, 15 Ark. 259; Barker *v.* State, 12 Tex. 273.

3. **Shooting Matches.**—The wagering of property on the result of a shooting match, had within two hundred yards of a public road of the second class, is an indictable offence in Tennessee, such shooting being rendered unlawful by the act of 1821, ch. 68, § 1. All the statutes upon the subject of gaming are to be taken together as one law. In this view the shooting match prohibited by the act of 1821, ch. 68, § 1, is not within the exemption of the act of 1817, ch. 61, § 7; Myers *v.* State, 3 Sneed (Tenn.) 98.

4. **"Three-card Monte." — "Strap Game."**—The Iowa law of 1876, ch. 102, deeming guilty of swindling "whoever by means of three-card monte, so called, or any other form of device, slight-of-hand, or other means whatever, by use of cards or other instruments of like character, obtains from another person any money or other property," is not restricted to the use of cards, but may apply to the sleight-of-hand game known as the strap game. State *v.* Quinn, 47 Iowa 368.

5. **Stocks and Futures—Broker or Middleman.**—Under the laws of Arkansas, act of March 20, 1888 (Mansf. Dig., §§ 1848, 1849), a broker or middleman, operating between buyer and seller, and bringing them together for the purpose of dealing in "grain futures," no *bona fide* sale and delivery of property being intended, is a gambler, even though he merely receives a commission on the sale, and has no other interest in the transaction. Fortenbury *v.* State, 47 Ark. 188; s. c., 8 Cr. L. Mag. 508. In this case the court say: "The plaintiff in error (Fortenbury) was convicted of gambling in grain futures, and was fined $250. Motions in arrest of judgment and for a new trial were denied. The indictment charges the offence in the language of the statute, which is as follows: 'Section 1. That the buying or selling, or otherwise dealing in what is known as *futures*, either in cotton, grain, or anything whatsoever, with a view to profit, is hereby declared to be gambling.' The second section makes such dealing a misdemeanor, punishable by fine, and for the second offence by thirty days' imprisonment in the county jail. Act March 30, 1880 (Mansf. Dig., §§ 1848, 1849). It is argued that this act is void as being in restraint of trade, and it may be conceded that it is loosely drawn. It does not define the offence that was intended to be prohibited, except in the most general terms. It does not declare of what a dealing in futures consists, and it does not draw the line between lawful contracts for the future delivery of commodities and gambling ventures. Certainly the legislature did not intend to impose any restrictions upon legitimate commerce, but only to destroy the parasite that infests it. Contracts for future delivery, if entered into in good faith, and with an actual intention of fulfillment, are as valid as any other species of contract. A farmer may sell and agree to deliver his wheat or his cotton for a stipulated price before it is harvested. Nay, one may sell

tantan,[1] thimble,[2] "tossing."[3]

goods to be delivered at a future day which he has not in actual or potential possession, but which he intends to go into the market and buy. But this is not what is commonly known as 'dealing in futures.' This phrase has acquired the signification of a mere speculation upon chances, where the grain, cotton or stock dealt in exists only in imagination, and where no delivery is contemplated, but the parties expect to settle upon the difference in the market. When so limited by judicial interpretation, the statute is not inconsistent with public policy. It forbids and punishes wagering contracts; that is, contracts in which the parties stipulate that they shall gain or lose upon the happening of a certain event, in which they have no interest, except that arising from the possibility of such gain or loss. . . . The plaintiff in error kept a 'bucket-shop' in Little Rock. This term seems, from the explanation of the witnesses, to denote a place where wagers are made upon the fluctuations in the price of grain and other commodities. The course of dealing corresponds with that described in the note to the case of Cobb *v.* Prell, 5 McCr. C. C. 85. A speculator comes to a commission firm and orders them to purchase a quantity of grain or stock for him. He does not pay for it, but simply deposits with the commission firm, as a 'margin,' a proportion—say 10 per cent.—of the cash value of the grain or stock 'bought' for him. The grain or stock is then purchased and held by the commission man, subject to the order of the speculator. If prices advance, he orders a sale at the advance and pockets the profits. If the prices recede, the 'margin' stands as security to protect the commission man, if he is compelled to sell at a loss. If the prices go so low as to absorb the entire 'margin,' more 'margins' are called for, and if the speculator fails to respond he is 'closed out;' that is, the commission man sells the grain or stock at a loss and reimburses himself out of his customer's margin. Any person, who was able to put up the necessary margin, could buy or sell an unlimited quantity of grain or cotton, without regard to his financial ability to meet such obligations. He was required to sign a printed form, importing, on its face, a contract for the future delivery of the article contracted for; but in none of the instances proved at the trial did the customer expect or desire a delivery. The plaintiff in error himself testified that he had carried on the business in Little Rock for six months, selling, some days, as high as 250,000 or 300,000 bushels of wheat, but that he never received or delivered any commodity, always paying or receiving the difference. . . . The plaintiff in error received for himself or his principals a so-called commission of one-fourth of a cent on each bushel of grain bought or sold. This sum represents in reality the odds which the customer gave them in the bet on the future of the market."

The following games or sports

**Gambling Under the Guise of Trading in Stocks,** bonds, petroleum, cotton, grain, provisions or other commodities is prohibited by the Missouri statute, act of March 19, 1887, L. 1887, p. 171.

**"Option" Contracts.**—See Kirkpatrick *v.* Bonsall, 72 Pa. St. 155; Smith *v.* Bouvier, 70 Pa. St. 327; Brua's Appeal, 55 Pa. St. 294.

**1. The Chinese Game of "Tantan"** is a game of pure chance, and, when played for anything of value, constitutes gambling within the inhibition of the statute. *In re* Lee Tong, (Oreg.) 5 Cr. L. Mag. 67; s. c., 18 Fed. Rep. 253. See People *v.* Sam Lung, 70 Cal. 515.

**2. "Thimble," or "Thimble and Balls."**—The statute against gaming "at any faro-bank, or at any other table or bank of the same or like kind, under any denomination whatsoever," includes the game called "thimble, or thimbles and balls." State *v.* Red, 7 Rich. (S. C.) L. 8.

**3. Wagering by "Tossing."**—The prisoners were indicted and convicted under 8 & 9 Vict., ch. 109, § 17, of obtaining, by fraud and unlawful device and ill-practice in playing at a certain game or sport, to wit, in and by wagering on the event of a certain game or sport, a watch and other things from the prosecutor. The evidence was that the prosecutor was induced to go to a public house and drink and toss for wagers with one of the prisoners, and the event was that the prosecutor lost, and the prisoners took away the property stated. *Held*, that this is a sport, pastime or exercise, if not a game, within the meaning of section 17 of 8 & 9 Vict., ch. 109. Reg. *v.* O'Connor, 15 Cox C. C. 3; s. c., 45 L. T. 512; 46 J. P. 214.

have been held not to be within the statute: backgammon,[1] cricket,[2] foot-ball,[3] quoits,[4] rowing matches,[5] shuffle-board,[6] ten-pins,[7] wrestling matches.[8]

**3. The Wager.**—*a.* WHO MAY BET OR WAGER.—To constitute the offence of unlawful gaming, it is not necessary that the offender both play the game or participate in the act upon which the bet is made, and lay the wager. If a party plays at a game knowing that bystanders or others are betting on it, but is not himself interested in any stake, he is not guilty of unlawful gaming;[9] but persons betting or wagering, or being in any way interested in a stake depending upon a game played by others, or in the determination of some act or event to be brought about by others, are guilty of the offence.[10] So, also, are persons looking on and encouraging a prohibited game, although they do not bet.[11]

*b.* WHAT CONSTITUTES A BET OR WAGER.—(1) *Time and Manner of Betting.*—The bet is complete when the offer to bet is accepted; and placing money on a gaming table without objection by the player or owner of the game is a sufficient offer and

1. **Backgammon.**—In *Alabama*, a statute prohibited the playing, in certain places, "at any game or games with cards or dice." This was *held* not to prohibit the playing of "backgammon" in such places, though played with dice. Wetmore *v.* State, 55 Ala. 198. This was upon the ground that the dice did not determine the result of the game; that was determined by the moves of the men by the opposing players—by the skill of the contestants.

2. Hodson *v.* Terrill, 1 Cromp. & M. 797; Walpole *v.* Saunders, 7 Dow. & Ry. 130; Jeffreys *v.* Walter, 1 Wilson 220.

3. Manby *v.* Scott, 1 Mod. 136.

4. Manby *v.* Scott, 1 Mod. 136.

5. Bostwick *v.* R., 3 M. Dig. 274.

6. **Shuffle-board** is not within the North Carolina statute, that being a game of skill. State *v.* Bishop, 8 Ired. (N. C.) L. 266.

7. State *v.* Gupton, 8 Ired. (N. C.) L. 271.

8. **Wrestling Matches,** if not prize fights, are lawful, in England, when played for a stake. Kennedy *v.* Gad, 2 Car. & P. 376.

9. Strawhern *v.* State, 37 Miss. 422. *Compare* Smith *v.* State, 5 Humph. (Tenn.) 163.

10. Bone *v.* State, 63 Ala. 185; Mitchell *v.* State, 55 Ala. 160; Jacobson *v.* State, 55 Ala. 151; Ray *v.* State, 50 Ala. 172; Napier *v.* State, 50 Ala. 168; Schuster *v.* State, 48 Ala. 199; Bass *v.* State, 37 Ala. 469; Ward *v.* State, 22 Ala. 16; Givens *v.* Rogers, 11 Ala. 543; State *v.* Mahan, 2 Ala. 340; Flynn *v.* State, 34 Ark. 441; State *v.* Carnikow, 20 Ark. 160; Wharton *v.* State, 13 Ark. (8 Eng.) 462; McClurken *v.* Detrich, 33 Ill. 349; Morgan *v.* Pettit, 4 Ill. (3 Scam.) 529; Smoot *v.* State, 18 Ind. 18; Parsons *v.* State, 2 Ind. 499; Com. *v.* Kennedy, 15 B. Mon. (Ky.) 531; Com. *v.* Kirk, 4 B. Mon. (Ky.) 1; Doyle *v.* Baltimore County, 12 Gill & J. (Md.) 488; Miller *v.* State, 33 Miss. 356; Torney *v.* State, 13 Mo. 455; State *v.* Bates, 10 Mo. 166; Hickerson *v.* Benson, 8 Mo. 8; Eubanks *v.* State, 5 Mo. 450; Veach *v.* Elliott, 1 Ohio St. 139; Barret *v.* Hampton, 2 Brev. (S. C.) 226; State *v.* Blackburn, 2 Coldw. (Tenn.) 235; Quarles *v.* State, 5 Humph. (Tenn.) 561; Bagley *v.* State, 1 Humph. (Tenn.) 486; State *v.* Posey, 1 Humph. (Tenn.) 384; Dobkins *v.* State, 2 Humph. (Tenn.) 424; State *v.* Cross, 2 Humph. (Tenn.) 301; State *v.* McLelland, 4 Sneed (Tenn.) 427; State *v.* Bristow; 41 Tex. 146; State *v.* Blair, 41 Tex. 30; Blair *v.* State, 32 Tex. 474; Bachellor *v.* State, 10 Tex. 258, 262; Crow *v.* State, 6 Tex. 334; Dunman *v.* Strother, 1 Tex. 89; Anderson *v.* State, 9 Tex. App. 177; Ben *v.* State, 9 Tex. App. 107; Stone *v.* State, 3 Tex. App. 675; Com. *v.* Shelton, 8 Gratt. (Va.) 592.

11. State *v.* Ebert, 40 Mo. 186; State *v.* Hall, 32 N. J. L. (3 Vr.) 158; Fugate *v.* State, 2 Humph. (Tenn.) 397; Johnson *v.* State, 4 Sneed (Tenn.) 614; Howlett *v.* State, 5 Yerg. (Tenn.) 145.

acceptance, and renders the parties participating guilty of gaming,[1] whether the game is finished or not.[2] The stake or wager need not be put up before the beginning of the game, if a mutual agreement is made to pay the agreed amount according to the result.[3]

(2) *Value of the Thing Staked.*—The stake must have or represent value, either intrinsic, or by agreement between the parties.[4] But the amount is immaterial,[5] and so is the character of the thing which is actually bet and staked, if it represents value which may be lost or won. Thus, playing for checks or chips, notes or instruments representing certain fixed sums with which they are to be redeemed on presentation,[6] or for the hire of the game, or of the table on which it is played,[7] or for the price of the liquor

1. State *v.* Welch, 7 Port. (Ala.) 463.

2. State *v.* Welch, 7 Port. (Ala.) 463. *Compare* Bagley *v.* State, 1 Humph. (Tenn.) 490.

3. State *v.* Leicht, 17 Iowa 28.

4. See Owens *v.* State, 52 Ala. 213; Clark *v.* State, 49 Ala. 37; State *v.* Wade, 43 Ark. 77; s. c., 51 Am. Rep. 560; Fagan *v.* State, 21 Ark. 390; State *v.* Recorder, 4 Harr. (Del.) 554; Porter *v.* State, 51 Ga. 300; Harbaugh *v.* People, 40 Ill. 294; Gibbons *v.* People, 33 Ill. 442; Middaugh *v.* State, 103 Ind. 78; s. c., 2 N. E. Rep. 292; Carr *v.* State, 50 Ind. 178; Crawford *v.* State, 33 Ind. 304; Mount *v.* State, 7 Ind. 654; Hamilton *v.* State, 25 Ind. 426; Alexander *v.* State, 99 Ind. 450; s. c., 6 Cr. L. Mag. 506; Blanton *v.* State, 5 Blackf. (Ind.) 560; State *v.* Albertson, 2 Blackf. (Ind.) 251; State *v.* Book, 41 Iowa 550; s. c., 1 Am. Cr. Rep. 234; State *v.* Bishel, 39 Iowa 42; State *v.* Leitch, 17 Iowa 28; State *v.* Cooster, 10 Iowa 453; State *v.* Maurer, 7 Iowa 406; McDaniel *v.* Com., 6 Bush (Ky.) 326; Ashlock *v.* Com., 7 B. Mon. (Ky.) 44; Com. *v.* Gourdier, 80 Mass. (14 Gray) 390; Com. *v.* Taylor, 80 Mass. (14 Gray) 26; Blewett *v.* State, 34 Miss. 606; Lord *v.* State, 16 N. H. 325; State *v.* Leighton, 23 N. H. (3 Fost.) 167; Brown *v.* State, 49 N. J. L. (20 Vr.) 61; State *v.* Hall, 32 N. J. L. (3 Vr.) 158; Hitchins *v.* People, 39 N. Y. 454; People *v.* Sergeant, 8 Cow. (N. Y.) 139; People *v.* Cutler, 28 Hun (N. Y.) 465; Ward *v.* State, 17 Ohio St. 32; Walker *v.* State, 2 Swan (Tenn.) 287; Walton *v.* State, 14 Tex. 381; Bachellor *v.* State, 10 Tex. 261; Com. *v.* Terry, 2 Va. Cas. 77; Nuckolls *v.* Com., 32 Gratt. (Va.) 884; Parsons *v.* Alexander, 1 Jur. N. S. 660.

5. State *v.* Albertson, 2 Blackf. (Ind.) 251.

6. Porter *v.* State, 51 Ga. 300; s. c., 1 Am. Cr. Rep. 232; Gibbons *v.* People, 33 Ill. 442; Ashlock *v.* Com., 7 B. Mon. (Ky.) 44; Walton *v.* State, 14 Tex. 381.

**"Checks," "Chips," etc.**—In Porter *v.* State, 51 Ga., 300; s. c., 1 Am. Cr. Rep. 232, the court say: "The statute makes gaming to consist of playing, etc., 'for money or other thing of value.' Why are not 'checks,' 'chips,' and things of this character, just as much things of value as bank notes? They are both of them only the representatives of value. If a check is good, when presented to the banker or dealer, for twenty-five cents or one dollar, according to its stipulated value, we are unable to see how it fails to come within the statute, any more than if the keeper of the bank had written his formal promise to pay, or the bet had been for as much money as the check or chip represents. In fact, that is the truth of the case. The bet is really for money, and the check is merely to aid in keeping the account, as well as for convenience."

**Checks Obtained Without Payment.**—On an indictment for betting at faro, the betting is the gist of the offence; and where defendant proves that he obtained checks from the banker without paying anything for them, and only used them in betting, he should be acquitted. Fagan *v.* State, 21 Ark. 390.

7. **Billiards.**—It is gaming to play on a billiard or pool table, where the loser pays the price of the game or the hire of the table. Owens *v.* State, 52 Ala. 213; Clark *v.* State, 49 Ala 37; State *v.* Records, 4 Harr. (Del.) 554; Crawford *v.* State, 33 Ind. 304; Hamilton *v.* State, 25 Ind. 426; Alexander *v.* State, 99 Ind. 450; s. c., 6 Cr. L. Mag. 506; Blanton *v.* State, 5 Blackf. (Ind.) 560; State *v.* Book, 41 Iowa 550; s. c., 1 Am.

or cigars used or to be used by the parties.[1]

Cr. Rep. 234; State *v.* Leighton, 23 N. H. (3 Fost.) 167; Ward *v.* State, 17 Ohio St. 32. *Compare* Harbaugh *v.* People, 40 Ill. 294; Blewett *v.* State, 34 Miss. 606; State *v.* Hall, 32 N. J. L. (3 Vr.) 158; People *v.* Sergeant, 8 Cow. (N. Y.) 139; Nuckolls *v.* Com., 32 Gratt. (Va.) 884; Parsons *v.* Alexander, 1 Jur. N. S. 660.

There is a marked conflict of authority on this question, and its determination must, to a great degree, depend upon the construction given to the statute under which the act is sought to be made an offence. In Hamilton *v.* State, 25 Ind. 426, the court said: "We think that sound reason supports the authorities that hold such playing as is charged (pool or billiards) in this case to be gaming. The manifest purpose of the legislature, in its various enactments on the subject of gaming, has been to make unlawful all games of chance by which money or other articles of value may be lost or won, and the evil effects of risking small sums on the result of skill at billiards is less in degree only than the hazard of larger stakes at other games. The weight of authority is also in favor of such construction of the statute under consideration."

In Alexander *v.* State, 99 Ind. 450; s. c., 6 Cr. L. Mag. 506, the court say: "The contention is, that as the loser was to pay, and did pay, to the proprietor of the tables, the charge for the game, instead of paying that amount to the successful party, the proof does not sustain the charge in the indictment that appellant won money from Koons.

"The purpose of the statute is to suppress gaming in all its varied forms, and it should have such a reasonable construction and application as to accomplish that purpose. To adopt a theory so refined as that advanced by appellant would enable parties, by ingenious arrangements, not only to thwart the purpose of the statute, but to avoid it altogether. The arrangement here was just as much gaming as if the losing party had agreed to and had paid to the successful party the amount charged for the game, and he had paid it over to the owner of the table. To whom the money was directly paid is not so material as the fact that the game decided who should profit by the payment. If appellant had lost the games he would have lost the amount charged for them. He won the games, and thereby won the amount charged for them, or at least one-half of that amount. At the end of each game he was ten cents better off than if he had lost the game, and he was five cents better off than he would have been if, without any chance or hazard, each party had paid for his cue. That he did not actually handle the money, it seems to us, can make no difference."

On the other hand, the court say, in Blewett *v.* State, 34 Miss. 606: "To constitute gaming, one or other of the parties must expect to profit by the game. Here neither could derive such profit, because neither was entitled to the fee paid to the owner of the table. Admitting that it is the rule of the game that the loser shall pay the fee, the owner has a perfect right to make his contract in this way, the law not prohibiting this mode of contracting."

**Ten-pins.**—It is an offence to play at ten-pins, where the loser pays the hire of the alley. Mount *v.* State, 7 Ind. 654. *Compare* State *v.* Hall, 32 N. J. L. (3 Vr.) 158. In this case the court say: "The third and last question propounded to this court is whether a public ten-pin alley, kept for the hire by the game, where the practice of the loser of the game paying for the use of the alley is habitually suffered, is a common gaming house. The solution of this question depends on the consideration whether, under such circumstances, the parties playing lay a wager on the game which they play. The transaction is this: the keeper of the alley lets it to the players on the condition that the loser shall pay him for its use. It would seem to be an unnecessary refinement to say that when the players accept these terms, and play under them, that the one lays a wager with the other, dependent on the result of the play. It is obvious the parties do not play for gain; they play simply for amusement, and it seems like putting a false gloss on the affair to call this gaming. . . . The place of of amusement in question cannot, on this ground, be declared to be illegal."

1. State *v.* Wade, 43 Ark. 77; s. c., 51 Am. Rep. 560; State *v.* Albertson, 2 Blackf. (Ind.) 251; State *v.* Bishel, 39 Iowa 42; State *v.* Leitch, 17 Iowa 28; State *v.* Cooster, 10 Iowa 453; State *v.* Maurer, 7 Iowa 406; McDaniel *v.*

**4. Publicity.**—Many statutes make publicity in a game or sport a necessary element of the offence, or create a separate offence which may be committed by the playing or carrying on of any game or sport, or of certain specific games or sports, at any public place, or at a designated class of public houses or places. Thus, it is a very general rule to prohibit the playing of any game with cards, dice, or with any other like gaming device, at any tavern, inn, dram-shop or other place where intoxicating liquors are sold or kept for sale;[1] and by many statutes the playing of those games, as well as others, at any public place

Com., 6 Bush (Ky.) 326; Com. *v.* Gourdier, 80 Mass. (4 Gray) 390; Com. *v.* Taylor, 80 Mass. (14 Gray) 26; Lord *v.* State, 16 N. H. 325; Brown *v.* State, 49 N. J. L. (20 Vr.) 61; s. c., 7 Atl. Rep. 340; 5 Cent. Rep. 667; Hitchins *v.* People, 39 N. Y. 454; Bachellor *v.* State, 10 Tex. 261; Com. *v.* Terry, 2 Va. Cas. 77.

**"Playing for Beer," etc.**—In Hitchins *v.* People, 39 N. Y. 454, the keeper of a shop for the sale of beer, cigars, etc., was indicted for suffering gaming on his premises. The proof showed that he allowed his customers to play games for such articles, he furnishing them at the end of the game, and charging the loser thereof. His counsel requested the court to charge that playing for beer, cigars, etc., was not gambling, within the statute. The court refused, and the court of appeals declared that the trial court was right in denying the request, saying: "All will agree that gambling for a barrel of beer or box of cigars is within the statute. It follows that gambling for a gallon or less quantity is equally within it. No exception is made by the statute on account of the smallness of the quantity, or to the use to which it is applied by the winner."

In Bachellor *v.* State, 10 Tex. 261, the court say: "If the parties bet upon the game with the understanding that the loser shall pay the bill of the company, it was, in effect, a betting of money. It certainly was not what the parties might drink which was risked or bet upon the game. It was not property nor its representative, but it was money, which, instead of being paid by the loser to the winner, was to be paid to the dram-seller. The conviction appears to have been legal and correct, and the judgment is affirmed."

**Playing at Ten-pins for Champagne.**—The jury, on the trial of a defendant charged with gaming, rendered the following special verdict: "We find that the defendant, with some six or more other gentlemen, played at a game called ten-pins, or handicap. In this game no one played to beat any other gentleman, but each one had assigned to him a certain number of pins to get, with a certain number of balls, some more and some less, according as they were considered good or bad players. If the player did not get the number of pins assigned to him, he was to treat to a bottle of champagne. The defendant did play at this game, in Maury county, in less than six months preceding this presentment, and did sometimes, on failing to get the number of pins allotted to him, treat to a bottle of champagne, and sometimes he did not. It was agreed by the parties, at the commencement of the playing, that the treat was to be a voluntary thing, and no one need do so, unless he was perfectly willing. The jury further find that the defendant and the other gentlemen engaged in this play did not believe it to be gaming." *Held*, that these facts constituted the offence of gaming. Walker *v.* State, 2 Swan (Tenn.) 287.

1. See Dickey *v.* State, 68 Ala. 508; s. c., 4 Am. Cr. Rep. 249; Windham *v.* State, 26 Ala. 69; Ansley *v.* State, 36 Ark. 67; s. c., 38 Am Rep. 29; State *v.* Hawkins, 91 N. C. 626; State *v.* Hix, 3 Dev. (N. C.) L. 116; State *v.* Black, 9 Ired. (N. C.) L. 378; State *v.* Smitherman, 1 Ired. (N. C.) L. 14; State *v.* Keisler, 6 Jones (N. C.) L. 73; Stebbins *v.* State, 22 Tex. App. 32; s. c., 2 S. W. Rep. 617; Galbreath *v.* State, 36 Tex. 200; Johnson *v.* State, 36 Tex. 198; Cherry *v.* State, 30 Tex. 439; Shihagan *v.* State, 9 Tex. 430; Cole *v.* State, 9 Tex. 42; Watson *v.* State, 13 Tex. App. 160; Com. *v.* Terry, 2 Va. Cas. 77; Purcell's Case, 14 Gratt. (Va.) 679; Farmer's Case, 8 Leigh (Va.) 741; Sanders' Case, 5 Leigh (Va.) 751.

**The Rule in Alabama.**—Section 4207, Code of Alabama, provides: "Any per-

son who plays at any game of cards, dice, or any device or substitute for either cards or dice, at any tavern, inn, store-house for retailing spirituous liquors, or house or place where spirituous liquors are retailed, sold or given away or in any public house, highway or other public place, or any outhouse where people resort, must, on conviction, be fined," etc. Dickey *v.* State, 68 Ala. 508; s. c., 4 Am. Cr. Rep. 249.

**Sleeping Apartment Above.**—A room on the second floor of a two-story house, rented and occupied by the defendant as a sleeping apartment, is not brought within the prohibition of the statute, by the mere fact that the lower story is used by another person for the sale of spirituous liquors. Dale *v.* State, 27 Ala. 31.

**Private Room of Proprietor.**—A room in the second story of a two-story house, which is accessible only by means of a flight of steps leading up to it on the outside, and which is used by one of the proprietors of the house as a sleeping apartment, the lower room being used by the proprietors for retailing spirituous liquors, is within the prohibition of the statute against gaming at any store-house for retailing spirituous liquors, or house or place where spirituous liquors are retailed or given away. Johnson *v.* State, 19 Ala. 527.

**Bedroom Without Connection.**— An indictment for playing cards at a house used for retailing liquors—*Held*, not supported by evidence that the playing was in a bedroom over the store, in no way connected therewith, and to which the only means of exit and entrance were by a stairway outside the building. Watson *v.* State, 13 Tex. App. 160.

**Place Outside.**—Where an indictment containing four counts charges the defendant with playing cards "at a highway," "at a house where spirituous liquors were retailed," "at a public place," and "at a public house," while the evidence shows that the playing took place in a hollow more than one hundred yards from a house where spirituous liquors were retailed, and where the persons present had been drinking; that the persons playing, of whom the defendant was one, could not be seen from the grocery nor from the public road; that witness had never seen, before or since, any playing, or signs of persons having played at that place before, the evidence will not support either count in the indictment. Smith *v.* State, 23 Ala. 39.

**Room in Tavern.**—A room in a house belonging to a proprietor of a hotel or tavern, and used by him at the time for the accommodation of guests, is appurtenant to the hotel or tavern, and within the statute of playing cards at hotels and other public houses or places (Code § 4207), although situated on a separate lot, eighty or ninety feet from the hotel, and never before used for the accommodation of guests. Russell *v.* State, 72 Ala. 222.

**"Ramps."**—Under an indictment for gaming (Ala. Code, § 3243), upon demurrer to the evidence, the defendant may be convicted on proof of his having played a game of "ramps" in a store-house where spirituous liquors were at the time retailed. Bryan *v.* State, 26 Ala. 65.

**Where no Betting.**—A statute forbidding "any game of cards, dice, or other gaming device," at any tavern or dram-shop, has been *held* not to include the playing of cards without any bet or stake depending thereon. Ansley *v.* State, 36 Ark. 67; s. c., 38 Am. Rep. 29.

But it has been *held*, in Virginia, that playing cards in a tavern is unlawful gaming, whether the party bets or not. Com. *v.* Terry, 2 Va. Cas. 77.

**Player not Betting.**—Under N. C. Rev. Stat. ch. 34, § 69, "concerning crimes and punishments," it is not a misdemeanor to play at cards in a tavern, where the player does not bet on the game, but another person does. State *v.* Smitherman, 1 Ired. (N. C.) L. 14.

**Liquor License Immaterial.**—Under a suatute prohibiting gambling in any house wherein spirituous liquors are sold, it is immaterial whether the sales were licensed or not. State *v.* Hawkins, 91 N. C. 626.

**Meaning of "Premises."**—Under a statute against gaming (N. C. Rev. Stat., ch. 34, § 69), the place of gaming and the place of retailing must be the same house, or, at the least, parts of the same establishment. "The premises" mean those places only which are occupied by the retailer, with the house in which he retails, as one whole. State *v.* Black, 9 Ired. (N. C.) L. 378.

**Counting Room Attached to Saloon.**—The playing at cards for money or property, in a counting-room attached to and under the same roof with a store-room in which spirituous liquors are retailed, falls within the prohibition

whatever, is especially prohibited.[1]

The meaning of the terms "public place" and "public house" necessarily depends upon the manner and connection in which they are used in the statutes, and while it may be generally said that any place which, for the time being, is made public by the

of the North Carolina act of 1831, forbidding the playing "at any game of cards in any house where spirituous liquors are retailed, or any outhouse or store attached thereto, or any part of the premises occupied with such house." State *v.* Hix, 3 Dev. (N. C.) L. 116.

By a statute prohibiting gaming in a house where spirituous liquors are retailed, the whole house is included. Cole *v.* State, 9 Tex. 42.

**Shoe-shop.**—Where, upon the trial of an indictment for unlawfully playing cards in a tavern, it appeared that the room, in which the game took place, was a part of the house in which the tavern was kept, but had been let by the month for a shoe-shop, and was not under the control of the landlord. *Held*, that the defendants could not be convicted, under N. C. Rev. Code, ch. 34, § 75. State *v.* Keisler, 6 Jones (N. C.) L. 73.

**What is Public.**—The term "public" may be applied to a house, either on account of the proprietorship, as a court-house, which belongs to the county, or the purposes for which it is used, as a tavern, store-house, house for retailing spirituous liquors, etc. The statute against gaming appears to have had in view houses of the latter class. Shihagan *v.* State, 9 Tex. 430.

**Question for Jury.**—Whether a room attached to and constituting a part of a house kept for the purpose of retailing spirituous liquor is, in contemplation of law, one of the prohibited places, is a question for the jury. Cherry *v.* State, 30 Tex. 439.

**Rear Room with Window.**—Proof that cards were played in the rear room of a building, of which the front room was a drinking saloon, between which and the rear room there was a partition, in which was a sliding window, through which the players in the rear room were supplied with drinks from the saloon room, when ordered by raps upon the intervening partition, *held* sufficient to show such a connection with the saloon as brought the rear room within Texas Penal Code, article 355, prohibiting the playing of cards "at a house for retailing spirituous liquors." Stebbins *v.* State, 22 Tex. App. 32.

**Store House of Same Person.**—The lessee and occupier of a tavern was also the occupier, under the same lease, of a store-house, which, however, was not within the curtilage of the tavern, nor used in any way with the tavern. *Held*, that the store-house was not a part or appurtenance of the tavern, within the meaning of the statute against unlawful gaming (1 Rev. Code, ch. 147, § 16). Sanders' Case, 5 Leigh (Va.) 751. To make a separate house an appurtenance to a tavern, within the meaning of that provision, such house must be used in connection with the tavern, for the accommodation of guests, as part of the tavern. Sanders' Case, 5 Leigh (Va.) 751.

**Law Office in Tavern Lot.**—Code of Va., ch. 198, § 4, imposes a fine for gaming "at any ordinary race-field, or other public place." *Held*, that a room within the inclosure of a tavern lot, and which had, at one time, been used as an appendage to the tavern, the room above being still so used, but now rented and occupied by a third person as a law office, is not a part of the "ordinary," nor a "public place," in the sense of the act, though the occupier board at the tavern and the servants of the same attend to the room. Purcell's Case, 14 Gratt. (Va.) 679.

**Barn 200 Yards Away.**—Upon the occasion of a public muster at a tavern, certain persons were engaged in gaming in a barn two hundred yards distant from the tavern house, and in a separate inclosure, though on the same plantation the barn being sixty or seventy yards in the rear of another barn in which spirits are sold by the tavern keeper. *Held*, that the first mentioned barn was a "public place," within the meaning of the act to prevent unlawful gaming. Farmers' Case, 8 Leigh, (Va.) 741.

1. See Russell *v.* State, 72 Ala. 222; Dickey *v.* State, 68 Ala. 508; s. c., 4 Am. Cr. Rep. 249; Henderson *v.* State, 59 Ala. 89; Smith *v.* State, 52 Ala. 384; Smith *v.* State, 37 Ala. 472; s. c., 1 Ala. Sel. Cas. 84; Bentley *v.* State, 32 Ala. 596; McDaniel *v.* State, 35 Ala. 390; Moore *v.* State, 30 Ala. 550; Cain *v.* State, 30 Ala. 534; Skinner *v.* State, 30 Ala. 524; Wilson *v.* State,

assemblage of people, or to which all who wish may go at any time, or at certain specified days, and indulge in gaming; or any place whatever which is open to the public for any purpose, is a public place;[1] yet no rule can be laid down for an accurate determination of their signification in all cases. But, under statutes prohibiting certain games in public houses or public places, it has been held a violation of the law to play the prohibited games in the following places: a bedroom or other private room, if habitually used for gaming,[2] the office of a

31 Ala. 371; Glass *v.* State, 30 Ala. 529; Burnett *v.* State, 30 Ala. 19; Arnold *v.* State, 29 Ala. 46; Huffman *v.* State, 29 Ala. 40; Dale *v.* State, 27 Ala. 31; McCauley *v.* State, 26 Ala. 135; Windham *v.* State, 26 Ala. 69; Bryan *v.* State, 26 Ala. 65; Sherrod *v.* State, 25 Ala. 78; Burdine *v.* State, 25 Ala. 60; Smith *v.* State, 23 Ala. 39; Swallow *v.* State, 20 Ala. 30; Mills *v.* State, 20 Ala. 86; Coleman *v.* State, 20 Ala. 51; Bythwood *v.* State, 20 Ala. 47; Flake *v.* State, 19 Ala. 551; Roquemore *v.* State, 19 Ala. 528; Johnson *v.* State, 19 Ala. 527; Campbell *v.* State, 17 Ala. 369; Clarke *v.* State, 12 Ala. 492; State *v.* Faulkner, 2 McCord (S. C.) 438; Lowrie *v.* State, 43 Tex. 602; Holtzclaw *v.* State, 26 Tex. 682; Parker *v.* State, 26 Tex. 204; State *v.* Alvey, 26 Tex. 155; Wilcox *v.* State, 26 Tex. 145; Bledsoe *v.* State, 21 Tex. 223; State *v.* Norton, 19 Tex. 102; Redditt *v.* State, 17 Tex. 610; Wheelock *v.* State, 15 Tex. 260; Shihagan *v.* State, 9 Tex. 430; Weiss *v.* State, 16 Tex. App. 431; Feazle's Case, 8 Gratt. (Va.) 585; Com. *v.* Vandine, 6 Gratt. (Va.) 689; Windsor's Case, 4 Leigh (Va.) 680; *In re* Freeston, 1 Hurl. & Nor. 93; s. c., 36 Eng. L. & Eq. 532; Turnbull *v.* Appleton, 45 J. P. 469; Langrish *v.* Archer, L. R., 10 Q. B. Div. 44; s. c., 52 L. J. M. C. 47; 47 L. T. 548; 31 W. R. 83; 47 L. J. 295; 15 Cox C. C. 194.

1. See Smith *v.* State, 52 Ala. 384; Windham *v.* State, 26 Ala. 69; Campbell *v.* State, 17 Ala. 369; Parker *v.* State, 26 Tex. 204.

**The Term "Public Place,"** as used in the statute against gaming (Ala. Code, § 3243), does not include any of the places therein before specially mentioned, but embraces all other public places, whether they are public *per se*, or become public merely by force of circumstances; and therefore, if the evidence shows that the defendants played cards at a "public house," they cannot be convicted of playing at a "public place." Windham *v.* State, 26 Ala. 69.

**In Texas** it has been *held* that the term "public place" in Pasch. Code, § 409, on the subject of gaming, does not mean a place devoted solely to the uses of the public, but public in fact as distinguished from private, a place visited by many persons, and usually accessible to the neighboring public. Parker *v.* State, 26 Tex. 204.

Whether any specified house is public, within the meaning and intention of the statute against gaming, is a question of law; but whether a place be public, will be, in general, a question of fact. Shihagan *v.* State, 9 Tex. 430.

2. **Public Place—In Alabama** any house to which all who wish can go, night or day, and indulge in gaming, is said to be a "public place," within the meaning of the Alabama statute. The fact that it is used as a bedroom, kept locked so that no one can enter but by permission, and after surveillance from the inside, and otherwise invested with privacy, will not prevent the characteristic of a "public place" attaching to it, if it is frequented by all who wish to engage in the sports which the occupant there carries on, and for the indulgence of which he furnishes the appliances. Smith *v.* State, 52 Ala. 384.

**In Texas.**—Where a certain room of a house is designated as the place, it must appear that the room is attached to a public house, Tex. Pen. Code, arts. 355, 356, so declaring. Weiss *v.* State, 16 Tex. App. 431.

**Adjoining Rooms with Open Doors.**—A charge which assumes as matter of law that playing two games of cards in two adjoining rooms, the door being open between the rooms, while other persons were present who were not playing, would make the room in which defendant played a public place, is erroneous. Lowrie *v.* State, 43 Tex. 602.

**Private Social Gathering.**—The assemblage of eight or ten persons by invitation, at a private house or room, to which the public have not the right to go, for the purpose of playing cards, or participating in social amusements, does

toll-keeper,[1] the office of a justice of the peace,[2] a saddler's shop,[3] steamboat,[4] a ferry-boat on a navigable river,[5] an infirmary,[6] a neighborhood road,[7] a path in common use,[8] the back room of a broker's office,[9] a jury-room in a court-house,[10] a back room of a physician's office,[11] a railway carriage,[12] a private field used

not constitute such house or room "a public place," within the statute against gaming. Coleman *v.* State, 20 Ala. 51.

1. **Toll-keeper's House.**—A house was occupied by the keeper of a public toll-bridge, consisting of two rooms, separated by a partition, in which there was a door connecting them. *Held*, that if the house was merely the private residence of the toll-keeper, it is not within the prohibition of the statute, although occasional settlements for toll were made therein; but if the front room was the apartment, or office, appropriated to the transaction of the business of the bridge, such as keeping the books in relation to tolls, etc., and to which, by the very nature of the business to which it was appropriated, persons desiring to pay what they owed for toll, or to make contracts about toll, were licensed to go, and was occupied by the keeper, subject to such appropriation, business, or use, then it was a public house, within the meaning of the statute. Arnold *v.* State, 29 Ala. 46.

2. **Magistrate's Office.** — Where a house consists of two rooms, front and back, with an open space intended for a door between them, and the front room is used as a magistrate's office, the back room is also within the prohibition of the statute, although only used by partners of a dissolved firm for the occasional settlement of their outstanding accounts. Burnett *v.* State, 30 Ala. 19.

3. Bentley *v.* State, 32 Ala. 596.

4. Coleman *v.* State, 13 Ala. 602.

5. Dickey *v.* State, 30 Ala. 529.

In this case the court say: "It is true, as *held* by the court in Glass *v.* State, 30 Ala. 529, that a navigable stream is not a highway within the meaning of of the above statute, and the court below so charged the jury, but it may become a 'public place' by force of circumstances. In Coleman *v.* State, 13 Ala. 602, it was *held* that a steamboat carrying passengers and freight on a navigable river was a public place. So, likewise, a neighborhood road has been *held* to be a public place. Mills *v.* State, 20 Ala. 86. And it is manifest that the reason upon which these cases are based would embrace a ferryboat plying across a public licensed ferry; nor does it matter that the playing was at the time unseen by any observers other than the participants. It is not the fact of being unseen, but the liability to be seen, which is contemplated by the statute. No matter what degree of secrecy may be preserved or how few the number of spectators present, if the place comes within the statutory prohibition, any game at cards there is in violation of law, and indictable." Windham *v.* State, 26 Ala. 69.

6. Flake *v.* State, 19 Ala. 551.

7. **A Neighborhood Road** is a "public place," within the statute against gaming, it being shown that the playing took place near an assemblage of persons, some of whom were looking on at the playing, and others passing about at the time. Mills *v.* State, 20 Ala. 86.

8. **A Place Near and in View of a Path** used by children going to school, and other persons, is a public place, within the meaning of the statute against gaming. Henderson *v.* State, 59 Ala. 89.

9. **A Broker's Office**, where such office consists of two rooms, front and back, connected by a door, and the front room is used for the transaction of the broker's business, and contains all his books, papers and money, and the back room is used and occupied by a member of his family who pays no rent, is a public place. Wilson *v.* State, 31 Ala. 371.

10. **A Jury-room of a Court House** occupied by permission of the sheriff and one of the county commissioners as a sleeping-room, is not thereby divested of its character as a "public place," in the meaning of the gaming laws. Wilcox *v.* State, 26 Tex. 145.

11. Redditt *v.* State, 17 Tex. 610.

12. **Railway Carriage—In England** the Vagrant Act Amendment Act, 1873 (36 & 37 Vict., ch. 38, § 3), imposes a penalty upon "every person playing or betting by way of wagering or gaming, in any street, road, highway, or other, open and public place, or in any place to which the public have, or are permitted to have, access, at or with any coin,

by the public for recreation,[1] a store-house in the country,[2] a barber's shop,[3] and an outhouse where people resort.[4] And

card, etc., used as an instrument or means of such wagering or gaming, at any game or pretended game of chance." *Held*, that a railway carriage, while travelling on its journey, is within the definition "an open and public place to which the public have, or are permitted to have, access," within the meaning of this section. Langrish *v.* Archer, L. R., 10 Q. B. Div. 44; s. c., 15 Cox C. C. 194; 52 L. J. M. C. 47; 47 L. T. 548; 31 W. R. 183; 47 J. P. 295. See *In re* Freestone, 1 Hurls. & N. 93; s. c., 26 L. J. M. C. 121; 2 Jur. N. S. 525.

**Railway Platform.**—It seems that a railway platform is a public place. *Ex parte* Davis, 2 Hurls. & N. 149; s. c., 26 L. J. M. C. 178.

**1. Place Where Public Have Access.**—A colliery company had a large field of thirty acres, which they allowed the workmen and their families to use for recreation and bowling matches. Strangers were also allowed to come and play there, and were not turned away. One day T and others played at pitch-and-toss in the field. *Held*, that they were liable to be convicted, under 36 & 37 Vict., ch. 38, § 3, for playing in a place to which the public are permitted to have access. Turnbull *v.* Appleton, 45 J. P. 469.

**2. A Store House in the Country** has been *held* to be a public house, within the meaning of § 3243 of the Alabama Code; and if the house consists of two rooms, the one in front being used as a dry-goods store, the other being a shed attached thereto, and communicating with the store-room by a door, and both rooms under the control of the same person, it is, *prima facie*, an entirety. But the separate rooms of such a house may be so disconnected, by being appropriated to separate and distinct uses, as if they were in fact two distinct houses. But this presumption is not overthrown by proof that one of the rooms was used by one of the proprietors as a bedroom, and that no articles were sold there, and no accounts settled there. Huffman *v.* State, 29 Ala. 40.

**Back Room.**—The back room of a country store is a public place where it is used only as a bedroom by one of the proprietors, an unmarried man, and not for the purposes of the store. Huffman *v.* State, 30 Ala. 532.

**Dry Goods Store.**—A store house in which dry goods only are sold is a public house, within the statute against gaming (Ala. Code, § 3243), although the playing is by night, when the doors and windows are closed, and no person other than the players is present. Skinner *v.* State, 30 Ala. 524.

**A Store House in a Village**, late at night, after persons cease to come to the store to purchase goods and the door is locked, has been *held* not to be a public place, within the meaning of the statute against gaming. Feazle's Case, 8 Gratt. (Va.) 585.

An indictment for gaming charged the defendant with unlawful playing with cards, to wit, at the game of "all-fours," of "loo," and of "whist," at a public house, to wit, at the store house of A. *Held*, that, to convict the defendant, it must be proved that he played at some one of the games specified in the indictment, and that, if the playing was at the store house of A, in the night time, after the business of the day was at an end, and the doors closed, the store house was not in such case, *prima facie*, a public house, though it was so when it was open to the public in the day time. Windsor's Case, 4 Leigh (Va.) 680.

**Same—Presumption as to Upper Room.**—On a trial, under an indictment for card-playing, one count whereof charged the offence "in a certain store-house, which was then and there occupied by one C," and another "in a certain room over C's grocery," *held* that it was error to instruct the jury that "if it be shown that C occupied a room as a store-house, he would be presumed to have the control of all the rooms of the house, until the defendant shows the contrary." Holtzclaw *v.* State, 26 Tex. 682.

**3. Barber's Shop.**—Where a two-story house, in a city or town, is rented or controlled by a barber, who uses the two rooms on the ground floor as his shop, the back room on the second floor is also within the prohibition of the statute, although accessible only by a flight of steps on the outside of the house, and used by the barber only in trying experiments in the daguerrean art, or as a deposit for his broken apparatus and chemicals. Moore *v.* State, 30 Ala. 550.

**4. By the Phrase "Outhouse Where People Resort,"** in the act to suppress gaming, is meant any house standing

the following have been held not to be "public places," within the meaning of such statutes: a navigable river, in and of itself,[1] a lawyer's office,[2] a physician's office, closed at night,[3] the back room of the office of the register in chancery,[4] and a place in the woods.[5] Horse-racing on a public highway is also

out and apart from houses used as dwellings or business houses. Wheelock *v.* State, 15 Tex. 260.

**Same—Must be Habitual Resort.**—An "outhouse where people resort," to be within the purview of the statute against gaming, must be one to which people have resorted on more than one occasion, or one where more persons than those actually engaged in gaming are assembled on the particular occasion when the offence is charged to have been committed. State *v.* Norton, 19 Tex. 102.

**A Still House** is such an "outhouse" as is contemplated by the act of 1816, prohibiting gaming. State *v.* Faulkner, 2 McC. (S. C.) 438.

**An Unoccupied Store House,** situated in a town, and fronting on the street, if habitually resorted to by persons for the purpose of playing cards, comes within the provision of the statute against playing cards at any "outhouse where people resort." Swallow *v.* State, 20 Ala. 30.

**A Privy** belonging to and in the same inclosure with a school-house is not, in vacation, a public house, public place, or an outhouse where people resort, within Code, § 3243. McDaniel *v.* State, 35 Ala. 390.

**One Visit not Fix Character of House.**—The fact that the defendant, with two or three other persons, once went to an outhouse for the purpose of playing cards, and there engaged in a game, does not constitute such house "an outhouse where people resort," within the prohibition of the statute against gaming. Cain *v.* State, 30 Ala. 534.

**1. A Navigable River** within the state is *held*, in Alabama, not to be a highway, within the statute (Ala. Code, § 3243) against gaming. Glass *v.* State, 30 Ala. 529.

**2.** McCauley *v.* State, 26 Ala. 135; Smith *v.* State, 23 Ala. 39; s. c., 1 Ala. Sel. Cas. 84.

**A Lawyer's Office,** during the session of the circuit court, is not a "public place," within the statute against gaming; playing having taken place at night, by permission of the person who occupied the room as a sleeping apartment, when the door was locked and the curtains drawn over the windows. Burdine *v.* State, 25 Ala. 60.

**3. Physician's Office.**—Where a physician and a few friends, present by invitation, played cards or dice at night, with closed doors, in his office, where he exhibited his medicines, received professional calls at all times, and, being unmarried, ate and slept, *held* that the office was not a public place, within the statute of Alabama against gaming. Clarke *v.* State, 12 Ala. 492; Sherrod *v.* State, 25 Ala. 78.

**4. Register in Chancery's Bedroom.**—A back room, occupied by the register in chancery as a bedroom, adjoining the front room, which was his office, and communicating with it by a door, is not a public place, within the statute against gaming, it being shown that the house was surrounded in the rear by a high fence; that the playing took place at night, when the doors were locked and the windows closed; that the persons present, about eight in number, came by invitation from the occupier of the room, and that they entered through a back door, and not through the public office. Roquemore *v.* State, 19 Ala. 528.

**5. A Place in the Woods** is not a public place, within the meaning of the statute prohibiting gaming in public places, when it cannot be seen from any road or house, and it is not shown to be a place of resort, and no circumstances are found to give it the character of a public place. Bledsoe *v.* State, 21 Tex. 223. See Smith *v.* State, 23 Ala. 39.

**Bushes on County Farm.**—Persons concealed in bushes and briers on land owned by a county for supporting its poor, and there gaming, will not be liable to indictment for gaming in a public place. Com. *v.* Vandine, 6 Gratt. (Va.) 689.

**In Woods.**—On an indictment for playing cards "at a public place," the proof showed that there was a large assembly of persons, on a public day, at a certain store-house in the country. The defendants, five in number, "went into a piece of woods where the undergrowth was very thick, and into a deep hollow in said woods, about four hundred yards from said store, and out

sometimes made an offence.[1]

**III. Visiting Gaming Houses.**—The act of visiting or frequenting gaming houses or places where unlawful games are played, or unlawful sports are carried on, is made, in some States, a separate offence, which does not require for its completion the playing of an unlawful game by the offender.[2] Proof of an occasional visit to a gaming house will not support a conviction where the statute prohibits the frequenting of such places, but something akin to a habit must be shown.[3] But where the statute makes it a crime to be present at such a place, a single visit completes the offence.[4]

**IV. Common Gamblers.**—In some of the States, it is provided that persons who habitually frequent houses, or places where unlawful games or sports are played or carried on, or who habitually and constantly engage in gambling for a livelihood, shall be deemed common gamblers, and punished as such.[5] Exactly what constitutes a common gambler can only be determined according to the wording of the statute, or the circumstances of the particular case. Three specific acts of unlawful gaming are not, as in the case of some analogous offence,[6] always requisite; but it has been held that, under certain circumstances, proof of a single act is sufficient to convict.[7] But a defendant cannot be convicted

of sight of any road," and there engaged in a game of cards. Whilst so engaged, three other persons came to the same place and took part in the game, one of whom testified that when he went into the woods he did not know where the defendants were, but hunted them up; that he had never known cards to be played at the place before, but that during the year previous he had known persons to play "in the piece of woods," some fifty or one hundred yards from "said hollow." *Held*, that the playing was not "at a public place." Bythwood *v.* State, 20 Ala. 47.

1. State *v.* Armstrong, 3 Ind. 139; Watson *v.* State, 3 Ind. 123.

**Horse-racing in Public Road.**—Upon an indictment under the statute for horse-racing, evidence that the race was run along a road leading from one turn to another, in the county, was *held* sufficient, *prima facie*, to sustain the averment in the indictment that the road in question was a public highway. Watson *v.* State, 3 Ind. 123. The termini of the highway need not be stated. State *v.* Armstrong, 3 Ind. 139.

2. See La Follette *v.* Higgins, 109 Ind. 241; Green *v.* State, 109 Ind. 175; Com. *v.* Hogarty, 141 Mass. 106; Johnson *v.* State, 4 Sneed (Tenn.) 614. *Compare* State *v.* Brannen, 8 Jones (N. C.) L. 208.

**Playing Shows Presence.**—The offence of being present at an unlawful game may be proved by evidence tending to show that defendant was found playing the game, although the offences may be distinct and separate, under the statute. Com. *v.* Hogarty, 141 Mass. 106.

**Cock-fighting.**—The proprietors of a cockpit, where betting was carried on as to the results of cock fights there, and such cock-fighting carried on for money, advertised that spectators could be admitted for a certain fee to witness the sport. *Held*, that mere spectators, under those conditions, were, under the statutes of the state, indictable for gaming. Johnson *v.* State, 4 Sneed (Tenn.) 614.

3. La Follette *v.* Higgins, 109 Ind. 241; Green *v.* State, 109 Ind. 175.

4. Com. *v.* Hogarty, 141 Mass. 106.

5. See Ind. Rev. Stat. 1881, § 2085; Green *v.* State, 109 Ind. 175; Howard *v.* State, 64 Ind. 516; Hamilton *v.* State, 25 Ind. 426; Bowe *v.* State, 25 Ind. 415; Com. *v.* Hopkins, 2 Dana (Ky.) 418; State *v.* Markham, 15 La. An. 498.

6. As, for instance, the unlawful sale of intoxicating liquors. See Com. *v.* Hopkins, 2 Dana (Ky.) 418.

7. Com. *v.* Hopkins, 2 Dana (Ky.) 418. In this case the court say: "While many acts or games may be played so as to show that the general

by proof of reputation as a common gambler.[1]

**V. JURISDICTION.**—The jurisdiction of proceedings and prosecutions for unlawful gaming is, as a general thing, governed by the same rules as that of prosecutions for other misdemeanors; but some statutes create exceptions under certain circumstances.[2]

**VI. INDICTMENT AND INFORMATION.—1. Information Permissible.**—Where the offence of gaming is only a misdemeanor, as it usually is, the offender may be proceeded against either by indictment or information.[3]

**2. Alleging Name of Persons Playing.**—An indictment for gaming must state the name of the person with whom the defendant played, or allege that it is unknown.[4]

conduct or practices of the individual are not such as constitute him a common gambler; on the other hand, a single act may be attended with such circumstances as to justify a conviction."

**Lawful Business in County.**—Indictment for professional gambling in two counts. The first charged that the defendant, at Marion county, etc., was engaged in the habit and practice of gaming, and did then and there get his livelihood thereby. The second count charged that the defendant, at, etc., was wandering about from place to place, in the habit and practice of gaming. The evidence showed that the accused had been, for two months, traveling about and gaming for a livelihood, but that he had come into the county where he was indicted on lawful business, and had not gamed therein. *Held*, that the evidence did not sustain the indictment. Bowe *v.* State, 25 Ind. 415; Hamilton *v.* State, 25 Ind. 426.

1. Com. *v.* Hopkins, 2 Dana (Ky.) 418.

2. **Warrant of Arrest.**—A warrant for the arrest of persons found gambling may be issued by a judge of the circuit court. People *v.* Copley, (Ill.) 4 Cr. L. Mag. 187.

**Trial Jurisdiction.**—See *Ex parte* Tucker, 25 Ark. 567; Johnson *v.* State, 59 Miss. 543.

**A Commitment Cannot be Quashed** where the magistrate had such evidence before him as would warrant him in committing. Reg. *v.* Shaw, (Manitoba Q. B.) 4 Man. L. Rep. 404.

**Jurisdiction Over Navigable Stream.**—Where the playing was in the middle of a river dividing two counties, the courts of either county have jurisdiction of the offence, under the statutes. See Dickey *v.* State, 68 Ala. 508; s. c., 4 Am. Cr. Rep. 250.

**Suppressing "Gaming and Gambling Houses"—Power of Municipal Corporations.**—A grant of power to a city "to suppress gaming and gambling houses" includes the power to suppress "gaming;" but when the crime of gaming is defined, and the punishment therefor prescribed by the law of the state, the city is not authorized to suppress any game not prohibited by such law, nor to punish any person playing thereat, but it is confined to the use of such means as may be within its power to enforce the State law within its limits. *In re* Lee Tong, (Oreg.) 5 Cr. L. Mag. 67; s. c., 18 Fed. Rep. 253.

3. See State *v.* Ebert, 40 Mo. 186; Davis *v.* State, 32 Ohio St. 24.

**In Missouri**, the constitution provides that "no person can, for an indictable offence, be proceeded against criminally by information;" but the offence of gaming, being only a misdemeanor, is not an indictable offence, within the meaning of the constitution. It is well settled that, as to misdemeanors, the legislature may make them punishable either by indictment or information. State *v.* Ebert, 40 Mo. 186.

4. State *v.* Jeffreys, 33 Ark. 136; Orr *v.* State, 18 Ark. 540; Jester *v.* State, 14 Ark. 552; Barkman *v.* State, 13 Ark. 703; Moffatt *v.* State, 11 Ark. 169; Parrott *v.* State, 10 Ark. 574; Drew *v.* State, 10 Ark. 82; Groner *v.* State, 6 Fla. 39; Davis *v.* State, 22 Ga. 101; Green *v.* People, 21 Ill. 125; Webster *v.* State, 8 Blackf. (Ind.) 400; State *v.* Ross, 7 Blackf. (Ind.) 322; Ball *v.* State, 7 Blackf. (Ind.) 242; Butler *v.* State, 5 Blackf. (Ind.) 280; State *v.* Maxwell, 5 Blackf. (Ind.) 230; State *v.* Dole, 3 Blackf. (Ind.) 294; Romp *v.* State, 3 Iowa 276; Johnson *v.* State, 15 Miss. (7 Smed. & M.) 58; State *v.* Prescott, 33 N. H. 212; Davis *v.* State, 7 Ohio 204; State *v.* Trotter, 5 Yerg. (Tenn.) 184;

**3. Description of the Game.**—In an indictment for gaming, the crime must be set forth with particularity.[1] It is generally sufficient to describe the game played, or the sport carried on, or the

State *v.* Ake, 9 Tex. 322. *Compare* Goodman *v.* State, 41 Ark. 228; Roberts *v.* State, 32 Ohio St. 171; Johnson *v.* State, 36 Tex. 198.

1. An indictment, framed under the Missouri act, concerning crimes and punishments, is not bad in using the word "gambling," instead of "gaming." State *v.* Nelson, 19 Mo. 393. And an indictment for gambling need not state the name of the game played, but under the Oregon act of 1876 it has been *held* that the indictment must show the nature of the device by which the game is played. State *v.* Gitt Lee, 6 Oreg. 425. And an indictment which charges that A B "did unlawfully bet at a certain gaming table, which said gaming table was then and there exhibited for gaming, contrary" does not sufficiently describe an offence under the Texas statute. State *v.* Blair, 41 Tex. 30. See Booth *v.* State, 26 Tex. 203.

**Describing the Devices.**—When it is practicable, it is proper to describe in the indictment the gaming devices, instrument and means by which the defendant fraudulently obtained the property of another; but an allegation in the indictment that these are to the grand jury unknown is a sufficent excuse for the want of that particularity of statements which might otherwise be required. Com. *v.* Ashton, 125 Mass. 384.

It is not literally the table or structure, whatever that may be, on which the game is played, which gives it the character or designation of a gaming table, but it is rather from the character of the playing or the game which is played that it receives its specific designation. If it be a billiard table which is used, the name and description of the game is not material, only that it appear that it is not the game which is protected by the license; or that it is the description or species of gaming prohibited by the statute. Estes *v.* State, 10 Tex. 300.

**Billiards.**—An indictment for betting on a billiard-table should show that the table was used as a gambling device to evade the law, and not for the usual game of billiards. State *v.* Bristow, 41 Tex. 146.

**Bowls.**—An indictment, under Tex. Crim. Code, art. 420, subd. 4, charging the accused with betting at a "ten-ball-alley," but not alleging that the alley was kept for the purpose of gaming, *held* to be insufficient. Anderson *v.* State, 9 Tex. App. 177; Ben *v.* State, 9 Tex. App. 107.

**Cards.**—An indictment for gaming, in Tennessee, was *held* sufficiently certain, without specifying the particular game of cards played. Dean *v.* State, Mart. & Y. (Tenn.) 480; State *v.* McBride, 8 Humph. (Tenn.) 66.

**Cock-fighting.**—An indictment charged that the defendant "did unlawfully game, bet, and hazard, upon a match at cock-fighting, a valuable thing, to wit," etc. *Held*, that this allegation charged with sufficient certainty both the game and the game that was played. Bagley *v.* State, 1 Humph. (Tenn.) 486.

**Faro.**—An indictment which set forth the time and place, and charged that the accused "unlawfully did bet at a faro bank, being then and there kept and exhibited for the purpose of gaming," *held* to be sufficiently certain. Blair *v.* State, 32 Tex. 474.

Where an indictment charged that appellant bet and wagered at "a certain faro bank," it was *held* sufficient, inasmuch as faro is one of the games specially denounced by statute. Short *v.* State, 23 Tex. App. 312. And an indictment for dealing faro, designating the offence as a "felony," is sufficiently specific as to name. And without these words the indictment is good where it states the facts which constitute the offence. People *v.* Beatty, 14 Cal. 566.

**Monte.**—An indictment under Gen. Stat. 1878, ch. 99, § 15, charged the manner of committing the offence as follows. " . . . did by means of three-card monte, so-called, and other forms and devices and sleight-of-hand (a more particular description of which is to the grand jury unknown), from one F O, . . . by the use of cards and instruments of like character (a more particular description of which is to the grand jury unknown), feloniously . . . . obtained . . . . the sum of twenty dollars, lawful money of the United States (a more particular description of which is to the grand jury unknown), of the lawful money," etc. *Held*, that the indictment is sufficient, and sets forth but one offence, and its allegation is sustained by proof of the use of cards different from the common

election upon which the bet was made, in the language of the statute.[1] The indictment or information must lay some day as the day on which the offence charged was committed, and the day so stated must be within the time within which the law

playing cards. State *v.* Gray, 29 Minn. 142.

An indictment for unlawfully betting at a monte bank charges an offence, under Tex. Pen. Code, art. 364, as amended March 5, 1881, and therefore is sufficient without an allegation that the bank was kept or exhibited for purposes of gaming. Wardlow *v.* State, 18 Tex. App. 356. And a charge in an indictment for gaming, that the defendant "did bet at a certain gaming-bank then and there exhibited and kept, called monte," was *held* to be sufficient. McKissick *v.* State, 2 Tex. 356.

**Poker.**—An indictment under the Ohio statute to prevent gaming (1 Swan & C. 664, § 7), which charged that C did unlawfully play at a certain game called draw-poker, for a sum of money, to wit, for the sum of six dollars, by means of a certain gaming device, to wit, a pack of cards. *Held* sufficient, after a plea of guilty. Carper *v.* State, 27 Ohio St. 572.

**Pool.**—Under Hart. Dig., art. 1477, an indictment charging that the defendant bet money "upon a certain game, known as pool," is not sufficient, without charging that the betting was on a gambling-table, or bank, or a gambling device. Tate *v.* State, 21 Tex. 202. And where the indictment charged "that Clark Middaugh, at said county (of Henry), on the 4th day of October, A. D. 1884, did then and there unlawfully play for money, to wit, the sum of ten cents, at and upon a certain game of pool played by him with John Cox and Homer Jeffreys, upon a billiard and pool-table, and did then and there, and thereby, unlawfully win of and from said Homer Jeffreys the sum of ten cents, of the current and lawful money of the United States of the value and denomination of ten cents." *Held*, substantially sufficient. Middaugh *v.* State, (Ind.) 2 N. E. Rep. 292.

**Rondo.**—Where the charge in the indictment was that the defendant "bet money at a certain gaming table at rondo, which said gaming table was then and there kept by one Andrew J. Smith, contrary to the form of the statute," etc., *held*, that the indictment was sufficient. Estes *v.* State, 10 Tex. 300.

**Shooting Match.**—On a presentment for betting on a shooting-match, to make the act charged unlawful, it is indispensable to charge in the presentment, if it is sought to connect the act of betting with the offence charged by Tenn. Code, § 1701, that the shooting was within two hundred yards of a public road of the first or second class State *v.* Bess, 5 Coldw. (Tenn.) 55.

**Twenty-one.**—An indictment charging defendant with carrying on the swindling game of twenty-one, or top and bottom dice, and not describing the game further than by such names, is too indefinite. Harland *v.* Territory, (Wash. Tr.) 13 Pac. Rep. 453.

1. State *v.* Hester, 48 Ark. 40; Fortenbury *v.* State, 47 Ark. 188; State *v.* Guider, 18 Ark. 297; Warren *v.* State, 18 Ark. 195; People *v.* Beatty, 10 Cal. 566; Wingard *v.* State, 13 Ga. 396; Middaugh *v.* State, 103 Ind. 78; Myers *v.* State, 1 Ind. 251; Com. *v.* Parker, 117 Mass. 112; Carper *v.* State, 27 Ohio St. 572; Davis *v.* State, 22 Ohio St. 24; State *v.* Bess, 5 Coldw. (Tenn.) 55; Bagley *v.* State, 1 Humph. (Tenn.) 486; Porter *v.* State, 5 Sneed (Tenn.) 358; Short *v.* State, 23 Tex. App. 312; State *v.* Shult, 41 Tex. 548; Blair *v.* State, 32 Tex. 474.

**The Rule in Arkansas.**—In an indictment for betting on any one of the games named in the first section of the Arkansas gaming act, it is sufficient to describe the game in the language of the act. But where the charge is for betting at a "gaming-table, or gambling device, or bank of the like or similar kind, or of any other description, although not named," the indictment should aver, in addition to the name, that it was a gaming table or bank similar to one of the games named in the act, or else that the game was a device "adopted, devised, and designed for the purpose of playing a game of chance, and at which money or property may be won or lost;" and so a charge that the defendant betted "upon and against a certain gambling device, commonly called 'the tiger,'" was *held* insufficient. State *v.* Grider, 18 Ark. 297.

**Disjunctive Form.**—An indictment for betting at a game of "hazard or

authorizes a prosecution to be commenced.[1] Where playing at or betting on a certain game, or a certain class or kind of games is especially prohibited, or is made a separate offence from playing or betting at certain other games, or all other prohibited games, or is defined and punished by a separate statute and a different penalty, an indictment which charges the playing or betting at a game or games of one class or kind will not support a conviction for gaming with the other class or kind.[2] Thus, where the statute especially prohibits and punishes the game of faro, an indictment cannot be supported except by proof that the game played was either faro or some other game of its nature or kind;[3] but where the game of faro is not especially pro-

skill" is not objectionable for the disjunctive "or." State *v.* Hester, 48 Ark. 40.

**Duplicity.**—An indictment charging defendant with playing a game of "hazard or skill" known as "craps" is not open to the objection of duplicity. The adding of the word "craps" does not vitiate the allegation. State *v.* Hester, 48 Ark. 40.

**Cards.**—An indictment for playing "a game of cards" sufficiently charges playing "a game with cards." State *v.* Shult, 41 Tex. 548.

**Faro.**—An indictment charging the defendant with betting on "a gambling device, commonly called a faro-bank," is not bad because it does not allege that defendant did bet upon the game played, by means of the apparatus which constituted the faro-bank. Warren *v.* State, 18 Ark. 195.

**Dealing in Futures.**—An indictment for dealing in futures, in the language of the statute, is sufficient. Fortenbury *v.* State, 47 Ark. 188.

**Horse Race.**—An indictment founded on Ind. Rev. Stat., ch. 53, § 103, and charging that defendant acted as "rider in a certain horse-race, which was then and there run along a public highway, in said county, between animals of the horse kind in a trial of speed," is not sufficiently certain and definite. Myers *v.* State, 1 Ind. 251.

**"Mare."**—An indictment charging that a defendant suffered his mare to be run in a certain race, is not supported by evidence that the animal run was a horse. Thrasher *v.* State, 6 Blackf. (Ind.) 460.

**Betting on Horse Race.**—An averment that the defendant "bet upon a horse-race" does not charge an offence, the words not necessarily importing that the race was run. Dobkins *v.* State, 2 Humph. (Tenn.) 424.

**Poker.**—An indictment charging that the accused "did play and bet at cards for money, at a game of poker, whist, faro, seven-up, three-up, and other games played with cards," using the words of the statute, *held*, good. Wingard *v.* State, 13 Ga. 396.

An indictment, under Mass. Gen. Stat., ch. 161, § 57, making punishable, as in larceny, the fradulent obtaining of another's property by any "game," etc., "trick or other means whatever, by the use of cards or other implements," which charges the fraudulent obtaining of money "by means of a game, device, sleight-of-hand, and trick, and by the use of cards and other implements and means," *held* to be broader than the statute, and fatally defective. Com. *v.* Parker, 117 Mass. 112.

1. Anthony *v.* State, 4 Humph. (Tenn.) 83.

2. See State *v.* Martin, 22 Ark. 420; State *v.* Grider, 18 Ark. 297; Patterson *v.* State, 12 Tex. App. 222.

**In Arkansas.**—A party indicted under section 9 of the gaming act cannot be convicted if the evidence offered shows that the game which he was indicted for playing falls within the provisions of section 1 of that act. State *v.* Martin, 22 Ark. 420.

**Betting Separate Offence from Playing.**—Under an indictment for betting at a game of cards, in violation of one provision of the statute, there cannot be a conviction for playing at a game of cards, which is an offence under another provision. Chambers *v.* State, 77 Ala. 80.

3. **"Faro" and "Tiger."**—On the trial of an indictment for betting at faro, the court instructed the jury, that if they found from the evidence, that the defendant betted on a game called tiger, and it is essentially different from faro,

hibited, a conviction for betting at it may be had under an indictment for unlawfully playing at cards.[1]

Where an indictment is for playing, or for playing and betting at an unlawful game, it must allege that the game was played within the county where the charge was brought, as well as follow the regular form of indictment for statutory offences in all other respects.[2] But it seems that where the indictment is only for betting on a prohibited game, it need not be alleged that the game was played in the county where the bet was made.[3]

**4. Description of the Stake or Wager.**—The indictment must show with or against whom the defendant made the bet or wager.[4] It

in the rules and principles of the game, so as to make it another game, they should acquit. *Held*, that the state had no right to complain of the instruction. State *v.* Grider, 18 Ark. 297.

**Faro and Playing Cards at a Public Place** are distinct offences, and a conviction for one of them cannot legally be had upon an indictment for the other. Faro, though cards are used in dealing it, is a banking game, and is especially denounced as such by the penal code. Patterson *v.* State, 12 Tex. App. 222.

1. Gibboney's Case, 14 Gratt. (Va.) 582.

2. See Perez *v.* State, 48 Ala. 356; Lindsey *v.* State, 48 Ala. 169; Batre *v.* State, 18 Ala. 119; Eubanks *v.* State, 17 Ala. 181; State *v.* Jeffery, 33 Ark. 136; State *v.* Anderson, 30 Ark. 131; Gibbons *v.* People, 33 Ill. 442; State *v.* Allen, 69 Ind. 124; Moore *v.* State, 65 Ind. 213; Howard *v.* State, 64 Ind. 516; Donniger *v.* State, 52 Ind. 326; State *v.* Thomas, 50 Ind. 292; Carr *v.* State, 50 Ind. 178; Alexander *v.* State, 48 Ind. 394; Zook *v.* State, 47 Ind. 463; State *v.* Cooster, 10 Iowa 453; Rice *v.* State, 3 Kan. 141; Com. *v.* Crupper, 3 Dana (Ky.) 466; Com. *v.* Edds, 80 Mass. (14 Gray) 406; State *v.* Stogsdale, 67 Mo. 630; State *v.* Kesslering, 12 Mo. 565; State *v.* Austin, 12 Mo. 576; State *v.* Annis, 10 Mo. 748; Territory *v.* Copley, 1 N. M. 571; Roberts *v.* State, 32 Ohio St. 171; Davis *v.* State, 32 Ohio St. 24; Carper *v.* State, 24 Ohio 572; King *v.* State, 3 Tex. App. 7; Campbell *v.* State, 2 Tex. App. 187; Sheppard *v.* State, 1 Tex. App. 304; State *v.* Shult, 41 Tex. 548; Longworth *v.* State, 41 Tex. 508; State *v.* Howery, 41 Tex. 506; Elsberry *v.* State, 41 Tex. 158; State *v.* Homan, 41 Tex. 155; State *v.* Arnold, 37 Tex. 409; Herron *v.* State, 36 Tex. 285; Galbreath *v.* State, 36 Tex. 200; State *v.* Roderica, 35 Tex. 507; Johnson *v.* State, 35 Tex. 198; State *v.* Jurgins, 31 Tex. 588; State *v.* Alvey, 26 Tex. 155; McGaffey *v.* State, 4 Tex. 156; Leath *v.* Com., 32 Gratt. (Va.) 873; Gallagher *v.* State, 26 Wis. 423.

3. State *v.* Kyle, 10 Mo. 389.

4. See Hany *v.* State, 9 Ark. 193; Archer *v.* State, 69 Ga. 767; State *v.* Stallings, 3 Ind. 531; State *v.* Little, 6 Blackf. (Ind.) 267. *Compare* Hinton *v.* State, 68 Ga. 322; Reg. *v.* Moss, 2 Jur. N. S. 1196.

**Charging Playing and Betting.**—Where the indictment charges that the defendants played and bet with each other, it is sustained by proof that they played at the same game and bet, though they all bet against the man who presided at the game. Archer *v.* State, 69 Ga. 767.

An indictment for gaming presented two counts: the first for money won, and the second for money lost, on a bet made at a game of cards played by the defendant and others, but it did not show whether the bet was made with the persons played with, or with some third person. *Held*, that the indictment was bad for uncertainty. State *v.* Stallings, 3 Ind. 531.

**In an Indictment for Gaming**, it was charged, in one of the counts, that the defendant and four other persons did "bet together and against each other" at a game of cards, etc., and in the other that the said defendant and the said other persons "did bet together" at a game of cards, etc. The proof was, that the four other persons mentioned in the indictment played the game of cards; that the defendant stood by and bet with one of them; that three of the players bet together, and that the fourth player did not bet at all. *Held*, that the evidence was not sufficient to sustain a verdict of guilty against the defendant; and that the charge in the indictment, though made

is not generally necessary to state what was bet,[1] or the amount or value.[2] Where the indictment, however, charges that money was bet, it is not supported by proof that the stake or wager consisted of other property;[3] but where the sum of money bet is mentioned, a variance between the allegation and the proof in that respect is immaterial.[4]

with unnecessary complication, must be proved as alleged. Hany *v.* State, 9 Ark. 193.

**Same—Variance.**—An indictment for gaming alleged that the defendant, by playing at cards, etc., had won from A, B and C a certain article, etc. The evidence was, that the winning was by the defendant and another, as partners, from A and C, as partners. *Held*, that the variance was fatal. Jackson *v.* State, 4 Ind. 560; Iseley *v.* State, 8 Blackf. (Ind.) 403; Wilcox *v.* State, 7 Blackf. (Ind.) 456.

**Charging Betting on Election.**—An averment, in an indictment for betting on the result of an election, that the defendant did unlawfully win and take from one N G, two notes, etc., by betting on the result of an election, shows with sufficient certainty that the bet was made with N G. State *v.* Little, 6 Blackf. (Ind.) 267.

**Charging Cheating at Cards—Averring Ownership of Money.**—An indictment framed under 8 & 9 Vict., ch. 109, § 17, alleges that the defendant, "by fraud, unlawful device, and ill-practice in playing at and with cards, unlawfully did win from," etc., but it was not averred to whom the money belonged. *Held*, that such an averment was not necessary, and the indictment was sufficient. Reg. *v.* Moss, 2 Jur. N. S. 1196.

**1.** Collins *v.* State, 70 Ala. 19; Mitchell *v.* State, 55 Ala. 160; Jacobson *v.* State, 55 Ala. 151; Reeves *v.* State, 9 Tex. 447; Long *v.* State, 22 Tex. App. 194; s. c., 58 Am. Rep. 633. *Compare* Horton *v.* State, 13 Ark. 62; Tate *v.* State, 5 Blackf. (Ind.) 174; State *v.* Kilgore, 6 Humph. (Tenn.) 44; Anthony *v.* State, 4 Humph. (Tenn.) 83; Hale *v.* State, 8 Tex. 171.

**An Indictment for Playing with Cards,** which alleged that money was bet on the result of the game, omitted to allege that the defendant bet the money, or that he knew money was bet, was *held* to be good. State *v.* Ward, 9 Tex. 370.

**The Averment that United States Fractional Currency was Bet** is equivalent to an averment that money was bet. Collins *v.* State, 70 Ala. 19.

**"Valuable Things."**—A charge, in an indictment for gaming, that the defendant bet certain "valuable things" is too vague. It must set forth and describe the valuable things. Anthony *v.* State, 4 Humph. (Tenn.) 83.

**"Goods, Wares and Merchandise."**—An indictment charging that the defendant bet "goods, wares and merchandise," does not describe with sufficient certainty the things bet. State *v.* Kilgore, 6 Humph. (Tenn.) 44. Thus it is *held* that an allegation that the accused, by a game and device, fraudulently obtained of F "certain moneys, to wit, divers promissory notes, current as money in said commonwealth," is supported by proof that the notes obtained were bank bills. Com. *v.* Ashton, 125 Mass. 384.

**2.** Collins *v.* State, 70 Ala. 19; State *v.* McBride, 8 Humph. (Tenn.) 66; Dean *v.* State, Mart. & Y. (Tenn.) 480; Long *v.* State, 22 Tex. App. 194; Reeves *v.* State, 9 Tex. 477. See Medlock *v.* State, 18 Ark. 363; Graham *v.* State, 1 Ark. 171; Parsons *v.* State, 2 Ind. 499; Com. *v.* McAtee, 8 Dana (Ky.) 28; Com. *v.* Garland, 3 Metc. (Ky.) 478.

Thus where an indictment charging that defendant did unlawfully bet and wager at a certain game with dice, was objected to for not alleging that money or other thing of value was bet on said game, the court *held* that, as the word "bet" meant the mutual agreement and tender of a gift of something valuable, which is to belong to the one or the other of the contending parties, according to the result of the trial of chance or skill, or both combined, the question was not one of pleading, but one of evidence as to whether or not the thing staked was valuable; and the objection was properly overruled. Long *v.* State, 22 Tex. App. 194; s. c., 58 Am. Rep. 633.

**3.** Horton *v.* State, 13 Ark. 63; Tate *v.* State, 5 Blackf. (Ind.) 174; Hale *v.* State, 8 Tex. 171.

**4** Medlock *v.* State, 18 Ark. 363; Parsons *v.* State, 2 Ind. 499; Com. *v.* McAtee, 8 Dana (Ky.) 28; Com. *v.* Garland, 3 Metc. (Ky.) 478.

An indictment for betting upon an election must allege that the bet was made before the election was held, or, at least, before the result was certain.[1] But proof that the bet was made after the election was held, or before the result became certain, will not support an indictment which charges that the bet was made before the election was held.[2]

**5. Averment of Place.**—When the alleged offence consists in gaming or carrying on the sport at a public house or place, or at some other place where gaming is an offence under the statutes, the indictment must show, with reasonable certainty, that the place where the gaming, betting or prohibited sports were carried on was within the prohibition of the statute.[3] And the fact that

**1. Indictment for Betting on Election — Essential Allegations.** — An indictment for betting on an election, which omits to state when the election was to be held, is bad. Lewellen *v.* State, 18 Tex. 538. But it is sufficient to name the election day without stating that the law required it to be held on that day. State *v.* Banfield, 22 Mo. 461.

In Tennessee, it has been *held* that an allegation charging the pendency of the general election for a particular year, and that the bet was made upon the event of that election, is sufficient. It is not necessary to charge that the defendant bet upon the success of any particular candidate. State *v.* Cross, 2 Humph. (Tenn.) 301. But, in Kentucky, it has been said that in an indictment for betting that a certain person would, or would not, be elected to a particular office, it must be averred that he was a candidate, or voted for, or in some manner proposed therefor at that election. Com. *v.* Shouse, 16 B. Mon. (Ky.) 325.

**Same — Specifying the Particular Election.**—An indictment for betting on the result of an election must state for what purpose the election bet on was held; that is, whether it was for president of the United States, for the governor of the State, etc. Bellair *v.* State, 6 Blackf. (Ind.) 104.

**Election for President.**—Indictment charging the defendant with betting on the election of "president and vice-president of the United States," *held* that the offence was well laid, though the election was directly for electors of president. Porter *v.* State, 5 Sneed (Tenn.) 358. But betting on the state election for presidential electors is not supported by proof of a bet that the state would vote for a certain presidential candidate. Gamble *v.* State, 35 Miss. 222.

**2.** Miller *v.* State, 33 Miss. 356.

**3.** Johnson *v.* State, 74 Ala. 537; Ray *v.* State, 50 Ala. 172; Napier *v.* State, 50 Ala. 168; Burnett *v.* State, 30 Ala. 19; Rodgers *v.* State, 26 Ala. 76; Burdine *v.* State, 25 Ala. 60; Logan *v.* State, 24 Ala. 182; Flake *v.* State, 19 Ala. 551; Roquemore *v.* State, 19 Ala. 528; State *v.* Atkins, 1 Ala. 180; Coggins *v.* State, 7 Port. (Ala.) 263; People *v.* Saviers, 14 Cal. 29; State *v.* Brown, 1 Ind. 532; State *v.* Burgett, 1 Ind. 479; State *v.* Langford, 3 Ired. (N. C.) L. 354; State *v.* Bess, 5 Coldw. (Tenn.) 55; Elsberry *v.* State, 41 Tex. 158; State *v.* Jurgins, 31 Tex. 588; State *v.* Fuller, 31 Tex. 559; Millican *v.* State, 25 Tex. 664; State *v.* Barns, 25 Tex. 654; State *v.* Norton, 19 Tex. 102; State *v.* Lopez, 18 Tex. 33; State *v.* Huston, 12 Tex. 245; Royal *v.* State, 9 Tex. 449; Shihagan *v.* State, 9 Tex. 430; Sublett *v.* State, 9 Tex. 53; Wilson *v.* State, 5 Tex. 21; Prior *v.* State, 4 Tex. 383; Colchell *v.* State, 23 Tex. App. 584; Early *v.* State, 23 Tex. App. 364; Bacchus *v.* State, 18 Tex. App. 15; Tummins *v.* State, 18 Tex. App. 13; Bowman *v.* State, 16 Tex. App. 513; Fossett *v.* State, 16 Tex. App. 375; Jackson *v.* State, 16 Tex. App. 373; Wallace *v.* State, 12 Tex. App. 479; Patterson *v.* State, 12 Tex. App. 222; Scribner *v.* State, 12 Tex. App. 173; Sheppard *v.* State, 1 Tex. App. 304; Com. *v.* Butts, 2 Va. Cas. 18; Bishop *v.* Com., 13 Gratt. (Va.) 785; Roberts' Case, 10 Leigh (Va.) 686; Linkous' Case, 9 Leigh (Va.) 608; Hord *v.* Com., 4 Leigh (Va.) 674; s. c., 26 Am. Dec. 340; Wortham *v.* Com., 5 Rand. (Va.) 669.

**Gaming on Steamer in River.**—A conviction for gaming may be had

the particular place where it is claimed that the offence was committed belongs to the class of places prohibited, must be alleged, as well as proved;[1] but the name of the owner of the house or room need not be stated; nor need a particular description be given, if its character and location are otherwise plainly and definitely stated.[2]

in Madison county (Code, § 4636), on proof that the offence was committed on a ferry-boat while in the middle of the river (Paint Rock) which divides Madison and Marshall counties. Dickey *v.* State, 68 Ala. 508; s. c., 4 Am. Cr. Rep. 250.

**Charging the Place in the Alternative —The Rule in Alabama.**—An indictment (under the Alabama Code) for gaming charged that defendant "played at a game called cards or dice, or at some device or substitute therefor, at a tavern, inn, store-house for storing spirituous liquors, or house or place where spirituous liquors were, at the time, stored or given away, or at a public house, or at some other public place where people resorted." *Held*, that the indictment was sufficient on demurrer, and was not violative of the tenth section of the first article of the state constitution, which provides that, "the accused in all criminal prosecutions has the right to demand the nature and cause of the action against him." Burdine *v.* State, 25 Ala. 60. In this case the court say: "The form of the indictment is in accordance with section 3506 of the Code, which provides that where offences are of the same character and subject to the same punishment, the defendant may be charged with the commission of either in the same count in the alternative. The objection to this provision urged on the part of the appellant, is that it is in violation of the tenth section of the first article of our Bill of Rights, which entitles the accused to be informed of the nature and cause of the action, and to have a copy thereof. The object of this clause of the constitution was to enable every person against whom a criminal prosecution was instituted to defend himself against it, if innocent, and a due regard to the intent and spirit of this provision would require us to pronounce against any indictment, whatever might be its form, which was obviously insufficient to secure this result. The fact that the defendant may be charged with the commission of one or the other of two or more offences, which are specified with legal certainty in the indictment, does not render him less able to defend himself against either of the charges which are alleged. It is true that he may be required to meet each one of the offences; but he would have been obliged to do this if the indictment, instead of pursuing the form used, had been framed with different counts alleging the commission of all the offences which are here charged in the same count. We do not think that any constitutional right of the defendant can be impaired by sustaining the indictment in its present form."

**A "Quirt Shop"** is not necessarily known as a public house. A charge of gaming there is not, therefore equivalent to charging gaming in a public house. Tummins *v.* State, 18 Tex. App. 13.

**A Livery Stable** is not necessarily a public place, and an averment that the playing was in a livery stable is not a sufficient averment. Fossett *v.* State, 16 Tex. App. 375.

1. See Elsberry *v.* State, 41 Tex. 158.

2. See State *v.* Atkins, 1 Ala. 180; People *v.* Saviers, 14 Cal. 29; Elsberry *v.* State, 41 Tex. 158; State *v.* Fuller, 31 Tex. 559; State *v.* Jurgins, 31 Tex. 588; Millican *v.* State, 26 Tex. 366; State *v.* Barns, 25 Tex. 624; State *v.* Norton, 19 Tex. 102; State *v.* Lopez, 18 Tex. 33; Royal *v.* State, 9 Tex. 449; Sublett *v.* State, 9 Tex. 53; Early *v.* State, 23 Tex. App. 364; Bacchus *v.* State, 18 Tex. App. 15; Bowman *v.* State, 16 Tex. App. 513; Fossett *v.* State, 16 Tex. App. 375; Jackson *v.* State, 16 Tex. App. 373; Patterson *v.* State, 12 Tex. App. 222; Sheppard *v.* State, 1 Tex. App. 304; Linkous' Case, 9 Leigh (Va.) 608; Com. *v.* Butts, 2 Va. Cas. 181; Hords' Case, 4 Leigh (Va.) 674; s. c., 26 Am. Dec. 340; State *v.* Bess, 5 Coldw. (Tenn.) 55. *Compare* Burnett *v.* State, 30 Ala. 19; Rodgers *v.* State, 26 Ala. 76; Burdine *v.* State, 25 Ala. 60; Logan *v.* State, 24 Ala. 182; Flake *v.* State, 19 Ala. 551; Roquemore *v.* State, 19 Ala. 528; Coggins *v.* State, 7 Port. (Ala.) 263.

An indictment under statute, which alleges that the defendant bet "at a game played with cards in a highway, or public place," is sufficient. Ray *v.*

Under a statute which excepts from its provisions all games played in private houses, the indictment must negative the existence of such exceptions.[1]

**6. Joint Indictment.**—Two or more persons may be indicted jointly,[2] and under such an indictment one or more of the defendants may be convicted, and the remainder acquitted, where such a proceeding is warranted by the proof.[3] In such a case the indictment must charge the defendants with playing together, and all at the same game,[4] or show that they are charged with separate

State, 50 Ala. 172; Napier *v.* State, 50 Ala. 168. And under such an indictment, a conviction may be had, on proof that the game was played "at a house where spirituous liquors were retailed," and if the playing was in an open place within ten feet of the door of the house and in full view of it, this, in contemplation of the law, is at the house. Ray *v.* State, 50 Ala. 172; Napier *v.* State, 50 Ala. 168.

**Alleging Public Place.**—A charge alleging that the accused "did unlawfully play at a game with cards, at a public house, to wit, in the back room of the store-house of S," giving time and venue. *Held*, sufficiently to show that the locus was a public place, within the requirements of the Texas statute. Sheppard *v.* State, 1 Tex. App. 304. And the averment, in an indictment for gambling, that the defendant played a game of cards "in a certain outhouse to which divers people did then and there resort," is a sufficient conformity with the language of the statute—"outhouse where people resort." State *v.* Norton, 19 Tex. 102. In an indictment for gaming, the "public place" is sufficiently described by the words "near McFadden's grocery, at a public place, at Black Jack Springs, in Fayette county." State *v.* Lopez, 18 Tex. 33.

An indictment for playing cards in a public place, "to wit, in the room back of the Gilt Edge saloon," does not sufficiently aver that the playing was in a public place. Jackson *v.* State, 16 Tex. App. 373; Bowman *v.* State, 16 Tex. App. 513. But to support a conviction for playing at cards at a public house, or public place not mentioned in the terms of the law, it must be so averred in the indictment, and the facts and circumstances relied upon making it public must be set forth. Elsberry *v.* State, 41 Tex. 158. However, it seems that an indictment for permitting a horse to be run in a horse race on a public highway, need not state the termini of the highway. State *v.* Burgett, 1 Ind. 479; State *v.* Brown, 1 Ind. 532.

**Variance Between Indictment and Proof.**— Under a statute (Alabama Code, 1876, § 4212) punishing the allowing of gaming on board by captains of steamboats "navigating any of the rivers of the state," conviction could not be had under an indictment for so allowing gaming while navigating the Mobile river, on proof that the gaming was while navigating the Mobile bay. Johnson *v.* State, 74 Ala. 537.

An indictment for playing cards in a public place described the place as "N's gambling room, over J's saloon, on A street, in Waco, Texas." Proof was that N's gambling room was not vertically over J's saloon, but was on the second floor of the same building and vertically over a shop which adjoined J's saloon on the ground floor. *Held*, that there was no material variance between the allegation and the proof. Patterson *v.* State, 12 Tex. App. 222.

But where a presentment for gaming charged the offence as committed at the booth of S; the proof was of gaming at the booth of one C, the said S having no right, interest, or agency in said booth. *Held*, that the proof was insufficient to support the charge. Com. *v.* Butts, 2 Va. Cas. 18.

1. Colshell *v.* State, 23 Tex. App. 584.

2. Lindsey *v.* State, 48 Ala. 169; Elliott *v.* State, 26 Ala. 78; Ward *v.* State, 22 Ala. 16; Covy *v.* State, 4 Port. (Ala.) 186; Johnson *v.* State, 13 Ark. 684; Brown *v.* State, 5 Yerg. (Tenn.) 367; State *v.* Homan, 41 Tex. 155; Herron *v.* State, 36 Tex. 285; Galbreath *v.* State, 36 Tex. 200; State *v.* Roderica, 35 Tex. 507.

3. Ward *v.* State, 22 Ala. 16; Covy *v.* State, 4 Port. (Ala.) 186; Brown *v.* State, 5 Yerg. (Tenn.) 367.

4. Lindsey *v.* State, 48 Ala. 169; Elliott *v.* State, 26 Ala. 78; State *v.* Ho-

offences.[1] But where, in one count, a number of persons are charged with betting at a game in which all the players bet or wager against the "bank" or the dealer, such as faro, or any other game of like nature, it is proper to charge that they severally bet; and such an allegation will not make the indictment voidable, although the joinder of persons severally gaming who are guilty of the same species of offence produces inconvenience.[2]

**7. Joinder of Offences.**—While several different and distinct acts of unlawful gaming of the same general kind and nature may be charged in one indictment,[3] yet, under the usual and ordinary statutory provisions against the offence of gaming, the offence of maintaining a nuisance in the form of a gaming house, or of permitting gaming to be unlawfully carried on, those crimes are of a different nature, and cannot be joined in an indictment.[4]

**8. Indictment Against Common Gambler.**—An indictment under a statute which provides that any person who, for the purpose of gaming, travels from place to place, or frequents any place where gambling is permitted, shall be deemed a common or professional gambler, and punished as such; an indictment or information must charge defendant's purpose in frequenting a gaming house;[5] but it need not state that defendants committed any act of unlawful gaming.[6]

man, 41 Tex. 155; Galbreath *v.* State, 36 Tex. 200; Herron *v.* State, 36 Tex. 285; State *v.* Roderica, 35 Tex. 507.

**Playing at Different Times.**—If A and B are jointly indicted and tried for gaming, and the evidence shows that A and others played at one time when B was not present, and that B and others played at another time when A was not present, no conviction can be had against them. Elliott *v.* State, 26 Ala. 78.

**Playing at Same Time and Place, but Separate Game.**—An indictment charging three persons jointly with playing at a game of cards, at a public place, etc., in the form given in the statute, is not supported by evidence that two of the defendants played together at the game, at a public place, and that the other defendant played at a game of cards at the same time and place with persons not indicted—the two games being separate and distinct, and at different tables, and having no connection with each other. Only those persons who participated in the same game should be joined in one indictment. Lindsey *v.* State, 48 Ala. 169.

1. State *v.* Homan, 41 Tex. 155.
2. Johnson *v.* State, 13 Ark. 684.
3. See Orr *v.* State, 18 Ark. 540; Covy *v.* State, 4 Port. (Ala.) 186.
4. See Wheeler *v.* State, 42 Md. 563; State *v.* Fant, 2 Brev. (S. C.) 487; State *v.* Howe, 1 Rich. (S. C.) L. 260.

**Joinder of Offences in Joint Indictment.**—Several were jointly indicted, one for permitting the others to play at a prohibited game in his house, and the others for playing at such game, contrary to South Carolina act of 1802. After verdict of conviction the judgment was arrested, on the ground that the offences were distinct, and could not be joined in one indictment. State *v.* Fant, 2 Brev. (S. C.) 487.

5. **An Indictment for Being a Professional Gambler.**—*Held*, defective, because it only alleged that defendant, "did unlawfully frequent a house where gambling is permitted," etc., and did not charge the purpose of defendant in frequenting such house. State *v.* Allen, 69 Ind. 124.

6. Under a statute which provided that "any person who, for the purpose of gaming, with cards or otherwise, travels about from place to place, or shall frequent any place where gambling is permitted, shall be deemed a professional gambler," a prosecution was instituted against A, the affidavit on which the same was based stating that, on a certain day, etc., the said A "did then and there unlawfully frequent, for the purpose of gaming with cards, a certain place in said county,

**VII. EVIDENCE.**—On the trial of an indictment for gaming, it is not necessary to prove the precise day upon which the offence was committed, if the proof shows that the unlawful act was done before the finding of the indictment, and within the period of limitations;[1] but, although the indictment may charge several distinct offences in the alternative in the language of the statute, the prosecution is confined to evidence of a single offence, and cannot, after making proof of any one act, be allowed to adduce evidence of another act, committed at a different time or place.[2] Where the statute excepts from its provisions all games or gaming at private houses, it is necessary that the evidence show the publicity of the place where the gaming was done.[3]

Where defendant was charged with playing a prohibited game, upon which money was bet, proof that the game was played by defendant throws upon him the burden to show that nothing of value was wagered or staked on the game.[4] Proof that money was seen on a table at which defendant and others were playing a prohibited game, makes a *prima facie* showing that money was bet upon the game.[5] Where it is shown that defendant participated in a game, the rules of which are shown to require each player to contribute a certain part of a stake played for, constitutes *prima facie* proof of guilt.[6]

In order to show the nature or kind of a specified game, the manner in which it is played and the means used, expert evidence

where gambling was then permitted, to wit, a certain room then and there occupied by B," etc. *Held*, that the affidavit was sufficient, and that it was not necessary to aver that A actually engaged in gaming. Howard *v.* State, 64 Ind. 516.

1. State *v.* Czarnikow, 20 Ark. 160; Chapman *v.* State, 18 Ga. 736; State *v.* Agudo, 5 La. An. 183; Com. *v.* Hyde, Thach. Cr. Cas. (Mass.) 19; Rainy *v.* State, 14 Tex. 409.

**Particular Instance—Failure of Proof.**—Where the state, in a prosecution for gambling, attempts to prove a particular instance of gaming by the defendant, by one witness, and fails, they may call another witness and prove another and different instance of gaming by the defendant, within the period of limitation. State *v.* Czarnikow, 20 Ark. 160.

**Not the Same Act Proved Before Grand Jury.**—Evidence is not admissible to show that the act of gaming described in the indictment, was not the same act of which proof was given before the grand jury. Crain *v.* State, 14 Tex. 634.

2. Cochran *v.* State, 30 Ala. 542. *Compare* Pope *v.* State, 63 Miss. 53.

3. Fossett *v.* State, 18 Tex. App. 330.

4. Wilcox *v.* State, 26 Tex. 145.

5. State *v.* Anderson, 43 Mo. 420; St. Louis *v.* Sullivan, 8 Mo. App. 455; Rice *v.* State, 10 Tex. 545.

**Faro.**—On a prosecution for gambling, the government introduced evidence showing that the defendant was found with others around a table, with a faro-box and cards in his hands, and that checks and money passed between them. *Held*, that the state made out a *prima facie* case; and in the absence of rebutting testimony, or of any explanation as to what the defendant and the others were doing with the gambling devices, he was properly convicted. State *v.* Andrews, 43 Mo. 470.

**Keno.**—Where a defendant is found at a table with gambling devices before him, and a game of keno in progress, *prima facie* he is gambling, though it be not proved that he has paid for the card before him. St. Louis *v.* Sullivan, 8 Mo. App. 455.

6. **Proof that a Person Played at Pin Pool,** the rules of that game requiring that one who plays must have contributed to the pool, is sufficient to sustain a conviction for betting money at game so called. Cohen *v.* State, 17 Tex. 142.

is not necessarily required; any person who has an ordinary knowledge of the game, acquired either by observation or experience, or both, is competent to testify concerning it; any objection that he is not sufficiently conversant with the game going to the weight as testimony, rather than to its competency.[1]

From the nature of the offence of gaming, proof by persons not implicated as to specific unlawful acts is frequently altogether wanting, and, probably, for this reason, it is sometimes provided by statute that a conviction may be had upon the uncorroborated testimony of a joint offender;[2] and such statutory provision is constitutional.[3]

Some statutes, also, provide that parties concerned in the transaction may be compelled to testify against defendant in a prosecution for gaming; and, under such a provision, the person called as a witness cannot refuse to testify on the ground that by so doing he will criminate himself.[4]

**VIII. JUDGMENT.**—As in the case of all other misdemeanors, the offence on which defendant is convicted must be set out in the judgment of conviction with clearness and certainty, but the judgment will not be vitiated on account of mere informalities, if it shows for what offence the defendant is punished.[5]

**IX. PUNISHMENT.**—Gaming and betting upon horse races and some other sports, and upon elections, is generally made a misde-

1. In a trial upon an indictment for gaming, under a statute, a witness who had played "keno" twice, and seen it played two or three times, but who said he was no expert, *held* competent to tell what he knew of the game. Nuckolls *v.* Com., 32 Gratt. (Va.) 884.

2. See Wright *v.* State, 22 Tex. App. 670. *Compare* Smith *v.* State, 37 Ala. 472; Bass *v.* State, 37 Ala. 469; Davidson *v.* State, 33 Ala. 350.

**The Rule in Alabama.**—A participant in a game of cards is an accomplice, within Alabama statute (Code, 3600), which forbids a conviction on the unauthorized testimony of an accomplice. Davidson *v.* State, 33 Ala. 350.

The court cannot say, on an indictment for gaming, that a witness who aided the defendant in gaming by advice, and played two or three of his cards for him, but was engaged in reading during a part of the playing, was an accomplice, within the meaning of § 3600 of the Alabama Code. Smith *v.* State, 37 Ala. 472.

A person who joins a game of tenpins at the request of others who are betting upon it, but without betting himself, is not an accomplice, within the meaning of § 3600 of Ala. Code, which forbids a conviction upon the uncorroborated testimony of an accomplice. Bass *v.* State, 37 Ala. 469.

3. **Evidence to Convict.**—In prosecutions for gaming, a conviction may be had upon the uncorroborated testimony of an accomplice or joint offender, and Penal Code Tex., art. 367, which so provides, is a constitutional enactment. Wright *v.* State, 22 Tex. App. 670.

4. Cheesum *v.* State, 8 Blackf. (Ind.) 332; s. c., 44 Am. Dec. 771.

**Horse Race** has been *held* to be a game, within the meaning of the Indiana statute compelling parties concerned in the transaction to testify against one indicted for gaming. Cheesum *v.* State, 8 Blackf. (Ind.) 332; s.c., 44 Am. Dec. 771.

5. **"As Charged in the Information."**—A recital in the judgment, that the defendant was found guilty of the offence of gaming at tan, as charged in the information, is equivalent to a recital that the defendant was found guilty of gaming at tan by carrying on and conducting the same for money or its equivalent. People *v.* Sam Lung, 70. Cal. 515.

Upon the trial of an indictment for carrying on the swindling game of twenty-one, or top and bottom dice, and a verdict of guilty as charged, a judgment of conviction for carrying on the swindling game of top or bottom dice, omitting any reference to twenty-one,

meanor.[1] But statutes have been passed punishing as a felony either the offence of gaming generally, or the playing of certain games;[2] and such statutes are constitutional.[3]

The punishment for the offence of gaming is usually a fine,[4] the amount of which must be determined as prescribed by law;[5] but where the defendant fails to pay the fine imposed, he may be imprisoned.[6]

## GAMING HOUSES.

I. Definition, 1065.
II. Keeping Gaming Houses and Gaming Implements, 1066.
1. *What Places and Things Are Within the Statute*, 1066.
2. *The Offence*, 1075.
*a. At Common Law*, 1073.
*b. Under the Statutes*, 1074.
3. *Seizure of Gaming Implements*, 1081.
4. *Jurisdiction*, 1084.
5. *Indictment and Information*, 1084.
*a. Form of Prosecution*, 1084.
*b. Charging the Offence*, 1084.
*c. Description of Place or House*, 1087.
*d. Description of Game and Gaming Implements*, 1088.
*e. Allegation of Purpose or Intent*, 1091.
6. *Evidence*, 1091.
*a. Competency and Weight*, 1091.
*b. Presumption and Burden of Proof*, 1092.
7. *Verdict*, 1093.
8. *Punishment*, 1093.

**I. DEFINITION.**—Gaming houses are houses kept for the purpose of permitting persons to gamble for money or other valuable thing.[7]

is erroneous. Harland *v.* Territory (Wash. Tr.), 13 Pac. Rep. 453.

1. See People *v.* Shear, 7 Cal. 139; Hayes *v.* State, 55 Ind. 99; 1 Bish. on Stat. Cr., § 880.

2. See People *v.* Beatty, 14 Cal. 566.

**Dealing Faro.**—Under the Tennessee act, of 1820, a faro dealer, and also any other persons who received profits from the game, were guilty of felony. See McGowen *v.* State, 9 Yerg. (Tenn.) 184.

**3. Constitutionality of Statutes.**—The California act of April 27th, 1857, making the offence of gaming punishable as a felony, is constitutional. People *v.* Beatty, 14 Cal. 566. In this case the court say: "The last point in the brief is that the statute is unconstitutional. No argument is offered to support this proposition, nor is it maintainable. Similar statutes exist in many of the states, and have been carried into effect without a question of the constitutional power of the legislature to pass them. It may be that the punishment is disproportionate to the offence, and the public policy is promoted by such penalties being prescribed for such offences as can and will be enforced; but these are considerations with which we have no concern, for they address themselves solely to the legislative department, and in no way affect the constitutionality of its action."

4. See *Ex parte* Harrison, 63 Cal. 299; People *v.* Markham, 7 Cal. 288; Faris *v.* Com., 3 B. Mon. (Ky.) 79; Ervine *v.* Com., 5 Dana (Ky.) 216; State *v.* Dent, 1 Rich. (S. C.) L. 469; Com. *v.* Pegram, 1 Leigh (Va.) 569; Pitman's Case, 2 Rob. (Va.) 800; Wright *v.* State, 22 Tex. App. 670.

5. Where a statute against gaming left the amount of the fine to the discretion of the jury, *held*, error in the court, to dispense with a jury, and fix the amount of the fine, without consent. Ervine *v.* Com., 5 Dana (Ky.) 216.

6. *Ex parte* Harrison, 63 Cal. 299; People *v.* Markham, 7 Cal. 208; Faris *v.* Com., 3 B. Mon. (Ky.) 79.

When a person was convicted of gambling under the California Penal Code, § 330, this punishment prescribed is a fine of not less than $200 nor more than $1,000 and imprisonment in the county jail until payment of the fine and costs, not exceeding one year. It was *held* that satisfaction of a judgment for fine and costs rendered under such section can only be made in one of two ways, viz: by payment in money or by imprisonment for the time fixed by the judgment, which must be within the maximum time prescribed by the section. The section gives a defendant no right to pay either fine or costs by imprisonment at the rate of $1 per day. *Ex parte* Harrison, 63 Cal. 299.

7. 1 Bouv. L. Dict. (15th ed.) 704.

**Gaming Room.**—If a room is used to facilitate gaming operations, and is one

**II. KEEPING GAMING HOUSES AND GAMING IMPLEMENTS.**—The term "gaming houses," the keeping of which is an offence, includes every house, room or place which is owned, occupied, controlled, or kept as a resort or place of gathering for the purpose of gambling, wagering or betting. Its meaning includes places known as gaming rooms, betting houses,[1] places where pools are sold upon the result of elections, horse races, or of any other event or contest,[2] as well as of other places of a like nature.

The terms "gaming implements" and "gambling devices," include all instruments, implements, devices or means which are made and provided to be used in unlawful gaming, and which are used, or are practically adapted to be used, especially in that manner and for that purpose.[3]

While the scope of the terms "gaming houses" and "gaming implements," or "gaming devices," must vary to some extent, according to their use in the various statutes, their common law significance has not been altered by statute, but, in some cases, is either limited or extended.

**1. What Places and Things are Within the Statute.**—The following places, implements and devices, have been held to be gaming houses, gaming implements or devices, as the case may be: a bar room, saloon or any other place where spirituous liquors are re-

in which sporting characters are invited to congregate for the purpose of illegal amusement and gain, and to stake money or other things of value upon trials of chance, skill or endurance, it is a gaming room. People *v.* Weithoff, 51 Mich. 203; s. c., 4 Cr. L. Mag. 682.

"**A Common Gaming House** is a house kept or used for playing therein at any game of chance or any mixed game of chance and skill, in which a bank is kept by one or more of the players exclusively of the others; and in which any game is played, the chances of which are not alike favorable to all the players, including among the players the banker or other person by whom the game is managed, or against whom the other players stake, play, or bet." Stephen's Cr. L., art. 181.

1. "**A Common Betting House** is a house, office, room, or other place kept or used for the purpose of betting, between persons resorting thereto and the owner, occupier or keeper thereof; or any person using the same; or any person procured or employed by, or acting for or on behalf of, any such person; or any person having the care and management, or in any manner conducting the business thereof; or kept or used for the purpose of any money or valuable thing being received by or on behalf of any such person as aforesaid, as or for the consideration for any assurance, undertaking, promise, or agreement, express or implied, to pay or give hereafter any money or valuable thing on any event or contingency of, or relating to, any horse race, or other race, fight, game, sport or exercise; or as or for the consideration for securing the paying or giving, by some other person, of any money or valuable thing on any such event or contingency. Every common betting house is deemed to be a common gaming house." Stephen's Cr. L., art. 182.

2. **Pools Room.**—Keeping a room for the sale of pools on the result of baseball games and horse races, for profit and gain, is keeping a "gaming room," under the Michigan statute. People *v.* Weithoff, 51 Mich. 203; s. c., 4 Cr. L. Mag. 682.

3. See Williams *v.* City of Warsaw, 60 Ind. 457; Hayes *v.* State, 55 Ind. 99; State *v.* Hardin, 1 Kan. 474; Coolidge *v.* Choate, 52 Mass. (11 Metc.) 79; Com. *v.* Tilton, 49 Mass. (8 Metc.) 232; State *v.* Herryford, 19 Mo. 377; State *v.* Purdom, 3 Mo. 114; State *v.* Mann, 2 Oreg. 238; Frisbie *v.* State, 1 Oreg. 264; Bagley *v.* State, 1 Humph. (Tenn.) 486; Johnson *v.* State, 4 Sneed (Tenn.) 614; Howlett *v.* State, 5 Yerg. (Tenn.) 145; Squires *v.* Whisken, 3 Campb. 141; Rex *v.* Howel, 3 Keb. 510.

tailed, in which playing bagatelle,[1] billiards,[2] bowls,[3] dice-throwing,[4] dominoes,[5] "pigeon hole,"[6] pool,[7] or any other kind of gaming is carried on;[8] a billiard room or table;[9] a booth or table in a race-field set up for the purpose of gaming;[10] a bowling alley,[11] a pack of cards, or a gaming table for the use of

1. People *v.* Cutler, 28 Hun (N. Y.) 465.

2. Smith *v.* State, 22 Ala. 54; Wortham *v.* State, 59 Miss. 179; Horan *v.* Chief Justice of Travis County, 27 Tex. 226.

3. State *v.* Records, 4 Harr. (Del.) 554.

4. State *v.* Bishel, 39 Iowa 42; Com. *v.* Gourdier, 80 Mass. (14 Gray) 390; Com. *v.* Taylor, 80 Mass. (14 Gray) 26; Whitney *v.* State, 10 Tex. App. 377.

5. Whitney *v.* State, 10 Tex. App. 377.

6. State *v.* Bishel, 39 Iowa 42.

7. People *v.* Cutler, 28 Hun (N. Y.) 465.

8. Jacobi *v.* State, 59 Ala. 71; s. c., 3 Am. Cr. Rep. 157; Campbell *v.* State, 55 Ala. 89.

9. See Clark *v.* State, 49 Ala. 37; Harbaugh *v.* People, 40 Ill. 294; Hamilton *v.* State, 75 Ind. 586; Carr *v.* State, 50 Ind. 178; Crawford *v.* State, 33 Ind. 304; State *v.* Hope, 15 Ind. 474; Mount *v.* State, 7 Ind. 654; Blanton *v.* State, 5 Blackf. (Ind.) 560; State *v.* Miller, 53 Iowa 154; State *v.* Book, 41 Iowa 550; s. c., 20 Am. Rep. 609; State *v.* Bishel, 39 Iowa 42; Germania *v.* State, 7 Md. 1; Com. *v.* Adams, 109 Mass. 344; Wortham *v.* State, 59 Miss. 179; People *v.* Sergeant, 8 Cow. (N. Y.) 139; People *v.* Harrison, 28 How. (N. Y.) Pr. 247; Ward *v.* State, 17 Ohio St. 32; State *v.* Bristow, 41 Tex. 146; Barker *v.* State, 12 Tex. 273. *In re* Snell, 58 Vt. 207; United States *v.* Duvall, 2 Cr. C. C. 42.

10. U. S. *v.* Smith, 4 Cr. C. C. 659; U. S. *v.* Conner, 1 Cr. C. C. 102.

11. See Com. *v.* Goding, 44 Mass. (3 Metc.) 130; Tanner *v.* Trustees of Albion, 5 Hill (N. Y.) 121; s. c., 40 Am. Dec. 337. *Compare* Com. *v.* Drew, 57 Mass. (3 Cush.) 279; State *v.* Hall, 32 N. J. L. (3 Vr.) 158; State *v.* Gupton, 8 Ired. (N. C.) L. 271; Neal's Case, 22 Gratt. (Va.) 917.

**A Bowling Alley.**—In Tanner *v.* Trustees of Albion, 5 Hill (N. Y.) 121; s. c., 40 Am. Dec. 337, the court say: "This case has been argued mainly on the general words at the conclusion of the fourth section of the village charter, session L. of 1828, pp. 447, 448. So far as the arguments go on these, they need not be considered; for I am of the opinion that the offence prohibited is within the more particular words. Among other things, the trustees are authorized by that section to make by-laws relative to slaughter-houses and nuisances generally. The by-law in question provides that it shall not be lawful for any person to keep or maintain any ball alley, or apparatus, alley, machine, building, or inclosure, constructed or used for the purpose of playing thereon or therewith at the game called or known by the name of nine-pins or ten-pins, for gain, hire, reward or emolument of any kind, or in any manner whatsoever. Establishments of this kind in populous communities are, at best, and even when used without hire, very noisy, and have a tendency to collect idle people together and detain them from their business. When built and kept on foot for gain, the owner is interested to invite and procure as full an attendance as possible, day after day; and for this purpose temptations beyond mere amusement are often resorted to, such as drinking and gaming. So far as I have been able to discover, erections of every kind adapted to sports or amusements, having no useful end, and notoriously fitted up and continued with the view to make a profit for the owner, are considered in the books as nuisances. Not that the law discountenances innocent relaxation; but because it has become a matter of general observation, that, when gainful establishments are allowed for their promotion, such establishments are usually perverted into nurseries of vice and crime. Common stages for rope dancers have been adjudged nuisances at the common law; 'not only,' says Hawkins, 'because they are great temptations to idleness, but also because they are apt to draw together great numbers of disorderly persons, which cannot but be very inconvenient to the neighborhood.' 1 Hawk. P. C., 32, § 6. In the next section he distinguishes between places kept for such useful sports, and play-houses, which were originally instituted for the laudable design of rec-

ommending virtue to the imitation of the people and exposing vice and folly. These, he says, are not nuisances in their own nature; but may only become such by accident; whereas the others cannot but be nuisances. I mention common stages for rope dancing, because bowling alleys were long held to stand on the same footing. Jacob Hall's Case, 1 Mod. 76. Hall, a rope-dancer, had erected a stage, or was about erecting one, at Charing Cross, which the court of king's bench pronounced to be a nuisance. HALE, C. J., mentioned as a precedent, 'that in the eighth year of Charles I, Noy came into court and prayed a writ to prohibit a bowling alley erected near St. Dustan's Church, and had it.' In the report of Hall's Case, 2 Keb. 846, CHIEF JUSTICE HALE is represented as saying that 'Noy prayed a writ to remove a bowling alley and had it, without any presentment at all.' Thus, we see Hawkins is sustained by the highest authority in saying that such places cannot but be nuisances. The tendency of the alley being well known, it was adjudged to be a nuisance of itself; and a writ accordingly issued to remove it without any trial. Now, this is not because rope-dancing, or playing at nine-pins or any other game with bowls, is a mischief; nor, that being a spectator at a rope dance is censurable in the least. Such acts are not nuisances. In themselves they are entirely innocent. The nuisance consists in the common and gainful establishment for the purpose of sports, having the aptitude and tendency of which Hawkins speaks; not that this always produces the consequence of which he complains, but because there is imminent danger of its doing so. A deposit of gunpowder—a useful article—among a block of houses, might be very harmless; yet it is a public nuisance, from the danger of explosion. Anonymous, 12 Mod. 342. The case of People *v.* Sergeant, 8 Cow. (N. Y.) 139, is relied on, which *held* that a room kept for the playing of billiards was not a public nuisance, though a profit was made off it. But the court disavow the intent to interfere with the principle laid down by Hawkins. On the contrary, they refer to it with approbation, and admit that the keeping of a gaming house was an indictable offence at common law. This was *held* expressly in Rex *v.* Dixon, 10 Mod. 335. Yet the act of gaming was no more criminal by that law than dancing on a rope, or playing at cricket. It may be somewhat difficult to reconcile People *v.* Sergeant with the general principle which seems perfectly well settled; but the case claims no more than that a billiard room, appearing to be kept in a particular way, forms an exception. In general, the law is not scrupulous about actual results. It sees that a building has been erected for at least an idle purpose, the probable consequences of which will be pernicious. It does not stop, therefore, and call a witness to prove that it is so in fact. When Hall, the rope-dancer, was brought up, LORD HALE *held* it enough that the stage had been, or was about to be erected. He told him he understood it was a nuisance to the parish. It is true that some of the inhabitants, being present, said it occasioned broils and fightings, and drew so many rogues to the place that they lost things out of their shops every afternoon. But this information was not received as from witnesses. No one could, on his oath, connect the cause with the effect; and no one appears to have been sworn. All the evils complained of might have existed without the stage. Had the erection been for the purpose of some useful business or object, actual consequences would have been inquired of. But it was the simple case of one man squandering his time for money, in order to induce others to waste both their time and money. No one is so blind as not to see that such places, on their becoming known, bring together the most profligate mixtures: brawlers, drunkards, gamblers, blacklegs, pickpockets, and other petit thieves. LORD HALE did not want witnesses of this. All he wanted was the notoriety of the fact—the testimony of experience. According to the report of Hall's Case, 2 Keb. 846, there were more affidavits that Hall was going on to build his booth, which was not yet done. The reporter adds that, after the court were informed of the working, they sent for Hall and the workmen by a tipstaff; 'and because he would not enter into a recognizance not to build on, they committed him, and then he ceased.' VENTRIS gives the same account of the matter, 1 Vent. 169. He says, the complaint was that the booth was erecting, and that Hall intended to show his feats of activity to the annoyance of the complainants, 'by reason of the crowd of idle and naughty people that

would be drawn thither, and their apprentices inveigled from their shops.' The court ordered him to stop, to which he replied, with great impudence, that he had the king's warrant for it and promise to bear him harmless. After committing him, the court caused a record to be made of the nuisance, as upon their own view, and awarded a writ to the sheriff to prostrate it. All this is only following out the rule of the law that a man shall be holden accountable for the probable consequences of his acts; the obvious ground on which the court proceeded a few years before in the case of the bowling alley without even waiting for a presentment. In Rex *v.* Moore, 3 Barn. & Ad. 184, the defendant was convicted on the ground that he had collected a crowd in his own field for pigeon shooting, by which the neighborhood was annoyed; and he was held guilty of a nuisance. LITTLEDALE, J., said: 'No doubt it was not his (the defendant's) object to create a nuisance. If it be the probable consequence of his act, he is answerable, as if it were his actual object. If the experience of mankind will lead anyone to expect the result, he will be answerable for it.' In Rex *v.* Howel, 3 Keb. 465, which was in the 27 Car. II, the court thought an indictment for a nuisance in keeping a cockpit valid at common law; and this again on the authority of the bowling alley case which they mentioned, and said it was pulled down as a common nuisance. In Rex *v.* Dixon, the indictment was simply for keeping a common gaming-house. No consequences were mentioned; and it did not conclude *ad commune nocumentum*. It was, therefore, insisted that it could not be good at common law. The court answered, the conclusion was not necessary, because the act was an offence in its own nature. In the case before us, the rules of playing in Tanner's ball alley are stated, with an instance of play by persons who hired the alley, and proceeded under the inspection and reckoning of Tanner. I have gone into a consideration of the cases, to show that the building which the law considers a nuisance in its own nature, when kept in a particular way, and for a particular purpose, is not to be tested by appearances. It cannot be modified by printed rules against the practice of gambling, and by the surveillance of the owner, as if to see that they are not violated. The law knows that appearances are often stimulated. Vicious houses commonly make loud pretences to superior regularity, that, however others may behave, they would be thought an exception. In the case of the ball alley mentioned by LORD HALE, the court did not send and inquire what appearances of regularity and decency might be affected by the owner. Information that it was a bowling alley satisfied them; and they issued a writ to abate it, without waiting for a trial. Their own sagacity spoke as to the ultimate effects. If the building had been so far well conducted, so much the better for the community. The court determined that it should not afterwards be conducted at all, on account of the consequences which would probably ensue. Suppose a woman to hold out her house as one of ill-fame. Does it take from it the character of a nuisance, that there has been no instance of actual prostitution? The law applies, as we have seen, the *presumptio juris et de jure*. A man who should erect a pig-sty under his neighbor's window could hardly excuse himself by showing that he intended to keep it clean and inoffensive, although the thing is useful in itself. A house in a populous town, divided for poor people to inhabit during the prevalence of an infectious disease, is a nuisance. 1 Roll. Abr. 139, tit. NUSANS COMMON (F), 3. The law does not wait for the disease to spread. It exercises a wide forecast, and repels the evil at the threshold. It does the same thing in favor of public morals and public economy. A useless establishment, wasting the time of the owner, tending to fasten his own idle habits on his family, and to draw the men and boys of the neighborhood into a bad moral atmosphere—a place which, in spite of every care, will be attended by profligates, with evil communication, and at best with a waste of time and money, followed by the multiplication of paupers and rogues—has always been considered an obvious nuisance. . . . . The only argument I have urged in excuse for bowling alleys is, that the exercise of the players is conducive to health. In this respect such alleys have been compared with bath-houses. The answer is, that there are various other kinds of exercise entirely equivalent; and if not, the means of playing with bowls are easily accessible without those public establishments carried on for hire, which the law has denounced as of evil tendency.

cards;[1] a club-house in which spirituous liquors are sold, retailed

The playing with cards and dice has been recognized by grave authority as useful in recreating and fitting a person for business. Bac. Abr., GAMING (A). Yet, it would scarcely be pretended that a card or dice room kept for a reward, under the strongest protestations that it was intended solely for recreation, should be tolerated by the law. The pernicious consequence of allowing men to have a pecuniary interest in promoting that sort of play is too well known. There is no need, therefore, as the counsel for the plaintiff in error supposes, of the corporation showing that the power they have assumed is derivable from the general clause of the statute authorizing by-laws relative 'to anything, etc., that may concern the safety, advantage, or good government of said village.' The by-law is not 'contrary to or inconsistent with the laws of this state or the United States.' It is not, as he supposes, necessary to show actual gambling or actual mischief; and the alley is far from being legitimate in the same sense as the instance he puts of oyster shops, places of innocent refreshment, recreation or amusement, or for religious exercise."

1. See Wren *v.* State, 70 Ala. 1; State *v.* Bishel, 39 Iowa 42; State *v.* Stilwell, 16 Kan. 24; Com. *v.* Burns, 4 J. J. Marsh. (Ky.) 177; State *v.* Herryford, 19 Mo. 377; State *v.* Purdom, 3 Mo. 114; State *v.* Mann, 2 Oreg. 238; Frisbie *v.* State, 1 Oreg. 264; Howlett *v.* State, 5 Yerg. (Tenn.) 145; State *v.* Lewis, 12 Wis. 434; Fields *v.* Territory, 1 Wyo. Tr. 78; s. c., 3 Am. Cr. Rep. 318; Rex *v.* Shaw, 4 Man. L. Rep. 404. *Compare* State *v.* Hardin, 1 Kan. 474.

**A Pack of Cards.**—In the last case the court say: "The question presented for the consideration of this court is whether 'a pack of cards' is a gambling device, within the meaning of the Kansas act, adapted, devised and designed for the purpose of playing games of chance, etc. It is to be remarked, in the first place, that the several gambling devices specifically enumerated in this section, A B C, faro, roulette, etc., are all of them devices intended, devised and desinged for the purpose of gambling and for no other purpose. They are tools, implements and machinery of professional gamblers, and are, in the very language of the statute, adapted, devised and designed for the purpose named, while a 'pack of cards,' though, without doubt, frequently used for the purpose of gambling, is also, and much more frequently, used for the purpose of mere amusement, like drafts, checkers, chess, billiards, ninepins and dominoes. It will hardly be claimed, we think, that an indictment, framed under this section, for permitting a gambling device, to wit, a 'checker-board,' or a 'chess-board,' could have been sustained, because these implements, although, manifestly, in the same sense, 'adapted' to the forbidden purpose, are not, within the meaning of the law, either devised or designed for that purpose. Their more obvious and common use is for the purposes of innocent amusement, and though they may, perhaps, very frequently be used for purposes of gambling, they could not be called 'gambling devices,' within the meaning of this act, without doing violence to its obvious purport and intent. If, in a similar act against the crime of counterfeiting the coin of the United States, it should be forbidden to keep, or permit to be used, any tools or implements adapted, devised and designed for counterfeiting, and an indictment under that act should charge the possession of dies or moulds for counterfeiting the gold eagles and half eagles, or the silver dollars, halves and quarters of the coin of the United States, it might be good, because such moulds or dies could be used only for such unlawful purpose; but, if the possession of crucibles, melting-pots, etc., was charged, it might not furnish any presumption of guilt, as these latter implements, though indispensable to counterfeiting, are more frequently employed for innocent and beneficial uses. Gambling is sometimes carried on with the aid of very simple machinery, as for instance, by means of two small sticks or twigs cut of different lengths, and called 'cuts' or 'lots,' and perhaps as frequently as by any other means, with a coin or piece of money, the gamblers betting upon the chance of the coin being 'odd' or 'even,' or upon its falling, upon being thrown into the air, with the head or the reverse side uppermost. Yet it would seem hard to presume that the keeping of sticks of different lengths, or of coin, in a house or shop, would render the owner or occupant of the house or shop liable to indictment, under this section

or given away, and where gaming is permitted;[1] a place where cock-fighting is carried on;[2] a faro room or table;[3] a field or ground used for cricket, foot-racing and like sports;[4] a table for gaming called "hap-hazard," "blind-hazard," or "skin-cup;"[5] a keno room or keno tables;[6] a game of "loto;"[7] a machine to register odds in betting;[8]

of the act in question. It must, we think, be obvious that it was the intention of the legislature, in using the general words, after enumerating, specifically, certain of the most notorious and obnoxious of the implements used for the forbidden purpose, to include others of similar character, and, like them, designed solely for gambling purposes. The two twigs and the coin, in the case supposed, are, in a certain sense, adapted to the gambler's purpose, else they would not be used for it, but they were neither 'devised' nor 'designed,' and if the legislature intends to forbid all gambling and betting upon games of chance, it is plain that more certain, definite and comprehensive language should be made use of to evidence such intent."

1. See Jacobi *v.* State, 59 Ala. 71; s. c., 3 Am. Cr. Rep. 157.

2. Com. *v.* Tilton, 49 Mass. (8 Metc.) 232.

3. See *Ex parte* Ah Yem, 53 Cal. 256; Simms *v.* State, 60 Ga. 145; Rice *v.* State, 3 Kan. 141; Ritte *v.* Com., 18 B. Mon. (Ky.) 35; Com. *v.* Monarch, 6 Bush (Ky.) 301; State *v.* Price, 12 Gill & J. (Md.) 260; s. c., 37 Am. Dec. 81; Baker *v.* State, 2 Har. & J. (Md.) 5; Mount *v.* State, 15 Miss. (7 Smed. & M.) 277; O'Blennis *v.* State, 12 Mo. 311; State *v.* Ames, 10 Mo. 743; State *v.* Melville, 11 R. I. 417; s. c., 3 Am. Cr. Rep. 158; State *v.* Burton, 25 Tex. 420; Com. *v.* McGuire, 1 Va. Cas. 119; U. S. *v.* Holly, 3 Cr. C. C. 656; U. S. *v.* Le Fevre, 1 Cr. C. C. 244.

4. A person was charged on a summons under the betting-house act (16 & 17 Vict., ch. 119), §§ 1 and 3, with knowingly and willfully permitting a place of which he was the occupier to be used by certain persons for the purpose of betting with persons resorting thereto. On the hearing it was proved that he occupied, as tenant, a house with a piece of inclosed ground adjoining, used for cricket, foot-racing, and other games and sports. On the day named in the summons, foot-racing took place in the grounds, to which persons were admitted on payment of 6d. Within the grounds, but outside the place reserved for the runners, and amongst the spectators, some fifteen or twenty professional bettors stood on chairs and stools in different spots, with books in their hands, calling out the odds on the various runners, and betting with different persons, a man behind each of the professional bettors recording the bets in a book, the persons betting paying 1s. each, and receiving a ticket. The evidence satisfied the magistrate that the party knew of what was going on and took no steps to prevent it, and that he might have prevented it if he had been so minded; and he accordingly convicted him of the offence charged. *Held*, that the conviction was right. Haigh *v.* Sheffield (Corporation), L. R., 10 Q. B. 102; s. c., 44 L. J., M. C. 17; 31 L. T. 536; 23 W. R. 547.

5. State *v.* Carr, 6 Oreg. 133; State Melville, 11 R. I. 417; Com. *v.* Wyatt, 6 Rand. (Va.) 694.

6. Schuster *v.* State, 48 Ala. 199; Miller *v.* State, 48 Ala. 122; Portis *v.* State, 27 Ark. 360; Trimble *v.* State, 27 Ark. 355; Hazen *v.* State, 18 Fla. 184; Overby *v.* State, 18 Fla. 178; Brown *v.* State, 40 Ga. 689; Com. *v.* Monarch, 6 Bush (Ky.) 298; New Orleans *v.* Miller, 7 La. An. 651; New Orleans *v.* Palfrey, 7 La. An. 498.

7. Lowry *v.* State, 1 Mo. 722.

8. T and L were charged with an offence under 31 & 32 Vict., ch. 52, § 3, in being on a race course with a machine so constructed as to register the odds laid upon the horses then about to run in a race there. They were taking deposits on the bets made and amounts staked on the several horses, and soliciting bystanders to make bets, charging 10 per cent. upon the amounts won, for the use of the instrument which displayed the state of the odds, and by a mechanical arrangement varied the announcement from time to time according to the bets made, and they having been convicted. *Held*, that such a machine was an instrument or means of wagering, within the meaning of the section, and that the conviction was, therefore, right. Reg. *v.* Wolverhampton (Justices), Tollett *v.*

the game of monte;[1] a movable box at the races;[2] an inclosure for pigeon-shooting;[3] a pico room or table;[4] poker,[5] pools;[6] a place where "pools" on the result of horse races or baseball games are sold;[7] a place where *rouge et noir* is played;[8] a roulette table;[9] a stool on a race-course covered by an umbrella;[10] and a temporary wooden structure adjoining a race-course;[11]

Thomas, L. R., 6 Q. B. 514; 40 L. J., M. C. 209; 24 L. T. 508; 19 W. R. 890.

1. Wallace *v.* State, 12 Tex. App. 479.

2. By 16 & 17 Vict., ch. 119, § 3, "any person, who, being the owner or occupier of any house, office, room, or other place, or person using the same, shall open, keep, or use the same for purposes" of betting with other persons resorting thereto, is liable to a penalty. The respondent and a companion, having paid for admission, were in a railed inclosure of the grand stand at a race meeting. The companion stood on a small wooden box not attached to the ground, and he and the respondent called out, offering to make and making bets with other persons. The companion received the money for bets made, and the respondent booked the same. They stood together in one place within the inclosure during the races. *Held*, that the fixed and ascertained spot defined in the inclosure by the box at which the respondent orally advertised his willingness to bet, was a "place" used by him for the purpose of betting with persons resorting thereto, and he was liable for a penalty, under 16 & 17 Vict., ch. 119, § 3. Gallaway *v.* Maries, 8 Q. B. D. 275; s. c., 51 L. J., M. C. 53; 45 L. T. 763; 30 W. R. 151; 46 J. P. 326.

3. E was the occupier of inclosed grounds, in which a pigeon-shooting match between two persons for £10 a side, and afterwards a foot-race, took place, and into which the public were admitted on payment of money. The persons who were admitted into the grounds made bets with each other, both on the pigeon-shooting match and on the foot-race. *Held*, that the grounds were a "place," and that they were kept and used by E for the purpose of betting, within the meaning of 16 & 17 Vict., ch. 119, § 3. Eastwood *v.* Miller, L. R., 9 Q. B. 440; s. c., sub nom Eastwood *v.* Milles, 43 L. J., M. C. 139; 30 L. T. 716; 22 W. R. 799.

4. Euper *v.* State, 35 Ark. 629.

5. Fields *v.* Territory, 1 Wyo. Tr. 78; s. c., 3 Am. Cr. Rep. 318.

6. Wakefield *v.* Com., Ky. Ct. of App., not reported. See 7 Cr. L. Mag. 385.

7. Com. *v.* Simmonds, 79 Ky. 618; People *v.* Weithoff, 51 Mich. 203; s. c., 4 Cr. L. Mag. 682; James *v.* State, 63 Md. 242.

**Kentucky Statute.** — The machine known as "French pool" or "Paris mutual," used in betting on horse-racing, is a "contrivance used in betting," within the meaning of § 6, art. 1, ch. 47, Gen. Stat., which prohibits the setting up, exhibiting or keeping any contrivance used in betting. Com. *v.* Simmonds, 79 Ky. 618.

8. Rex *v.* Rogier, 1 B. & C. 272; s. c., 2 Dow. & Ry. 431.

9. State *v.* Simmonds, 3 Mo. 414.

10. B was on a race-course, standing on a stool, over which was a large umbrella, similar to a carriage umbrella, capable of covering several persons, the stock being made in joints like that of a sweep's brush, so as to be taken in pieces, and was fastened in the ground with a spike. The umbrella, when opened, was seven or eight feet high. It was a showery day, but the umbrella was kept up, rain or dry. On the umbrella was painted in large letters, "G. Bows, Victoria Club, Leeds." There was also a card exhibited, on which were the words, "We pay all bets first past the post." B was calling out, offering to make bets; and he was seen to make bets, the money being deposited with him, and for which he gave a ticket. *Held*, that B was using a fixed and ascertained "place" for the purpose of betting with persons resorting thereto, and was properly convicted, under 16 & 17 Vict., ch. 119, § 3. Bows *v.* Fenwick, L. R., 9 C. P. 339; s. c., 43 L. J., M. C. 107; 30 L. T. 524; 22 W. R. 804.

11. Upon a slip of land adjoining a race-course, during the races, there was erected a temporary wooden structure, four feet high, without a roof. Over it a board was exhibited upon which was the name of the proprietor, and there were betting lists containing the odds upon and against each horse which he

and a table for playing "thimble," or "thimbles and balls."[1]

**2. The Offence.**—*a.* AT COMMON LAW.—The keeping of a common gaming house is indictable at common law as a nuisance,[2] because such places are detrimental to the public welfare, in that they promote cheating and other corrupt practices, and incite to idleness and avaricious and wrongful ways of obtaining money or property of those whose time might otherwise be employed for the good of the community;[3] and because they encourage breaches of the public peace, and tend towards public disorder generally.[4]

The keeping or exhibiting of gaming implements is usually necessarily included in the offence of keeping a common gaming house, but such is not always the case, and it is often a separate offence.[5]

was willing to bet. The structure had two frontages, and boards, used as desks, fronting each way. At each desk, a man sat with a book for the purpose of recording the bets made with persons outside. Persons betting deposited money and received a card containing the terms of the bet. *Held*, that this was an office or place, within the meaning of 16 & 17 Vict., ch. 119, § 1. Shaw *v.* Morley, L. R., 3 Ex. 137; s. c., 37 L. J., M. C. 105; 19 L. T. 15; 16 W. R. 763.

1. State *v.* Red, 7 Rich. (S. C.) L. 8.

2. Vanderworker *v.* State, 13 Ark. (8 Eng.) 700; People *v.* Raynes, 3 Cal. 366; People *v.* Sponsler, 1 Dak. 277; State *v.* Doon, R. M. Charlt. (Ga.) 1; State *v.* Savannah, T. U. P. Charlt. (Ga.) 235; Bloomhuff *v.* State, 8 Blackf. (Ind.) 205; West *v.* Com., 3 J. J. Marsh. (Ky.) 641; State *v.* Haines, 30 Me. 65; Com. *v.* Stahl, 89 Mass. (7 Allen) 304; Com. *v.* Tilton, 49 Mass. (8 Metc.) 232, 235; Barada *v.* State, 13 Mo. 94; Lord *v.* State, 16 N. H. 325; s. c., 41 Am. Dec. 729; People *v.* Sergeant, 8 Cow. (N. Y.) 139; Tanner *v.* Trustees of Albion, 5 Hill (N. Y.) 121; s. c., 40 Am. Dec. 337; People *v.* Jackson, 3 Den. (N. Y.) 101; s. c., 45 Am. Dec. 449; U. S. *v.* Dixon, 4 Cr. C. C. 107; U. S. *v.* Holly, 3 Cr. C. C. 661; U. S. *v.* Ismenard, 1 Cr. C. C. 150; Rex *v.* Higginson, 2 Burr. 32; Reg. *v.* Rogier, 2 Dow. & Ry. 431; s. c., 1 B. & C. 272; Reg. *v.* Shaw, 4 Man. L. Rep. 404; Greenhuff's Case, 2 Swint. 236; Rex *v.* Medlor, 2 Show. 38; 1 Bish. Cr. L., §§ 504, 1135; Harris' Cr. L., 138; Roscoe's Cr. Ev. (10th ed.) 821; 1 Russ. on Cr. (5th Eng. ed.) 428; Stephen's Cr. L., art. 181; Wood on Nuis. § 45.

**Married Woman.**—A married woman may be convicted of keeping a gaming house. Reg. *v.* Dixon, 10 Mod. 335.

3. See Vanderworker *v.* State, 13 Ark. (8 Eng.) 700; State *v.* Doon, R. M. Charlt. (Ga.) 1; Com. *v.* Stahl, 89 Mass. (7 Allen) 304; Lord *v.* State, 16 N. H. 325; s. c., 41 Am. Dec. 729; Rex *v.* Dixon, 10 Mod. 336; Rex *v.* Medlor, 2 Show. 38; Bacon's Abridg. tit. NUISANCES; 1 Bish. Cr. L., § 1135; 1 Hawks, ch. 76, § 6; Roscoe's Cr. Ev. (10th ed.) 821; 1 Russ. on Cr. (5th Eng. ed.) 428.

4. See People *v.* Jackson, 3 Den. (N. Y.) 101.

5. See Wren *v.* State, 70 Ala. 1; Toney *v.* State, 61 Ala. 1; Hazen *v.* State, 18 Fla. 184; Overby *v.* State, 18 Fla. 178; Murray *v.* State, 9 Fla. 246; Simms *v.* State, 60 Ga. 145; State *v.* Stillwell, 16 Kan. 24; Rice *v.* State, 3 Kan. 141; State *v.* Hardin, 1 Kan. 474; Com. *v.* Simmonds, 79 Ky. 618; Waddell *v.* Com., (Ky.) 8 Cr. L. Mag. 741; Ervine *v.* Com., 5 Dana (Ky.) 216; Hinkle *v.* Com., 4 Dana (Ky.) 518; Com. *v.* Burns, 4 J. J. Marsh. (Ky.) 177; Ritte *v.* Com., 18 B. Mon. (Ky.) 35; State *v.* Markham, 15 La. An. 498; State *v.* Caldwell, 3 La. An. 435; James *v.* State, 63 Md. 642; Germania *v.* State, 7 Md. 1; State *v.* Price, 12 Gill & J. (Md.) 260; s. c., 37 Am. Dec. 81; State *v.* Smith, 19 Mo. 683; State *v.* Fulton, 19 Mo. 680; State *v.* Herryford, 19 Mo. 377; State *v.* Ames, 10 Mo. 743; State *v.* Simonds, 3 Mo. 414; State *v.* Purdom, 3 Mo. 144; Lowry *v.* State, 1 Mo. 722; State *v.* Gupton, 8 Ired. (N. C.) L. 271; State *v.* Bishop, 8 Ired. (N. C.) L. 266; State *v.* Carr, 6 Oreg. 133; State *v.* Mann, 2 Oreg. 238; Frisbie *v.* State, 1 Oreg. 264; Com. *v.* Wyatt, 6 Rand. (Va.) 694; State *v.* Melville, 11 R. I. 417; s. c., 3 Am. Cr. Rep. 158;

The word "keeping," used in connection with gaming houses or gaming implements, signifies duration; and it has been held that neither a single act of play nor even a single day's use of a gambling device will constitute the offence of "keeping" it.[1] But it has also been decided that the "exhibition" of a gaming table is not a continuous offence.[2] A continuous keeping of a gaming house, however, even for a space of many months, is but one criminal act, and subject only to one indictment.[3]

*b.* UNDER THE STATUTES.—While the keeping of a gaming house or of gaming implements, is an offence at common law, it is also specifically made an offence by statute in most of the states. These statutes, however, differ greatly in the acts, places or things prohibited; and no general rule as to the extent or limit of the scope of these statutes can be laid down. In some states, the owner or occupant of premises who permits gaming thereon is indictable;[4] in others the statutes especially provide against gaming in any house or place where intoxicating liquors are sold or kept for sale at retail;[5] and, under such a statute, it makes no difference whether the defendant had or had not a

McGowan *v.* State, 9 Yerg. (Tenn.) 184; Howlett *v.* State, 5 Yerg. (Tenn.) 145; State *v.* Johnson, 41 Tex. 504; Houghton *v.* State, 41 Tex. 136; Yepperson *v.* State, 39 Tex. 48; Wolz *v.* State, 33 Tex. 331; Stearnes *v.* State, 21 Tex. 692; Kain *v.* State, 16 Tex. App. 282; State *v.* Horan, 11 Tex. 144; Wallace *v.* State, 12 Tex. App. 479; Reeves *v.* State, 12 Tex. App. 149; Whitney *v.* State, 10 Tex. App. 377; Harris *v.* State, 9 Tex. App. 308; U. S. *v.* Smith, 4 Cr. C. C. 659; U. S. *v.* Holly, 3 Cr. C. C. 656; U. S. *v.* Lefevre, 1 Cr. C. C. 244. U. S. *v.* Conner, 1 Cr. C. C. 102.

1. U. S. *v.* Smith, 4 Cr. C. C. 659. *Compare* State *v.* Crogan, 8 Iowa 523. In this case it was *held* that, under the Iowa Code, § 2721, which prohibits the keeping of gambling houses, the offence is as complete, if the house is kept for that purpose for one day, as if kept for a year. State *v.* Crogan, 8 Iowa 523.

2. Kain *v.* State, 16 Tex. App. 282.

3. State *v.* Lindley, 14 Ind. 430.

4. Poteet *v.* State, 72 Ala. 558; Wakefield *v.* Com. (Ky.) not reported in full; see 7 Cr. L. Mag. 385.

**In Kentucky.**—An indictment will lie against a person for suffering gaming in a house of which he is possessed. Com. *v.* Lampton, 4 Bibb (Ky.) 261.

**Knowledge of Betting Immaterial.**—To authorize a conviction under section 10 of article 1, chapter 47, Kentucky General Statutes, for suffering gaming on one's premises it is not necessary to allege or prove that the accused had knowledge of the betting. A person who permits games to be played upon his premises must, at his peril, see that there is no betting. Wakefield *v.* Com., (Ky.) 7 Cr. L. Mag. Rep. 385.

**Widow in Possession.**—A widow was indicted for knowingly permitting a tenement, of which she was owner, to be used for gambling. It appeared that a public road ran through the estate of her husband, and that the gambling took place at a spring on the opposite side of the road from her house, but whether in the road or not, did not appear. *Held*, that, as the widow was in possession of the premises, she was bound to protect them against any illegal use, and that it made no difference whether her dower had been assigned or not, or whether or not she was entitled to the full possession. Roberts *v.* Com., 11 B. Mon. (Ky.) 3.

5. See State *v.* Bishel, 39 Iowa 42; Com. *v.* Watson, 2 Duv. (Ky.) 408; Marston *v.* Com., 18 B. Mon. (Ky.) 485; Wortham *v.* State, 59 Miss., 179; Hitchins *v.* People, 39 N. Y. 454; People *v.* Cutler, 28 Hun (N. Y.) 465; State *v.* Hawkins, 91 N. C. 626; State *v.* Hix, 3 Dev. (N. C.) L. 116; Horan *v.* Chief Justice of Cravis Co., 27 Tex. 226; Whitney *v.* State, 10 Tex. App. 77; U. S. *v.* Lefevre, 1 Cr. C. C. 244.

**Leased Room.**—It is no defence to a prosecution of a licensed retailer for allowing gaming to be carried on in the same building with his saloon, that the room where it was done was leased by

license to sell intoxicating liquors.[1] And in other states, some games are licensed and others prohibited;[2] and nearly all have statutory provisions specially relating to certain games or classes of games at certain places.[3]

him (he being lessee of the whole building) to another person, unless he satisfies the jury that he let for lawful uses only, and the gaming is wholly independent of him. Campbell *v.* State, 55 Ala. 89.

1. State *v.* Hawkins, 91 N. C. 626.

2. See People *v.* Raynes, 3 Cal. 366; Hazen *v.* State, 18 Fla. 184; Overby *v.* State, 18 Fla. 178; People *v.* Goldman, 1 Idaho N. S. 714; State *v.* Johnson, 41 Tex. 504; Houghton *v.* State, 41 Tex. 136; Reeves *v.* State, 12 Tex. App. 129; Harris *v.* State, 9 Tex. App. 308; Fields *v.* Territory, 1 Wy. Tr. 78; s. c., 3 Am. Cr. Rep. 318.

**In California.**—Under the act of March 15, and April 29, no license-money can be recovered from a keeper of a gaming house who has not obtained a license. People *v.* Raynes, 3 Cal. 366. And the failure to obtain such license leaves the party as he would have been at common law, a public wrongdoer, and subject to indictment and punishment. People *v.* Raynes, 3 Cal. 366.

**In Florida,** a keno table is a gaming table, but the keeper of one cannot be punished under the law of 1839 (Thomp. Dig. 500, 501), for the reason that the legislature of 1879, ch. 3099, has legalized it by requiring a license for such table. Overby *v.* State, 18 Fla. 178. And persons keeping and running "keno" tables without having procured a license and paid a license tax are guilty of a misdemeanor, and should be punished on conviction, by a fine, as is provided in laws of 1879, ch. 3099, § 12. Hazen *v.* State, 18 Fla. 184.

**Idaho Act of January 13, 1871,** supersedes the common law in relation to the offence of keeping gaming houses. *Held*, therefore, that the act having provided for the licensing of certain games, and having pronounced certain others unlawful, it was intended that games not named in the act should be lawful. People *v.* Goldman, 1 Idaho N. S. 714.

**In Texas,** the act of March 24, 1881, provided for the levy of a tax on gaming tables, and further provides that such levy shall not exempt from punishment under the laws in force against gaming. *Held*, therefore, that the rule formerly announced is abrogated, and that payment of a license tax cannot be pleaded in bar to a prosecution for keeping a gaming table. Reeves *v.* State, 12 Tex. App. 129. (Overruling Harris *v.* State, 9 Tex. App. 308; Houghton *v.* State, 41 Tex. 136; State *v.* Johnson, 41 Tex. 504).

**In Wyoming.**—Under the Wyoming statute of 1869, as to gaming, the offence consists in keeping or dealing, or permitting, etc., any game of chance with cards for money, which game is not authorized to be licensed. Fields *v.* Territory, 1 Wyo. Tr. 78; s. c., 3 Am. Cr. Rep. 318.

3. **In Alabama.**—The Alabama statute of 1828, against gaming, covers the whole ground of the previous statutes, so far as the keeping, exhibiting, carrying on, or being in any manner interested in any gaming table or bank whatever, is concerned, and includes every offence connected with the subject-matter. State *v.* Whitworth, 8 Port. (Ala.) 434.

**What is Keeping a "Gaming Table."**—The statute which prohibits the keeping or exhibition of "gaming tables" (Ala. Code, § 4208), is not confined to tables on which banking games are played, such as faro, roulette, etc., but includes all tables for games of cards, such as draw-poker. A person who has the custody or possession of the table, and authority over the use of it, and supervises the gaming on it, is the keeper of it; and whoever has an interest in the gain or profit derived, or expected to be derived from its use for gaming purposes, is interested or concerned in the keeping of it, as those words are used in the statute. Wren *v.* State, 70 Ala. 1. See Toney *v.* State, 61 Ala. 1.

**Who is Liable.**—Under the statute which makes it a penal offence for any person, "being the owner or proprietor of any house, room," etc., to rent or lease the same for gaming purposes, or knowingly to permit the same to be used for any such purpose (Ala. Code, § 4214), a conviction may be had against a person who has possession as a tenant or lessee. Poteet *v.* State, 72 Ala. 558.

**In Arkansas.**—A person who knowingly permits any kind of gaming whatsoever in any house, outhouse, or

other building of which he is the owner or occupant, may, under section 4 of the statute against gaming, be indicted and punished. (Rev. Stat. 273.) State *v.* Mathis, 3 Ark. 84.

The owner or occupant of a house, etc., cannot be indicted, under section 4 of the gaming act, for permitting poker or any of the small games of cards mentioned in section 8 of the act, to be played in his house, etc., but only for suffering some of the games, tables, banks, etc., embraced in the previous sections to be played, carried on, exhibited, etc., therein. Stith *v.* State, 13 Ark. 680; State *v.* Stillwell, 20 Ark. 96.

**In Colorado.**—To keep a gaming house contrary to Colorado Revised Statutes 223, is a misdemeanor, which may be punished upon information filed by the district attorney, pursuant to Colo. Rev. Stat. 224. Chase *v.* People, 2 Colo. 509.

**In District of Columbia,** a public gaming house is a nuisance. U. S. *v.* Ismenard, 1 Cr. C. C. 150. *Compare* U. S. *v.* Milburn, 4 Cr. C. C. 720.

**Former Conviction Under Ordinance.**—A conviction under the by-law of Washington for keeping a faro table, does not bar an indictment for keeping a common gambling house, relating to the same period. The power delegated to a municipal corporation to legislate upon the subject does not abrogate the common law offence, so long as the corporation has not passed a by-law covering the whole extent of the common law offence. U. S. *v.* Holly, 3 Cr. C. C. 656.

**Renting.**—One who sets up a billiard table and room, and rents it to another, is liable to the penalty prescribed by Maryland act of 1798, ch. 113, whether he receives his rent by the game or all at once. U. S. *v.* Duvall, 2 Cr. C. C. 42.

**In Georgia.**—In order to a conviction under the Georgia Code, § 4540, for keeping a faro table for the purpose of playing and betting at the same, it need not be proved that things of value were bet. Simms *v.* State, 60 Ga. 145.

**In Illinois.**—Simply keeping billiard tables for amusement and exercise of persons desiring to use them for that purpose, although it may be the custom for the parties to play for the purpose of determining who are to pay for the use of the tables, is not "keeping a common gaming house," within the meaning of § 129 of the Illinois Criminal Code. Harbaugh *v.* People, 40 Ill. 294.

**In Indiana—Billiards.**—As the keeper of a billiard table for the purpose of wagering any article of value thereon is specially prohibited by section 74 of the act defining misdemeanors, it must be *held* that such tables are not within section 38 of the Ind. Crimes Act. State *v.* Hope, 15 Ind. 474.

The keeper of a billiard table, though he do not play on it himself for money, nor suffer others to do so, yet if, for a stipulated compensation per game, he allows persons to use it, is liable to indictment under the statute of Indiana. Rev. Stat. 1838, ch. 218. Blanton *v.* State, 5 Blackf. (Ind.) 560.

**Hire of Table.**—Suffering gaming for "the hire of the table" is indictable under 2 Ind. Rev. Stat. 1876, p. 469, § 29. Hamilton *v.* State, 75 Ind. 586.

**Knowledge of Gaming Necessary.**—A conviction on an indictment for keeping a gaming house, *held* not to be sustained by proof that gaming was carried on by third persons on the premises of the defendant without his knowledge. Padgett *v.* State, 68 Ind. 46.

**Playing by Minor.**—One having the general care and management of a billiard table cannot evade the law by showing that, at the time the game was played by the minor, he was present, but did not personally control or manage the table. Hipes *v.* State, 73 Ind. 39.

In an indictment for allowing minors to play billiards, the words "public billiard hall" *held* to indicate a public place where billiard tables were kept to be used in playing billiards. Manheim *v.* State, 66 Ind. 65.

**Municipal Control.**—The word "game," in the city incorporation law (1 Ind. Rev. Stat. 1876, p. 267, § 53), means one upon the result of which a wager is made. A complaint by a city for violation of an ordinance prohibiting one from allowing a minor to "participate in any game of any kind whatever," must allege that the game was not upon the result of which a wager was made. Williams *v.* Warsaw, 60 Ind. 457.

**In Iowa.**—Keeping a house where games at billiards, dice, cards or pigeonhole are played, for the use of the table or other appliances therefor, and for beer, cigars or oysters, is keeping it for "gambling," within the Iowa Revision, § 4363. State *v.* Bishel, 39 Iowa 42.

**Playing for the Hire of the Table.**—In State *v.* Book, 41 Iowa 550; s. c., 20 Am. Rep. 610, the court say: "The evidence shows that the defendant kept

a place, as charged in the indictment, where persons resorted for the purpose of playing games of billiards, pin-pool, etc., and where the defendant also kept cigars and drinks for sale; that it was the custom or habit of persons resorting to this place to play billiards and pin-pool, and the losing party to pay for the game; the price of pin-pool was five cents a cue, and billiards twenty cents a game. Sometimes, too, the man that got beat would treat. The evidence also leaves no doubt of the fact that the defendant knew that games of billiards and pin-pool were played in the manner the evidence shows; in other words, that it was usual, in fact universal, for them to play those games with the agreement or understanding that the loser should pay for the games, and that they were in fact so played.

"The statute provides that to 'play at any game for any sum of money or other property of any value' is gambling. Code, § 4028. Now, it is clearly shown, and not disputed, that the defendant kept certain tables on which divers persons were in the habit of playing at what is called the game of 'pin-pool.' That this play is a 'game' there is no dispute, and there is no controversy about the fact that, for the use of the tables and other instruments of the game, the defendant charged and required the players to pay a certain sum of money for each cue (whatever that is). When, therefore, two or more persons played this game they became jointly or severally bound to pay the sum or sums of money chargeable therefor. It is plain that if they play the game or games in order to determine which of the players shall pay the entire sum or sums which they would be jointly or severally bound to pay, they play for the sum each one would be bound to pay, and it does not change the matter that they play the game in advance of paying therefor. The principle is the same as if the money had been staked or put up before the game was played. It is gambling in the one case as well as in the other. Nor is it any less gambling that the sum of money played for is small. To 'play at any game for any sum of money,' however small, comes within the statute."

**In Kentucky.**—Under the statute of 1823, a person who sets up a gaming table, at which money is bet or a game is played, is liable, although he does not bet or play himself. Com. *v.* Burns, 4 J. J. Marsh. (Ky.) 177.

**Dealer of Cards.**—Under the statute of 1823, a person who deals the cards for a bank or gaming table, although he have no interest in the profits, violates the law. Com. *v.* Burns, 4 J. J. Marsh. (Ky.) 177.

Section 2 of the act of 1823, if not repealed, applies only where "a gaming table or bank" is set up or kept; not where games with cards are merely permitted. Ervine *v.* Com., 5 Dana (Ky.) 216.

**Permission Without Authority.**—The statute of 1833 does not authorize the imposition of a fine upon one who assumes, without authority, the right, and does permit gaming in a room where he is neither owner, occupant, nor, by lawful authority, superintendent. Calvert *v.* Com., 5 B. Mon. (Ky.) 264.

**Confined to Gambling Devices.**—Ky. Rev. Stat. 368, § 6, providing that "whosoever shall set up, etc., any faro bank, gaming table, machine or contrivance used in betting, or other game of chance, whereby money or other thing is, or may be, won or lost, shall be fined," etc., was intended to suppress the use of such tables, machines, or contrivances only as are ordinarily used for gambling purposes, and not such as are ordinarily used for amusement only, although by them money may be lost or won. Ritte *v.* Com., 18 B. Mon. (Ky.) 35.

**Gain or Loss of Money Immaterial.**—In a prosecution under section 6, art. 1, ch. 47, Gen. Stat. Ky., for setting up, exhibiting, and keeping any machine, instrument or contrivance that is ordinarily used for gambling for money or property, it is not necessary to allege in the indictment, or to prove on the trial, that money or other thing was on any particular occasion won or lost thereby. Waddell *v.* Com., (Ky.) 8 Cr. L. Mag. 741.

**"Setting Up" and "Keeping" at Same Time.**—Setting up a gaming table may be an entire offence, and keeping a gaming table and inducing others to bet upon it may also constitute a distinct offence, and for either a separate indictment would lie; but where both are perpetrated by the same person at the same time, they constitute but one offence, for which, in Kentucky, one count is sufficient, and for which but one penalty can be inflicted. Hinkle *v.* Com., 4 Dana (Ky.) 518.

**For Price of Game.**—Two persons entered the defendant's pool room and

played a game, being aware that the charges by the owner were five cents for each cue used. There was no agreement as to who would pay these charges, but it was the "practice" for the loser to pay the bill. When the game was over the loser settled the account. *Held*, that there was no money "bet and lost," and that the defendant was not guilty of suffering gaming. Wakefield *v.* Com., (Ky.) not reported in full; see 7 Cr. L. Mag. Rep. 385.

**Tavern Keeper.**—An indictment of a tavern keeper for permitting gaming in his house will not be sustained where it appears from the evidence in the case that such gaming was carried on, without the defendant's knowledge, in a room which he had leased for a bedroom, and over which he had no control. Com. *v.* Watson, 2 Duv. (Ky.) 408.

**In Louisiana**, a statute was passed with the design to suppress gaming houses with their capital always ready for play. Whether the stake was owned or furnished by the house, or made up at the time by the players, the evil, it was *held*, was the same, and the offence was the same. The game of keno was *held* to be within the description. New Orleans *v.* Palfrey, 7 La. An. 498; New Orleans *v.* Miller, 7 La. An. 651. To keep a house where a banking game is carried on, as well as to keep a banking game, is an offence, under the statute; there is no real difference between keeping a banking house where money is bet or hazarded, and keeping a house where a banking game is carried on. State *v.* Markham, 15 La. An. 498.

**Municipal Permission Immaterial.**—On a trial of an information, under the gambling act, a municipal ordinance authorizing, and receipts for a license to exhibit the game during the time of the offence, are not admissible. State *v.* Caldwell, 3 La. An. 435.

**In Maryland.**—The offence is not confined to keeping a gaming table, but the keeping of any house or other place for the purpose of gambling, is within the letter of the law. Wheeler *v.* State, 42 Md, 563.

**Faro.**—The act of 1797, ch. 110, in relation to faro tables, only applies to dwelling houses, outhouses, and places occupied by tavern keepers, etc. Baker *v.* State, 2 Har. & J. (Md.) 5.

**Billiard Tables Used for Faro.**—Billiard tables used for playing game of faro, ceases to be a billiard table in the eyes of the law, and does not fall within the exception of a statute prohibiting the keeping of any gaming tables except billiard tables. State *v.* Price, 12 Gill & J. (Md.) 260; s. c., 37 Am. Dec. 81.

**An Incorporated Club Owning a Billiard Table** and making a charge for the use thereof, is liable, under Maryland acts of 1824, ch. 64, and 1826, ch. 219, to the penalty imposed on "any person keeping or exhibiting for use a billiard table," without a license. Germania *v.* State, 7 Md. 1.

**Pools on Horse Races.**—Under Md. Code, §§ 59, 62, amended Md. Acts 1882, ch. 271, punishing the keeping of "a gaming table or other place of gambling," and providing that "all games, devices or contrivances at which money or any other thing shall be bet or wagered, shall be deemed a gaming table." *Held*, that a person could not be indicted for selling pools on horse races, or keeping rooms where such pools are sold. James *v.* State, 63 Md. 242.

**In Massachusetts.**—An averment in an indictment that a person has kept and maintained a tenement used for illegal gaming does not charge an offence at common law, or one punishable under Mass. Gen. Stat., ch. 85, § 7, or ch. 87, § 6. Com. *v.* Stahl, 89 Mass. (7 Allen) 304.

**At Private House for Amusement.**—It was a violation of Mass. Rev. Stat., ch. 50, § 17, to allow persons to resort to one's own house for the purpose of playing at any unlawful game, although only for amusement. Com. *v.* Pattee, 66 Mass. (12 Cush.) 501.

**One Room Only of House.**—A person keeping one room only of a house, and keeping a faro bank therein for public resort, is within the statute of 1798, ch. 20, although the words of the statute are, "keeping a house," and although there be no proof of his paying rent for the room. Com. *v.* Hyde, Thach. C. C. (Mass.) 19.

**Playing for Liquor.**—Playing cards, dice, or any game of hazard, to determine who shall pay for liquor, or for any other article, is illegal gaming; and evidence of such gaming in a building will support an indictment on Mass. Stat. 1855, ch. 405, for a nuisance by keeping a tenement resorted to for illegal gaming. Com. *v.* Gourdier, 80 Mass. (14 Gray) 390; Com. *v.* Taylor, 80 Mass. (14 Gray) 26.

**Renting Shed.**—The defendant let a shed contiguous to a passage-way between the shed and the defendant's store, and received the rent, knowing that the shed was used for gaming. *Held*, that the defendant did not actually occupy the shed, within the meaning of the statute of Mass. 1798, ch. 20, § 2. Com. *v.* Dean, 18 Mass. (1 Pick.) 387.

**Billiards.**—Under Mass. Gen. Stat., ch. 88, § 70, the fact that the owner of a building fitted up a room in it, and let it and the table for a weekly rent, to a tenant in whose possession, with the defendant's knowledge, the table was used for playing at billiards for hire, gain or reward, without any license from the mayor, aldermen or selectmen, will sustain an indictment. Com. *v.* Adams, 109 Mass. 344.

**Bowls.**—The game of bowls, or nine-pins, is an unlawful game, within the meaning of Mass. Rev. Stat. ch. 50, § 117; and one who is not licensed as an inn-holder, etc., is liable to indictment, if he, for hire, gain or reward, suffer persons to resort to a building actually used or occupied by him for the purpose of playing at bowls and nine-pins. Com. *v.* Goding, 44 Mass. (3 Metc.) 130. If he suffer persons, from time to time, to resort to a house, etc., he does not commit a single continuing offence, but several distinct offences, and is liable to a penalty for each of them. Com. *v.* Goding, 44 Mass. (3 Metc.) 130. *Compare* Com. *v.* Drew, 57 Mass. (3 Cush.) 279.

**Cock-fighting** is an unlawful game or sport; and an inn-holder, who suffers any person resorting to his premises to use or exercise that game or sport there, is indictable, under Mass. Rev. Stat., ch. 47, § 9. Com. *v.* Tilton, 49 Mass. (8 Metc.) 232.

**In Michigan.**—Keeping a room for the sale of pools on the result of base-ball games and horse races, for profit and gain, is keeping a "gaming room," under ch. 43, § 15, of the Mich. Revised Stat. of 1846, as amended by the act of 1877 (Public Acts 1877, p. 168). People *v.* Weithoff, 51 Mich. 203, s. c., 47 Am. Rep. 557; 4 Cr. L. Mag. 682; 1 Denv. L. J. 186; 15 Chicago L. N. 404.

**In Mississippi.**—A liquor-seller cannot be convicted under Miss. Code 1880, § 1121, of permitting a "game of chance" upon his premises, on proof that he allowed billiard playing. Wortham *v.* State, 59 Miss. 179.

**Faro.**—On a trial for suffering a gaming table to be exhibited in the house occupied by the accused, the court refused to instruct the jury, "that if the accused had let the rooms of his house, in which the exhibition of the faro bank took place, to certain persons, and that, at the time when he left them, he had no knowledge or expectation that they would be used for that purpose, they must find for the defendant." *Held*, that the instruction was properly refused. Mount *v.* State, 15 Miss. (7 Smed & M.) 277.

**In Missouri.**—It is not necessary in order to constitute the offence of enticing and permitting persons to play upon a gambling device, under the criminal law of 1845, that money or property should be bet, won or lost thereon. State *v.* Fulton, 19 Mo. 680; State *v.* Smith, 19 Mo. 683.

**Cards.**—Keeping a pack of cards, with which money is won and lost, is an offence punishable under the statute against gambling. State *v.* Purdom, 3 Mo. 144. State v. Herryford, 19 Mo. 377.

**Faro.**—An indictment charging the keeping of a faro bank, and inducing persons to play therewith for money, charges but one offence. State *v.* Ames, 10 Mo. 743.

**Loaning Money to Set Up Gaming House.**—The lending of money to set up a faro bank, and the receiving of a part of the winnings, is not an offence against § 16 of art. 8 of the statute concerning crimes and punishments. O'Blennis *v.* State, 12 Mo. 311.

**Loto.**—The game of "loto" is a gambling device, and if a loto table is kept at which the game was played for money, it is an indictable offence. Lowry *v.* State, 1 Mo. 722.

**Question of Chance for Jury.**—On an indictment for keeping a gambling device, the question whether the game is one of chance is for the jury. Glascock *v.* State, 10 Mo. 508.

**Subletting the Premises.**—Where a statute imposes a penalty on "one who permits gaming tables to be set up and used for the purpose of gaming in a house to him belonging, or by him occupied, or of which he has at the time the possession or control," it is a sufficient defence to a prosecution thereunder, that the defendant had sublet the premises occupied by the tables to a third party, and parted with the entire possession thereof to him, and that the sub-lessee had the exclusive

possession of the premises. State *v.* Ebert, 40 Mo. 186.

**Former Conviction by Municipality.**—An individual, who has been punished by the corporate authorities of the city of St. Louis for keeping a roulette table cannot be indicted in the state courts for the same offence. State *v.* Simonds, 3 Mo. 414.

**In New Hampshire.**—An indictment alleged that the defendant kept a gaming place for "money, hire, gain and reward." The proof was that it was the general custom for the party defeated to pay for the use of the tables—one shilling for each game. *Held*, that this was gaming for money, within the meaning of the statute. State *v.* Leighton, 23 N. H. (3 Fost.) 167.

**In New York.**—One who keeps a shop for the sale of beer, cigars, etc., and allows his customers to play games for such articles, he furnishing them at the end of the games and charging the loser therefor, is guilty of violating the statute against gambling (Laws 1851, ch. 504), although such gambling takes place only occasionally. Hitchins *v.* People, 39 N. Y. 454.

**Who are Deemed to be "Gamesters."**—The defendant kept a public saloon, to which persons resorted for the purpose of playing pool and bagatelle. In some cases the losers were, by the terms of the game, to pay for the use of the apparatus, and in others for the drinks. *Held*, that the house was a public nuisance at common law, and that persons who resorted to it were gamesters, within the meaning of the N. Y. Code of Civ. Pro., subd. 4 & 7 of § 899, People *v.* Cutler, 28 Hun (N. Y.) 465.

**In Ohio,** one who keeps a billiard saloon violates the statute "for the prevention of gaming" if he allows persons to play on condition that the fee for the use of the table be paid by the loser. Ward *v.* State, 17 Ohio St. 32. The act "more effectually to prevent gambling" does not repeal, alter or modify the act of March 12, 1831, entitled, "An act for the prevention of gaming," but simply comes in aid of the latter act, by provisions intended to break up gambling houses, and to punish severely the keeper of any gaming establishment or device. Buck *v.* State, 1 Ohio St. 61.

**In Oregon.**—In Oregon, the exhibitor of a gaming table called "hap-hazard," alias "blind-hazard," alias "stick-cup," is liable to the same punishment as an exhibitor of a faro bank. State *v.* Carr, 6 Oreg. 133.

**In Rhode Island,** the same is true. State *v.* Melville, 11 R. I. 417; s. c., 3 Am. Cr. Rep. 158.

**In Tennessee,** the act of 1829, making dealers at faro guilty of felony, is not, like the ordinary acts against gaming, to be construed remedially. McGowan *v.* State, 9 Yerg. (Tenn.) 184.

**In Texas.**—The word gaming, as used in article 2047 of Paschal's Digest of the Laws of Texas, which provides that "if any person shall keep or exhibit, for the purpose of gaming, etc.," is synonymous with betting. When it is evident that the keeping of a gaming table is not for the purpose of obtaining bettors, there is no violation of the statute. Wolz *v.* State, 33 Tex. 331.

**Keeper Must Have Knowledge of the Betting.**—Though a table in a public place, upon which games are played, is usually kept for the fees of the table, and not for gaming, yet if a game is played for money, the keeper may be found guilty of keeping it for the purpose of gaming, in the absence of proof that the money was bet without his knowledge or consent. Yepperson *v.* State, 39 Tex. 48.

**Raffle.**—An indictment, found under article 412 of Texas Penal Code, charging that defendant "did keep a gaming table for the purpose of gaming," is sustained by proof that he exhibited a game called grand raffle. Stearnes *v.* State, 21 Tex. 672.

**"Exhibiting."**—The act of 1848, concerning crimes, etc., repeals, or renders inoperative, the act of 1840, with regard to gaming. Hence, since 1848, the exhibition of gaming tables in one's house, or the letting of a room for such exhibitions, is not indictable. State *v.* Horan, 11 Tex. 144.

**What is a Public Gaming House.**—A room to which persons generally are permitted to resort to play at games with cards for money, though every person who desires has not access to it, is a public gambling house, within the meaning of the statute. Lockhart *v.* State, 10 Tex. 275; Rice *v.* State, 10 Tex. 545.

The room in which the game is played must be shown to have the inhibited character. It is not necessary that it be in the main business-room, but it must be auxiliary to, or used in connection with, the principal room. O'Brien *v.* State, 10 Tex. App. 544.

**3. Seizure of Gaming Implements.**—In several states, the seizure and public destruction of gaming tables and other implements and devices used for gambling, are authorized by statute.[1] That

**Table for Dice-throwing in Saloon.**—The appellant was prosecuted under an indictment charging that he did "unlawfully keep and exhibit a gaming table for the purpose of gaming." The evidence disclosed that the appellant was the proprietor of a saloon, and kept in his saloon a table upon which the game of dice was thrown for drinks and money, and upon which the game of dominoes was played. *Held*, that the tables denounced by articles 358, 359, 360 of the Penal Code, are such tables only as are constructed only for the playing of certain specific inhibited games, in which the table is not only a part of the gaming device, but is also essential to the proper playing of the game. Whitney *v.* State, 10 Tex. App. 377.

**Monte.**—The indictment alleged that the game played was *monte*, which is one of those specially inhibited by article 360 of the Penal Code, but there is no allegation that the same was kept or exhibited for the purpose of gaming, and unless so kept and exhibited for the purpose of gaming, it was no violation of law to permit the game to be played in one's house, unless the house is such an one as is named in article 355, Penal Code. Wallace *v.* State, 12 Tex. App. 479.

**In Virginia.**—Several offences, under the Virginia gaming act, may be charged against one for exhibiting, another for playing at, and a third for suffering, faro to be played at his house. Com. *v.* McGuire, 1 Va. Cas. 119.

**Poker.**—One who keeps tables on which the game of poker or draw-poker is played, and who is only interested in the game for compensation for the use of the tables, house and gas, is not guilty of gaming, under Virginia Code 1873, ch. 194, § 1. Nuckolls *v.* Com., 32 Gratt. (Va.) 884.

**Hap-hazard.**—In Virginia, the exhibitor of a gaming table called "hap-hazard," alias "blind-hazard," alias "skin-cup," is liable to the same punishment with an exhibitor of a "faro bank." Com. *v.* Wyatt, 6 Rand. (Va.) 694.

**In Manitoba,** the cards, etc., referred to in § 3 of 38 Vict., ch. 41, must be such as are ordinarily used in playing an unlawful game. Reg. *v.* Shaw, Manitoba (Q. B.;) s. c., 4 Man. L. Rep. 404.

1. People *v.* Copley, (Ill.) 4 Cr. L. Mag. 187; Ridgeway *v.* West, 60 Ind. 371; Com. *v.* Certain Gaming Implements, 141 Mass. 114; Com. *v.* Gaming Implements, 119 Mass. 332; Coolidge *v.* Choate, 52 Mass. (11 Metc.) 79; Lowry *v.* Rainwater, 70 Mo. 152; s. c., 35 Am. Rep. 420; Willis *v.* Ward, 1 Hilt. (N. Y.) 590.

**An Ordinance Authorizing the Arrest,** etc., of a person keeping a gaming house, does not, without a specific provision therefor, authorize the seizure and destruction of gaming implements. Ridgeway *v.* West, 60 Ind. 371.

**Police Officer.**—A police officer may, without a warrant, arrest a person found in the act of gambling, but a warrant directed to the "sheriff or any constable" gives a police officer no right to seize gambling implements. People *v.* Copley, (Ill.) 4 Cr. L. Mag. 187.

**Game Cocks** are not implements of gaming, within the meaning of Mass. Rev. Stat., ch. 50, § 19, and ch. 142, § 2, and cannot be lawfully seized on a warrant commanding the seizure of such implements. Coolidge *v.* Choate, 52 Mass. (11 Metc.) 79.

**Complaint.**—A complaint on the Gen. Sts., ch. 170, § 2, as amended by the St. of 1859, ch. 364, § 2, alleged belief that "gaming apparatus and implements are used, kept and provided to be used in unlawful gaming, in certain rooms resorted to for the purpose of unlawful gaming, in a certain building situated and numbered thirteen and one-half, in Hayward Place, in Boston, that is to say, in the rooms on the second, third and fourth stories of said building, and also that furniture, fixtures and personal property are contained therein, and may be found therein, at any time when persons may there be found playing at some unlawful game, which said rooms are occupied by some person whose name is to your complainant unknown." The warrant issued on this complaint directed the officer to enter the rooms mentioned in the complaint and search for and seize said gaming apparatus and implements, and also to search for and seize all the furniture, fixtures and personal property found in the rooms described in the complaint, at the time when any persons are there found playing at any unlawful game. *Held*, that

such statutes are valid under some circumstances cannot be questioned;[1] but a statute which authorizes the destruction of gaming implements without notice to the owner, or a judicial determination of his guilt, is clearly in violation of the federal constitution.[2]

the premises to be searched were sufficiently described. Com. *v.* Gaming Implements, 119 Mass. 332.

**Information.**—An information, filed after the return of a warrant issued on a complaint under the Gen. Sts., ch. 170, § 2, as amended by the St. of 1869, ch. 364, § 2, after reciting the complaint and the warrant, averred that "by virtue of said warrant" the informant, on a day named, entered the rooms described, and then and there seized certain gaming apparatus and implements (describing them), "and your informant did also then and there seize certain furniture, fixtures and personal property used as the furniture, fixtures and personal property of said rooms." *Held*, that the information showed that the furniture, fixtures and personal property were seized by virtue of the warrant. Com. *v.* Gaming Implements, 119 Mass. 332.

**Notice.**—Upon the filing of an information after the return of a warrant issued on a complaint under the Gen. Sts., ch. 170, § 2, as amended by the St. of 1869, ch. 364, § 2, praying for the condemnation of certain gaming apparatus and implements, the clerk issued an order "in accordance with the order of the court," directing a service by copy of the information and order upon the persons in whose possession the articles were found, and by posting a copy of the order and information on the building where the seizure was made, fourteen days before the hearing. The return of the officer showed that after diligent search, he could not find the parties named, and that their usual places of abode were unknown to him, and that the notice was served by posting a copy, as directed, on the building. *Held*, that publication of notice in the public papers was not required, and that the notice given was sufficient. Com. *v.* Gaming Implements, 119 Mass. 332.

**1.** See Lowry *v.* Rainwater, 70 Mo. 152; s. c., 35 Am. Rep. 420; McCoy *v.* Zane, 65 Mo. 13.

**2.** See People *v.* Copley, (Ill.); 4 Cr. L. Mag. 187; Lowry *v.* Rainwater, 70 Mo. 152; s. c., 35 Am. Rep. 420.

**Destruction of Gaming Implements.**—In the last case, which was an action for damages against the acting president of the board of police commissioners of the city of St. Louis and others, for the seizure and destruction of certain property claimed by defendants to have been a gaming table, the court say: "Since this case was decided by the court of appeals, that of McCoy *v.* Zane, 65 Mo. 13, was decided by this court, wherein this court intimated an opinion that sections 24, 26 and 27, Wag. Stat. 503, are constitutional. These sections are identical with sections 5, 6 and 7 of the act creating the board of police commissioners of the city of St. Louis, except that sections 24, 26 and 27 of the general statutes confer the power upon any judge or justice of the peace, which by the police commissioners' act is conferred upon the acting president of the board. Section 5 of the act creating the board of police commissioners provided that, 'Whenever the acting president of said board (in the general statutes, any judge or justice of the peace) shall have knowledge or shall receive satisfactory information that there is any prohibited gaming table, or other gaming device, kept or used in the city of St. Louis, he shall have power to issue, and it shall be his duty forthwith to issue, a warrant directed to some other officer of the police force under said board (in the general statutes, to the sheriff or any constable) to seize and bring before him such gaming table or other gaming device.' Section 6. 'The officer charged with the execution of such warrant shall have power, if necessary, to break open doors for the purpose of executing the same, and for that purpose may have the assistance of the whole police force.' Section 7. 'It shall be the duty of such acting president (in the general law, of the judge or justice of the peace) before whom any such prohibited gaming table or gaming device shall be brought, to cause the same to be publicly destroyed by burning or otherwise.' In McCoy *v.* Zane, 65 Mo. 13, the constitutionality of the sections upon which the proceedings of JUDGE HENDRICKS were based was not considered by this court, NAPTON, J., observing that 'in view of the

conclusions we have reached in the case, it is unnecessary to determine the questions which have been so extensively discussed by the counsel in regard to the constitutionality of these statutory provisions.' It is, therefore, in this state, an open question, with which we are in this case directly confronted. By the general law, a judge or justice of the peace, and by the act establishing the board of police commissioners, the acting president of the board, may issue his warrant directing a constable, or police officer, to bring before him any gaming table or gaming device alleged to be used for gaming purposes, and, without any further investigation, order its destruction. A legislative act which authorizes an officer, without notice to the owner, or even the semblance of a judicial investigation, to seize and destroy the property of a citizen, cannot be sustained under a constitution which declares that 'no state shall deprive a person of life, liberty or property without due process of law.' LORD COKE says that the words '*per legem terræ*' mean by due process of law, and being brought into court to answer according to law. In the language of CURTIS, J., in Greene *v.* Briggs, 1 Cur. C. C. 311, the words 'law of the land' do not mean any act which the assembly may choose to pass. If it did, the legislative will could inflict a forfeiture of life, liberty or property without a trial. The exposition of these words as they stand in magna charta, as well as in the American constitutions, has been that they require 'due process of law,' and in this is necessarily implied and included the right to answer to, and contest, the charge, and the consequent right to be discharged from it unless it be proved. In Cooley's Constitutional Limitations, p. 362, the learned author says: 'Nor can a party by his misconduct so forfeit a right that it may be taken from him without judicial proceedings in which the forfeiture shall be declared in due form.' Forfeiture of rights and property cannot be adjudged by legislative act, and confiscations without a judicial hearing after the notice would be void, as not being due process of law. JUDGE SELDEN, in Wynehamer *v.* People, 13 N. Y., 378, said, 'the words "due process of law" must be understood to mean that no person shall be deprived by any form of governmental action of either life, liberty or property, except as the consequence of some judicial proceeding appropriately and legally conducted.' JUDGE COOLEY, in his work on constitutional limitations, speaking of laws to prohibit the sale and manufacture of intoxicating drinks as a beverage, declaring them a nuisance, and providing for their condemnation and destruction, remarks that 'it is only where, in framing such legislation, care has not been taken to observe those principles of protection which surround the persons and dwellings of individuals, securing them against unreasonable searches and seizures, and giving them a right to trial before condemnation, that the courts have felt at liberty to declare that it exceeded the proper province of police regulation.' We doubt if a case can be found in any state in the Union sustaining an act conferring such power upon a judge, justice of the peace, police commissioner, or any other officer, as the president of the board of police commissioners is invested with by sections 5, 6 and 7 of the act establishing that board; similar, but infinitely less obnoxious, acts have been *held* void in Massachusetts (Fisher *v.* McGirr, 67 Mass. (1 Gray) 1, in Michigan, (Hibbard *v.* People, 4 Mich. 126), and in other states. In Lincoln *v.* Smith, 27 Vt. 355, the court observes of their statute for the seizure and destruction of intoxicating liquors: 'It would be somewhat remarkable if an enlightened legislature at the present day should pass a law with an intention to have liquors adjudged forfeited by a judicial tribunal, and ordered to be destroyed, without a trial and without proof that they were intended for sale contrary to law, and we apprehend that the statute does not require us to put the legislature who passed this act in so awkward a dilemma.' If valid, what we have regarded as guarantees of our rights of property, both in the federal and state constitutions, are unmeaning phrases, calculated to lull us into a sense of security rather than to afford us protection against invasions of what we have regarded as sacred rights. We are not unmindful of the duty of the courts to weigh carefully all that may be urged in favor of the validity of an act of the legislative department of the government, before declaring it in conflict with the organic law, and only to announce such a conclusion when no doubt is entertained of its correctness. After a careful examination of the 7th section of the act under consideration,

Where the seizure is lawful, the officer making it has an implied right to hold the property until the trial; during that time it is in the custody of the law, and no action lies to recover it therefrom, whether the owner be guilty or not.[1]

**4. Jurisdiction.**—Gaming houses, being nuisances, are within the class of offences which may generally be suppressed and punished by municipal corporations, as well as by state courts;[2] but the fact that a city or town has jurisdiction to prosecute and punish the keeping of a gaming house, or of gaming implements, is no bar to a separate prosecution for the same offence by the people.[3]

**5. Indictment and Information.**—*a.* FORM OF PROSECUTION.—While proceedings against a person charged with keeping a gaming house and gaming implements are generally prosecuted by indictment or information, yet the penalty for the violation of such statutory provisions against gaming houses can only be recovered by action *qui tam*;[4] and under other statutes the penalty can be recovered by indictment, although the prosecutor or informer may receive a share.[5]

A criminal prosecution for the offence of keeping a gaming house, or of keeping or exhibiting gaming implements or devices, may ordinarily be prosecuted either by indictment, presentment or information, as in the case of other misdemeanors generally.[6]

*b.* CHARGING THE OFFENCE.—An indictment for keeping a gaming house is framed in the same general manner as for keeping a disorderly house of any other kind. Where the offence to

and numerous adjudications of the courts of other states bearing upon the question involved, we are satisfied that it is in conflict with the fourteenth amendment to the Federal Constitution, and therefore invalid."

1. Willis *v.* Warren, 1 Hilt. (N.Y.) 490.

2. See City of Mount Pleasant *v.* Breeze, 11 Iowa 399; Tanner *v.* Trustees of Albion, 5 Hill (N. Y.) 121.

**Suppressing Gaming and Gambling Houses.**—The grant of power to "suppress gaming and gambling houses," includes the power to suppress "gaming;" but where the crime of gaming is defined, and the punishment thereto prescribed by the law of the state, the city is not authorized to suppress any game not prohibited by such law, nor to punish any person playing thereat; but it is confined to the use of such means as may be within its power to enforce the state law within its limits. *In re* Lee Tong, 18 Fed. Rep. 253; s. c., 5 Cr. L. Mag. 67.

**Same—A Grant of Power to a City to** "suppress and restrain all descriptions of gaming," repeals by implication an earlier statute empowering the selectmen to promote or forbid the use of billiard tables. The grant of power to restrain gaming confers the right to license billiard playing. *In re* Snell, 58 Vt. 207.

3. Hankins *v.* People, 106 Ill. 628; Wragg *v.* Penn Township, 94 Ill. 12; Skidmore *v.* Bricker, 77 Ill. 164; Severin *v.* People, 37 Ill. 414; Freeland *v.* People, 16 Ill. 380.

4. **The Penalty for Keeping a Billiard Table Without License,** under the Alabama statute (Aik. Dig. 411), cannot be enforced, except by action *qui tam*. State *v.* Fillyaw, 3 Ala. 735.

5. **In Maryland.**—By the provisions of the act of 1797, ch. 10, and the settled practice, the penalty prescribed for keeping a faro table in a place used as a tavern, may be recovered by indictment, although one-half of the penalty goes to the informer. U. S. *v.* Evans, 4 Cr. C. C. 105.

6. **In Virginia,** a tavern-keeper, who is presented for suffering faro and loo to be played at his house, may be tried on the presentment alone, without any information; and if he refuses to answer to the presentment, judgment by default may be rendered against him. Com. *v.* Maddox, 2 Va. Cas. 19.

be charged is statutory, the form will, necessarily, vary somewhat, according to the terms of the statute.[1] Some offences

1. State *v.* Crogan, 8 Iowa 573; State *v.* Cure, 7 Iowa 479.

**An Information for "Carrying on and Conducting** a certain game of tan, then and there played for money," is good, under Penal Code Cal., § 330. It is not necessary to state that the person accused was the employe or owner of the game; nor is it proof as to that fact an essential prerequisite to conviction. People *v.* Sam Lung, 70 Cal. 515.

**Allegation that Games were Actually Played.**—In an indictment under Mass. Rev. St., ch. 50, § 17, it is sufficient to allege that the defendant did, for hire, gain and reward, permit persons to resort, etc., for the purpose of playing at a certain unlawful game mentioned, without alleging that persons actually did resort there for the purpose of playing, or did there play, at any unlawful game. Com. *v.* Stowell, (50 Mass.) 9 Metc. 572.

**In Iowa.**—An indictment charging that defendant "did keep a house, shop and place under his control, in which said house, shop and place said defendant did permit and suffer divers persons to the jurors unknown, to play at cards, dice, dominoes and other games for money, cigars, beer and other things, contrary to the form of the statute in such cases provided, and against the peace and dignity of the state of Iowa," is sufficient, under § 4026 of the Code. State *v.* Kaufman, 59 Iowa 273.

**Keeping and Permitting Playing.**—An indictment with two counts, the first charging the keeping of a gambling house, and the second the permitting of other persons in a place under the defendant's control to play for money, is not objectionable for duplicity. State *v.* Bitting, 13 Iowa 600; State *v.* Cooster, 10 Iowa 453.

**In Maryland.**—Md. Code, art. 30, § 56, provides that "No person shall keep any gaming table, or any house, vessel or place, on land or water for the purpose of gambling" and by section 59, "any person keeping a gaming table, or other place for gambling, shall be deemed guilty of a misdemeanor, and on conviction thereof," etc. *Held*, that a count, in an indictment under this article which averred that the accused, at a certain time and place, did, for gambling purposes, then and there keep a certain place, to wit, a certain room in a hotel, for gambling then and there, contrary to the statute, sufficiently charges the offence within the statute. Wheeler *v.* State, 42 Md. 563.

**Exhibiting Table.**—An indictment which alleges that the accused "did unlawfully keep and exhibit a certain bank and table for the purpose of gaming," is sufficient to charge the offence of exhibiting a gaming table, as defined by the Penal Code. Parker *v.* State, 13 Tex. App. 213.

**In England,** an information under 16 & 17 Vict., ch. 119, charged A with having on the 5th of October, and on divers other days and times between the 5th of October and laying the information (the 16th November), being then and there the occupier of a house, knowingly and willfully opened, kept and used the same for the purpose of betting with persons resorting thereto. The justices state that it was established to their satisfaction that he did so keep and use the house on the 8th November, but not on the 5th October, or any other day; and they convicted him of the offence committed on the 8th November. *Held*, that the information was good, as not alleging more than one offence, and that the conviction thereon might, therefore, be upheld. Onley *v.* Gee, 30 L. J., M. C. 222; s. c., 7 Jur. N. S. 570; 4 L. T. 338; 9 W. R. 662.

**"Kept and Suffered."**—An indictment for keeping a gaming house is not bad for charging that the defendant kept and suffered his house to be used for gaming, etc.; otherwise, if the allegation is used in the disjunctive. Dormer *v.* State, 2 Ind. 308.

**Omission of Connecting Words.**—An indictment against the owner of a billiard table for permitting a minor "to play a certain game said table, called pool," is bad, because of the omission of the word "at" or "upon" before the words "said table." Donninger *v.* State, 52 Ind. 326.

**Conclusion.**—Concluding an indictment of a gaming house as a common nuisance, contrary to the form of the statute, "will not vitiate, when it is coupled with an allegation that the offence charged was a "common nuisance," and a further conclusion "against the peace and dignity of the state." The words, "contrary to the statute," etc., will be regarded as surplusage. Vanderworker *v.* State, 13 Ark. 700.

may be charged in the language of the statute.[1] An allegation in an indictment for the common law misdemeanor of keeping a common gaming house, that the same was "feloniously" as well as unlawfully done, may be rejected as surplusage;[2] and so also may an allegation in such an indictment that the keeping was "against the statute."[3]

A charge that the defendant "kept" the house in which gaming is alleged to have been carried on, is a sufficient allegation that he occupied it.[4]

The indictment need not state the names of the persons who played in the house where the gaming is charged to have been committed; and if it does, every name need not be proved as alleged.[5]

Where the offence to be charged is statutory, the question as to what provisos or exceptions the indictment must negative is determined according to the settled rule applicable to all indictments on statutes,[6] which may be stated generally as follows:

**1. An Indictment for Keeping a Pigeon-hole Table Without License** is sufficient if it charges the offence in the language of Wagner's Mo. Stat., 213, § 7. State *v.* Stogsdale, 67 Mo. 630.

**"A House."**—An indictment for keeping a gaming house was *held*, not to be bad for charging that the defendant kept a house instead of his house for gaming, the term "his" being used by the statute. Hamilton *v.* State, 75 Ind. 586; State *v.* Hubbard, 3 Ind. 530.

**Charging Several Places.**—An indictment under the gaming act was as follows: The grand jurors impanelled, etc., upon their oath, present that M, on, etc., at the county, etc., aforesaid, and continuously from that day until the finding out of this bill of indictment, had and possessed a house, a room, a shed and a tenement, situated in said county, and that the said M there, during all the time aforesaid, did keep and suffer his said house, room, shed and tenement, to be used and occupied for gaming, contrary, etc. *Held*, that the indictment was good; and, also to sustain the indictment, it was sufficient to prove that he kept either of the places set forth, for any length of time, for such a purpose. McAlpin *v.* State, 3 Ind. 567.

**2.** State *v.* Crummey, 17 Minn. 72.

**3.** State *v.* Crummey, 17 Minn. 72.

**4.** Stoltz *v.* People, 5 Ill. 168.

**5.** Chase *v.* People, 2 Colo. 509; Carpenter *v.* State, 14 Ind. 109; Dormer *v.* State, 2 Ind. 208.

**Permitting Minor to Play Billiards.**—Under a statute which prohibits the keeper of a billiard table from allowing a minor to play on it, and inflicts a fine for each game allowed to be played, an indictment which does not allege that a game was played, or name the person with whom the minor played, or give any reason for not naming him, is bad, on a motion to quash. Donninger *v.* State, 52 Ind. 327; Alexander *v.* State, 48 Ind. 394; Zook *v.* State, 47 Ind. 463; s. c., 1 Am. Cr. Rep. 240.

**6. Sufficiency of Allegation in Indictment.**—In an indictment for permitting a gaming table to be exhibited and carried on in a house occupied by the defendant, it is not necessary to aver that the defendant does not come within the proviso of the statute (Clay's Dig. 434, § 16). Clark *v.* State, 19 Ala. 552.

Under the Arkansas act of 1845, relative to billiard tables, the setting up and keeping of a billiard table is not, of itself, an offence, and an indictment under the statute must specify that the party refused to pay the tax of $25 into the state treasury; otherwise the indictment is void. Mayers *v.* State, 8 Ark. 222. And in Kentucky it has been *held* that an indictment for keeping a billiard table in a house, under Kentucky Rev. Stats., ch. 42, § 19, should, since the amendment thereto of February, 1858, which excepts billiard tables kept in private houses, and not for hire, allege that such table was kept for hire. Holt *v.* Com., 2 Bush (Ky.) 33.

An indictment under section 8 of the "act to prevent and punish gaming," Iowa Rev. Stats. 275, for suffering gam-

where the statute states the exceptions in the enacting clause, their existence must be negatived in the indictment, so that the description of the crime may correspond to the statute in all respects;[1] but where the statute contains provisos and exceptions in distinct clauses, it is not necessary for the indictment to negative their existence, as they are wholly matters of defence.[2]

*c.* DESCRIPTION OF PLACES OR HOUSES.—The indictment need not particularly set forth the location where the gaming house was kept, or the gaming implements exhibited; it is sufficient if it shows it to be within the county and state.[3]

ing, need not negative the exception in section 4 of athletic exercises. Romp *v.* State, 3 Iowa 276.

An averment that the defendant was a coffee-house keeper, in an indictment for permitting gambling, is sufficient, without averring that he was licensed. Buford *v.* Com., 14 B. Mon. (Ky.) 24.

1. See Rex *v.* Jarvis, 1 Burr. 148; Bell's Case, Fost. 430; s. c., 1 East 167, 169; Whitwicke *v.* Osbaston, 1 Lev. 26; Spiers *v.* Parker, 1 T. R. 141, 144; 1 Bish. Cr. Proc., § 633; 1 Chit. Pl. (4th ed.) 322; 1 Chit. Cr. L. 283b, 284; 2 Hale P. C. 170.

2. Wells *v.* Eggulden, 3 Barn. & C. 186; Steel *v.* Smith, 1 Barn. & Ald. 94; Rex *v.* Pemberton, 2 Burr. 1035, 1037; s. c., 1 W. Bl. 230; Rex *v.* Jarvis, 1 Burr. 48; s. c., 1 East 167, 169; Whitwicke *v.* Osbaston, 1 Lev. 26; Rex *v.* Bryan, 2 Str. 1101; Rex *v.* Baxter, 5 T. R. 83; s. c., 2 Leach C. C. (4th ed.) 578; Bac. Abr. tit. "Indictment;" 1 Bish. Cr. Proc., § 632; Burns' Just. tit. "Indictment" IX.; 1 Chit. Pl. (4th ed.) 322; 1 Chit. Cr. L. 283b, 284; 2 Hale P. C. 171; 2 Hawk. P. C., ch. 25, § 112; Popham 93, 94; 1 Sid. 303.

3. Dohme *v.* State, 68 Ga. 339; Kleepies *v.* State, 106 Ind. 383; Keith *v.* State, 90 Ind. 89; App *v.* State, 90 Ind. 73; State *v.* Prescott, 33 N. H. 212. See People *v.* Saviers, 14 Cal. 29; Withers *v.* State, 21 Tex. App. 210; s. c., 18 Chic. Leg. N. 420. *Compare* Perez *v.* State, 48 Ala. 356; Wallace *v.* State, 12 Tex. App. 479.

**Description of Place.**—An indictment under statute for knowingly suffering a game of cards to be played at or in the places named in said section, or in a "highway or some other place" not named in said section, is fatally defective, both on demurrer and appeal. Perez *v.* State, 48 Ala. 356. But an indictment for dealing the game of monte for money is sufficient, if it describes the offence and the place where it was committed, without particularly describing the room, persons present, etc. People *v.* Saviers, 14 Cal. 29.

An indictment for keeping a device for gaming, under § 2086, Ind. Rev. Stat. 1881, averring "that the defendant did, at the county and state aforesaid, unlawfully keep and exhibit a certain gaming apparatus, to wit, a faro bank, and then and there unlawfully keep the same for the purpose of wagering, winning and gaming thereon money and other articles of value," sufficiently charges the offence. App *v.* State, 90 Ind. 73.

**Renting House.**—An indictment for permitting and renting a house to be used for gaming purposes need not state the name of the tenant, and it is sufficient to charge that the building is in the county and the property of the defendants, without any particular description. Kleepies *v.* State, 106 Ind. 382.

**Permitting Cards.**—An indictment for "permitting a certain game of cards to be played," etc., which fails to describe the house in which the game was permitted to be played as one of those inhibited by the statute, is not sufficient to charge an offence. That the house was "known as the saloon of Wallace" will not suffice. Wallace *v.* State, 12 Tex. App. 479.

**Unnecessary Allegation of Place.**—If an instrument contains a necessary allegation which cannot be rejected, yet the pleader makes it necessarily minute in the way of description, the proof must satisfy the description as well as the main part, since the one is essential to the identity of the other. Had the indictment in this case alleged simply that the gaming table was exhibited in Denton county, it would have sufficed to charge the offence. Having, however, unnecessarily charged that the table was exhibited in the "city of Denton," the state was bound to prove

Where the indictment is for a statutory offence committed by carrying on or permitting gaming in a house or place of a certain class or kind, it must allege facts sufficient to show with certainty that the offence falls under the statute under which the charge is prosecuted.[1]

*d.* DESCRIPTION OF GAME AND GAMING IMPLEMENTS.—It may be stated, as a general rule, that an indictment for keeping a gaming house need not particularly describe the game or games alleged to have been played therein, but it is sufficient to follow the language of the statute, or in any other way to show with certainty that the game or games came within the prohibition of the statute;[2] but the fact that the indictment describes such

the allegation as laid. Such proof is not made by evidence that the table was exhibited "over Paschall's saloon in Denton county." Withers *v.* State, 21 Tex. App. 210; s. c., 18 Chic. Leg. N. 420.

1. **Dram Shop.**–An indictment which, in the language of the statute, charges defendant with "permitting gaming in his dram shop," describes the building with sufficient certainty. Farmer *v.* State, 45 Ark. 95.

**"Dram Shop or Grocery."**—An indictment for permitting gaming in a "dram shop or grocery" is not uncertain. The word grocery, if intended as a synonym for dram shop, is harmless; if used in a different sense, it is surplusage, and to be disregarded, the real offence being the permitting of gaming in a dram-shop. Ballentine *v.* State, 48 Ark. 45.

**In Massachusetts,** an indictment under Mass. Stat. 1855, ch. 405, may charge that the defendant kept a tenement resorted to for illegal gaming, and used for the illegal sale and illegal keeping of intoxicating liquors, without also alleging that it was a house of ill-fame. Com. *v.* Edds (80 Mass.), 14 Gray 406.

**Liquor House.**—An indictment under the Texas statute, against the proprietor of a public house for permitting a game of cards to be played therein, must particularly describe the house, as a public house, and one where spirituous liquors were retailed. State *v.* Mansker, 36 Tex. 364.

2. Dudney *v.* State, 22 Ark. 251. Pemberton *v.* State, 85 Ind. 507; State *v.* Pancake, 74 Ind. 15; Com. *v.* Crupper, 3 Dana (Ky.) 466; Montee *v.* Com., 3 J. J. Marsh (Ky.) 132; Buford *v.* Com., 14 B. Mon. (Ky.) 24; Wheeler *v.* State, 42 Md. 563; Com. *v.* Moody, 145 Mass. 77; State *v.* Kelly, 24 Tex. 122; Huff's Case, 14 Gratt. (Va.) 648; Schilling *v.* Territory 2 Wash. Tr. 283. *Compare* State *v.* Noland, 29 Ind. 212; Booth *v.* State, 26 Tex. 203.

**Specifying Game.**—It is not necessary to charge, in an indictment for keeping a common gaming house, that any particular game was played there, but having so charged, the state is bound to prove the charge as made. Dudney *v.* State, 22 Ark. 251. And in an indictment for keeping a gambling house, "unlawful games at cards" is a sufficient specification of the game. Com. *v.* Crupper, 3 Dana (Ky.) 466.

It has been *held* in Indiana, that, in an indictment for permitting gaming in a licensed grocery, it is not necessary to set forth the name of the game which was played. State *v.* Dole, 3 Blackf. (Ind.) 294. And in Kentucky that in an indictment for keeping a gaming table or bank, "a game of chance, on a bank," or "on a gaming table," is a sufficient description of the game. Montee *v.* Com., 3. J. J. Marsh. (Ky.) 132. *Compare* Buford *v.* Com., 14 B. Mon. (Ky.) 24. But it has been said in Massachusetts that a complaint charging the defendant with keeping a room for the purpose of registering bets and selling pools, is not bad for duplicity, because it charges in one count that various games and contests were made use of for such unlawful purpose at the place in question. Com. *v.* Moody, 145 Mass. 177.

**Device Not Specified in Statute.**—An indictment for unlawfully setting up, etc., a machine or contrivance used in betting, where the machine or contrivance alleged to have been set up, etc., is not specified in the statute, but merely embraced therein under the rule of *ejusdam generis*, must allege that said machine or contrivance is ordi-

games will not vitiate it.[1] But where the prosecution is under a statute which prohibits by name a certain game or class of games, the indictment must show that the games charged are within the description.[2] It is not necessary to specify the amount lost or

narily used in betting. Com. *v.* Shaurer, 4 Ky. L. Rep. 342; s. c., 2 Ky. L. J. 240. An indictment for gaming under Va. Code 742, ch. 198, § 1, should aver that the gambling table exhibited, if not one of those specially enumerated in the statute, was one of the like kind; that is, of a kind whereon the chances are unequal, and are in favor of the exhibitor. Huff's Case, 14 Gratt. (Va.) 648. An omission to describe any offence against the statute, in such indictment, is not cured by a general allegation that the act was unlawful. Huff's Case, 14 Gratt. (Va.) 648.

**"Whereby Money, etc., May be Lost."**—In an indictment under § 6, art. 1, ch. 47, Gen. Stat. Ky., for setting up, keeping, etc., any contrivance for gambling, such words as "whereby money or property or other thing is or may be lost," are not essential, unless such contrivance is not mentioned, or the purpose for which it is ordinarily used is otherwise indicated in the statute. Hence the mere charge that defendant set up, kept, etc., a faro bank is sufficient, though in the case of keeping a keno table more words might be necessary. Waddell *v.* Com., (Ky.) 8 Cr. L. Mag. 741; 1 S. W. Rep. 480.

**Keno Table.**—The statute prohibited certain games by name, and then prohibited generally "tables, machines, contrivances ordinarily used in betting." *Held*, that an indictment for keeping a keno table which did not aver that a keno table is "a contrivance ordinarily used in betting," was bad on demurrer; the game of keno not being specifically named in the statute, the court cannot take judicial notice of its character. Com. *v.* Monarch, 6 Bush (Ky.) 298.

**Faro Bank.**—An indictment for setting up a faro bank, under a statute which denounces this contrivance for gaming by name, need not aver that it was a banking game, or contrivance ordinarily used for gaming purposes, or that it was an ordinary game for betting or hazard. Com. *v.* Monarch, 6 Bush (Ky.) 301.

Gen. Stat. Ky., ch. 47, art. 1, § 6, prohibiting any one who shall set up, exhibit, or keep for himself a faro bank, gaming table, or contrivance used in betting, an indictment under this statute merely averring that the contrivance by which or upon which the money was won or lost was commonly called a "crap board," without alleging that such contrivance was ordinarily used for the purpose of gaming, is not sufficient, or within the prohibition of the statute. Jones *v.* Com., (Ky.) 3 S. W. Rep. 128.

**Pool Selling.**—A complaint under the Massachusetts Statute of 1885, ch. 342, § 1, alleging that defendant, at the time and place named, kept a certain room in the building described, and occupied "said room with books, betting tickets, and other devices for the purpose of registering bets and of buying and selling pools upon the results of trials and contests of skill and speed and endurance of men, beasts, birds and machines, and upon the results of certain games of baseball to be played between contesting baseball players, "is not bad for duplicity." Com. *v.* Moody, 145 Mass. 177.

1. Pancake *v.* State, 74 Ind. 15.

**Billiard Table.**—An indictment charging that defendant "did unlawfully keep, for the purpose of gaming, a table "resembling a billiard table," sufficiently describes the offence, the words "resembling a billiard table" being considered surplusage. Longworth *v.* State, 41 Tex. 508.

**Setting Out in Conjunctive Form.**—An indictment, under the statute (Va. Code of 1873, ch. 194, § 1), for gaming, pursued the language of the statute, except that it used the word "and" in place of "or," thus charging the accused with exhibiting all the games mentioned in said statute. *Held*, that it charged but one offence, and was supported by proof of the keeping or exhibiting of any one of the games or tables mentioned, and on conviction there would be but one fine, and one term of imprisonment. Leath *v.* Com., 32 Gratt. (Va.) 873.

2. Brown *v.* State, 10 Ark. 607; Squire *v.* State, 66 Ind. 317, 604; Bartender *v.* State, 51 Ind. 73; Rice *v.* State, 3 Kan. 141.

Thus it has been *held* that, under the statute of Arkansas, declaring the exhibiting of "any faro bank," etc., a

won, if anything,[1] nor by whom.[2]

It need not be alleged by whose permission the gaming was done, where the prosecution is against the owner or occupant of the house, as he is, *prima facie*, responsible.[3]

Where the statute divides the prohibited games or gaming implements into different classes, the proof must show the games played or the implements or devices exhibited to be of the same kind or class described in the indictment.[4] Where the offence is merely the keeping of a gaming house or apparatus, it is not necessary to allege that any game was played therein or thereon;[5] and the same is true where the statute makes the offence charged the "keeping" of a room or house to be used or occupied for gambling.[6] But where the indictment is for suffering gaming or

misdemeanor, an indictment charging the defendant with exhibiting "a gaming table commonly called faro," is sufficient. Brown *v.* State, 10 Ark. 607. And section 230, of the Kansas crimes act, on which an indictment was founded, having prohibited the setting up or keeping of a "faro bank" by name, it was not necessary to set forth in the indictment that the faro bank was a gambling device "adapted, devised and designed for the purpose of playing any game of chance for money or property." Rice *v.* State, 3 Kan. 141.

**Charging Keeping Pool Table in Saloon.**—The Texas statute levying a tax for every "billiard, bagatelle, pigeon-hole, devil among the tailors, or Jenny Lind table, or anything of the kind, used for profit," provides that "any such table used in connection with a drinking saloon shall be regarded as used for profit." (Act 17 Leg. Spec. Sess. p. 20). *Held*, that a "pool table," not being included *eo nomine* in the statute, an information charging the keeping of a "pool table" in connection with a drinking saloon without a license, which did not allege that the pool table was of a kind with some one or all of those mentioned, and that it was used for profit, was fatally defective. Longenotti *v.* State, 22 Tex. App. 61.

**Billiards not "Pool."**—A charge of suffering a minor to play "at billiards" is not sustained by proof of having suffered him to play a game of "fifteen ball pool." Squire *v.* State, 66 Ind. 317, 604.

**"Pigeon-hole" not "Jenny Lind."**—On the trial of indictment under the Indiana act of March 8, 1873 (acts 1873, Reg. Sess. 30), charging the defendant with having the care and management of a pigeon-hole table, and suffering and allowing person named, under the age of 21, to play a game of pigeon-hole with another person, such table not being kept or used in a private family, it was proved that the table on which the game was played was not a pigeon-hole table, but a Jenny Lind table; and the two kinds of tables and the games played thereon were shown to be substantially different. *Held*, that there was a fatal variance. Bartender *v.* State, 51 Ind. 73.

1. Ready *v.* State, 62 Ind. 1; Com. *v.* Crupper, 3 Dana (Ky.) 466; Montee *v.* Com., 3 J. J. Marsh. (Ky.) 132.

**Permitting Minors to Play.**—An inidictment under 2 Ind. Rev. Stat., 484, § 1, prohibiting owners of billiard, bagatelle or pigeon-hole tables from permitting minors to congregate at, in, and about the place, need not allege that anything had been lost or won on the game. Ready *v.* State, 62 Ind. 1.

**Nor Necessary to Show Betting.**—It is not necessary to allege in an indictment against the keeper of a billiard table, for suffering a minor, without the written consent of his parents or guardian, to play thereon, that the minor bet on the game. Green *v.* Com., 5 Bush (Ky.) 327.

2. Com. *v.* Crupper, 3 Dana (Ky.) 466; Montee *v.* Com., 3 J. J Marsh. (Ky.) 132.

3. State *v.* Ellis, 4 Mo. 474. *Compare* Com. *v.* Crupper, 3 Dana (Ky.) 466.

4. See Webb *v.* State, 17 Tex. App. 205.

5. State *v.* Thomas, 50 Ind. 292.

6. Sowle *v.* State, 11 Ind. 492; State *v.* Miller, 5 Blackf. (Ind.) 502. See Winemiller *v.* State, 11 Ind. 516; State *v.* Staker, 3 Ind. 570.

gambling in a house or room, the gaming or gambling must be alleged to have taken place.[1]

*e.* ALLEGATION OF PURPOSE OR INTENT.—Under most statutes prohibiting the keeping of gaming houses, or of gaming tables or implements, the indictment must allege that the place or thing was kept or exhibited for the purpose of gaming.[2]

**6. Evidence.**—*a.* COMPETENCY AND WEIGHT.—As in the case of other crimes of a like nature, the offence of keeping a gaming house may be inferred from other facts proven, without being itself established directly by the testimony of witnesses.[3]

**1.** Sowle *v.* State, 11 Ind. 492. See Chase *v.* People, 2 Colo. 509.

**2.** See Sumner *v.* State, 74 Ind. 52; State *v.* Miller, 5 Blackf. (Ind.) 502; Com. *v.* Moody, 143 Mass. 177; Com. *v.* Colton, 74 Mass. (8 Gray) 488; State *v.* Cure, 7 Iowa 479; Doyle *v.* State, 19 Tex. App. 410; Kramer *v.* State, 18 Tex. App. 13; State *v.* Crowder, 39 Tex. 47. *Compare* State *v.* Holland, 22 Ark. 242; Com. *v.* Fraize, 5 Bush (Ky.) 325; State *v.* Brice, 2 Brev. (S. C.) 66.

**Faro Bank.**—But under the Arkansas statute it is *held*, that it is not necessary for an indictment for exhibiting a faro bank, to allege the purpose for which it was exhibited. State *v.* Holland, 22 Ark. 242.

**Keeping Gaming Table.**—On indictment under 2 Ind. Rev. Stat. 1876, § 74, for keeping a gaming table "for the purpose of wagering therein," *held*, that this clause must be construed, "for the purpose of wagering (himself) therein;" and that a conviction would not be warranted unless the evidence showed that defendant had wagered on such table himself, although he had permitted others to do so. Sumner *v.* State, 74 Ind. 52.

Describing a table in an indictment as a gaming table is not tantamount to an allegation that it was kept or exhibited for the purpose of gaming. Doyle *v.* State, 19 Tex. App. 410.

An indictment charging that defendant "unlawfully and knowingly kept a house to be used and occupied for gambling," sufficiently describes a misdemeanor, under Pasch. Tex. Dig., art. 2034. State *v.* Crowder, 39 Tex. 47.

**Keeping Gaming House.**—An indictment under Iowa Code, § 2731, charging that A B willfully and unlawfully kept a house resorted to for gaming by, etc., sufficiently charges the illegal intent of the defendant, that he kept it for illegal purposes. And an averment that he willfully and unlawfully suffered, etc., to play for money, in, etc., the said room being under the defendant's control, avers a knowledge that money was played for. State *v.* Cure, 7 Iowa 479.

**Bowling Alley—Charging Intent.**—When an indictment avers that the setting up of a ten-pin alley at which the owner and occupier permits games to be played, and that he engaged therein himself, and that bets were made on such games, it should reasonably be inferred that he knew not only of the setting up of such contrivances, but also of the betting, unless it appears otherwise. Such an indictment contains all the averments essential to show that the statute has been violated. Com. *v.* Fraize, 5 Bush (Ky.) 325. And it has been *held* that an indictment or complaint on Mass. Stat. 1855, ch. 429, § 1, for illegally keeping open a bowling alley, need not allege that it was done for gain. Com. *v.* Colton, 74 Mass. (8 Gray) 488.

**Buying and Selling Pools.**—Complaint that the defendant kept a room, with apparatus, books, betting tickets, and other devices for the purpose of registering bets, and of buying and selling pools on the results of trials and contests of skill and speed and endurance of men, beasts, birds and machines, and upon the result of certain games of ball to be played, is not bad for duplicity. It makes no difference how many different unlawful or criminal purposes the room was kept for. The offence for keeping a room for these various purposes is a single one, and may be properly charged on one count. Com. *v.* Moody, 143 Mass. 177.

**3.** Robbins *v.* People, 95 Ill. 175; McAlpin *v.* State, 3 Ind. 567. See State *v.* Worth, R. M. Charlt. (Ga.) 5; State *v.* Staker, 3 Ind. 570.

Thus, under an indictment for keeping "a common gaming house," it was proven that the defendant was seen

The articles or implements used in carrying on the game are always competent evidence, as part of the *res gestæ;*[1] and a game proved to have been conducted by defendant, and described by a witness, may be identified by another witness from the description as the game charged in the indictment.[2]

*b.* PRESUMPTIONS AND BURDEN OF PROOF.—It has been held to be a *prima facie* presumption that the occupant of a house or room had notice of gaming carried on therein;[3] but it has also been held that proof that the defendant owned the house in which the prohibited gaming device was exhibited raises no pre-

frequently in certain rooms, and was there dealing the cards at the game of faro; that the rooms were kept and used as common gambling rooms, in which were the implements of gambling, and that the rooms were fitted up for gambling rooms. It was also proven that the defendant had charge of the rooms, and whenever any questions arose about the games being played there, all disputes were referred to him for settlement. *Held*, that if it were necessary to a conviction that it should appear that there was gambling in the rooms "for money or other valuable thing," that fact might be inferred from the other facts proven. Robbins *v.* People, 95 Ill. 175.

**Indictment for Keeping Gaming House —Sufficiency of Evidence.**—A conviction for keeping a gaming house will not be *held* unwarranted by evidence that defendant kept the doors of his sleeping apartments blanketed, and when visited by the police at one o'clock in the morning, his guests, or some of them, hurriedly retired under the bed, while beer, a table suitable for gaming, eleven packs of cards, two boxes of chips, and a memorandum book, with names and numbers entered in it, were found in the room, while the rattle of checks and money, and expressions about $7 and $12, were heard by the police on approaching. Pacetti *v.* State, (Ga.) 7 S. E. Rep. 867.

**Proof of Knowledge.**—On trial of an indictment for keeping a house for gaming, evidence that, although the defendant's saloon, bar and tables were in charge of his clerk or bartender, he was frequently present, inattentive, sitting behind the stove in a remote part of the saloon, reading newspapers, and that his tables had been so used for gaming for two years, justified the jury's inference that he knew how the business of his saloon was being conducted, and a finding that he suffered the same to be used as charged. Hamilton *v.* State, 75 Ind. 586.

**Games Forbidden.**—Defendant was convicted of exhibiting a gaming table upon evidence that he owned a pool table, upon which games were played for table fees and drinks, but whether he kept or exhibited the table for gaming purposes, or had any knowledge that the table was so used, did not appear; but it did appear that he had frequently forbidden betting upon games played on the table, and had printed notices to the same effect conspicuously posted where the table was situated. *Held*, that the conviction should be reversed. Wells *v.* State, 22 Tex. App. 18.

**Same—Former Permission of Single Game.**—Whether the fact that the defendant permitted a roulette to be gambled upon once in his house is sufficient evidence to support an indictment for keeping a gaming house, is a question for the jury. Armstrong *v.* State, 4 Blackf. (Ind.) 247.

**Same—Renting the House for Proper Purposes.**—That the defendant had, for several years previously, rented the house for proper purposes, does not prove him not guilty of "keeping a gaming house," it being under his control at the time when the offence was charged. Scott *v.* State, 29 Ga. 263.

1. Thus it has been said that the articles used in carrying on and conducting the game of tan are part of the *res gestæ*, and admissible in evidence in illustration of the nature of the game. People *v.* Sam Lung, 70 Cal. 515.

2. Thus, on the trial, a witness described the game which he saw the defendant conducting. Another witness thereupon testified that the game described was tan. *Held*, that the evidence was admissible. People *v.* Sam Lung, 70 Cal. 515.

3. Robinson *v.* State, 24 Tex. 152.

sumption against him.[1]

As in all other prosecutions, the state must show defendant's guilt, upon all the evidence, beyond a reasonable doubt, and it, therefore, has the burden of proof to show defendant guilty of all the constituent elements of the offence. Thus, in a prosecution under a statute forbidding the letting of a house for gaming purposes, the illegal purpose of the defendant in renting the property must be shown.[2] The state also has the burden to show want of consent by a parent or guardian to a minor's playing billiards, where the statute makes it an offence to permit a minor to play without such consent.[3] But where the prosecution shows, *prima facie*, that the defendant, without authority, permitted a minor to play, the burden of proof is changed to the defendant to show that, acting in good faith, he believed, or had good reason to believe, that the minor was of full age.[4] And it has been held that, in a prosecution under a statute prohibiting the playing of cards in a public place, upon which money is bet, where the state has proved the playing, the *onus* is on the defendant to prove that nothing was bet or was dependent upon the game.[5]

**7. Verdict.**—Where the statute distinguishes between different acts or different kinds of acts which constitute the keeping of gaming houses or gaming implements, the verdict of guilty must conform to the charge contained in the indictment.[6] But where the indictment contains separate counts, charging different acts which constitute the same offence, a general verdict of guilty is sufficient.[7]

**8. Punishment.**—The keeping of a gaming house is a misde-

**1. A, Being Indicted for Permitting a Faro Bank** to be kept and exhibited in his house, *held*, that it was not sufficient to prove that he owned the house, and that the faro bank was kept and exhibited in it; positive or presumptive evidence must be given that the defendant permitted it. Harris *v.* State, 5 Tex. 11.

**Former Occupation of Room.**—No presumption of interest in or control over a gaming room, or knowledge of the manner in which it is used, arises from the fact that the proprietor of the saloon previously lived in the room, which was situated over his saloon. Barnaby *v.* State, 106 Ind. 539.

**2.** Rodifer *v.* State, 74 Ind. 21; Harris *v.* State, 5 Tex. 11.

**3.** Conyers *v.* State, 50 Ga. 103, s. c., 1 Am. Cr. Rep. 237.

**Consent of Parent.**—In Conyers *v.* State, *supra*, the court say: "The consent of a parent is not required by the statute to be in writing, and it does not, therefore, as in the case of license to sell intoxicating liquors, lie peculiarly within the knowledge of the defendant. That the consent is not given is as well known to the parent or guardian as it is to the defendant."

**4.** Taylor *v.* State, 107 Ind. 483.

**5.** Wilcox *v.* State, 26 Tex. 145.

**6.** An information was filed against a defendant for keeping "a banking game or banking house at which money, and bone or ivory checks representing money, were bet," and a verdict of "guilty of keeping a banking game or gambling house" was returned. *Held*, that the verdict was defective. State *v.* Davis, 20 La. An. 354.

**7. Sufficiency of Verdict.**—When an indictment contained two counts, one charging the keeping of a gaming house, the other in renting the rooms for the purpose of gaming, a general verdict of guilty was sufficient, without specifying on which count it rested. Dohme *v.* State, 68 Ga. 339.

meanor at common law; and it is also generally punishable as such under the statutes. Special penalties or punishments are also sometimes imposed by statute upon conviction of keeping a gaming house or exhibiting gaming implements, or of permitting gaming to be carried on; such as the destruction of the gaming implements,[2] or the forfeiture of the license of a dram shop or drinking saloon where the gaming was permitted.[3] The usual punishment is generally by a fine,[4] or fine and imprisonment;[5] and sometimes the penalty is heavier for subsequent convictions.[6]

1. See Vanderworker *v.* State, 13 Ark. (8 Eng.) 700; People *v.* Raynes, 3 Cal. 366; People *v.* Sponsler, 1 Dak. 288; State *v.* Doon, R. M. Charlt. (Ga.) 1; State *v.* Savannah, T. U. P. Charlt. (Ga.) 235; Bloomhuff *v.* State, 8 Blackf. (Ind.) 205; West *v.* Com., 3 J. J. Marsh. K(y.) 641; State *v.* Haines, 30 Me. 65; Com. *v.* Stahl, 89 Mass. (7 Allen) 304; Com. *v.* Tilton, 49 Mass.(8 Metc.) 232, 235; Barada *v.* State, 13 Mo. 94; Lord *v.* State, 16 N. H. 32; s. c., 41 Am. Dec. 729; State *v.* Leighton, 23 N. H. (3 Fost.) 167; People *v.* Sergeant, 8 Cow. (N. Y.) 139; People *v.* Jackson, 3 Den. (N. Y.) 101; s. c., 45 Am. Dec. 449; Tanner *v.* Trustees of Albion, 5 Hill (N. Y.) 21; s. c., 40 Am. Dec. 337; U. S. *v.* Dixon, 4 Cr. C. C. 107; U. S. *v.* Holly, 3 Cr. C. C. 656; U. S. *v.* Wells, 2 Cr. C. C. 45; U. S. *v.* Ismenard, 1 Cr. C. C. 150; Rex *v.* Higginson, 2 Burr. 32; Rex *v.* Rogier, 2 D. & R. 431; s. c., 1. B. & C. 272; Reg. *v.* Shaw, 4 Man. L. Rep. 404; Rex *v.* Medlor, 2 Show. 36; Greenhuff's Case, 2 Swint. 236; Segel *v.* Jebb, 3 Stark. 2; 1 Bish. Cr. L., §§ 504, 1135; Harris Cr. L., 138; Roscoe's Cr. Ev. (10th ed.) 1031; 1 Russ. on Cr. (5th Eng. ed.) 428; Stephen's Cr. L., art. 181; Wood on Nuisances, § 45.

2. See People *v.* Copley, (Ill.) 4 Cr. L. Mag. 187; Ridgeway *v.* West, 60 Ind. 371; Com. *v.* Certain Gaming Implements, 141 Mass. 114; Com. *v.* Gaming Implements, 119 Mass. 332; Coolidge *v.* Choate, 52 Mass. (11 Metc.) 79; Lowry *v.* Rainwater, 70 Mo. 132; s. c., 35 Am. Dec. 420; Willis *v.* Ward, 1 Hilt. (N. Y.) 590.

3. See Ballentine *v.* State, 48 Ark. 45; Buford *v.* Com., 14 B. Mon. (Ky.) 24.

**Not Assessed by Jury.**—The forfeiture of a license is a consequence of a conviction for permitting gaming in a dram shop, and is not a part of the penalty to be assessed by the jury; and it is not error for the court in charging to refuse to read the portions of the statute which works the forfeiture. Ballentine *v.* State, 48 Ark. 45.

**License to Another.**—Where the license of a dram shop was issued to a person other than the defendant, in an indictment for permitting gaming, but the evidence tends to show that the defendant was a real party in interest, and the active proprietor, it is not error, on conviction on indictment, to declare a forfeiture of the license. Ballentine *v.* State, 48 Ark. 45.

4. Wragg *v.* Penn Township, 94 Ill. 12; Skidmore *v.* Bricker, 77 Ill. 164; Severin *v.* People, 37, Ill. 414; Hankins *v.* People, 106 Ill. 628; Berry *v.* People, 36 Ill. 223; Freeland *v.* People, 16 Ill. 380; Buford *v.* Com., 14 B. Mon. (Ky.) 24; Wray *v.* Ellis, 1 El. & El. 276; s. c., 28 L. J., M. C. 45.

**Excessive Fines.**—It was recently *held*, in Arkansas, that in an indictment for permitting gaming in a dram shop, where the jury assesses the fine against the defendant at $60, while by the Arkansas statute (Mansf. Dig., § 1859), the maximum punishment is limited to a fine of $50, the court may, under Mansf. Dig., § 2309, remit the excess and enter judgment for the maximum fine authorized. Ballentine *v.* State, 48 Ark. 45.

5. Ballentine *v.* State, 48 Ark. 45. The court say, in this case, that, in such an indictment, an instruction by the court that the maximum punishment allowed was a fine of $250 and imprisonment for a period not exceeding twelve months, does not prejudice the defendant, and he cannot complain where the penalty imposed is not in excess of the fine of $50 authorized by the Arkansas statute. Mansf. Dig., § 1859.

6. Under section 127 of the Illinois Criminal Code, providing for the punishment for keeping a gaming house, etc., which provides that for the first

The defendant is also sometimes required to give security against a repetition of the offence.[1]

**GANANCIAL** property (Sp. law) is that which husband and wife, living together, acquire, during matrimony, by a common title, lucrative or onerous; or those which husband and wife, or either, acquire by purchase or by their labor and industry, as also the fruits of the separate property which each brings to the matrimony or acquires by lucrative title during the continuance of the partnership,[2]

**GANGWAY.**—A passage-way or avenue into or out of any inclosed place.[3]

**GARDEN.**—See MARKET.[4]

**GARDENER.**[5]

offence the offender shall be fined not not less than $100, and for the second offence not less than $500, etc., the court is not limited to a fine of $100 on a conviction for the first offence. It seems, however, that such fine might as well be regarded as limited, in so far that it shall not be for a larger sum than that authorized for a second conviction. Hankins *v.* People, 106 Ill. 628; Wragg *v.* Penn Township, 94 Ill. 12; Skidmore *v.* Bricker, 77 Ill. 164; Severin *v.* People, 37 Ill. 414; Freeland *v.* People, 16 Ill. 380; overruling Berry *v.* People, 36 Ill. 223.

1. Proceedings under the statute (Mich. Comp. Laws 1871, § 1998) to enforce a penalty for keeping a billiard table, etc., are criminal in character; the judgment provided for being both a fine and security for good behavior, etc., is an entirety. A separate prosecution for the fine cannot be had, nor can a judgment thereunder be recovered in a civil suit. Justices of the peace have no jurisdiction to try and determine cases under this statute. Pardee *v.* Smith, 27 Mich. 33.

2. Cartwright *v.* Cartwright, 18 Tex. 634. A narrower definition, quoted from the Institutes of the Civil Law of Spain, is given in Cutler *v.* Waddingham, 22 Mo. 254, viz.: "All that which is increased or multiplied during marriage. By multiplied is understood all that is increased by onerous cause or title, and not that which is acquired by a lucrative one."

3. Webster: Sangamon Coal Min. Co. *v.* Wiggerhaus, (Ill.) 13 N. East Rep. 650.

4. An indictment for hoeing "in his field" on Sunday is sustained by evidence that the defendant hoed "in a field back of his house; that it was a part of his garden." "Whether a garden is always a field or not, it may be in a field." Com. *v.* Josselyn, 97 Mass. 411.

**Garden Seeds** are "seeds used either for planting or sowing in the gardens adjacent to dwelling houses, small spaces of land, and in the large spaces of land called market gardens, lying about cities or other large places of numerous and condensed population." Beet and cabbage seed are within the term as used in the customs laws, but cabbage and mangel-wurzel seed are not, as these are generally the subject of field culture. Ferry *v.* Livingston, 115 U. S. 542. The term does not include flower seeds. Decision of Treas. Dept., quoted in Ferry *v.* Livingston.

5. A farmer who rents a farm of 130 acres under a lease which provides that he shall not take more than two crops of corn successively from the ground, but will let it lie fallow, or plant peas or potatoes every third year, and who has 12 acres in peas and 20 acres in potatoes, the product of which he consigns to commission merchants to be sold for table consumption, is not a market gardener, within the meaning of the term in a bankruptcy act. *Ex parte* Hammond, De Gex 93.

## GARNISHMENT.


I. Definitions, 1097.
1. *Garnishment*, 1097.
2. *Garnishee*, 1097.
3. *Other Terms*, 1097.
II. Statutory Proceeding, 1098.
III. General Nature and Scope, 1099.
1. *Auxiliary to Principal Case*, 1099.
2. *A Process*, 1100.
3. *General Object*, 1100.
4. *A Mode of Attachment and Execution*, 1101.
5. *A Proceeding at Law*, 1102.
6. *In Nature of a Proceeding in Rem*, 1103.
IV. Construction of Statutes, 1104.
V. In what Cases the Process may Issue, 1105.
1. *General Rules*, 1105.
2. *Under Attachment*, 1107.
3. *Under Execution*, 1110.
VI. Proceedings to Obtain Garnishment, 1111.
1. *The Affidavit*, 1111.
2. *The Bond*, 1115.
3. *The Writ and Summons*, 1116.
*a. Service of*, 1118.
*b. The Officer's Return*, 1124.
4. *Notice to Defendant*, 1126.
VII. Who May be Charged as Garnishee, 1128.
1. *General Rule*, 1128.
2. *Non residents*, 1129.
3. *Private Corporations*, 1130.
*a. General Rule*, 1130.
*b. Foreign Corporations*, 1131.
4. *Public Corporations and Their Officers*, 1132.
5. *National and State Governments and Their Officials*, 1135.
6. *Attorneys at Law*, 1137.
7. *Persons Holding as Agents of the Law*, 1137.
*a. General Rules*, 1137.
*b. Administrators and Executors*, 1138.
*c. Guardians*, 1142.
*d. Sheriffs*, 1142.
*e. Clerks of Court and Justices of the Peace*, 1144.
*f. Assignees, Receivers and Trustees*, 1145.
VIII. Liability of the Garnishee, 1147.
1. *General Grounds Upon Which Liability Is Based*, 1147.
2. *In Respect to Character of Property Held*, 1152.
3. *Capacity in Which Property Is Held*, 1154.
4. *Possession Necessary to Charge Garnishee*, 1156.
5. *As a Debtor*, 1160.
6. *As to Debts Before Maturity*, 1165.
7. *Credits Jointly Owned and Joint Debts*, 1166.
8. *Judgment Debtors, and in Suits Pending*, 1169.
9. *In Cases of Negotiable Paper*, 1172.
10. *As Affected by Assignment*, 1179.
11. *As Affected by Prior Encumbrance or Pledge*, 1185.
12. *Contracts Between Defendant and Garnishee*, 1189.
13. *As Affected by Fraud*, 1192.
14. *Where Liability Is Contingent*, 1194.
15. *For Interest*, 1196.
16. *To Defendant After Garnishment*, 1197.
IX. The Effect of Garnishment, 1198.
X. Proceedings to Determine Garnishee's Liability, 1202.
1. *Plaintiff's Right to Oral Examination of Garnishee*, 1202.
2. *The Interrogatories*, 1204.
3. *The Answer*, 1206.
*a. Must be Under Oath*, 1206,
*b. Certainty and Sufficiency*, 1207.
*c. Amendment of the Answer*, 1210.
*d. Garnishee's Refusal to Answer*, 1211.
4. *Garnishee's Defence*, 1212.
*a. Garnishee's Right of Set Off* 1213.
*b. Proceedings in Principal Case*, 1218.
*c. Pendency of Other Proceedings*, 1219.
*d. Disclosure of Adverse Interests*, 1222.
*e. Defendant's Exemption Rights as a Defence*, 1223.
5. *The Effect of the Answer*, 1225.
6. *The Issue on the Answer*, 1228.
7. *The Trial*, 1232.
8. *Proceedings as to Adverse Claimants*, 1237.
XI. The Judgment, 1242.
1. *Garnishee Not Liable to Judgment in Some States*, 1242.
2. *Personal Judgment Against the Garnishee*, 1243.
3. *Form and Contents of the Judgment*, 1244.
4. *Void and Voidable Proceedings*, 1245.
5. *Judgment Upon Default*, 1246.
6. *Judgment Upon the Answer*, 1249.
7. *Discharge of the Garnishee*, 1249.

8. *Force and Effect of the Judgment*, 1251.
XII. Conflict of Laws, 1254.
XIII. Aid of Equity in Garnishment, 1256.
XIV. Appeals, 1257.
1. *Effect of Appeals*, 1257.
2. *Who May Appeal*, 1259.
3. *From What Appeal Lies*, 1259.
4. *What Errors Will be Considered*, 1261.
5. *The Record*, 1261.
6. *Assignment of Errors*, 1262.
7. *Action of Appellate Court Upon the Record*, 1263.
8. *Certiorari*, 1263.
9. *Amendment and Correction of the Record*, 1264.
XV. Costs, 1264.
1. *General Rule*, 1264.
2. *Costs Incurred by Fault or Negligence of Garnishee*, 1265.
3. *Costs When Garnishee Contests*, 1265.
4. *In Case of Appeal of Garnishment Proceedings*, 1266.
5. *Liability of Intervening Claimant*, 1266.
6. *As Between Plaintiff and Defendant*, 1266.
7. *The Judgment as to Costs*, 1267.
8. *What Costs May be Allowed*, 1267.

**I. DEFINITIONS—1. Garnishment.**—Generally speaking, it is a mode of attachment or execution, where money or property of a debtor in the hands of third persons is levied upon, and by subsequent proceedings in the court wherein the original action is pending, subjected to payment of the claim of a judgment creditor.[1] Technically, it is a process in aid of writ of execution and attachment, whereby one not a party to the cause wherein the process issues is notified to appear in court and disclose whether he is indebted to, or has in his possession property belonging to, the defendant in such cause, and if so, that he shall not pay such indebtedness nor surrender such property until further order of court.[2]

**2. Garnishee.**—The person in whose hands property is thus sought to be attached is called the garnishee, because he has had "garnishment"; that is, warning not to pay the money nor deliver the property.[3]

**3. Use of Terms.**—In the New England States, the process of garnishment is denominated the trustee process, and the person garnished is called the trustee.[4] In Connecticut it is sometimes

1. A garnishment is a legal proceeding, assimilated to an attachment, intended to reach debts or other choses in action, the property of a debtor, not capable of a seizure by execution or attachment, or to compel the discovery of effects, capable of seizure, in the possession of a third person. Henry *v.* Murphy, 54 Ala. 246; Woodward *v.* Adams, 9 Iowa 474; Strickland *v.* Maddox, 4 Ga. 393, 394; Simmons *v.* Guyon, 57 Ala. 111, 112; Tinsley *v.* Savage, 50 Mo. 141. "Garnishment is a seizure where there is anything subject to be seized at the time the officer of the law performs his function; with nothing then to seize it is like the casting of a net and making a 'water haul.' If the cast is not a total failure, if anything is caught, whether debt, property or effects, nothing once in can get out, and the net, so to speak, remains undrawn until the result is reported by return or answer, and whatever enters up to that time is equally a part of the capture." Western R. Co. *v.* Thornton, 60 Ga. 306; Steen *v.* Norton, 45 Wis. 412.

2. Sweet's Law Dict., tit. "Foreign Attachment"; Bouvier's Law Dict., tit. "Garnishment."

3. 3 Jacob's Law Dict. 175; Welsh *v.* Blackwell, 2 Green (N. J.) 348; Sweet's Law Dict., tit. "Garnishee." "A garnishee is a trustee, or one warned by legal process in respect to the interest of third parties in property held by him." Smith *v.* Miln, 1 Abb. Adm. (U. S.) 380.

4. Dane's Abr., ch. 192; McConnell on Trustee Process, 1; Cushing on Trustee Process, 4 to 16; 2 Kent's Com. 403,

called factorizing, and the person garnished, the factor.[1] Under the custom of the city of London, the process was called foreign attachment, and the same term was applied to it under the early statutes in most of the States, and in a few of the older States still obtains.[2] The use of the garnishment process is called garnishing, and when the same is served upon one he is said to have been garnished.[3] The words garnisheeing and garnisheed are corruptions in the orthography of the two words above mentioned, and are not used by the best writers.[4]

**II. STATUTORY PROCEEDING.**—The process of garnishment as it now obtains in the United States and in England is purely a statutory proceeding.[5] In the seventeenth and eighteenth centuries, the need of relief against absent and absconding debtors gave occasion for the enactment, in some of the provinces, of statutes providing for attachment of the credits or effects of a debtor in the hands of a third person,[6] and the proceeding is

note a; Bouvier's Law Dict., tit. Trustee Process; Burrill's Law Dict., tit. Trustee Process; 2 Wade on Att., § 325.

1. 2 Wade on Attach., § 325; McConnell on Trustee Process 1, note 4.

2. Sweet's Law Dict., tit. "Foreign Attachment"; 1 Swift's Dig.(Conn.)584; Tomlin's Law Dict., tit. "Attachment Foreign"; Burrill's Law Dict., tit. "Foreign Attachment"; U. S. Dig., tit. "Absent and Absconding Debtors."

3. Sweet's Law Dict., tit. Foreign Attachment.

4. Drake on Attach., § 451, n. 2.

5. Swift's Dig. (Conn.) 584; Henderson *v.* Ala. G. L. Ins. Co., 72 Ala. 32; Griswold *v.* Sharpe, 2 Cal. 24; Penn. Steel Co. *v.* So. R. Co., 4 Houst. (Del.) 572; Cahoon *v.* Levy, 5 Cal. 294; Carikeer *v.* Anderson, 27 Ill. 358; Bigelow *v.* Andress, 31 Ill. 322, 330; Bartell *v.* Bauman, 12 Bradw. (Ill.) 450; Haywood *v.* Collins, 60 Ill. 328; Lackland *v.* Garesche, 56 Mo. 267, 270; King *v.* Payan, 18 Ark. 583. It has been said that "the doctrine of garnishment is part of the common law derived from the custom of London;" but particular or local customs were not a part of the local common law adopted in this country. Penn. Steel Co. *v.* N. J. S. R. Co., 4 Houst. (Del.) 572; Hannibal, etc. R. Co. *v.* Crane, 102 Ill. 249.

6. Stat. Penn. 14 Ann. C. 28. In Barnet's case, 1 Dall. (Pa.) 152, the court say: "The object in passing the first act was to subject the effects of absent debtors to the payment of their debts; as it appears by the preamble, that before that time, they were not equally liable with the effects of those persons who reside on the spot." In Campbell *v.* Morris, 3 Har. & M. (Md.) 535, 567, it is said that the attachment laws of that state arose from "the obvious necessity of some mode to recover debts from an absent person." See also Ancient Charters and Laws, Mass. Bay C. 267; Dane's Abr., ch. 192, art. 2.

"The statute respecting absent or absconding debtors, when first made, extended only to the goods and effects of such debtors, left in trust with some agent, attorney or trustee, who was supposed to be authorized by such debtor to transact his affairs." Strong *v.* Barlow, Kirby's Rep. (Conn.) 376.

"One of the most accomplished of the lawyers of Maryland, before the revolution, gave it as his opinion, which has been sustained by adjudications subsequent thereto, that under the provincial government, and of course since, the property of British merchants here has been, and is understood to be a depositum or peculiar security for the payment of country creditors; to the extent therefore of such property credit is given here without inquiry into the circumstances of the merchant elsewhere; and on these conditions our attachment act and practice have been founded; thus intimating, as the fact is, that the proceeding by attachment is founded as well upon the custom of the country as upon legislative enactments." Hepburn's Case, 3 Bland (Md.) 95, 119; Burk *v.* McClain, 1 Har. & M. (Md.) 237.

In Connecticut the early statutes seem to have been enacted for the pur-

now authorized by statute in all of the several States of the United States. In England, by a statute enacted in 1854, attachment of debts due a defendant in a superior court was authorized, and in 1867, authority to issue the process was extended to the county courts.[1]

**III. General Nature and Scope—1. Auxiliary to Principal Case.**—Garnishment is a special auxiliary remedy for the more effectual recovery of debts.[2] The proceeding for its enforcement, however, possesses many of the features of an original action.[3] It is

pose of enabling creditors to reach property that had been fraudulently transferred. In the preamble of the first statute of that state it is stated to be an act "for the better preventing fraud and deceit, sometimes designed and practiced by ill-minded debtors, who betrust their goods, estate or effects in the hands of others, with the intent to reserve and receive the same to their own use, and thereby defeat their creditors of their just dues." Treadway *v.* Andrews, 20 Conn. 384, 392.

Hepburn's Case, 3 Bland (Md.) 95; Maryland Acts of 1875, C. 40; 5 Hening's Stat. at Large, Virginia, 220. By this statute the garnishment was effected by writ of injunction issued from a court of equity, restraining the person to whom it was directed "from paying, conveying away, or secreting such debts or effects until the further order or decree of said court." Treadway *v.* Andrews, 20 Conn. 384, 392; Culver *v.* Hall, 20 Conn. 409, 414; Ancient Charters and Laws, Mass. Bay C. 267; Laws, Delaware, 1829, p. 46; Laws, New Hampshire, 1815, p. 173; Haywood & Cobb's L. L. Tenn. 1831, p. 11; Kentucky, Acts 1796, p. 124; 2 Kent's Com. 403, note a.

1. 17 and 18 Vict., ch. 125, §§ 60, 67; 23 and 24 Vict., ch. 126, §§ 28, 31; Broom's Com. p. 239, n. v.

2. Hepburn's Case, 3 Bland (Md.) 95, 119; Tinsley *v.* Savage, 50 Mo. 141; Barber *v.* Ferrill, 57 Ala. 446; Maynards *v.* Cornwell, 3 Mich. 309, 312; Kidderlin *v.* Meyer, 2 Miles (Pa.) 242; Fechheimer *v.* Hays, 11 Ind. 478; Robbins *v.* Alley, 38 Ind. 553.

If the principal case fails, the garnishment proceedings will go down with it. Iron Cliffs Co. *v.* Lahais, 52 Mich. 394; Laidlaw *v.* Morrow, 44 Mich. 547; Robbins *v.* Alley, 38 Ind. 553; Michael *v.* Thomas, 24 Ind. 72.

So is the proceeding by *scire facias* against a garnishee auxiliary to the judgment on which it is founded. Therefore, where a city court, the jurisdiction of which is limited to cases where at least one of the parties resides, and the cause of action arises within the city, has rendered judgment in a suit of foreign attachment properly brought before it, it has jurisdiction also of the proceeding of *scire facias* founded thereon, although the demand upon the garnishee on the execution, and his refusal to pay over the moneys in his hands, constituting an essential part of the cause of action, may have occurred without the limits of the city. Shewood *v.* Stevenson, 25 Conn. 431. And where in an action of *scire facias*, a garnishee failed to appear, under the belief that the counsel retained by him in the original proceeding would as a matter of course appear for him, and in consequence a judgment was rendered against him by defendant; it was *held* that he was not guilty of such negligence as would deprive him of the aid of a court of equity for the opening of the case. Day *v.* Wells, 31 Conn. 344.

3. In some of the states it is held that garnishment is the institution of suit by the plaintiff in the original action against the garnishee as defendant, both of whom have a day in court. Wittier *v.* Barbar, 3 Stew. (Ala.) 335; Travis *v.* Tartt, 8 Ala. 574; Pearce *v.* Winter Iron Works, 32 Ala. 68; Griel *v.* Loftin, 65 Ala. 591; Thorn *v.* Woodruff, 5 Ark. 55; Wallace *v.* Blanchard, 3 N. H., 395, 398; Ingraham *v.* Olcock, 14 N. H. 243; Delacroix *v.* Hart, 24 La. An. 141; Tunstall *v.* Worthington, Hemp. (U. S.) 662; Middleton Paper Co. *v.* Rock River Paper Co., 19 Fed. Rep. 252; Gorman *v.* Swaggerty, 4 Sneed (Tenn.) 560; Whitman *v.* Keith, 18 Ohio St. 134; 2 Wade Attach., § 332; Drake Attach., § 452.

In Malley *v.* Altman, 14 Wis. 22, it was *held* that the proceeding against a garnishee is an action within the meaning of a statute, authorizing the granting of an injunction when during liti-

governed largely by the general rules applicable to other suits,[1] and is subject to the provisions of constitutions and statutes limiting the jurisdiction of courts.[2]

**2. A Process.**—Garnishment, in so far as the term applies to the summons to the garnishee, is a process and not a pleading, and serves its purpose when it brings the garnishee before the court.[3] If there are available defects in the writ, they are the subject of a motion to quash or a plea in abatement, and cannot be reached by a demurrer.[4]

**3. General Object.**—Its object is to enable a creditor to subject the property, effects and credits of his debtor in the hands of

gation it shall appear that "the defendant in the action" is doing or threatens to do some act in violation of the plaintiff's rights respecting the subject of the action and tending to render the judgment ineffectual. The statute of Wisconsin, however, treats the proceeding as an action by the creditor, as plaintiff, against the garnishee, as defendant, and provided that the judgment rendered therein shall have the same force and effect as in other personal actions and makes the garnishee subject to attachment for contempt if he failed to appear when summoned.

In Jones *v.* N. Y. R. Co., 1 Grant (Pa.) 457, a proceeding by garnishment in execution was *held* to be a suit within the meaning of a provision in a charter granted to a foreign corporation, providing that it should keep "at least one manager, toll gatherer, or other officer a resident in the county of Susquehanna" on whom service of process might be made "in all suits or actions which may be brought against said company."

While the defendant in the attachment does not institute the proceeding, and the law authorizes it to be done by the creditor, yet the law regards it as the case of the defendant for the use of his creditor against the garnishee, in which the latter has the same rights of defence, and is entitled to the same mode of trial as if the defendant in the attachment had brought the suit directly in his own name. Haines *v.* O'Connor, 5 Bradw. (Ill.) 213.

But a statute providing that "no suit must be commenced against an executor or administrator, as such, until six months after the grant of letters testamentary or of administration," *held* not to debar a creditor from suing out and serving the process of garnishment upon an executor or administrator before the expiration of six months. Moore *v.* Stainton, 22 Ala. 831.

And unless otherwise provided by statute a judgment in favor of the garnishee does not bind the principal defendant, and the latter may maintain an action in his own name upon the same claim against the garnishee. *Post*, sub., tit. JUDGMENT.

1. Griel *v.* Loftin, 65 Ala. 591. But being ancillary to the principal suit the proceedings when not prescribed by statute must to a great extent be adapted to the condition and relative position of the parties. Travis *v.* Tartt, 8 Ala. 574.

Two separate debtors cannot be joined in the same garnishment proceeding unless they could be joined in a suit at law. Thorn *v.* Woodruff, 5 Ark. 55; Cincinnati etc. Co. *v.* Bridge etc. Co., 17 Ark. 364; Wallace *v.* Blanchard, 3 N. H. 395, 399.

And where several garnishees are summoned under the same writ they are entitled to have their liability determined severally, unless they have been summoned as joint debtors. Ingraham *v.* Olcock, 14 N. H. 243; Sleeper *v.* Weymouth, 26 N. H. 35. And the plaintiff has the right to dismiss to the same extent as in other suits. Griel *v.* Loftin, 65 Ala. 591.

2. Wittierspoon *v.* Barber, 3 Stew. (Ala.) 335; Moore *v.* Shephard, 1 Met. (Ky.) 97. And the jurisdiction of the court may be defeated by an appropriate plea by the garnishee. Pearce *v.* Winter Iron Works 32 Ala. 68.

3. Curry *v.* Woodward, 50 Ala. 259, 260. The summons is a process within the meaning of the statute of the U. S., prescribing the manner in which process shall issue from the federal courts. Middleton Paper Co. *v.* Rock River Paper Co., 19 Fed. Rep. 252.

4. Curry *v.* Woodward, 50 Ala. 259,

third persons, to the payment of his claim [1] by means of a delivery or payment by compulsion of law.[2]

**4. A Mode of Attachment and Execution.**—In fact, it is simply a mode of attachment or execution.[3] While it does not effect such a lien upon specific property as is acquired by actual seizure under

260; Stevens *v.* Dillman, 86 Ill. 233.

1. Henry *v.* Murphy, 54 Ala. 246; Simmons *v.* Guyon, 57 Ala. 111, 112; Strickland *v.* Maddox, 4 Ga. 393, 394.

2. **Compulsory Assignment.**—Garnishment operates as a species of compulsory statute assignment, by which a creditor may obtain that operation of the law which his debtor voluntarily signed to him in payment of his debts. SHAW, C. J., in Strong *v.* Smith, 1 Met. (Mass.) 476; Pettingill *v.* Androscoggin R. Co., 51 Me. 370; Hicks *v.* Gleason, 20 Vt. 139, 143; Campbell *v.* Nesbitt, 7 Neb. 309, 304; Caldwell *v.* Stewart, 30 Iowa 379, 380.

**Sequestration.**—The proceeding is in the nature of a sequestration of the effects of a debtor in the hands of his debtor, and may be tried by any tribunal to the extent of its execution process. Cheairs *v.* Slaten, 3 Humph. (Tenn.) 191; Pennsylvania R. Co. *v.* Pennock, 51 Pa. St. 244, 260; Cheairs *v.* Slaten *v.* Humph. (Tenn.) 101, 103.

**Compulsory Payment.**—In Mayor etc. *v.* London Joint Stock Bank, 50 L. J. (Q. B.) 594, SELBORNE, Ld. Ch., referring to foreign attachment under the custom of London, said: "Foreign attachment is an incidental process against a defendant to a suit, who has not appeared, having been summoned according to the course of the court, to compel his appearance. The only thing which makes such a custom reasonable at all, and capable of being sustained in law, is that the court which has jurisdiction over the defendant is, in substance, by this custom, acting against the defendant alone, to compel his submission to that jurisdiction. For this purpose it arrests or attaches his goods within the jurisdiction, or the debts owing to him within the jurisdiction (which are equivalent to his goods), by way of security to enforce his appearance, in whatever hands they may happen to be found. The stakeholder, the person in whose hands these goods of the defendant may be, or from whom the debt is due to the defendant, has no interest in the matter, and does not suffer in any interest of his own, so long as he is properly indemnified; and the custom, if duly followed, indemnifies him. As against the garnishee (that is the third party, the stakeholder), the whole proceeding is *res inter alios acta*. He is no party to the suit; no judgment, in any proper sense of that word, can pass against him in that suit, or be executed against him on any principle which is applicable to a defendant before a competent court. In order to bind him, and in order also to indemnify him, the custom must be strictly applicable to the case, and it must be followed in all material points. The effect of the custom, where so followed, when the goods in his hands are delivered over, or when the debt due from him is paid (or security is given by him for its payment, if it is not payable at the time), is to discharge him, not by virtue of the terms of his contract, but against that contract, and without the consent of the bailor or creditor, from all further liability for the goods or money to which the bailor or creditor was entitled. That is the peculiar effect of the custom, and upon what principle is it possible that such an effect can be produced? On one principle only—that of a delivery or payment by compulsion of law. If that element were absent, it would be impossible that he could be absolved, as against his creditor, from a debt which he has paid, without the creditor's authority, to a person to whom it was not payable by the contract. But if it be by compulsion of law, then he is discharged. It may be by compulsion of law if the custom is reasonable; and the custom, being long established, is not in law unreasonable, so long as its operation and effect is strictly limited to its proper object—that of compelling the submission of a defendant, in an action duly instituted against him before a competent court, to the jurisdiction of that court in that action—and so long as it is pursued only against that which is ascertained to be the property or the debt of that person, the defendant in the action, in the hands of the garnishee.

3. Woodward *v.* Adams, 9 Iowa 474; Barber *v.* Ferrill, 57 Ala. 446; May-

those writs,[1] yet it binds the debt in the hands of the garnishee from the date of the service,[2] and the judgment rendered therein becomes security for the payment of the indebtedness of the principal defendant.[3] Whatever rights the principal defendant may have in relation to the debt thus attached subsist in subordination to the claims of the garnishing creditor.[4]

**5. A Proceeding at Law.**—In most of the States garnishment is strictly a legal proceeding, as distinguished from proceedings in chancery, operating generally, in the absence of fraud only, on the rights of the defendant in attachment or execution which he could, in an action at law, enforce in his own name.[5] It cannot be converted into a method of drawing within the jurisdiction of

nards *v.* Cornwell, 3 Mich. 309, 312; Tinsley *v.* Savage, 50 Mo. 141; Baynard *v.* Simmons, 5 El. & Bl. 57, 61.

1. It differs from attachment by seizure in two important particulars: *First*, its validity does not depend upon the officers taking possession. *Second*, it creates no specific lien upon the defendant's property in favor of the plaintiff. 2 Wade on Attach., § 325.

It resembles an actual seizure of the goods, however, by the sheriff, much more than the simple delivery of the writ to the sheriff, which binds no specific goods but merely the property of the debtor in general. Emanuel *v.* Bridger, L. R., 9 Q. B. 286, 290; Lowe *v.* Blackmoor, 44 L. J. 155, 158.

2. Holmes *v.* Tutton, 5 El. & Bl. 65; s. c., 24 L. J., 2 B. 346; Emanuel *v.* Bridger, L. R., 9 Q. B. 286.

The moment the order of attachment is served upon the garnishee the property in the debt due from him is absolutely transferred from the judgment debtor to the judgment creditor. The garnishee can then only pay his debt to the judgment creditor of the original debtor. The property in the debt is transferred and there is a complete and perfect security the moment the order of attachment is served. *Ex parte* Joselyne, L. R., 8 Ch. Div.

The effect of a judgment against the garnishee is to declare the debt bound and to make the garnishee liable to execution. Chatterton *v.* Watney, L. R., 17 Ch. Div. 259.

3. Such a judgment will constitute the execution creditor holding security on the property of the bankrupt within the meaning of section 12 of the English Bankruptcy act, 1869, providing that a secured creditor, holding any mortgage, charge or lien on the bankrupt's estate or any part thereof as a security for a debt due to him. Emanuel *v.* Bridger, L. R., 9 Q. B. 286. See also Holmes *v.* Tutton, 5 El. & Bl. 65; s. c., 24 L. J., Q. B. 346.

In *ex parte* Joselyne, L. R., 8 Ch. Div. 327, the process was *held* to have such effect when the bankruptcy of the defendant occurred after service and answer by the garnishee, but before final judgment. Lowe *v.* Blackmoor, L. R., 10 Q. B. 485.

But *held* in Chatterton *v.* Watney, L. R., 17 Ch. Div. 259, that a judgment against the garnishee would not transfer to the creditor the security held for the indebtedness due from the garnishee in the nature of a mortgage on real estate so as to bind the surplus proceeds of the mortgaged lands in the hands of a prior mortgagee. The decision of the court, however, was based upon the existence of a statute proceeding "that no judgment shall affect any land of whatever tenure until such land shall have been actually delivered in execution, by virtue of a writ of elegit or other lawful authority in pursuance of such judgment."

4. Subject to such claims the rights of the defendant, for the purpose of making demand of his debtor or of securing the indebtedness by attachment or otherwise, remain unimpaired. Hicks *v.* Gleason, 20 Vt. 139.

5. Griswold *v.* Sharpe, 2 Cal. 17; Harrell *v.* Whitman, 19 Ala. 135; Roby *v.* Labuzan, 21 Ala. 60; Price *v.* Masterson's Exr., 35 Ala. 483; Godden *v.* Pierson, 42 Ala. 370; Henry *v.* Murphy, 54 Ala. 246; May *v.* Baker, 15 Ill. 89; Lackland *v.* Garesche, 56 Mo. 267; Sheedy *v.* Second Nat. Bank, 62 Mo. 17, 24; Atwood *v.* Hale, 17 Mo. App. 81; Galveston etc. R. Co. *v.* McDonald, 53 Tex. 510. But while this is the usual test it is not necessarily decisive.

courts of law matters and rights of purely equitable cognizance.[1] Nor can the aid of a court of equity be invoked to supply any deficiency in, nor in any manner enlarge, the remedy.[2]

**6. In Nature of a Proceeding in Rem.**—Although the purpose of the proceeding is neither the recovery of property nor the enforcement of a lien thereon, yet the remedy may at least be said to be in the nature of a proceeding *in rem*, since its primary object is to reach the *res* in the hands of a third person, against whom there is no foundation for a personal claim when the summons issues.[3] But the garnishee may, by his subsequent conduct, subject himself to a personal liability.[4] If the debt or other

Whitney *v.* Monroe, 19 Me. 42; s. c., 36 Am. Dec. 732; *Post*, sub tit. WHAT LIABLE TO GARNISHMENT.

1. Toomer *v.* Randolph, 60 Ala. 356; Kearney *v.* Nixon, 19 La. An. 16; Lackland *v.* Garesche, 56 Mo. 267; Seers *v.* Thompson, 72 Iowa 61. If, however, a discovery is desired, it can be as effectually had by the answer of the garnishee as by his answer to a bill in equity. The interrogatories propounded to him may be made as searching and efficacious as if they were contained in a bill. If the answer is untrue, it may be contradicted as well as an answer to a bill. Bigelow *v.* Andress, 31 Ill. 322, 334. But when it is sought to reach property fraudulently transferred, the remedy by garnishment is not so full and complete as a proceeding in chancery. Phillip *v.* Wesson, 16 Ga. 137.

And a statute providing that the attachment law "shall not be rigidly and strictly construed," and further authorizing "amendment of any defect in the original papers," does not change the proceeding from a legal to an equitable one. Thomas *v.* Hopper, 5 Ala. 442.

In the New England and some other States, however, the garnishment proceeding is regarded as an equitable action. Stedman *v.* Vickery, 42 Me. 132, 137; Boardman *v.* Cushing, 12 N. H. 105, 114; Wolf *v.* Tappan, 5 Dana (Ky.) 361; Dugas *v.* Mathews, 9 Ga. 510, 515.

2. Wolf *v.* Tappan, 5 Dana (Ky.) 361; Jones *v.* Huntington, 9 Mo. 249; Bigelow *v.* Andress, 31 Ill. 322; Arthur *v.* Batte, 42 Tex. 159.

Courts of equity will not lend their aid to carry into effect the incomplete execution of statutory powers that have for their objection the involuntary transfer of property. Wade on Attach., § 334; Gridley *v.* Phillips, 5 Kan. 349.

The general rule is that where a statute creates a right or liability and gives a remedy, the remedy given is exclusive. Moies *v.* Sprague, 9 R. I. 541, 543, 544. In Godding *v.* Pierce, 13 R. I. 532, the court say: We do not understand this rule to mean that the remedy given is so exclusive that it will not admit of a proceeding auxiliary to itself, but only that it is exclusive of any other independent or cumulative remedy; for instance, we are not prepared to say that a suit in equity for a discovery might not properly be resorted to during the pendency of the original action in aid of the proceeeding.

The attachment of the interest of one member of a partnership by the garnishment of his copartner will not entitle the creditor to maintain an action in equity against the firm for an accounting to ascertain the extent of the defendant's interest therein. Treadwell *v.* Brown, 43 N. H. 290.

But a bill in equity, in aid of the remedy at law, may be sustained against one summoned as garnishee, where it appears that he is fraudulently putting his property beyond the reach of legal process in order to prevent the collection of the judgment which he anticipates may be rendered him as such garnishee. More *v.* Kidder, 55 N. H. 488.

3. Drake on Attach. (6th ed.), § 452; Christmas *v.* Biddle, 13 Pa. St. 223; Richmond *v.* Duncan, 4 Ark. 197, 199; Morris *v.* U. P. R. Co., 56 Iowa 135; Daniels *v.* Clarke, 38 Iowa 556, 558; Gage *v.* Maschmeyer, 72 Iowa 696; Brecht *v.* Corby, 7 Mo. App. 300, 306.

4. "It is true that the attachment process is a proceeding *in rem;* but it is equally true that it is something more. It is also a proceeding against the garnishee personally, for the purpose of compelling him to answer for the value where the thing itself is not produced.

property be condemned in the hands of the garnishee by a court having jurisdiction, the judgment will, as between parties to the record, have the same effect as in other proceedings *in rem*.[1]

**IV. CONSTRUCTION OF STATUTES.**—Garnishment statutes, being remedial in their nature, should be liberally construed for the advancement of the remedy,[2] and may be given a retrospective operation, if vested rights will not thereby be impaired.[3] But

The summons, the judgment and the execution contain the bone and the sinews of a proceeding in *personam* against the garnishee, by means of which his own estate may be taken in execution if he fails to 'answer interrogatories,' or 'to procure the goods and effects of the defendant' found to be in his hands or possession, or 'neglect to pay the debt attached, if the same be due and payable.' The ultimate object of the proceeding is to appropriate the debtor's assets to the payment of his debts, and the object is one that ought to be favored. It may be accomplished wherever the courts have jurisdiction over the person who has the actual possession of the property, and the power to dispose of it according to their discretion, or wherever the property itself may be taken into actual possession by the officers of the law." Childs *v.* Digby, 24 Pa. St. 23, 26; Coleman's appeal, 75 Pa. St. 441, 455; McConnell *v.* Denham, 72 Iowa 464.

In some cases it is *held* that it becomes a proceeding *in personam* only when the principal defendant is personally served with notice of appeal in the action. Richmond *v.* Duncan, 4 Ark. 197, 199; McBride *v.* Protection Ins. Co., 22 Conn. 248, 257.

1. Moore *v.* Chicago etc. R. Co., 43 Iowa 385. But the proceeding by garnishment is *inter partes*, and as a proceeding *in rem* must be confined to such. It is not based on any allegation that the right of property is to be determined between any other persons than the parties to the suit. No notice is sought to be given to any other person, and the judgment being only as to the status of the property, as between the parties of record, it is as to all other persons a mere nullity. Woodruff *v.* Taylor, 20 Vt. 65.

2. Treadway *v.* Andrews, 20 Conn. 384; Fitch *v.* Waite, 5 Conn. 117, 122; Fisher *v.* Hervey, 6 Colo. 16; Ill. Cent. R. Co. *v.* Weaver, 54 Ill. 319, 321; Hannibal etc. R. Co. *v.* Crane, 102 Ill. 249; U. S. *v.* Graff, 67 Barb. (N. Y.) 304; Bacon *v.* Masters, 2 Root (Conn.) 43; Woodward *v.* Woodward, 4 Halst. (N. J.) 115; Whitney *v.* Munroe, 19 Me. 42; s. c., 36 Am. Dec. 732; Fisher *v.* Consequa, 2 Wash. (U. S.) 382; s. c., 2 Browne (Pa.) App. 28; Dunning *v.* Owen, 14 Mass. 157, 164.

"These statutes have received a practical construction by the profession and by the courts. . . . It has always been treated as providing for a preliminary investigation, the result of which, while it is not binding upon either of them, is still of great value in providing for them a convenient mode, by which in most cases they are enabled to discover the extent of their legal rights, and thus to save them from the expense of further litigation." Bacon Academy *v.* Delwolf, 26 Conn. 602.

But some cases *hold* that the rights conferred by these statutes being in derogation of the common law, they should be strictly construed. State Bank *v.* Hinton, 1 Dev. (N. Car.) 397; Ferris *v.* Ferris, 25 Vt. 100, 102; Maynard *v.* Cornwell, 3 Mich. 309; Sievers *v.* Woodburn, Sarven Wheel Co., 43 Mich. 275; Ford *v.* Detroit Dry Dock Co., 50 Mich. 358; Iron Cliffs Co. *v.* Lahais, 52 Mich. 394; Schindler *v.* Smith, 18 La. An. 476. In Gibbon *v.* Bryan, 3 Bradw. (Ill.) 298, 302, it is said that there should at least be substantial performance of the provisions of the statute to entitle one of the remedy.

3. "The objection to retrospective statutes does not apply to remedial statutes which may be of a retrospective nature, provided they do not impair contracts nor disturb vested rights; but go only to confirm existing rights, and in furtherance of the remedy." Fisher *v.* Hervey, 6 Colo. 16.

A statute making stock-holders of a corporation liable to creditors of the company for the amount of stock subscribed by them, and unpaid, as debtors to the corporation, and providing that such liability might be enforced by garnishment, must be prospective in its character so far as it relates to the institution of suits authorized by it, and

the remedy cannot be extended beyond the plain provisions of the statute, either to bring within its scope cases not contemplated in its enactment, or to supply defects in the method provided for its enforcement.[1] The rules established in foreign attachment under the custom of London do not determine its limits when such rules are broader or narrower than the provisions of the statute.[2]

**V. In What Cases the Process May Issue—1. General Rules.**—Being a remedy unknown at common law, and dependent entirely upon legislation, garnishment may be employed only in such cases as come within the purview of the statute.[3] The fact

cannot apply to suits then in existence. Bingham *v.* Rushing, 5 Ala. 403. But it will operate retrospectively so as to embrace liabilities arising upon contracts or subscription previously made. Paschall *v.* Whitsett, 11 Ala. 472. But such statute has no application to a case where one is attached as a common debtor to a corporation. De Mony *v.* Johnston, 7 Ala. 51; neither does it operate against stockholders of a corporation after dissolution, or whose franchise has been lost by non-uses, or has otherwise become extinguished. Paschall *v.* Whitsett, 11 Ala. 472; Cooper *v.* Frederick, 9 Ala. 738, 743. Where such a statute is constitutional, *quære*, Paschall *v.* Whitsett, 11 Ala. 472.

And a statute permitting executors and administrators to be summoned as garnishees will not be given a retrospective operation so as to permit an administrator to be summoned as garnishee in proceedings by *scire facia* on a judgment recovered prior to the enactment of the statute. Hartle *v.* Long, 5 Pa. St. 491.

1. Sharp *v.* Clarke, 2 Mass. 91; Penn. Steel Co. *v.* N. J. S. R. Co., 4 Houst. (Del.) 572; King *v.* Payan, 18 Ark. 583; Stillman *v.* Isham, 11 Conn. 124; Ferris *v.* Ferris, 25 Vt. 100, 102; Wigins *v.* Anderson, 1 Tex. 73; Willis *v.* Lyman, 22 Tex. 268; Sievers *v.* Woodburn, Sarven Wheel Co., 43 Mich. 275; Ford *v.* Detroit Dry Dock Co., 50 Mich. 358; Iron Cliff Co. *v* Lahais, 52 Mich. 394; Brecht *v.* Corby, 7 Mo. App. 300, 306; Botton *v.* Clarke, 7 Cush. (Mass.) 487; Porter *v.* Hildebrand, 14 Pa. St. 129; Coleman's Appeal, 75 Pa. St. 441; Picquet *v.* Swan, 4 Mason (U. S.) 443; Bliss *v.* Smith, 78 Ill. 359; Gregg *v.* Hilson, 8 Phila. (Pa.) 91. The relief granted by the statute is dependent upon the remedies provided by the statute itself. Aldis *v.* Hull 1 D. Chip. (Vt.) 314; Baynard *v.* Simmons, 5 El. & Bl. 57, 61. Therefore, *held*, that statutes providing for garnishment of the debtor of a defendant in execution, would not authorize use of the process against the debtor of a garnishee against whom an execution has been returned *nulla bona*. Ill. C. R. Co. *v.* Weaver, 54 Ill. 319.

An a statute authorizing judgment against a garnishee simply for "sums of money" acknowledged by him to be due the defendant, or for what "effects" of the defendant he has in his possession, *held*, not to warrant a judgment appropriating choses in action of the debtor in the hands of the garnishee. Under such a statute the garnishee can be charged only for property which, if surrendered, might be sold under the ordinary process of execution. Price *v.* Brady, 21 Tex. 614.

2. Fisher *v.* Consequa, 2 Wash. (U. S.) 382; s. c., 2 Browne (Pa.) Appx. 28; Bottom *v.* Clarke, 7 Cush. (Mass.) 487. In Hannibal etc. R. Co. *v.* Crane, 102 Ill. 249, 257, the court say: "We are not bound or required by our statute, adopting the common law of England, to enforce local customs, as it does not impose local customs and statutes as a rule of action in this State. On the contrary, they are excluded. The proceeding by foreign attachment was unknown to the common law. It, by local custom, existed in London, Exeter, and may have existed in some other places. 1 Roll's Ab. 552; 1 Comyn Dig. 580. It was a local custom, and wholly governed by the special custom. As our legislature in no wise refers to it in adopting our earliest attachment law, or subsequent amendments or revisions, we have no ground to suppose that body had those customs in mind, or could have intended them to have any bearing in giving these acts construction."

3. Parker *v.* Farr, 2 Browne (Pa.)

that it involves a third person in litigation in which he has no interest, and puts him to trouble and expense, which he might be saved but for the garnishment, besides exposing him to new liabilities, has influenced courts generally to restrict the operation of such statutes, and leave to the legislative body the extension of the remedy to cases not clearly provided for.[1] They will indulge in no presumptions to help out a particular case.[2] Being a mode of attachment and execution, the use of the remedy is dependent upon the right of the creditor to one or the other of these writs,[3] and where it appears that the process has been improperly issued, it is the duty of the court to dismiss the proceeding.[4] It cannot issue in actions commenced merely by petition or declaration,[5] and being a remedy intended for the collection of debts owing from the principal defendant to the plaintiff in suit, it will not lie against the debtor of a garnishee against whom an execution has been returned *nulla bona;*[6] nor can it be employed as a species of injunction to hold funds of the garnishee in the hands of another when he becomes bankrupt pending proceedings on the garnishment.[7] Neither is it designed to try questions of fraud in dealings between a debtor and third parties.[8] Subject to these limitations, any plaintiff in a civil action, upon complying with provisions of the statute in relation to attachments, is entitled to the benefit of this remedy, and any judgment creditor may enforce the collection of his judgment by this method in such cases, upon the conditions and in the manner prescribed by statute; and in a number of the States it is not confined to the enforcement of legal demands alone against the principal defendant, but is permitted in proper cases on attachment in suits in equity;[9] and, of course, judgments in cases of the same nature may be enforced. In most of the States the tendency has been to greatly broaden the scope of the remedy by extending it to cases not included in the earlier statutes, and by providing that the statutes shall receive a liberal construction; but in some quarters the opinion obtains that it is a "harsh and peculiar" remedy, and that it ought not to be resorted to when the redress sought may be obtained through the ordinary process of the law.[10]

331; Wolf *v.* Tappan, 5 Dana (Ky.) 361; May *v.* Baker, 15 Ill. 90; Bliss *v.* Smith, 78 Ill. 359; Iron Cliffs Co. *v.* Lahais, 52 Mich. 394.

1. Sievers *v.* Woodburn Sarven Wheel Co., 43 Mich. 275; Wade on Attach., §§ 326, 333.

2. Weimeister *v.* Manville, 44 Mich. 408, 411.

3. Van Fossen *v.* Anderson, 8 Iowa 251; Iron Cliffs Co. *v.* Lahais, 52 Mich. 394.

4. Chanute *v.* Martin, 25 Ill. 63; Mitchell *v.* Watson, 9 Fla. 160; Knox *v.* Summers, 66 Ga. 256; Holek *v.* Phoenix Ins. Co., 63 Tex. 66; Hill *v.* Whitney, 16 Vt. 461.

5. Weimeister *v.* Manville, 44 Mich. 408.

6. Ill. Cent. R. Co. *v.* Weaver, 54 Ill. 319.

7. Wolf *v.* Tappan, 5 Dana (Ky.) 361.

8. Hutchins *v.* Hanley, 9 Vt. 295.

9. King *v.* Payan, 18 Ark. 583; Lane *v.* Marshall, 1 Heisk. (Tenn.) 30; Templeman *v.* Fauntleroy, 3 Rand. (Va.) 434.

10. Iron Cliffs Co. *v.* Lahais, 52 Mich.

The United States,[1] or any of the several States,[2] are entitled to the benefit of the remedy under the same circumstances as other creditors, and, unless the contrary is provided by statute, it lies in favor of one who is a non-resident.[3]

**2. Under Attachment.**—Statutes authorizing the commencement of actions by attachment generally provide for the service of the writ by garnishment, and where the maintenance of the suit is dependent upon property of the defendant being found within the jurisdiction, attachment by this process is held to be sufficient.[4] The validity of the garnishment in such cases is, however, dependent upon the existence of certain facts, and their proof by affidavit prior to the issuance of the writ and summons.[5]

First among these is that plaintiff's action against the defendant be of a kind permitted by the statute to be commenced by attachment.[6] The more common provision in this regard, es-

394. "The obvious design of this law was only to authorize such a proceeding after a failure, where a reasonable effort has been made in good faith to collect the money by the ordinary process of the law. And it was not the design of the general assembly that the proceeding might be resorted to simply when the execution has been returned 'no property found,' as manifested by the fact that the affidavit must also be filed to authorize the process to issue. It was only intended to be allowed when there is no property subject to execution, or when it cannot be found by reasonable efforts of the officer and the plaintiff in execution. The law requires something more than a mere formal affidavit, otherwise it would never have been required. It could not have been the design to permit a plaintiff in execution to resort to this proceeding, and thereby harass his debtors by the costs of another suit when the debtor had an abundance of property liable to execution, simply because the plaintiff in the execution could make his money sooner by the process than by the sale of real estate." Chanute *v.* Martin, 25 Ill. 63, 64; Mich. Cent. R. Co. *v.* Keohane, 31 Ill. 144; Kruse *v.* Wilson, 79 Ill. 233; Gibson *v.* Bryan, 3 Bradw. (Ill.) 298.

Under such statutes, if the officer finds sufficient property to satisfy the writ, he should proceed no further. But if in the opinion of the officer the property found is insufficient, he is authorized to summon every person who may be in the possession of property of the defendant or be otherwise indebted to him. Desha *v.* Baker, 3 Ark. 509, 520.

1. United States *v.* Graff, 67 Barb. (N. Y.) 304.

2. People *v.* Johnson, 14 Ill. 342.

3. Woodley *v.* Shirley, Minor (Ala.) 14; Burrows *v.* Dumphy, 2 Har. (Del.) 308.

Under a statute of Maryland limiting the benefits of the statute to attaching creditors residing in that state, or some other of the United States, *held* that a citizen of the District of Columbia was not entitled to the remedy. Yerby *v.* Lackland, 10 Har. & J. (Md.) 446; 2 Giddens *v.* Williamson, 65 Ala. 439.

4. King *v.* Holmes, 7 Fost. (N. H.) 266; Gardner *v.* Barker, 12 Mass. 36. Under a statute authorizing the commencement of all personal actions by this process, except those of detinue, replevin, actions on the case for a malicious prosecution, for slander by writing or speaking, and for assault and battery, *held* an action in tort in the nature of trespass *quare clausum fregit* may be commenced in the county where the garnishee lives, although such is not the county where the land is situated. Linscott *v.* Fuller, 57 Me. 407; Way *v.* Dame, 11 Allen (Mass.) 357.

5. Black *v.* Briskin, 3 Minn. 360; Prince *v.* Heenan, 5 Minn. 347; Hubbard *v.* Brown, 1 Root (Conn.) 276; Knox *v.* Summers, 66 Ga. 256; Weimeister *v.* Manville, 44 Mich. 408; Iron Cliffs Co. *v.* Lahais, 52 Mich. 394; Holek *v.* Phœnix Ins. Co., 63 Tex. 66; Newman *v.* Manning, 89 Ind. 422.

6. Hill *v.* Whitney, 16 Vt. 461. Concerning actions that may be commenced by attachment generally, see 1 Am. & Eng. Ency. of L., 894, 896; Drake on Attach. (6th ed.) ch. 11.

pecially in the older States, is that the indebtedness must be one arising upon contract, either express or implied, or some provision equivalent to this, as that the plaintiff must be a "creditor" of the defendant, or that the defendant must be "indebted to the plaintiff," or that the action is for the "recovery of money,"[1] which provisions have been construed as being applicable only to causes of action growing out of some contract relation between the plaintiff and defendant.[2] Under any of such provisions it is held sufficient that the action be one based upon contract, as for unliquidated damages for a breach thereof;[3] but that they will not be construed to include actions arising *ex delicto*.[4] Later statutes, however, give a broader scope to the operation of the remedy, and permit its use in any civil action.[5]

The next requisite is the existence of some one of the grounds upon which the attachment of the defendant's property is authorized. With reference to these the provisions of the statutes of

1. California Code of Civil Procedure, 1885, § 537; Colorado Code of Civil Procedure, 1877, § 91; Idaho Ter. Code of Civil Procedure, 1881, § 313; Illinois Rev. Stats., 1883, ch. 11, § 1; Kentucky, Bullitt's code, 1876, § 194; Louisiana, Voor. Rev. Stat., 1875, §§ 240, 243; Massachusetts Pub. Stats., 1882, ch. 161, § 38; Michigan Howells' annotated Stats., 1883, § 7986; Mississippi Rev. Code, 1880, § 2414; Montana Ter. Rev. Stats., 1879, ch. 4, § 179; Nebraska Compiled Laws, 1881, ch. 111, § 198; Nev. Gen. Stats., 1885, ch. 4, § 3145; New Jersey Rev. Stats., 1887, tit. Attach. (6th ed.), § 1; New Mexico Ter., Compiled Laws, 1884, § 1923; Oregon Gen. Laws, 1872, tit. 15, ch. 1, § 142; Texas Rev. Stats., 1879, tit. 9, ch. 1, art. 152; Utah Ter. Stats., 1884, ch. 4, § 410; Vermont Rev. Laws, 1880; Wisconsin Rev. Stats., 1878, §§ 2729, 2752, 2753. The process is permitted in actions for "the recovery of money" under the following statutes: Ind. Rev. Stats., 1881, § 913; Gen. Stats., Minn., 1878, § 145; Ohio Rev. Stats., 818, § 5521; Kansas, Dassler's Dig., 1885, § 3999.

2. Drake on Attach. (6th ed.), §§ 12-22.

Duties due upon goods imported constitute a personal debt due from the importer to the United States, which the latter may enforce by garnishment. United States *v.* Graff, 67 Barb. (N. Y.) 304.

3. Drake on Attach. (6th ed.), §§ 12-22; Fisher *v.* Consequa, 2 Wash. (U. S.) 382; s. c., 2 Browne (Pa.) Appx. 28; Redwood *v.* Consequa, 2 Browne (Pa.) 62; Bozer *v.* Bullard, 102 Pa. St. 555. But such construction is limited to cases where the contract in suit affords the rule for ascertaining the damages. Drake on Attach. (6th ed.), §§ 23-26.

4. Fisher *v.* Consequa, 2 Wash. (U. S.) 382; s. c., 2 Browne (Pa.) Appx. 28; Coleman's Appeal, 75 Pa. St. 441; Boyer *v.* Bullard, 102 Pa. St. 555; Groves *v.* Severens, 37 Me. 651; So *held* as to an action for trespass. Ferris *v.* Ferris, 25 Vt. 100; Drake on Attach. (6th ed.), § 10.

A statute permitting attachments against "absent debtors" will not authorize an action for slander to be instituted by such process. Sargeant *v.* Helmbold, Harp. (S. Car.) 219.

But the court will not go behind the form of action to ascertain whether the cause of action was originally *ex delicto* or *ex contracto*. Elwell *v.* Martin, 32 Vt. 217.

5. Iowa, McClain's Annotated Stats., 1888, tit. 18, ch. 1, § 4163; Maine Rev. Stats., 1884, ch. 81, § 24; Maryland Rev. Code, 1878, tit. Attach., § 1; Missouri Rev. Stats., 1879, ch. 6, § 398; New Hampshire Gen. Laws, 1878, ch. 224, § 1; Pennsylvania, Brightley's Purdon's Dig., tit. Actions Personal, § 71; Rhode Island Pub. Stats., 1882, ch. 206, § 12; Tennessee, Milliken & Ventree's Code, 1884, § 4192; Washington Ter. Gen. Laws, 1885-6, p. 39, § 1; Wyoming Ter. Compiled Laws, art. 1, § 187. The statutes of New York and North Carolina permit attachment in actions to recover money only as damages for one or more of the follow-

the different States are very similar.[1] With but few exceptions they authorize attachments in cases against non-resident, absconding or concealed debtors,[2] or against a defendant contemplating the removal of himself or his property from the State; or one

ing causes: 1. Breach of contract, express or implied, other than a contract to marry. 2. Wrongful conversion of personal property. 3. Any other injury to personal property, in consequence of negligence, fraud or other wrongful act. N. Y. Code of Civil Procedure, 1883, § 635; N. C. code, 1883, ch. 4, § 347.

Garnishment will not lie to enforce pre-existing equities or liens in favor of the plaintiff, either against the garnishee or some third person. Johnson *v.* Brant, 38 Kan. 754. But in Wisconsin it may issue in aid of a suit to onforce a laborers' lien upon cord wood, given by ch. 143, Rev. Stats. Wis., 1873. O'Reilly *v.* Milwaukee R. etc. Co., 68 Wis. 212.

**1.** 1 Am. & Eng. Ency. of L., 896-900.

**2.** These were formerly the only grounds upon which the process was permitted, the foundation for the relief in such cases being in the fact that the defendant is beyond the reach of process, and his property within. Chase *v.* Manhardt, 1 Bland. (Md.) 333, 344; Barr *v.* Perry, 3 Gill (Md.) 313, 325; Fitch *v.* Waite, 5 Conn. 117; Penn. R. Co. *v.* Pennock, 51 Pa. St. 244.

When so limited, the primary purpose of the process is to compel the appearance of the debtor, when from non-residence or flight he is beyond the process of the judicial tribunals of the state. Barr *v.* Perry, 3 Gill (Md.) 313, 326; Risewick *v.* Davis, 19 Md. 82, 91.

A statute permitting the process against the effects of persons only who are "not residents or residing within the province" will not authorize its issue against the effects of a person dwelling in the county where the writ issued. Bainbridge *v.* Alderson, 2 Browne (Pa.) 51; and a statute permitting the same against goods or effects of persons "not inhabitants of this province," *held* not to refer to persons not happening to reside in the province at the time of issuing the process, but only to those persons who never resided there, or whose actual residence was in another country, and that it did not include absconding debtors. Barnet's Case, 1 Dall. (Pa.) 480, and that the fact whether the defendant had been an inhabitant of the state is to be determined from a consideration of all the circumstances of the case. Taylor *v.* Knox, 1 Dall. (Pa.) 241. Under such a statute the process will lie against the effects of one who has never been within the limits of the state. Redwood *v.* Consequa, 2 Browne (Pa.) 62.

An "absent or absconding debtor" is one who lives without the state, or one who has intentionally concealed himself from his creditors, or withdrawn himself from the reach of their suits with the intention to thereby frustrate their just demands. Thus if a person depart from his usual residence or remain absent therefrom, or conceal himself in his house so that he cannot be served with process, with intent unlawfully to delay or defraud his creditors, he is an absconding debtor. But if he depart from the state, or from his usual abode, with the intention of again returning, and without any fraudulent design, he has not absconded nor absented himself within the intendment of the law. Fitch *v.* Waite, 5 Conn. 117, 121; Ives *v.* Curtiss, 2 Root (Conn.) 133; Branson *v.* Shinn, 1 Greene (N. J.) 250.

But to constitute one an "absconding or concealed debtor" it must appear that he has been an inhabitant of the state, and has secretly absconded from or keeps concealed within it. Austin *v.* Palmer, 2 Vt. 489; Baxter *v.* Vincent, 6 Vt. 614. And where a single man, having a usual place of resort as a home in New Hampshire, came into the State of Vermont under a contract to teach school for three months, leaving a chest of clothes at his place in the former state, and going once or twice to exchange them during said term, and then returning at the expiration of said term, he did not thereby become an inhabitant of the state of Vermont within the meaning of the statute. Boardman *v.* Bickford, 2 Aik. (Vt.) 345.

An executor residing in another state is not an "absent debtor," as to debts due from his testator, in such sense as to sustain a suit by attachment against him upon such indebtedness. Weyman *v.* Murdock, Harp. (S. Car.)

who has disposed, or is about to dispose, of his property with intent to defraud his creditors; or where the defendant is a foreign corporation.[1]

Another requirement necessary to the validity of the garnishment is that there shall be a compliance with the rules prescribed by statute as to procedure in such cases. The mode of proceeding by this law is regulated by the law itself, and material omissions in the performance of its provisions must prove fatal to the jurisdiction of the court,[2] unless they are such as can be cured by amendment.[3] But a court may so mould its processes and proceedings as to secure to a party before it the benefit of a right given by law, although the circumstances of a particular case may not seem to be provided for.[4]

**3. Under Execution.**—If no grounds exist for suit by attachment, garnishment can only be had after judgment has been obtained,[5] and the judgment must be of such nature as is contemplated by the statute.[6] A creditor cannot resort to this remedy if he would not be entitled to execution against the property of the debtor in possession.[7] The process cannot issue on a judg-

125; *in re* Hurd, 9 Wend. (N. Y.) 465; Stanton *v.* Holmes, 4 Day (Conn.) 87.

1. For construction of such provisions see 1 Am. & Eng. Ency. of L. 896-900; Drake on Attach. (6th ed.), ch. 111.

2. Culver *v.* Hill, 20 Conn. 414; Weimeister *v.* Manville, 44 Mich. 408; Iron Cliffs Co. *v.* Lahais, 52 Mich. 394; Axtell *v.* Gibbs, 52 Mich. 640; Newman *v.* Manning, 89 Ind. 422; Drake on Attach. (6th ed.), §§ 83-87; 2 Wade on Attach. (6th ed.), §§ 356, 357.

3. 2 Wade on Attach. (6th ed.), § 358; Drake on Attach. (6th ed.), § 87, 113; 1 Am. & Eng. Encyc. of L. 907.

4. Stewart *v.* Dobbs, 39 Ga. 82; Alston *v.* Dunning, 35 Ga. 229.

5. King *v.* Payan, 18 Ark. 583; Littlejohn *v.* Lewis, 32 Ark. 423; Iron Cliffs Co. *v.* Lahais, 52 Mich. 394.

6. A person who has obtained a rule in one of the superior courts of England, ordering the payment of costs, is not by force of section 18 of 1 & 2 Vict., ch. 110, a judgment creditor within the garnishment clauses of the common law procedure act, 1854, providing that "any creditor who has obtained a judgment in any superior court may have the debtor examined as to debts due to him, and such judgment creditor may obtain an order attaching the debts due from third persons due the debtor." *Re* Frankland, L. R., 8 Q. B. 18; Cremetti *v.* Crom, L. R., 4 Q. B. 225. Nor is one who has obtained an order for the costs of an interpleader issue and entered it of record, pursuant to section 7 of 1 & 2 Wm. 4, ch. 58, so as to have the force and effect of a judgment, is not a judgment creditor within the meaning of the garnishee clauses, sections 60 & 61 of the English common law procedure act, 1854. Best *v.* Pembroke, L. R., 8 Q. B. 363; overruling Hartley *v.* Shemwell, 1 B. & S. 1. Neither can an order of the court of chancery for payment of money, though a judgment debt within 1 & 2 Vict., ch. 110, section 18, be enforced by process of garnishment under sections 60 & 61 of the English common law procedure act, 1854, those provisions applying only to judgments in the superior courts of common law. *Re* Price, L. R., 4 C. P. 155.

7. In Jauralde *v.* Barker, 6 Hurlst. & N. 431, Pollock C. B. said: I am of the opinion that the 61st section of the common law procedure act, 1854, early intended to place debts in the same position as other property which might be taken in execution. It would be monstrous to hold that a creditor may resort to a debt to satisfy his judgment when he cannot resort to a chattel.

A judgment creditor who has taken his debtor in execution under *ca. sa.* cannot attach his debts under the garnishment clauses of the English common law procedure act, 1854. Jauralde *v.* Barker, 6 Hurlst. & N. 431; *Ex parte* Worman, 7 L. 278. But see

ment *in rem*.[1] Nor on a satisfied judgment.[2] But it will lie in favor of a surety who has paid a judgment rendered against him and his principal, and taken an assignment of the same to himself.[3] Also in favor of the equitable owner of a judgment;[4] and of the assignee of a claim pending suit thereon.[5] And no judgment creditor can go into equity to reach debts due the defendant in execution until he has tried this remedy and found it inadequate.[6]

As in cases of attachment, so under execution, the proceeding must follow the statute in all its requirements to be valid.[7]

**VI. Proceedings to Obtain Garnishment—1. The Affidavit.**—In most of the States garnishment is simply a mode of service of the writs of attachment and execution, and the officer's possession of either of those writs is authority to levy not only on the defendant's property subject to actual seizure, but also on that in the hands of third persons by summoning the latter as garnishees.[8]

Under the statutes of a number of the States, however, the basis of the proceeding is an affidavit by the creditor to the existence of certain facts, upon which the right to the remedy is made to depend.[9] If the process is desired in an action commenced by attachment, and the necessary facts are stated in the petition, and this is duly verified, it is generally sufficient.[10]

But the filing of such affidavit before the issue of the process is indispensable to give the court jurisdiction of the proceeding;[11]

Hartley *v.* Shemwell, 1 B. & S. 1.

In Maine a judgment creditor who has taken his debtor in execution may, upon discovering goods, effects or credits of his debtor, proceed by garnishment if within the seven days after such process is served discharge the body of the debtor by a memorandum in writing directed and delivered to the officer having him in custody, stating the reason of the discharge of the person of the debtor. Thompson *v.* Taylor, 13 Me. 420. And so in Massachusetts; Dunning *v.* Owen, 14 Mass. 157.

1. Gilcreest *v.* Savage, 44 Ill. 56.

2. Thompson *v.* Wallace, 3 Ala. 132.

3. Giddens *v.* Williamson, 65 Ala. 439.

4. So *held* in favor of one who became the owner of a promissory note pending suit thereon. Dugas *v.* Mathews, 9 Ga. 510.

5. Whitman *v.* Keith, 18 Ohio St. 134.

6. Field *v.* Jones, 10 Ga. 229.

7. Where an affidavit is required to be first filed that "deponent has good reason to believe and does believe" that a third person has property or is indebted to defendant, such affidavit must be filed before the process issues or the court will have no jurisdiction. Hinkley *v.* St. Anthony Falls, etc., 9 Minn. 55; Chanute *v.* Martin, 25 Ill. 63; Kinse *v.* Wilson, 79 Ill. 233. A summons requiring the garnishee to appear in court at any other time than that prescribed by statute, will not give the court jurisdiction of the garnishee so that a judgment by default can be rendered against him. Padden *v.* Moore, 58 Iowa 703.

8. Woodward *v.* Adams, 9 Iowa 474; Van Fossen *v.* Anderson, 8 Iowa 251; Pritchard *v.* Toole, 53 Mo. 356.

For procedure in cases where garnishment is a mode of service of the writ of attachment, see 1 Am. & Eng. Ency. of L., pp. 901, 925.

9. **Affidavit—Basis of Proceeding.**—Prince *v.* Hendy, 5 Minn. 341; Hinkley *v.* St. Anthony Falls W. P. Co., 9 Minn. 55; Hathaway *v.* Brady, 26 Colo. 581; Steen *v.* Norton, 45 Wis. 412, 415; Sun Mutual Ins. Co. *v.* Selligson, 59 Tex. 3; Bowers *v.* Continental Ins. Co., 65 Tex. 52.

10. Fremont Cultivator Co. *v.* Fulton, 103 Ind. 393, 396.

11. In garnishment proceedings the

and if the record does not show a compliance with the statute in this regard, the proceedings against the garnishee will be of no validity.[1] Its absence cannot be waived by the appearance of the garnishee, and submission to the jurisdiction of the court.[2] Nor will such appearance generally cure material defects in an affidavit in fact filed.[3] But slight defects in matter and form may be cured by amendment,[4] or waived by the garnishee.[5] And

plaintiff can put in motion the jurisdiction of the court only by complying with the statutory prerequisites. Steen *v.* Norton, 45 Wis. 412, 414; Gibbon *v.* Bryan, 3 Brad. (Ill.) 298; Stickley *v.* Little, 29 Ill. 315; Black *v.* Brisbin, 3 Minn. 360; Prince *v.* Hendy, 5 Minn. 341.

In Minnesota, two things are necessary to give a court jurisdiction of proceedings in garnishment: (1.) That the principal action is "founded upon contract express or implied, or upon a judgment or decree;" (2.)that an affidavit has been made and filed, setting forth the indebtedness, etc., of the party to be garnished. Black *v.* Brisbin, 3 Minn. 360.

In Illinois, when the process is desired for the collection of a judgment previously rendered, the creditor must make affidavit stating the amount of the judgment recovered against the judgment defendant, and file interrogatories before the process issues. Stickley *v.* Little, 29 Ill. 315.

When the answer of a garnishee was desired in six different cases pending on small notes in justice's court, *held*, that affidavit and bond must be filed, and summons issued in each case. Rich *v.* Kiser, 61 Ga. 370.

**1. Proceeding Invalid Without Affidavit.**—Hinkley *v.* St. Anthony Falls W. P. Co., 5 Minn. 55, 63.

In Wisconsin, *held* that neither a docket entry that an affidavit was made and filed, but not showing its contents, nor an appearance and submission to the court by the garnishee can supply the absence of such affidavit in the record so as to give validity to the judgment against the garnishee. Wells *v.* American Express Co., 55 Wis. 23.

When the proceeding is in justice's court, the affidavit must substantially comply with the statutory requirements, or the justice will acquire no jurisdiction of the subject matter of the proceeding. Steen *v.* Norton, 45 Wis. 412; Russell *v.* Ralph, 53 Wis. 328, 330.

That the affidavit is subscribed and sworn to before a justice of the peace instead of before the clerk of the court will not render the garnishment invalid. Horat *v.* Jackel, 59 Ill. 139.

In Rhode Island, in cases of garnishment on attachment the affidavit must be endorsed on the writ. Carroll *v.* Sheehan, 12 R. I. 219.

**2. Garnishee's Appearance as Affecting Affidavit.**—The appearance of the garnishee will waive all objections to defects in the proceeding preliminary to the issuance of the process so far as they affect jurisdiction of his person, but cannot confer jurisdiction of the subject matter. Steen *v.* Norton, 45 Wis. 412, 413; in which case Blackwood *v.* Jones, 27 Wis. 498, and Fairfield *v.* Madison Mfg. Co., 38 Wis. 346, as to this point are criticised, and so far as they seem in conflict with the above case are overruled.

3. Bowers *v.* Continental Ins. Co., 65 Tex. 52.

The initial steps in the proceeding must be taken as required by statute, and if not so taken, in the view of the law they are not taken at all. Green *v.* Tripp, 11 R. I. 424, 426.

In Wisconsin, an affidavit in justice's court which omits to state that the money, effects and credits of the defendant in the garnishee's possession are not exempt, is fatally defective, and will not authorize the constable to summon the garnishee nor the justice on its return to take jurisdiction of the proceeding. Steen *v.* Norton, 45 Wis. 412.

Objection to such defects in the affidavit may be raised by the garnishee at any stage of the proceeding. Barr *v.* Perry, 3 Gill (Md.) 313.

4. Hinkley *v.* St. Anthony Falls W. P. Co., 9 Minn. 55, 63.

5. Bowers *v.* Continental Ins. Co., 65 Tex. 52; Stevens *v.* Dillman, 68 Ill. 233; Fremont Cultivator Co. *v.* Fulton, 103 Ind. 393; Goll *v.* Hubbell, 61 Wis. 293.

Slight defects in the affidavit should be taken advantage of by the garnishee upon appearance, and before answer, by motion to quash the writ, or they will

if the defendant appears to the action, it does not lie with the garnishee to object to the sufficiency of the affidavit.[1]

Generally, the affidavit may be made by either the plaintiff or his agent or attorney;[2] but the affiant must make oath to his personal knowledge of the fact.[3]

The facts to be shown by the affidavit depend upon the requirements of the particular statutes of the different States. Generally, it must state that the affiant believes that a third person named therein is indebted to or has property or effects of the defendant in his possession;[4] and sometimes the further fact that the defendant has no property in his possession which is subject to execution,[5] or that the affiant believes garnishment to

be deemed waived. Stevens *v.* Dillman, 68 Ill. 233; Fremont Cultivator Co. *v.* Fulton, 103 Ind. 393.

Where a referee is appointed to take the answer of a garnishee, and not to try any issue of law or fact, an objection to the sufficiency of the affidavit made upon the coming in of the report is in time, although not made before the reference upon the disclosure. Prince *v.* Hendy, 5 Minn. 347. But such questions cannot be raised for the first time upon appeal. Jones *v.* Polk, 6 Ala. 154; Burt *v.* Parish, 9 Ala. 211; Corbin *v.* Goddard, 94 Ind. 419.

Where the garnishee receives notice, and there is a conflict of testimony as to whether the affidavit was verified, the supreme court will not disturb the finding of the trial court upon that question. Field *v.* Malone, 102 Ind. 251.

1. Baltimore etc. R. R. Co. *v.* Taylor, 81 Ind. 24.

2. Dunlap *v.* Hooper, 7 Ga. 721; Weatherwax *v.* Paine, 2 Mich. 555.

In Carroll *v.* Sheehan, 12 R. I. 218, *held*, that the act of the officer in first making the required affidavit as plaintiff's agent, and then, as officer, serving the writ, although improper, was not illegal.

An affidavit made by "B. F. Fly," without other description, is insufficient, notwithstanding the petition filed in the cause is signed by "Fly & Fly, attorneys and plaintiffs." A court cannot judicially know that such affiant is one of the persons who signed the petition, nor will it look to the record in the case for information that should be in the affidavit. Willis *v.* Lyman, 22 Tex. 268.

The affidavit for garnishment on execution should be made by the real owner of the judgment, though he be a person other than the plaintiff of record. Jackson *v.* Shipman, 28 Ala. 488.

An affidavit for garnishment, under section 3702, R. S. Wis., if not made by the plaintiff, must contain a sworn statement that it is made on his behalf. A mere recital, as "J. K. on behalf of I. S. being duly sworn," is not sufficient. Miller *v.* C. M. & St. P. R. Co., 58 Wis. 310.

3. Weimeister *v.* Manville, 44 Mich. 408.

4. **Facts That Must Appear in Affidavit.**—Indiana Revised Statutes, 1888, section 931; Kansas, Dassler's Compiled Laws, 1885, section 4009; Michigan, Howell's Statutes, 1882, sections 8031, 8058. In Michigan the affidavit must state whether the principal suit is on an express or an implied contract, and must distinctly connect the garnishee's indebtedness with a suit on contract. Weimeister *v.* Manville, 44 Mich. 408. And it will be fatally defective if the statement of such facts is omitted. Conway *v.* Ionia Circuit Judge, 46 Mich. 28; Farwell *v.* Chambers, 62 Mich. 317. Where it is sought to reach money due a defendant by an insurance company, the affidavit should show that the company named is amenable under the laws of Michigan, whether it is a corporation legally organized, and whether a domestic or foreign corporation. Ettelsohn *v.* Fireman's Fund Ins. Co., (Mich.) 31 N.W. Rep. 201; Minn. Gen. Stats. 1888, ch. 66, § 164; Nebraska, Comp. Stats. 1885, part 2, § 207; Ohio, Rev. Stats. 1884, §§ 5530, 6498; Wyoming, Rev. Stats. 1887, § 2878.

In England an affidavit is required showing, in addition to the facts stated in the text, that judgment has been rendered against the defendant, and that the same remains unsatisfied. Com. L. Proc. act, 1854, 17 & 18 Vict., ch. 125, § 61.

5. Florida, McClelland's Digest,

be necessary to obtain satisfaction of plaintiff's judgment.[1]

The affidavit should state facts and not conclusions of law,[2] and the statement should be sufficiently direct and positive to make it clear what the affiant intends to charge.[3] The usual test as to its sufficiency is whether perjury can be assigned upon it.[4] But where several causes for garnishment are given by

1881, ch. 109, § 1; Statutes 1883, tit. Garnishment, §§ 1, 14, 19; Illinois, Annotated Stats. 1885, ch. 62, part 1. When the process issues on execution the affidavit must state the amount of the judgment recovered of the defendant. Stickley *v.* Little, 25 Ill. 315; Texas, Rev. Civil Stats. 1879, arts. 183, 185; Wisconsin, Rev. Stats. 1878, supplement 1883, sections 2753, 3716.

Where a judgment has been obtained against several defendants, to authorize the issue of garnishment thereon, the affidavit must state that none of the defendants have property within the jurisdiction of the court out of which the debt can be made. Willis *v.* Lyman, 22 Tex. 268.

When garnishment is permitted only where no property of the defendant can be found which is subject to attachment or execution, the plaintiff is not bound to make every possible effort to find property, and it is sufficient if he uses reasonable effort or makes reasonable enquiry to find it; but if, when the knowledge is brought home to him or his attorney, or to the officer, of sufficient property to satisfy the writ, he cause summons of garnishment to issue, it will constitute such an abuse of the process of the court as to warrant a dismissal of the proceeding. Chanute *v.* Martin, 25 Ill. 63.

1. Alabama Civil Code, 1886, section 2973; Pounds *v.* Hammer, 57 Ala. 342; Georgia Code, 1882, sections 3533, 3535. It is not necessary in this state to set fourth in the affidavit the names of the persons against whom the summons is to issue. Owsley *v.* Woolhopter, 14 Ga. 124. But an affidavit for garnishment that the attorney has reason to believe that his client will apprehend the loss of the debt is insufficient. Knox *v.* Summers, 66 Ga. 256.

2. **Must State Facts, Not Conclusions of Law.**—Morrison *v.* Lovejoy, 6 Minn. 183.

But where the affidavit set forth the required facts, and drew from them a wrong conclusion of law, the latter will be regarded as mere surplusage. Ordway *v.* Remmington, 12 R. I. 319; s. c., 34 Am. Rep. 646.

3. Merrill *v.* Lowe, 1 Pin. (Wis.) 221; Greene *v.* Tripp, 11 R. I. 424; Sun Mutual Ins. Co. *v.* Selligson, 59 Tex. 3; Corbin *v.* Goddard, 94 Ind. 419.

The statement that the garnishee "has property, credits, money and effects," is a sufficient statement that he has personal property. Russell *v.* Ralph, 53 Wis. 328.

An affidavit which states in the language of the statute that the indebtedness for which suit is brought is due upon contract, express or implied, is sufficient without stating more precisely the nature of the contract. The material fact necessary to appear is that the cause of action is one arising upon contract in contradiction to one formed in tort. Klenk *v.* Schwalm, 19 Wis. 111.

An affidavit that the affiant "has good reason to believe, and does believe, that A has property, money or effects in his hands or under his control belonging to B, or is indebted to him, *held* insufficient, because the two grounds stated in the affidavit are distinct and involve different relations between the defendant and the garnishee, though the latter may sustain both relations at the same time; and to entitle a creditor to the process his knowledge must be sufficiently definite and certain to enable him to charge the garnishee in one capacity or the other, or in both if the case warrants. Prince *v.* Hendy, 5 Minn. 347, 350.

4. Wells *v.* Munson, 34 Wis. 579.

The statement that the affiant "verily believes," instead of the statutory form, "has good reasons to believe," is sufficient, the former being the stronger form, and perjury being assignable upon it. Russell *v.* Ralph, 53 Wis. 228, 332.

But where a statute requires a positive statement in the affidavit of the existence of certain facts, an affidavit that the affiant "verily believes" the existence of such facts is not sufficient and an attachment issued thereon is illegal. Greene *v.* Tripp, 11 R. I. 424.

statute, two or more of them may be stated in the disjunctive.[1]

The affidavit is not conclusive of the facts stated therein, but may be controverted by the garnishee,[2] or its sufficiency tested by motion or demurrer.[3]

**2. The Bond.**—Whether the bond required of the plaintiff be that provided for in cases of ordinary attachment, or one that is peculiar to cases of garnishment, the execution and filing thereof before the issuance of the writ and service of summons is necessary to the validity of the garnishment.[4] Ordinarily, defects in the bond may be cured by amendment so as to make it conform to the requirements of the law;[5] but it has been held that a material variance between its conditions and those required by statute is fatal to the validity of the garnishment.[6]

As the bond is intended for the indemnity of the defendant in the suit, and not for the benefit of the garnishee, if the defendant appears, the garnishee cannot be heard to object to the sufficiency thereof.[7] But if the defendant does not appear, and there is a failure to file the bond, or if it be fatally defective, the garnishee will be bound to protect himself against an attachment thus issued.

In those States where a special bond is required in cases of garnishment, the usual condition is, that the plaintiff will prosecute the original suit to judgment, and pay the defendant therein all damages and costs which he may sustain by the wrongful or vexatious suing out of the garnishment.[8]

1. Russell *v.* Ralph, 53 Wis. 328; White *v.* Lynch, 26 Tex. 185; Botsford *v.* Simmons, 32 Mich. 352.

An objection to the affidavit upon this ground, if good in any event, must be made by the garnishee before answer. Everdell *v.* Sheboygan & F. Du L. R. R. Co., 41 Wis. 395.

An affidavit alleging that the plaintiff has good reason to believe that the defendant "has assigned, disposed of or concealed, or is about to assign, dispose of or conceal his property with intent to defraud his creditors," is not objectionable. Klenk *v.* Schwalm, 19 Wis. 111.

But an affidavit that affiant has good reason to believe, and does believe, that "T, the attachment defendant, has assigned, disposed of or concealed, or is about to assign, dispose of or conceal any of his property with any intent to defraud his creditors, *held* insufficient, because perjury could not be assigned upon it. Miller *v.* Munson, 34 Wis. 579.

**2. Affidavit Not Conclusive as Facts Stated.**—Barr *v.* Perry, 3 Gill (Md.) 313.

But where proceedings in garnishment are based upon an affidavit that is jurisdictionally defective, but the garnishee appears and discloses assigned claims in which he has no personal interest, it is within the court's discretion to dismiss the proceedings on motion made by the garnishee, before judgment is entered in the principal case; especially if the affidavit is not amended after notice to dismiss, and the garnishee's conduct has not caused prejudice. Conway *v.* Ionia Circuit Judge, 46 Mich. 28.

3. Corbin *v.* Goddard, 94 Ind. 419.

**4. The Bond in Garnishment.**—Root *v.* Monroe, 5 Blackf. (Ind.) 59; Hays *v.* Anderson, 57 Ala. 374.

5. James *v.* Tomlinson, 30 Ga. 340; Burton *v.* Wynne, 55 Ga. 615; Gregory *v.* Clark, 73 Ga. 542.

6. Maddox *v.* Herd, 64 Ga. 448.

7. Camberford *v.* Hall, 3 McCord (S. C.) 345; Pounds *v.* Hammer, 57 Ala. 342; Hays *v.* Anderson, 57 Ala. 374; Baltimore, Ohio & Chi. Ry. Co. *v.* Taylor, 81 Ind. 24.

**8. Condition of Bond.**—Pounds *v.* Hammer, 57 Ala. 342. The filing of the attachment bond required by Pa. Laws, 1869, p. 1, does not justify the

If the plaintiff fails to maintain his suit against the defendant, or if the grounds alleged as cause for the issuance of the writ be untrue, there will be a breach of the condition of the bond for which the plaintiff will be liable to respond to the defendant in damages,[1] but no right of action will accrue to the garnishee thereon.[2] If the issuance of the garnishment was simply wrongful, actual damages only are recoverable; but if it be sued out wrongfully and vexatiously, exemplary or vindictive damages may be recovered.[3]

**3. The Writ and Summons.**—The notice to the garnishee whereby he is informed of the attachment of the defendant's property or credits in his hands, and commanded to appear in court and submit to an examination in relation thereto, is process within the meaning of statutes and constitutional provisions prescribing the manner in which process shall issue.[4]

In some of the States such notice consists of a certified copy of the writ of attachment,[5] or what is termed a writ of garnishment,[6] and in others it is a mere notice issued as an incident to the writs of attachment and execution;[7] but in either case its purpose is the same. It must issue out of the court having juris-

sheriff in seizing the garnishee's goods. The bond enures only the defendant's security. The sheriff's proper protection in case of such wrongful seizure is either to demand of plaintiff a bond of indemnity or to have an order of interpleader. Rothermell *v.* Marr, 98 Pa. St. 285.

1. **Action for Breach of Bond.**—Pounds *v.* Hammer, 57 Ala. 342. Action upon the bond is given the defendant, because, when the garnishee is actually indebted and the claim thereby tied up, and its collection delayed, some damage may be done the defendant, and the debt lost to him, and the tendency of garnishment is to harass and bring odium upon him. Hays *v.* Anderson, 57 Ala. 375.

2. Pounds *v.* Hammer, 57 Ala. 342. But in Barnes *v.* Webster, 16 Mo. 258, s. c., 57 Am. Dec. 232, *held* that the defendant might maintain an action upon the bond for the benefit of the garnishee when the attachment was dissolved, the suit dismissed and the garnishee discharged.

3. In a suit upon the bond, no recovery can be had for the defence of the action in which the garnishment issued, nor defence of the garnishee, nor for attorney's fees, nor for injured feelings are recoverable. Pounds *v.* Hammer, 57 Ala. 342; Hays *v.* Anderson, 57 Ala. 375; Flournoy *v.* Lyon, 70 Ala. 308.

4. **Summons to Garnishee Is Process.**—Middleton Paper Co. *v.* Rock River Paper Co., 19 Fed. Rep. 252; Boyd *v.* Chesapeake & O. Canal Co., 17 Md. 195. But where the process is defective in this respect, the defect will be waived by the appearance of the garnishee. Hinkley *v.* St. Anthony Falls W. P. Co., 9 Minn. 55.

The writ should be entitled in the name and style of the original cause. Jackson *v.* Shipman, 28 Ala. 488.

In Alabama it is not necessary that the notice to the garnishee be signed by anyone. Moore *v.* Stainton, 22 Ala. 831.

5. **Form of Summons to Garnishee.**—O'Brien *v.* Mechanics' Fire Ins. Co., 14 Abb. Pr. Rep. (N. S.) 321.

6. Howell's Annotated Statutes, Mich., 1883, § 8058; Weimeister *v.* Manville, 44 Mich. 408; Renneker *v.* Davis, 10 Rich. Eq. (S. Car.) 289.

7. Hogshead *v.* Cawuth, 5 Yerg. (Tenn.) 230. Whether the practice had been changed by more recent statutes in Tennessee, *quære.* Moody *v.* Alter, 12 Heisk. (Tenn.) 142.

In Clarke *v.* Gaither, 6 Ala. 139, a summons of garnishment issued and served by a sheriff, in pursuance of a writ of execution which had been committed to him, was *held* insufficient to support a judgment against the garnishee.

diction of the original suit,[1] and both the writ and summons, except where the latter is merely incidental to the former, must be issued by an officer authorized by law to issue judicial process.[2] It should describe the person to be summoned,[3] and the capacity in which it is intended to charge him, if otherwise than individually,[4] and must conform to the requirements of the statute in regard to the time and place for the appearance and answer of the garnishee.[5]

If the court be one of general jurisdiction, the process may, in

1. Hoffer *v.* Todd, 8 Ala. 121; Gould *v.* Meyer, 36 Ala. 565; Toledo, W. & W. Ry. Co. *v.* Reynolds, 72 Ill. 487; McGuire *v.* Pitt's Sons, 42 Iowa 535; West *v.* Harvey (Ga.), 8 S. E. Rep. 449.

2. Process issued by any other person than the one authorized by law is void. Where the statute requires the summons to the garnishee to be issued by a magistrate who is capable of issuing an attachment, a sheriff has no authority to issue such summons, notwithstanding the affidavit and bond have been filed with the clerk as provided by law. Stephenson *v.* Campbell, 30 Ga. 159.

A summons which was issued by plaintiff's attorney, when it should have been issued by the clerk of the court, is no process at all, and cannot be amended as in the case of a mere defect or irregularity. Under such a summons the court gets no jurisdiction of the case, and there is nothing to amend. Middleton Paper Co. *v.* Rock River Paper Co., 19 Fed. Rep. 252.

3. Ettlesohn *v.* Fireman's Fund Ins. Co., 64 Mich. 331.

But where the officer is authorized under a writ of attachment or execution to summon "such persons as may be designated by the plaintiff in writing," such persons need not be designated in the writ. Pulliam *v.* Aler, 15 Gratt. (Va.) 54.

A writ of garnishment which directs the officer to summon as garnishee "James Sorley, agent and attorney for the Sun Mutual Insurance Co.," will confer no jurisdiction over the insurance company named. Sun Mut. Ins. Co. *v.* Seeligson, 59 Tex. 3. And see Buchanan Co. Bank *v.* Cedar Rapids etc. R. Co., 62 Iowa 494.

A summons of garnishment which requires the agent of a railroad company to appear and answer what he owes to the defendant, is not sufficient to found a judgment thereon against the company as garnishee. Varnell *v.* Speer, 55 Ga. 132.

4. A summons addressed to one as agent of several corporations named therein, and requiring him to appear and answer "what said companies named above are indebted to said defendant, or what property or effects you have in your hands belonging to the defendant," etc., *held* sufficient, being directed to one person as agent for all the companies, and that it was not joint as said companies, but several. Flournoy *v.* Rutledge, 73 Ga. 735.

If it is intended to reach property or credits in the hands of a copartnership, the process should issue to the firm, or all the individual members thereof should be summoned. Anderson *v.* Wanzer, 5 How. (Miss.) 587; s. c., 37 Am. Dec. 170; Bean *v.* Barney, 10 Iowa 498.

Service upon one in his individual capacity will not bind property in his hands as executor, and judgment cannot be rendered against him in that capacity, although he appear and answer that his testator was indebted to the defendant, and that the same is payable out of the estate in his hands. Executors of Tillinghast *v.* Johnson, 5 Ala. 514.

5. Houston *v.* Porter, 10 Ired. (N. C.) 174; Walker *v.* Tewksbury, 67 Me. 496.

Where the statute prescribes that notice to the garnishee must require him to appear on the first day of the next term of the court, notice to appear at any other time will not give the court jurisdiction. Padden *v.* Moore, 58 Iowa 703.

The service of the summons will confer no jurisdiction unless it is made returnable upon the return day of the writ of attachment of execution. McDonald *v.* Vinette, 58 Wis. 619; Elder *v.* Hasche, 67 Wis. 653. But see Miller *v.* Whitescarver, 23 W. Va. 10.

the absence of a statute limiting its operation, issue to any county in the State.[1]

Being mere process, neither the writ nor summons are subject to demurrer;[2] but the garnishee may, upon appearance, take advantage of defects therein by a motion to quash,[3] or by plea in abatement.[4] The plaintiff will, in general, however, be permitted to cure any merely formal defects by amendment;[5] and if no rights of third persons have intervened, the garnishment will thereupon become valid as of the date of service.[6] And the answer of the garnishee without objection to the process will be deemed a waiver of all defects therein,[7] unless they are of such a nature as to render the attachment absolutely void.

*a. Service of.*—It is the service of the process upon the garnishee that arrests the debt or property of the defendant in his hands, and gives the court jurisdiction to condemn it to the payment of plaintiff's demand.[8] Its purpose is not to bring the garnishee before the court merely as a witness, but is intended to

1. Toledo, W. & W. Ry. Co. *v.* Reynolds, 72 Ill. 487; Marqueze *v.* LeBlanc, 29 La. An. 194.

But in Maine actions commenced by garnishment are required by statute to be brought in the county where the garnishees, or some of them, reside. Greenwood *v.* Fales, 6 Me. 405; Mansur *v.* Coffin, 54 Me. 314. And if the garnishee be a corporation aggregate, the process must be returnable in the county where such corporation has its established and usual place of business. Scudder *v.* Davis, 33 Me. 575; Cooper *v.* Bailey, 52 Me. 230. And see Pyke *v.* Lytle, 6 Ark. 212.

2. **Defects in Summons—How Cured.**—Curry *v.* Woodward, 50 Ala. 258.

3. Stevens *v.* Dillman, 86 Ill. 233.

In South Carolina it is *held* that a garnishee may except to a void writ of attachment, but cannot take advantage of mere interrogatories. Lindau *v.* Arnold, 4 Strobh. (S. Car.) 290.

4. Mansur *v.* Coffin, 54 Me. 314.

If the garnishee is discharged on a mere technical point, he may be served again. Marsh *v.* Phillips, 77 Ga. 436.

But the joinder of a number of persons in the same writ, whether they hold property or are indebted jointly or severally to the debtor, does not make the writ subject to plea in abatement. Curry *v.* Woodward, 50 Ala. 258.

5. Wellover *v.* Soule, 30 Mich. 481.

Where the firm of "J. Allen & Bro." consisted of Joseph and John Allen, and, upon the affidavit that "John Allen & Bros." were indebted, etc., a summons in garnishment, addressed to "John Allen & Bro." was served upon one member of the firm, and the firm appeared and answered by one of its members, *held* that the misnomer of the garnishees in the affidavit and summons is of no importance, and an amendment in that respect was properly allowed. Bushnell *v.* Allen, 48 Wis. 461.

6. Sullivan *v.* Langley, 128 Mass. 235.

7. Richardson *v.* White, 19 Ark. 241; Wellover *v.* Soule, 30 Mich. 481; Hinkley *v.* St. Anthony Falls W. P. Co., 9 Minn. 61; National Bank *v.* Titsworth, 73 Ill. 591; Stevens *v.* Dillman, 83 Ill. 233; Hearn *v.* Crutcher, 4 Yerg. (Tenn.) 461, 474; Moody *v.* Alter, 12 Heisk. (Tenn.) 142; Flournoy *v.* Rutledge, 73 Ga. 735; Gould *v.* Meyer, 36 Ala. 565; Betancourt *v.* Eberlin, 71 Ala. 461; Baltimore, Ohio & Chi. R. Co. *v.* Taylor, 81 Ind. 24.

8. **Service of Process, Effect of.**—Service of the writ of summons upon the garnishee in the manner prescribed by statute is an attachment of the funds in his possession belonging to the defendant, and is an essential step in the proceedings by which the property is appropriated without the defendant's consent to the payment of his debts. Nelson *v.* Sanborn, 64 N. H. 310; Arnold *v.* Linaweaver, 3 Head (Tenn.) 51; National Bank *v.* Lake Shore & M. S. Co., 21 Ohio St. 221; Elder *v.* Hasche, 67 Wis. 653; Haley *v.* Hannibal & St. J. R. R. Co., 80 Mo. 114.

operate as a levy upon the debt or property in his hands, as a seizure by the officer does upon property in the possession of the defendant.[1] If the jurisdiction of the court to entertain the action depend upon the attachment of property, the service of this process upon one indebted to the defendant is a sufficient levy.[2] The rights and liabilities of the respective parties to the proceeding are fixed as to the date of such service, and the property or credit placed beyond the control of the original debtor and creditor.[3] But until legal service has been made upon the garnishee, the court has no jurisdiction over the property in his hands,[4] and no valid judgment can be rendered against him.[5]

1. Tingley *v.* Bateman, 10 Mass. 343; McDonald *v.* Moore, 65 Iowa 171; Gage *v.* Maschmeyer, 72 Iowa 696; Fletcher *v.* Wear, 81 Mo. 524.

2. But there must be an actual indebtedness or possession of property in respect to which the garnishee is chargeable at the time of the service, or the court will not acquire jurisdiction. Cleaveland *v.* State, 34 Ala. 254; Flournoy *v.* Lyons, 71 Ala. 308; Betancourt *v.* Eberlin, 71 Ala. 461; National Bank *v.* Lake Shore & M. S. Ry. Co., 21 Ohio St. 221; Hoggerty *v.* Ward, 25 Tex. 146; Moore *v.* Wayne Circuit Judge, 55 Mich. 87; Martin *v.* Dryden, 1 Gilman (Ill.) 187; Cooper *v.* Reynolds, 10 Wall. (U. S.) 317; Renneker *v.* Davis, 10 Rich. Eq. (S. Car.) 289.

And there must be at least constructive notice upon the defendant in the main action, and where attempted service by publication upon the defendant was *held* illegal, jurisdiction of the fund was not acquired by service of process upon the garnishee. Dorr's Admr. *v.* Rohe, 82 Va. 359. But service of garnishee summons upon the principal defendant under section 2756 Wis. Stat. is not a prerequisite of jurisdiction of the *res.* Winner *v.* Hoyt, 68 Wis. 278.

From the time of the service of the summons upon the garnishee, he is accountable to the plaintiff in the action for the amount of money, property or credits in his hands or due and owing from him to the defendant. Cleneay *v.* Junction R. R. Co., 26 Ind. 375; First Nat. Bank *v.* Armstrong, 101 Ind. 244. And he cannot for the purpose of escaping such liability dispute the return of service or his knowledge of it. Hite *v.* Fisher, 76 Ind. 231.

3. Hite *v.* Fisher, 76 Ind. 231; Bethel *v.* Judge of Superior Court, 57 Mich. 379; Watkins *v.* Field, 6 Ark. 391; Hagard, Admr. *v.* Franklin, 2 Ala. 349; Haley *v.* Hannibal & St. J. R. R. Co., 80 Mo. 112, 114; Nash *v.* Gale, 2 Minn. 310; Davenport *v.* Swan, 9 Humph. (Tenn.) 186.

Under a statute permitting service of the summons upon the garnishee by leaving a copy thereof at his usual place of residence, *held* that such a service would bind a debt due from the garnishee at the time, notwithstanding he was then absent from home, and his agent, who had knowledge of the time and manner of the service, afterward and before his return, paid over the money in his hands to the defendant in attachment before the garnishee had actual notice of the garnishment. Conley *v.* Chilcote, 25 Ohio St. 320.

Service of garnishment upon one member of a firm that is indebted to the defendant is notice to all the members of said firm, and payment of the debt by a partner in ignorance of the service of such garnishment will not discharge the garnishee from liability. Arnold *v.* Linaweaver, 3 Head (Tenn.) 51.

4. Robinson *v.* Hall, 3 Met. (Mass.) 301; Thayer *v.* Ray, 17 Pick. (Mass.) 166; Desha *v.* Baker, 3 Ark. 509; McDonald *v.* Moore, 65 Iowa 171; Lambreth *v.* Clarke, 10 Heisk. (Tenn.) 32; Phelps *v.* Boughton, 27 La. An. 592.

5. Sun Mut. Ins. Co. *v.* Seeligson, 59 Tex. 3; Steiner *v.* Central R. R. Co., 60 Ga. 552; St. L. I. M. & S. R. Co. *v.* Richter, 48 Ark. 350; Mosher *v.* Banking House etc., 6 Mo. App. 598; Gage *v.* Maschmeyer, 72 Iowa 696; Bruce *v.* Cloutman, 45 N. H. 37.

Before default can be regularly taken against a garnishee there must be positive and sufficient evidence in court of due service, and no substantial defect in that respect can be cured by subsequent knowledge of the facts. Johnson *v.* Delbridge, 35 Mich. 436; Montgomery

It is incumbent upon the plaintiff, therefore, at the very threshold of the proceeding, to show a valid service upon the person thus sought to be charged.[1] While a service which is merely defective may be cured by the appearance and answer of the garnishee,[2] an appearance which is purely voluntary will not confer jurisdiction;[3] nor can the garnishee generally accept service,[4] nor waive any of the material steps which are required to

& E. R. R. Co. *v.* Hartwell, 43 Ala. 508; Elder *v.* Hasche, 67 Wis. 653; Cohn *v.* Tillman, 66 Tex. 98.

Filing a protest against the jurisdiction of the court by the garnishee will not constitute an appearance, or confer jurisdiction upon the court to enter default for want of answer. Padden *v.* Moore, 58 Iowa 703. But see Freeman *v.* Miller, 51 Tex. 443.

**1. Record Must Show Valid Service.**—Desha *v.* Baker, 3 Ark. 509; Rock *v.* Singmaster, 62 Iowa 511; McDonald *v.* Moore, 65 Iowa 171.

2. An entire failure of any link in a chain of facts necessary to confer jurisdiction, cannot be supplied; but a slight defect, when tending to substantial justice, may always be. Hinkley *v.* St. Anthony Falls W. P. Co., 9 Minn. 55, 63; Howard *v.* Crawford, 21 Tex. 399; Hains *v.* Somerset & Kennebec R. R. Co., 47 Me. 298; Reynolds *v.* Collins, 78 Ala. 94; Baltimore, Ohio & Chicago R. R. Co. *v.* Taylor, 81 Ind. 24; Truitt *v.* Griffin, 61 Ill. 26; Railroad *v.* Todd, 11 Heisk. (Tenn.) 549; Miller *v.* O'Bannon, 4 Lea (Tenn.) 398; Pullian *v.* Aler, 15 Gratt. (Va.) 54; Carrington *v.* Eastman, 1 Pin. (Wis.) 650; Bushnell *v.* Allen, 48 Wis. 460; Carter *v.* Koshland, 12 Oreg. 492; Lupton *v.* Moore, 101 Pa. St. 318.

**3. Voluntary Appearance of Garnishee.**—It is essential, in order to bind the defendant whose claim is sought to be appropriated by means of garnishment proceedings, that there be service of process or its equivalent, and he will not be bound by any independent and spontaneous submission of his rights by his debtor. The intervention of the law according to its own substantial appointments can alone initiate compulsory novation. Hebel *v.* Amazon Ins. Co., 33 Mich. 400.

No voluntary appearance or submission of the garnishee will confer jurisdiction or waive the requirements of the statute. In ordinary actions, of course, a party may waive process, make a voluntary appearance and submit to the jurisdiction of the court. But this right, a garnishee as such has not. He cannot voluntarily appear and substitute his creditor's creditor for his own, because that goes to jurisdiction of the subject matter, not to jurisdiction of his person. Elder *v.* Hasche, 67 Wis. 653, 658.

**4. Acceptance of Service.**—Garnishment is a species of compulsory assignment or transfer of property, and the defendant has a right to insist that if his property be taken from him against his will and applied to satisfy his indebtedness to the plaintiff, it shall be done in the mode pointed out in the statute. The garnishee can waive his own, but not the defendant's rights. Nelson *v.* Sanborn, 64 N. H. 310; Clarke *v.* Wilson, 15 N. H. 150; Phelps *v.* Broughton, 27 La. An. 592. See, however, Masqueze *v.* LaBlanc, 29 La. An. 194.

But in a few of the States an acceptance or waiver of service of the writ or summons is *held* sufficient to give jurisdiction. Whitney *v.* Lehmer, 26 Ind. 503; Carter *v.* Coshland, 12 Oreg. 492; Roy *v.* Heard, 38 Miss. 544.

In Cahoon *v.* Morgan, 38 Vermont 236, it is said: "It is true that the trustee process is sometimes called 'attaching a debt' because it creates a lien upon the debt as attachment does upon personal property. But the validity of the two kinds of lien rests on wholly different grounds. Attachment of personal property must be by taking possession of it. But no possession can be taken of a debt. To make the lien valid against the debt, all that is required is notice to the debtor (garnishee) of the suit, a mere summons, and this notice we think may be given as a summons in any other case may be, as well by an acceptance of service of the summons in writing on the back of the process as by actual service by a legal officer."

But an indorsement upon the process of a written acknowledgment of service purporting to be signed by the party is

be taken under the law to get jurisdiction of the defendant's property in his hands.[1]

To be effectual, the service of the process must be upon one within the jurisdiction of the court to which it is returnable,[2] and be made within the life of the writ.[3]

Generally, only an officer authorized by law to levy an attachment can serve summons of garnishment.[4] And it is only when he is in possession of a writ of attachment or execution, or of garnishment, where such writ is distinct from the former, that he is authorized to summon one as garnishee.[5]

Usually, service is made by the officer reading the summons to

not sufficient, without proof of the authenticity of such indorsement and signature to authorize the entry of default for want of appearance. Johnson *v.* Delbridge, 35 Mich. 436.

**1. Service, Materially Defective, Not Waived by Appearance.**—A garnishee cannot waive material defects in the service of summons, and submit himself to the jurisdiction of the court to the prejudice of junior attaching creditors. Southern Bank etc. *v.* McDonald, 46 Mo. 31; Haley *v.* Hannibal & St. J. R. R. Co., 80 Mo. 112, 114; Gates *v.* Tusten, 89 Mo. 13; Pratt *v.* Sanborn, 63 N. H. 115.

If a garnishee, without objecting to the jurisdiction of a justice of the peace, submit to answer out of the county of his residence, the defendant will on motion be entitled to have the garnishee discharged. Gage *v.* Maschmeyer, 72 Iowa 696. But in Phillips *v.* Thurber, 56 Ga. 393, *held* that neither the defendant nor an adverse claimant to the fund can in such case object to the jurisdiction.

A sheriff having five executions in his hands at the same time in favor of as many different creditors, but against the same defendant, served one notice of garnishment upon A, in which he was required to appear and answer such interrogatories as might be filed by the several plaintiffs, naming them, touching his indebtedness to the defendant. *Held*, that the object of giving the notice was to have the garnishee before the court and obtain from him a disclosure of his entire indebtedness to the defendant, and it was not material to him whether the amount owing by him to the defendant was claimed by one or more plaintiffs upon one or more executions, as it would in neither event increase his liability. Quarles *v.* Porter, 12 Mo. 76.

**2.** Gage *v.* Maschmeyer, 72 Iowa 696; Rindge *v.* Greene, 52 Vt. 204.

**3.** Southern Bank *v.* McDonald, 46 Mo. 31.

**4. Who May Serve Summons.**—Service of the summons cannot be made by a justice of the peace. Massengale *v.* McGinty, 73 Ga. 120.

The writ must be served by the officer to whom it is directed, and not by an officer to whom it might be directed. Menderson *v.* Speeker, 79 Ky. 509.

In Johnson *v.* Delbridge, 35 Mich. 436, it is said that whether the law requires that the summons be served by an officer commissioned to serve process or not, it is better and safer to entrust service to such persons than to others.

Where the person to be summoned as garnishee is a deputy sheriff, and the law requires that service in such case be made by the coroner, a service of the writ by a deputy sheriff will be invalid. Thayer *v.* Ray, 17 Pick. (Mass.) 166.

Where the officer who received the writ sent it to the sheriff of another county for service upon one as garnishee, *held* that only the officer to whom the writ was committed was authorized to serve the same, and therefore no valid service was made upon the garnishee. Carroll Co. Bk. *v.* Goodall, 41 N. H. 81.

**5.** Van Fossen *v.* Anderson, 8 Iowa 251; Woodward *v.* Adams, 9 Iowa 474.

Under some statutes the officer is authorized to summon one as garnishee only in case of his inability to find sufficient property of the defendant which is subject to seizure. Desha *v.* Baker, 3 Ark. 509; Truitt *v.* Griffin, 61 Ill. 26.

In New Hampshire, the officer's authority to summon a particular person as garnishee under a writ of foreign attachment is dependent upon a direction to that effect in the writ, and a separate

and in the hearing of the garnishee, and by delivering to him a copy thereof duly attested by the officer, or by leaving such copy at his last or usual place of residence.[1] But under some statutes the officer is required to declare publicly in the presence of one or more citizens of the county that he has attached all the property and credits of the defendant in the hands of the garnishee, or if not all, to indicate what particular portion thereof is attached; and if this be not done, the attachment is invalid.[2] And in a few States the officer must make an actual seizure of the defendant's property in the garnishee's hands if it be capable of seizure.[3]

Another requirement is that the garnishee shall be personally served.[4] Where it is intended to charge several persons as

paper containing a list of names delivered to the officer with the writ will confer no authority to summon such persons as garnishees. Such action, it is *held*, would be an attempted attachment, and service without a writ, and therefore unauthorized and void. Pratt *v.* Sanborn, 63 N. H. 115.

In Missouri, under a writ of attachment, the officer is bound to summon garnishees when known to him, but not under an execution unless directed by the plaintiff or his attorney. Pritchard *v.* Toole, 53 Mo. 356.

**1. Service, How Made.**—Hite *v.* Fisher, 76 Ind. 231; Conley *v.* Chilcote, 25 Ohio St. 320; Kneeland *v.* Cowles, 3 Pin. (Wis.) 316; Cushing *v.* Laird, 4 Benedict 70.

In Georgia, the original, and not a copy, of the summons of garnishment must be delivered to the garnishee. West *v.* Harvey, 8 S. E. Rep. 449.

Under a statute providing that written notice be served upon the garnishee, requiring him to appear and answer, leaving a copy of the writ of attachment with the garnishee is equivalent to no service at all. Railroad *v.* Todd, 11 Heisk. (Tenn.) 549, 556.

Service upon a railroad corporation by leaving a copy of the summons at the last and usual place of abode of the "treasurer" or other proper officer is sufficient. Harris *v.* Somerset & K. R. Co., 47 Me. 298.

Under the Kentucky statute the garnishee must be served with a copy of the order of attachment, together with a notice specifying the debt or demand sought to be garnished. Menderson *v.* Specker, 79 Ky. 509.

Under a statute of Connecticut requiring that "a true and attached copy" of the writ with the officer's return thereon be left with the defendant in the suit, *held* that where the officer's name to such copy was signed by his clerk, no attachment of the property was effected, nor was it rendered valid by the defendant appearing and pleading to the merits. McGuire *v.* Church, 49 Conn. 248.

**2.** Desha *v.* Baker, 3 Ark. 509; Hathaway *v.* Jones, 20 Ark. 109, 112.

**3.** Norwell *v.* Porter, 62 Mo. 309; Kean *v.* Bartholow, 4 Mo. App. 507; Morgan *v.* Watmough, 5 Whart. (Pa.) 125; Pennsylvania R. Co. *v.* Pennock, 51 Pa. St. 244.

But a sheriff attaching property in the hands of a garnishee would not be justified in taking it out of his possession, where the garnishee claims it in his own right or in the right of another. Berry *v.* The State, Dudley 215.

**4. Service Must be Personal.**—*Ex parte* Alston, 2 Brev. (S. Car.) 87.

The act of the legislature making a copy of a writ left at the residence of the defendant equivalent to personal service does not include writs of attachment. Richardson *v.* Whitfield, 1 McCord (S. Car.) 403.

In Louisiana it is *held* that service may be made upon the bookkeeper of the garnishee, but personal service must be made of the interrogatories. Schindler *v.* Smith, 18 La. An. 476.

Under a statute providing that summons of garnishment shall be served by leaving a copy thereof "with such third person," *held* that the summons must be served upon the garnishee personally, and that service upon his attorney is insufficient. But such defect will be cured by the appearance of the garnishee. Carter *v.* Koshland, 12 Oregon 492.

Certain goods were taken possession

garnishees as being jointly indebted to the defendant, all should be served with process if inhabitants of the State.[1] But service upon one member of a copartnership is sufficient to bind the firm.[2]

The statutes generally provide as to the manner in which service may be made upon corporations;[3] but in the absence of

of by a non-resident firm under a chattel mortgage, and while in the possession of an agent, notice of garnishment was served upon him by name. *Held*, that the notice was sufficient and that the attachment created a trust in the property in his possession, and that notice to the agent was notice to the principal. Mathews *v.* Smith, 13 Neb. 178.

Where a return stated that the process was served upon the "United Express Co." as garnishee, "by reading and delivering a copy to H. C. & A. C. F., agents of the company, and on D. B. C.," their clerk, *held* that the name of the garnishee imported a corporation and that service was sufficient. United States Ex. Co. *v.* Bedbury, 24 Ill. 459.

1. Jewett *v.* Bacon, 6 Mass. 60; Warner *v.* Perkins, 8 Cush. (Mass.) 518; Rix *v.* Elliott, 1 N. H. 538; Atkins *v.* Prescott, 10 N. H. 120; Hutchinson *v.* Eddy, 16 Shepley 485; Wetherwax *v.* Paine, 2 Mich. 555; Heith *v.* Pfeifle, 42 Mich. 31.

2. Speak *v.* Kinsey, 17 Tex. 301; Hinkley *v.* St. Anthony Falls W. P. Co., 9 Minn. 55; State, etc., *v.* Linaweaver, 3 Head (Tenn.) 51.

A slight misnomer of the partnership in the affidavit and summons may be corrected by amendment. Bushnell *v.* Allen, 48 Wis. 461.

A partnership may be served by leaving a copy of the order of attachment and notice to appear and answer at its usual place of doing business within the county. Whitman *v.* Keith, 18 Ohio St. 134.

But one member of a non-resident partnership cannot acknowledge service within the State so as to bind the partnership. Clark *v.* Wilson, 15 N. H. 150.

3. **Service on Corporations.**— An agent of a foreign insurance company located and doing business for the company within the State is a "managing officer" of such corporation upon whom summons of garnishment may be served. McAlister *v.* Pennsylvania Ins. Co., 28 Mo. 214; Mosher *v.* Banking House, etc., 6 Mo. App. 598.

A return of a summons to a railroad company describing the person served as the "nearest agent" of said company, does not show a valid service under a statute providing that service on such corporations shall be made by delivering the summons or a copy thereof to the nearest "station or freight agent" of such company. Haley *v.* Hannibal & St. J. R. Co., 80 Mo. 112.

But where the return is defective in this respect it may be amended if in fact a valid service was made. Mangold *v.* Dooley, 89 Mo. 111.

Under a statute permitting the summons to a corporation to be served on "the president, cashier, secretary, treasurer, general or special agent, superintendent or other principal officer," a justice of the peace will not acquire jurisdiction over a railway company on a return of service upon a specified person described merely as "agent of the within named defendant" and the appearance of some person of a different name describing himself as "ticket agent of said road." Lake Shore & M. S. Ry. Co., 39 Mich. 469. The "general or special agent" within the meaning of such statute, is an agent having a general or special controlling authority, either generally or in respect to some particular department of corporate business. Lorman *v.* Phoenix Ins. Co., 33 Mich. 65.

Under the Texas statute service upon a corporation as garnishee must be made either upon its president, treasurer, principal officer or agent, or upon the agent or person representing such corporation in the county within which the cause of action arose, and service upon its trustees is insufficient. Lodge *v.* Wheeler, 59 Tex. 554.

Foreign corporations may be summoned by service of process upon local officers or agents. Holland *v.* Railroad Co., 16 Lea (Tenn.) 414, 418.

Where it is sought to charge a foreign corporation as garnishee by service upon a local agent of the company, the agent must be one who is capable in law of receiving such service as the law authorizes and recognizes, and it must

such a provision service may be made in the manner prescribed for the service of original notice in ordinary actions against corporations.[1]

In garnishment, as when the levy is effected by a seizure of property, the rights of creditors take precedence in the order of service of their writs.[2]

*b. The Return.*[3]—The return of the officer upon the writ is the proper evidence of his acts under it.[4] It should, therefore, sufficiently recite all his doings thereunder, and should show upon

be made in conformity with the statute. Heble *v.* Amazon Ins. Co., 33 Mich. 400; Moore *v.* Wayne, Circuit Judge, 55 Mich. 84.

1. Hinkley *v.* St. Anthony Falls W. P. Co., 9 Minn. 55, 62; Baltimore & Ohio R. Co., 12 Gratt. (Va.) 655; Boyd *v.* Chesapeake & O. Canal Co., 17 Md. 195.

Service of a notice of garnishment directed to the mayor and recorder of a city in name will not give the court jurisdiction of the city. Claflin *v.* Iowa City, 12 Iowa 284.

Under a statute providing that process against corporations must be served on the "president, or other head of the same, or the secretary, cashier, or other managing agent thereof," a summons of garnishment to a banking corporation served upon the teller is not sufficient. Kennedy *v.* Hibernia S. & L. Society, 38 Cal. 151.

Under a statute providing that when any corporation is engaged in the transaction of business in any other town than that in which its secretary resides, process of garnishment can be served upon it by leaving a copy with any agent or clerk employed by the corporation to keep its accounts or pay its employes in the town wherein it transacts its business, *held* that a corporation whose principal office was in the city of H. but carried on manufacturing in W., where its accounts were kept and its employes paid, and where also its secretary resided, but went early every day to H. and spent the entire day in the office of the company there, that the secretary was not to be regarded as residing in W., and that service made upon the clerk in W., who kept the accounts and paid the employes there, was good. Adams *v.* Willimantic Co., 46 Conn. 320.

Under a statute of Georgia authorizing service of process in the commencement of ordinary actions against corporations to be made upon "any agent" thereof, *held* that service of summons of garnishment, which is required to be "personally served," must be made upon the president of the company, if he resides within the State, and cannot be made upon a subordinate officer or agent, although the president be temporarily absent. Clark *v.* Chapman, 45 Ga. 486; Steiner *v.* Central R. Co., 60 Ga. 552; Bingham *v.* Port Royal & A. Ry. Co., 74 Ga. 365.

Service upon the ticket agent of a railroad company in a county other than that in which the company has its chief office for business is not notice to the company, it not appearing that the matter in any way grew out of the business of the agency, nor any reason assigned for failing to serve it on the president, secretary, treasurer or a director. Lambreth *v.* Clarke, 10 Heisk. (Tenn.) 32.

2. **Priority of Lien.**—Wallace *v.* Forrest, 2 Har. & McH. (Md.) 261; Pritchard *v.* Toole, 53 Mo. 356; English *v.* King, 10 Heisk. (Tenn.) 666; Crowninshield *v.* Strobel, 2 Brev. (S. Car.) 80; Robertson *v.* Forest, 2 Brev. (S. Car.) 466.

But the mere failure of the officer to serve a writ first received will not give a subsequent garnishing creditor, whose writ is first served, priority. Callahan *v.* Hallowell, 2 Bay (S. Car.) 8.

3. Upon officer's return generally, see Am. & Eng. Encycl. of L., vol. 1, tit. ATTACHMENT; vol. 7, tit. EXECUTION.

4. **Officer's Return on Writ.**—McDonald *v.* Moore, 65 Iowa 171; Batchelor *v.* Richardson, 21 Pac. Rep. (Oreg.) 392; Castner *v.* Styer, 3 Zab. (N. J.) 236.

A summons of garnishment with a return of service endorsed thereon cannot furnish evidence of a levy of a writ of attachment. The return must be endorsed upon the *writ*, or upon a paper annexed thereto. Rock *v.* Singmaster, 62 Iowa 511.

whom the writ has been served,[1] the manner in which service was made, and the date and the hour thereof.[2] No presumption will be indulged as to facts upon which the jurisdiction of the court depends, that the officer has performed his duty according to law;[3] nor is parol evidence admissible to contradict the facts stated in the return.[4]

**1. Facts, Return Must Show.**—A return of "executed" on a writ of garnishment is no evidence of service upon which the court can act. Roy *v.* Heard, 38 Miss. 544.

In Pennsylvania, it is *held* that the officer should state in his return that the party summoned as garnishee holds under the defendant. Hayes *v.* Gillespie, 35 Pa. St. 155; Bryan *v.* Trout, 90 Pa. St. 492.

In Maryland, a return "laid in the hands of" the garnishee "in the presence of two witnesses" is sufficient, McCoy *v.* Boyle, 10 Md. 392.

It is not necessary that the return should state that sheriff was directed by plaintiff to summon such garnishees. Lindell *v.* Benton, 6 Mo. 361.

But the garnishment may be quashed on motion unless the return shows that the officer attached the property on evidence of debt "in his hands." Norvell *v.* Porter, 62 Mo. 309; Fenglein *v.* C. & St. L. R. Co., 6 Mo. App. 580; Connor *v.* Pope, 18 Mo. App. 86.

The return of service upon a railway company must, under the Missouri Statutes, show service upon "the nearest station or freight agent," and a return describing him as the "nearest agent" is insufficient. Haley *v.* H. & St. J. R. Co., 80 Mo. 112. See also Masterson *v.* Mo. Pac. R. Co., 20 Mo. App. 653.

**2.** Lambert *v.* Challis, 35 Pa. St. 156; Sun Mut. Ins. Co. *v.* Seeligson, 59 Tex. 3; Mosher *v.* Banking House, 6 Mo. App. 598.

In Arkansas, the officer must make a public declaration in the presence of one or more citizens of the county as to what property is attached in the garnishee's hands, and must return with the writ a schedule of the property thus attached, and the names of the persons in whose presence the writ was executed. Desha *v.* Baker, 3 Ark. 509. But see Reed *v.* Kirkwood, 19 Ark. 332, 338.

In Oregon, where an officer under a writ of execution summons one as garnishee on account of an indebtedness due from him to the defendant, his return must recite that the writ was served by levying upon a "debt" due the defendant. Batchelor *v.* Richardson, 21 Pac. Rep. 392.

An officer's return that he left at "the dwelling house" of the garnishee a true and attested copy of the writ is a sufficient return under a statute providing that the same shall be left at "the last and usual place of abode" of the garnishee. Bruce *v.* Cloutman, 45 N. H. 37.

Service of writ *held* not defective when return showed it was left with garnishee on two different days. Anderson *v.* Graff, 41 Md. 601.

**3.** Semmes *v.* Patterson, 65 Miss. 6, 9.

The ordinary platitude that an officer is presumed to do his duty, does not possess sufficient potency to cure palpable defects in his return. Gates *v.* Tusten, 89 Mo. 13.

But in Alabama, under a statute directing that when an attachment shall be served in the hands of a supposed debtor of the defendant, the garnishee shall be summoned "in writing," *held*, that it is not necessary that a copy of the written summons should be returned with the attachment; but a return by an officer that he had summoned a third person as garnishee will warrant the inference that the duty was performed according to law. Lowry *v.* Clements, 9 Ala. 422; Burt *v.* Parish, 9 Ala. 211.

And where the return shows that service of the writ has in fact been made, it will be presumed that the officer has obeyed the directions of the law as to mere details or incidents connected with the levy. Rowan *v.* Lamb, 4 G. Gr. (Iowa) 468.

**4.** But where there are two writings in the form of a return, inconsistent with each other, each signed by the officer, but one of which is crossed out by an ink line drawn through it, testimony as to which writing was upon the writ when returned is admissible. Brecht *v.* Corby, 7 Mo. App. 300.

For the purpose of affecting or questioning the fact and validity of the ser-

The return cannot be questioned collaterally,[1] nor altered on the motion of the officer after the writ has passed out of his hands into those of the court.[2] But with leave of court it can generally be amended.[3] If the return fails to show a proper execution of the writ by service upon the garnishee according to law, no valid attachment can be based thereon.[4]

**4. Notice to Defendant.**—The law nowhere permits the institution of suit against a debtor without some kind of notice. If his location is unknown or his residence beyond the limits of the State, and the presence of property belonging to him is made

vice, and the jurisdiction of the court over the person of the party in the case wherein the summons was issued, the truth of the return may not be denied. It is conclusive between the parties as respects the fact of the service and the jurisdiction based thereon. But it does not estop the party purporting to have been served from showing, for the purposes of setting aside a default, and being admitted to plead, that he was ignorant of the service, and of the fact that the action was pending. Hite *v.* Fisher, 76 Ind. 231.

1. Castner *v.* Styer, 3 Zab. (N. J.) 236; Brecht *v.* Corby, 7 Mo. App. 300. In Mayer *v.* Chatahoochee Nat. Bank, 46 Ga. 606, *held*, that where the summons had been lost and the sheriff was deceased, the plaintiff should be permitted to prove by testimony *aliunde* that the summons of garnishment was directed to the person served as president of a bank; and if the garnishee denied it, he could tender an issue, which, if found in favor of the plaintiff, would entitle him to an order amending the return so as to make the proceedings conform to the facts.

2. That only is the return of an officer to which he signs his name when he returns the writ. Brecht *v.* Corby, 7 Mo. App. 300.

3. Boyd *v.* Chesapeake & O. Canal Co., 17 Md. 195; Main *v.* Lynch, 54 Md. 658; O'Connell *v.* Ackerman, 62 Md. 337; Mangold *v.* Dooley, 89 Mo. 111.

Amendments should be permitted only upon affidavit, and not then where the officer depends upon his memory alone after the elapse of months. Brecht *v.* Corby, 7 Mo. App. 300.

A justice of the peace may permit an officer to amend his return when it was in fact made. Kidd *v.* Dougherty, 59 Mich. 240.

Where the return was dated before the return day, and the return was amended by leave of court, *held*, sufficient. Ware *v.* B. & B. R. Co., 69 Me. 97.

Where copartners are garnished by their firm name, and the return shows service by reading it and delivering a copy to one of them, but does not show which one, and is endorsed upon the garnishee summons, instead of the summons in the principal action, these defects may be cured by amendment. Bushnell *v.* Allen, 48 Wis. 461.

A return which states that the officer served a person named "personally" with a summons of garnishment, may be so amended as to show that he served such person as the president of a bank. Mayer *v.* Chatahoochee Nat. Bank, 46 Ga. 606.

If the service upon the garnishee was in fact insufficient, the officer will not be permitted to make a return by way of amendment that will show sufficient service. Carroll Co. Bank *v.* Goodall, 41 N. H. 81.

4. Sun Mut. Ins. Co. *v.* Seeligson, 59 Tex. 3; Steiners. *v.* Central R. Co., 60 Ga. 552; Roy *v.* Heard, 38 Miss. 544; Semmes *v.* Patterson, 65 Miss. 6; Haley *v.* Hannibal & St. J. R. Co., 80 Mo. 114; Masterson *v.* Missouri Pacific R. Co., 20 Mo. App. 653.

A return of a writ against a railroad company, as garnishee, that the same was "served on the M. & E. R. Company, the garnishee, by leaving a copy of the garnishment with O, president of said road," is insufficient to authorize a judgment by default, without proof, that "O" is in fact the president of such railroad company. Montgomery & E. R. Co. *v.* Hartwell, 43 Ala. 508.

Where the return of the sheriff failed to show that he was unable to find property subject to levy to satisfy a writ of attachment, but that the same was regularly served upon a number of persons as garnishees, *held*, that while

the basis of jurisdiction for the commencement of suit, the defendant must at least be given constructive notice of the proceeding before the jurisdiction of the court will be complete.[1]

But notice of the garnishment proceedings, either on attachment or execution, is not generally necessary unless required by statute.[2] But where notice to the defendant in suit is made one of the conditions upon which the plaintiff may have judgment against the garnishee, proof of the service of such notice is indispensable to the jurisdiction of the court, and, consequently, the validity of its judgment.[3] If the statute provides that the notice to the defendant shall issue with the writ, a failure to have the writ and notice issued and served contemporaneously will render the garnishment invalid.[4] But where it is simply required that the defendant shall be given notice of the garnishment proceeding before judgment rendered therein, such notice goes simply to the jurisdiction of the court to render judgment of condemnation, and not to the validity of the attachment of the debt in the hands of the garnishee,[5] and may issue and be served either contemporaneously with, or at any time subsequent to, the service of the garnishment, provided the required time intervene before

it would have been more regular to have returned *nulla bona*, and although the garnishee might have quashed the return, if not amended, the court, nevertheless, acquired jurisdiction, and the inequality was waived by answering interrogatories. Truitt *v.* Griffin, 61 Ill. 26.

If the return of an attachment upon garnishees be irregular, and the garnishee appear and answer without objecting thereto he cannot raise the objection in the appellate court. Pullian *v.* Aler, 15 Gratt. (Va.) 55.

**1. Notice to Defendant.** — Dorr's Admr. *v.* Rohe, 82 Va. 359.

**2.** Phillips *v.* Germon, 43 Iowa 101.

**3.** Where the proceedings preliminary to the issue and service of the writ are particularly described by statute, the course of procedure so prescribed must appear to have been at least substantially complied with or the court will not have jurisdiction. Stone *v.* Magruder, 10 Gill & J. (Md.) 383; s. c., 32 Am. Dec. 177; Hamilton *v.* Plumer (Mich.), 84 N. W. Rep. 278. But see Winner *v.* Hoyt, 68 Wis. 278.

If the defendant be a non-resident of the State, such notice may be served by publication after the manner of service of original notice in such cases. Broome *v.* Galena, D. D. & M. Packet Co., 9 Minn. 239.

**4.** Stone *v.* Magruder, 10 Gill & J. (Md.) 383; s. c., 32 Am. Dec. 177; McGuire *v.* Church, 49 Conn. 248, Corbyn *v.* Bollman, 4 Watts & Serg. (Pa.) 342.

**5.** Original notice of suit served upon the defendant will not satisfy the requirement of the statute as to such notice, and a judgment rendered without actual notice of the proceeding to the defendant will be valid for failure of jurisdiction. Wise *v.* Rothschild, 67 Iowa 84.

Where issue has been taken on the answer of the garnishee and trial had thereon without objection thereto for want of notice to the defendant, the result of the proceedings is a mistrial, owing to a defect of parties necessary to give the court jurisdiction of the subject matter, and an order setting aside the submission and continuing the cause for further action is proper. Williams *v.* Williams, 61 Iowa 612.

Where the statute required that the garnishee summons must be served on the defendant, "*either before or within ten days after service on the garnishee*," or "the service on the garnishee shall become void and of no effect from the beginning," *held* that a failure to make service on one of several defendants, joint owners of the debt attached in the hands of the garnishee, who knew of the pendency of the proceedings against the garnishee, did not render the garnishment invalid, and that plaintiff was entitled to judgment against the gar-

trial of an issue, or the rendition of judgment, if no issue be joined.[1]

If the defendant voluntarily appear to the proceeding, either in person or by attorney, he cannot afterwards complain that notice was not served upon him.[2] And where the proceedings have been properly commenced, and jurisdiction obtained by the attachment of property, mere defects in the service of the second notice upon the defendant will not render the judgment void, although the defect may be sufficient cause for the reversal of the judgment on error.[3]

**VII. Who May be Charged as Garnishee—1. General Rule.**—The broad language of the statutes in most of the States is that "any person" who may be indebted to, or have in his possession or under his control, property, money or effects of a debtor, is subject to garnishment.[4] This is sufficiently comprehensive to charge as garnishees all persons in any manner indebted to the defendant or having any of his property, effects or estate in their possession, custody or power.[5]

The person sought to be charged must generally, however, be one against whom the defendant has a right of action,[6] and whom he might himself sue in the same forum. Although the rule is that one person cannot be both plaintiff and defendant in an adversary proceeding, yet the authorities seem to be about evenly divided upon the question whether a plaintiff in an action may have himself summoned as garnishee.[7] But one of several de-

nishee. Winner *v.* Hoyt, 68 Wis. 278.

1. Phillips *v.* Germon, 43 Iowa 101; King *v.* Holmes, 27 N. H. 266.

2. Hinkley *v.* St. Anthony Falls W. P. Co., 9 Minn. 55; Everdell *v.* Sheboygan & F. DuL. R. Co., 41 Wis. 395.

3. Bruce *v.* Cloutman, 45 N. H. 37.

4. **Who May be Charged.**—Michigan Cent. R. Co. *v.* Chicago, Mich. & L. S. R. Co., 1 Ill. App. 399.

5. Under a statute providing that "any person having property of the defendant of any description in his possession or under his control, which the sheriff cannot attach by seizure, or that is indebted to the defendant, or has the control or agency of any property or its credits or effects of the defendant may be summoned as garnishee," *held* that any person indebted in any manner to the defendant may be summoned as garnishee. Halbert *v.* Stinson, 6 Blackf. (Ind.) 398; Clenay *v.* The Junction R. Co., 26 Ind. 375; Simonds *v.* Harris, 92 Ind. 505.

6. Bartle *v.* Bauman, 12 Ill. App. 450.

In Vermont it has been *held* that a minor may be charged as garnishee for any indebtedness to the defendant for *necessaries* or for any specific goods or chattels of the defendant in his hands. Wilder *v.* Eldridge, 17 Vt. 226.

7. **Plaintiff as Garnishee.**—Graighle *v.* Notnagle, Peters (U. S. C. C.) 245; Boyd *v.* Baylies, 4 Humph. (Tenn.) 386; Grayson *v.* Veeche, 12 Martin (La.) 342; Lyman *v.* Wood, 42 Vt. 113; Coble *v.* Nonemaker, 78 Pa. St. 501; Norton *v.* Norton, 43 Ohio St. 509.

But on the other hand it is *held* by very respectable authority, that inasmuch as the garnishee must in many cases be regarded as representing the defendant in the proceeding, it is repugnant to the first principles of jurisprudence to permit him to have himself charged as garnishee. Knight *v.* Clyde, 12 R. I. 119; Belknap *v.* Gibbon, 13 Met. (Mass.) 471. And see Wooldridge *v.* Holmes, 78 Ala. 568; Beech *v.* Fairbanks, 52 Conn. 167.

And *held* that in an action by one in his individual capacity, he cannot summon himself as garnishee in the capacity of administrator. Hoag *v.* Hoag, 55 N. H. 172.

Nor can a copartnership summon one

fendants liable *in solido* to the plaintiff cannot be so charged.[1] In a suit by a married woman against her debtor, her husband may be summoned under this process.[2]

But, as we shall see, upon principles generally recognized by the courts of the country, there are numerous classes of persons whom it is held are not within the operation of such statutes. From consideration of public policy it is assumed that the legislature intended a much more restricted application of these provisions than the language employed would seem to import, and the courts have construed them accordingly.[3]

**2. Non-Residents.**—Whether a person is liable to garnishment in a State other than that of his residence is a question of jurisdiction. The process of the courts of a State is limited in its operation by State lines. A court cannot, by service upon a person domiciled in a foreign State, acquire the authority to pass upon his personal rights and relations; nor can it, by sending its process thither, make its judgments effective against property situated in a foreign jurisdiction.[4] A court may, however, in ordinary suits, have effectual service of process upon a non-resident if he voluntarily comes within its jurisdiction; or it may, without actual service, subject his property within its jurisdiction to the demands of his creditors bringing suits before it.[5]

But in proceedings against one as garnishee, it is necessary that both the person sought to be so charged and the property in his hands, which is the subject of the attachment, be brought within the jurisdiction of the court.[6] If a non-resident be legally served, and he answer that he has property in another State belonging to the defendant, the court cannot require him to go out of the State and bring such property within its jurisdiction.[7] And choses in action, upon which the garnishee is liable to the defendant, are not to be considered as following the former wherever he may be transiently found, to be there taken, at the will of a third person, within a jurisdiction where neither such debtor nor his creditor resides.[8]

of its members as garnishee. Blaisdell *v.* Ladd, 14 N. H. 129.

1. Bailey *v.* Lacey, 27 La. An. 39; Richardson *v.* Lacey, 27 La. An. 62.

2. Funks *v.* Groves, 57 M. E. 586; Thompson *v.* Silvers, 59 Iowa 670.

But where the common law disabilities of the wife have not been removed by statute, she cannot be charged as garnishee until authorized by her husband to appear and defend in the proceedings. Delacroix *v.* Hart, 24 La. An. 141.

3. Michigan Cent. R. Co. *v.* Chicago, Mich. & L. S. R. Co., 1 Ill. App. 399; Dobbins *v.* Orange etc. R. Co., 37 Ga. 240.

4. Pennoyer *v.* Neff, 95 U. S. 714.

5. Pennoyer *v.* Neff, 95 U. S. 714.

6. **Non-Residents, When Chargeable.**—Tingley *v.* Bateman, 10 Mass. 346; Young *v.* Ross, 11 Fost. (N. H.) 201; Lawrence *v.* Smith, 45 N. H. 539; Gibson *v.* Bryan, 3 Ill. App. 298, 301.

Therefore, *held*, that a debt due by a foreign corporation to one of its employes at the place of its domicile, not being within the jurisdiction of the courts of Alabama, cannot be reached and subjected by a creditor of that State by an attachment against the non-resident served by garnishment of the corporation. Louisville & N. R. Co. *v.* Dooly, 78 Ala. 524.

7. Buchanan *v.* Hunt, 98 N. Y. 560.

8. Sawyer *v.* Thompson, 4 Fost.

As a general rule, therefore, the courts of a State cannot, by the service of their process upon an inhabitant of another State transiently within their jurisdiction, charge such person as garnishee.[1] But if, when so served, the garnishee have in his possession within the State money or property of the defendant,[2] or has contracted to pay money or deliver property within such jurisdiction, he may be charged[3] And if a court has jurisdiction of the suit between the principal parties, it may condemn property or choses in action in the hands of a non-resident garnishee, upon the ground that the *situs* of such property is supposed to follow the person of the owner.[4] Whether the garnishee is in fact a non-resident may be determined upon issue joined, where the objection is raised by the answer of the garnishee, or on motion for discharge.[5]

**3. Private Corporations**—*a. General Rule.*—Under the rule that the term "person" in a statute embraces not only natural but artificial persons, private corporations are held to be within the general provisions of garnishment statutes.[6] But a corporation

(N. H.) 510, 515; Tingley *v.* Bateman, 10 Mass. 346; Ray *v.* Underwood, 3 Pick. (Mass.) 302; Green *v.* Farmer's etc. Bank, 25 Conn. 452; Smith *v.* Eaton, 36 Me. 298; Morgan *v.* Neville, 74 Pa. St. 52; Wright *v.* Chicago etc. R. Co., 19 Neb. 175, 182.

Choses in action follow the person of the creditor, and their disposition is regulated by the law of his domicile. Keyser *v.* Rice. 47 Md. 211.

1. Nye *v.* Liscombe, 21 Pick. (Mass.) 342; Baxter *v.* Vincent, 6 Vt. 614; Cronin *v.* Foster, 13 R. I. 196; Wright *v.* Chicago etc. R. Co., 19 Neb. 175, 180.

The fact that the property sought to be reached was received by the garnishee under an assignment for the benefit of creditors, executed by an insolvent debtor within the State, will not give the court jurisdiction. Hart *v.* Anthony, 15 Pick. (Mass.) 345; Allen *v.* Wright, 134 Mass. 347.

But it has been *held* that service upon a non-resident within the jurisdiction will give the court jurisdiction to render a personal judgment against the garnishee for want of appearance and answer. Lawrence *v.* Smith, 45 N. H. 539.

The description of the garnishee in the writ as being an inhabitant of the State at the date thereof, does not preclude him from showing the fact in this respect upon appearance. Sawyer *v.* Thompson, 4 Fost. (N. H.) 510, 515.

Where by statute it was provided that persons not inhabitants of the State may be summoned as garnishees, *held* that the purpose of such statute was to provide a remedy in cases when a non-resident was indebted to or had property belonging to a defendant resident, or found within the State, and would not give the court jurisdiction of a non-resident served as garnishee, where jurisdiction was not had of the principal defendant. Lovejoy *v.* Albee, 33 Me. 414; s. c., 54 Am. Dec. 630.

2. Young *v.* Ross, 11 Fost. (N. H.) 201; Molyneaux *v.* Seymour, 30 Ga. 440; Cassity *v.* Cota, 54 Me. 380.

3. Jones *v.* Winchester, 6 N. H. 497.

4. Commercial Bank *v.* Chicago etc. Ry. Co., 45 Wis. 172, 179. But see Miller *v.* Hooe, 2 Cranch U. S. C. C. 622; Wheat *v.* Platte City etc. R. R. Co., 4 Kan. 370.

But under a statute permitting only inhabitants of or persons residing within the State to be summoned as garnishees, a court can under no circumstances take jurisdiction of a non-resident under such process. Baxter *v.* Vincent, 6 Vt. 614; Rindge *v.* Green, 52 Vt. 204.

And an objection to the jurisdiction of the court in such case is not one of personal privilege to the garnishee, but may be made by any one having an interest in the matter in controversy, or the court may dismiss the proceeding on its own motion. Rindge *v.* Green, 52 Vt. 204.

5. Rindge *v.* Green, 52 Vt. 204.

6. **Private Corporations.**—Planters & Merchants' Bank *v.* Andrews, 8 Port.

does not become a person until after the grant of its charter, and if summons be previously served upon one as its president, it will be void.[1]

*b. Foreign Corporations.*[2]—The question of the liability of foreign corporations to garnishment differs little from that of natural persons domiciled in another jurisdiction, in so far as the course of business of certain classes of corporations has occasioned the enactment of special statutes in most of the States, giving courts jurisdiction of such bodies when engaged in the prosecution of their business in States other than that of their residence.[3]

Except, therefore, in those States where it is held that corporations are in no event subject to garnishment, a foreign corporation may be charged as garnishee in all cases where an original action might be maintained against it for the recovery of the property or credit in respect to which the garnishment is served. In some of the States this rule obtains, through the construction of statutes, *pari materia*,[4] and in others by express provi-

(Ala.) 8; Knox *v.* Protection Ins. Co., 9 Conn. 430; s. c., 25 Am. Dec. 33; Mineral Point Railroad Co. *v.* Keep, 22 Ill. 9, 18; Taylor *v.* Burlington & Mo. R. R. Co., 5 Iowa 114; Burton *v.* District Township, 11 Iowa 166; St. Louis Perpetual Ins. Co. *v.* Cohen, 9 Mo. 416; Boyd *v.* Chesapeake Canal Co., 17 Md. 195; Hughes *v.* Oregonian Ry. Co., 11 Or. 158; Baltimore & Ohio R. R. Co. *v.* Gallahue's Admrs. 12 Gratt. (Va.) 655; s. c., 65 Am. Dec. 254; Chesapeake & O. R. R. Co. *v.* Paine, 29 Gratt. (Va.) 502.

But in Holland *v.* Crawford, 2 Har. (Del.) 306, it was *held* that a corporation could not be summoned as garnishee because there was no means provided by law whereby the court could compel it to answer.

In Michigan Central R. R. Co. *v.* Chicago & Michigan Lake Shore R. R. Co., 1 Ill. App. 399, *held* that the same considerations which exempt public officers and agents in the discharge of their official duties from the operation of the statute, are applicable to common carriers, wherever subjection to the process will manifestly and necessarily interfere with the proper discharge of their official duties.

A foreign insurance company having an agent residing in Georgia, who audits and approves claims against the company arising in South Carolina and Florida, gives checks for the amounts due on account thereof, and when in funds sometimes pays them is not engaged in the transaction of business in Georgia in such sense as to subject it to suit in that State, and therefore is not liable there to garnishment. Schmidlapp *v.* La Confiance Ins. Co., 71 Ga. 246.

1. Nor can the members of the company be *held* liable under such summons as partners. Bartram *v.* Collins Mfg. Co., 69 Ga. 751.

2. See tit. FOREIGN CORPORATIONS, 8 Am. & Eng. Encyclo. of L.

3. Smith *v.* V. C. & M. R. Co., 33 N. H. 337, 342.

4. **Foreign Corporations.**—Baltimore & Ohio R. Co. *v.* Gallahue's Admr., 12 Gratt. (Va.); s. c., 65 Am. Dec. 254; Libbee *v.* Hodgdon, 9 N. H. 394; Brauser *v.* New Eng. Fire Ins. Co., 21 Wis. 512; N. O. J. & G. N. R. R. Co. *v.* Wallace, 50 Miss. 248; Darlington *v.* Rogers, 13 Phila. (Pa.) 102; McAllister *v.* Pennsylvania Ins. Co., 28 Mo. 214; McNichol *v.* United States Mercantile Rep. Agency, 74 Mo. 472; Fithian *v.* King, 31 Pa. St. 114; Barr *v.* King, 96 Pa. St. 485; Campbell *v.* The State, 48 Ga. 352; Schmidlapp *v.* La Confiance Ins. Co., 71 Ga. 246, 248; Roche *v.* Rhode Island Ins. Co., 2 Brad. (Ill.) 364; C. D. & V. R. R. Co. *v.* Bank of North America, 82 Ill. 495; Hannibal & St. J. R. R. Co. *v.* Crane, 102 Ill. 249; Young *v.* South Treadegar Iron Works, 4 Am. Rep. 752.

In Myer *v.* Liverpool L. & G. Ins. Co., 40 Md. 595, where the principal defendant was a non-resident, and the indebtedness upon which it was sought to charge the foreign corporation as garnishee arose upon a contract of

sion.[1] Generally, the jurisdiction of the court in such cases is based upon a statute providing for the commencement of suits against foreign corporations when engaged in doing business within the State, by service upon some officer or agent of the company resident there, or that may be found within the jurisdiction.[2]

**4. Public Corporations and Officers of.**[3]—In some of the States, municipal corporations are exempt from garnishment by an express statutory provision.[4] In other States, they are in the same manner made subject to this process.[5] And again in others they are held liable by a liberal construction of terms in the statute having a general application.[6]

insurance made in another State upon property in such State, *held* that the garnishee could not be charged, as the statute of Maryland permitted suits by non-residents against a foreign corporation only "when the cause of action has arisen, or the subject of the action is situated in this State." And see Louisville & N. R. R. Co. *v.* Dooley, 78 Ala. 524; Towle *v.* Wilder, 57 Verm. 622.

A corporation chartered in two States is liable to garnishment in either, and may be charged in respect to wages due one employed by it in another State, and who is a resident of that State. Holland *v.* Mobile & O. R. R. Co., 6 Lea (Tenn.) 414; Mahany *v.* Kephart, 15 W. Va. 609.

1. Hebel *v.* Amazon Ins. Co., 33 Mich. 400; Larkin *v.* Wilson, 106 Mass. 120.

In Massachusetts, *held* that a railroad corporation created by the laws of another State, which had an office in that commonwealth for the convenience of its stockholders, and for the better management of its finances and other business where its principal officers are to be found, and where it carries on such business as is usually carried on in the office of the president and treasurer of a railroad corporation, has a usual place of business in that commonwealth, within the meaning of the St. of 1870, ch. 194, and may be summoned as garnishee by process served upon its treasurer. See also Whipple *v.* Robbins, 97 Mass. 107; American Bank *v.* Rollins, 99 Mass. 313; National Bank of Commerce *v.* Huntington, 129 Mass. 444.

Before the enactment of such statute in Massachusetts it was there *held* that under a statute providing that "all corporations may be summoned as garnishee, and they may appear by their cashier, treasurer, secretary or other officer as they shall appoint," a foreign corporation having no property within the State was not subject to garnishment, although many of the members of the corporation reside there, and its books and records were kept there. Danforth *v.* Penny, 3 Met. (Mass.) 564; Gold *v.* Housatonic R. Co., 1 Gray (Mass.) 424.

2. Fithian *v.* New York & Erie R. Co., 31 Pa. St. 114; Barr *v.* King, 96 Pa. St. 485; Roche *v.* Rhode Island Ins. Assn., 1 Ill. App. 360; Selma etc. R. Co. *v.* Tyson, 48 Ga. 352; McAllister *v.* Pennsylvania Ins. Co., 28 Mo. 214; Brauser *v.* New England Fire Ins. Co., 21 Wis. 506.

3. See tit. MUNICIPAL CORPORATIONS, Am. & Eng. Encyc. of L.

4. **Cities and Towns Exempt by Statute.**—Holt *v.* Experience, 26 Ga. 113; McLellan *v.* Young, 54 Ga. 399; s. c., 21 Am. Rep. 276; Pendleton *v.* Perkins, 49 Mo. 565; Clapp *v.* Walker, 25 Iowa, 315; School District *v.* Gage, 39 Mich. 484.

The exemption under such statutes is applicable to all cases where a municipal corporation is sought to be charged, and is not dependent upon the question whether the garnishment in the particular case will or not interfere with the discharge of corporate duties. Jenks *v.* Osceola Township, 45 Iowa 554.

5. **Cities and Towns Liable by Statute.**—City of Denver *v.* Brown (Colo.), 18 Pac. Rep. 214.

6. **Cities and Towns Held Liable Under General Statutes.**—So held in Ohio, under a statute subjecting to garnishment "any claims or choses in action due or to become due" to the judgment debtor, and all "money, goods or effects" which he may have in the hands of "any person, body politic or corporate." City of Newark *v.* Funk, 15 Ohio St. 462.

In New Hampshire a similar statute

But according to the greater weight of authority, reason and necessity justify the construction that such bodies and their officers are not included in such terms, however broad they may be.[1] The reasoning of these authorities is that a public corpora-

was construed in an early case to permit the garnishment of a town. Whidden *v.* Drake, 5 N. H. 113. And the same was *held* in Wendell *v.* Pierce, 13 N. H. 502. But see Brown *v.* Heath, 45 N. H. 168.

In Connecticut a statute providing that debts due from "any person to a debtor" may be reached by garnishment, was *held* sufficiently comprehensive to embrace corporations, and the court said it could discover no reason why it was not applicable to municipal corporations, such as towns, as well as to private corporations. Bray *v.* Wallingford, 20 Conn. 416.

So in Massachusetts, a county was *held* chargeable as garnishee under a statute providing that "any person or corporation may be summoned as trustee of defendant." Under the statutes of that State, the court say: "There has never been a doubt that cities and towns are liable to be summoned as trustees, and we find nothing in any of the statutes upon this subject that places counties upon a different footing in this respect." Adams *v.* Tyler, 121 Mass. 380. But a town cannot be charged as garnishee for the salary of one of its officials which is fixed by statute and not due by virtue of any contract, express or implied, with the town. Walker *v.* Cook, 129 Mass. 577, 579.

In Wales *v.* City of Muscatine, 4 Iowa 302, the mayor and recorder of the city were summoned as garnishees, and appeared and answered, without pleading exemption, that the city was indebted to the defendant in a sum stated. Subsequently the principal defendant appeared by his attorney and objected to judgment being rendered against the city because of its not being subject to garnishment. The statutes of Iowa provided that "the plaintiff may cause any property of the defendant, which is not exempt from execution, to be attached," and that "attachment by garnishment is effected by informing the supposed debtor or person holding the property that he is attached as garnishee." Again, the code of the State provided in relation to the construction of statutes, that "the word 'person' may be extended to bodies public and corporate." *Held*, that the word "person" included corporations, municipal as well as private. This case was followed in Binton *v.* District Township, 11 Iowa 166, and again in Clapp *v.* Walker, 25 Iowa 315, where the garnishee appeared and answered without claiming the benefit of the exemption then provided by statute.

In Kentucky, although the supreme court *held* in Divine *v.* Harvie, 7 Mon. 439, that the salary of an officer or employe of the State was not subject to attachment in the hands of the State treasurer, upon the ground that the State could not be subjected to garnishment; yet in Rodman *v.* Musselman, 12 Bush. 354; s. c., 23 Am. Rep. 724, they *held* that the city of Louisville could be charged as garnishee for the salary of its marshal.

In New Jersey the same rule has been announced in Mayor etc. *v.* Horton, 38 N. J. L. 88.

In Rhode Island the city of Providence was *held* subject to garnishment under a statute providing for service of the process upon "any body corporate." Wilson *v.* Lewis, 10 R. I. 285.

**1. Cities and Towns Exempt Under General Statutes.**—In the following cases it is *held* that upon grounds of public policy a municipal corporation cannot by service of garnishment upon its mayor, treasurer or other disbursing officer be charged as garnishee on account of salary due one of its officers or employes. Hawthorn *v.* St. Louis, 11 Mo. 59; s. c., 47 Am. Dec. 141; City of Erie *v.* Knapp, 29 Pa. St. 173; McLellan *v.* Young, 54 Ga. 399; s. c., 21 Am. Rep. 276; Boon *v.* Williams (Ga.), 7 S. E. Rep. 868; Waldman *v.* O'Donnell, 57 How. Pr. (N. Y.) 215; Switzer *v.* City of Wellington (Kan.), 19 Pac. Rep. 620. The case of Hawthorn *v.* St. Louis was affirmed in Fortune *v.* St. Louis, 23 Mo. 239. Subsequently a statute was enacted exempting municipal corporations in express terms; but in Pendleton *v.* Perkins, 49 Mo. 565, it was *held* that money in the city treasury belonging to a debtor who had absconded, might be reached by a creditor by bill in equity. The court say: "There is no reason why a city for any ordinary liability unconnected with its present public service or the prosecution of its

tion is created for the public benefit, with political powers to be exercised for purposes connected with the public good in the administration of civil government, and public policy demands that such bodies should not be subject to the serious interruptions in the prosecution of the public business, and the inconvenience and delay, to the prompt and efficient discharge of official duties, and the accomplishment of important works and measures which might result from subjection to such process. That the defendant might have sued the corporation upon the indebtedness sought to be reached does not affect the grounds upon which the above rule is based. And salary due an employe of a city, upon being audited and ordered paid does not become a personal liability of the officer whose duty it is to pay the same so as to subject the same to garnishment in his hands.[1]

The rules applied to municipalities in the strict sense, as cities and towns are held equally applicable to other public corporations, such as counties,[2]

public works, should not, like private corporations, be held to answer a garnishment process. But the prohibition is general, and creditors like the present plaintiff are deprived of the usual remedy against their absconding debtors, if the latter have been sharp enough to place their funds in the city treasury. Upon what principle should this fact also deprive them of the equitable remedy they would possess if the garnishee process was unknown to the law? The maxim that equity follows the law has no such application; otherwise, in most cases where legal remedies fail, equitable relief would be cut off." But see State *v.* Curran, 7 Eng. (Ark.) 321, 364. Statutes providing that "any person" may be summoned as garnishee are not to be construed as including such bodies. Mayor etc. *v.* Root, 8 Md. 95; s. c., 63 Am. Dec. 692; Bradley *v.* Town of Richmond, 6 Vt. 121. Even though the law provide that the word "person" when used in a statute shall be construed as including corporations as well as natural persons. Mayor etc. *v.* Rowland, 26 Ala. 498. In Smoot *v.* Hart, 33 Ala. 69, it was *held* that a city marshal might be garnished by a creditor of the city to subject the funds of the corporation in his hands arising from taxes, fines and forfeitures, and the court in their opinion seem to discredit the soundness of the decision in Mayor *v.* Rowland; but the latter case was subsequently affirmed in Clark *v.* Mobile School Com., 36 Ala. 621; and in Underhill *v.* Calhoon, 63 Ala. 216, the case of Smoot *v.* Hart is expressly overruled. Merwin *v.* City of Chicago, 45 Ill. 133; s. c., 92 Am. Dec. 204; Buffham, City of Racine, 26 Wis. 449. In City of Memphis *v.* Laski, 9 Heisk. (Tenn.) 511; s. c., 24 Am. Rep. 324, the corporation was required to respond to the process of garnishment in a dozen different cases, at the suit of as many small creditors, in order to subject an indebtedness of four hundred dollars in aggregate amount. The court *held* the expense, inconvenience and embarrassment incident to such litigation to be a perversion of the duties and functions of the municipal government and a wrong to the public for whose convenience and protection that government was created.

The same rule has been *held* to apply with respect to debts due persons not connected with the city government. Burnham *v.* City of Fond du Lac, 15 Wis. 193; s. c., 82 Am. Dec. 668; People *v.* Mayor, 2 Neb. 166.

1. Hawthorn *v.* St. Louis, 10 Mo. 59; s. c., 47 Am. Dec. 141; City of Erie *v.* Knapp, 29 Pa. St. 173; Mayor etc. *v.* Root, 8 Md. 95; s. c., 63 Am. Dec. 692; Triebel *v.* Colburn, 64 Ill. 376. A city treasurer is the mere agent of the municipal corporation and cannot be garnished for money held by him by virtue of his office. Smith *v.* Woolsey, 22 Ill. App. 185.

2. **Counties and Their Officers.**—"The varied relations which such bodies, through their officers, hold towards individuals as their debtors would render them liable to be constantly attacked with such process and would very ma-

townships[1] and school districts.[2] Such corporations, too, are within the prohibition of a statute exempting municipal corporations from garnishment.

Whether a public corporation can waive the exemption from garnishment is a question upon which the courts are divided. By some it is held that the exemption is a mere privilege extended to such bodies, which they may waive like individuals;[3] and others hold that the exemption belongs to the person whose debt is garnished, and cannot be waived without his consent.[4] But the true position would seem to be that the exemption is granted from public necessity and for the public benefit, and that it cannot be waived by either party.[5]

**5. National and State Governments and Their Officials.**—As "neither the general government nor the several States are bound, without express mention, by general words in a statute which trench on their respective prerogatives of sovereignty,"[6] they cannot be subjected to garnishment without express author-

terially embarrass them in the performance of their duties. If they are subject to such suits they are bound to give them the same attention which is required of private individuals, and this would involve their attendance upon district courts and the consequent absence from their respective offices. It would also very much embarrass them in their accounts, as each indebtedness disclosed would necessarily suspend the payment of the sum until the decision of the litigation between the principal parties, which might be protracted for years. Public policy cannot tolerate such an obstacle to the exercise of officials as this rule would necessarily be should it be allowed to obtain." FLANDRAU, J., in McDougal *v.* Board of Supervisors, 4 Minn. 184; Chealy *v.* Brewer, 7 Mass. 259; Hunsaker *v.* Borden, 5 Cal. 290; Wallace *v.* Lawyer, 54 Ind. 501; Edmonson *v.* DeKalb Co., 51 Ala. 103; Boone County *v.* Keck, 31 Ark. 387; State *v.* Eberly, 12 Neb. 616; Board of County Com. *v.* Bond, 3 Colo. 411. Since this decision municipal corporations have been made liable to garnishment by statute. See note 5, p. 1132, *ante.*

In Ward *v.* County of Hartford, 12 Conn. 404, it was *held* that a county was not subject to garnishment, but this case would seem to be overruled in Bray *v.* Wallingford, 20 Conn. 416. And in Adams *v.* Tyler, 121 Mass. 380, it was *held* that a county is subject to garnishment.

The operation of the rule cannot be avoided by making the process run to an officer or agent of the corporation whose possession is that of the county. Merrill *v.* Campbell, 49 Wis. 535.

1. Millison *v.* Fisk, 43 Ill. 112.

2. **School District.**—Bulkey *v.* Eckert, 3 Pa. St. 368; Ross *v.* Allen, 10 N. H. 96; Millison *v.* Fish, 43 Ill. 112; Bivens *v.* Harper 59 Ill. 21; Hightower *v.* Slaton, 54 Ga. 108; s. c., 21 Am. Rep. 276.

A school district is within the meaning of a statute exempting municipal corporations from garnishment. School District *v.* Gage, 39 Mich. 484.

In Clapp *v.* Walker, 25 Iowa 315, a school district was *held* to have waived the exemption provided by statute by filing an answer and going to trial upon issue joined thereon.

3. Clapp *v.* Walker, 25 Iowa 315; Board of Commissioners *v.* Bond, 3 Colo. 411.

But making answer before a commissioner appointed for that purpose will not have such effect. Jenks *v.* Osceola Township, 45 Iowa 554. Nor will the bringing of an action in relation to the fund attached and making the garnishing creditor a party thereto constitute a waiver. County of Des Moines *v.* Hinkley, 62 Iowa 637.

4. School District *v.* Gage, 39 Mich. 484.

5. Wallace *v.* Lawyer, 54 Ind. 501, 509; McLellan *v.* Young, 54 Ga. 399, 400; s. c., 21 Am. Rep. 276; Rindge *v.* Green, 52 Vt. 204.

6. **National and State Governments.** People *v.* Herkimer, 15 Am. Dec. 381 note.

ity of law.[1] Another reason for such exemption is that such governments are not, without their consent, subject to suit, and whether garnishment be deemed a suit or not, the exemption would follow from the inability of the defendant to sue upon such indebtedness.[2] Again it is held that the embarrassment and delay in the administration of public affairs likely to ensue from submission to such process is sufficient reason for holding the general government and that of the several States exempt therefrom.[3] And as the possession of an officer of any government is deemed in law as that of the government itself, such exemption cannot be avoided by the garnishment of the treasurer or other officer or agent through whom payment of the government creditors is usually made.[4]

1. The People *v.* Herkimer, 4 Cow. (N. Y.) 345; s. c., 15 Am. Dec. 379; Divine *v.* Harvie, 7 T. B. Monroe (Ky.) 439; 18 Am. Dec. 194; Dewey *v.* Garvey, 130 Mass. 86.

2. Dobbins *v.* Orange etc. R. Co., 37 Ga. 240; Wilson *v.* Bank of Louisiana, 55 Ga. 98; Rollo, Assignee, *v.* Andes Ins. Co., 23 Gratt. (Va.) 509; s. c., 14 Am. Rep. 147; Divine *v.* Harvie, 7 T. B. Monroe (Ky.) 439; s. c., 18 Am. Dec. 194; Gilbert *v.* Lynch, 17 Blatchf. (U. S. C. C.) 402, 404; Dewey *v.* Garvey, 130 Mass. 86; Tate *v.* Salmon, 79 Ky. 540; Loder *v.* Baker, 10 Vr. (N. J.) 49.

3. Buchanan *v.* Alexander, 4 How. (U. S.) 20. "In enlightened communities public policy must ever be paramount to individual convenience and private interest. And it cannot be doubted that the most efficient administration of the government in general, and the free course of the stream of justice in the tribunal, are the very highest of these considerations. To interpret the will of the legislature as in conflict, in any degree, with these great public objects, could rarely, if ever, be done; as to do so would be abhorrent to every legal idea of civil liberty. And that the proper and efficient administration of the State government, in all its departments, would be endangered by the establishment of the doctrine contended for by the plaintiffs in error, cannot for a moment be doubted, as it would at all times in its practical operations be embarrassing, would frequently be mischievous, and, under some circumstances, might prove fatal to the public service." SCOTT, J., in McMeekin *v.* The State, 4 Eng. (Ark.) 553, 557; Bank of Tennessee *v.* Dibrell, 3 Sneed (Tenn.) 379; Keyser *v.* Rice, 47 Md. 203, 213; Allen *v.* Russell, 78 Ky. 105, 116.

It is no objection to attachment in State court wherein U. S. is plaintiff that the property attached, being in the possession of an officer of the U. S., as such, cannot be attached by an officer of the State court without an act of congress authorizing it, for this rule is established solely in the interest of the U. S., and does not apply when the government is itself the attaching creditor. U. S. *v.* Murdock, 89 Am. Dec. 651; s. c., 18 La. An. 305.

4. **National and State Officials.**—In Averill *v.* Tucker, 2 Cranch (C. C. U. S.) 544, it was sought to charge, as garnishee of a clerk in the war department of the United States, the government agent for the payment of salaries of the clerks in such department. The answer of the garnishee showed that, according to the usage of the department, a general warrant had been drawn in his favor for the payment of salaries of persons employed in the war department, which warrant was carried through the necessary forms of the government, and upon the money being received thereon, was placed by said garnishee in the office of discount and credited at Washington to his credit as said agent; and that there was due out of said moneys to the principal defendant the sum of $400. *Held*, that the garnishee was to be considered as the agent of the government, and was not subject to garnishment. In Buchanan *v.* Alexander, 4 How. (U. S.) 20, a purser was *held* not subject to garnishment for money in his hands due to seamen of the United States navy. Spalding *v.* Imlay, 1 Root (Conn.) 551; Stillman *v.* Isham, 11 Conn. 124; Bank of Tennessee *v.* Di-

**6. Attorneys at Law.**—While an attorney at law is an officer of the court before which he practices, and may be called to account by summary proceedings for alleged misconduct in relation to business entrusted to him, yet his possession of money or property coming into his hands in the course of his employment as an attorney is not that of the court, as in the case of sheriffs or receivers, but as the agent and representative of his client, and he is subject to garnishment in respect thereto to the same extent as are other agents.[1] And his liability to be charged does not depend upon a demand having been made by the client.[2] But an attorney summoned as garnishee may refuse to answer any interrogatories which would require him to disclose matters or communications between himself and his client which are privileged under the law.[3]

**7. Persons Holding as Agents of the Law**—*a. General Rules.*—An official whose duties are prescribed and regulated by law cannot be garnished in respect to property held by him in his official capacity, unless expressly authorized by statute.[4] His possession in such case is merely as the agent of the law, and to interfere with his possession is to interfere with the jurisdiction of the court whose officer he is. A court having custody of money or property under the law, holds it for some purpose of which that

brell, 3 Sneed (Tenn.) 379; Wild *v.* Ferguson, 23 La. An. 752; Mechanics and Traders' Bank *v.* Hodge, 3 Robinson (La.) p.373; Rollo *v.* Andes Ins. Co., 23 Gratt. (Va.) 509; s. c., 14 Am. Rep. 147; Tracy *v.* Hornbuckle, 8 Bush (Ky.) 336; Tate *v.* Salmon, 79 Ky. 541; Providence & S. Steamship Co. *v.* Virginia F. & M. Ins. Co., 11 Fed. Rep. 284, 287. In Dewey *v.* Garvey, 130 Mass. 86, a state lunatic hospital, under the control and government of the State of Massachusetts, was *held* not to be deemed the real contracting party as to an indebtedness owing by it, except as the substitute or representative of the State, and that proceedings against such institution as garnishee was in effect a suit against the State, which could not be permitted. Jardain *v.* Fairton Savings Fund Assoc., 15 Vroom (N. J.) 376; Waldman *v.* O'Donnell, 57 How. Pr. (N. Y.) 215.

1. **Attorneys.**—Mann *v.* Buford, 3 Ala. 312; s. c., 37 Am. Dec. 691; Tucker *v.* Butts, 6 Ga. 580; Coburn *v.* Ansart, 3 Mass. 318; Thayer *v.* Sherman, 12 Mass. 441; Cook *v.* Holbrook, 6 Allen (Mass.) 88; Hancock *v.* Colyer, 99 Mass. 187; s. c., 96 Am. Dec. 730; Staples *v.* Staples, 4 Me. 532; Ayer *v.* Brown, 77 Me. 195; Riley *v.* Hirst, 2 Pa. St. 346; White *v.* Bird, 20 La. An. 188; s. c., 96 Am. Dec. 393.

An attorney at law is not an employe within the meaning of a statute exempting from garnishment the "clerk, cashier or other employe" of the defendant. Narramore *v.* Clark, 63 N. H. 166.

In Johns *v.* Allen, 5 Har. (Del.), it is *held*, however, that an attorney cannot be garnished as debtor of his client on account of money collected by him.

2. Staples *v.* Staples, 4 Me. 532.

3. White *v.* Bird, 20 La. An. 188; s. c., 96 Am. Dec. 393. But interrogatories addressed to an attorney to ascertain who his client in fact is, when that relation commenced and ended, what money has been received on claims in his hands, what paid over, and to whom paid, are not within the rule. Shaughnessy *v.* Fogg, 15 La. An. 330.

4. **Officers of the Law Exempt from Garnishment.**—Wilder *v.* Bailey, 3 Mass. 289; Gassett *v.* Grout, 4 Met. (Mass.) 489; Winchell *v.* Allen, 1 Conn. 385; Adams *v.* Barrett, 2 N. H. 274; Bulkley *v.* Eckert, 3 Pa. St. 368; Richards *v.* Griggs, 16 Mo. 416; s. c., 57 Am. Dec. 240; Lightner *v.* Steinagel, 33 Ill. 510; s. c., 85 Am. Dec. 295; Hill *v.* La Crosse etc. R. Co., 14 Wis. 291; 85 Am. Dec. 783.

court is the exclusive judge, and to permit the garnishment of its officer, to whom its actual custody has been entrusted, might defeat the purpose for which it is held, and, in many cases, enable some other court to dispose of the property and wholly divest it from the end or purpose for which possession had been taken.[1] For these reasons, and because it is deemed contrary to public policy to permit such officers to be subjected to the embarassment, delay and expense incident to such process, the authorities are almost uniform in holding that general words in garnishment statutes are not to be construed as including them.[2] If, however, from any cause, the relation of the officer is so changed that the official obligation becomes a personal liability, then he is of course subject to be summoned in respect to such claim in his individual capacity.[3] And in many of the States, as we shall see, the rule as to some of such officers has been changed by statute, making them liable as other persons.

*b. Administrators and Executors.*—The cases in which this question has perhaps most frequently been presented are those in which it has been sought to charge administrators and executors as garnishees in respect to the interests of persons having claims against such estates as creditors, and of those entitled to share in the final distribution as heirs and legatees.

1. Marvin *v.* Holly, 9 Mo. 378; s. c., 43 Am. Dec. 574; Adams *v.* Haskell, 6 Cal. 113; s. c., 65 Am. Dec. 491; Bank of Chester *v.* Ralston, 7 Pa. St. 482; Reddick *v.* Smith, 3 Scam. (Ill.) 451; Lightner *v.* Steinagel, 33 Ill. 510; s. c., 85 Am. Dec. 295; Dowden *v.* Schatzell, 1 Bailey's Eq. (S. Car.) 360; s. c., 23 Am. Dec. 170.

One of our ablest judges on the federal bench gives the reasons for the rule as follows: "When property or money is *in custodia legis*, the officer holding it is the mere hand of the court; his possession is the possession of the court; to interfere with his possession is to invade the jurisdiction of the court itself, and an officer so situated is bound by the orders and judgments of the court whose mere agent he is, and he can make no disposition of it without the consent of his own court, express or implied. How can such an officer, when garnished, know what answer he can make with safety to himself in advance of the orders and judgments of the court having possession of the property and jurisdiction of his person? How could such an officer safely expose himself by his answer as garnishee to the danger of a personal judgment in some other court before the determination of the court having control of him and the property? Suppose the court whose hand and agent he is should order and direct him, in a given case, to make one disposition of the property or money, and the court issuing the process of garnishment should enter judgment against him requiring a wholly different disposition of it, which judgment should he obey? He would be like a soldier between two fires, and he would inevitably fall under one or the other, and by far the deadlier fire of the two would be that of his own court, since he would not only by a disobedience of its orders expose himself to a suit upon his official bond, but to a punishment for contempt." LOVE, J., *In re* Cunninghum, 19 Nat. Bankruptcy Reg. 276.

2. **Not Included Under General Terms of Statute.**—Wilder *v.* Bailey, 3 Mass. 289; Shewell *v.* Keen, 2 Whart. (Pa.) 332; s. c., 30 Am. Dec. 266; Blair *v.* Cantey, Exr., 2 Spear L. (S. Car.) 34; s. c., 42 Am. Dec. 360; Conway *v.* Armington, 11 R. I. 116; Harrington *v.* La Rocque, 13 Oreg. 344; Post *v.* Love, 19 Fla. 634; Millison *v.* Fisk, 43 Ill. 112; Mayor *v.* Root, 8 Md. 95; s. c., 63 Am. Dec. 692.

3. **Liable When Obligation Becomes Personal.**—Adams *v.* Barrett, 2 N. H. 374; Fitchett *v.* Dolbee, 3 Harr. (Del.) 267; Harrington *v.* La Rocque, 13

The question as to the interest of creditors was presented in Massachusetts at an early day in the case of Brooks *v.* Cook.[1] There the garnishee answered that he had no "goods, effects or credits" of the defendant in his possession, excepting as he was administrator of the estate of Peter Barrett, deceased. That previous to the death of said Peter, the defendant, Cook, had commenced a suit against him to recover the value of certain hides, which suit was still pending at the time of the garnishee's answer. The court held, that as the administrator derived his authority from the law, and was obliged to execute it according to the rules of law, he was not liable to process of this kind, and such has been the almost uniform current of authority, including cases as to executors as well.[2]

The same rule is applicable to these officers with respect to legacies and the distributive shares of heirs, without regard to the question whether there exists the relation of debtor and creditor between them and the legatee or other distributee.[3]

Oreg. 344; Lightner *v.* Steinagel, 33 Ill. 510; s. c., 85 Am. Dec. 295; Hoyt *v.* Christie, 51 Vt. 48.

1. 8 Mass. 246.

2. **Administrators and Executors Not Subject to Garnishment for Interests of Creditors.**—Waite *v.* Osborne, 11 Me. 185; Kimball *v.* Woodman, 19 Me. 200; McCombe *v.* Dunch, 2 Dall. (Pa.) 73; Welch *v.* Gurley, 2 Hay. (N. Car.) 334; Tate *v.* Morehead, 65 N. Car. 681; Lyons, Admr. *v.* Houston's Exrs., 2 Har. (Del.) 349; Plunkett *v.* LeHuray, 4 Har. (Del.) 436; Thorn *v.* Woodruff, 5 Ark. 55; Fowler *v.* McClelland, 5 Ark. 188; Thornhill *v.* Christmas, 11 Rob. (La.) 201; Curling *v.* Hyde, 10 Mo. 374; Conway *v.* Armington, 11 R. I. 116; Bickle *v.* Cusman's Admx., 76 Va. 678; Parker *v.* Donnally, 4 W. Va. 648; Norton *v.* Clark, 18 Nev. 247; Harrington *v.* La Rocque, 13 Oreg. 344; Jackson *v.* Walsworth, 1 Johns. Cas. (N. Y.) 372; In the Matter of Hurd, 9 Wend. (N. Y.) 465.

3. **Nor for Shares of Legatees, etc.**—Winchell *v.* Allen, 1 Conn. 385; Barnes *v.* Treat, 7 Mass. 271; Elliott *v.* Newby, 2 Hawks (N. Car.) 21; Executors of Woodward *v.* Woodward, 4 Halsted (N. J.) 115; McCreary *v.* Toffer, 10 Pa. St. 419; Picquet *v.* Swan, 4 Mason (U. S. C. C.) 443, 463; Short *v.* Moore, 10 Vt. 446; Crownover *v.* Bamburg, 2 Ill. App. 162; Post *v.* Love, 19 Fla. 634; Case Threshing Machine Co. *v.* Miracle, Exr., 54 Wis. 295; Macdowell *v.* Hollister, 3 Com. L. Rep. 933; Young *v.* Young, 2 Hill (S. Car.) 425; Harrington *v.* LaRocque, 13 Oreg. 344.

"An executor or administrator is, to a certain extent, an officer of the law, clothed with a trust to be performed under prescribed regulations. It would tend to distract and embarrass these officers if, in addition to the ordinary duties which the law imposes, of themselves often multiplied, arduous and responsible, they were drawn into conflicts created by the interposition of creditors of legatees and compelled to withhold payment of legacies, without suit; to suspend indefinitely the settlement of estates; to attend, perhaps, to numerous rival attachments, to answer interrogatories on oath and to be put to trouble and expense for the benefit of third persons no way connected with the estate, nor within the duties of their trust. . . . it is of great importance to the interests of heirs, creditors and legatees that the affairs of a decedent's estate be kept as simple and distinct as possible; that the estate be speedily closed and the estate adjusted." Shewell *v.* Keen, 2 Whart. (Pa.) 332–339; s. c., 30 Am. Dec. 266.

In a few cases, however, executors and administrators have been held liable under the general terms of a statute. Executors of Tillinghast *v.* Johnson, 5 Ala. 514; Dudley *v.* Falkner, 49 Ala. 148; Stratton *v.* Ham, 8 Ind. 84; Hardesty *v.* Campbell, Admr., 29 Md. 533.

So *held* under a statute providing that whoever "shall have in his possession any money, goods, chattels, rights or credits of any debtor" may be charged as garnishee. Adams *v.* Bar-

Nor can garnishment proceedings be revived against the administrator or executor of a garnishee who dies before answer and while proceedings are pending.[1]

But whenever the probate court has ordered the payment of a creditor's claim against the estate, or when the estate has been fully administered upon, the officer's accounts settled, and an order for distribution made to the legatees or other distributees, the executor or administrator thereupon becomes personally liable for the payment thereof, and he may be summoned in his individual capacity.[2] And in some of the States the rule as above stated has been changed by legislation, making administrators and executors liable to garnishment in express terms.[3] The

rett, 2 N. H. 374; Palmer *v.* Noyes, 45 N. H. 174, overruling Beckwith *v.* Baxter, 3 N. H. 67.

In Vance *v.* McLaughlin's Admr., 8 Gratt. (Va.) 289, and in Deblieux *v.* Hotard, 31 La. An. 194, the garnishment of an executor seems to have been permitted in the absence of any objection from the garnishee; but in the latter case it was *held* that the attaching creditor was not entitled to have an order on the executor to turn over the distributive share of an heir until after administration upon the estate. And see Deblieux *v.* Hotard, 32 La. An. 280.

But a court having no jurisdiction of actions to which ex-executors and administrators are parties cannot summon such persons as garnishees. Harmon *v.* Birchard, 8 Blackf. (Ind.) 418.

1. White *v.* Ledyard, 48 Mich. 264; Brecht *v.* Corby, 7 Mo. App. 300; Weaver *v.* Davis, 47 Ill. 235.

A statute providing that no action shall abate by death if the cause of action survive is not applicable to such a case. If the garnishee dies after summons he ceases to be the custodian of the property; and if it is desired to reach the property a new summons should issue against the actual custodian as such. The administrator cannot be substituted even by consent. Gastavus *v.* Brecht, 7 Mo. App. 300. And see Tate *v.* Morehead, 65 N. Car. 681.

2. Richards *v.* Griggs, 16 Mo. 418; s. c., 85 Am. Dec. 295; Bartell *v.* Bauman, 12 Ill. App. 450; Burton *v.* Morris, 3 Harr. (Del.) 269; Short *v.* Moore, 10 Vt. 446; Macdowell *v.* Hollister, 3 Com. L. Rep. 933; Harrington *v.* LaRocque, 13 Oreg. 344.

3. **Executors and Administrators Liable Under Special Statutes.**—Holbrook *v.* Waters, 19 Pick. (Mass.) 354; Wheeler *v.* Browen, 20 Pick. (Mass.) 563; Kimball *v.* Woodman, 19 Me. 200; Cummings *v.* Garvin, 65 Me. 301; Parker *v.* Cushman, 9 Vt. 320; Simnickson *v.* Painter, 32 Pa. St. 384; Holman *v.* Fisher, 49 Miss. 472; McClaim's Annotated Code 1888, section 4201.

In Georgia the statute provides that the administrator shall not be compelled to answer until the estate is sufficiently administered upon to enable him to do so safely. Sapp *v.* McArdle, 41 Ga. 628.

Under such statutes it is not necessary to wait until the expiration of one year until administration is had upon the estate before the process can issue. but the officer may be garnished as soon as he has qualified. Hoar *v.* Marshall, 2 Gray (Mass.) 251; Vantine *v.* Morse, 104 Mass. 276.

But where the validity of a will is contested and pending the proceedings, the estate is in the possession of a special administrator and executor cannot be charged as garnishee in respect to such estate. In the Matter of the Claim of Flandrow, 92 N. Y. 256.

In Simonds *v.* Harris, 92 Ind. 505, *held*, under a statute permitting garnishment of executor and administrator that an executor was liable to garnishment for the unascertained share of a legatee, and that an order for the payment thereof binds a subsequent administrator so that he cannot, in the settlement of his trust take credit for payment thereof to such distributee or legatee.

Under such statute, in Massachusetts, *held* that the process would lie against an executor for a legacy before a decree of distribution, and if necessary that the court could continue the case for proceedings upon the answer of the garnishee so as to preserve to the creditor the benefit of the statute

effect of such statutes is to divest the claimant against such estate of his distributive share, and award payment thereof to his creditor.[1] But these provisions do not impose any different rule as to liability upon such officers from that which applies to other persons under this process. An administrator cannot be held liable if, from the nature of the indebtedness, his intestate could not be charged if living.[2] Nor is an executor chargeable where,

without exposing the garnishee to an unjust liability. Holbrook *v.* Waters, 19 Pick. (Mass.) 354. So also it will lie against an administrator for the distributive share of an heir at law, although the answer of the garnishee show that it is uncertain whether there will be any assets for distribution. Wheeler *v.* Bowen, 20 Pick. (Mass.) 563. If the executor have no personal assets with which to pay the legacy he is entitled to an opportunity to obtain a licence for the sale of real estate in his hands to obtain money therefor. Cady *v.* Comey, 10 Met. (Mass.) 459. And the liability of the executor does not depend upon demand having been made for payment by the legatee. Hoar *v.* Marshall, 2 Gray (Mass.) 251, 254.

To entitle the plaintiff to the benefit of the garnishment, however, he must, if required, give bond to the executor to refund, if the sum recovered by him shall be needed to satisfy demands against the estate and also to indemnify the executors. Cady *v.* Comey, 10 Met. (Mass.) 459; Hoar *v.* Marshall, 2 Gray (Mass.) 251, 253.

Under a statute of Pennsylvania providing that "any interest which any person or persons may have in the real or personal estate of any decedent, whether by will or otherwise," may be attached "in the hands of the executor or administrator, or in whose hands or possession soever the same may be, as fully and effectually as in other cases," *held* not to authorize the garnishment of an administrator under process issued on a judgment rendered against a distributee before the enactment of the statute. Hartle *v.* Long, 5 Pa. St. 491. Nor to charge an executor for the distributive share of a legatee in land which can only be sold after the death of the testator's widow, she being yet alive. Hess *v.* Shorb, 7 Pa. St. 231. Nor to permit the garnishment of an executor or administrator for the share of a distributee until the same has been ascertained by a settlement of his accounts. Bank of Chester *v.* Ralston, 7 Pa. St. 482; McCreary *v.* Tapper, 10 Pa. St. 419. After these decisions an act was passed proving that the above statute should be deemed to authorize the service of the process "at any time after the interest which any person or persons may have in the real or personal estate of the decedent shall have accrued by reason of the death of such decedent." This statute was *held* to give the creditor the right to succeed to the defendant's interest in a legacy or distributive share without regard to the relations of the garnishee. Gochenaur's Exrs., 18 Pa. St. 414. And before the settlement of the estate of the decedent, it being in the power of the court to mould the judgment against the executor or administrator into such form that no injustice would be done to anyone. Sinnickson *v.* Painter, 32 Pa. St. 384.

Under a statute providing that executors and administrators may be garnished for a debt due by the testator or intestate to the defendant an executor may be summoned as garnishee under execution on a judgment against him in his individual capacity to reach an indebtedness due him from the estate of which he is executor. Dudley *v.* Falkner, 49 Ala. 148.

Pecuniary legacies are not goods or effects, nor can they be denominated credits. Without the relation of debtor and creditor there can be no such thing as a credit. Barnes *v.* Treal, 7 Mass. 271; Winchell *v.* Allen, 1 Conn. 385.

A pecuniary legacy is within the description of the words "effects and credits" contained in a statute providing for garnishment of executors. Cummings *v.* Darling, 65 Me. 301.

A statute prohibiting suit against estates of decedents when declared insolvent will not preclude an executor from being summoned as garnishee. Holman *v.* Fisher, 49 Miss. 472.

1. Holman *v.* Fisher, 49 Miss. 472; Strong's Exr. *v.* Bass, 35 Pa. St. 333.

2. Commercial Bank *v.* Neally, 39 Me. 402.

in addition to his ordinary powers and duties, a trust is created by the will, or by implication of law arises out of its terms, by which the title to the property of the estate is vested in the executor as trustee for the benefit of a *cestui que trust* for life.[1]

*c. Guardians.*—The rights, duties and liabilities of guardians in relation to the estates of their wards are deemed inconsistent with the rights of creditors under garnishment proceedings, and it is therefore held that persons holding this relation, either as to minors or insane persons, cannot be charged as garnishees in respect to any estate of their wards, until there has been a final accounting, and a balance found in the guardian's hands.[2]

*d. Sheriffs.*—Another numerous class of cases which come under the above rule are those in which it is sought to charge sheriffs or other ministerial officers, employed in the execution of the process of the courts, as garnishees in respect to money or property coming into their hands in the performance of their official duties.

A leading case upon this question is that of Wilder *v.* Bailey,[3] where a deputy sheriff was summoned as garnishee, and it appeared that at the time of service of the process he held a sum of money collected by him on an execution issued upon a judgment in favor of the defendant. The court held, that the possession of this money by the officer did not create the relation of debtor and creditor between him and the defendant, nor did the latter have any right of property in the particular pieces of money so received by the officer, but that the same was in the custody of the law to be dealt with pursuant to the requirements of the law, and until so applied, the officer was a trustee for its safe keeping, and, therefore, not subject to garnishment, for reasons which we have before stated. This view is supported in many well considered opinions of courts in other States, and must be accepted as the rule in the absence of a statute making such officers liable.[4]

Nor can an executor be held liable where the defendant has failed to make proof of his claim, and the estate being insolvent, the executor distributes the entire fund in his hands under order of the probate court. Gaptill *v.* Ayer, 20 N. E. Pre. 449 (Mass. 1889).

An executor who is indebted in that capacity to the defendant cannot, of course, be charged in respect to such indebtedness in his individual capacity. Clark *v.* Schrader, 41 Iowa 491.

1. Carson *v.* Carson, 6 Allen (Mass.) 397.

2. **Guardians Not Liable.**—Davis *v.* Drew, 6 N. H. 399; s. c., 25 Am. Dec. 467; Gasett *v.* Grant, 4 Met. (Mass.) 486; Hanson *v.* Butler, 48 Me. 83; Perry *v.* Thornton, 7 R. I. 15; Vierheller *v.* Brutto, 6 Ill. App. 95.

Nor is the estate of the ward subject to such interference by garnishment of a person indebted for property purchased of the guardian. Homestead *v.* Loomis, 53 Me. 549.

3. 3 Mass. 289. See also Penniman *v.* Ruggles, 6 Mass. 166.

4. **Sheriffs Exempt as General Rule.**—Marvin *v.* Hawley, 9 Mo. 378; s. c., 43 Am. Dec. 547; Reddick *v.* Smith, 3 Scam. (Ill.) 451; Lightner *v.* Steinagel, 33 Ill. 510; s. c., 85 Am. Dec. 292; Clymer *v.* Willis, 3 Cal. 363; s. c., 58 Am. Dec. 414; Ross *v.* Clark, 1 Dall. (Pa.) 354; Crane *v.* Freese, 16 N. J. L. 305; Zurcher *v.* Magee, 2 Ala. 253; Hill *v.*

The same rule applies where the sheriff holds money paid him

LaCrosse & M. R. Co., 14 Wis. 291; s. c., 80 Am. Dec. 783; Pollard *v.* Ross, 5 Mass. 319; Davis *v.* Seymour, 16 Minn. 210; Pawley *v.* Gains, 1 Overton (Tenn.) 208; Jones *v.* Jones, 1 Bland's Ch. (Md.) 443; s. c., 18 Am. Dec. 327, 342; Dubois *v.* Dubois, 6 Cow. (N. Y.) 944; Bowden *v.* Schatzell, 1 Bailey's Eq. (S. Car.) 360; s. c., 23 Am. Dec. 170.

A *fi. fa.* contains peremptory directions from the court to the sheriff to collect the money of defendant, and have it at the next term of court, subject to the order of court. An attachment sued out by a third party would have the effect of arresting the operation of the writ and enjoining its execution, as it would be to require the sherift to have the money subject to the attachment, instead of having it at court, according to the exigency of the execution. The business of a ministerial officer like the sheriff is to obey the directions of the process placed in his hands, and in doing so he should have the money levied under a *fi. fa.* at court, to be paid over to the plaintiff, without let or hindrance from any source, except that of a court of competent jurisdiction. Blair *v.* Cantey, Exr., 2 Spear L. (S. Car.) 34; s. c., 42 Am. Dec. 360.

A United States marshal is exempt from garnishment. Burrell *v.* Letson, 1 Strobh. (S. Car.) 239; Clarke *v.* Shaw, 28 Fed. Rep. 356.

"While money remains in the hands of the officer, it is in the custody of the law. It does not become the property of the judgment creditor till it is paid over, and consequently is not liable to be attached as his. The writ of attachment cannot supersede the execution or release the sheriff from a literal compliance with its command, which requires him to bring the money into court, so that it may be subject to its order. Cases frequently occur in which the right to receive the proceeds of a judgment is contested, and in which the decision of the court is necessary as a guide to the officer." Dawson *v.* Holcomb, 1 Ohio 275; s. c., 13 Am. Dec. 618. And see Zurcher *v.* Magee, 2 Ala. 253, 255.

In Vermont, however, it is *held* that a sheriff having collected money on an execution thereby becomes so indebted to the creditor that the latter may maintain an action therefor as for money had and received, and that therefore such officer is liable to garnishment as the debtor of the execution creditor. Hurlburt *v.* Hicks, 17 Vt. 193; s. c., 44 Am. Dec. 329.

But an officer cannot be charged for money collected upon execution on a judgment against one for damages for the wrongful seizure and detention of exempt property under an attachment. Stebbins *v.* Peeler, 29 Vt. 289; Lovejoy *v.* Lee, 35 Vt. 430.

A constable may be garnished in respect to the proceeds of an execution in favor of the defendant issued by a justice of the peace. Davis *v.* Mahany, 9 Vroom (N. J.) 104; Storm *v.* Adams, 56 Wis. 137.

In New Hampshire a sheriff may be charged as garnishee under the general provisions of the statute for money collected by him on an execution, although the execution creditor could not maintain an action therefor. Woodbridge *v.* Morse, 5 N. H. 519.

And in Connecticut, where the writ of execution commands the officer to pay the money collected thereon directly to the execution creditor, the officer is the agent of the creditor, and he is subject to garnishment for money thus received by him. New Haven Saw Mill Co. *v.* Fowler, 28 Conn. 103; Overruling Willis *v.* Pilkin, 1 Root (Conn.) 47, and Geary *v.* Shepard, 1 Root (Conn.) 544. But see Winton *v.* The State, 4 Ind. 321, decided under a statute requiring the officer receiving money on an execution to pay the same within twenty days to the person entitled thereto, unless payment thereof shall have been enjoined.

An officer who has received money in satisfaction of an execution cannot attach it in his own hands as property of the execution creditor. Turner *v.* Fendall, 1 Cranch (U. S. C. C.) 117; Thompson *v.* Brown, 17 Pick. (Mass.) 162; First *v.* Miller, 4 Bibb (Ky.) 311; Winton *v.* The State, 4 Ind. 321.

In Tennessee, however, *held* that money belonging to a judgment debtor in the hands of a sheriff, may be appropriated by him to satisfy an execution in his possession against such debtor.

Dolby *v.* Mullins, 3 Humph. (Tenn.) 437; s. c., 39 Am. Dec. 180; and see Payne *v.* Billingham, 10 Iowa 360.

But the contrary was held in Hardy

on the redemption of lands sold on execution.[1] But a sheriff may be garnished for a surplus remaining in his hands after fully satisfying an execution, as such surplus belongs to the execution defendant, and the officer's possession thereof is not regarded as official.[2] So, also, under a statute making sheriffs and constables subject to garnishment for "money of a defendant in their hands." A deputy sheriff who, at the instance of the mortgagee, has taken possession of mortgaged chattels, and sold the same under a power contained in the mortgage, is chargeable as the debtor of the mortgagor in respect to a balance from the proceeds of such sale remaining in his hands after satisfaction of the mortgage;[3] and likewise as to money seized by mistake under such mortgage.[4] So, too, a city marshal is chargeable as to money taken from a prisoner charged with larceny, at the suit a creditor of the prisoner, it not appearing that the arrest was fraudulently or otherwise unlawfully made.[5] But an officer is not chargeable in respect to money or property taken from a prisoner which is in no manner connected with the crime committed.[6]

*e. Clerks of Court and Justices of the Peace.*—The rule stated with reference to administrators, executors and sheriffs has been applied to clerks of court[7] and justices of the

*v.* Tilton, 68 Me. 195; s. c., 28 Am. Rep.

1. Lightner *v.* Steinagel, 33 Ill. 510; s. c., 85 Am. Dec. 292.

2. **Sheriffs Chargeable Whenever Possession Ceases to be Official.**—Tucker *v.* Atkinson, 1 Humph. (Tenn.) 300; s. c., 34 Am. Dec. 650; King *v.* Moore, 6 Ala. 160; s. c., 41 Am. Dec. 44; Pierce *v.* Carlton, 12 Ill. 358; s. c., 54 Am. Dec. 405; Lightner *v.* Steinagel, 33 Ill. 510; s. c., 85 Am. Dec. 292; Jacquett's Admr. *v.* Palmer, 2 Harr. (Del.) 144.

In Watson *v.* Todd, 5 Mass. 271, a U. S. marshal was *held* chargeable as to such surplus.

A master in chancery may be garnished in respect to money received as the proceeds of a sale of a land in partition proceedings, after final order of court has been made directing the payment thereof to the parties entitled to the same. Weaver *v.* Davis, 47 Ill. 235.

Money deposited with the sheriff by the defendant in a replevin suit to enable him to retain the property is not *in custodia legis;* no law of Missouri authorizing a sheriff in his official capacity to deliver replevined property to the defendant upon a deposit of money. Johnson *v.* Mason, 16 Mo. App. 271.

Funds in the hands of an ex-sheriff, consisting of fees due to and collected by him for an "ex-register of wills" are liable to an attachment in the hands of the former; both parties being out of office at the time the attachment was issued, they stood in the same relation to each other as any other creditor and debtor. Robertson *v.* Beall, 10 Md. 125.

3. Hoffman *v.* Wetherell, 42 Iowa 89.

4. Minthorn *v.* Hemphill, 73 Iowa 257.

5. Reifsnyder *v.* Lee, 44 Iowa 101; Fogg *v.* Worster, 49 N. H. 503. And see Patterson *v.* Pratt, 19 Iowa 358; Payne *v.* Billingham, 10 Iowa 360; Closson *v.* Morrison, 47 N. H. 482.

6. So *held* as to money and a watch taken from a prisoner charged with the crime of uttering a forged promissory note. Commercial Exchange Bank *v.* McLeod, 65 Iowa 665; Robinson *v.* Howard, 61 Mass. 257.

7. **Clerks of Courts.**—Drane *v.* McGavock, 7 Humph. (Tenn.) 132; Ross *v.* Clark, 1 Dall. (Pa.) 354; Overton *v.* Hill, 1 Murph. (N. Car.) 47; Alston *v.* Clay, 2 Hayw. (N. Car.) 171; Hunt *v.* Stevens, 3 Ired. (N. Car.) 365; Sibert *v.* Humphreys, 4 Ind. 480; Weaver *v.* Cressman, 33 N. W. Rep. (Neb. 1887) 478; Lord *v.* Collins (Me.), 9 Atl. Rep. 1887, 611.

A county clerk is not liable as gar-

peace.[1] But a clerk may be garnished in respect to money deposited with him in pursuance of law, in place of an undertaking on appeal, or that has been paid to him under a decree of a court of chancery, where the process issues from the same court as that of which the clerk is an officer.[2] And money collected by a justice of the peace on accounts against divers persons is not held by him in his character as magistrate, but as the agent of the person for whom the collections were made, and he is liable to garnishment in respect thereto.[3] So where money is taken from one by a sheriff and delivered to a justice in execution of a search warrant issued by such magistrate, the latter is chargeable as garnishee in respect thereto.[4]

*f. Assignees, Receivers and Trustees.*—Receivers, assignees under a general bankrupt law and under the insolvent laws of the different States, and trustees appointed by the court, are likewise within the doctrine above stated. A receiver cannot lawfully be sued, nor himself defend suits, without the authority of the court appointing him, and generally a court of chancery will not yield its own jurisdiction to a court of law for the purpose of trying, by garnishment proceedings, the question as to the appropriation of the fund in the hands of such officer.[5] Even where the bill under which the appointment was made has been dismissed, the legal consequence of which is to dispense with the functions of the receiver as a depositary of the parties to the legislation.[6] And as the court appointing a receiver retains its

nishee in any respect to money received by him in redemption of land from tax sale. Smith *v.* Finlen, 23 App. (Ill.) 156.

1. **Justices of the Peace.**—Hooks *v.* York, 4 Ind. 636; Sievers *v.* Woodburn Sarven Wheel Co., 43 Mich. 275.

2. Dunlap *v.* Patterson Fire Ins. Co., 74 N. Y. 145; s. c., 30 Am. Rep. 283; Wilburn *v.* Flannery, 15 Atl. Rep. 203 (Vt. 1888).

Money belonging to an absconding debtor in the hands of the clerk of a court of equity under a decree for the sale of land for the purpose of partition may, after an order of distribution, be attached and the clerk garnished by the debtor's creditors under the statutes of N. Car. Gaither *v.* Ballew, 4 Jones L. (N. Car.) 488; s. c., 69 Am. Dec. 763.

And the register of a court of chancery may be garnished as to surplus in his hands belonging to the execution defendant. Langdon *v.* Lockett, 6 Ala. 727.

3. Clark *v.* Boggs, 6 Ala. 809; s. c., 41 Am. Dec. 85.

4. Patterson *v.* Pratt, 19 Iowa 358.

In Corbyn *v.* Bollman, 4 S. & W. (Pa.) 342, court say that considerable doubt exists whether a justice of the peace, who has collected money on judgments rendered before him, can be charged as garnishee.

5. **Receivers Not Subject to Garnishment.**—Field *v.* Jones, 11 Ga. 13; Taylor *v.* Gillcan, 23 Tex. 508; Columbia Book Co. *v.* De Colyer, 115 Mass. 67; Tremper *v.* Brooks, 40 Mich. 333; Jackson *v.* Lahee, 114 Ill. 287; Farmers' Bank *v.* Beaston, 7 Gill & J. (Md.) 421; Adams *v.* Haskell, 6 Cal. 113; s. c., 65 Am. Dec. 491; County of Youba *v.* Adams, 7 Cal. 35; Nelson *v.* Connor, 6 Rob. (La.) 339; Wiswall *v.* Sampson, 14 How. (U. S.) 52, 65; Martin *v.* Davis, 21 Iowa 535.

But in Phelan *v.* Ganebin, 5 Colo. 14, it was *held* that the receiver of a railroad corporation engaged in the operation of such railway, may be charged as garnishee for money due an employe under such receiver; it appearing that such garnishment would in no way tend to disturb the rights of the receiver under the general orders of the appointing court.

6. Under such circumstances the re-

jurisdiction over him for the enforcement of all its orders until final discharge, and no other court can call him to account, he is none the less exempt from garnishment, after an order of payment to the principal defendant has been made.[1]

So assignees in bankruptcy cannot be garnished in respect to claims upon the fund in their hands.[2] And this is so even after a dividend has been declared and the assignee has been ordered to pay a specific sum to the principal defendant.[3] Likewise, assignees under the State insolvent laws are not chargeable,[4] nor are assignees under voluntary assignments for the benefit of creditors.[5] But if the title of the assignee is dependent upon a deed which is fraudulent as to creditors of his assignor, he will be subject to garnishment in respect to the property held by him in such assignment.[6]

ceiver is still the officer of the court, and both he and the fund in his hands are subject to the order of court, and it is the duty of the court to order the money or property turned over to him from whom it was wrongfully taken, without conditions, unless withheld from so doing by the claims of persons brought to the cognizance of the court according to the forms of chancery proceedings. Field *v.* Jones, 11 Ga. 413. And see Taylor *v.* Gillcan, 23 Tex. 508; Vorhees *v.* Sessions, 34 Mich. 99. The rule would probably be otherwise if the receiver had been garnished after order of court to redeliver the fund or property.

1. Tremper *v.* Brooks, 40 Mich. 333. But in New Hampshire a receiver may be charged as garnishee for money remaining in his hands after the termination of the equity proceedings. Willard *v.* Decatur, 59 N. H. 137.

2. **Assignees in Bankruptcy.**—*In re* Kohlsaat, 18 Nat. Bankruptcy Reg. 570.

3. Atkins *v.* Stradley, 1 N. W. Rep. 609. In *In re* Cunningham, 19 Nat. Bankruptcy Reg. 276, 281, LOVE, J., says: "Here the court of bankruptcy has declared a dividend, and determined specifically what each creditor is entitled to. It has ordered the assignee to pay a specific sum to the judgment debtor in the state court from which the process of garnishment issued. If the assignee failed to pay that sum, he would be liable to a personal action; why, thereupon, may he not be garnished? Why may not a personal judgment be rendered against him as garnishee for the amount of the dividend, since a personal action could be maintained by the judgment creditor against him for the same cause?

"There is, in my judgment, an insuperable difficulty in recognizing this view in the present case, growing out of the peculiar jurisdiction in bankruptcy. It cannot for a moment be doubted that the court of bankruptcy has exclusive jurisdiction of the bankrupt's estate, and of its administration from the time of the adjudication to the final discharge of the estate and the discharge of the assignee. This jurisdiction does not, by any means, cease with the order of distribution. It is clearly within the power of the court, and its duty, to see that the assignee pays over to the distributees the dividends awarded to them. The assignee failing to perform this duty, the court would punish him for contempt, order a suit upon his official bond, and refuse to give him a final discharge. This jurisdiction is exclusive. No other court can touch or bind the assets of the bankrupt, or authorize any suit against the assignee, who is the officer of the court. It follows that any action in any other tribunal, aiming to control the action of the assignee, or directly or indirectly compel the assignee to dispose of the assets or pay over money in his hands belonging to the estate, must be utterly without jurisdiction, and therefore null and void.

4. **Assignees Under Insolvent Laws.**—Colby *v.* Coates, 6 Cush. (Mass.) 558; Dewing *v.* Wentworth, 11 Cush. (Mass.) 499; Lord *v.* Meacham, 19 N. W. Rep. 346; Kimball *v.* Mulhern, 15 Ill. 205.

5. Haust *v.* Burgess, 4 Hughes (U. S.) 560.

6. **Assignees Liable When Assignment Void.**—The assignment being fraudu-

And trustees appointed by the court and holding funds subject to its control are not subject to the process.[1] But in the case of a trustee appointed under a decree of a court of chancery for the sale of real estate, the exemption is purely a matter of defence, of which the trustee must avail himself at some stage of the proceeding before final judgment.[2] And if the trustee fails to make such defence, the garnishee will be effectual to hold the distributive share of the debtor having a claim upon the fund in his hands which has been ascertained before the trial of the garnishment proceeding.[3]

**VIII. LIABILITY OF THE GARNISHEE—1. General Grounds Upon Which Liability Is Based.**—There are two general grounds common to every attachment system, viz, 1. That the garnishee must have in his possession, when garnished, property of the defendant capable of being seized and sold on execution:[4] 2. His liability, *ex contractu*, to the defendant, whereby the latter has a cause of action, present or future.[5]

lent and void as to a creditor of the assignor does not have the effect, so far as he is concerned, to place the property purporting to be assigned, or its proceeds, in *custodia legis*; for, as to him, the jurisdictional foundation of an assignment under and in accordance with the insolvent act is wanting. May *v.* Walker, 35 Minn. 194; Nat. Park Bank *v.* Lanahan, 60 Md. 477; Ferrall *v.* Farnen, 67 Md. 76; Dawson *v.* Coffey, 12 Oreg. 513; Vernon *v.* Upson, 60 Wis. 418; First Nat. Bank *v.* Knowles, 67 Wis. 373; Kimball *v.* Evans, 58 Vt. 655.

So where an assignee has taken possession of property under an assignment, and is summoned as garnishee before the same has been assented to by creditors, he may be charged. Brewer *v.* Pitkin, 11 Pick. (Mass.) 298.

1. **Trustees.**—Bentley *v.* Shrieve, 4 Md. Ch. Dec. 412; Cockey *v.* Leister, 12 Md. 124; 71 Am. Dec. 588; McPherson *v.* Snowden, 19 Md. 197, 233; Fenton *v.* Fisher, 106 Pa. St. 418; Thayer *v.* Tylar, 5 Allen (Mass.) 94; Richards, Merrimack etc. R. Co., 44 N. H. 127.

2. Groome *v.* Lewis, 23 Md. 137; s. c., 87 Am. Dec. 563.

3. Groome *v.* Lewis, 23 Md. 137; s. c., 87 Am. Dec. 563.

4. Drake on Attachment, § 463; Price *v.* Brady, 21 Tex. 614.

**The whole scope** and operation of garnishment is to subject legal demands recoverable only by the debtor or property of his which is subject to execution if the sheriff could get possession of it. Cook *v.* Walthall, 20 Ala. 334; Toomer *v.* Randolph, 60 Ala. 356, 361; Golden *v.* Pierson, 42 Ala. 370; Henry *v.* Murphy, 54 Ala. 246; Hassie *v.* G. I. W. V. Congregation, 35 Cal. 378.

**Garnishment proceedings bind** just such property, money and credits, and only such, as belong to the defendant and are not exempt from attachment and garnishment and are in the hands of the garnishee or owing by him to the defendant at the time when the garnishee notice is served, and plaintiff in garnishment proceedings can never obtain a garnishment lien upon more in the hands of the garnishee than the defendant owns. Johnson *v.* Brant, 38 Kan. 754.

Where the effects of the debtor in the hands of the garnishee consist of works of art, proof of the money value of the the property is necessary to support a judgment against a garnishee. Keeper *v.* Moore, 33 N. W. Rep. 499 (Mich.) 1887. Drake on Attachments (6th ed.), § 463; Henry *v.* Murphy, 54 Ala. 246.

5. The garnishing creditor stands in no better situation in relation to the subject of the garnishment than his debtor, and cannot recover unless the principal defendant could in an action by him against the garnishee. Harris *v.* Phœnix Ins. Co., 35 Conn. 310; Nesbitt *v.* Ware, 30 Ala. 68; Smith *v.* Davis, 1 Wis. 447; s. c., 60 Am. Dec. 390; Richardson *v.* Lester, 83 Ill. 55; Carson *v.* Allen, 2 Pinn. (Wis.) 457; s. c., 2 Chand. (Wis.) 123; 24 Am. Dec. 148.

**Claims Arising in Tort.**—The liability

Unless specially authorized by statute, the demand due to the defendant, to be subject to garnishment, must be such as he could reach in an action at law,[1] whatever else under particular statutes authorize his being charged, as is the case in some States in respect to real estate or *choses in action*.[2] These two general grounds are fully embraced in any system which provides that one having in his possession "goods, effects or credits" may be charged as garnishee. The addition of the words "money, chattels, property or rights," singly or together, are not supposed to enlarge in legal construction the basis as above stated.[3]

There must also, except in case of fraud, be privity of contract, express or implied, and of interest between the garnishee and the defendant, sufficient to support a right of action by such defendant against the garnishee,[4] or an equitable claim against him to recover the property for his own use, either at the present

of the garnishee must be *ex contractu*, as contradistinguished from liability for tort. See VIII., 5, *infra.*; also notes 6 and 7, *infra.*

**1. Demands Enforceable at Law.**—The demand must arise *ex contractu*, and be of such a nature that an "action at law" would lie in contradistinction to "equity." Harrall *v.* Whitman, 15 Ala. 135; Loby *v.* Labuzan, 21 Ala. 60; s. c., 56 Am. Dec. 237, 239; Swan *v.* Summers, 19 W. Va. 115; Johnson *v.* Brant, 17 Pac. Rep. (Kan.) 794; Farwell *v.* Chambers, 62 Mich. 316; Harrall *v.* Whitman, 19 Ala. 138; Hassie *v.* G. I. W. V. Congregation, 35 Cal. 378; Hoyt *v.* Swift, 13 Vt. 129; O. R. & N. Co. *v.* Gates, 10 Oreg. 514.

Only such demands as the debtor, by an *action at law* in his own name, can enforce, the creditor may reach and condemn by this remedy; that is such moneyed demands as might be recovered in action of debt or *indebitatus assumpsit*. Powell *v.* Sammons, 31 Ala. 552; Golden *v.* Pierson, 42 Ala. 370. And maintain the suit in his own name. Avery & Son *v.* Lockhard, 75 Ala. 530; 85 Fla. 493.

Under a statute, Code Fla. 1885, § 2976, providing that the process may be served upon those "who are in anywise indebted to a defendant," and that the person thus served shall "answer upon oath what amount he or she is indebted to the defendant in the attachment," *held* that only such indebtedness could be reached as could be enforced in a court of law in an action brought by the principal defendant against the garnishee. May *v.* Baker, 15 Ill. 89.

Equitable demands cannot be reached, and if a legal demand exists, complicated and involved with matters strictly and purely of equitable cognizance, which must be adjusted if full and complete justice is done, the parties will be remitted to a court of equity. Harris *v.* Miller, 71 Fla. 32; Henderson *v.* Ala. Gold Life Ins. Co., 72 Fla. 32.

2. See VIII., 2, *post.*

3. Drake on Attach. (6th ed.), § 463.

Where the statute states a ground for garnishment to be, "any goods, effects or credits of the principal defendant be *entrusted* or *deposited* in the hand or possession of the trustee," garnishment may be had, although direct levy of attachment could have been made. Brown *v.* Davis, 18 Vt. *201.

In Massachusetts the statute is that "where the property is *entrusted* or *deposited* in the hands of the trustee," the same cannot be attached by the ordinary process of law. Burlingame *v.* Bell, 16 Mass. 320.

4. Drake on Attach., § 485: Atwood *v.* Hale, 17 Mo. App. 81; Brigden *v.* Gill, 16 Mass. 522; McIlvane *v.* Lancaster, 42 Mo. 96; Wright *v.* Foord, 5 N. H. 178. See VII., 4, b, *post.*

The mere possession of property without any claim to hold it against the owner by virtue of any contract would not seem to be sufficient to hold one as trustee. Skowhegan Bank *v.* Farrar, 46 Me. 293. See also VII., 4, d.

A debt due one as assignee of a chose in action cannot be reached by garnishment unless the debtor has promised to pay the debt to the assignee, there being no privity of contract between him and the assignee of his creditor. Folsom *v.* Haskell, 11 Cush. (Mass.) 470.

or some future time,[1] although in case where a demand would first have to be made by the defendant before bringing suit, such debtor may be garnished, although such demand has not been made, the issuing of the process being considered a substitute for such demand.[2]

An attaching creditor does not acquire any greater rights against the garnishee than the defendant himself possesses,[3] except in case of fraudulent transfer.[4] The garnishee will not be placed in a worse position than if the action was enforced by the defendant,[5] or than that occupied by him prior to the attachment.[6]

Where there are exceptions to the rules above stated, and the attaching creditor may garnish a debtor of the principal defendant when such defendant could not himself have brought the action,[7] there being no fraud or defence to the action by the garnishee, the costs allowed such garnishee are supposed to recompense him for any inconvenience it may cause him.[8]

A garnishee should, under no circumstances, when free from blame on his part, be placed in such a position that he is liable to be called upon a second time to pay the same indebtedness; consequently, the judgment against him should be in such form as to secure him from such a liability.[9]

A trespasser in possession of another's goods cannot be charged as garnishee in the suit of a creditor against the owner thereof. Despatch Line *v.* Bellamy Mfg. Co., 12 N. H. 205; s. c., 37 Am. Dec. 203.

1. Huot *v.* Ely, 17 Fla. 775; Webster Wagon Co. *v.* Peterson, 27 W. Va. 314; Skowhegan Bank *v.* Farrar, 46 Me. 293.

2. Wagon Co. *v.* Peterson, 27 W.Va. 334, 335; Coffin *v.* Coffin, 7 Me. 298; Waples on Attach. 218; Quigg *v.* Kitridge, 18 N. H. 139; Corby *v.* Powers & Tr., 18 Vt. 587.

3. Harris *v.* Phœnix Ins. Co., 35 Conn. 310; Myer *v.* Liverpool L. & G. Ins. Co., 40 Md. 595; Tupper *v.* Cassell, 45 Miss. 352; Richardson *v.* Luster, 83 Ill. 55; National Bank *v.* Staley, 9 Mo. App. 146; Fenton *v.* Block, 10 Mo. 536; Fitzgerald *v.* Hollingsworth, 14 Neb. 188; Waldron *v.* Wilcox, 13 R. I. 518; Oregon R. & N. Co. *v.* Gates, 10 Oreg. 514; United States *v.* Robertson, 5 Pet. (U. S.) 641; Nesbit *v.* Ware, 30 Ala. 68.

4. Lamb *v.* Stone, 11 Pick. (Mass.) 527; Eyerman *v.* Krickhaus, 7 Mo. App. 455; United States *v.* Vaughan, 3 Binn. (Pa.) 394; Henry *v.* Murphy, 54 Ala. 246; Lee *v.* Tabor, 8 Mo. 322; Lackland *v.* Goresche, 56 Mo. 267. See also VIII., 5, *post.*

5. Drake on Attach. (6th ed.), § 462.

6. Curtiss *v.* Alvord, 45 Conn. 569; Daniels *v.* Clark, 38 Iowa 556; Tupper *v.* Cassel, 45 Miss. 352; Citizen's Bank *v.* Payne, 21 La. An. 380; Williams *v.* Housel, 2 Iowa 154.

7. Whitney *v.* Monroe, 19 Me. 42; s. c., 36 Am. Dec. 732.

As where a debt due to two joint creditors (not partners) is garnished and only one of such creditors is made party defendant. See VIII., 7. Or where a demand must be made by the defendant in attachment before he can bring suit. See note 2, *supra.* Or in case of fraud against the creditor of the defendant. See VIII., 13, *post.*

Garnishee is not chargeable for tort against the defendant. Bates *v.* Forsyth, 69 Ga. 365. Nor is he liable as bailee for *chose in action* in his possession. Tingley *v.* Dolby, 13 Neb. 371.

It is also a general rule that, in the absence of fraud, the attaching creditor has no greater rights against the garnishee than the defendant would himself have in case of an action by him against the garnishee. Drake on Attach., § 456–660.

8. Whitney *v.* Monroe, 19 Me. 42; s. c., 36 Am. Dec. 732.

9. Murdock *v.* Daniels, 58 Miss. 411. See XI., sub-title JUDGMENT, *post.*

Having been properly summoned,[1] and the court having jurisdiction of the parties to the suit, and the property or debt sought to be condemned,[2] the garnishee is liable only for such property in his possession or for debts due to the defendant at the time of service of process; and he is not liable for property of the defendant coming into his possession or for obligations incurred in favor of the defendant after service, unless the statute so declares.[3] Some liability must exist at the time the process

1. A garnishee must be served with a copy of the order of attachment, together with a notice specifying the debt or demand sought to be garnished; otherwise no lien will be created. Munderson *v.* Specker, 79 Ky. 509.

The garnishee cannot be held if the original attachment served upon him is void, although there may have been personal service upon the principal defendant, and judgment rendered against him. Greene *v.* Tripp, 11 R. I. 424.

So the garnishee cannot be made liable unless the garnishing creditor has done all that is required by the statute to make him liable. Greene *v.* Tripp, 11 R. I. 424.

One cannot be charged as garnishee unless he has been legally summoned, even though he appear and answer interrogatories. McDonnald *v.* Moore, 65 Iowa 171.

2. Wales *v.* Alden, 22 Pick. (Mass.) 248; Field *v.* Malone, 102 Ind. 251; Adams *v.* Scott, 104 Mass. 166, Sawyer *v.* Thompson, 4 Fost. (N. H.) 516.

It is the levy on the debt or property in the hands of the garnishee which gives the court jurisdiction. Tillinghast *v.* Johnson, 5 Ala. 514.

In cases where the principal defendant is not before the court, the garnishee must, for his own protection, enquire whether the court has jurisdiction over the defendant or himself. McGuire *v.* Pitts Sons, 42 Iowa 538, *citing* Drake on Attach., §§ 593, 595; Noble *v.* Thompson Oil Co., 79 Pa. St. 354.

In Wells *v.* East Tenn., Va. & Ga. R. Co., 74 Ga. 548, the railroad was incorporated in both Georgia and Tennessee; the debt due from the garnishee, the railroad company, was performed in Tennessee; the court said: "The very foundation for the attachment is wanting; the debtor has neither effects nor a debt due to him from the garnishee in this State. He has not, and never had here, any effects on which an attachment could be levied. There is nothing to which the jurisdiction of this court could attach."

**Property outside of the State** is not subject to garnishment. Montrose Pickle Co. *v.* Dodson & Hills Mfg. Co., 40 N. W. 705; Fitch *v.* Bower, 11 Atl. Rep. (N. J.) 330; Bates *v.* C. M. & St. P. R. Co., 60 Wis. 296; s. c., 50 Am. Rep. 369; Western R. R. Co. *v.* Thornton, 60 Ga. 300; Sutherland *v.* Second Nat'l Bank, 78 Ky. 250; Wheat *v.* P. C. & Ft. D. R. Co., 4 Kan. 370, 378; I. C. R. R. Co. *v.* Cobb, 48 Ill. 402; Lawrence *v.* Smith, 45 N. H. 533; Tingley *v.* Bateman, 10 Mass. 343; Clark *v.* Brewer, 6 Gray (Mass.) 320; Young *v.* Ross, 11 Fost. (N. H.) 201. *Contra*, Childs *v.* Digby, 21 Pa. St. 23. But this case disapproved in Penn. R. R. Co. *v.* Pennock, 51 Pa. St. 244.

That the court must have jurisdiction of the garnishee and of the property, see VII., 1, *supra*.

3. Kiggins *v.* Woodke, 34 N. W. Rep. (Iowa) 789; Fountain *v.* Smith, 30 N. W. Rep. (Iowa) 635; Armington *v.* Screws, 9 Ired. (N. Car.) L. 42; s. c., 49 Am. Dec. 408; Williams *v.* A. & K. R. R. Co., 36 Me. 201; Norton *v.* Soule, 75 Me. 385; Hoffman *v.* Fitzwilliam, 81 Ill. 521; Bliss *v.* Smith, 78 Ill. 359; Sievers *v.* Woodburn S. W. Co., 43 Mich. 275; Marts *v.* Detroit F. M. Ins. Co., 28 Mich. 201; Hobson *v.* Dinan, 48 Mich. 612; O'Brien *v.* Collins, 124 Mass. 98; Peterson *v.* Loring, 135 Mass. 397; Hancock *v.* Colyer, 99 Mass. 187; s. c., 95 Am. Dec. 730; Haffey *v.* Miller, 6 Gratt. (Va.) 454; B. & O. R. R. Co. *v.* Gallahue's Admrs. 12 Gratt. (Va.) 665; Strauss *v.* R. R. Co., 7 W. Va. 368; Roby *v.* LaBuzan, 21 Ala. 60; Bean *v.* Miss. Union Bank, 5 Rob. (La.) 333; Biggs *v.* Kouns, 7 Dana (Ky.) 405; Norris *v.* Burgoyne, 4 Cal. 409; Davenport *v.* Swan, 9 Humph. (Tenn.) 186; Morris *v.* U. P. R. R. Co., 56 Iowa 135; Drake on Attach. (6th ed.), § 4519.

Under a statute making the garnishee liable if it appear "that at or after the

is served in order to charge him, but that liability may be greatly modified, or even discharged by subsequent events, for the garnishee is entitled to set off against his liability as garnishee whatever claims he may have against the principal defendant which at the time of the trial have been liquidated, and the amount made capable of being definitely ascertained.[1]

The garnishee is not liable for defendant's property in his possession, or for debts due to the defendant, unless it is known by him to be the property of the defendant.[2] Where property is in the possession of the garnishee, but under the control also of another person, and after service of process upon the principal, it is delivered out of the possession of the garnishee before, by reasonable diligence, he can inform such person of the attachment, he is not liable.[3] What is a reasonable diligence depends upon the peculiar facts of each case.

The garnishee's liability to the plaintiff in attachment is ascertained by his answer, which must show liability affirmatively, or

service of the garnishment he was possessed of property of the defendant or was indebted to him," *held* that the words "or after" were intended to embrace the case of debts not payable until after the service of the notice. Martin *v.* Gayle, 2 Disney (Ohio) 86.

"Debts to become due" may be satisfied by limiting the expression to debts then existing payable at a future day. Baltimore & O. R. Co. *v.* Gallahue, 12 Gratt. (Va.) 665.

A statute made the garnishee chargeable for "money, goods, chattels, rights or credits in his possession at the time of the service of the writ upon him *or any time after*." *Held*, that he is chargeable for all that was due from him at the time judgment was rendered, Palmer *v.* Noyes, 45 N. H. 174, changing the rule in Smith *v.* Boston, C. & M. R. Co., 33 N. H. 337, in which it was *held* that the garnishee could only be subjected to liability for his indebtedness up to the time of disclosure.

**Time of Answer.**—The garnishee was *held* to be liable for money and property received up to the time of answer in Edgerley *v.* Sanborn, 6 N. H. 397; Newell *v.* Ferris, 16 Vt. 135; Spring *v.* Ayer, 23 Vt. 516; Franklin F. Ins. Co. *v.* West, 8 W. & S. (Pa.) 350; Sheetz *v.* Hobensack, 20 Pa. St. 412.

**Return Day.**—Garnishment binds money received between the date of service and the return day. Columbus Ins. Co. *v.* Hirsh, 61 Miss. 74; Gause *v.* Cone, 61 Miss. 74.

**Time of Trial.**—In Glenn *v.* Boston & S. Glass Co., 7 Md. 287, the garnishee was *held* to be liable for property in his possession at the time of trial.

In New York, where garnishment, as it elsewhere exists, is unknown, but where the service of attachment upon a party having property of the defendant in his possession is in effect a garnishment of the property, it was *held* that an attachment took effect although the goods, for which the factor had a bill of lading, did not come within the county for over two months and in the meantime another attachment had been laid after the goods were within the county. Patterson *v.* Berry, 10 Abb. Pr. (N. Y.) 82; s. c., 5 Bos. (N. Y.) 518. *Compare* Grant *v.* Shaw, 16 Mass. 341; Andrews *v.* Ludlow, 5 Pick. (Mass.) 28.

1. Some liability must exist at the time of garnishment, but it may be modified or even discharged by subsequent events. As for instance liens for suretyship or a lien for a general balance, bills of exchange whose payment is uncertain, or a judgment against the principal defendant obtained by the garnishee after service of process, which he can lawfully set off against his indebtedness to the defendant, as was the case in Smith *v.* Stearns, 19 Pick. (Mass.) 20; Eddy *v.* O'Hara, 132 Mass. 56.

2. Drake on Attach. (6th ed.), § 482; Bingham *v.* Lamping, 26 Pa. St. 340; Hamilton *v.* Plummer, 34 N. W. Rep. (Mich.) 278.

3. Laudry *v.* Chayrat, 58 N. H. 89; Bates *v.* C. M. & St. P. Ry. Co., 60 Wis. 296; s. c., 50 Am. Rep. 369; Lyon

by evidence *aliunde* sufficient to charge him,[1] the burden of proof being upon the plaintiff.[2]

**2. In Respect to Character of Property Held.**—Property of the principal defendant in the possession of the garnishee, and for which he may be charged, must be such as comes within the terms of attachment and garnishment statutes,[3] and would, if in

*v.* Russell, 72 Me. 519; Jordan *v.* Jordan, 75 Me. 100.

1. See X., 1–5, *infra.*

2. Porters *v.* Stevens, 9 Cush. (Mass.) 530; Richards *v.* Stevenson, 99 Mass. 311; Lane *v.* Felt, 7 Gray 491; Driscoll *v.* Hoyt, 11 Gray 404; Lomerson *v.* Huffman, 1 Dutch. (N. J.) 625; Williams *v.* Housel, 2 Iowa 154; Forwell *v.* Howard, 26 Iowa 381; Reagan *v.* Pacific R. Co., 26 Mo. 30; Karnes *v.* Pritchard, 36 Mo. 135; Caldwell *v.* Coates, 78 Pa. St. 312.

3. See V., 1, *supra.*

An execution in the hands of a sheriff is not within the statute. Sharp *v.* Clark, 2 Mass. 91.

**Books of Account.**—Debts are not within the meaning of the terms "property" or "effects" in the statute, but books of account would be. Ide *v.* Harwood, 30 Minn. 191. Attaching books of account does not bind the debtor who is on such books. That can only be done by garnishment of such debtor. Ide *v.* Harwood, 30 Minn. 191.

**Chattel Mortgage.**—A chattel mortgage previous to foreclosure confers no title or interest in the property covered by it on the mortgagee, which is subject to levy and sale on execution against him. Nor has the court any jurisdiction in proceedings supplemental to execution under the provision of title 2, ch. 3, of the Oregon code of civil procedure, to direct the foreclosure of such a mortgage and the application of the proceeds towards the satisfaction of the judgment against the mortgage upon which the execution issued. Knowles *v.* Herbert, 11 Oreg. 54.

**Shares of Stock.**—At common law shares of stock in an incorporated company cannot be levied on by an attachment. The statutes of Missouri have not changed that rule, but under the statute relating to execution they may be seized and sold by the sheriff. Foster *v.* Potter, 27 Mo. 525.

Stock in a corporation is subject to attachment by garnishment only when specially authorized, or the statutes are broad enough to include it. Titcomb *v.* Union M. & F. Ins. Co., 8 Mass. 326. *Held*, not subject to attachment in Haley *v.* Reid, 16 Ga. 437; Ross *v.* Ross, 25 Ga. 297; Foster *v.* Potter, 37 Mo. 525; Planters & Merchants' Bank *v.* Leavens, 4 Ala. 753.

Shares of stock in a building and loan association *held* to come within the terms of a garnishment statute which includes "money due." And this is so whether or not notice has been given that the stock is to be withdrawn. Atwood *v.* Dumas, 21 N. E. Rep. (Mass.) 236.

Where, under a statute, "stocks or interest in stocks" belonging to a defendant in suit may be attached, the interest of a stockholder in the property of a private corporation represented by certificates of shares registered in his name, may be reached by garnishment process served upon the corporation. Norton *v.* Norton, 43 Ohio St. 509.

See also article FOREIGN ATTACHMENT, *ante.* p. 310.

Equitable or executory right or interest in corporate stock is not attachable under the Rhode Island statutes. Lippitt *v.* American Wood Paper Co., 15 R. I. 141; s. c., 2 Am. St. Rep. 886. *Contra*, Middletown Savings Bank *v.* Jarvis, 33 Conn. 372; Foster *v.* Potter, 37 Mo. 525.

The corporation is not debtor to the stockholders by reason of their owning shares, and should not be garnished as such, though there has been conflict on this point in decisions. See article FOREIGN ATTACHMENT, *ante*, p. 310.

A private corporation holds its property in trust for the benefit of its stockholders, hence a non-resident stockholder in a corporation has property within the State, within the meaning of section 70 of the Ohio code. National Bank of London *v.* Lake Shore & M. S. R. Co., 21 Ohio St. 22.

**Shares Owned Out of the State.**—See article FOREIGN ATTACHMENT, *ante*, p. 311.

**Real Estate.**—Without express statutory provision, one cannot be made liable as garnishee in respect to real estate of the defendant in his possession.

Plummer *v.* Roundlett, 42 Me. 365; Stedman *v.* Vickery, 42 Me. 132; Bissell *v.* Strong, 9 Pick. (Mass.) 562; Seymour *v.* Kramer, 5 Iowa 285. Even though it be held by a fraudulent conveyance. Baxter *v.* Currier, 13 Vt. 615; How *v.* Field, 5 Mass. 390; Risely *v.* Wells, 5 Conn. 431.

He may, however, be indebted to the principal by reason of real estate in his hands in such a manner as to render him chargeable. Wright *v.* Ford, 7 N. H. 590.

**Choses in Action in Possession of Bailee.**—Under a statute providing that to charge one as garnishee he must have in his hands or possession "money, goods, chattels, rights or credits" of the principal debtor. *Held*, that by money, rights or credits is meant cash in the hands of the garnishee or debts due from him belonging to the principal debtor, and that the possession of a note belonging to another received by one as security for a liability assumed for the owner thereof as surety, would not make such person the debtor of the owner of such note until he had received money upon it or had become liable therefor in some other way. Sargeant *v.* Lelland, 2 Vt. 277.

"Goods and chattels" do not include a mere chose in action as a debt or as a claim on another for money due. Kirkland *v.* Brune, 31 Gratt. (Va.) 126.

It has been often *held* that choses in action, as notes, drafts, checks, etc., uncollected, which have been deposited with another to be thereafter collected, do not render him liable to be charged under the trustee process. Moore *v.* Goddard, 17 N. E. Rep. (Mass.) 535; Lupton *v.* Cutter, 8 Pick. (Mass.) 298; Lane *v.* Felt, 7 Gray (Mass.) 491; Hancock *v.* Colyer, 99 Mass. 187; Levisohn *v.* Wagner, 76 Ala. 412; Pearce *v.* Shorter, 50 Ala. 318; Morston *v.* Carr, 16 Ala. 325; Jones *v.* Norris, 2 Ala. 526; Hopkins *v.* Ray, 1 Met. (Mass.) 79; New Hampshire I. F. Co. *v.* Platt, 5 N. H. 193; Howland *v.* Spencer, 14 N. H. 530; Fuller *v.* Jewett, 37 Vt. 473; Bowker *v.* Hill, 60 Me. 172; Grosners *v.* Farmers & Mechanics' Bank, 13 Conn. 104; Moore *v.* Pillow, 3 Humph. (Tenn.) 448; Allen *v.* Erie City Bank, 57 Pa. St. 129; Wilson *v.* Albright, 2 Greene (Iowa) 125; Deacon *v.* Oliver, 14 How. (U. S.) 610; Price *v.* Brady, 21 Tex. 614; Ellison *v.* Tuttle, 26 Tex. 283; Drake on Attach. (6th ed.), § 481.

Indorsement of check "for collection" or for deposit does not constitute bank a debtor until its collection. But there is an exception. National Commercial Bank *v.* Miller, 77 Ala. 168.

"Personal property in the hands of a garnishee in respect to which he may be charged, must be such as is capable of being seized and sold under execution. . . Under our statutes choses in action are not liable to levy and sale under an execution." Price *v.* Brady, 21 Tex. 614.

A check on a bank is within the rule even though it be presented and paid before answer is made. It is contingent in so far as it may never be paid. Knight *v.* Bowley, 117 Mass. 551; Hancock *v.* Colyer, 99 Mass. 187; s. c., 96 Am. Dec. 730; Lane *v.* Felt, 7 Gray (Mass.) 491.

If, however, the transaction between the parties is such as to create a debt due absolutely, whether the security held be good or not, the garnishee would then be charged. Hancock *v.* Colyer, 99 Mass. 187; s. c., 96 Am. Dec. 730; Knight *v.* Bowley, 117 Mass. 551.

When collected he is liable as trustee on process served after the collection has been made. Hancock *v.* Colyer, 103 Mass. 396. And where such collections to be made are placed in a bank by the trustee (garnishee), and he is credited with such amount *conditioned* that they will be collected in due course, is such conditional credit such a payment as will support the trustee process? C. ALLEN, J., says: "Until the bank was under a legal obligation to pay him there was no pecuniary obligation on his part to the defendant." Moore *v.* Goddard, 17 N. E. Rep. (Mass.) 535.

But bank bills which are current as money do not come within the restriction. Morrill *v.* Brown, 15 Pick. (Mass.) 173; Lovejoy *v.* Lee, 35 Vt. 430.

Claims were sent for collection, and contrary to directions the proceeds were paid to a creditor of the person sending the claims. *Held*, the collector was subject to garnishment for the same at the suit of other creditors of person sending the claim. Felch *v.* Eau Pleine Lumber Co., 58 Wis. 431.

A garnishee who answered, "I have under my control notes, judgments and other evidences of indebtedness" of the debtor, is not liable under the Nebraska statute unless he has converted some of

the possession of the principal defendant, be capable of being seized and sold on execution.[1]

**3. Capacity in Which Property Is Held.**—If the demand of the defendant be one for which garnishment would properly lie were it not for the question of the capacity in which it is held by the garnishees, such garnishee is liable if the defendant himself could maintain an action at law against him,[2] even though he would

the securities to his own use. Tingley *v.* Dolby, 13 Neb. 371.

**Bailee of Chose in Action Subject to Garnishment.**—Statutes relating to garnishment and attachment are *in pari materia* and the latter may be considered in aid of the construction of the former. Under the latter statute a draft payable to the debtor *may be seized on attachment*, and the officer (if he cannot sell it on execution or under order of the court) has ample authority to collect it. So an unaccepted sight draft in favor of the defendant in attachment and in the hands of the garnishee, bought by them with defendant's money, is subject to garnishment. Storm *v.* Cotzhausen, 38 Wis. 139.

In Missouri the statute regulates the manner of attaching evidences of indebtedness and the garnishee has right to sue for and collect bills and notes, evidences of debt in his possession belonging to the defendant until an order is made by the court or the judge, in vacation, requiring such choses in action to be delivered to the sheriff or a receiver appointed under the statute. Bank of State of Mo. *v.* Bredow, 31 Mo. 523.

Section 2423 of Mississippi code of 1880 authorizes an officer having in his hands for service a writ of attachment "to seize the books of account and other evidences of indebtedness belonging to the defendant, and to summon as garnishees all persons thereby appearing to be indebted to the defendant," and provides that "all debts and choses in action attached shall be bound by such attachment from the date of the service thereof." Section 2424 provides that "in case of any levy on the rights, credits and choses in action of the defendant, the officer shall seize and take into his possession the books of account and all other evidences of indebtedness, if the same can be had, and shall summon all persons alleged to be indebted to the defendant, or to have effects of the said defendant's in their hands." *Held*, that under these provisions, (1) the seizure of books of account and choses in action creates no lien in favor of the attaching creditor, but the lien is acquired only by service of notice upon the garnishee; (2) the officer (though authorized to do so) is not required to summon as garnishee all persons who by the books seized appear to be indebted to the defendant, but only such as may be "alleged" to be so indebted; and (3) where the same chose in action has been seized under two writs of different creditors and the debtor summoned, as garnishee, under both, the creditor who first suggested the indebtedness and first obtained service on the garnishee is entitled to the money collected from him, if both have judgments. Boone *v.* McIntosh, 62 Miss. 744.

In Minnesota it is *held* that a promissory note in an attorney's hands for collection is subject to garnishment, no reference being made either to statute or precedent. Trunkey *v.* Crosby, 33 Minn. 464.

If a garnishee hold promissory notes which are the property of the principal defendant and surrenders the same at the suit of a creditor he will do so at his own risk, and unless it appears that the promissory note was surrendered subject to the payment of the debt in the garnishment proceeding he will be liable for the amount due upon the same when they are shown to be good. Stevens *v.* Dillman, 86 Ill. 233.

1. See VII., 7, *supra*.

2. McLaughlin *v.* Swan, 18 How. (U. S.) 217; Gassett *v.* Trout, 4 Met. (Mass.) 486.

**Dividend.**—These reasons are applicable to a dividend in the hands of an assignee. Colby *v.* Coates, 6 Cush. (Mass.) 558; Coppell *v.* Smith, 4 T. R. 312. And Grant *v.* Hawding, in note; *In re* Bridgman, 2 Nat. B'k Reg. 252; Gilbert *v.* Lynch, 17 Blatchf. (U. S. C. C.) 403.

This rule applies to trustees not under order of court, and they are not liable to garnishment for the debt of the *cestui que trust*. Hall *v.* Williams, 120 Mass. 344; Hinckley *v.* Williams, 1 Cush.

(Mass.) 490; Corson *v.* Corson, 6 Allen (Mass.) 397; Luckland *v.* Gasesche, 56 Mo. 267; McIvane *v.* Lancaster, 42 Mo. 96; Bunfield *v.* Wiggins, 58 N. H. 155; Richards *v.* Merrimac R. Co, 44 N. H. 127; Haust *v.* Burgess, 3 Hughes (U. S.) 560; Palmer *v.* Noyes, 45 N. H. 174; Kelley *v.* Whiting, 51 How. Pr. (N. Y.) 201; Thurber *v.* Blank, 50 N. Y. 80; Rich *v.* Reed, 22 Me. 28. Unless such *cestui que trust* can revoke his authority by a demand of the property, and upon a refusal to surrender it, be entitled to bring an action against him in his own name. Eastbrook *v.* Earle, 97 Mass. 302; Haskell *v.* Haskell, 8 Met. (Mass.) 545; Watkins *v.* Otis, 2 Pick. (Mass.) 88; Thompson *v.* Stewart, 3 Conn. 171; Edson *v.* Trask, 22 Vt. 18; Palmer *v.* Noyes, 45 N. H. 174; Groom *v.* Lewis, 23 Md. 137.

Property of *cestui que trust* has been *held* not liable to garnishment even after it has come from the hands of a trustee into the hands of the attorney for defendant, if by the deed of trust it was given for a specific purpose. White *v.* White, 30 Vt. 338. See also Picquet *v.* Swan, 4 Mason (U. S.) 443.

Assent of *cestui que trust*, or creditors to be benefited, that they will receive the benefit of the trust is not essential. Rogers Locomotive Works *v.* Kelley, 88 N. Y. 234; Van Winkle *v.* Iowa Iron etc. Co., 56 Iowa 245, *Contra*, Cox *v.* Reeves, 78 Ga. 543.

Where a trust is created for the benefit of a third person, and the trustee is vested with a discretion as to the time, amount or manner of the payment to be made, he cannot be charged as garnishee. Banfield *v.* Wiggin, 58 N. H. 155; Richards *v.* R. R., 44 N. H. 127; Palmer *v.* Noyes, 45 N. H. 174; White *v.* Jenkins, 16 Mass. 62.

Property which is in hands of trustee, but is still under the control of the person making the trust, is liable to be garnished for his debts. Kelley *v.* Roberts, 40 N. Y. 432. But not if his control be that of agent merely. Bank of Northern Liberties *v.* Jones, 42 Pa. St. 536; Jones *v.* Bank of Northern Liberties, 44 Pa. St. 253. And the testimony of such agent is admissible to prove the agency. Jones *v.* Bank of Northern Liberties, 44 Pa. St. 253; McCormac *v.* Hancock, 2 Pa. St. 310; Granite Nat. Bank *v.* Neal, 71 Me. 125.

A party cannot be charged as garnishee when his relation to the fund in his hands is such that he cannot take advantage of the statutory provision which gives him the right when garnished to appear and confess his judgment for the amount in his hands. Cockey *v.* Leister, 12 Md. 124; s. c., 71 Am. Dec. 588.

**Surplus** of money left over from the sale of property which has been placed in the hands of one to be sold and the proceeds applied to a particular purpose is the subject of garnishment. McLaughlin *v.* Swan, 18 How. (U. S.) 217; Casebolt *v.* Donaldson, 67 Mo. 308. See also VIII., 11, *post*.

When property has been conveyed by the principal defendant to the alleged trustee, and not purchased by the trustee, any balance of the same in the hands of the trustee, over and above the amount the defendant owed him, would be held by him without consideration, and would be attachable by prior creditors. Barker *v.* Osborne, 71 Me. 69.

Surplus in the hands of a trustee, due to the person creating the trust, who is also the principal defendant, is subject to garnishment. First Nat. Bk. of Plattsburg *v.* Brainerd, 28 Fed. Rep. (Vt.) 917.

**Rents and profits** of trust property, which are payable upon demand of *cestui que trust*, may be garnished. Knaefler *v.* Shaeve, 78 Ky. 297. *Compare* McIlvane *v.* Lancaster, 42 Mo. 96.

**Interest money** the same. Mathews *v.* Park, 1 Pittsburgh, Pa. 22; Park *v.* Mathews, 36 Pa. St. 28; 2 Grant (Pa.) 136.

Interest money due from a trustee to a spendthrift *held* not subject to garnishment. Prentice *v.* Pleasanton (Pa.), 8 Atl. Rep. 842.

A deed conveying personal property to trustees for the purpose of paying debts therein specified upon which the trustees have taken possession and proceeded to sell is a valid transfer though unrecorded. Clark *v.* Ward, 12 Gratt. (Va.) 440.

A garnishee who has only disclosed claims of creditors held under assignment wherein he has no personal interest, can be held, if at all, only upon proof of liability on the trial of the issue. Conway *v.* Ionia Circuit Judge, 46 Mich. 28; Van Winkle *v.* Iowa Iron etc. Co., 56 Iowa 245.

**Onus Probandi.**—Where the garnishee claims that the moneys of the judgment debtor, which he admits are in his hands, are effected by a trust, the *onus*

first have had to make a demand before bringing the action.[1] There are, however, exceptions to this rule, as in the case of fraudulent conveyance by the defendant,[2] or a debt of the garnishee which is not due at the time of answering.[3] Where the garnishee is in possession of defendant's property, which, from its nature, is not subject to attachment,[4] or when a debt due to joint creditors is attached for the debt of only one of them, the rule has no application.[5]

Where the law exempts the person in possession from garnishment, the debt cannot be reached, although the defendant might sue for it.[6]

**4. Possession Necessary to Charge Garnishee.**—To charge a garnishee for property of the defendant, it is absolutely essential that at the time of service of process, he should have it in his possession[7] within the State,[8] and that it is within the terms of the garnishment statutes, and known by him to be the property of the defendant.[9]

The mere possession of the property of another does not make him liable to the process if it is subject to direct levy of attachment,[10] except where the person in possession does something to

is on him to show the trust; and this cannot be shown by a deed of assignment made in another State, and not shown to have been valid anywhere. Frank *v.* Frank, 6 Mo. App. 589.

1. See VIII., 1, *supra.*

2. Wade on Attach., § 327; Fearey *v.* Cummings, 41 Mich. 376. See VIII., 5, *post.*

3. Branch Bank *v.* Poe, 1 Ala. 396. See VIII., 12, *post.*.

4. Clark *v.* Brown, 14 Mass. 271.

5. VIII., 7; Freeman on Ex. (2nd ed.), § 169.

6. Mayor *v.* Root, 8 Md. 95; s. c., 63 Am. Dec. 692; Dawson *v.* Holcomb, 1 Ohio 275; s. c., 13 Am. Dec. 618. See also VII., *supra.*

7. Kiggins *v.* Woodke, 34 N. W. Rep. (Ia.) 789; s. c., 42 N. W. Rep. (Ia.) 576; Folkerts *v.* Standish, 55 Mich. 463; Burrell *v.* Letson, 1 Strobh. (S. Car.) 239; Claim of Flandrow, 92 N. Y. 256. See VIII., 1.

8. See VIII., 1, 11.

Mass. Gen. Sts., ch. 142, § 21, provides that: "Persons having goods, effects or credits of the defendant entrusted or deposited in their hands or possession" may be garnished. A trunk in the vault of a bank was deposited for safe keeping merely, with the consent of the officers of the bank, who were *ignorant of its contents. Held*, the bank officers could not be charged as trustees, because it did not appear that the locked trunk contained any "goods, effects or credits" of the principal defendant, which were attachable. Bottom *v.* Clark, 7 Cush. (Mass.) 487. *Contra*, Loyless *v.* Hodges, 44 Ga. 647.

A package in the hands of a common carrier, and *in transitu, proved to contain money* of the principal defendant, was *held* subject to the trustee process. Adams *v.* Scott, 104 Mass. 165.

**Safe Deposit Companies.**—Not liable as garnishee. Gregg *v.* Nilson, 1 Leg. Gaz. Rep. 128; s. c., 8 Phil. (Pa.) 91. *Contra*, garnishment sustained as being necessary to enable sheriff to execute the writ. United States *v.* Graff, 67 Barb. (N. Y.) 304.

**Statutory Separate Estate of Wife**, as to whether it is liable to garnishment, see Long *v.* Walker, 84 Ala. 72; Jones *v.* Crews, 64 Ala. 368; Canley *v.* Blue, 62 Ala. 77; Lee *v.* Ryall, 68 Ala. 354; McMullen *v.* Lockwood, 64 Ala. 56.

9. See VIII., 1.

**Stockholder of corporation** having in his possession property or funds of such corporation, not having been declared a dividend, is liable as garnishee. Hughes *v.* Oregon Ry. Co. (Limited), 11 Oreg. 158.

10. "The words of the statute are: 'Every person having any goods, effects or credits of the principal defendant *entrusted* or *deposited* in his hands or possession, may be summoned as trustee.' The words 'entrusted' or 'deposited' imply in their ordinary signifi-

prevent the goods being attached, or conceals them or refuses on request to expose them, or asserts a claim to them himself.[1] The possession necessary to so charge the garnishee must be "actual" in contradistinction to "constructive" possession, and what is actual possession within the meaning of the term can be determined by applying the test as to whether the garnishee has the right to and the power to take immediate possession or control of such property; if so, he is liable,[2] otherwise, not.[3]

cance something more than mere possession, but if it were otherwise, such a construction would be unreasonable and inadmissible." Staniels *v.* Raymond, 4 Cush. (Mass.) 314. See also Pettingale *v.* Androscoggin R. R. Co., 51 Me. 370; Skowhegan Bank *v.* Farrar, 46 Me. 293.

**Contra.**—By Vermont statute, which includes "having any goods, effects or credits of the principal defendant, *entrusted* or *deposited* in his hands or possession," *held* that garnishment might be brought even though the property be open to the ordinary attachment. Brown *v.* Davis, 18 Vt. 211. See also Loyless *v.* Hodges, 44 Ga. 647. *Compare* Pettingale *v.* Androscoggin R. R. Co., 51 Me. 370.

"Goods contained in boxes securely fastened, so that their character is entirely concealed, when deposited with a third person are not liable to attachment by ordinary process, but may be reached by process against the depositary as trustee." Hooper *v.* Day, 19 Me. 56; s. c., 36 Am. Dec. 734.

**Logs in private boom** may properly be garnished where it appears that the owner of the boom has them for safe keeping and is to receive an agreed price for keeping them. Farmers & Mechanics' Bank *v.* Wells, 23 Minn. 476.

It is a principle of garnishment that the garnishee must not only have the actual possession of the defendant's effects, but that there must be a privity of contract and of interest between the garnishee and the defendant, which would give the defendant a right to an action at law against him. Atwood *v.* Hale, 17 Mo. App. 81. *Compare* Sweet *v.* Brown, 5 Vick. (Mass.) 178; De Graff *v.* Thompson, 24 Minn. 457.

1. Pettingale *v.* Androscoggin R. R. Co., 51 Me. 370; Swett *v.* Brown, 5 Pick. (Mass.) 178; Hooper *v.* Day, 19 Md. 56; Balkham *v.* Lowe, 20 Me. 369; Chanute *v.* Martin, 25 Ill. 63; Stickney *v.* Batchelder, 18 N. H. 40.

Where a garnishee abandons the property of the debtor in his hands after the notice is served, the court may appoint a suitable person to take charge of, and, if necessary, dispose of the property. Northfield Knife Co. *v.* Sharpleigh, 39 N. W. Rep. (Neb.) 788.

2. Drake on Attach. (6th ed.), § 485; Freman on Ex. (2nd ed.), § 160; Lane *v.* Nowell, 15 Me. 86; Morse *v.* Holt, 22 Me. 180; Childs *v.* Digby, 24 Pa. St. 23.

In Glen *v.* Boston & Sandwich Glass Co., 7 Md. 287, it is *held* that the garnishee is liable if he has the legal right to the possession or control. He must have it in his possession so that he can surrender it if the court so directs, in exoneration of his liability as garnishee. If he has only a right to possession, or constructive possession, he may possibly be required to make a demand for the property, but he cannot be required to commence an action to recover it. Smalley *v.* Miller, 71 Iowa 90. "And the court cannot follow it into the hands of third persons or its proceeds *in defendant's* hands in this proceeding, if the title of the lumber is to be litigated in order to show plaintiff's interest." Folkerts *v.* Standish, 55 Mich. 467; Fearey *v.* Cummings, 41 Mich. 384.

Property in bond in U. S. storage warehouse, *held* to be subject to trustee process against the consignee. Peabody *v.* Maguire, 79 Me. 572. See Harris *v.* Dennie, 3 Pet. (U. S.) 304; Conard *v.* Insurance Co., 6 Pet. (U. S.) 262.

**Found in Custody but Not in Possession.**—One who has the equitable right to the custody of a fund, but not the actual possession thereof, may be garnished in relation thereto for the debt of those who are the equitable owners of the fund; and such garnishment will create a lien upon the fund, senior to that created by checks subsequently drawn thereon by the equitable owners. Des Moines County *v.* Hinkley, 62 Iowa 637.

3. Smalley *v.* Miller, 71 Iowa

Garnishment, being a process against "third persons, cannot be granted against agents or servants, whose possession is the possession of the defendant.[1] But if an agent is liable, *ex contractu*, to the defendant, whereby the latter has at the time of garnishment a cause of action, present or future, against him, garnishment is the proper remedy.[2]

Property in the hands of a common carrier is liable to garnishment;[3] but when actually *in transitu*, it has been held to be

90; Andrews *v.* Ludlow, 5 Pick. (Mass.) 28; Nickerson *v.* Chese, 122 Mass. 296; Grant *v.* Shaw, 16 Mass. 341; Willard *v.* Sheafe, 4 Mass. 235.

**Safe Deposit Company** *held* not to have possession of property in one of its safes. Gregg *v.* Wilson, 1 Leg. Gaz. (Pa.) 128; s. c., 8 Phila. 91. *Contra.* U. S. *v.* Graff, 67 Barb. (N. Y.) 304.

1. Hall *v.* Filter Mfg. Co., 10 Phila. (Pa.) 370; Flanagan *v.* Wood, 33 Vt. 332; McDonald *v.* Gillett, 69 Me. 271.

For like reason where a principal has property or money in an agent's hands belonging to defendant, garnishment must be had upon the principal. Casey *v.* Davis, 100 Mass. 124; Meuer *v.* O'Fallen, 18 Mo. 277; Barnard *v.* Graves, 16 Pick. (Mass.) 41; Huntley *v.* Stone, 4 Wis. 91; Wells *v.* Green, 8 Mass. 504; Lewis *v.* Smith, 2 Cranch (C. C.) 571; Smith *v.* Posey, 2 Hill (S. Car.) 471; Hewitt *v.* Wheeler, 22 Conn. 557; Greentree *v.* Rosenstock, 61 N. Y. 583.

In New Hampshire a station agent of a railroad company, in a suit against it, is chargeable as garnishee for money collected from the sale of railroad tickets and for freight carriage. Little Nat. Bk. *v.* P. O. R. Co., 58 N. H. 104. But see McGraw *v.* Memphis & O. R. Co., 5 Cold. (Tenn.) 434.

Notice of garnishment to agent of *non-resident* firm who has possession of the property is constructive notice to principal and binds the property. Mathews *v.* Smith & Crittenden, 3 Neb. 179.

Money deposited in bank to the credit of the depositor as "Supt." is liable to garnishment as a debt due the execution defendant (a corporation), it appearing that the depositor was the latter's superintendent and that the money belonged to it. Gregg *v.* Farmers & Mechanics' Bank, 80 Mo. 251.

A sued B and attached B's funds on deposit in a bank. The bank, in its disclosure as garnishee, showed that the deposit was in the name of "B, agent," that it knew nothing of any principal for whom B was agent, that B had never made known any principal. It appearing that no one had as principal ever claimed the deposit either before or after the garnishment, *held* that the bank was chargeable as garnishee of B. Proctor *v.* Greene, 14 R. I. 42.

**Officer of Corporation** having deposited funds in bank, such funds can be garnished by creditors of corporation proceeding against the bank. Gibson *v.* Park Bank, 98 N. Y. 87. If such officer has the legal title in his individual name it can be reached only through an action in equity. Gibson *v.* Park Bank, 98 N. Y. 87.

2. Kennedy *v.* Aldridge, 5 B. Mon. (Ky.) 141; Center *v.* McQuesten, 18 Kan. 476; s. c., 24 Kan. 344.

3. Walker *v.* Detroit G. H. & M. R. R. Co., 46 Mich. 445.

Goods in the hands of a common carrier may under ordinary circumstances be attached. Locke on Foreign Attach. 32.

But garnishment cannot defeat the right of a vendor to stoppage in transit. C. B. & Q. R. R. Co. *v.* Painter, 15 Neb. 394.

A railway company is not liable to garnishment for cars received of a connecting line under running arrangements existing between them. "It has long been *held* that a common carrier exercises a *public employment*, the duties and liabilities pertaining to which are clearly defined and regulated by law. C. & A. R. Co. *v.* People, 67 Ill. 11. A common carrier is bound to serve the public fairly and without unjust discrimination, and to receive transport and deliver freight when offered with reasonable despatch. . . . In the absence of express contract, nothing can excuse it for non-delivery at the point of destination of the goods received except the act of God or the public enemy. We are unable to perceive why substantially the same considerations of public policy which exempt other public officers and

not subject to garnishment, if not within the county where it was delivered to him for transportation, and doubt has been expressed as to the liability of a carrier to such process within the county while the goods are actually *in transitu*, common carriers being public servants, compelled by law to accept for transportation any goods offered to them, whom it would be unwise to delay and inconvenience by subjecting them to liability to the process.[1] Other special circumstances may arise which will prevent a common carrier from being charged as garnishee, as where he has issued a bill of lading or a carrier's receipt; for while such muniment of title is outstanding he cannot know to whom it is his duty to deliver the property.[2] Baggage for which a check has been given is governed by this rule, and it has been questioned whether garnishment of baggage would be allowed upon the

agents in the discharge of their official duties from the operation of the statutes in relation to garnishment, may not also be extended to the case of common carriers, whenever the application of the statute will manifestly and necessarily interfere with the proper discharge on the part of the carrier of its public duties and functions." Mich. Cent. R. Co. *v.* Chicago etc. R. Co., 1 Brad. (Ill.) 399. See also as to construction of statutes, Staniels *v.* Raymond, 4 Cush. (Mass.) 314; Ryegate *v.* Wardsbon, 30 Vt. 746; Chanute *v.* Martin, 25 Ill. 63.

1. Bates *v.* C. M. & St. P. R. Co., 60 Wis. 296; s. c., 50 Am. Rep. 369; I. C. R. Co. *v.* Cobb, 48 Ill. 402; Mich. Cent. R. Co. *v.* Chicago etc. R. Co., 1 Brad. (Ill.) 399. See Montrose Pickle Co. *v.* Dodson & Hill, 40 N. W. Rep. 705.

BREESE, C. J.: "No case has been cited by appellees in which such a proceeding has been, and in the absence of precedent we should be strongly inclined to hold that companies were not so liable; certainly not out of the county where the property delivered to them for transportation is situate. Any other rule would make railway companies collecting agents of creditors, and that, too, at the risk of these companies. They are common carriers of all kinds of manufactured and agricultural products, having a lien upon the articles delivered for the freightage. . . . When the goods are in the depot of the railway company, in the county in which the attachment proceedings are instituted, there could perhaps be no objection to such process, but on this point we express no definite opinion." I. C. R. Co. *v.* Cobb, 48 Ill. 402. *Approved* in Bates *v.* C. M. & St. P. R. R. Co., 60 Wis. 296; s. c., 50 Am. Rep. 369.

*Contra*, express package of money in hands of an express company *in transitu*, and to be delivered to the principal defendant in an *adjoining State*. Such defendant having appeared, money *held* liable to the process. MORTON, J.: "But we are of the opinion that such judgment would be a sufficient excuse to the trustee for a failure to deliver according to his contract. The doctrine of the common law that a carrier is responsible for all losses, except those occurring by the act of God or a public enemy, has no application to a case like the present. There has been no loss, but the defendant's property has been sequestrated by the law to be applied to his use and benefit. . . Whenever property is attached in a suit against the owner and taken into the custody of the law, it excuses the person having possession of it. . The law substitutes the delivery to its officers for a performance of his contract. . . This case is clearly distinguishable from Edwards *v.* White, 104 Mass. 159. In that case the property of the plaintiff, while in the hands of a common carrier *in transitu* was attached by a third person." Adams *v.* Scott, 104 Mass. 166.

2. Walker *v.* Detroit G. H. & M. R. Co., 49 Mich. 446. See also Bingham *v.* Lamping, 26 Pa. St. 340; s. c., 67 Am. Dec. 418.

Common carriers must recognize transfers of bills of lading and consignments of goods, and unless protected by proper vouchers cannot always assume to deal with consignments as

ground of public policy and the great inconvenience which would result to the travelling public.[1]

**5. As a Debtor.**—The liability of a person to garnishment on the ground that he has property, money or chattels, credits and effects in his hands, or under his control, is distinct from his liability on the ground of indebtedness to the principal defendant, and when process is issued upon one of these grounds he cannot be charged with liability upon the other.[2] The garnishee is liable only for such demands as the defendant in attachment could himself enforce in an action at law;[3] and he cannot be compelled to pay his debt to his creditor's creditor at a time when or place where it could not be recovered by his own creditor.[4]

It is essential that the obligation existing against the garnishee be such as is payable in money only,[5] except where the statutes,

actually and beneficially belonging to the consignee. Walker *v.* Detroit G. H. & M. R. Co., 45 Mich. 446.

1. Western R. Co. *v.* Thornton, 60 Ga. 300.

2. Botsford *v.* Simmons, 32 Mich. 352.

So the answer must show, or there must be evidence to prove, that the property sought to be reached comes within the terms of the statute. Adams *v.* Scott, 104 Mass. 166; Sheedy *v.* Second Nat. Bank, 62 Mo. 17; Bottom *v.* Clarke, 7 Cush. (Mass.) 487. *Compare* with this case Loyless *v.* Hodges, 44 Ga. 647.

3. Patton *v.* Smith, 7 Ired. (N. Car.) 438; Hancock *v.* Colyer, 103 Mass. 396; Goode *v.* Barr, 64 Wis. 659; VIII., 1, *supra.*

But a creditor cannot, upon any allegation that the garnishee himself is bankrupt, reach the funds *he* may have in the hands of another *his* debtor or trustee. The relations between debtor and creditor or principal and agent thus remote from the original transaction cannot be reached in that mode. Wolf *v.* Tappan, 5 Dana (Ky.) 361.

4. Com'l Bank *v.* Chicago etc. R. Co., 45 Wis. 172.

As to the liability of the garnishee for *debts* payable outside the state, see VII., 2, *supra.*

5. Mims *v.* Parker, 1 Ala. 421; Jones *v.* Crews, 64 Ala. 368; Wrigley *v.* Geyer, 4 Mass. 102; McMinn *v.* Hall, 2 Tenn. 328. Blackburn *v.* Davidson, 7 B. Mon. (Ky.) 101.

An obligation payable in anything but money cannot be garnished, for the court has power to render only an unconditional money judgment against the garnishee, or to condemn personal chattels in his hands. It has been settled that only such debts as would maintain *indebitatus assumpsit* if sued on by the defendant can be the subject of such condemnation. Jones *v.* Crews, 64 Ala. 371.

So *held* in cases of "store accounts." Smith *v.* Chapman, 6 Port. (Ala.) 365. See Blair *v.* Rhodes, 5 Ala. 648; Deaver *v.* Keith, 5 Ired. (N. Car.) 374. Or in "board." Aldrich *v.* Brooks, 5 Fost. (N. H.) 241; Peebles *v.* Mead, 96 Pa. St. 150. Or "in work or labor." Wrigley *v.* Geyer, 4 Mass. 101. *Contra*, Louderman *v.* Wilson, 2 Har. & J. (Md.) 379. Or in "Saddlery." Blair *v.* Rhodes, 5 Ala. 648. Or in "castings and iron." Nesbitt *v.* Ware, 30 Ala. 68.

As a contract to pay in specific articles of personal property becomes a money debt only after a demand and refusal to pay over the specified property, and no money judgment can be rendered on such contract until that time, *held* that *before such demand* had been made by the principal defendant there was no such liability due from the promisor as could be reached by garnishment. Weil *v.* Tyler, 38 Mo. 545; s. c., 90 Am. Dec. 441; Smith *v.* Davis, 1 Wis. 447; s. c., 60 Am. Dec. 390. See also Levison *v.* Wagner, 76 Ala. 412; Weaver *v.* Puryear, 11 Ala. 941; Hurst *v.* Home Protection Ins. Co., 1 So. Rep. (Ala.) 210; Bozeman *v.* Rose, 40 Ala. 212; Peter *v.* Butler, 1 Leigh (Va.) 285; Ward *v.* Begg, 18 Barb. (N. Y.) 139; Strock *v.* Little, 45 Pa. St. 416.

In some States by statutory authority a garnishee may be charged in respect

by the use of the words "effects" or "credits,"[1] include specific articles or values or where they specially include "specific articles or whatsoever other than money."[2] It is also essential that the debt be in existence at the time of service of process,[3] absolutely payable at the present or some future time,[4] and is a legal

to a contract with the defendant whereby he is to deliver to him goods or chattels; such goods to be delivered to the officer holding the execution.

1. Clark *v.* Brewer, 6 Gray (Mass.) 320. In Massachusetts the statute also provides that the garnishee shall not be compelled to deliver at any other time or place than that contracted for. So goods contracted to be delivered outside the State cannot be garnished. Clark *v.* Brewer, 6 Gray (Mass.) 320. *Compare* Adams *v.* Scott, 104 Mass. 164. In this case, however, such person to whom the money was to be delivered was before the court, and the money was taken by service of process *while in* the State. In case the delivery can be demanded of the garnishee at a place other than the one contracted for, the goods must be shown to belong to the defendant, and a garnishee is not compelled at his peril to decide questions of fact as to such ownership. And this is true even at the place of delivery. Walker *v.* Detroit G. H. & M. R. Co., 49 Mich. 446; Adams *v.* Scott, 104 Mass. 164.

Common carriers must recognize transfers of bills of lading and consignments of goods, and unless protected by proper vouchers, cannot always assume to deal with consignments as actually and beneficially belonging to the consignee. Walker *v.* Detroit G. H. & M. R. Co., 49 Mich. 446.

Where the statutes allow the attachment of "effects" as well as mere debts it has been *held* that the garnishee can be compelled to surrender any specific article to which the defendant is entitled from him. Stadler *v.* Parmlee, 14 Iowa 175.

For form of judgment in such a case see King *v.* Hyatt, 41 Pa. St., and Stadler *v.* Parmlee.

Money due and owing, and which by express agreement is to be paid in labor, *is a credit* and may be attached. Louderman *v.* Wilson, 2 H. & J. (Md.) 379.

If the indebtedness of the trustee (garnishee) to the principal debtor is payable in labor or specific property on demand, and there had been previous to the service of the trustee's process no breach of the contract, the judgment against the trustee must be that he is chargeable for the amount of his indebtedness, payable to the plaintiff in the specific manner prescribed by the original contract. Bartlett *v.* Wood, 32 Vt. 372. See also Cherry *v.* Hooper, 7 Jones (N. Car.) 82.

Where a person has agreed to pay in certain notes or *obligations*, the judgment should be that he pay within a specified time or that he shall in default pay a certain sum of money. Marshall *v.* Grand Gulf R. R. & Bk. Co., 5 La. 360; Jennings *v.* Summers, 7 How. (Miss.) 453. *Contra*, Mims *v.* Parker, 1 Ala. 421. Also so *held* where an order for goods was the contract by which the garnishee was to receive his wages. Willard *v.* Butler, 14 Pick. (Mass.) 550. But if so made with intent to defraud it would be unavailing. Hooper *v.* Hills, 9 Pick. (Mass.) 435. Where the notes not subject to garnishment were not yet due and not attachable until due. Fuller *v.* O'Brien, 121 Mass. 422.

2. Comstock *v.* Farnum, 2 Mass. 96; Clark *v.* King, 2 Mass. 524.

3. Hopson *v.* Dinan, 48 Mich. 612. Johnson *v.* Lamping, 34 Cal. 293. See also VIII., 10, *post*.

4. MAXWELL, C. J.: "The rule is that to charge the garnishee as a debtor of the defendant, it must appear affirmatively that, at the time of the garnishment, the defendant had a cause of action against him for the recovery of a legal debt due, or to become due by the efflux of time." Edney *v.* Willis, 36 N. W. Rep. (Neb.) 300; *citing* Drake Attach., § 583. See also Wetherill *v.* Flanagan, 2 Miles (Pa.) 243; Bridges *v.* North, 22 Ga. 52; Pressnal *v.* Mabry, 3 Port. (Ala.) 105; Foster *v.* Walker, 2 Ala. 177; Fortune *v.* Bank, 4 Ala. 385; Connoly *v.* Cheesborough, 21 Ala. 166; Estill *v.* Goodloe, 6 La. 122; Horney *v.* Ellis, 1 S. & M. (Miss.) 348; Brown *v.* State, 7 Humph. (Tenn.) 112; Davis *v.* Pawlette, 3 Wis. 300; Wilson *v.* Albright, 2 G. Greene (Iowa) 125; Pierce

debt,[1] due from a legal debtor,[2] and still belongs to the principal defendant.[3] It is another essential that an indebtedness to be reached by garnishment must be absolutely due as a money demand unaffected by liens or prior encumbrances,[4] or conditions of contract.[5] The fact that a person summoned as a garnishee is liable to the defendant in an action of tort,[6]

*v.* Carlton, 12 Ill. 358; People *v.* Johnson, 14 Ill. 342; Ellicott *v.* Smith, 2 Cranch (C. C.) 543.

Must not be dependent upon any contingency. See VIII., 5, *post.*

A person who obtains possession of a definite sum of money belonging to another, which he has no right in justice or equity to retain, may be garnished as his debtor for such sum by a creditor of the latter. Graff *v.* Thompson, 24 Minn. 452.

1. Coburn *v.* Angart, 3 Mass. 319; Pundt *v.* Clary, 13 Neb. 406. Must be "legal" in contradistinction to "equitable." See *infra.*

Garnishee not liable for a debt based upon an illegal consideration. McGlinchy *v.* Winchell, 63 Me. 31.

Money paid to the winner on an election bet cannot be reached by a creditor of the loser, the rule being that money voluntarily paid under a void contract cannot be recovered back. Speise *v.* McCoy, 6 W. & S. (Pa.) 485; s. c., 40 Am. Dec. 579. See VIII., 13.

2. An executor cannot be garnished for a legacy in his hands, because it is not a legal debt due from a legal debtor within the meaning of the common law procedure act. MacDowall *v.* Hollister, 3 C. L. R. 933.

Money derived from the sale of a decedent's real estate, and in the hands of the administrator's counsel, cannot be garnished for the debt of the administrator. Marvel *v.* Babbitt, 143 Mass. 2216.

An executor or administrator cannot be garnished for a legacy in his hands due to the wife of the defendant, because it is not the husband's until he reduces it into possession. Arrington *v.* Screws, 9 Ired. (N. Car.) 42; s. c., 49 Am. Dec. 408; McLean *v.* McPhaul, 6 Jones Eq. (N. Car.) 15.

While the relation between the bank and its depositor may be that merely of debtor and creditor, and the balance due on the account may be only a debt, yet if the money deposited belongs to a third person and is held by the depositor in a fiduciary capacity, its character is not changed by being placed to his credit in his bank account or mixed with other moneys deposited in his own name; and when the principal and equitable owner of the fund asserts his right to the money before repayment to the depositor, neither an attaching nor a garnishing creditor is entitled to have it applied to satisfy the debt or judgment of the depositor. Morrill *v.* Raymond, 28 Kan. 415; s. c., 42 Am. Rep. 167; see also Cram *v.* Shackleton, 64 N. H. 44; Naser *v.* First Nat. Bank, 36 Hun (N. Y.) 343; Townsend *v.* Webster Five Cent Bank, 143 Mass. 147.

If a debt due from a supposed trustee is due to the creditor as agent it is not attachable as his property. Granite Nat. Bank *v.* Neal, 71 Me. 125.

**Estoppel.**—County treasurer who has deposited the county's money in his own name is estopped from asserting that the funds in the bank were not private funds. First Nat. Bank *v.* Gaudy, 11 Neb. 431.

3. Hewitt *v.* The Wagar Lumber Co., 38 Mich. 701.

4. Scales *v.* Southern Hotel, 37 Mo. 520.

Money received by A upon collateral held by him under an argument that any surplus remaining after the payment of his debt should be paid by him, cannot be taken by garnishment in A's hands as a debtor of B. Field *v.* Crawford, 6 Gray (Mass.) 116.

5. Weil *v.* Tyler, 43 Mo. 581.

Must be absolutely due at the time of judgment. See *post*, VIII., 5.

6. Getchell *v.* Chase, 37 N. H. 106; Foster *v.* Dudley, 10 Fost. (N. H.) 464; Ten Broeck *v.* Sloo, 13 How. Pr. (N. Y.) 28; 2 Abb. Pr. (N. Y.) 234; Davenport *v.* Ludlow, 4 How. Pr. (N. Y.) 337; Hudson *v.* Plets, 11 Paige (N. Y.) 180; Hill *v.* Bowman, 35 Mich. 191.

Garnishment cannot be used as a means of attaching a claim by the principal defendant for a wrongful conversion. Paul *v.* Paul, 10 N. H. 117. Or trespass. Dispatch Line *v.* Bellamy, 12 N. H. 205. Or breach of official duty. Hemmenway *v.* Pratt, 23 Vt. 332;

or for unliquidated damages,[1] does not render him chargeable under garnishment.[2] When, however, judgment is rendered for a claim for unliquidated damages, it is no longer exempt by reason of the character of the claim upon which the judgment was rendered, but is is governed by the rules

Lomerson *v.* Huffman, 1 Dutch. (N. J.) 625; or for liability for an "action of deceit," Bates *v.* Forsyth, 69 Ga. 365.

As to an incorrect legal conclusion in pleading, see Greentree *v.* Rosenstock, 61 N. Y. 583.

1. This rule applies whether the unliquidated damages be for tort or breach of contract. Rand *v.* White Mountains R., 40 N. H. 79; Selheimer *v.* Elder, 98 Pa. St. 154; Eastman *v.* Thayer, 60 N. H. 575; Hugg *v.* Booth, 2 Ired. (N. Car.) 282; Deaver *v.* Keith, 5 Ired. (N. Car.) 374; Ransom *v.* Hayes, 49 Mo. 445; Peet *v.* Daniels, 27 La. An. 455; Leefe *v.* Walker, 18 La. An. 1; Detroit P. & T. Co. *v.* Reilly, 46 Mich. 459.

**Exceptions to the Rule.**—Unliquidated damages may be reached by the process of foreign attachment, which lies for "a demand arising *ex contractu*, the amount of which was ascertained, or which was susceptible of ascertainment by some standard referable to the contract itself, sufficiently certain to enable the plaintiff by affidavit to aver or a jury to find it, might be the foundation of a proceeding by way of foreign attachment, without reference to the form of action or the technical definition of *debt*, the expression used in law." Fisher *v.* Consequa, 2 W. N. C. (Pa.) 382. Approved in Girard Fire Ins. Co. *v.* Field, 45 Pa. St. 132. As applying to the character of debt which may be reached, see also 3 Grant (Pa.) 329; Drake on Attach., § 549; Hough *v.* Kugler, 36 Md. 186; Warwick *v.* Chase, 23 Md. 154.

Where such is the case, the claim has been *held* to come within the terms of the statute, "where debts are due from an absent or absconding debtor, etc." Knox *v.* Protection Fire Ins. Co., 9 Conn. 430; s. c., 25 Am. Dec. 33; Newhaven Saw Mill Co. *v.* Fowler, 28 Conn. 108. The object of the statute is "to secure for the benefit of the creditors *all* the property of the debtor and *all* his goods and effects." Woodruff *v.* Bacon, 35 Conn. 104.

Money due from fire insurance company, though the loss be unadjusted, is subject to attachment in the hands of the company. It comes within the meaning of "goods and effects." Girard Fire Ins. Co. *v.* Field, 45 Pa. St. 142. And the contract must furnish a standard by which the amount of the liability may be ascertained and fixed. Knox *v.* Protection Ins. Co., 9 Conn. 430; Girard Fire Ins. Co. *v.* Field, 45 Pa. St. 142; North Western Ins. Co. *v.* Atkins, 3 Bush (Ky.) 328. *Contra*, Gies *v.* Bechtner, 12 Minn. 279; McKean *v.* Turner, 45 N. H. 203; Gove *v.* Varrall, 58 N. H. 78; Bucklin *v.* Powell, 60 N. H. 119; Katz *v.* Sorsby, 34 La. An. 588. But the insurance company must have waived the proof of loss, otherwise it will not be chargeable before proof. Lovejoy *v.* Hartford Fire Ins. Co., 11 Fed. Rep. (Ill.) 63.

Money due from fire insurance company upon a loss is a liquidated claim as soon as it is *adjusted*. Boyle *v.* Franklin Ins. Co., 7 W. & S. (Pa.) 76; Franklin Fire Ins. Co. *v.* West, 7 W. & S. (Pa.) 350.

2. Freeman on Ex. (2nd ed.), § 167; Holcomb *v.* Town of Winchester, 52 Conn. 447; s. c., 52 Am. Rep. 609; Victor *v.* Hartford Fire Ins. Co., 33 Ia. 210; Webster *v.* Steele, 75 Ill. 544.

"A person wronged may be in a condition to waive the wrong and to recover in *assumpsit*. The right to make this waiver belongs only to the injured party. Until it has been made the wrongdoer must be regarded as a tort feasor, and not as a debtor, and cannot be charged as a garnishee." Lewis *v.* Dubose & Co., 29 Ala. 219; National Commercial Bank *v.* Miller, 77 Ala. 168.

As to what are unliquidated damages, see Butts *v.* Collins, 13 Wend. (N. Y.) 156; McKean *v.* Turner, 45 N. H. 204. See also Meacham *v.* Corbitt, 2 Met. (Mass.) 352.

Where parties have the right to have their claims liquidated in a court of chancery garnishment will not lie, for it can reach only such claims that the defendant might enforce in an action at law. See note 2, *supra*. So it is as to partnership accounts. Burnham *v.* Hopkinson, 17 N. H. 259; Driscoll *v.* Hoyt, 11 Gray (Mass.) 404; Sheedy *v.*

that apply to garnishment of judgments.[1] Where one, in writing, contracts in his own name for the act of another, and becomes personally liable, he may be charged as garnishee.[2] But a promise to pay the debt of another to a third person, *when made upon a sufficient consideration*, need not be in writing. Such contract operates by way of an assignment, and only the surplus remaining after such contract has been executed, can be reached by garnishment of the promisor,[3] even

Second National Bank, 62 Mo. 17; Ives *v.* Vanscoyooc, 81 Ill. 120.

1. Mortgage given for future support, where there has been a breach and an *award of amount due*, is subject to trustee process for such amount. Dickinson *v.* Dickinson, (Vt.) 10 Atl. Rep. 821.

A default by the defendant does not create a debt for which garnishment will lie. It does not change in the least the nature of the demand, but merely dispenses with the necessity of certain proof. The right of action for the original tort remains through all the proceedings until merged in a judgment, and then it becomes a debt. Holcomb *v.* Winchester, 52 Conn. 447; s. c., 52 Am. Rep. 609; Thayer *v.* Southwick, 8 Gray (Mass.) 229; Cranch *v.* Gridley, 6 Hill (N. Y.) 250; Kellogg *v.* Schuyler, 2 Denio (N. Y.) 73.

If the judgment be reversed and after service of process be recovered again, the garnishment will not hold the second judgment. St. Joseph Mfg. Co. *v.* Miller, 69 Wis. 389.

2. **Subscription to Stock.**—Garnishee, in writing, signed in his own name, agreed to take certain shares of the capital stock of a corporation "to be paid by Peck." *Held*, that the garnishee was personally liable therefor to the corporation and to the creditors of the corporation on process of garnishment. Langford *v.* Ottumwa W. P. Co., 59 Iowa 283.

3. Clinton National Bk. *v.* Steademan, 37 N. W. Rep. (Iowa) 112; Troxall *v.* Applegarth, 24 Md. 183; Chapin *v.* Jackson, 45 Ind. 153; Curtis *v.* Norris, 8 Pick. (Mass.) 280; Armor *v.* Cockburn, 4 Mart. N. S. (La.) 667; Mayhew *v.* Scott, 10 Pick. (Mass.) 54; Dryden *v.* Adams, 29 Iowa 195; Black *v.* Paul, 10 Mo. 103; Curle *v.* St. Louis Perpetual Ins. Co., 12 Mo. 578; Porter *v.* Bullard, 26 Me. 448; Rudd *v.* Paine, 2 Cranch (C. C.) 9; Newby *v.* Hill, 2 Metcalf (Ky.) 530; Baker & Smith *v.* Elgin, 11 Oreg. 333; Noyes *v.* Brown, 33 Vt. 431; Hutchins *v.* Watts, 35 Vt. 360; Porter *v.* Griffin, 72 N. Car. 362; Putney *v.* Farnham, 27 Wis. 187; Balliet *v.* Scott, 32 Wis. 174.

It is not a guaranty, but a promise to pay the promissor's own debt, and is certainly not within the statute of frauds, though it be in form to answer for the liability of a third person. Reed on Statute of Frauds, section 111. See also tit. STATUTE OF FRAUDS, Vol. 8, p. 657.

As the defendant could not lawfully, by any interference, prevent the garnishee from paying the debt as agreed, so neither could the plaintiff by the operation of the attachment. Owen *v.* Eglis, 5 Mass. 530. But the contract to pay the debt to a third person must be the contract of the garnishee and not of a third person. Webster *v.* Randall, 19 Pick. (Mass.) 13.

Where a debtor promised orally to pay part of his debt by paying his creditor's indebtedness to a third person, the latter being notified of such understanding and having assented thereto, *held* that the promise being one to pay in a certain manner *the promisor's own debt*, was not within the statute of frauds, and the promisor was not liable for the amount in garnishment by a judgment creditor of the promisee, although the garnishee process was served before actual payment to the third party. The court said: "This case is different from Seamen *v.* Whitney, 24 Wend. (N. Y.) 260, where funds were merely deposited by a debtor with a third person with directions to pay them over to a creditor in extinguishment of a debt, and there was no agreement, express or implied, by which the funds became the property of the creditor, so that the debtor did not lose control over them. . . . So much as is said, rather *obiter* than otherwise, respecting the necessity of obtaining the assent of the party for whose benefit a promise is made to another, either at

though the person or creditors for whose benefit the promise was made, had not accepted him as their debtor;[1] such promisor is a debtor of the person for whose benefit the promise was made.[2]

Where a contract by a garnishee with a third person other than the principal defendant in garnishment is within the statute of frauds, the statute cannot be used to charge a garnishee who may set up against his debt to the principal defendant a verbal promise within the statute to pay the defendant's debt to another.[3]

**6. As to Debts Before Maturity.**—A debt existing in favor of the garnishee, not due at the service of the writ, but which is sure to become due at a future period, may be reached by garnishment;[4]

or before the time the consideration for the promise passes, or the promise is made, in order that such promise may be valid or available to the party for whose benefit it is made, is opposed by the weight of authority and does not meet our approval." Putney *v.* Farnham, 27 Wis. 187.

Any surplus left over after meeting such requirements as the above text refers to have been fulfilled, will of course be due to the plaintiff in garnishment. Davis *v.* Wilson, 52 Iowa 187.

For authorities to cases similar to Seamen *v.* Whitney, *supra*, see Center *v.* McQuestion, 18 Kan. 476; s. c., 24 Kan. 480; Heorn *v.* Foster, 21 Tex. 401; Putney *v.* Farnham, 27 Wis. 187; Union Mutual Life Ins. Co. *v.* Holbrook, 4 Gray (Mass.) 235; 15 Ga. 486; 51 Ga. 325; 40 Ga. 217; Cox *v.* Reeves, 78 Ga. 543; Merchants & Mech. Bank *v.* Coleman, 81 Ala. 170; Nitter *v.* Little, 66 Iowa 431; Drake on Attachment, section 525.

1. Coleman *v.* Merchants & Mechanics' Bank, 77 Ala. 217.

The promise enures to the benefit of such third person, and the defendant's right of action was suspended until his creditor repudiated the transaction. Merchants & Mechanics' Bank *v.* Coleman, 81 Ala. 170.

The creditors of the debtor are not bound to accept payment from the promisor, and if money is left in his hands by the refusal of the creditors to accept it in payment of their claim, it is subject to garnishment as the property of the original debtor. Green & Button Co. *v.* Remington, 72 Wis. 648.

But if the debt be paid with money furnished by the original debtor (the defendant), then the liability of the garnishee to the attaching creditor is revived. Merchants & M. Bank *v.* Coleman, 81 Ala. 170.

2. Rickman *v.* Miller, 39 Kan. 362; see also Anthony *v.* Herman, 14 Kan. 495; Strong *v.* Marcy, 33 Kan. 109; Head *v.* Richardson, 16 N. H. 454; Coleman *v.* Merchants & Mechanics' Bank, 77 Ala. 217.

If such debt is not paid as promised and the person for whose benefit the promise was made has not accepted the promissor as his debtor, he may secure judgment against his original debtor and collect the amount from the promissor by garnishment. Martin *v.* Copeland, 3 S. E. Rep. (Ga.) 256.

A garnishee may be chargeable, although he has agreed in writing to pay the money in his hands to the *agent* of principal defendant. Chesley *v.* Coombs, 58 N. H. 142.

The purchaser of mortgaged premises does not, by his purchase, become indebted to the mortgagee, nor does he become such debtor by virtue of an agreement with his vendor to pay the mortgage debt. He therefore cannot be garnished by a creditor of the mortgagee. Hartman *v.* Olvera, 54 Cal. 61.

But where A, after collecting moneys for B, pays the same to a creditor of B, contrary to the direction of the latter, he may be held liable therefor in garnishee proceedings by other creditors of B. Felch *v.* Eau Pleine L. Co., 58 Wis. 431.

3. The right to plead the statute is a personal privilege and may be waived. Cahill *v.* Bigelow, 18 Pick. 369. Approved in Swett *v.* Ordway, 23 Pick. 266; Ames *v.* Jackson, 115 Mass. 512; Townsend *v.* Hargrave, 118 Mass. 336. Drake on Attach., § 595. *Contra*, Hazeltine *v.* Page, 4 Vt. 79; Strong *v.* Mitchell, 19 Vt. 644.

See FRAUDS, STATUTE OF, vol. 8, p. 657.

4. Teague *v.* Le Grand, 85 Ala. 493; Sheriff of Fayette *v.* Buckner, 1 Little

but the garnishee will not be compelled to make payment of the obligation against him until it has fully matured. The entry of the judgment against him will be delayed till the debt becomes due,[1] or if such delay be not made in entering the judgment, execution thereon will be stayed as the justice of the case may require.[2]

**7. Joint Debts and Credits Jointly Owned.**—Where several persons are jointly and severally liable for a debt, all should be garnished.[3] Although not absolutely essential in some States that all should be garnished, yet if those not summoned pay the debt before answer made by those summoned, such garnishees are not liable.[4]

Where debts are due from two or more persons jointly instead of jointly and severally, as, for instance, in partnership, all must be served with process;[5] but where, by statute, partners can be sued severally on partnership obligations, either may be garnished for a debt due from the firm.[6] Several persons cannot

(Ky.) 127; Cottrell *v.* Varnum, 5 Ala. 229; s. c., 39 Am. Dec. 323; Wentworth *v.* Whitmore, 1 Mass. 471; Willard *v.* Sheafe, 4 Mass. 235; Stewart *v.* West, 1 H. & J. (Md.) 536; Groome *v.* Lewis, 23 Md. 137; s. c., 87 Am. Dec. 563; Walker *v.* Gibbs, 2 Dall. (Pa.) 211; s. c., 1 Yeates 255; Fulweiler *v.* Hughes, 17 Pa. St. 440; Sayward *v.* Drew, 6 Md. 263; Freeman on Ex. (2nd ed.), § 165; Peace *v.* Jones, 3 Murph. (N. Car.) 256; King *v.* Vance, 46 Ind. 246; Dunnegan *v.* Byers, 17 Ark. 492. *Contra*, but not now the law. Dalton *v.* Solly, Cro. Eliz. 184; Childress *v.* Dickens, 8 Yerg. (Tenn.) 113; McMinn *v.* Hall, 2 Tenn. 328.

But such debt must be in existence at the time of garnishment. Thomas *v.* Gibson, 61 Iowa 50.

Where a debt exists, but the time when it may become payable depends upon a notice to be given by the defendant to the garnishee, it may be attached though no such notice has been given. Clapp *v.* Hancock Bank, 1 Allen (Mass.) 394; Nichols *v.* Schofield, 2 R. I. 123; Fay *v.* Smith, 25 Vt. 610. See VIII., 2.

Where policy of fire insurance forbids commencement of suit until proof of loss, *held* not to forbid garnishment of company, which is but process authorized to discover if anything be owing to the insured, or whether some debt or obligation exists not yet matured. Ins. Co. *v.* Willis, 70 Tex. 12.

1. Wilson *v.* Albright, 2 Green (Iowa) 125; Secor *v.* Witter, 39 Ohio St. 218.

2. Anderson *v.* Wanzer, 5 How. (Miss.) 587; s. c., 37 Am. Dec. 170; Sheriff of Fayette *v.* Buckner, 1 Little (Ky.) 127; Cottrell *v.* Varnum, 5 Ala. 229; s. c., 39 Am. Dec. 323.

Execution on a judgment against a garnishee on a debt not yet due is stayed by operation of law (Statute 1827) until the debt becomes due, and therefore the judgment need not be accompanied by an order of court directing the stay. Anderson *v.* Wanzer, 5 How. (Miss.) 587; s. c., 37 Am. Dec. 170.

3. Hathaway *v.* Russell, 16 Mass. 473; Hoyt *v.* Robinson, 10 Gray (Mass.) 371; Warner *v.* Perkins, 8 Cush. (Mass.) 518.

He must summon all the debtors. Treadwell *v.* Brown, 41 N. H. 12; Barker *v.* Garland, 22 N. H. 103; Jewitt *v.* Baker, 6 Mass. 60.

The true rule, as stated in Ladd *v.* Baker, 6 Fost. N. H. 83, WOODS, J.: "A trustee therefore who is summoned and comes into court and makes a full disclosure of the facts in the case, will not be held chargeable unless in a case and under circumstances effectually protecting him against all further danger of legal liability for the payment of the debt, or the discharge of the duty for which he may be held liable. Such are the grounds, reasons and views upon which the well settled rule in regard to the liability of joint and joint and several debtors have been arrived at."

4. Jewett *v.* Bacon, 6 Mass. 60; Robinson *v.* Hall, 3 Met. (Mass.) 301; Sabin *v.* Cooper, 15 Gray (Mass.) 532.

5. O'Connell *v.* Ackerman, 62 Md. 337.

6. Ladd *v.* Baker, 6 Fost. N. H. 76;

be held as joint garnishees unless the liability to the principal defendant is joint, and this is so whether the garnishment pro-

Atkins *v.* Prescott, 10 N. H. 120; Hudson *v.* Hunt, 5 N. H. 538; Rix *v.* Elliott, 1 N. H. 184; Fairchild *v.* Lampson, 37 Vt. 407; Pettes *v.* Spaulding, 21 Vt. 66; Nash *v.* Brophy, 13 Met. (Mass.) 476; Jewett *v.* Bacon, 6 Mass. 60; Warren *v.* Perkins, 8 Cush. Mass. 518; Wilson *v.* Albright, 2 Greene (Iowa) 125; Haskins *v.* Johnson, 24 Ga. 625; Elliott *v.* Smith, 2 Cranch (C. C.) 543; Hirth *v.* Pfeifle, 42 Mich. 31; Markham *v.* Gehan, 42 Mich. 74. Changed by statute. See 2 How. Stat. 268; Hamilton *v.* Plumner (Mich.), 34 N. W. Rep. 278. See Hawley *v.* Athlerton, 39 Conn. 309. *Contra*, Bealsford *v.* Meade, 1 Yeates (Pa.) 488.

**Non-Resident Partner.**—In South Carolina, by statute, a non-resident partner may be made a party by service of process upon the resident partner. Whitfield *v.* Hovey, 8 S. E. Rep. (S. Car.) 840.

BIGELOW, J.: "The omission to summon a joint contractor as trustee is properly matter in abatement, and if the person summoned as trustee desires to avoid the process on this ground he must avail himself of the objection in answer to the original process. He cannot do it on *scire facias*." Hoyt *v.* Robinson, 10 Gray (Mass.) 371; Sabin *v.* Cooper, 15 Gray (Mass.) 532.

The name of each individual partner must be set out in the process of garnishment; simply stating the firm name charges no member of it. Reed *v.* McLead, 20 Ala. 576.

If properly summoned, the answer of one of the partners binds them if he admits an indebtedness. Anderson *v.* Wagner, 5 How. (Miss.) 587. But summoning two or more garnishees in the same writ does not convert the proceedings into a suit against them as joint debtors. Curry *v.* Woodward, 52 Ala. 371.

Where a debtor holds a joint contract against two or more persons, and his creditor would avail himself of the benefit of the contract under garnishment proceedings, he must summon all the parties liable under the law to discharge it. Weatherwax *v.* Paine, 2 Mich. 555.

If the affidavit does not charge a joint liability, but the answer of the garnishees discloses one, they are properly *held* chargeable. Gall *v.* Hubbard, 61 Wis. 293.

Where the answer of a joint debtor, who has alone been served, is that he does not owe anything to the debtor but that he and another are liable jointly, he should be discharged. Wellover *v.* Soule, 30 Mich. 481; Atkins *v.* Prescott, 10 N. H. 120.

In Tennessee, a service of the garnishment on one partner is notice to all the members of the partnership, and the partners not served cannot discharge their liability to the attaching creditor by payment to the principal defendant. State *v.* Linaweaver, 3 Head. (Tenn.) 51.

**Non-resident Partner.**—Members of a partnership, a part of whom reside in this State, and a part in another State, who form their partnership and carry it on in this State, can be *held* chargeable as trustees of one to whom they are indebted in this State. The foreign residents of the firm may be proceeded against if they see fit to waive their right of exemption by entering an appearance. Pick *v.* Barnum, 24 Vt. 75.

"Had the non-resident partner been included in the writ, whether service is on him or not, the firm would have been holden, but the trustee would not have been required to disclose until he could have informed his partner of the pendency of the trustee process. If the partner had not paid the claim to the principal debtor, then he could not do it after such notice except in his own wrong." Atkins *v.* Prescott, 10 N. H. 120. See also Parker *v.* Dan Gorth, 16 Mass. 299. *Contra*, if resident in a foreign country. Kidder *v.* Packard, 13 Mass. 80. Or a resident of the State and temporarily absent. Bowen *v.* Pope, 17 N. E. Rep. (Ill.) 64.

GOLDTHWAITE, J.: "The act of 1818 provides that whenever any cause of action may exist against two or more partners of any denomination whatever it shall be lawful to prosecute an action against one or more of them. And when a writ shall be issued against all the partners of the firm, service of the same upon any one of them shall be equivalent to service upon all. . . . It will be observed the statute does profess to change the liability of partners from joint to joint

ceeding is based upon a debt or upon the possession of property.[1] In Connecticut, an attachment is not invalidated by a misjoinder of any person as garnishee, as was the case at common law.[2]

A person may be garnished for a debt owing to, or property belonging to several creditors, whether they (the defendants) are liable to the plaintiff jointly or jointly and severally, if all such creditors be made principal defendants; and where there are several defendants in attachment, the property of each being liable for the whole debt, the garnishee will be charged if he be indebted to one or more of the defendants, though not to all. But if the debt be owing to joint creditors, only part of whom are such defendants, or where a debt belonging to joint creditors is sought to be reached to pay the individual debt of one of them, the rule is, that if the credit is owned by partners, it is liable only for the partnership debts, and all the partners must be defendants,[3] even though the garnishee be the copartner of

and several; it allows the privilege of suing each partner and provides that a service on one shall be equivalent to a service on all." Travis *v.* Tartt, 8 Ala. 574; Speak *v.* Kinsey, 17 Tex. 301.

1. Ball *v.* Young, 52 Mich. 476.

2. The Conn. statutes provide that in all actions against two or more defendants, if the plaintiff fail to make out a case against a party he may yet recover against the others. *Held* to apply to factorizing process. Hawley *v.* Atherton, 39 Conn. 309.

3. Crescent Ins. Co. *v.* Baer, 1 So. Rep. (Fla.) 319; Forwell *v.* Chambers, 62 Mich. 316; Winston *v.* Ewing, 1 Ala. 129; Trickett *v.* Moor, 34 Kan. 755; Johnson *v.* King, 6 Humph. (Tenn.) 233; Bullfinch *v.* Winchenback, 3 Allen (Mass.) 161; Fish *v.* Herrick, 6 Mass. 271; Upham *v.* Naylor, 9 Mass. 490; Williams *v.* Gage, 49 Mass. 777; Sheedy *v.* Second Nat. Bank, 62 Mo. 17; Kingsly *v.* Missouri F. Ins. Co., 14 Mo. 467; Atkin *v.* Prescott, 10 N. H. 120; Thomas *v.* Lusk, 13 La. 277; Smith *v.* McMacken, 3 La. 319; Sweet *v.* Reed, 12 R. I. 121; Barry *v.* Fisher, 39 How. Pr. (N. Y.) 521; Towne *v.* Leach, 32 Vt. 747; Lyndon *v.* Gorham, 1 Gall. (U. S.) 367; Meyers *v.* Smith, 29 Ohio St. 120. *Contra*, Parker *v.* Wright, 66 Me. 392; 2 Yeates (Pa.) 190; Burrell *v.* Wild, 59 Me. 423; McCarty *v.* Emlen, 2 Dall. (Pa.) 277. *Compare* Knerr *v.* Hoffman, 65 Pa. St. 116, and Alter *v.* Brooke, 9 Phila. (Pa.) 258; Chatzill *v.* Bolton, 2 McCord (S. Car.) 478; s.c., 13 Am. Dec. 748; Branch, Scott & Co. *v.* Adams, Smith & Co., 51 Ga. 113; Church *v.* Knox, 2 Conn. 514.

Sole surviving partner *held* liable in Knox *v.* Schefler, 2 Hill (N. Y.) 595. *Contra* in California. See Robinson *v.* Tevis, 38 Cal. 612. The burden of proof is upon the plaintiff to show that there would be a surplus left after the firm's debts are paid. CROCKETT, J., dissenting.

In Commercial Bank *v.* Wilkin, 9 Me. 34, the court said: "It is a well-settled principle of law that a creditor of one of the members of a copartnership can claim only his just share, after all the partnership debts are paid." In Fox *v.* Hanbury, Cowp. 445, LORD MANSFIELD says: "No person deriving under a partner can be in a better condition than the partner himself."

BRENT, J.: "The exception to this rule is where equity powers have been conferred by statute upon the common law courts, and when by virtue of such powers they can compel a settlement of the partnership for the purpose of ascertaining whether one of the partners has such an interest in a particular debt due the firm as to justify its appropriation to the payment of his individual indebtedness. As no such powers have been conferred upon the common law courts of this State, the exception cannot be applied to an attachment here." People's Bank *v.* Shryock, 48 Md. 436; overruling Wallace *v.* Patterson, 2 H. & McH. (Md.) 463.

Where a copartnership firm is garnished, and the individual members thereof are garnished under the same execution; *quære*, whether the dismissal as to the individuals is a dismissal of the firm. Ellison *v.* Ralston, 19 Mo. App. 537.

When a partnership is dissolved and

the defendant.[1] In Georgia, by statute, the interest of a co-partner may be reached by garnishment,[2] direct levy and sale not allowed as at common law.[3]

To all joint creditors *not partners*, the opposite rule obtains, though not unanimously, and the interest of such joint creditor may be taken by garnishment for his individual debt.[4] Credits due to judgment debtors, whether owned jointly, or jointly and severally, may be taken by garnishment in aid of execution, to pay the judgment debt, and the rule in execution as to joint and joint and separate property, should here apply,[5] bearing in mind, however, the distinctions as made under this subdivision, and that garnishment cannot be used to settle equities.

**8. Judgment Debtors and in Suits Pending.**—Debts in suit are liable to garnishment if process issue from within the jurisdiction in which the suit is pending,[6] but not otherwise because the

the interests of each ascertained, the amount due to each becomes a legal demand and may be reached by garnishment, and a jury to subject partnership property for the payment of the debt of an individual member thereof, should so find as an essential fact in the case. Birtwhistle *v.* Woodward, 7 S. W. Rep. (Mo.) 465.

If the writ be against only one of two copartners, it may be amended by adding the other partner, and if the garnishee still continue to hold the property, and no rights of third parties have intervened, the previous attachment becomes valid as to the property in the possession of the garnishee. Peabody *v.* Maguire, 79 Me. 572; Sullivan *v.* Langley, 128 Mass. 237.

1. Treadwell *v.* Brown, 43 N. H. 290; Burnham *v.* Hopkins, 17 N. H. 259.

2. Code 1908, Willis *v.* Henderson, 43 Ga. 325; Anderson *v.* Chenney, 51 Ga. 372; Branch *v.* Adams, 51 Ga. 113.

3. Shaws *v.* McDonald, 21 Ga. 395.

4. The interest of a joint contractor may be reached by garnishment, although the effect will be to sever the liability. The law, in carrying out its remedial provisions, may sever a contract so as to subject the debtor to the liability of two suits upon one contract. Whitney *v.* Munroe, 19 Me. 42; s. c., 36 Am. Dec. 732; Thorndike *v.* De Wolf, 6 Pick. (Mass.) 120. *Compare* Hawes *v.* Waltham, 18 Pick. (Mass.) 451; Miller *v.* Richardson, 1 Mo. 310. See note 1, Joint Debtors; and also *compare* Freeman on Executions (2nd ed.), § 169, and cases cited. French *v.* Rogers, 16 N. H. 177; Hansom *v.* Davis, 19 N. H. 133; both of which were cases of joint liability, and no provision possible of protecting the garnishee from other suits, and to discharge his liability to the other joint owner. See also Fairchild *v.* Lampson, 37 Vt. 407. *Contra* to the above rule, Ford *v.* Detroit Dry Dock Co., 50 Mich. 358.

5. Freeman on Executions, 2nd ed. (169 *a*); Thompson *v.* Taylor, 13 Me. 420; Caignett *v.* Gilbaud, 2 Yeates (Pa.) 35; Stone *v.* Dean, 5 N. H. 502; Parker *v.* Guillon, 10 N. H. 103; Lockert *v.* Child, 11 Ala. 640. *Contra*, Ford *v.* Dry Dock Co., 50 Mich. 358. Under a judgment against one person, two or more persons cannot be united in one garnishment where their liability is severed. Ball *v.* Young, 52 Mich. 476.

6. Foster *v.* Jones, 15 Mass. 185; Smith *v.* Barker, 10 Me. 458; Sweeney *v.* Allen, 1 Pa. St. 380; Franklin *v.* Ward, 3 Mason (U. S.) 136; Penniman *v.* Smith, 5 Lea (Tenn.) 130; Thrasher *v.* Buckingham, 40 Miss. 67; Lieber *v.* St. Louis A. & M. Assn., 36 Mo. 382; Crabb *v.* Jones, 2 Miles (Pa.) 130; Huff *v.* Mills, 7 Yerg. (Tenn.) 42; McDonald *v.* Karney, 8 Kan. 20; Hitt *v.* Lacey, 3 Ala. 104; s. c., 36 Am. Dec. 440.

The mere commencement of a suit against a debtor does not prevent his being made liable as garnishee, for he may plead such matter in abatement, before reference or verdict. Trowbridge *v.* Means, 5 Ark. 135; s. c., 39 Am. Dec. 368. But *compare* Burrill *v.* Letson, 2 Spear (S. Car.) 318. The only case where an attachment may have effect after suit is brought is where the evidence of the debt, as bonds, notes or books of account may be seized, and their seizure would operate as a transfer and assignment to the plaintiff.

allowance of process might permit one tribunal to interfere with the proceedings of another. This view has been adopted where a debt in suit in a federal court has been sought to be reached by process from a State court,[1] or where process from the court of one State seeks to subject to attachment a debt in suit in a different State.[2] In Michigan, this reasoning has been applied to courts in the same State.[3]

If, however, the suit shall have reached such a point that the garnishment may not be pleaded, and a stay of proceedings asked, then such debt is no longer subject to garnishment.[4] This has been held in case of a verdict,[5] an award made by a referee,[6] and after judgment.[7] In some States, the statutes have been held to be broad enough to cover debts of every kind and nature,

Statutes in some States regulate the commencement of suits against garnishees while the garnishment suit is pending. Brande *v.* Bond, 63 Wis. 140; Hauselman *v.* Kegel, 60 Mich. 540.

In Marden *v.* Wheelock, 1 Mont. 49, the court laid down the rule that if an action is pending and the defendant be served with garnishment for the same debt, the court should proceed with the first action to final judgment and protect such defendant (garnishee) if necessary by staying execution until the attachment suit is determined, which judgment can be rendered perpetual in whole or in part, as justice may require. Crawford *v.* Slade, 9 Ala. 887; Spicer *v.* Spicer, 23 Vt. 678.

1. "The jurisdiction of the district court of the United States and the right of the plaintiff to prosecute his suit in that court, having attached, that right could not be arrested or taken away by any proceedings in another court. This would produce a collision in the jurisdiction of courts that would extremely embarrass the administration of justice." Wallace *v.* McConnell, 13 Pet. (U. S.) 136; Wood *v.* Lake, 13 Wis. 84; Greenwood *v.* Rector, Hempst. (U. S.) 708.

2. American Bank *v.* Rollins, 99 Mass. 313; Whipple *v.* Robbins, 97 Mass. 107.

3. Custer *v.* White, 49 Mich. 262; Noyes *v.* Foster, 48 Mich. 273.

4. Kidd *v.* Shepard, 4 Mass. 238; Thayer *v.* Pratt, 47 N. H. 472; Wadsworth *v.* Clark, 14 Vt. 139; Thorndike *v.* DeWolf, 6 Pick. (Mass.) 120; Trombly *v.* Clark, 13 Vt. 118.

5. Foster *v.* Dudley, 30 N. H. 463. See Blake *v.* Adams, 64 N. H. 86.

6. McCaffrey *v.* Moore, 18 Pick. (Mass.) 492; Howell *v.* Freeman, 3 Mass. 121; Holt *v.* Kirby, 39 Me. 164; Strout *v.* Clemens, 22 Me. 292.

"If the defendant is liable at all under the process of garnishment he is liable from the time of service of the writ. But between the time of the service of the writ of garnishment and before the day of answering, his property may be exposed to execution and sale and he left remediless against the plaintiff in execution." Trowbridge *v.* Means, 5 Ark. 135; s. c., 48 Am. Dec. 368.

7. Despain *v.* Crow, 14 Oreg. 404; Norton *v.* Winter, 1 Oreg. 47; s. c., 62 Am. Dec. 297; Prescott *v.* Parker, 4 Mass. 170; Sharp *v.* Clark, 2 Mass. 91; Williamson *v.* Boardman, 9 Allen (Mass.) 570; Franklin *v.* Word, 3 Mason (U. S.) 136; Perkins *v.* Guy, 2 Mont. 15; Black *v.* Black, 32 N. J. Eq. 74; Elizabeth Savings Inst. *v.* Gerber, 35 N. J. Eq. 159; American Bank *v.* Snow, 9 R. I. 11; Estey *v.* Flanders, 16 N. H. 218; Burnham *v.* Folsom, 5 N. H. 566; Kerry *v.* Bower, Cro. Eliz, 186; Codfellow *v.* Cox, 1 Sneed (Tenn.) 330; s. c., 60 Am. Dec. 157; Turnstall *v.* Means, 5 Ark. 700; Trowbridge *v.* Means, 5 Ark. 135; s. c., 39 Am. Dec. 368; Bailey *v.* Louch, 46 Me. 167.

In Massachusetts, a judgment may be reached by statute if it remain unpaid for one year and a day. Sabin *v.* Cooper, 15 Gray (Mass.) 532.

Under the law of foreign attachment, by the custom of London, money due upon a judgment was not subject to garnishment. Coppell *v.* Smith, 4 T. R. 312; Caila *v.* Elgood, 2 T. R. 193.

In an early case in New Jersey the court said: "Notwithstanding the comprehensive phraseology of the act it is well settled that all rights and credits are not the subject matter of attachment." Judgment matter not subject to garnishment. Shinn *v.* Zimmerman, 3 Zab. (N. J. L.) 150; s. c., 55 Am. Dec. 260.

including debts reduced to judgment,[1] even after execution issued and levy made;[2] but not if the garnishment process issue

During the pendency of an appeal to the circuit court from a judgment rendered before a justice of the peace, such suit then stands "simply as an action pending for its collection" and is liable to garnishment. St. Louis etc. R. Co. *v.* Richter, 48 Ark. 349.

A judgment debt pending an appeal was garnished by filing petition in equity in circuit court. Thereupon the action on appeal was compromised and a release of the judgment obtained by the garnishee from the principal defendant in attachment suit. *Held*, that the garnishee was still liable on the garnishment. Bell *v.* Wood, 7 S. W. Rep. (Ky.) 550.

Jones *v.* St. Ouge, 67 Wis. 520; Detroit Post & Tribune Co. *v.* Reilly *et al.*, 46 Mich. 459; Dore *v.* Dougherty, 72 Cal. 232; s. c., 1 Am. St. Rep. 48; McBride *v.* Fallon, 65 Cal. 301; Safford *v.* Maxwell, 23 La. An. 345; *In re* Claim of Flandron, 92 N. Y. 256; Gager *v.* Watson, 11 Conn. 168; Fithian *v.* N. Y. etc. R. Co., 31 Pa. St. 114; Webster *v.* McDaniel, 2 Del. Ch. 297; Cahoun *v.* Whittle, 56 Ala. 138; O'Brien *v.* Liddell, 10 S. & M. (Miss.) 37; Halbert *v.* Stinson, 6 Blackf. (Ind.) 498; Minard *v.* Lawler, 26 Ill. 301; Cowart *v.* Chaffee, 51 Iowa 606; Keith *v.* Horns, 9 Kan. 386; Jones *v.* N. Y. etc. R. Co., 1 Grant (Pa.) 457.

Garnishment must issue from the same court in which judgment is rendered. Skipper *v.* Foster, 29 Ala. 330; s. c., 65 Am. Dec. 405. Calhoun *v.* Whittle, 56 Ala. 141.

Execution on the judgment will be stayed on the giving by the garnishee of sufficient security to protect the defendant from loss, if judgment is not obtained on the garnishment. Skipper *v.* Foster, 29 Ala. 330; Crawford *v.* Slade, 9 Ala. 887.

1. The judgment against the garnishee, sought to be charged as judgment debtor, makes out a *prima facie* case against him. If he has discharged it, he must prove it. O'Brien *v.* Liddell, 10 S. & M. (Miss.) 371.

A judgment is not subject to levy and sale under execution; the proper practice is to garnish the judgment debtor. Osborn *v.* St. Cloud, 23 Iowa 104; s. c., 92 Am. Dec. 413. *Contra*, Potter *v.* Phillips, 44 Ia. 353. See note, Ochiltree *v.* M. I. & N. R. Co., 49 Iowa 150.

Rev. Stat. 1845, which provides that where any person is indebted, or has any effects or estate of the defendant in his hands, the same may be the subject of garnishment, includes a judgment debtor, and a judgment debtor in the circuit court may be garnished on a process issued by a justice of the peace. Luton *v.* Hoehn, 72 Ill. 81. *Contra* in Tenn., Clodfelter *v.* Cox, 1 Sneed (Tenn.) 330.

If a judgment is obtained by one party for the use of another (and the defendant being notified that the judgment against him belongs to a person other than the plaintiff on the record, he is bound by the notice), such judgment debtor cannot be garnished, nor can the interest of the equitable owner of the judgment be reached by such proceedings. Hodson *v.* McConnell, 12 Ill. 170; Dank *v.* Alexander, 117 Ill. 330. Or if a judgment be assigned it cannot be taken in garnishment proceedings against the one in whose name it was given. Ives *v.* Addison, 39 Kan. 172; Allen *v.* Watt, 79 Ill. 284.

Where a process of foreign attachment is issued, and garnishee has a suit pending against him in another state for the same debt, which suit is put into judgment, the attaching plaintiff succeeds to the rights of the debtor in the foreign judgment. Fuller *v.* Foote, 15 Atl. Rep. 760.

Doe, J., in Blake *v.* Adams, 64 N. H. 87, said: "A practical difficulty which might arise in some jurisdictions from the trustee's liability to the enforcement of the former judgment not against them, may be serious here, where all interested persons are made parties to the suit, and are bound by a single judgment, rendered upon an equitable adjustment of their rights, and upon a disposition of the former judgment and execution that will not leave the trustees exposed to the danger of being twice compelled to pay a single debt. See also Owen *v.* Weston, 63 N. H. 599; Westmoreland *v.* Miller, 8 Tex. 168.

"All debts due," as used in the Civil Practice act, does not include judgments and promissory notes. Perkins *v.* Guy, 2 Mont. 15.

2. "It is ordered that proceedings on this *fi. fa.* be stayed until the attachment be dissolved." Becher *v.* Grubb, 4 Hous. (Del.) 461.

from a court of different jurisdiction.[1]

In some States, special statutes have been enacted subjecting judgments to levy and sale under execution, but they are construed strictly, and do not extend to proceedings in attachment; garnishment in such cases being the proper remedy.[2]

**9. In Cases of Negotiable Paper.**—In several States, it has been decided on principle, uninfluenced by statutory provision, that the maker of a negotiable instrument shall not be charged as garnishee of the payee while such instrument is still current.[3] But in some of the States negotiable instruments are considered as coming within the terms of the garnishment statutes;[4] in others as not coming within such terms.[5]

In some States there have been special statutes enacted making negotiable instruments liable to attachment, and stating how such attachment must be made.[6] In other States negotiable

1. Henry Seivers *v.* Woodburn Sarven Wheel Co., 43 Mich. 275; Young *v.* Young, 2 Hill (S. Car.) 426; Henry *v.* Gold P. M. Co., 15 Fed. Rep. 649; *Contra*, Jones *v.* N. Y. & Erie R. Co., 1 Grant (Pa.) 457.

2. Ochiltree *v.* M. I. & N. R. Co., 49 Iowa 150; Hanna *v.* Bry, 5 La. 651.

Garnishment by the statute of March 20th, 1839, for attaching judgment debtors, is merely cumulative, and levy and sale under execution may still be pursued even though the judgment be pending on an appeal. Safford *v.* Maxwell, 23 La. 345.

In New York, where direct levy and execution upon judgment is allowed, an undertaking upon appeal was *held* to be an incident of the judgment and not necessary to be also attached. Wehle *v.* Spellman, 75 N. Y. 585.

3. Stone *v.* Dean, 5 N. H. 502. By statute since then the maker of a negotiable note may be garnished in a suit against the payee at any time before the transfer of the note. Rev. St. N. H. 1843, ch. 208, §§ 18, 19. See Amoskeag Mfg. Co. *v.* Gibbs, 8 Fost. (N. H.) 316; Hutchins *v.* Evans, 13 Vt. 541. But the next year the legislature made them subject to attachment, if not already negotiated and *notice given to the debtor*. Williams Comp. Stat. (Vt.) 262; Kimball *v.* Gay, 16 Vt. 131; Chase *v.* Houghton, 16 Vt. 594; Barney *v.* Douglas, 19 Vt. 98; Nichols *v.* Hooper, 17 Atl. Rep. (Vt.) 134.

Information of indorsement from a mere stranger to the paper is not sufficient. Peck *v.* Walton, 25 Vt. 33; Ludlow *v.* Bingham, 4 Dall. (U. S.) 47. *Compare* Kieffer *v.* Ehler, 18 Pa. St. 388.

4. Perkins *v.* Guy, 2 Mont. 15; Kiefer *v.* Ehler, 18 Pa. St. 388. The words in Pa. statutes are all "debts due."

In Hightower *v.* Smith, 7 Yerg. (Tenn.) 500, the court said: The supreme court examined with solicitude to see if it could except debts founded on negotiable paper, out of the general laws relating to garnishment, but the statutes having made no exception the court could make none, but left the remedy to the legislature. See also Huff *v.* Mills, 7 Yerg. (Tenn.) 42; Turner *v.* Armstrong, 9 Yerg. (Tenn.) 412.

It is proper to remark that in none of the States where the attachment of negotiable paper has been sustained are the statutory provisions as to the general scope and effect of an attachment more comprehensive than in those States where the contrary position is taken. In every State the defendant's *credits* may be attached, and that term is as to this question fully as comprehensive as if the statute also authorized, as is frequently the case, the attachment of "*rights*" or "*effects*." Drake on Attach. (6th ed.), § 590.

5. The maker of a negotiable promissory note is not liable as the trustee of the payee, because an indebtedness of this kind was not included in the terms "goods, effects and credits of the principal defendant." Eunson *v.* Healy, 2 Mass. 32; Maine Fire & Marine Ins. Co. *v.* Weeks, 7 Mass. 438; Wood *v.* Bodwell, 12 Pick. (Mass.) 268; Perry *v.* Coats, 9 Mass. 537; Davis *v.* Pawlette, 3 Wis. 269; Hubbard *v.* Williams, 1 Minn. 54. *Contra*, Chase *v.* Houghton, 16 Vt. 597.

6. By section 640, Code Civil Pro-

paper is specially excepted, by statute, from attachment by garnishment before maturity.[1]

In some States promissory notes are not such negotiable paper as is governed by "the law merchant," and notice of their transfer must be given to the maker to protect the interest of the assignee; in such case they are subject to attachment by garnishment, and the principles apply that govern all equitable assignments.[2]

The decisions and statutes of the different States as to whether a debt, evidenced by a negotiable instrument, is subject to attachment or garnishment by a creditor of the holder of such instrument, are very different from each other, and there are instances in which exactly opposite conclusions have been reached, from the same wording of a statute. However, there are two general principles which apply to all negotiable paper, and each case will fall under one or the other of them. When so ascertained, the law as laid down can easily be applied to each case which may arise.

1. The maker of a negotiable instrument, summoned as the garnishee of the payee or endorsee, should not be charged as garnishee under an attachment served before the maturity of the debt, unless it be *affirmatively shown* that before the *rendition of the judgment*, the debt *had become due*, and *was then still the*

cedure, service of a copy of the warrant of attachment upon a person, having possession of negotiable paper is not a levy thereon and where a sheriff afterwards obtains possession of the property, his possession does not relate back to the time of such service. Anthony *v.* Wood, 96 N. Y. 180, reversing 29 Hun 239; overruling Bills *v.* National Bank, 89 N. Y. 343; following Thurber *v.* Blanck, 50 N. Y. 80; Castle *v.* Lewis, 78 N. Y. 131.

**1.** Maker cannot be charged with liability until maturity. Missouri Statutes, 1855.

In Matheny *v.* Hughes, 10 Heisk. (Tenn.) 40, the court said: "Before the enactment of the code it was *held* that a negotiable paper might be attached. See Moore *v.* Green, 4 Humph. (Tenn.) 299; Daniels *v.* Rawlins, 6 Humph. (Tenn.) 403." Brittain *v.* Anderson, 8 Baxt. (Tenn.) 316.

Notice of assignment must be given to the payee of a note, even though it has not matured. Williams' Compiled Stat. (Vt.) 262.

**2.** Where paper is not, strictly speaking, negotiable, still if the title in the assignee is good, without giving notice to the maker, it must, as regards liability to attachment, be considered as on the same footing as negotiable paper. St. Louis Perpetual Ins. Co. *v.* Cohen, 9 Mo. 421.

**Contra.**—If the note remained the property of the principal defendant at the time of service of the process of garnishment, then a judgment against the garnishee by the attaching creditor is a good defence to a suit by an assignee of such note. Speight *v.* Brock, Freeman (Miss.) 391.

A party indebted to an attachment defendant by a note not negotiable may be garnished, although his note may not be due, and judgment may be rendered against him in favor of the attaching creditor, payable when the note becomes due. King *v.* Vance, 46 Ind. 246, overruling Junction R. Co. *v.* Cleneay, 13 Ind. 161.

**Conflict of Law.**—If a note is negotiable in the State where executed, and is considered as not negotiable in the State where garnished, the proceedings must be determined by the law of the State where it was given or negotiated; that if negotiable there, the garnishee will not be charged as garnishee. Bayliss *v.* Houghton, 15 Vt. 626; Ludlow *v.* Bingham, 4 Dall. (Pa.) 47; Green *v.* Gillett, 5 Day 485; Smith *v.* Blatchford, 2 Ind. 184.

*property of the payee.*[1] This rule applies to all those States wherein it is held that negotiable debts are not subject to garnishment.

2. Where the maker of a negotiable instrument is summoned as a garnishee of the payee or endorsee, the plaintiff in attachment is not entitled to a judgment of condemnation if it appears that the instrument, either *before* or *after* the service of the attachment, has been transferred or endorsed over to a third person *before its maturity, for value* and without actual notice to him of the attachment.[2] This rule applies to all cases wherein the

But where a resident of one State made a note to a person in another State, *payable in the State where the maker resides*, it was *held* that he might be garnished, although by the law of place where the note was negotiated he would not be liable. Emerson *v.* Partridge, 27 Vt. 8.

1. Drake on Attachment (6th ed.), § 584, 587; Littlefield *v.* Hodge, 6 Mich. 326; Somers *v.* Losey, 48 Mich. 294; Commissioner *v.* Fox, Morris (Iowa) 48; Wilson *v.* Albright, 2 Greene (Iowa) 127; Fowler *v.* Doyle, 16 Iowa 534; Gregory *v.* Higgins, 10 Cal. 339; McMillan *v.* Richards, 9 Cal. 365; Ludlow *v.* Bingham, 4 Dall. (Pa.) 44. See, however, Day *v.* Zimmerman, 68 Pa. St. 72; Hutchins *v.* Evans, 13 Vt. 541. See Kimball *v.* Gay, 16 Vt. 131; Greer *v.* Powell, 1 Bush (Ky.) 489; Hubbard *v.* Williams, 1 Minn. 54; s. c., 55 Am. Dec. 66; Clough *v.* Buck, 6 Neb. 343; Gaffney *v.* Bradford, 2 Bailey (S. Car.) 441; Davis *v.* Pawlett, 3 Wis. 269. See Carson *v.* Bailey, 2 Chand. (Wis.) 123; s. c., 2 Pinn. 457; Perkins *v.* Guy, 2 Mont. 15. Or that it was not in the hands of a *bona fide* holder. Cleneay *v.* Junction R. Co., 26 Ind. 375; King *v.* Vance, 46 Ind. 246.

Though if voluntarily or fraudulently transferred for the purpose of protecting the debt from the creditors of the payee, the maker may be garnished while it is in the hands of the endorsee. Clough *v.* Buck, 6 Neb. 343.

While a negotiable instrument is current the maker cannot, as a general rule, be charged in garnishment. Drake on Attachm. (6th ed.), § 584; Inglehart *v.* Moore, 21 Tex. 501; Price *v.* Brady, 21 Tex. 614; Bassett *v.* Garthwaite, 22 Tex. 230; Kapp *v.* Teel, 33 Tex. 811; Thompson *v.* Gainesville Bank, 66 Tex. 156.

Negotiable notes cannot be attached in the hands of the debtor before maturity after they are put in circulation, except by actual seizure of the notes themselves, or by attachment in the hands of a person holding them as the property of the debtor. Erwin *v.* Commercial and R. Bank, 3 La. An. 186; s. c., 48 Am. Dec. 447; Sheets *v.* Culver, 14 La. 449; Kimbal *v.* Plant, 14 La. 511; Denman *v.* Payne, 20 La. An. 195; Davis *v.* Mitchell, 34 Cal. 81. *Contra.* The service creates a lien upon the debt which cannot be defeated by a subsequent *bona fide* transfer before maturity by the payee of the note to a third person, notwithstanding the entire ignorance of the assignee of process or its service. Dore *v.* Dawson, 6 Ala. 712. Overruled in Mayberry *v.* Morris, 62 Ala. 113; Chase *v.* Houghton, 16 Vt. 597. In these States, however, the law was that *notice* of the assignment of a promissory note should be given the maker.

2. Cruett *v.* Jenkins, 53 Md. 217 (the word *endorser*, p. 225, 3d line, should read *endorsee*); overruling Stewart *v.* West, 1 H. & J. (Md.) 536; Somerville *v.* Brown, 5 Gil. (Md.) 399; Secor *v.* Witter, 39 Ohio St. 218; Woolridge *v.* Holmes, 72 Ala. 568; *compare* Mills *v.* Stewart, 12 Ala. 96; Mayberry *v.* Morris, 62 Ala. 113; Hills *v.* Krafts, 29 Pa. St. 186; Day *v.* Zimmerman, 68 Pa. St. 72; Howe *v.* Ould, 28 Gratt. (Va.) 1; Enos *v.* Tuttle, 3 Conn. 27; Culver *v.* Parish, 21 Conn. 412; Glanton *v.* Griggs, 5 Ga. 436; Mims *v.* West, 38 Ga. 18; Burton *v.* Wynne, 55 Ga. 615; Scott *v.* Hill, 3 Mo. 88; Walden *v.* Valient, 15 Mo. 409; Colcord *v.* Daggett, 18 Mo. 557. Same in Florida. See Simon *v.* Huot, 8 Hun (N. Y.) 378; 1 Barr (Pa.) 263; 3 Barr (Pa.) 109; Pearce *v.* Jones, 3 Murphy (N. Car.) 256; Myers *v.* Beeman, 9 Ired. (N. Car.) 116; Ormond *v.* Moye, 11 Ired. (N. Car.) 564; Schuler *v.* Bryson, 65 N. Car. 201; Turner *v.* Armstrong, 9 Yerg. (Tenn.) 412; Yar-

maker of a negotiable instrument, before its maturity, can be garnished for his debt due to the holder of such instrument.

In either case, to charge the garnishee with liability, it must *affirmatively appear* that the defendant in attachment *still holds the note*, or *had not assigned it*,[1] or show that it has been paid in violation of good faith, and is then in the possession of such maker.[2]

borough *v.* Thompson, 3 S. & M. (Miss.) 291; Thompson *v.* Shelby, 3 S. & M. (Miss.) 296.

The note must be payable within the State. Chadbourne *v.* Gilman, 63 N. H. 353; Cabel *v.* Mason, 64 N. H. 10; Jones *v.* Rider, 60 N. H. 452.

Attachment of a note given to a mutual insurance company allowed, where at the time of garnishment the amount of the assessment had not been made, but was ascertained before judgment. Hay *v.* Lycoming Fire Ins. Co. 99 Pa. St. 621.

Where a note given as collateral security is sold by the pledgee along with the debt as security for the debt, the purchaser, having obtained a judgment for his debt against the pledgor, may by garnishment subject the debt due by the maker of the note, although he might also maintain an action on the note. Woolridge *v.* Holmes, 78 Ala. 568.

1. Edney *v.* Willis, 36 N. W. Rep. (Neb.) 303; Kinsly *v.* Evans, 34 Ohio St. 158; McNeill *v.* Roache, 49 Miss. 456; Ormond *v.* Moye, 11 Ired. (N. Car.) 564; Myer *v.* Beeman, 9 Ired. (N. Car.) 118; Shuler *v.* Bryson, 65 N. Car. 201.

This applies to either rule; for to charge the garnishee, his answer, or the evidence offered, must show affirmatively that he is indebted to the defendant in attachment, and, being indebted upon a negotiable instrument, his answer should so state the fact, and also state in whose possession the instrument is, or that he does not know who holds it, and consequently does not know to whom he owes the debt. But if the answer of a garnishee admits the execution of a note in favor of the defendant and does not show that the note is negotiable, or has been assigned to some person named, the plaintiff will be entitled to judgment on the answer. Fretwell *v.* Laffoon, 77 Mo. 26.

In Tennessee the court guarded against the inconvenience in practice of allowing attachment of negotiable paper by requiring the answer of the garnishee to show that the paper is still in the hands of the principal debtor. Pickler *v.* Rainey, 4 Heisk. (Tenn.) 335; Turner *v.* Armstrong, 9 Yerg. (Tenn.) 412; Daniel *v.* Rawlings, 6 Humph. (Tenn.) 403. The code has since made them not subject to attachment. Matheny *v.* Hughes, 10 Heisk. 401.

**Burden of Proof.**—The presumption is that the note came into the hands of an assignee before its maturity, and it is incumbent on the plaintiffs to show that the note did not pass into the hands of the intervenors before its maturity, but that it was in fact the property of the defendant (judgment debtor) at the time of the writ of garnishment. Bassett *v.* Garthwaite, 22 Tex. 230. But where a note is transferred after it is due it is a suspicious circumstance. Bridge *v.* Johnson, 5 Wend. (N. Y.) 355; Edney *v.* Willis, 36 N. W. Rep. (Neb.) 303.

The presumption that the note was endorsed in the usual course of business and before maturity is of the weakest kind, and is liable to be rebutted by the slightest circumstances of suspicion. Hulls *v.* Krofts, 29 Pa. St. 186; Snyder *v.* Bailey, 6 Barr. (Pa.) 168. See also Smith & Co. *v.* Ewer & Peck, 10 Harr. (Pa.) 116.

**A certified check** on a bank by the owner of a fund therein deposited and outstanding *in the hands of the drawer*, constitutes no such change in the ownership of the fund as exempts it from the lien of an attachment against the owner levied thereon. A bank can defeat such a liability to hold such deposit subject to the lien of the attachment only by showing a payment of the check made in good faith to a *bona fide* holder, or that it was outstanding unpaid in the hands of such a holder. Where a debt has been legally attached in an action against the creditor, an active duty is imposed upon the debtor and he is liable when, by an action, he allows the attached fund to be removed from his possession. Gibson *v.* Nat. Park Bk., 98 N. Y. 87; Bills *v.* Nat. Park Bk., 89 N. Y. 343.

2. Gibson *v.* National Park Bank,

The priority of a transfer of a negotiable instrument past due, and an attachment by a creditor of the transferor, is gauged by the *date* of the transfer and the *time of service* of process in garnishment.[1] A *bona fide* holder of a negotiable instrument for value holds the *legal title*, and if taken when past due, he takes it subject to all the equitable defences which might exist between the original parties, just the same as in case of an assignment of any chose in action, with this exception, that as the holder of a negotiable paper having the legal title, it is *not necessary that he give notice of the transfer to protect his rights.*[2] This makes it plain why, before judgment shall be given in garnishment upon a past due negotiable instrument, it should affirmatively appear that the defendant in garnishment still holds the instrument, or has not assigned it; for if he has, and such transfer was prior to the garnishment, such judgment will be no defence by the garnishee to an action by the holder of the evidence of his debt.[3]

Before judgment upon a negotiable instrument can be given against a garnishee, he has the right to insist upon the surrender

98 N. Y. 92; Thompson *v.* Gainesville Bank, 66 Tex. 156.

Where the answer of the garnishee is that the defendant held a promissory note against him, and that he does not know in whose hands it is, he is not discharged by such answer so as afterwards to settle directly or indirectly with the defendant. The issue presented by such an answer is whether the defendant held the note at the time of the service to the garnishment. The garnishee's legal protection is to pay the money in the court. Smith *v.* Wellborn, 73 Ga. 131.

Payment by the maker to one who, to his knowledge, did not hold it for value or in good faith, but simply for the benefit of the attachment debtor, is no defence to the garnishee. Bills *v.* Nat. Park Bank, 89 N. Y. 343.

**1.** Burton *v.* Wynne, 55 Ga. 615; Stevens *v.* Pugh, 12 Iowa 430. See also Daniels *v.* Rawlins, 6 Humph. (Tenn.) 403; Pickler *v.* Rainey, 4 Heisk. (Tenn.) 335.

Where the garnishee answers explicitly that he was indebted at the time of service, and it appears that the negotiable instrument, the evidence of the debt, has not been assigned before it was dishonored by nonpayment, the answer will charge the garnishee. Daniels *v.* Rawlings, 6 Humph. (Tenn.) 403; Moore *v.* Green, 4 Humph. (Tenn.) 299; Huff *v.* Mills, 7 Yerg. (Tenn.) 42; Matheny *v.* Franklin, 10 Heisk. (Tenn.) 401.

**2.** Shuler *v.* Bryson, 65 N. Car. 201; Knisely *v.* Evans, 34 Ohio St. 158; Edney *v.* Willis, 23 Neb. 56.

**3.** Shuler *v.* Bryson, 65 N. Car. 201; Parker *v.* Wilson, 17 Atl. Rep. (Vt.) 747; Inglehart *v.* Moore, 21 Tex. 501; Knisely *v.* Evans, 34 Ohio St. 158; Edney *v.* Willis, 36 N. W. Rep. (Neb.) 303; McCord *v.* Beatty, 12 Iowa, *overruled.*

The garnishee ought to have denied the fact of his indebtedness to the defendant unless it was first proved that he had not assigned the note before maturity. Ormond *v.* Moye, 11 Ired. (N. Car.) 567; Myers *v.* Beeman, 9 Ired. (N. Car.) 116; Brittain *v.* Anderson, 8 Baxt. (Tenn.) 316; Denham *v.* Payne, 20 La. An. 196; Drake on Attach. (6th ed.), § 592.

A judgment against the maker of a note as garnishee does not bind the payee of the note or his assigns, unless such payee had agreed that such judgment should discharge the note. Callaway *v.* Johnson, 51 Mo. 33.

But the holder of the negotiable instrument may recover back the money from the plaintiff in attachment, for he gained no greater right than the defendant in attachment had in the debt. Garrott *v.* Jaffrey, 10 Bush (Ky.) 413; Quarles & Thompson *v.* Porter, 12 Mo. 83; Colcord *v.* Hall & Daggett, 18 Mo. 56. *Compare* Funkhouser *v.* How, 24

of the evidence of his indebtedness, or an indemnity, as in case of a lost note.[1]

In case of garnishment of the maker of a negotiable instrument before its maturity, judgment of condemnation should not be given until the surrender of the evidence of the debt into the hands of the court, and the court from which the attachment issues may require the instrument to be placed in such custody as will prevent its improper transfer, taking care that the payment of it be demanded at maturity, and if necessary, proper notice given to endorsers. The money paid into court to be in place of the note, and to abide the event of the proceedings, and to satisfy any judgment which may have been given.[2]

Mo. 414, which is explained in Garrott *v.* Jaffrey, *supra.*

1. Shuler *v.* Bryson, 65 N. Car. 201. Or show that it was paid in bad faith and is then in possession of the maker. Gibson *v.* Nat. Park Bank of New York, 98 N. Y. 87; Bills *v.* Nat. Park Bank of New York, 89 N. Y. 343.

If the indemnity bond is not given the judgment against the garnishee is erroneous. Pickler *v.* Rainey, 4 Heisk. (Tenn.) 335.

In South Carolina the court in one instance, in a case where the note could not be surrendered, refused to charge the maker of the note, then past due. "The probability is so great that the absent debtor may have transferred negotiable notes, that it would be too great a hardship to compel the maker to pay the money and resort to his indemnity if he should be compelled to pay it over again." Gaffney *v.* Bradford, 2 Bailey (S. Car.) 441.

If the garnishee allow judgment to go against him without protecting himself, he is liable to an innocent purchaser. Brittain *v.* Anderson, 8 Baxt. (Tenn.) 316; Conner *v.* Allen, 3 Head (Tenn.) 418.

2. Kieffer *v.* Ehler, 18 Pa. St. 388. This case *held*, that the authority to garnish the maker of a negotiable instrument for the debt due to the payee of such instrument, was contained in the term "all debts belonging to or due to the defendant." The right to impound the note is inherent to the functions of a court. The negotiation of a note by the payee after garnishment of the maker is a fraud upon the law.

See Drake on Attach. (6th ed.), § 587, note 1.

**The Practice in Ohio.**—In action before a justice of the peace a garnishee who is summoned to answer is not a party, nor has he his day in court in that action. His duty is to appear and answer all questions touching the property and credits of defendant in his possession or under his control, and truly disclose the amount owing by him to defendant, whether due or not, and whether upon a negotiable instrument or otherwise. If it appears that he is owing defendant on a negotiable instrument not yet due, it is the duty of the justice, after judgment against defendant, to order him to pay the amount when due to the justice, to be applied in satisfaction of such judgment. Such order is not a judgment charging the garnishee. It does not determine the ultimate rights of the parties. It can only be enforced by actions as in other cases. In legal effect it is an assignment of defendant's right in the claim to the plaintiff, and authorizes him to sue thereon in his own name, if the order is not complied with. In such an action the garnishee may interpose any offset or defence he may have against the action, notwithstanding the order of the justice, and no judgment should be rendered against him that will not be a protection against the rights of third persons.

In an action for failure to obey the order of the justice, the fact that the instrument had, since it was seized in attachment, and before its maturity, become the property of a *bona fide* holder, will defeat a recovery. After the order of the justice and before the maturity of a negotiable instrument so seized in attachment, equity will interpose, on the application of the plaintiff, against an endorser with actual notice of the attachment, to restrain him from transferring the same so as to defeat the attachment, and on final hearing will grant such relief as the rights of

This being the case, and the rights of endorsees and of the makers of negotiable instruments being fully protected, and the negotiable qualities of the paper remaining unimpaired, there can be no sound reason advanced why such indebtedness should not be subject to attachment before maturity for the payment of a debtor's obligations; but rather there is good reason why it should be liable, for it is the policy of the law to subject a debtor's property to the payment of his just debts. As to what notice of an attachment is sufficient to effect a *bona fide* endorsee for value, it is held that the doctrine of *lis pendens* did not apply to negotiable securities,[1] and it can hardly be doubted that the only safe and consistent rule is that the notice must be *actual*.[2] Whenever it appears that a transfer of the title to the debt has been made, and is claimed by a third person, the garnishee should not be exposed to the hazard of a double judgment, but, upon his prayer to that effect, or upon the court's receiving notice, the assignee should be cited to appear and interplead and have their rights adjusted,[3] and an attachment creditor can thus test the validity of a transfer,[4] and all the parties to the suit will be bound by the judgment.[5]

The law as applicable to negotiable paper has been quite fully stated under the preceding sub-title, to which we also refer,[6] and also append the principles to be observed in connection with this subj .[7]

the parties may require. Secor *v.* Witter, 39 Ohio St. 218.

1. Mims *v.* West, 38 Ga. 18; Kiefer *v.* Ehler, 18 Pa. St. 388; Mayberry *v.* Morris, 62 Ala. 113; Winston *v.* Westfeldt, 22 Ala. 760; County of Warren *v.* Marcy, 97 U. S. 105; Murray *v.* Lilburn, 2 Johns. Ch. (N. Y.) 441; Matheny *v.* Franklin, 10 Heisk. (Tenn.) 401; 1 Parsons on Notes and Bills, 260; Secor *v.* Witter, 39 Ohio St. 218.

2. Drake on Attach. (6th ed.), § 591; Secor *v.* Witter, 39 Ohio St. 218.

Notice from a mere stranger to the paper is not sufficient. Peck *v.* Walton, 25 Vt. 33. But see Emerson *v.* Partridge, 27 Vt. 8.

The maker of a promissory note was summoned as garnishee in a suit against the payee named in said note, and afterwards, but before answer, received a letter purporting to be signed by one P, and stating that he had bought said note, describing it, "which you will pay me." The garnishee testified that he did not know the handwriting of P, and that said letter was all the notice he had received of any transfer or assignment of the note. *Held*, that the garnishee at the time of answer had not received such notice of the assignment as to enable him to make a disclosure of it as a fact. McAllister *v.* Brooks, 22 Me. 80.

3. Inglehart *v.* Moore, 21 Tex. 501; Fowler *v.* Doyle, 16 Iowa 534; Fitch *v.* Brower, 11 Atl. Rep. (N. J.) 330; Thompson *v.* Shelby, 3 S. & M. (Miss.) 296.

4. VIII., 8.

Even where the rule is that they are not liable to an attachment before maturity. Clough *v.* Buck, 6 Neb. 343.

Where an affidavit charges that the attachment defendant, at the time of his alleged fraudulent transfer of a promissory note to the garnishee, was notoriously insolvent, and that all his property, subject to execution, had been sold on execution, it is sufficient to withstand a motion in arrest. Gorbin *v.* Goddard, 94 Ind. 419.

5. Judgment for a note carries with it the mortgage by which it is secured, and the plaintiff may proceed to foreclose. Alsdorf *v.* Reed, 45 Ohio St. 653.

6. VIII., 8, note.

7. In every case of attachment of negotiable paper, as well as in cases of assignment, where the garnishee does

**10. As Affected by Assignment.**—A valid assignment by the defendant, which transfers either the legal or equitable title to the assignee, of property in the hands of a garnishee, or debts owing by him to such defendant, is sufficient to discharge the garnishee from liability for such property,[1] or upon such obligation.[2] The

his whole duty, the following principles must be observed:

"1. It is impossible to charge a garnishee unless it appear *affirmatively* that at the time of garnishment the defendant had a cause of action against for the recovery of a legal debt, due or to become due by the efflux of time. 2. The attachment plaintiff can hold the garnishee responsible (except in some few cases which have been referred to and have no application here) only so far as the defendant might hold him by an action at law. 3. The garnishee is under no circumstances to be placed by the garnishee in a worse position than he would otherwise be in. 4. No judgment shall be rendered against him as garnishee where he answers fairly and fully, unless it would be available as a defence against an action afterwards brought against him on the debt in respect of which he was charged." Drake on Attach. (6th ed.), § 583.

1. In determining whether the property has been assigned, the point to be ascertained is whether the supposed assignor has so disposed of it that it is beyond his control. But where the assignment has been accepted by the assignor, it is of little moment the particular form in which it is done. Drake on Attach. (6th ed.), §§ 525, 526; Balderson *v.* Mauro, 2 Cranch C. C. (U. S.) 623; Howe *v.* Jones, 57 Iowa 130.

2. Ives *v.* Addison, 39 Kan. 172; White *v.* Coleman, 130 Mass. 316.

**Book Accounts.**—Garnishment must be made upon the debtors owing such accounts, and not upon an assignee who holds the books of account by fraud. Ide *v.* Harwood, 30 Minn. 191.

Where the debt of the garnishee is not evidenced by a writing, it may be assigned verbally if the debtor assent. Where such assent is given the assignment is complete, and the debtor is bound to pay the assignee. Drake on Attach., § 614. See also VII., 4, h, *supra*; Howe *v.* Jones, 57 Iowa 130; Little Wolf River Imp. Co. *v.* Jackson, 66 Wis. 42; Newmann *v.* Calumet & Hecla Mining Co., 57 Mich. 97.

Assignment of wages as computed by coupons. See Stinson *v.* Caswell, 71 Me. 510.

**Assignment of Exempt Property.**—Garnishment process will not reach personal property assigned by the principal debtor, if in his hands it would have been exempt from execution. Anderson *v.* Odell, 51 Mich. 492.

Equity recognizes the validity of an assignment of *part of a claim*, and the assignee may avail himself of the equitable principle in a trustee process in which he appears as claimant of a part of the fund. Horne *v.* Steam Mill Co., 79 Me. 263; Exchange Bank *v.* McLoon, 77 Me. 498. And an acceptance is not requisite where a draft is drawn on a bank payable out of a larger fund lying there to the credit of the drawer. Bullard *v.* Randall, 1 Gray (Mass.) 606.

"When it is sought to reach by garnishment a credit of the defendant, it must be both legally and equitably due him. . . . The same principle is applicable to all cases of equitable assignments of debts where the defendant may be legally entitled to collect the debt; but not for his own benefit." Drake on Attach. (6th ed.), § 602; Rodgers *v.* Hendsley, 2 La. 597; Keeley *v.* Abbott, 14 N. H. 359; Leland *v.* Sabin, 7 Fost. (N. H.) 74. See VIII., 2, *supra*.

While the mere delivery to a third person of a check or draft drawn by a creditor upon his debtor does not effect a legal transfer of the debt, yet where it appears that the intent was to make such a transfer, it is the duty of the court to carry out the intent. Throop Grain Cleaner Co. *v.* Smith, 110 N. Y. 83.

Where a depositor in a bank, before the service of process upon the bank as garnishee, at the suit of a creditor of the depositor, drew a check in favor of another, which was forwarded to the bank, and was by it paid in due course of business after the service of the writ, and charged to the account of the depositor, it was *held* that the bank, as garnishee, was entitled to credit for the amount of the check so paid. American Bank *v.* Ind. Banking Co., 114 Ill. 483. See Nat. Commercial Bank *v.* Miller, 77 Ala. 168.

priority of garnishment and an assignment over each other are gauged by the time of service of process and the date of the assignment.[1] The genuineness of the receipt being established, and nothing appearing to repel the *prima facie* presumption that it bears its proper date, proof of delivery, or receipt and acceptance of an assignment before service of the attachment is not necessary to perfect it as an equitable assignment, and to give it priority over the attachment.[2] But the *bona fides* of an assignment may be enquired into, and the title impeached on account of fraud[3]

The attaching creditor is not in a better condition than his debtor would have been if the attachment had not been laid. So a draft by the defendant upon the garnishee in favor of a third person before the attachment is an assignment to the payee of the amount stated in the draft, and will be preferred to an attachment. Miller *v.* Hubbard, 4 Cranch (C. C.) 451.

Attachment of funds on which an endorsee had received a bill of exchange, must be postponed to an assignee of the endorsee who received his assignment before the service of process. Corser *v.* Craig, 1 Wash. (U. S.) 424.

CUMMIN, P. J., in Saylor *v.* Bushong, 100 Pa. St. 27: "It is regarded as settled that the holder of a check cannot maintain an action in his own name against the drawee, though they have sufficient funds of the drawer, if they refuse to accept it. A check may be revoked before presentment," etc. "It is true a garnishee is bound to make every legal defence that a claimant of the fund might make" as to the attaching debtor. An attaching creditor stands in the shoes of the debtor. Patten *v.* Wilson, 34 Pa. St. 299. An attachment is an equitable assignment . . . A substitution of the creditor for the debtor, it places the judgment creditor in the shoes of the debtor, with all his privileges, just as he stood at the date of the service of attachment. Reed *v.* Penrose, 2 Grant's Cas. (Pa.) 472. See White & Tudor's Leading Cases Eq., pt. 2 (4th Am. ed.), which states that: "Agreeable to the weight of authority, a check is essentially a bill of exchange, and will not therefore operate as an equitable transfer or appropriation." See Jordan's Appeal, 10 W'kly Cases 37; Kuhn *v.* Warren Savings Bank, 11 Atl. Rep. (Pa.) 440.

An unaccepted draft is not an assignment of the fund. Lewis *v.* Traders' Bank, 30 Minn. 134.

So, where a debt has been legally attached, in an action against the creditor, an active duty is imposed upon the debtor, and he is liable when by inaction he allows the attached fund to be removed from his possession. Applied to case of funds in a bank in Gibson *v.* Nat. Park Bank of N. Y., 98 N. Y. 87.

As to what constitutes an assignment, both as to property and debts, see 1 AM. & ENG. ENCY. OF LAW 827; 3 ibid. 235, 6 ibid. 658.

1. Southern Md. R. Co. *v.* Moyer, 17 Atl. Rep. Pa. (1889) 46; Stevens *v.* Pugh, 12 Iowa 430; Giddings *v.* Coleman, 12 N. H. 153; Baldwin *v.* Wright, 3 Gill (Md.) 241; Greentree *v.* Rosenstock, 61 N. Y. 583.

A garnishment is not superseded or dissolved by a subsequent assignment at common law, nor by an assignment under our insolvent act of 1881 filed more than ten days after the garnishment. Fairbanks *v* Whitney, 36 Minn. 305.

Assignment must have been completed before the garnishment to have priority. Hart *v.* Beck, 60 Miss. 946.

In Kirkland *v.* Brune, 31 Gratt. (Va.) 126, an assignment to a trustee which had not been recorded was given priority to garnishment.

**Burden of Proof.**—Where the garnishment and an assignment were both executed the same day, and there is doubt as to which was prior in point of time, the burden of proof rests upon the assignee. Beigman *v.* Sells, 539 Ark. 97.

2. Sandiges *v.* Graves, 1 Patton Jr. & H. (Va.) 101.

3. Fulweiler *v.* Hughes, 17 Pa. St. 440; Curtis *v.* Stuver, 7 Vroom (N. J.) 304; Hooper *v.* Hilk, 9 Pick. (Mass.) 435; Ripley *v.* Severance, 6 Pick. (Mass.) 474; Dawson *v.* Coffey, 12 Or. 513; Daggitt *v.* St. L. M. F. Ins. Co., 19 Mo. 201; Lee *v.* Tabor, 8 Mo. 322.

But the assignee must be before the court, and in a position to defend his

or other invalidating circumstances,[1] whether the garnishee sets up title in himself,[2] or an assignment is claimed by a third person.[3] To do this it is necessary that the assignee be before the court and in a position to assert his rights, or so he may be called upon to defend them.[4] But the rights of conflicting assignments cannot be tried in an attachment suit.[5]

If the garnishee, before being summoned, has *bona fide* paid debts of the defendant to an equal value of the property in his hands, even though he received it under a contract that was fraudulent as to creditors,[6] he is not liable as garnishee in respect to such property;[7] and where garnishment proceedings are ended for any reason, as by plaintiff's failure to appear on the return of a summons to the garnishee to show cause why judgment should not be entered against him, the subsequent appearance of both plaintiff and garnishee cannot affect rights acquired by a third person as assignee of the debtor's demand against the

rights. Keep *v.* Sanderson, 2 Wis. 42; s. c., 60 Am. Dec. 404; 12 Wis. 352; Prentiss *v.* Danaker, 20 Wis. 311; Inglehart *v.* Moor, 21 Tex. 501.

An attachment levied on the funds in the hands of a receiver of an insolvent corporation, asserting such assignment to be fraudulent and void, binds such funds in the hands of the receiver, and an injunction *pendente lite* is unnecessary and inappropriate, for the receiver is liable as garnishee if complainant's claim shall be sustained. Kimball *v.* Lee, 43 N. J. Eq. 277.

1. Knight *v.* Gorman, 4 Me. 492.

Where a judgment has been entered for the use of a party who disclaimed the assignment to him, the defendant may move the court to strike out the use, and upon proof of such disclaimer the court may strike it out. Baldwin *v.* Wright, 3 Gill (Md.) 241.

As respects a creditor who will have nothing to do with an invalid assignment of an insolvent debtor, it is void, and he may therefore disregard it, and lay hold of the assigned property or its proceeds in the hands of an assignee by garnishment or otherwise as the circumstances advise. As to him, the property and proceeds are not *in custodia legis*. May *v.* Walker, 35 Minn. 194.

2. Cowles *v.* Coe, 21 Conn. 219.

3. Maher *v.* Brown, 2 La. 492; Giddings *v.* Coleman, 12 N. H. 153.

4. Noble *v.* Thompson Oil Co., 79 Pa. St. 369; s. c., 21 Am. Rep. 66; Roy *v.* Boracus, 43 Barb. (N. Y.) 310; Smith *v.* Wright, 6 Blackf. (Ind.) 550. Drake on Attach. (6th ed.), § 524.

The assignee must be a party, otherwise the judgment of the court would not be conclusive upon him, and the garnishee might be subjected to pay his debt twice. Simpson *v.* Tippin, 5 S. & P. (Ala.) 208.

The garnishee holds the property to abide the action of the court. Saller *v.* Ins. Co., 62 Ala. 221.

If it is conceded by the pleadings that the force and extent of the transfer of assignment are involved, the court has the right under the pleadings to pronounce upon such questions in the absence of the claimant, *if neither party* demands that he should be brought before the court. McKittrick *v.* Clemens, 52 Mo. 160.

5. Shattuck *v.* Smith, 16 Vt. 132.

6. Ripley *v.* Severance, 6 Pick. 474; Thomas *v.* Goodwin, 12 Mass. 140; Hutchins *v.* Sprague, 4 N. H. 469.

7. At a sheriff's sale, on an execution against an incorporated company, A bought in the company's property with money given him for this purpose by the company. He subsequently transferred said property, in good faith, with the approval of the board of directors and the assent and acquiescence of the stockholders of the company, to a newly organized corporation into which the old one was merged. After this transfer of the property by A, an attachment execution was issued against him as garnishee of the original company. *Held*, that he was not liable as garnishee of said company, either for the property purchased for them and so transferred to the new corporation or

garnishee, for the right of an assignee cannot be forfeited by the action of a garnishee in the assignee's wrong.[1]

The notice required to be given by an assignee of an unnegotiable debt is such as will enable the garnishee to show such assignment in his answer, or at least that he may bring it to the attention of the court before judgment is given against him.[2] In Vermont, it is held that the notice to the debtor of the assignment of a demand must emanate from, and be given by, the procurement of the assignee or his agent in order to protect the demand from attachment, as the property of the assignor. No particular form is necessary, and such knowledge or information may be merely casual, and for no definite purpose, and yet be sufficient notice.[3]

for the value of it. Balliet *v.* Brown, 103 Pa. St. 546.

1. Johnson *v.* Dexter, 38 Mich. 695; Tabor *v.* VanVranken, 39 Mich. 795.

2. Dix *v.* Cobb, 4 Mass. 508; Wakefield *v.* Martin, 3 Mass. 558; Walling *v.* Miller, 15 Cal. 38; Smith *v.* Clarke, 9 Iowa 241; Walters *v.* Washington Ins. Co., 1 Iowa 404; Haldeman *v.* Hillsborough & Cin. R. Co., 2 Handy (Ohio) 101; Canal Co. *v.* Insurance Co., 2 Phila. (Pa.) 354; Noble *v.* Thompson Oil Co., 79 Pa. St. 354; s. c., 21 Am. Rep. 66; McGuire *v.* Pitts, 42 Iowa 535; Dresser *v.* McCord, 96 Ill. 389; Stevens *v.* Stevens, 1 Ashm. (Pa.) 190; Crayton *v.* Clark, 11 Ala. 787; Smith *v.* Sterritt, 24 Mo. 260; Muir *v.* Schenck, 3 Hill (N. Y.) 228; Northam *v* Cartwright, 10 R. I. 19; Tracy *v.* McCarty, 12 R. I. 168; Williams *v.* Pomeroy, 27 Minn. 85; Drake on Attachment (6th ed.), § 527, 608.

**Wages.**—An assignment in good faith of wages to be earned under an existing contract is valid against a garnishment subsequent in time, provided the garnishee have such notice of the assignment as will enable him to disclose it in his affidavit and thus avoid being charged. Notice to the garnished debtor is necessary only for his protection. Tiernay *v.* McGarity, 14 R. I. 231.

**Contra to All the Above.**—Notice of an equitable interest must be given to the debtor before *service of process*, or the attaching creditor has the prior right. Ward *v.* Morrison, 25 Vt. 593; Barron *v.* Porter, 44 Vt. 587; Flickey *v.* Loney, 4 Baxt. (Tenn.) 173; Clodfelter *v.* Cox, 1 Sneed (Tenn.) 339; s. c., Am. Dec. 403. And this is true although the assignment be by deed registered before garnishment served. Miller *v.* O'Bannon, 4 Lea (Tenn.) 403.

The following exception is made, however: Where the title as against the debtor is evidenced by a writing signed by him, which is assigned by actual manual delivery to the assignee, thus denuding the assignor of the *indica* of ownership, it transfers the title to the assignee without notice to the debtor, whether the legal title in the instrument passed by the assignment or not. Gayoso Savings Institute *v.* Fellows, 6 Cold. (Tenn.) 472. *Contra*, Van Buskirk *v.* Hartford Fire Ins. Co., 14 Conn. 141; s. c., 36 Am. Dec. 473.

Notice must be given to the debtor within a reasonable time after assignment. Van Buskirk *v.* Hartford Fire Ins. Co., 14 Conn. 141; s. c., 36 Am. Dec. 473; Judah *v.* Judd, 5 Day (Conn.), 534; Bishop *v.* Holcombe, 10 Conn. 444.

By the preponderance of the English authorities an assignee of a chose in action without notice to the debtor will be protected against the claims of the creditors of his assignor, but not as against the claims of a subsequent assignee for value and in good faith. This rule is the one countenanced by the English cases. See Kinderly *v.* Jervis, 22 Beav. 31; Pickering *v.* Ilfracombe R. Co., L. R. 3, C. P. 235, both holding that the claims of an assignee, though no notice has been given of the assignment, are paramount to those of the creditors of the assignor, and commenting upon and virtually overruling Watts *v.* Porter, 3 El. & Bl. 743, which had *held* such notice necessary. 36 Am. Dec., *note*, p. 476.

3. Barron *v.* Porter, 44 Vt. 587; Dale *v.* Kimpton, 46 Vt. 76.

**Mere rumor** of the transfer of a re-

Notice to one of two trustees, executors, etc., is sufficient.[1]

When a garnishee discloses an assignment of the debt to a third person, the supposed assignee may be cited to become a party to the suit in order to test the validity of the assignment, and the court is bound to suspend proceedings against the garnishee, and to give notice to the supposed assignee that he may appear and contest the garnishment.[2] If a garnishee with notice of an assignment or interest of a third person in property garnished, fails to bring it to the notice of the court, the judgment rendered against him will be no bar to a suit by such third person.[3]

It is the duty of an assignee, who would protect his interest in the claim assigned, upon proper notice, to furnish to the trustee competent evidence of the assignment of the claim where the garnishee is not in possession of the facts essential to his dis-

ceipt to an assignee coming to the ear of a garnishee before garnishment, is not sufficient notice of such assignment. Beck *v.* Cole, 16 Wis. 95.

Notice to a local insurance agent is not sufficient, but notice to a general agent is. Weed *v.* Boutelle, 56 Vt. 570.

1. Foster *v.* Mix, 20 Conn. 395.

2. Clark *v.* Coleman, 62 Ala. 243; Noble *v.* Thompson Oil Co., 79 Pa. St. 369; s. c., 21 Am. Rep. 66. Canal Co. *v.* Ins. Co., 2 Phila. (Pa.) 354.

3. Parker *v.* Wilson, 17 Atl. Rep. (Vt.) 747; Dodds *v.* Gregory, 61 Mass. 351; Tabor *v.* Van Vranken, 39 Mich. 793: Smith *v.* Ainscow, 11 Neb. 476; Dodd *v.* Brott, 1 Minn. 270; s. c., 66 Am. Dec. 541; Smoot *v.* Eslava, 23 Ala. 659; s. c., 58 Am. Dec. 310; Fowler *v.* Williamson, 52 Ala. 18; Craylon *v.* Clark, 11 Ala. 787; Kimbrough *v.* Davis, 34 Ala. 583; Bunker *v.* Gilmore, 40 Me. 88; Pitts *v.* Mower, 18 Me. 361; Larrabee *v.* Knight, 69 Me. 320; Gates *v.* Kirby, 13 Mo. 175; Wigwall *v.* Union Coal & M. Co., 37 Iowa 130; Large *v.* Moore, 17 Iowa 258; Walters *v.* Washington Ins. Co., 1 Iowa 404; s. c., 63 Am. Dec. 451; Prescott *v.* Hull, 17 Johns. (N. Y.) 284; Greentree *v.* Rosenstock, 61 N. Y. 583; Page *v.* Thompson, 43 N. H. 373; Nugent *v.* Opdike, 9 Rob. (La.) 453; Colvin *v.* Rich, 3 Port. (Ala.) 175; Lamkin *v.* Phillips, 9 Port. (Ala.) 98; Foster *v.* White, 9 Port. (Ala.) 221; Black *v.* Brisbin, 3 Minn. 360; Casey *v.* Davis, 100 Mass. 124; Noble *v.* Thompson Oil Co., 79 Pa. St. 354; s. c., 21 Am. Rep. 66; Dawson *v.* Jones, 2 Horst. (Del.) 412; Connor *v.* Allen, 3 Head (Tenn.) 418.

It matters not how such notice is received so long as it comes from the assignee or his agent. Bank of St. Mary *v.* Morton, 12 Rob. (La.) 409. Or that it came to him on Sunday. Crozier *v.* Shants, 43 Vt. 478. It is not his duty to ascertain the truth or falsity of the information before stating it in his answer. Foster *v.* Walker, 2 Ala. 177; Wicks *v.* Branch Bank, 12 Ala. 594.

The assignment of a contract not negotiable cannot be shown in garnishment proceedings instituted against the promisor therein named, except by the disclosure of the garnishee in his answer. Foster *v.* Sinkler, 4 Mass. 450.

Where debtors of an insolvent have been sued by their creditors' assignee after being garnished, they should ask leave to file a supplemental disclosure setting up the alleged assignment, and they should notify the plaintiffs in garnishment proceeding to defend the suit brought by the assignee. They will be bound by the judgment in the suit so defended. Butler *v.* Wendell, 57 Mich. 62.

Cases in which the notice given by the assignee was *held* effectual to make the garnishee liable to him. Adams *v.* Robinson, Pick. (Mass.) 461; Nesmith *v.* Drum, 8 Watts & Sargeant (Pa.) 9; Legro *v.* Staples, 16 Me. 252; Lamkin *v.* Phillips, 9 Port. (Ala.) 98; Colt *v.* Ives, 31 Conn. 25; Dobbins *v.* Hyde, 37 Mo. 114; Newell *v.* Blair, 7 Mich. 103.

**Assignment—How Shown.**—Prior to the service on the garnishee W. said to him: "If there is anything due from you to M., the defendant, I want you to pay it to me." The garnishee replied that he had been requested to do the

charge, or else to appear personally and defend his rights.[1] Otherwise the claim of the assignee will be considered as waived or abandoned,[2] and in either case the judgment rendered in the cause will be decisive of his rights, and will bar a subsequent proceeding by him against the garnishee.[3]

The consequences of the failure of an assignee to give the debtor notice of the assignment differs where he is the legal owner, the debt being negotiable, and where he is only an equitable owner, the debt being non-negotiable, and notice essential to complete the transfer. It is no defence to an action, by the assignee of a negotiable instrument, against the maker that he has already paid the debt to an attaching creditor of the payee or endorsee, provided such assignee be a *bona fide* holder of the instrument for value, and, if past due when received, that the transfer to him was prior to the service of process of garnishment, and this is true although no notice of the assignment had ever been given.[4] But the assignee can, if he choose, recover back the money paid by the garnishee to plaintiff in attachment, for the attaching creditor can get no better title than the defendant in attachment had at the time of service of process.[5] But where the assignee has only an equitable title, he has no right to the debt where he failed to give the debtor notice before judgment is rendered in the garnishment proceedings, for the

same by two others that day. To this W. replied that "he claimed it." *Held* that this did not constitute notice of the assignment to W. of the debt due the defendant by the garnishee. Cahoon *v.* Morgan, 38 Vt. 234.

1. Stevens *v.* Dillman, 86 Ill. 233.

It is error to discharge the garnishee on motion of the intervenor, where there was no proof of his claiming the money by an assignment to him. Nat. Bank of Galena *v.* Chase, 71 Iowa 120.

Where a claimant appears and is treated by the court and parties as a party to the end of the proceedings, it is then too late to object that no formal order making him a party was entered. Williams *v.* Pomeroy, 27 Minn. 85.

2. Giddings *v.* Coleman, 12 N. H. 153; Stevens *v.* Dillman, 86 Ill. 233.

Notice *held* insufficient in substance and unreasonable in time. See Noble *v.* Thompson Oil Co., 79 Pa. St. 368; s. c., 21 Am. Rep. 66.

The notice of the assignment, in order to be effectual against the claim of a creditor of the assignor, who has summoned the debtor as trustee, must, when given, *be full, and accompanied with the evidence of the transfer;* or, at least this evidence must be in the debtor's possession when he answers interrogatories, in order that the court may judge whether the assignment is legal and valid or not. Wood *v.* Partridge, 11 Mass. 488.

3. Fisk *v.* Weston, 5 Me. 410; Born *v.* Steadman, 24 Ill. 320; Moor *v.* Shackmann, 12 S. & R. (Pa.) 287; Butler *v.* Wendell, 57 Mich. 62; Smoot *v.* Eslava, 23 Ala. 659; s. c., 58 Am. Dec. 310.

If the garnishee give notice of the assignment he cannot be charged as garnishee. Walters *v.* Washington F. Ins. Co., 1 Iowa 404; s. c., 63 Am. Dec. 1451; Allison *v.* Barrett, 16 Iowa 283; McPhail *v.* Hyatt, 29 Iowa 141.

**Proof of Assignee.**—If the assignee of funds trusteed appears, upon notice, and claims the funds, and is examined as a witness, it is his duty to state fully and clearly the circumstances connected with the assignment, and the consideration for which it is made; and if he refuses to do so, and gives only vague, indefinite and sweeping answers, his claim may justly be viewed with suspicion and declared invalid. Thompson *v.* Reed, 77 Me. 425; Foster *v.* Skinker, 4 Mass. 450.

4. See VIII., 10, note.

5. See VIII., 10, note.

attaching creditor is then to be deemed a purchaser in good faith from the date of the attachment.[1] But if the attaching creditor had notice of an equitable assignment before laying the attachment, he cannot be considered as a purchaser in good faith, and the money may be recovered back from him by the assignee, notwithstanding the judgment of a competent court decreeing the property to him.[2]

**11. As Affected by Prior Encumbrance or Pledge.**—At common law, an equitable interest in personal property cannot be taken under execution or attachment.[3] So the interest of a mortgagor or

1. Gill & Co. *v.* Frank, 12 Or. 704; Garrett *v.* Jaffrey, 10 Bush. (Ky.) 413; Funkhouser *v.* How, 24 Mo. 44; Dickey *v.* Fox, 24 Mo. 217; Smith *v.* Ewer, 22 Pa. St. 116; s. c., 60 Am. Dec. 73; Gullagher *v.* Caldwell, 22 Pa. St. 300; s. c., 60 Am. Dec. 85; Woodbridge *v.* Perkins, 3 Day (Conn.) 364; Richards *v.* Griggs, 16 Mo. 416; Clodfelter *v.* Cox, 1 Sneed (Tenn.) 330; s. c., 60 Am. Dec. 157; McCoid *v.* Beatty, 12 Iowa 299; Dodd *v.* Brott, 1 Minn. 270; Penniman *v.* Smith, 5 Lea (Tenn.) 130; Robertson *v.* Baker, 10 Lea (Tenn.) 300; Neptune Ins. Co. *v.* Montell, 8 Gill (Md.) 228.

No notice of the assignment had been given. *Held*, that the claimant could not compel the garnishee to pay him while a judgment against him was still in force. McCoid *v.* Beatty, 12 Iowa 219. But an action may be maintained by the assignee to have the judgment declared in his favor instead of to the plaintiff in attachment. McGuire *v.* Pitts' Sons, 42 Iowa 535.

Notice is only requisite to bind the debtor himself, who without it would be justified in paying an attaching creditor or subsequent assignee. It is well settled in New York that an assignment of a debt is perfect as against subsequent attaching assignees or attaching creditors, though no notice of the assignment has been given the debtor. Freund *v.* Importers & T. Natl. Bank, 76 N. Y. 356.

Greentree *v.* Rosenstock, 61 N. Y. 593.

In Brown *v.* Ayre, 33 Cal. 525, a garnishee was made to pay a second time because of a statute making notice of a transfer of judgment unnecessary. To same point see Countryman *v.* Boyer, 3 How. Pr. (N. Y.) 386; Robinson *v.* Weeks, 6 How. Pr. (N. Y.) 161; Richardson *v.* Ainsworth, 20 How. Pr. (N. Y.) 531.

2. Bank of North Am. *v.* McCall, 3 Binn. (Pa.) 338.

An assignment of a chose in action without notice to the debtor is valid as between the parties, and no person having knowledge of the assignment can sustain the character of a *bona fide* creditor for the purpose of defeating it. So, although there be no notice to the debtor and a creditor, of the assignor, with notice of the assignment, attach the debt and get judgment in his favor, it may be recovered back by the assignee. Bishop *v.* Holcomb, 10 Conn. 444. *Contra*, Funkhouser *v.* How., 24 Mo. 44.

The evidence necessary to discharge a garnishee who in his disclosure admits himself to be indebted to the principal debtor must be, either by statements of facts known to himself or by testimony derived from other sources, of as high a character as that which is furnished by the affidavit of the garnishee himself, of facts of which he has personal knowledge. Giddings *v.* Coleman, 12 N. H. 153.

So he is chargeable if his evidence of an assignment be only hearsay evidence. Giddings *v.* Coleman 12 N. H. 153.

Competent evidence to prove the assignment are the affidavits of disinterested persons appended to and made parcel of the disclosure of a trustee, stating facts within the knowledge of those making such affidavits. Giddings *v.* Coleman, 12 N. H. 153.

3. Bedlam *v.* Tucker, 1 Pick. (Mass.) 399; s. c., 11 Am. Dec. 202; Scott *v.* Scholey, 8 East (K. B.) 467.

A creditor can reach such interest of his debtor only by resorting to a court of equity, where he may be let in to redeem incumbrances. Bedlam *v.* Tucker, 1 Pick. (Mass.) 399; Shirley *v.* Watts, 3 Atk. 200.

Property in the hands of a third person, having a lien thereon, is not at-

pledgor in mortgaged or pledged property cannot be garnished unless authorized by statute.[1]

But the propriety of subjecting the interest of a mortgagor or pledgor to execution and attachment has been generally conceded and statutory provision made in most States,[2] garnishment being the most convenient way of reaching such interest when the property is in the hands of the mortgagee or pledgee.[3]

The equitable interest of a mortgagor or pledgor is in subor-

tachable in a suit against the genera. owner; but if the depositary waive his lien, the objection does not lie in the mouth of the general owner. STORY, J., Meeker *v.* Wilson, 1 Gall. (U. S.) 419.

1. Drake on Attach., §§ 538, 540; Beckham *v.* Toottle, Hanna & Co., 19 Mo. App. 596; Patterson *v.* Harland, 12 Ark. 158; Andrews *v.* Ludlow, 5 Pick. (Mass.) 28; Haven *v.* Low, 2 N. H. 13; Whitney *v.* Dean, 5 N. H. 249; Holbrook *v.* Baker, 5 Me. 309; Thompson *v.* Stevens, 10 Me. 27; Picquet *v.* Swan, 4 Mason (U. S.) 443; Sargent *v.* Carr, 12 Me. 396; Callender *v.* Furbush, 46 Me. 226; Lyle *v.* Barker, 5 Binn. (Pa.) 457; Hall *v.* Page, 4 Ga. 428; Central Bank *v.* Prentice, 18 Pick. (Mass.) 396; Kerwin *v.* Dawson, 1 Gilm. (Ill.) 86; Rhodes *v.* Megonigal, 2 Pa. St. 39.

A mortgage of personal property transfers the legal title to the mortgagee, and the mortgagor has but the equitable right of redemption. See CHATTEL MORTGAGES, vol. 3, p. 175. So, property in the possession of a pledgee gives him the legal title subject to the pledger's right to redeem. See BAILMENT; PAWNS AND PLEDGES.

2. Freeman on Ex. (2nd ed.), § 159*a*; Treadwell *v.* Davis, 34 Cal. 601; s. c., 94 Am. Dec. 770; Huges *v.* Corey, 20 Iowa 399; Davis *v.* Wilson, 52 Iowa 157; Cortey *v.* Fenstemaker, 14 Ohio St. 457; Chapman *v.* Gale, 32 N. H. 421; Becker *v.* Dunham, 27 Minn. 32; Burnham *v.* Doolittle, 14 Neb. 214; Blake *v.* Hutch, 25 Vt. 555.

3. Burnham *v.* Doolittle, 14 Neb. 214. See also cases in preceding note.

**The equity of redemption** in mortgaged or pledged personal property, even after condition broken, is such an interest as, in Nebraska, may be reached by attachment or garnishment before judgment, and by garnishment after judgment in aid of execution. Burnham *v.* Doolittle, 14 Neb. 214.

**Certificate of stock** in hands of pledgee having been regularly assigned on books of the company, garnishment must be had on pledgee, and the officers of the corporation are not the proper parties to garnish. Edwards *v.* Beugnot, 7 Cal. 162. See also Norton *v.* Norton, 43 Ohio St. 509, where the assignment upon the books had not been made, and garnishment of the corporation *held* to have been proper. See also Security Loan Asso. *v.* Weems, 69 Ala. 584.

**Stock in hands of pledgee** cannot be attached by direct levy, nor will equity appoint a receiver and put it in his hands. Morton *v.* Grafflin, 68 Md. 545.

**Mortgagee's interest in land** cannot be reached by garnishment. Farwell *v.* Wilmarth, 65 Wis. 160.

The second mortgagee of real estate cannot, by the garnishment of a first mortgagee as the debtor of the common mortgagor, subject the rents and profits of the mortgaged property received by the garnishee in excess of his debt. Toomer *v.* Randolph, 60 Ala. 356, 361.

**Fire insurance money** which is secured to a mortgagee cannot be taken on attachment. Mansfield *v.* Stevens, 31 Minn. 40; Mason *v.* Phœnix Ins. Co., 64 Wis. 26. And on the same principle that the mortgagee owns the legal title, wood sold from mortgaged premises by committing waste (without the consent of the mortgagee) cannot be attached to pay the debts of the mortgagor. Cotta *v.* O'Neal, 58 N. H. 572.

**Commission Merchant.**—A bill of lading in the hands of consignee, a commission merchant, entitles him to payment of unpaid acceptances before attaching creditors can take the property. Patterson *v.* Perry, 10 Abb. Pr. (N. Y.) 82; Black *v.* LaChain, 3 How. (U. S.) 483. *Contra*, Taylor *v.* Gardner, 2 Wash. (C. C.) 686; Locke on Attachment, 57, note.

It is a qualified property given by the bill of lading to a factor, commensurate

dination to all valid prior liens,[1] and, generally, the holder of such property cannot be deprived of his possession without being first paid, or payment tendered of the debt due him,[2] and is in no case liable as garnishee, unless he has possession of the property.[3]

with and to support his lien, and no more. Strictly and in legal precision the consignor is the owner. But the factor has such rights as to enable him to sue others for interfering with the goods, or to compel a delivery, or to support a claim for damages, or to defeat a claim of the shipper to stoppage *in transitu*. It is an ownership as lien holder, and nothing more. Patterson *v.* Perry, 10 Abb. Pr. (N. Y.) 92. See also Grant *v.* Shaw, 16 Mass. 341.

1. Consequently the priority of mortgagee or pledgee over attachment extends only to those legally executed before the service of process. Cushing *v.* Hurd, 4 Pick. (Mass.) 253; Worden *v.* Adams, 15 Mass. 233.

Advances made upon mortgages or pledges after service of process are subject to the attaching creditor's claim being first satisfied. Bernard *v.* Moore, 8 Allen (Mass.) 273; Adams *v.* Wheeler, 10 Pick. (Mass.) 199; Jones *v.* Smith, 1 Hare 55.

Otherwise if he had no notice of the attachment. Adams *v.* Wheeler, 10 Pick. (Mass.) 199; Brinkerhoff *v.* Martin, 5 Johns. Ch. (N. Y.) 327; Lansing *v.* Woodworth, 1 Sandf. Ch. (N. Y.) 43; Barry *v.* Merchants' Exchange, Sandf. Ch. (N. Y.) 314; Seymour *v.* Darrow, 31 Vt. 122; Rolt *v.* Hopkinson, 26 Beav. 461.

An unrecorded chattel mortgage has priority over attaching creditors. Kendall *v.* Ladd, 21 N. W. Rep. (Minn.) 733.

But such mortgage can, in such attachment, be impeached as being fraudulent as against creditors. North Star Boot & Shoe Co. *v.* Ladd, 32 Minn. 381.

CAMPBELL, J.: "We have heretofore *held* that a chattel mortgage not seasonably filed is void against creditors whose right intervenes between the making and the filing. And the law does not require previous proceedings to exhaust other remedies before garnishment." Crippen *v.* Fletcher, 56 Mich. 389.

**Estoppel.**—COLE, C. J.: "When the mortgagee of chattels delays the filing of his mortgage at the request of the mortgagor, and in order that the credit of the latter may not be injured, he is estopped to assert such mortgage as against creditors, who, after the execution of the mortgage and before its filing, gave credit to the mortgagor upon the faith that his property was unencumbered, and this is so although the mortgagee had no intent to defraud any creditor." Sanger *v.* Frie Presse Co., 41 N. W. Rep. (Wis.) 436.

And the creditor, having permitted the mortgagee (and garnishee) to take possession and dispose of the mortgaged property, is not thereby estopped from requiring the latter to account for it. Sanger *v.* Frie Presse Co., 41 N. W. Rep. (Wis.) 436.

2. Bedlam *v.* Tucker, 1 Pick. (Mass.) 389; Cotton *v.* Marsh, 3 Wis. 221; Cotton *v.* Watkins, 6 Wis. 629; Frisbee *v.* Langthworthy, 11 Wis. 375; Selleck *v.* Phelps, 11 Wis. 380.

Though it has been *held* that pledged property may be taken and offered at public auction; if more is bid than the amount of such lien it is sold; otherwise it is returned to the pledgee. Norton *v.* Norton, 43 Ohio St. 509; Hills *v.* Smith, 8 Fost. (N. H.) 369; Biggs *v.* Walker, 1 Fost. (N. H.) 72. See Stelf *v.* Hart, 1 N. Y. 20.

In no case can he be charged as garnishee if he is not in possession, and a mortgagee is under no obligation to take possession so as to make a fund capable of being attached by a creditor of the mortgagor. Curtis *v.* Raymond, 29 Iowa 52; First National Bank *v.* Perry, 29 Iowa 266.

Nor can he in the absence of an agreement be compelled to sell the property mortgaged or pledged to pay his debt. Howard *v.* Cord, 6 Me. 353; Bedlam *v.* Tucker, 1 Pick. (Mass.) 389.

3. Stedman *v.* Vickery, 6 Me. 353; Callender *v.* Furbush, 46 Me. 226; Wood *v.* Estes, 35 Me. 145; Pierce *v.* Henrie, 35 Me. 57; Central Bank *v.* Prentice, 18 Pick. (Mass.) 396.

In a proceeding against a garnishee to whom a chattel mortgage had been given before he was put in possession of the property, questions as to the validity of the mortgage were of no consequence so long as there was no showing that he took possession by virtue of

The garnishee is liable only for the surplus remaining after all liens have been satisfied.[1]

After service of process upon a mortgagee, he cannot, to the prejudice of the attaching creditors, give the notice to proceed to foreclose such mortgage.[2] But in case of conversion by the mortgagee, he cannot be held responsible, except for the balance after his own debt is paid.[3]

The rights and liabilities of those holding property subject to lawful liens other than those of mortgagees or pledgees, are governed by the same rules as apply to pledgees. "Lawful liens" are only those whereby the holder of the property could, if demand were made by the legal owner, lawfully withhold it until such lien be satisfied.[4]

it. Folkerts *v.* Standish, 55 Mich. 463.

**Foreclosure of Mortgage.**— When mortgaged property out of possession of mortgagee is taken by direct attachment, the mortgagee can file bill to reach his property, and is liable to attaching creditor for the surplus after its sale. Long Dock Co. *v.* Mallery, 1 Beas. (N. J.) 93.

Property in the possession of a mortgagor after condition broken may be attached and a replevin sued out by mortgagee does not divest attaching creditor of his lien on the surplus. Carty *v.* Fenstimaker, 14 Ohio St. 457; Burnham *v.* Doolittle, 14 Neb. 214.

Moneys accruing to the railroad company from its earnings, and in the hands of an express company as its bailee, are subject to garnishment at the suit of its judgment creditors; and such garnishments being served prior to the filing of a bill by the trustees to foreclose the mortgage, their lien must prevail over any claim asserted by the trustees. Johnston *v.* Riddle, 70 Ala. 219.

1. Bedlam *v.* Tucker, 1 Pick. (Mass.) 389; s. c., 11 Am. Dec. 202; Barker *v.* Osborn, 71 Me. 69; Worder *v.* Baker, 67 Wis. 408; Reed *v.* Fletcher, 39 N. W. Rep. (Neb.) 437; National Bank *v.* Chase, 32 N. W. Rep. 202; Mensing *v.* Engelke, 4 S. W. (Tex.) 202; Norton *v.* Norton, 43 Ohio St. 509.

In Michigan, the statute (How. Stat., § 8064) contemplates that a court may appoint a receiver to dispose of property of defendant attached in the hands of a third person. This includes mortgagees of chattels. The receiver may take possession to sell, but can exercise no greater power than a sheriff could in levying execution. The mortgagee's lien is to be first satisfied by selling the goods *in gross* unless mortgagee is first paid. Smith *v.* Circuit Judge, 53 Mich. 560.

**Judgment** against mortgagee should be for the general residuary interest or equity of redemption of the mortgagor and not of specific articles. Daggett *v.* McClintock, 56 Mich. 54, and cases cited.

2. Hobart *v.* Jouvett, 6 Cush. (Mass.) 105.

3. Daggett *v.* McClintock, 56 Mich. 51, 53; Brink *v.* Freoff, 40 Mich. 610; s. c., 44 Mich. 69.

Where a bank is summoned as garnishee, and subsequent to the service of summons converts and disposes of collateral securities held by it, the burden of proof is upon it to show that it has properly discharged its duty as custodian of such securities. First Nat. Bank *v.* Armstrong, 101 Ind. 244.

4. Allen *v.* Megguire, 15 Mass. 490; Jarvis *v.* Rogers, 15 Mass. 414; Allen *v.* Hall, 5 Met. (Mass.) 263; Bailey *v.* Ross, 20 N. H. 302; Smith Twogood & Co. *v.* Clark & Henley, 9 Iowa 241; Nolan *v.* Crook, 5 Humph. (Tenn.) 312; Curtis, *v.* Norris, 8 Pick. (Mass.) 280.

Such lien need not be one of contract relation with the defendant. It may be for liability incurred because of the property itself; commission merchants' lien, etc. Bank *v.* Levy, 1 McMull. (S. Car.) 431. The same is true of a stableman's lien. Williamson *v.* Gayle, 7 Gratt. (Va.) 152.

**Set Off.**—Consequently *set-off*, other than the amount secured by his lien, cannot be allowed the garnishee when specific property is attached in his hands as belonging to the defendant. He occupies the same position as if the defendant had sued him, and can inter-

**12. Contracts Between Defendant and Garnishee.**—To charge a garnishee with liability upon a contract, it must affirmatively appear that there is tangible property or a credit due to the principal defendant, for which an action at law would lie, at the time of service of process.[1]

Garnishment cannot have the effect of changing the nature of a contract between the garnishee and the defendant.[2] Nor can the plaintiff, where the contract is not tainted with fraud, recover from the garnishee any more than the defendant might recover

pose no greater objections. Allen *v.* Megguire, 15 Mass. 490. *Contra* in So. Carolina, where by statute, for existing debt, he is considered "a creditor in possession." Mitchell *v.* Byrne, 6 Rich. (S. Car.) 171; Yongue *v.* Linton, 6 Rich. (S. Car.) 275.

Liability for charge of storage does not constitute "goods pawned or pledged," or "demised for a term." Good *v.* Abertauffer, 1 T. & H., Pr. (Pa.) 756.

Money deposited with a college in lieu of security for board, tuition, etc., cannot be garnished while the education of the children is in progress, unless the deposit was a fraudulent one. Poe *v.* St. Mary's College, 4 Gill.(Md.) 499.

1. O'Brien *v.* Collins, 124 Mass. 98. Not liable on a contract for which *debt* or *indebitatus assumpsit* would not lie. Lundie *v.* Bradford, 26 Ala. 512. See also VIII, 1, *supra*.

It is error to enter judgment upon an answer which states "that upon the defendant's complying with his contract he will be indebted to him." Russell *v.* Clingan, 33 Miss. 535.

**Conditional Sale.**—Goods delivered to one on trial in pursuance of negotiations for a purchase thereof which are afterwards delivered to the owner within the time limited for trial, whether before or after the service of process of garnishment upon the holder thereof, with notice that he does not intend to complete the purchase but which are left in his possession, cannot be taken by garnishment. Staniels *v.* Raymond, 4 Cush. (Mass.) 314.

**Contracts for future delivery.**—In the case of contracts for future delivery of goods or chattels, the garnishee is not liable unless he had become indebted to the principal defendant by the delivery of the property before the service of process in garnishment. Hitchcock *v.* Miller, 48 Mich. 603; Hopson *v.* Dinan, 48 Mich. 612; Jones *v.* Crews, 64 Ala. 368.

2. Mensing *v.* Engelke, 67 Tex. 533. When an insured has violated the condition of an insurance policy the creditors of the insured have no better right to compel the payment of the policy under process of garnishment against the insurance company than the insured himself had. Phœnix Ins. Co. *v.* Willis, 6 S. W. Rep. (Tex.) 825.

Where there is a breach of the contract by the principal defendant, the amount of damages can be deducted from the amount which would have been due him but for the breach. Doyle *v.* Gray, 110 Mass. 206.

It is so where a contract provides that if a contractor fail to pay his workmen the employers may pay them out of the contract price. Doyle *v.* Gray, 110 Mass. 206; Taylor *v.* Burlington & M. R. R. Co., 5 Iowa 114: Drake *v.* Harrison, 69 Wis. 99; s. c., 2 Am. St. Rep. 717.

Or all liens should first be paid. Kieley *v.* Bertrand, 34 N. W. Rep. (Mich.) 674.

Where a contractor was to execute a release of all claims or demands before he should receive the final amount due by his contract, *held* that attaching creditors could not recover until the release was executed; a common law court has no authority to make its judgment against the company operate as a release under seal by the contractor. B. & O. R. Co. *v.* McCullough, 12 Gratt. (Va.) 595.

Garnishee cannot be required to violate his contract, and if property is to be delivered, and unless the court appoint a receiver, he may still go on to pay if the consequence of his failing to do so might subject him to pay money instead of property. If he has failed to pay property according to his contract and rendered himself liable for the value thereof, he may be directed to pay such value to the complainant. Blackburn *v.* Davidson, 7 Bush. (Ky.) 101.

Garnishment cannot affect the con-

had he brought the action,[1] or interfere with a contract entered into between the garnishee and a third person with reference to his indebtedness to the principal defendant;[2] or prevent the garnishee from discharging his debt, by payment to a third person when such was his contract with the principal defendant.[3] The liability of a garnishee is to be determined, ordinarily, by his accountability to the defendant on account of the property or the obligation. If, by any pre-existing *bona fide* contract, that accountability has been removed or modified, it follows that the garnishee's liability is correspondingly affected.[4]

A garnishee is not liable where the contract being entire, nothing is due until its completion, and the contract has not been performed at the date of service of garnishment,[5] for to attach

tract rights of mortgagees. Daggett *v.* McClintock, 56 Mich. 51.

1. Healy *v.* Butler, 66 Wis. 9.

2. Van Staphorst *v.* Pearce, 4 Mass. 258; Swisher *v.* Fitch, 1 Smed. & M. (Miss.) 541; Vincent *v.* Watson, 18 Pa. St. 96; Mason *v.* Ambler, 6 Allen (Mass.) 124; Watkins *v.* Pope, 38 Ga. 514; Mines *v.* Pyles, 4 Houst. (Del.) 646; Callagan *v.* Pocasset Mfg. Co., 119 Mass. 173; St. Louis *v.* Regenfuss, 28 Wis. 144; Balliet *v.* Scott, 32 Wis. 174; McPherson *v.* A. & P. R. R. Co., 66 Mo. 103; Godfrey *v.* Macomber, 128 Mass. 188; Whiting *v.* Earle, 3 Pick. (Mass.) 201; Manchester *v.* Smith, 12 Pick. (Mass.) 113; Bray *v.* Wheeler, 29 Vt. 514; Russell *v.* Convers, 7 N. H. 343.

So where the principal defendant has previously assigned what would be due him, it cannot be taken as his property by garnishment of the person owing the debt. Hall *v.* Magee, 27 Ala. 414; White *v.* Richardson, 12 N. H. 93.

It must appear that such third person stood in such a position as to have a legal right to enter into the contract, and that it was entered into with the defendant's assent. Swett *v.* Ordway, 23 Pick. (Mass.) 266; Wiggins *v.* Lewis, 19 N. H. 548.

3. See VIII., 11, *supra*, note.

4. B. & O. R. R. Co. *v.* Wheeler, 18 Md. 372; Traxall *v.* Applegarth, 24 Md. 183; Poe *v.* St. Mary's College, 4 Gill (Md.) 499; Harris *v.* Phœnix Ins. Co., 35 Conn. 310; Chapin *v.* Jackson, 45 Ind. 153; O'Brien *v.* Collins, 124 Mass. 98; Ward *v.* Mann, 124 Mass. 586; Grant *v.* Shaw, 16 Mass. 341; Collins *v.* Brigham, 11 N. H. 420; Drake on Attach. (6th ed.), § 517.

So where a contract stipulated that monthly balances of accounts should be made between railroad companies, *held* that there could be no settlement enforced before that time, and then the garnishee would be chargeable only for a balance remaining after settlement. B. & O. R. R. Co. *v.* Wheeler, 18 Md. 372. See Poe *v.* St. Mary's College, 4 Gill (Md.) 499.

So where the contract gives a right which cannot be enforced in an action at law by the defendant, garnishment will not lie. Lundie *v.* Bradford, 26 Ala. 513.

So as to money deposited by the defendant as security. Ellis *v.* Goodnow, 40 Vt. 237; Truitt *v.* Griffin, 61 Ill. 26.

His answer and proof must bring him within the rule. McCoy *v.* Williams, 6 Ill. 584; Crain *v.* Gould, 46 Ill. 239.

But in a contract of bailment of goods of the defendant, if the receipt be non-negotiable he delivers them to a third person at his peril. Smith *v.* Davis, 7 Ga. 104.

5. Williams *v.* Androscoggin & K. R. Co., 36 Me. 201; Smith *v.* Davis, 1 Wis. 447; Bishop *v.* Young, 17 Wis. 47; Wheeler *v.* Day, 23 Minn. 545; Kieley *v.* Bertrand, 34 N. W. Rep. (Mich.) 674; Warner *v.* Perkins, 8 Cush. (Mass.) 518; Robinson *v.* Hall, 3 Met. (Mass.) 301; Strauss *v.* Railroad Co., 7 W. Va. 368; Coburn *v.* City of Hartford, 38 Conn. 290; Kettle *v.* Harvey, 21 Vt. 301; Guild *v.* Holbrook, 11 Pick. (Mass.) 101; Hassie *v.* G. I. W. N. Con., 35 Cal. 378.

An entire contract before its final completion is not a case of *debitum in præsenti, solvendo in futuro*. Potter *v.* Cain, 117 Mass. 238. Under an entire contract, one of the parties cannot be compelled to pay by *quantum meruit*

tangible property or garnishee a credit, it is essential that the property or credit exist.[1] So, a garnishee cannot be charged with liability upon a contract which he has an option to perform in two or more different ways, while the right of action by the defendant is still undetermined.[2] But where the garnishee is indebted, it will not vary his liability that the contract was to pay the money in another State or country than that in which the attachment is pending.[3]

Contracts between the garnishee and defendant, for which the garnishee has given an illegal consideration,[4] or which are void by reason of public policy, may be recovered of the garnishee as though he were a mere depositary.[5] If, however, the property

for work already performed. Smith *v.* Davis, 1 Wis. 447; s. c., 60 Am. Dec. 390; Peterson *v.* Loring, 135 Mass. 397. Or for crops to be grown. Reinhardt *v.* Hardesty, 17 Nev. 141.

If the original contract had been assigned, and the assignee had completed the contract, the debtor may be liable for the assignee's debt. Zimmerman *v.* Davis, 35 Mich. 39.

**Sale.**—Where sale is for cash, and the money has not yet been paid, buyer cannot be charged as garnishee of the price, even after delivery of the property, for the title does not pass until payment. Paul *v.* Reed, 52 N. H. 136; Bates *v.* New Orleans etc. R. Co., 4 Abb. Pr. (N. Y.) 72; Case *v.* Dewey, 55 Mich. 116; McKay *v.* Evans, 48 Mich. 603.

If order be given against garnishee in any of the above cases, and his answer has shown such a state of facts, he is not estopped in action by plaintiff against him to show that the conditional indebtedness had not been complied with. Linder *v.* Murphy, 37 Kan. 152.

**Wages** not due until completion of contract not liable to garnishment. Rundle *v.* Scheetz, 2 Miles (Pa.) 330. Annuity *held* not subject to. Carry *v.* Day, 2 Miles (Pa.) 412.

**1.** Early *v.* Redwood City, 57 Cal. 193.

Nor does it help that the contract was afterwards fulfilled, for the question of liability must be settled upon the facts as they existed when the writ was served. Williams *v.* A. & K. R. Co., 36 Me. 201; Norton *v.* Soule, 75 Me. 386; Gomilla *v.* Milliken, 5 So. Rep. (La.) 548.

**2.** Drake *v.* Harrison, 69 Wis. 99; s. c., 2 Am. State Rep. 717; Jones *v.* Crews, 64 Ala. 368.

Fire insurance company cannot be charged with liability as garnishee, while they have the option to rebuild or to replace lost or damaged goods. Marts *v.* Detroit F. M. Ins. Co., 28 Mich. 201; Vogel *v.* Preston, 42 Mich. 511. *Compare* Smith *v.* Cahoon, 37 Me. 281. And the fact that after service of process upon it, it makes an arrangement with the assured and a creditor of his, by which the insurance company pays the money to the creditor, who erects a building on his own land, is immaterial. Godfrey *v.* Macomber, 128 Mass. 188.

The court might, on motion, retain the case until the expiration of the period limited for rebuilding. Hurst *v.* Home Protection Fire Ins. Co., 81 Ala. 175.

Evidence is admissible to prove that the garnishee has a right and an interest in paying money in a particular way, which, under his contract with his creditor, he has a right to do. Drake *v.* Harrison, 69 Wis. 99; s. c., 2 Am. St. Rep. 717.

**3.** Leiber *v.* U. P. R. Co., 49 Ia. 688; Mooney *v.* U. P. R. Co., 60 Ia. 346; Nichols *v.* Hooper, 17 Atl. Rep. (Vt.) 134; Sturtevant *v.* Robinson, 18 Pick. (Mass.) 175; Commercial Nat. Bank *v.* C. M. & St. P. R. Co., 45 Wis. 172; Blake *v.* Williams, 6 Pick. (Mass.) 286. *Contra*, where the contract was made in another State and nothing to be paid until the contract had been fulfilled. Hamilton *v.* Plummer, 34 N. W. Rep. (Mich.) 278. See CONFLICT OF LAWS, vol. 3, p. 499.

**4.** McGlinchy *v.* Winchell, 63 Me. 31; Ball *v.* Gilbert, 12 Met. (Mass.) 397.

**5. Wagers.**—The contract being void between the parties, the money in the hands of a stakeholder becomes a

has passed beyond the control of the garnishee, or he has fulfilled the obligation for which it was given before the service of process, he is not liable.[1]

**13. As Affected by Fraud.**—Where a garnishee sets up title in himself, it is entirely competent for the plaintiff to impeach that title on account of fraud or other invalidating circumstance, and thereby show that the property is still due for the defendant's debts.[2] The fraud must, however, be against the attaching

naked deposit to the use of the depositor, and is precisely within the provisions of the trustee law. Ball *v.* Gilbert, 12 Met. (Mass.) 404; Reynolds *v.* McKinney, 4 Can. 94.

In New Hampshire, in an earlier case, the court decided that whether a wager be legal or illegal, and whether the party in a given case might or might not rescind an agreement for a wager, by virtue of which money was deposited with a stakeholder, his creditors cannot, without his assent, rescind such an agreement, unless he is insolvent or in embarrassed circumstances. Clark *v.* Gibson, 12 N. H. 380.

Where a stakeholder in a wager is summoned as garnishee of the winning party, and the wager was determined without any demand upon the garnishee by the losing party for the money deposited by him, and he make no claim, judgment will be given against the garnishee for the whole sum in his hands. Wimer *v.* Pritchartt, 16 Mo. 252.

After the money has been paid over, the winner cannot be charged as garnishee of the loser in respect thereof. McAllister *v.* Hoffman, 16 S. & R. (Pa.) 147; Speise *v.* McCoy, 6 Watts & S. (Pa.) 485.

1. Tierney *v.* McGarity, 103 Pa. St. 546.

2. Healey *v.* Butler, 66 Wis. 9; Lackland *v.* Gorfsche, 56 Mo. 267; Henry *v.* Murphy, 54 Ala. 246; Hart *v.* Rafter, 3 S. E. Rep. (Ga.) 699; Cable *v.* Wanemaker, 78 Pa. St. 501; Johnson *v.* Hersey, 73 Me. 291. Fraudulent vendee. Morris *v.* House, 32 Tex. 492. Fraudulent mortgage. Brainard *v.* VanKuvan, 22 Iowa 261.

Plaintiff in attachment after writ is served has such a specific lien as will authorize him to seek to set aside a fraudulent transfer of property, and where garnishment will lie such remedy should be used, and a *creditor's bill* will not lie. Humphreys *v.* Atlantic Milling Co., 10 S. W. Rep. (Mo.) 140.

It is not the taking of a fraudulent transfer, but the reception of property, which makes the garnishee answerable. So if he did not have the property in his possession at the time of service of process, he cannot be charged as garnishee. Gutterson *v.* Morse, 58 N. H. 529; Bailey *v.* Ross, 20 N. H. 302; Emerson *v.* Wallace, 20 N. H. 567.

In such a case as mentioned in the text, an assignment for benefit of creditors made after garnishment will not defeat the lien. Thomas *v.* Brown, 10 Atl. Rep. (Md.) 713. See also VIII., 8.

In the case of a void assignment for benefit of creditors the assignee may be garnished. Kimball *v.* Evans, 58 Vt. 655; Ferrall *v.* Farnen, 67 Md. 76; Vernon *v.* Upson, 19 N. W. Rep. Wis. 400. Or his vendee, if he has not already paid the price. Dixon *v.* Hill, 5 Mich. 104; Johnson *v.* Hersey, 73 Me. 291.

**Partnership Assets.**—The funds of an insolvent firm, paid by one partner upon his private debt, without the consent of the copartner, may be attached in the hands of the private creditor by trustee process in behalf of a firm creditor, the private creditor knowing when he received the funds that they belonged to the firm. The principle applies, although the note upon which the payment is made be the single partner's note with the copartner's name thereon as a surety, and although the money be collected by a draft given in the name of the firm to the order of an agent or the private creditor. Johnson *v.* Hersey, 73 Me. 291.

If a vendee who has fraudulently received goods sell them to an innocent purchaser before garnishment, he may nevertheless still be held for the proceeds of such property. Risser *v.* Rathebun, 71 Iowa 113.

A promissory note fraudulently assigned before maturity can be garnished by a creditor of the assignor, a creditor's bill not being the proper remedy

creditor, and not against the debtor,[1] and be confined to transactions which occurred previous to the time of making the affidavit on which they are attacked.[2]

In case fraud be shown, the relief which the creditor may have is not limited to that to which the debtor is entitled, as it is when he seeks to recover a demand of his debtor against the garnishee, untainted with fraud.[3] So where the law provides that property mortgaged, pledged or delivered to a trustee, may be made available to creditors, the right of the garnishee to set-off against the property the amount of his lien does not apply when the conveyance is absolute in form and fraudulently intended by the parties to be so as to creditors, but as between themselves to be as security only. The garnishee, in such case, should be holden absolutely, and not on condition of payment to him of the consideration of the conveyance.[4]

before judgment. Humphreys *v.* Atlantic Milling Co., 10 S. W. Rep. (Mo.) 140. See Anthony *v.* Wood, 96 N. Y. 180.

A judgment creditor may maintain garnishment proceedings against the vendee in a fraudulent conveyance of debtor's property, although after the commencement of the proceedings a second execution upon his judgment has been levied upon the property included in the conveyance. Sutton *v.* Hasey, 58 Wis. 556.

Personal judgment given for value of the property in excess of garnishee's debt not erroneous. Sutton *v.* Husey, 58 Wis. 556.

**Real Estate.**—It was not the intention of the legislature that the real estate of a debtor which he has conveyed to another in fraud of creditors should be reached by the process of garnishment, nor that the one holding title to it should be charged as a garnishee with a money judgment for its value. Boyle *v.* Maroney, 73 Iowa 70.

1. Curtis *v.* Steever, 7 Vroom (N. J.) 308; Garrettson *v.* Kane, 3 Dutch (N. J.) 208.

Garnishee may be *held* liable for property conveyed to him in fraud of creditors, even though the conveyance is valid, against the debtor himself. Cummings *v.* Favey, 44 Mich. 40.

So a holder of a chattel mortgage void as to creditors, cannot set off against the goods the money which he may have advanced to the mortgagor. Cummings *v.* Favey, 44 Mich. 40.

A creditor of such debtor may treat the sale as void, and subject the goods to the payment of his claim; or he might compel the fraudulent vendee to account for the purchase price of the goods. But he cannot have both remedies. Bradford *v.* Beyer, 17 Ohio St. 388.

However, if he elect to take an assignment of a promissory note given for such property, and the property is subsequently taken by other creditors of the vendor, there is a failure of consideration for the note, and the assignee cannot collect the note. Bradford *v.* Beyer, 17 Ohio St. 388.

The validity of a trust deed as against creditors of the grantor may be tested in garnishment proceedings. First Nat. Bank of Stevens Point *v.* Knowles, 67 Wis. 374.

A judgment obtained by the garnishee against his debtor, showing that he had a legal title from such debtor, will not prevent the attaching plaintiff from showing fraud as against the *creditors* of the principal defendant. Raymond *v.* Richmond, 78 N. Y. 351.

2. Favey *v.* Cummings, 41 Mich. 376.

The holder of a chattel mortgage void as to creditors having no preference by legal proceedings cannot go behind judgments recovered against the principal defendant to enquire the dates at which debts matured. Cummings *v.* Favey, 44 Mich. 39.

3. Healey *v.* Butler, 66 Wis. 9; Bradford *v.* Beyer, 17 Ohio St. 388.

A garnishee who is party to a fraudulent transfer of property, cannot retain such property as against the vendor's execution creditor, because the garnishee's notes for a part of the purchase money are in the hands of a person not before the court. St. Louis Brokerage Co. *v.* Cronin, 14 Mo. App. 586.

4. Thompson *v.* Pennell, 67 Me. 159.

If the property or debt, the subject of garnishment, is claimed by a third person, he should be made a party to the suit, and his right to the property, including the question of fraud, may be fully litigated.[1]

**14. Where Liability Is Contingent.**—To charge a garnishee for a debt due to defendant it must be absolutely payable at present or in the future, and not dependent on any contingency[2] at the

The garnishee cannot invoke equity. Thompson *v.* Pennell, 67 Me. 159.

1. Hodges *v.* Coleman, 76 Ala. 103.

**Payment After Service.**—A garnishee cannot pay over money to the defendant after garnishment, though defendant receive it as agent of, and in payment of a note given to the defendant's son, for property purchased of the father, but which, it was afterward claimed, belonged to the son, if in fact the property belonged to the father, and the use of the son's name was merely to defraud defendant's creditors, and the garnishee knew that the object of the garnishment was to reach this money. Kesler *v.* St. John, 22 Iowa 567.

Where a garnishee after being summoned pays to a third person the debt, which the garnishment was *meant to reach*, but the debt was actually owing to such third person who held the *legal title*, and the garnishee was not informed that the debt was claimed as belonging to the principal defendant, he cannot properly be charged as garnishee. Hemstedt *v.* German Bank, 46 Ark. 537. Payment of the above debt might have been stopped by delivery of a proper notice to the bank specifying that it was attached as the property of the principal defendant. German Bank *v.* Hemstedt, 42 Ark. 65.

2. Drake on Attach. 551; Davis *v.* Ham, 3 Mass. 33; Modul *v.* Mosseaux, 29 La. An. 228; Bishop *v.* Young, 17 Wis. 46; Word *v.* Buxton, 108 Mass. 102; Hoven *v.* Wentworth, 2 N. H. 93; Miller *v.* Goddard, 34 Me. 102; Otis *v.* Ford, 54 Me. 104; Jordan *v.* Jordan, 75 Me. 100; Hopson *v.* Dinan, 48 Mich. 612.

Many contracts for which money liability may *possibly* arise are not subject to garnishment. Jones *v.* Crens, 64 Ala. 368; Hurst *v.* Home Protection Ins. Co., 81 Ala. 174; Lewisohn *v.* Waganer, 76 Ala. 412; Lec. & Loun Ins. *v.* Weems, 69 Ala. 584; Henderson *v.* Ala. Gold L. Ins. Co., 72 Ala. 32; Alexander *v.* Pollock, 72 Ala. 137.

Where an insurance company has not waived proof of loss, there is no indebtedness which can be garnished in a suit against the insured. Garnishment will not lie to impound a debt which is simply contingent. Lovigoy *v.* Ins. Co., 11 Fed. Rep. 63; Gies *v.* Bechtner, 12 Minn. 279; Davis *v.* Davis, 49 Me. 283; Nickerson *v.* Nickerson, 80 Me. 100. *Compare* Phœnix Ins. Co. *v.* Willis, 6 S. W. Rep. (Tex.) 25.

Such waiver may be a question of fact, and it is error to take the question from the jury. Nickerson *v.* Nickerson, 80 Me. 100.

There have been statutes enacted permitting contingent claims to be subject to garnishment, but garnishment process cannot reach sums that will not come due until the performance of a contract at some future time; and claims for the payment of such moneys are not "contingent" within the reason of act 256 of 1879, which permits contingent claims to be garnished. Webber *v.* Bolte, 51 Mich. 113.

**Check** on funds in a bank *held* to be a contingent claim. Hancock *v.* Colye, 99 Mass. 187; s. c., 96 Am. Dec. 730.

So *held* in case of a draft. Larrabee *v.* Walker, 71 Me. 441.

**Subscription to Corporate Stock.**—Stockholder not liable as garnishee for unpaid subscription to capital stock, when the call for payment has not been made. Teague *v.* Le Grant, 5 So. Rep. (Ala.) 287; McKelvy *v.* Crockett, 18 Nev. 238; Meintz *v.* East St. Louis Rail Mill Co., 89 Ill. 48.

In a recent case in Alabama, STONE, C. J., said: "Chancery might have taken juridiction, the corporation being insolvent, and itself made calls and enforced their collection for the benefit of creditors. Glenn *v.* Lemple, 80 Ala. 159. A common law court, the more especially under statutory garnishment, is without the power to do so." Teague *v.* Le Grant, 5 So. Rep. (Ala.) 287.

A stockholder can only be made liable to an execution creditor of the corporation on garnishment, when he is in default to the corpora-

time of service of process.[1] The contingency must, however, affect the property itself, or the debt which is supposed to exist, and not merely the title to the property in the possession of the trustee, or his liability on a contract which he actually made, but the force and effect which is in litigation.[2] In order to render garnishee liable on a conditional contract, the plaintiff must show both the contract and the fulfillment of the condition.[3] Rights which the judgment debtor has the option of enforcing or are not subject to garnishment;[4] and the liability of the

tion for instalments due on his stock or for calls made by the directors. If his liability is not due according to the terms of his subscription, and no call has been made by the directors,the creditor's remedy is by special execution awarded under § 13, p. 291, Wagner's Statutes, which allows execution against the property of a stockholder to the amount of his stock owned, together with any amount unpaid thereon. Simpson *v.* Reynolds, 71 Mo. 594. The stockholder is liable who holds such stock at the time special execution issues, and not the person who owned it at the time the debt was constructed. McLaren *v.* Franciscus, 43 Mo. 452.

Stockholder liable as garnishee for his unpaid subscription when called. *In re* Warwick etc. R. Co., 2 De G., F. & J. 354; Peterson *v.* Sinclair, 83 Pa. St. 250; Woolridge *v.* Holmes, 78 Ala. 568.

Where legally liable the creditors of the corporation may proceed by attachment and garnishment against resident stockholders, *though no service be had on the corporation.* And a secret agreement to release stockholders from further assessment will not bar recovery in such a proceeding. Turner *v.* Alabama Mining Co. 25 Ill. App. 144.

**Seamen's wages** *held* not chargeable in garnishmen' until the vessel has arrived at the port of unlading, the possibility that the ship may never arrive being a contingency. Wentworth *v.* Whittemoore, 1 Mass. 471; The Lizzie Williams, 11 Fed. Rep. 619; Taber *v.* Uge, 12 Pick. (Mass.) 105.

Same as seamen's wages in coasting trade. McCarty *v.* Steam Propeller, 4 Fed. Rep. 818. *Contra*, Eddy *v.* O'Hara, 132 Mass. 56; White *v.* Dunn, 134 Mass. 271.

1. See note 6, *post.*

2. Thorndyke *v.* De Wolf, 6 Pick. (Mass.) 120; Smith *v.* Cahoon, 37 Me. 281; Wore *v.* McGowan, 65 Me. 534; Webber *v.* Bolte, 51 Mich. 113; Foxton *v.* Kucking, 51 Me. 346.

The contingency must be such as may preclude the principal from any right to call the trustee to settle or to account, and not a mere uncertainty as to how the balance may stand; Dwinel *v.* Stone, 30 Me. 384; Cutter *v.* Perkin, 47 Me. 557; Downer *v.* Topliff, 19 Vt. 399; Webster Wagon Co. *v.* Peterson, 27 W. Va. 314; Ware *v.* Gowen, 65 Me. 534; and must affect the debt itself, and not the liability to have the effects or credits called out of the hands of the trustee in a particular manner. Downer *v.* Curtis, 25 Vt. 650.

Where promise to pay is absolute, future rent has been *held* subject to garnishment. Rowell *v.* Felker, 54 Vt. 526. *Contra*, in Michigan, where, under the same statutory provision, the court said: "Comp. L. 6503, in providing that demands to become due, absolutely, may be garnished, refers only to claims which are already fixed in amount or capable of being fixed, and not dependent for their validity or amount on anything to be done or earned in the future or on the continued liability for which may be changed by events." Thorp *v.* Preston, 42 Mich. 511.

3. Caldwell *v.* Silva, 23 Mo. App. 417; Balis *v.* N. O. R. R. Co., 4 Abb. Pr. (N. Y.) 72.

If there be anything to be done by the defendant as a condition precedent to his recovering, the plaintiff cannot obtain judgment against the garnishee without showing the condition has been performed. Phœnix Ins. Co. *v.* Willis, 6 S. W. Rep. (Tex.) 825; B. & O. Ry. Co. *v.* McCullough, 12 Gratt. (Va.) 595; Katz *v.* Sorsby, 34 La. An. 588; Ross *v.* McKinney, 2 Rawle (Pa.) 227; Kettle *v.* Harvey, 21 Vt. 301; Otis *v.* Ford, 54 Me. 104.

4. So *held* as to usurious interest money, where the principal defendant has the right to reclaim. Eslet *v.* Rhodes, 1 B. Mon. (Ky.) 316; Graham *v.* Moore, 7 B. Mon. (Ky.) 53; Boardman *v.* Roe, 13 Mass. 104; Barker *v.*

garnishee is not affected by the fact that subsequent to the service of the trustee process, but before the final trial, the debt became absolute.[1]

**15. For Interest.**—The garnishee, while prevented by legal process from discharging his debt, is not chargeable with interest, whether such interest would have been due by contract[2] or not,[3] and it makes no difference whether the attachment terminate in favor of the plaintiff or defendant.[4] He is chargeable with interest, however, if he has put the defendant's money at interest;[5] or if he has used it as his own;[6] or if he assume the position of a litigant;[7] or if by collusion or fraud, he occasion any unreasonable delay.[8] He is liable for interest if he be served with a void process.[9]

The presumption is that the money was not used during the

Estey, 19 Vt. 131; Ranson *v.* Hays, 39 Mo. 445.

A stockholder who has not paid the full amount of his subscription to such stock cannot be garnished before an assessment or call is made. McVey *v.* Crockett, 18 Nev. 238; Brown *v.* Union Ins. Co., 3 La. Ann. 177; Bingham *v.* Rushing, 5 Ala. 405.

Not so, however, if the garnishee is liable, but no action will lie until demand is made. The plaintiff may, in such case, garnish the debtor. VIII., 2, *supra.*

1. Wetherell *v.* Evarts, 17 Vt. 219. *Contra*, Weil *v.* Poston, 77 Mo. 284.

By statute in Wisconsin, if the liability is not contingent at time of judgment, garnishee may be made subject. Jones *v.* St. Ouge, 30 N. W. Rep. (Wis.) 927. See also Hurst *v.* Home Protection Ins. Co., 81 Ala. 175.

2. If by agreement, express or implied, the garnishee's debt is one bearing interest, still he ought not to be charged with interest while prevented by legal operation of an attachment from making payment. Little *v.* Owen, 32 Ga. 20; Cohen *v.* St. Louis Perpetual Ins. Co., 11 Mo. 374; Clark *v.* Powell, 17 La. 177; Candee *v.* Skinner, 40 Conn. 464; Irwin *v.* P. & C. R. R. Co., 43 Pa. St. 488; Osborn *v.* Bank of United States, 9 Wheat. (U. S.) 738; Blair *v.* Porter, 2 Beas. (N. J.) 270; Prescott *v.* Parker, 4 Mass. 170; Selleck *v.* French, 1 Am. L. Cas. 527. *Contra*, Abbott *v.* Stinchfield, 71 Me. 213.

But where a person attaches money in his own possession he will be charged with interest. Willings *v.* Consequa, Pet. (C. C.) 303.

3. Lyman *v.* Orr, 26 Vt. 119; Adams *v.* Cordis, 8 Pick. (Mass.) 260; Quigg *v.* Kittredge, 18 N. H. 137; Fitzgerald *v.* Caldwell, 2 Dall. (Pa.) 215; Updegraff *v.* Spring, 11 S. & R. (Pa.) 190.

**Damages.**—If the interest would have accrued by way of damages for a wrongful detention of the principal sum by the debtor, he cannot be charged with interest for the period of time that the attachment suit was pending. Prescott *v.* Parker, 4 Mass. 170; Rennell *v.* Kimball, 5 Allen (Mass.) 356; Irvin *v.* Pittsburgh etc. R. Co., 43 Pa. St. 488; Swanscot Machine Co. *v.* Partridge, 5 Fost. (N. H.) 369; Huntress *v.* Rice, 111 Mass. 213; Swanscot Machine Co. *v.* Partridge, 25 N. H. 371; Smith *v.* Flanders, 129 Mass. 322; Abbott *v.* Stinchfield, 71 Me. 213.

4. Mackey *v.* Hodgson, 9 Pa. St. 468.

5. Brown *v.* Silsby, 10 N. H. 521; Blodgett *v.* Gardiner, 45 Me. 542; Abbott *v.* Stinchfield, 71 Me. 213.

6. Mattingly *v.* Boyd, 20 How. (U. S.) 128; Woodruff *v.* Bacon, 35 Conn. 97.

7. Chase *v.* Manhardt, 1 Bland (Md.) 333; Stevens *v.* Gwatheney, 9 Mo. 636; Moore *v.* Lowry, 25 Iowa 336; s. c., 95 Am. Dec. 790; Shahan *v.* Tallman, 39 Kan. 185.

**Interest as Damages.**—Where defendant in an action defends upon the merits of his case and is garnished in another court for the same debt and released from garnishment before determination of first suit, interest will be allowed for whole time. Albion Lead Works *v.* Citizens' Ins. Co., 3 Fed. Rep. 197.

8. Fitzgerald *v.* Caldwell, 2 Dall. (Pa.) 215; 1 Yeates 274; Jones *v.* Man. Natl. Bk., 99 Pa. 317; Risser *v.* Rathbun, 32 N. W. Rep. (Iowa) 198.

9. Hawkins *v.* Ga. Natl. Bk., 61 Ga. 106.

pendency of the suit.[1] Although in some States he is presumed to use it unless he pays it into court.[2]

The foregoing rules are confined in their operation to the garnishee's liability to judgment in favor of the plaintiff for interest accrued *pendente lite*. When the whole of the debt garnisheed by the plaintiff is not required to meet the plaintiff's claim, it would appear that the garnishee is liable to the principal defendant for interest on the balance of the debt whilst the proceedings were pending.[3]

**16. To Defendant After Garnishment.**—We have heretofore stated the effect of garnishment upon the effects or credits in the hands of the garnishee and the rights of the principal defendant, and liability of the garnishee up to the time of judgment.

Garnishment, being an effectual attachment of the credits and effects of the defendant in the possession of the garnishee, it follows that while the garnishment proceedings are pending, if he allows the property to leave his hands, or pays the debt, he does so at his peril, and it will be no defence to the attachment lien of the plaintiff in garnishment.[4]

Where judgment has been had against the garnishee in due course of law,[5] it acts as a judicial assignment of the debt which

1. Moore *v.* Lowry, 25 Iowa 336; Morris *v.* Hall, 18 Me. 332; Blodgett *v.* Gardiner, 45 Me. 542.

2. Candee *v.* Webster, 9 Ohio St. 452; Work *v.* Glaskins, 33 Miss. 539; Smith *v.* German Bank, 60 Miss. 69; Templeman *v.* Fauntleroy, 3 Rand. (Va.) 434; Adams *v.* Cardis, 8 Pick. (Mass.) 260; McCann *v.* Board, 1 Dana (Ky.) 338, in which it is said he will be charged interest unless he brings the money into court.

3. Sickman *v.* Lapsley, 13 S. & R. (Pa.) 224.

4. Even though it were honestly made, and with the advice of counsel, if the same were made unlawfully. Johann *v.* Rufner, 27 Wis. 195.

A trustee is liable for goods taken from his possession by a wrong doer after service of process. Despatch Line of Packets *v.* Bellamy Mfg. Co., 12 N. H. 205.

But not if taken before such service of process, and they never came into his possession again. Kidder *v.* Page, 48 N. H. 38.

5. Webb *v.* Miller, 24 Miss. 638; New Orleans R. Co. *v.* Long, 50 Ala. 498. See Hitt *v.* Lacey, 3 Ala. 104, as to costs.

As to the procedure, where garnishee is liable to the defendant upon a judgment, see Chandler *v.* Faulkner, 5 Ala. 567; Hagadon *v.* Campbell, 24 Ala. 375.

It does not matter that the proceedings have been irregular, as long as they were not void. See Palmer *v.* Ballard, 3 Stew. (Ala.) 326; Tubb *v.* Madding, Minor (Ala.) 129.

But garnishee will not be protected in payment of judgment against himself, based on void proceedings, and garnishee may enquire into jurisdiction of court rendering judgment against defendant in attachment, in a proceeding on writ of error to reverse the judgment pronounced against himself, and if that court had no jurisdiction, the judgment against the garnishee will be reversed. Pierce *v.* Carlton, 12 Ill. 358; s. c., 54 Am. Dec. 410.

Where a suit was commenced by garnishment under attachment upon two notes, and afterwards, and before trial, another note between the same parties fell due, and by an amendment was included in the complaint, and the judgment embraced the amount of all three of the notes, *held*, that as against a garnishee who pays such judgment, the same is not absolutely void, although the proceedings were irregular and the judgment perhaps erroneous; but that the judgment was such as the garnishee might regard in making payment, and such as he

is conclusive upon the defendant in the principal action, and will bar his recovery against the garnishee to the amount of the judgment.[1] But a judgment discharging the garnishee upon the ground of non-liability is not conclusive upon the defendant,[2] nor is he precluded from recovering more than was paid on the judgment.[3]

**IX. The Effect of Garnishment.**—The service of process of garnishment operates to place the property in the hands of the garnishee, constructively, *in custodia legis*,[4] and is an effectual attachment of the property and effects of the defendant in the garnishee's possession,[5] differing from attachment by levy only that it gives him the right to hold the garnishee personally

might rely upon in defence to a subsequent action against him by the principal defendant. Schoppenhast *v.* Bollman, 21 Ind. 280. See also Gunn *v.* Howell, 35 Ala. 144.

1. Ladd *v.* Jacobs, 64 Me. 347; Brown *v.* Dudley, 33 N. H. 511; Hirth *v.* Pfeifle, 42 Mich. 32; Allen *v.* Watt, 79 Ill. 284; Ross *v.* Pitts, 39 Ala. 606; Morgan *v.* Neville, 74 Pa. St. 52; B. & O. R. Co. *v.* May, 25 Ohio St. 347; Wigall *v.* Union C. & M. Co., 37 Iowa 129; Canada *v.* Detrick, 63 Ind. 485; Sessions *v.* Slevens, 1 Fla. 233; s. c., 46 Am. Dec. 339. And such judgment is a good defence to an action by an assignee subsequent to the garnishment. Bunker *v.* Gilmore, 40 Me. 88; Newman *v.* Manning, 79 Ind. 218; Bushnell *v.* Allen, 48 Wis. 460.

When a debt has been recovered from a debtor by garnishee process under an attachment proceeding in a court of competent jurisdiction in another State, the recovery is a protection in Illinois to the garnishee against his original creditor, and the fact that the debt may have been put into a judgment does not change the rule. Allen *v.* Watts, 79 Ill. 284.

But a party claiming protection against the suit of the principal defendant, subsequent to the garnishment proceeding, because of the judgment therein against him, must show that all the proceedings therein are legal and valid. Edler *v.* Hasche, 67 Wis. 653.

However, a judgment against a garnishee without satisfaction thereof, is no defence to an action by the creditor, the principal defendant. Sharpe *v.* Wharton, 85 Ala. 225.

2. Ruff *v.* Ruff, 85 Pa. St. 333; Puffer *v.* Graves, 26 N. H. 256; Cameron *v.* Stollenwerck, 6 Ala. 704.

3. Freeman on Judg., § 167; Brown *v.* Dudley, 33 N. H. 511; Barton *v.* Allbright. 29 Ind. 489. And this right is available to the assignee of the defendant. Tams *v.* Bullitt, 35 Pa. St. 308.

The judgment rendered is not evidence against the defendant where answer had not been controverted. Jones *v.* Kolisenski, 11 Ala. 637.

4. Reed *v.* Fletcher, 39 N. W. Rep. (Neb.) 437; Northfield Knife Co., *v.* Shampleigh, 39 N. W. Rep. (Neb.) 788; *Compare* Bigelow *v.* Andres, 31 Ill. 322. See, however, Smith *v.* Clinton Bridge Co., 13 Bradw. (Ill.) 572.

So it has been said that, "Ordinarily property is not *in custodia legis* until actually seized and reduced into possession by the officer; under the law of attachment it is by the levy of the officer that creates the lien." McGarry *v.* Lewis Coal Co., 93 Mo. 237; s. c., 3 Am. St. Rep. 522; Bank of Mo. *v.* Bredow, 31 Mo. 523; Bigelow *v.* Andress, 31 Ill. 322; Walcott *v.* Keith, 22 N. H. 196.

But there are authorities which hold that garnishment places the property *in custodia legis*. Brashear *v.* West, 7 Pet. (U. S.) 608; Mattingly *v.* Boyd, 20 How. (U. S.) 128. *Compare* Staniels *v.* Raymond, 4 Cush. (Mass.) 314.

5. Hucker *v.* Stevens, 4 McLean (U. S.) 535; Kennedy *v.* Brant, 6 Cranch (U. S.) 187; Martin *v.* Fareman, 18 Ark. 249; Burlingame *v.* Bell, 6 Mass. 318; Swett *v.* Brown, 5 Pick. (Mass.) 178; Blaisdell *v.* Ladd, 14 N. H. 129; Renneker *v.* Davis, 10 Rich. (S. Car.) Eq. 289; Wilder *v.* Weatherhead, 32 Vt. 765; *in re* Peck, 16 Nat. Bank Reg. 43; Renneker & Glover *v.* Davis, 10 Rich. (S. Car.) Eq. 289.

liable for the value of the property in his possession, instead of securing a clear and full lien upon the specific property.[1] It creates no specific lien upon the defendant's property[2] in favor only so far as to restrain his power to regain his property while it is in the custody of the garnishee. So long as the property is in the custody of the garnishee, the attaching creditor cannot resort to his remedy by execution against the principal defendant. If he does so, he thereby waives his right to look to the property in the hands of the garnishee, and the debtor at once has the right to reclaim the property." Beamont *v.* Easton, 12 Heisk. (Tenn.) 421.

**The lien cannot be divested** by any arrangement between the defendant and garnishee. Cottrell *v.* Varnum, 5 Ala. 229; s. c., 39 Am. Dec. 323.

**Legal Effect.**—MINSHALL, J.: "The legal effect of the garnishment of a debtor of the defendant is where judgment is rendered for the plaintiff to transfer the indebtedness of the garnishee to the plaintiff in the attachment so far as the same may be necessary to satisfy the judgment. Secor *v.* Whitter, 39 Ohio St. 218. And as a security is always regarded as an incident to the debt, it follows that where the indebtedness of the garnishee is secured by a mortgage the garnishment of the indebtedness carries with it the mortgage. Edwards *v.* Edwards, 24 Ohio St. 411." Alsdorf *v.* Reed, 45 Ohio St. 653."

**Insolvency of the Principal Defendant.**—The levy of an attachment on *mesne* process constitutes a valid lien, which is not to be impaired by a proceeding in insolvency, unless the insolvent or bankrupt law expressly declares such lien dissolved. Thomas *v.* Brown, 10 Atl. Rep. (Md.) 713.

**2. No Specific Lien.** Wade on Attach. 325; Bigelow *v.* Andress, 31 Ill. 333; McGarry *v.* Lewis Coal Co., 93 Mo. 237; s. c., 3 Am. St. Rep. 522; Bank of Mo. *v.* Bredow, 31 Mo. 523; Bailey *v.* Ross, 20 N. H. 302; McCampbell *v.* Denham, 72 Iowa 494.

"It may be less satisfactory to the plaintiff, for the reason that, instead of the specific lien, the responsibility of the garnishee is substituted." Wade on Attach. 325; Bigelow *v.* Andress, 31 Ill. 333.

Under the law applicable to attachment, it is the levy of the officer that creates the lien. If the plaintiff in garnishment is not satisfied to look to

1. Drake on Attach. (6th ed.) 453; Booth *v.* Gist, 39 N. W. Rep. (Iowa) 704; Walcott *v.* Keith, 22 Fost. (N. H.) 196; Moore *v.* Holt, 10 Gratt. (Va.) 284; Winner *v.* Hoyt, 68 Wis. 278; McConnell *v.* Denham, 72 Iowa 494. *Compare* McGarry *v.* Lewis Coal Co., 93 Mo. 237; Johnson *v.* Gorham, 6 Cal. 195.

No "vested right" is secured until final judgment against the garnishee is rendered. Tate *v.* Moorhead, 65 N. Car. 687.

In Vermont, garnishment was termed an "inchoate lien." Wilder *v.* Weatherhead, 32 Vt. 765; Cooke *v.* Cooke, 43 Md. 522; Curtis *v.* Moore, 20 Md. 93; Poley *v.* Bitters, 34 Md. 650.

In South Carolina, a creditor who sues by attachment, and thus gains a lien on assets attached, has no right, for any balance due him after exhausting his lien, to come in with other creditors and participate with them in the distribution of unattached assets of the absent debtor. Renneck *v.* Davis, 10 Rich. (S. Car.) Eq. 289.

Where the statute makes the garnishee liable for property coming into his hands, and for obligations incurred after service of process, the lien attaches in such cases the same as to that in possession when service was made. Aldrich *v.* Woodcock, 10 N. H. 99; Parker *v.* Parker, 2 Hill Eq. (S. Car.) 35; Loyless *v.* Hodges, 44 Ga. 647; Stevens *v.* Dillman. 86 Ill. 233.

NICHOLSON, C. J.: "If the service of garnishment acts as satisfaction of the defendant's debt, as in case of direct levy of execution, the creditor has no other indemnity; he can look only to the responsibility of the garnishee, even if the garnishee fails to make proper return of the property of the debtor. But as the garnishee is simply an agent for the custody of the debtor's effects, upon his default, the creditor can either waive his right to proceed against the garnishee, and proceed by *alias* execution against the garnishee, and then resort to his judgment against his debtor for any unsatisfied balance. This is the necessary result of the legal fact that the service of the garnishment does no more than vest in the garnishee a special title as a custodian for the court, and divests the title of the debtor

of the plaintiff, except in case of fraudulent conveyance by the defendant. In such case it gives the plaintiff such a specific lien that he may contest, upon the ground of fraud, the validity of the conveyance by which the garnishee holds the property, the same as in direct seizure in attachment. To do this, it is not necessary that the plaintiff's claim shall have been conclusively established.[1]

The primary purpose of garnishment is to subject claims and demands in favor of the defendant against third persons to the payment of his debts, and this it accomplishes by divesting the defendant of whatever rights he may have against the garnishee at the time of service, and substituting the plaintiff in his stead.[2] The latter gets by the process whatever rights the defendant had, and this is all it is intended to secure for him. From the time of service of process upon him, the garnishee becomes accountable to the plaintiff in respect to any liability due from him to the defendant, and he cannot, except in cases of liability on negotiable paper, escape from such accountability through any subsequent acts of his own or of the defendant.[3] The garnishee cannot relieve himself from the obligation thus imposed upon him by payment to the defendant,[4] or the delivery to him of property in his possession.[5] Against the performance of any obligation in this regard, the garnishment affords him a complete defence as to either the defendant or those claiming through him.[6] Nor can the defendant afterwards dispose of

the responsibility of the garnishee, he may apply to the court, or to the judge in vacation, and obtain an order upon the garnishee to deliver the property to the sheriff or into court, or the court may permit the garnishee to retain the property upon the execution of a bond to plaintiff with security. (This provision is given by statute.) McGarry *v.* Lewis Coal Co., 93 Mo. 237; s. c., 3 Am. St. Rep. 522; Bank of Mo. *v.* Bredow, 31 Mo. 523.

1. Rinchey *v.* Striler, 28 N. Y. 45; s. c., 84 Am. Dec. 324 and note.

2. Hicks *v.* Gleason, 20 Vt. 139, 143; Nash *v.* Gale, 2 Minn. 310; Rushton *v.* Rowe, 64 Pa. St. 63; Roig *v.* Tiny, 103 Pa. St. 115; Baltimore etc. R. Co. *v.* Gallahue's Admr., 12 Gratt. (Va.) 664; Campbell *v.* Nesbitt, 7 Neb. 300; Edwards *v.* Edwards, 24 Ohio St. 402, 411; Secor *v.* Witter, 39 Ohio St. 218-232; *Ex parte* Joselyne, L. R., 8 Ch. Div. 327; Chatterton *v.* Watney, L. R., 17 Ch. Div. 259.

The service of process upon a bank having on deposit funds of the defendant, effects an appropriation by operation of law of the whole fund in the hands of the garnishee to the satisfaction of the demand of the garnishing creditor, and the garnishee cannot discharge itself by payment thereof upon a check afterwards presented, though made and delivered by the defendant before service upon the garnishee. Kuhn *v.* Warren Savings Bank, 11 Atl. Rep. (Pa.) 440. Nor will the previous certification of a check thus drawn change the rule. Bills *v.* Nat. Park Bank, 89 N. Y. 343; Gibson *v.* Nat. Park Bank, 98 N. Y. 87. And see Robertson *v.* Huggins, 10 Lea (Tenn.) 300.

3. Martin *v.* Foreman, 18 Ark. 249; Cleneary *v.* Junction R. Co., 26 Ind. 375; First Nat. Bank *v.* Armstrong, 101 Ind. 244; Cottrell *v.* Varnum, 5 Ala. 229; s. c., 39 Am. Dec. 323; National Commercial Bank *v.* Miller, 77 Ala. 168, 176; White *v.* Bird, 20 La. Ann. 188; s. c., 96 Am. Dec. 393; Roberts *v.* Lydecker, 9 Cal. 262; Bethel *v.* Judge of Superior Ct., 57 Mich. 379.

4. Johann *v.* Rufener, 32 Wis. 195; Arnold *v.* Linaweaver, 3 Head (Tenn.) 51; Hughes *v.* Monty, 24 Iowa 499.

5. Loyless *v.* Hodges, 44 Ga. 647; Stevens *v.* Dillman, 86 Ill. 233.

6. Stiles *v.* Davis, 1 Black (U. S.) 101; Walcott *v.* Keith, 22 N. H. 196.

the property to the prejudice of the rights of the garnishing creditor.[1] Where there are several garnishments of the same person, and against property of the same defendant, they will take precedence according to the priority of service upon the garnishee.[2]

But until the garnishee's liability is discharged by satisfaction of a valid judgment against him in the garnishment proceeding, the rights of the defendant to enforce his claim are suspended only, not extinguished, and for the purpose of making demand or obtaining security by attachment or otherwise, they remain unimpaired, though in subordination to the plaintiff's rights in the premises.[3] Neither will the proceeding interfere with the execution of any contract previously existing between the parties, except as above indicated,[4] nor prevent them engaging in any new transaction.[5]

Whether, after service of process upon one as garnishee, the property thus attached in his hands is subject to seizure under process against the defendant, and if so, what effect such seizure will have upon the rights and liabilities of the parties, the courts are not agreed. It was held, in an early case in Massachusetts, which has been followed by later decisions of the same court, that property thus situated is liable to seizure on attachment against the defendant, but that the officer into whose custody the property may come will hold the same subject to the right of the garnishee to have satisfaction, out of the proceeds thereof, for any judgment that may be rendered against him in the garnishment proceeding.[6] In other States, it is held that, no lien being acquired by garnishment, an attachment by seizure of the prop-

1. Hacker *v.* Stevens, 4 McLean (U. S.) 535.

2. Talbot *v.* Harding, 10 Mo. 350; Johann *v.* Rufener, 32 Wis. 195; Blaisdell *v.* Ladd, 14 N. H. 129; Caperton *v.* McCorkle, 5 Gratt. (Va.) 177; Arledge *v.* White, 1 Head (Tenn.) 241; McCombs *v.* Howard, 18 Ohio St. 422; The Olivia A. Carrigan, 7 Fed. Rep. 507.

A creditor's right to priority will not be affected by a subsequent garnishment of the same debtor in favor of the United States. Beaston *v.* Farmers' Bank, 12 Pet. (U. S.) 102, 135.

Satisfaction of a prior garnishment by the garnishee, before judgment in such proceeding, will be no defence to existing attachments subsequent garnishing creditors. Brandon Iron Co. *v.* Gleason, 24 Vt. 228; McCobb *v.* Tyler, 2 Cranch (C. C.) 199.

But where the defendant directed the garnishee to pay his debt to an attaching creditor, and he agreed to do so, *held* that a creditor subsequently attaching, but before the money was paid over, was not entitled to any claim on the fund. Rudd *v.* Paine, 2 Cranch (C. C.) 9.

An attachment by seizure of the property in possession of the garnishee will be entitled to priority over a garnishments ubsequently served, though the process issued before the attachment writ. English *v.* King, 10 Heisk. (Tenn.) 666; Pritchard *v.* Toole, 53 Mo. 356.

3. Hicks *v.* Gleason, 20 Vt. 139; Smith *v.* Clinton Bridge Co., 13 Ill. App. 572, 580.

4. Baugh *v.* Kirkpatrick, 54 Pa. St. 84; Aldrich *v.* Woodcock, 10 N. H. 99, 102; Crownover *v.* Bamburg, 2 Ill. App. 162.

5. Victor *v.* Hartford Fire Ins. Co., 33 Iowa 210, 212.

6. Burlingame *v.* Bell, 16 Mass. 318; Swett *v.* Brown, 5 Pick. (Mass.) 178; Platt *v.* Brown, 16 Pick. (Mass.) 553.

erty in the garnishee's hands will be effectual against any rights acquired by the garnishing creditor.[1] But the trouble with this last position would seem to be that, while garnishment gives no lien upon specific property, it nevertheless deprives the defendant of all control over it, and the power to assert any right or title thereto as against the plaintiff, from the time of service upon the garnishee, and an attaching creditor who seizes the property while thus situated, if it be subject to seizure at all, can certainly take no greater interest thereby, than his debtor had at the time of the levy.[2] It has accordingly been held that such an interference with the garnishee's possession is wrongful, and that no lien will be acquired thereby, nor the right of the garnishing creditor be defeated.[3]

**X. Proceedings to Determine Garnishee's Liability—1. Plaintiff's Right to Oral Examination of Garnishee.**—Generally, the garnishing creditor is entitled to personally examine the gar-

1. Johnson *v.* Gorham, 6 Cal. 195.

2. Stephenson *v.* Walden, 24 Iowa 84; Manny *v.* Adams, 34 Iowa 165; Samuel *v.* Agnew, 80 Ill. 553.

In Erskine *v.* Staley, 12 Leigh (Va.) 406, 424, the court say: "It was contended, that as there was no actual seizure, no levy on specific effects which were thus placed under the custody of the law, the *property* in the goods remained in the debtor, and being in him other creditors might levy on them. But granting that no actual seizure is made so as to divert the property of the debtor, the consequence deduced does not follow. The legal property of goods may remain in one, subject to the equitable lien of another; and third persons coming in under the first, must occupy his position and hold subject to the lien. For many purposes the property in the goods may rest in the debtor, notwithstanding the service of the attachment. Thus, in several attachments against the same absconding debtor, the attachments are levied successively on the same goods as his property, and they are paid according to the dates of their respective levies."

3. Erskine *v.* Staley, 12 Leigh (Va.) 406; Moore *v.* Holt, 10 Gratt. (Va.) 284; Ronan *v.* Dewes, 17 Mo. App. 306, 310.

The same position, though based upon different grounds, is taken in the following cases: Scholefield *v.* Bradlee, 4 Martin (La.) 252; Dennistown *v.* New York Croton & Steam Faucet Co., 6 La. Ann. 782; Renneker *v.* Glover, 10 Rich. Eq. (S. Car.) 289; Reed *v.* Fletcher, 24 Neb. 435; Northfield Knife Co. *v.* Shapleigh, 24 Neb. 635. And see Brashear *v.* West, 7 Pet. (U. S.) 608, 621; Mattingly *v.* Boyd, 20 How. (U. S.) 128; Arnold *v.* Linaweaver, 3 Head (Tenn.) 51; Beaumont *v.* Eason, 12 Heisk. (Tenn.) 417, 420.

If the property be taken out of the possession of the garnishee under junior process against the defendant, it is his duty to disclose such fact in his answer, or give notice to the plaintiff, that the latter may take the necessary steps to protect his rights; and if he fails to do this he may be charged, notwithstanding such seizure. Ronan *v.* Dewes, 17 Mo. App. 306. And some authorities hold that if the garnishee permits the property to be taken from his possession he will nevertheless be chargeable therefor. Aldrich *v.* Woodcock, 10 N. H. 99, 103; Despatch Line etc. *v.* Bellamy Mfg. Co., 12 N. H. 235. 238; s. c., 37 Am. Dec. 203. But other authorities hold that such seizure, without fault on the part of the garnishee, will entitle the latter to be discharged, and that the plaintiff's remedy is against the party committing the trespass. Goddard *v.* Hapgood, 25 Vt. 272; s. c., 60 Am. Dec. 272.

If the garnishing creditor subsequently seizes the property in the garnishee's hands on attachment, it will operate as a discharge of the garnishee; and if the property has been previously attached, such attachment will have priority over the lien of the garnishing creditor. Goddard *v.* Hapgood, 25 Vt. 351; s. c., 60 Am. Dec. 272; Clapp *v.* Rogers, 38 N. H. 435.

nishee,[1] and he cannot be deprived of this right by the filing of a written answer.[2] Even where the answer is made in writing by agreement of parties, or in pursuance of the statute, if the disclosure is meagre, and its statements evasive, or otherwise unsatisfactory to the plaintiff, he should be allowed to examine the garnishee orally.[3] It follows that the garnishee must generally appear before the court in person for the purpose of the examination. Unless authorized by statute, he cannot, usually, make answer by an attorney,[4] or any other agent.[5] But where a copartnership is summoned by its firm name, one of the partners may answer for the firm.[6] So, too, may one of several garnishees summoned upon the ground of a joint liability.[7] And a corporation must answer through its officers or other agents, according as authority has been conferred upon them.[8]

**1. Oral Examination of Garnishee.**—Penn *v.* Pelan, 52 Iowa 535; Roberts *v.* Landecker, 9 Cal. 262, 266; Wright, Admr., *v.* Swanson, 46 Ala. 708; Brainard *v.* Simmons, 58 Iowa 464.

Under the practice in some of the States the plaintiff must file interrogatories in writing for the garnishee to answer. Corbyn *v.* Ballman, 4 W. & S. (Pa.) 342; Richardson *v.* White, 19 Ark. 242; Roberts *v.* Barry, 42 Miss. 260.

Sometimes the statute prescribes certain interrogatories, which may be asked the garnishee at the time of service of the summons. Conoble *v.* Hylton, 10 Iowa 593. But the answer can only be so taken when the officer is in possession of a writ of attachment or execution against the property of the defendant. Van Fossen *v.* Anderson, 8 Iowa 251. And an answer so taken will not preclude the plaintiff from further examination of the garnishee in court. Thompson *v.* Silvers, 59 Iowa 670.

**2.** Scales *v.* Swan, 9 Port. (Ala.) 163; Curry *v.* Woodward, 53 Ala. 371, 374.

A written answer, denying all indebtedness, drawn and filed as if it were a pleading, is sufficient, however full and explicit it may be; and on motion may be stricken from the files as having been filed without authority of law. Penn *v.* Pelan, 52 Iowa 535; Brainard *v.* Simmons, 58 Iowa 464, 466.

But if, upon the offer of a garnishee to answer in writing, the plaintiff permits the same to be received in court without objection, he cannot afterwards have the same stricken from the files, even though unsatisfactory. Seamon *v.* Bank, 4 W. Va. 339.

**3.** Wright, Admr., *v.* Swanson, 46 Ala. 708; Seamon *v.* Bank, 4 W. Va. 339; Thompson *v.* Silvers, 59 Iowa 672.

But in Elwood *v.* Crowley, 64 Iowa 68, *held*, that the court may limit the plaintiff to an examination upon written interrogatories.

**4. Personal Attendance of Garnishee Necessary.**—But in Maine, if the garnishee resides outside the county, he is permitted by a statute of that State to answer through an attorney. Macomber *v.* Wright, 35 Me. 156.

**5.** Cornell *v.* Payne, 115 Ill. 62, 68; Dickson *v.* Morgan, 7 La. Ann. 490.

**6.** Gerry *v.* Gerry, 10 Allen (Mass.) 160.

But the plaintiff is entitled to the answer of the several partners if desired. Hennessey *v.* Farrell, 4 Cush. (Mass.) 267.

**7.** Hennessey *v.* Farrell, 4 Cush. (Mass.) 267.

**8. Corporations Answer Through Agents.**—Chicago etc. R. Co. *v.* Mason, 11 Ill. App. 525; Oliver *v.* Chicago etc. R. Co., 17 Ill. 588; Baltimore etc. R. Co. *v.* Gallashue's Admr., 12 Gratt. (Va.) 655; s. c., 65 Am. Dec. 254; The Branch Bank *v.* Poe, 1 Ala. 396; Planters & Merchants' Bank *v.* Leavens, 4 Ala. 753; Callahen *v.* Hallowell, 2 Bay (S. Car.) 8; Udall *v.* School Dist., 48 Vt. 588.

And under a statute permitting a corporation to answer by its "agent or any officer or member of the company," *held* that answer may be made by the attorney of the corporation, although neither a member nor its general business agent. Head *v.* Merrill, 34 Mo. 586.

Nor is it necessary that the answer be made by the officer or agent served

**2. The Interrogatories.**—Just what scope the examination of the garnishee may be allowed to take, varies somewhat in the different States, but it rests largely in the discretion of the court, in view of the provisions of the statute under which the proceeding obtains, and the circumstances of the particular case.[1] In order that the remedy given by the statute may be made effectual, the plaintiff ought not to be too much restrained in the exercise of his rights thereunder.[2] Such a disclosure should be obtained as will enable the court to determine, if possible, the question of liability without putting the parties to the expense and delay of a trial upon an issue joined.[3]

The garnishee is, in some respects, a witness, and the rule is that a witness in a civil case may generally be required to testify to any fact pertinent to the issue.[4] He cannot be excused from answering because his testimony may tend to charge him with a debt, or subject him to a pecuniary loss or liability.[5] But, as in

with the process. Duke *v.* Rhode Island Locomotive Works, 11 R. I. 599.

And if the issue be taken on the answer so made, the plaintiff may summon any officer or agent of the company and examine him as a witness. Bailey *v.* Union Pacific R. Co., 62 Iowa 354, 358; Warren *v.* Perkins, 8 Cush. (Mass.) 518.

1. **Scope of the Examination.**—In New York the garnishee may be enquired of as to the character in which he holds money or property of the defendant, the manner in which the same was obtained, and the purpose of his possession, but the examination cannot be extended beyond this. Baxter *v.* Missouri etc. R. Co., 67 Barb. (N. Y.) 283.

In Neally *v.* Ambrose, 21 Pick. (Mass.) 185, it is said that the court should interpose in behalf of the garnishee only where the interrogatories are plainly immaterial, or have a tendency to change him criminally.

2. Pickler *v.* Rainey, 4 Heisk. (Tenn.) 335, 340; Devries *v.* Buchanan, 10 Md. 210.

Justice may often require that the garnishee should be submitted to the most pointed and searching interrogatories. But the interrogatories must not go beyond the design of the statute, viz: to charge the garnishee with property or effects of the judgment debtor, or with some indebtedness to him. When they tend to some other purpose, the garnishee should be relieved from answering. Roquest *v.* Steamer B. E. Clark, 13 La. Ann. 210, 212.

The policy of the law in relation to this process is to render the effects and credits of the defendant in the hands of the garnishee available for the benefit of creditors; and the statutes should receive a liberal construction in furtherance of this object. Mansfield *v.* New England Exp. Co., 58 Me. 35, 38.

It has been held in Massachusetts and some other States that by summoning the garnishee, the plaintiff in some respects makes him his witness, and that he is bound by his statements under oath, and can neither impeach his character nor contradict his testimony, and therefore is not entitled to the privilege of a cross-examination. But this is contrary to the rule which prevails in most of the states. Crossman *v.* Crossman, 21 Pick. (Mass.) 21; Nutter *v.* Framingham, etc., R. Co., 131 Mass. 231; Spears *v.* Chapman, 43 Mich. 541; Banning *v.* Sibley, 3 Minn. 389; Cole *v.* Sater, 5 Minn. 468.

But under more recent statutes in Minnesota, other testimony than that of the garnishee may be introduced as to facts tending to corroborate or explain the testimony of the garnishee. Leighton *v.* Heagerty, 21 Minn. 42.

3. Richardson *v.* White, 19 Ark. 242.

4. Bull *v.* Loveland, 10 Pick. (Mass.) 9; Maynard *v.* Cornwell, 3 Mich. 309.

5. **Interrogatories Garnishee May be Required to Answer.**—Bull *v.* Loveland, 10 Pick. (Mass.) 9.

That the questions tend to the discovery of fraud on his part will not excuse the garnishee from answering. Devoll *v.* Brownell, 5 Pick. (Mass.) 448; Neally *v.* Ambrose, 21 Pick. (Mass.) 185; St. Louis Brokerage Co. *v.* Cronin, 14 Mo. App. 586.

the case of ordinary witnesses, the above rule is subject to certain exceptions, as where his testimony would expose the garnishee to a criminal prosecution, or subject him to penalty or forfeiture,[1] or when the facts sought to be elicited are within the rule affecting privileged communications. But such rule will not be so construed as to exempt or shield property of the defendant in the hands of his attorney from the pursuit of creditors.[2] And a statute providing that "neither the husband nor wife shall in any case be a witness against the other," will not excuse the husband or wife, when summoned as garnishee, from answering as to his or her indebtedness to the other.[3]

The general rule, therefore, is to permit the plaintiff to put such interrogatories to the garnishee as are calculated to elicit facts tending to charge him.[4] This implies that they must concern the estate and effects of the defendant in the garnishee's hands, or debts due from him to the defendant [5] at the time of the service of garnishment.[6] With subsequent and independ-

Nor is it a valid objection to a proper interrogatory that it requires the garnishee to make a statement of his accounts with the defendant. Roquest *v.* Steamer B. E. Clark, 13 La. Ann. 210.

1. Boardman *v.* Roe, 13 Mass. 104; Neally *v.* Ambrose, 21 Pick. (Mass.) 185.

2. **Privileged Communications.**—An attorney at law cannot be excused from answering interrogatories put to him unless he declare upon oath that he cannot answer the same without disclosing matters confided to him by his client, or advice given by him to his client concerning business about which he was retained. White *v.* Bird, 20 La. Ann. 188.

Where the object of interrogatories addressed to an attorney is to ascertain who is the client who entrusted notes to him, through whose agency or in what manner he was retained; when that relation commenced and ended, and what money has been received, and what paid over, and to whom paid, none of the matters called for are within the rule of privileged communications. Shanghuessy *v.* Fogg, 15 La. An. 330.

And where an attorney has received money which he is to hold until the question of its ownership shall be determined between the parties, he cannot refuse to state with whom he has deposited the same, and the conditions upon which the deposit was made upon the ground that his knowledge of the matter is privileged. Williams *v.* Young, 46 Iowa 140.

3. Thompson *v.* Silvers, 59 Iowa 670.

4. Crossman *v.* Crossman, 21 Pick. (Mass.) 21; Nutter *v.* Framingham etc. R. Co., 131 Mass. 231.

5. **Directed to Garnishee's Liability at Time of Service.**—Corbyn *v.* Bollman, 4 W. & S. (Pa.) 342; Callender *v.* Furbish, 46 Me. 226.

In Michigan the examination is limited to the character of the liability of the garnishee alleged in the affidavit for issuance of the process. Mack *v.* Brown, 20 Mich. 335.

Under a statute providing that the garnishee shall be summoned to "answer touching his indebtedness to the defendant and any property, money or effects of the defendant in his possession or under his control," the garnishee may be questioned as to his liability in both respects, although the affidavit may only state one ground as the basis for issuing the summons. Prince *v.* Hendy, 5 Minn. 341, 351.

6. Generally, the garnishee can only be examined touching his liability at the time of the service of the garnishment. Norris *v.* Burgoyne, 4 Cal. 409.

Under the statute of Illinois, which requires the garnishee to disclose as to his indebtedness or possession of property of the defendant "at the time of the service of the garnishee process, or at any time thereafter, or which may thereafter become due," *held* that the garnishee is required to make full discovery in reference to any indebtedness to the defendant or property or effects in his hands up to the time of making

ent transactions the plaintiff has nothing to do;[1] nor with the garnishee's title to real estate,[2] except as he may be liable to account as trustee for the rents and profits thereof, or for the proceeds if the same shall be sold.[3] Neither should a garnishee be required to disclose in respect to his liability in any capacity or relation other than that in which he has been served.[4] If the enquiry be to communications received by the garnishee from third persons, or to conveyances to which he was not a party, he should not be required to answer unless he has personal knowledge of the truth of the matters enquired of.[5] In some of the States, the statute permits an examination of the garnishee in respect to his knowledge of the indebtedness of other persons to the defendant; but his answer in such case will, of course, bind no one but himself.[6]

**3. The Answer**—*a. Must be Under Oath.*—The invariable rule is that the garnishee shall answer under oath.[7] But this requirement is for the benefit of the attaching creditor,[8] and a corporation, when summoned, cannot excuse itself from answering because it cannot be sworn. In such case, if the manner of making answer is not prescribed by statute, the garnishee may be required to answer in writing, under its corporate seal,[9] or sworn

answer, and is not limited in that regard to the date of the service of the writ. Young *v.* First Nat. Bank, 51 Ill. 73.

And in Mississippi, under a statute providing that the garnishee may be cited to answer "what he is indebted or was indebted to the defendant" at the time of service of the summons, *held* that plaintiff was entitled to a disclosure as to any liability accruing between the date of service and the return day. Columbus Ins. & Bank Co. *v.* Hirsh, 61 Miss. 74.

1. The garnishee may decline to answer where the examination is directed to matters in no way connected with any business or liability which existed between him and the defendant when the process was served. Humphrey *v.* Warren, 45 Me. 216; Wood *v.* Wall, 24 Wis. 647.

2. As only the personal effects and credits of the defendant can generally be attached in the hands of the garnishee, he is under no obligation to answer interrogatories looking to the disparagement of his title to real estate. Boardman *v.* Roe, 13 Mass. 104; Moor *v.* Towle, 38 Me. 133; Battles *v.* Simmons, 21 La. An. 416.

But in New Hampshire, *held* that the garnishee is obliged to answer, although in so doing he furnish evidence that may go to impair or impeach his title to real estate. Bell *v.* Kendrick, 8 N. H. 520.

3. Russell *v.* Lewis, 15 Mass. 122; Hazen *v.* Emerson, 9 Pick. (Mass.) 144; Webb *v.* Peele, 7 Pick. (Mass.) 247.

4. Knapp *v.* Levanway, 27 Vt. 298; Frizzell *v.* Willard, 37 Ark. 478.

5. Stackpole *v.* Newman, 4 Mass. 85; Hawes *v.* Langton, 8 Pick. (Mass.) 67.

6. Bean *v.* Barney, 10 Iowa 498; Cordes *v.* Kaufman, 29 Tex. 180.

7. **Answer Must be Under Oath.**—Cordes *v.* Kaufman, 29 Tex. 179; Roberts *v.* Landecker, 9 Cal. 262, 266; Oliver *v.* Chicago etc. P. R. Co., 17 Ill. 587; Chicago etc. R. Co. *v.* Mason, 11 Ill. App. 525, 527; Cornell *v.* Payne, 115 Ill. 62, 68; Lewis *v.* Prenatt, 24 Ind. 98; 100; Porter *v.* Stevens, 9 Cush. (Mass.) 530, 536; Seamon *v.* Bank, 4 W. Va. 339, 341; Pickler *v.* Rainey, 4 Heisk. (Tenn.) 335, 339.

Where the officer is authorized to take the answer of the garnishee at the time of service of the summons, the oath may be administered by him. Conable *v.* Hylton, 10 Iowa 593.

8. Roberts *v.* Landecker, 9 Cal. 262, 266.

9. **Corporations—Answer Under Corporate Seal.**—In Virginia, where such

to by an officer or agent having the requisite authority, and who is cognizant of the facts.[1] If the garnishee answer falsely, he may be prosecuted for perjury.[2]

*b. Certainty and Sufficiency of.*—It is the duty of the garnishee to make his answer as full, explicit and positive as his knowledge of the facts and the circumstances of the case will permit.[3] Unlike ordinary witnesses, he is not limited to a statement of facts within his own knowledge, but may testify upon information and belief.[4] He may make the statements, letters, affidavits or deeds of third persons a part of his answer, if he is willing to testify to their truth, or he may reject them if he believes them untrue.[5] But in such case the answer must be sufficiently full to enable the court to determine whether the declaration of his belief be true.[6] A mere general denial of all liability to the defendant in the language of the statute is not sufficient. A garnishee cannot substitute his own legal inferences and conclusions for facts.[7] He should give such an answer as will enable the court to say

answer was required, *held* that the plaintiff must accept the same as sufficient unless it is claimed that a full disclosure has not been made, in which case the officers of the corporation may be examined as witnesses. Baltimore & O. R. R. Co. *v.* Gallahen's Admr., 12 Gratt. (Va.) 665; s. c., 65 Am. Dec. 245; Branch Bank *v.* Poe, 1 Ala. 396; Planters & Merchants' Bank *v.* Leavens, 4 Ala. 573; Calahan *v.* Hollowell, 2 Bay (S. Car.) 8.

**1. Or by Its Officers or Agents.**—Oliver *v.* Chicago etc. R. Co., 17 Ill. 588; Chicago etc. P. R. Co. *v.* Mason, 11 Ill. App. 525; Knox *v.* Protection Ins. Co., 9 Conn. 430. See Subdivision "Plaintiff's Right to Oral Examination of Garnishee," note 8.

2. Moore *v.* Greene, 4 Humph. (Tenn.) 299.

Where part of a garnishee's disclosure is given in writing, as the statute requires, and another part is given orally and not reduced to writing, a prosecution for perjury cannot be predicated on the part not reduced to writing. State *v.* Trask, 42 Vt. 152.

**3. Answer Must be Full and Explicit.**—Richardson *v.* White, 19 Ark. 241; Hirth *v.* Pfeifle, 42 Mich. 31; Hosley *v.* Scott, 59 Mich. 420; Conner *v.* Allen, 3 Head (Tenn.) 418; Bridges *v.* North, 22 Ga. 52; DeBlanc *v.* Webb, 5 La. 82; Vason *v.* Clark, 4 La. An. 581; Secor *v.* Witter, 39 Ohio St. 218; Thompson *v.* Reed, 77 Me. 425; Elder *v.* Hasche, 67 Wis. 653, 660.

**4. May State Facts on Information and Belief.**—Crossman *v.* Crossman, 21 Pick. (Mass.) 21; Shaw *v.* Bunker, 2 Met. (Mass.) 376; Fay *v.* Sears, 111 Mass. 154; Burnham *v.* Dunn, 35 N. H. 556; Northam *v.* Cartwright, 10 R. I. 20; Sexton *v.* Amos, 39 Mich. 695; Drake *v.* Lake Shore etc. R. Co., 37 N. W. Rep. (Mich.) 70.

5. Kelley *v.* Bowman, 12 Pick. (Mass.) 383; Hawes *v.* Langton, 8 Pick. (Mass.) 67; Bell *v.* Jones, 17 N. H. 307; Chase *v.* Bradley, 17 Me. 89.

6. Shaw *v.* Bunker, 2 Met. (Mass.) 376; Porter *v.* Stevens, 9 Cush. (Mass.) 530.

In Massachusetts such statements or documents, when made a part of the answer, will be taken as true. First Nat. Bank *v.* Bright, 126 Mass. 535.

**7. Must State Facts, Not Conclusions of Law.**—"Such a denial must be considered in the nature of a plea, which is to be sustained by answers to interrogatories propounded by the plaintiff, if he seeks an investigation, and gives the trustee a full opportunity to disclose the true business relations subsisting between himself and the defendant; otherwise the trustee would be constituted the judge of the law as well as of matters of fact, with the exclusive privilege of drawing inferences and conclusions, which more properly belong to the court." Toothaker *v.* Allen, 41 Me. 324; Mansfield *v.* New England Express Co., 58 Me. 35; Shaw *v.* Bunker, 2 Met. (Mass.) 376, 380; Mortland *v.* Little, 137 Mass. 339, 340; Weil *v.* Posten, 77 Mo. 284; Baxter *v.* Mis-

judicially whether he should be charged.[1] And if he answer evasively or refuses to answer any particular interrogatory, he may be required to answer further under penalty of being charged for failure to do so.[2]

Being his own language, the answer of the garnishee must, in all cases where its terms are of doubtful import, receive a construction most strongly against himself. But this rule of interpretation will not justify expressions which are reasonably plain, being wrested from their proper meaning, nor of drawing inferences therefrom against the fair and natural import of the language taken altogether.[3]

The rule being that one who alleges payment or settlement in discharge of his obligation has the burden of establishing such fact, if the garnishee discloses an indebtedness to the defendant, or the possession of property belonging to him, but seeks to discharge himself by proof of matter in avoidance of such liability, he must show enough to discharge himself; and if, having the opportunity to disclose fully, his answer is indefinite and evasive, and no sufficient matter of discharge is shown, it will be deemed conclusive against him.[4] Doubtful, indefinite and sweeping state-

souri etc. R. Co., 67 Barb. (N. Y.) 283.

1. Graves *v.* Walker, 21 Pick. (Mass.) 160, 162.

2. Richardson *v.* White, 19 Ark. 241; Toothaker *v.* Allen, 41 Me. 324; Bridges *v.* North, 22 Ga. 52; Keel *v.* Ogden, 5 T. B. Mon. (Ky.) 362; Townsend *v.* Cass Circuit Judge, 39 Mich. 407.

In Michigan, if the answer is full and explicit to the allegations in the affidavit on which the process issues, the answer is not subject to exception for insufficiency, because there is no disclosure concerning a liability not alleged in the affidavit. Mack *v.* Brown, 20 Mich. 335.

The court, even before issue joined on the garnishee's answer, may require him to make it more definite and certain by giving a copy of the contract set up in such answer as the basis of his claim to hold the property in dispute belonging to the original defendant; and such an order is not appealable. Lusk *v.* Galloway, 52 Wis. 164.

3. Kelley *v.* Bowman, 12 Pick. (Mass.) 383; Sampson *v.* Hyde, 16 N. H. 492; United States *v.* Langton, 5 Mason (U. S.) 280, 281; Thrasher *v.* Buckingham, 40 Miss. 67.

**4. Admission of Indebtedness and Statement of Matter in Avoidance.**— Sebor *v.* Armstrong, 4 Mass. 206; Scott *v.* Ray, 18 Pick. (Mass.) 360; McCoy *v.* Williams, 1 Gilm. (Ill.) 584, 591; Crain *v.* Gould, 46 Ill. 293; Wright *v.* Foord, 5 N. H. 178; Fogg *v.* Worster, 49 N. H. 503; Hoops *v.* Culbertson, 17 Iowa 305; Buttman *v.* Hobbs, 35 Me. 227, 232; DeBlanc *v.* Webb, 5 La. 82; Vason *v.* Clarke, 4 La. Ann. 581; Parker *v.* Page, 38 Cal. 522.

Doubtful and indefinite statements by a garnishee as to the quantity and value of property in his hands belonging to the defendant, with whom it is his business to keep an exact account, will be construed most strongly against the garnishee, and he will be charged unless his disclosure clearly shows him entitled to be discharged. Whitney *v.* Kelley, 67 Me. 377.

But where in the nature of things the garnishee cannot be expected to have certain knowledge of the matters enquired of, if his answer does not clearly show him liable, he cannot be charged. Ormsby *v.* Anson, 21 Me. 23; Wilhelmi *v.* Haffner, 52 Ill. 222.

Where in a proceeding by *scire facias*, a conveyance under which the garnishee holds is alleged to be fraudulent, and the evidence presents a case so unlike anything that would ordinarily occur in a *bona fide* transaction, that it excites a strong suspicion of fraud, and the garnishee, if in fact innocent, has the means of making his innocence appear quite within his power, and does not do it, it is but reasonable that the conclusion should be against him. Page *v.* Smith, 25 Me. 256.

ments will not satisfactorily supply the omission of details and particulars.[1] His doubtful statements will be received as indicative that he could not make any that would relieve the case

A garnishee admitted in his answer that at the time of service he had in his possession a promissory note due that day and payable to defendant's order, which was received from a correspondent with directions to collect and pass the proceeds to such correspondent's credit, with which directions he had complied; that he never had any communication with the defendant, nor was ever informed by any one in his behalf that such proceeds belonged to him. *Held*, that he was not chargeable, although it did not appear that the note was even endorsed by the defendant. Richards *v.* Stephenson, 99 Mass. 311.

In Born *v.* Staaden, 24 Ill. 322, an answer by the garnishee that he was indebted to the defendant in the sum of $467 upon a building contract, but that more than sixty days subsequent to the service of the garnishment he was served with notice by the defendant of an assignment in writing of the amount due upon said contract, which purported to have been made more than sixty days before the garnishment, was *held* not sufficiently specific to relieve the garnishee from his admitted liability.

But under a statute making it the "duty of the plaintiff" upon the garnishee informing the court that the credit or property attached is claimed by a third person, to cite such person to appear and defend his interest, a garnishee who has answered admitting an indebtedness to the defendant, may, upon receiving notice from a third person that he claimed title thereto, unless known to him to be a mere fraudulent pretext, relieve himself from liability by setting up such defence in an amendment to his answer. Fowler *v.* Williamson, 52 Ala. 16.

And an answer by the garnishee simply that he was well satisfied "that a note made by him to defendant had been transferred before service of the garnishment," was *held* not to warrant judgment against the garnishee, but that he was entitled to the benefit of the doubt presented by his answer. King *v.* Carhart, 18 Ga. 650.

Where the garnishee admits the possession of moneys of the judgment debtor, but claims that they are subject to a trust, the *onus* is upon him to prove the trust, and this cannot be established by a deed of assignment made in another State and not shown to be valid anywhere. Frank *v.* Frank, 6 Mo. App. 588.

And the mere fact that the answer might be made more explicit will not be sufficient to charge a garnishee, when it appears that it was not designedly evasive, nor intended to avoid a legal responsibility. Price *v.* Thomason, 11 Ala. 875; Jemison *v.* Scarborough, 56 Tex. 358.

**1. Doubtful and Indefinite Statements.**—Barker *v.* Osborne, 71 Me. 70; Weil *v.* Poston, 77 Mo. 284, 288; Jemison *v.* Scarborough, 56 Tex. 358.

Thus, where a garnishee disclosed that at a time specified the principal defendant in the original action was "nearly paid up," it is incumbent upon the garnishee to show how nearly and why any portion of the balance should be taken as due for personal wages, if he would have a further deduction upon that score. Brainard *v.* Shannon, 60 Me. 342.

Where there are accounts of large amount and long standing between the defendant and the person summoned as garnishee, which have never been adjusted, and the latter has kept an account of his dealings with the former, the garnishee is bound to make a specific disclosure in respect to the same, and if he decline to do so upon the ground that he is unable to make a complete statement because of not having been furnished with the defendant's account against him, he will be charged, although he declare his belief that the balance of the account is greatly in his favor. Shaw *v.* Bunker, 2 Met. (Mass.) 376.

Where the garnishee answered that it owed the debtor, but that it was informed and believed that he was a married man, living with his family, and that its debt to him was for personal earnings within ninety days next preceding the garnishment, *held* that such answer (waiving the question of its materiality, as coming from the garnishee) was not sufficient to show that the earnings were exempt, since it did not allege as a fact that the debtor was the head of a family, nor that he was a resident of this State. Smith *v.* Chicago etc. R. Co., 60 Iowa 312.

from doubt,[1] and no presumptions will be indulged in his favor.[2] The issue thus presented by the garnishee is what will discharge him, and he has the burden to clear himself if he can.[3] But, of course, the admission of liability in such case must be in respect to property which, under the law, may be reached by garnishment.[4]

*c. Amendment of the Answer.*—Whether the garnishee, having had an opportunity to make a full disclosure of his transactions with the defendant, shall be permitted to answer further must rest with the discretion of the court in view of the attending circumstances.[5] He cannot claim an opportunity to make a further disclosure as a matter of right; and if, through carelessness or wilful neglect, a garnishee, when given the opportunity, fails to disclose a fact material to his defence, he cannot afterwards insist upon making a further disclosure.[6] But, generally, if the garnishee has, through inadvertence, omitted material facts, or has made an erroneous statement, or so stated the fact that his language is capable of a different construction from what he intended, he will be permitted, with leave of court, to supply the omission by making an additional disclosure to the matter in question.[7] So, also, any matter of defence accruing to the garnishee, or coming to his knowledge after his first disclosure, may be shown by an amended or supplemental answer at any time

But in Tennessee it is *held*, that if under such circumstances the answer leaves it doubtful whether the garnishee owes the debtor, he cannot be charged. Mayor *v.* Potomac Ins. Co., 2 Baxt. (Tenn.) 296, and see Pierce *v.* Carleton, 12 Ill. 358; s. c., 54 Am. Dec. 405.

And in Little *v.* Nelson, 61 Miss. 672, *held* that final judgment should not be rendered against the garnishee for want of sufficient answer without objection having first been made to the answer for insufficiency, or averring that the garnishee was indebted at the time of service.

1. Lamb *v.* Franklin Mfg. Co., 18 Me. 187.

2. Ripley *v.* Severance, 6 Pick. (Mass.) 474, 477.

Where the garnishee answered that he was indebted to the defendant on a date named and "about the time of the service of the garnishment," *held* that the indebtedness existed at time of the service of the process, which was the next day. Hoops *v.* Calbertson, 17 Iowa 305.

In Bethel *v.* Linn (Mich.), 30 N. W. Rep.) 84, *held* that an admission by a garnishee engaged in buying and selling goods, that five months before the garnishment he had goods belonging to the defendant in his possession, which were mixed with his own stock but were capable of identification, did not relieve the plaintiff of the burden of proving the continuance of such possession at the time of garnishment.

3. Clevelan *v.* Clap, 5 Mass. 201; Ripley *v.* Severance, 6 Pick. (Mass.) 474; Butman *v.* Hobbs, 35 Me. 227; Wright *v.* Foord, 5 N. H. 178; Sampson *v.* Hyde, 16 N. H. 492; Kendall *v.* Brownson, 47 N. H. 186; Drake *v.* Lake Shore etc. R. Co., 37 N. W. Rep. (Mich.) 70.

4. Lane *v.* Felt, 7 Gray (Mass.) 491.

5. **Amendment of Answer.**—Steadman *v.* Vicery, 42 Me. 132; McMillin *v.* Hodson, 41Me. 131; Allen *v.* Hazen, 26 Mich. 142; Collins *v.* Smith, 12 Gray (Mass.) 435; Winstead Bank *v.* Adams, 97 Mass. 110; American Button Hole etc. Machine Co. *v.* Burgess, 75 Me. 52.

6. Pickler *v.* Rainey, 4 Heisk. (Tenn.) 335; Conner *v.* Allen, 3 Head (Tenn.) 418.

7. Carrique *v.* Sidebottom, 3 Met. (Mass.) 297; Collins *v.* Smith, 12 Gray (Mass.) 431; Tracy *v.* McGarty, 12 R. I. 168; Smith *v.* Brown, 5 Cal. 118; Bell *v.* Strow, 59 Mo. 118.

before final judgment.[1] But where such privilege is granted, the plaintiff is entitled to an opportunity for further examination of the garnishee.[2] And the several answers of the garnishee thus made will be construed together in determining his liability.[3]

*d. Garnishee's Refusal to Answer.*—The refusal of the garnishee to answer any proper interrogatory will generally render him liable to a personal judgment, as in case of default.[4] And, unlike the case of the ordinary witness, this is usually the only penalty that can be imposed.[5] But the garnishee is entitled in such case to the opinion of the court, whether the particular interrogatory is a proper one, and until it has been determined that he is bound to answer he should not be held liable.[6] If the interrogatory is not pertinent to the issue, or is one that the garnishee may properly be excused from answering, the plaintiff has no right to demand an answer.[7] And whether judgment shall be rendered for such cause is for the trial court to determine upon all the facts and circumstances of the case, and its refusal to charge the garnishee on this account will not generally be received on appeal.[8] So, whether having once submitted to ex-

1. Wingate *v.* Nutter, 17 N. H. 256; Drake *v.* Lake Shore etc. R. Co., 37 N. W. Rep. (Mich.) 70.

On reversal of judgment discharging a garnishee, he should be allowed to file an amended answer setting forth the payment of the debt by him to his creditor, after the judgment of discharge, and before writ of error was sued out, if he could make no defence against the claim of his creditor in law or in equity, and his judgment could be enforced by legal process. Webb *v.* Miller, 24 Miss. 638; s. c., 57 Am. Dec. 189.

A garnishee may, by proper proceedings, state plaintiff's judgment against him or set up any defence upon the occurrence subsequent to his examination, of anything which would furnish a legal defence to any action against him by the defendant. Cottrell *v.* Varnum, 5 Ala. 229; s. c., 39 Am. Dec. 323.

2. Hovey *v.* Crane, 12 Pick. (Mass.) 167.

3. Meadowcroft *v.* Agnew, 89 Ill. 469.

4. **Garnishee's Liability for Refusal to Answer.**—Corbyn *v.* Bollman, 4 W. & S. (Pa.) 342; De Blanc *v.* Webb, 5 La. 82; Mansfield *v.* New Eng. Express Co., 58 Me. 35, 39.

Where exceptions to the sufficiency of the disclosure because of evasive answers or the refusal to answer specific interrogatories at all, have been sustained, and the garnishee is ordered by the court to answer further, and he refuses, he is as much in default as though he had not answered at all, and judgment may be rendered accordingly. Richardson *v.* White, 19 Ark. 24.

The right of the plaintiff to judgment against the garnishee on account of his refusal to answer interrogatories will be waived, if instead of asking for judgment he obtain an order for further examination, to which the garnishee submits. Thompson *v.* Silvers, 59 Iowa 670.

5. In Wisconsin, it is provided by statute that if the garnishee refuses to answer all proper questions propounded to him, the court may punish him by fine or imprisonment, or both, at its discretion, and may also render judgment against him for the amount of the execution and costs thereon. Wood *v.* Wall, 24 Wis. 647, 649.

6. Sawyer *v.* Webb, 5 Iowa 315; Wood *v.* Wall, 24 Wis. 647.

But it has been *held* that if the statute does not describe what interrogatories shall be propounded, and what shall be answered, it is no part of the duty of the court to direct the garnishee what questions to answer, and what he may safely decline to answer. Mansfield *v.* New Eng. Express Co., 58 Me. 35, 38.

7. Wood *v.* Wall, 24 Wis. 647; Humphrey *v.* Warren, 45 Me. 216.

8. Worthington *v.* Jones, 23 Vt. 546.

amination, the garnishee may be required to answer further, rests in the discretion of the court. If the proposed enquiry is to matters previously covered, or is impertinent or immaterial, further examination may properly be refused.[1]

**4. The Garnishee's Defence.**[2]—Under all statutes, it is held that the person whom it is sought to charge as garnishee should be placed at no greater disadvantage in such proceeding than he would be if sued by the defendant upon the same claim in respect to which he has been summoned.[3] The process entitles the plaintiff to no greater rights than the defendant himself could assert in the pursuit of such debtor.[4] It is accordingly held, therefore, that the garnishee may generally avail himself of any ground of discharge which would constitute a good defence to a suit by his creditor;[5] and, of course, the converse of this statement is true, that if the garnishee has no defence which would be available against his creditor, he cannot set up one against the plaintiff in such proceeding.[6] If, before service of the process, the garnishee had paid the debt to his creditor, he may, of course, claim a discharge on this account.[7] So, if from any other reason at the time he is summoned the garnishee has become entitled to a release from his indebtedness,[8] or if, on account of some contract anterior to the attachment, his accountability to the defendant has been removed or modified, the gar-

1. Carique *v.* Sedebottom, 3 Met. (Mass.) 297; Warner *v.* Perkins, 8 Cush. (Mass.) 518; Pickler *v.* Rainey, 4 Heisk. (Tenn.) 335, 341; Callinder *v.* Furbish, 46 Me. 226.

2. Concerning garnishee's defence in respect to his liability to defendant generally, see Subdivision "Liability of the Garnishee," *supra.*

3. **Garnishee's Defence.** — Allen *v.* Hall, 5 Met. (Mass.) 263, 266; Nutter *v.* Framingham etc. R. Co., 132 Mass. 427, 430; Curtis *v.* Alvord, 45 Conn. 569; Weil *v.* Tyler, 38 Mo. 545; s. c., 90 Am. Dec. 441; Cox *v.* Russell, 44 Iowa 556, 562; St. Louis *v.* Regenfuss, 28 Wis. 144; Gage *v.* Chesebro, 49 Wis. 486, 492.

4. **Plaintiff Can Claim No Greater Rights than Defendant.**—Drake on Attachment (6th ed.), § 458; Whipple *v.* Robbins, 97 Mass. 107, 109; Firebaugh *v.* Stone, 36 Mo. 111, 115. Secor *v.* Witter, 39 Ohio St. 218, 232; Richardson *v.* Lister, 83 Ill. 55.

It is competent for the plaintiff to avail himself of all the rights and advantages which appertain to the defendant respecting what may be owing by the garnishee, but no more. Mathis *v.* Clark, 2 Hill (S. Car.) 456; s. c., 12 Am. Dec. 688.

5. **Garnishee Entitled to Any Defence Good Against Defendant.** — Mathis *v.* Clark, 2 Mill (S. Car.) 456; s. c., 12 Am. Dec. 688; Webb *v.* Miller, 24 Miss. 638; s. c., 57 Am. Dec. 189; Firebaugh *v.* Stone, 36 Mo. 111; Crossman *v.* Crossman, 21 Pick. (Mass.) 21; Russell *v.* Hinton, 1 Murph. (N. Car.) 468; Ellison *v.* Tuttle, 26 Tex. 283; Roig *v.* Tim, 103 Pa. St. 115.

Garnishment being in the nature of an execution against the effects of the defendant in the hands of the garnishee, the latter cannot make all the defences that he could were the suit by his creditor, for the process is valid even though his creditor may have a suit pending, or a judgment obtained against him for the same claim, and there can be no plea in bar or abatement on this account. But such facts may be pleaded to affect the form of the judgment. And to the same purpose he may plead prior garnishments, or that the debt is not yet due. Kase *v.* Kase, 34 Pa. St. 128.

6. Roig *v.* Tim, 103 Pa. St 115.

7. Gleason *v.* Gage, 2 Allen (Mass.) 410.

8. Thompson *v.* Wallace, 3 Ala. 132; Baldwin *v.* Merrill, 8 Humph. (Tenn.) 132; Myers *v.* Baltzel, 37 Pa. St. 491, 493.

nishment cannot change nor in any manner affect the rights and liabilities of the parties under such agreement.[1] But, upon the service of garnishment, the rights and liabilities of the parties become fixed so far as the plaintiff is concerned, and his right to charge the garnishee will not be affected by any agreement[2] or payment thereafter made.[3] If the obligation in respect to which it is sought to charge the garnishee was without consideration,[5] or is barred by the statute of limitations,[4] such defence will prove as effectual for the garnishee in this proceeding as in a suit by his creditor. And so if it is sought to hold him upon a promise which is within the statute of frauds, the plaintiff cannot complain that the garnishee avails himself of such shield.[6]

But it is not alone respecting his liability to the defendant that the garnishee must defend. The law charges him with the duty of protecting the rights of the defendant, and of others, in the debt or property attached, if they are not in court, to the extent of resisting any adjudication of their rights in excess of the jurisdiction acquired; and this he must do under penalty of being twice charged for the same debt.[7]

*a. Garnishee's Right of Set-Off.*—In accordance with the general rule that the plaintiff's right of recovery against the garnishee is limited by the latter's liability to the defendant at the time of garnishment,[8] the garnishee is entitled to plead against the attachment any matter of set-off or claims by way of recoupment, or contract liabilites to defendant's creditors, which would have been pleadable to an action by the defendant upon the same claim at the date of the service.[9] What can be so pleaded in

1. Baltimore & Ohio R. Co. *v.* Wheeler, 18 Md. 372; Collins *v.* Brigham, 11 N. H. 420; White *v.* Richardson, 12 N. H. 93; Vincent *v.* Watson, 18 N. H. 96; Mayhew *v.* Scott, 10 Pick. (Mass.) 54; Lundie *v.* Bradford, 26 Ala. 512; Bray *v.* Wheeler, 29 Vt. 514.

2. McCause *v.* McClure, 38 Mo. 410, 414.

3. Hinkle *v.* Currin, 2 Humph. (Tenn.) 137; Benton *v.* Lindell, 10 Mo. 557; Hazen *v.* Emerson, 9 Pick. (Mass.) 144.

4. Crossman *v.* Crossman, 21 Pick. (Mass.) 21, 24.

5. Leslie *v.* Merrill, 58 Ala. 322; Ellis *v.* Goodnow, 40 Vt. 237.

6. Cleneay *v.* Junction R. Co., 26 Ind. 375; Toledo etc. R. Co. *v.* McNulty, 34 Ind. 531; Hughes *v.* Monty, 24 Iowa 499; Mason *v.* Crabtree, 71 Ala. 479; Pulliam *v.* Aler, 15 Gratt. (Va.) 54; West *v.* Platt, 116 Mass. 308.

7. Oldham *v.* Ledbetter, 1 How. (Miss.) 43; s. c., 26 Am. Dec. 690, 692; Pierce *v.* Carleton, 12 Ill. 258; s. c., 54 Am. Dec. 405; Shinn *v.* Zimmerman, 3 Zab. (N. J.) 150; s. c., 55 Am. Dec. 260.

8. **Defence of Set-off.**—St. Louis *v.* Regenfuss, 28 Wis. 144; Cox *v.* Russell, 44 Iowa 556, 562; Boston Type Co. *v.* Mortimer, 7 Pick. (Mass.) 166.

9. Smith *v.* Stearns, 19 Pick. (Mass.) 20, 22; Doyle *v.* Gray, 110 Mass. 206, 208; Beach *v.* Viles, 2 Pet. (U. S.) 675; Wheeler *v.* Emerson, 45 N. H. 526, 528; McCoy *v.* Williams, 1 Gilm. (Ind.) 584; Pennel *v.* Grubb, 13 Pa. St. 552; Arledge *v.* White, 1 Head (Tenn.) 241; Dyer *v.* McHenry, 13 Iowa 527; Ashby *v.* Watson, 9 Mo. 235; Keyls *v.* Milwaukee etc. R. Co., 25 Wis. 691.

**Defence Must be Specially Pleaded.**—But such defence must be specially pleaded by the garnishee in his answer, and if he contents himself with a general denial of indebtedness, he will not be permitted to prove matter of set-off on the trial of an issue thereon. Fox *v.* Reed, 3 Grant's Cas. (Pa.) 81; Reed *v.* Penrose, 36 Pa. St. 214.

ordinary actions is, of course, governed by the particular language of statutes conferring the right of set off in the several States, and the provisions of such statutes will determine the rights of the garnishee in this regard in the garnishment proceeding. In a few of the States, a most liberal rule obtains, the garnishee being entitled to set off all claims of either a legal or equitable nature,[1] and whether owned by him in his own right, or in the right of those with whom he is privy.[2] Nor is it ma-

**A promissory note** received by defendant for collection for the garnishee, and which may be withdrawn from his possession at any time, cannot be set off against the garnishee's liability to defendant. Rankin *v.* Simonds, 27 Ill. 352.

Where the garnishee, a railroad corporation, disclosed that it was indebted for the carriage of freight, the transportation of which was performed in part by the defendant corporation and in part by another company over another connecting road, it being the custom for the former company to collect the whole freight, and pay to the other company its portion of the same, *held* that the garnishee was liable only for such proportion of the whole freight due from it as would belong to the defendant road on final settlement. Bowler *v.* European etc. R. Co., 67 Me. 395.

Where the liability of the garnishee arises out of a contract, which has been broken by the defendant, he will be entitled to set off the amount of damages suffered in consequence of such breach, notwithstanding a statute excepting from the right of set-off garnishee's claims for "unliquidated damages for wrongs and injuries." Cota *v.* Mishow, 62 Me. 124; Powell *v.* Sammons, 31 Ala. 552.

**Failure of consideration** is a good defence *pro tanto* in favor of the garnishee, and only the balance due, after deducting any set-off the debtor may have against his creditor at the filing of the bill, can be reached. Mowry *v.* Davenport, 6 Lea (Tenn.) 80.

Where property in the possession of a garnishee is held by him under an assignment for the benefit of creditors, upon such assignment being declared void, the garnishee is entitled to set-off against the claims of attaching creditors debts due him from the assignor. Firebaugh *v.* Stone, 36 Mo. 111; 114; Stedman *v.* Vickery, 42 Me. 132.

Where by the terms of a lease of a railroad the rental to be paid was thirty-five per cent of the gross earnings of the road, out of which the lessee was entitled from time to time to deduct all taxes imposed upon the leased property which the lessee has paid or might be liable to pay, and there was at the time no law imposing a personal liability for taxes upon any one, but any taxes levied upon the property were a lien upon it; *held*, that the stipulation in the lease amounted to the appropriation of a reserve fund out of the rental to the payment of the taxes, and that in a garnishment proceeding the judgment creditors of the lessor could recover of the lessee only what remained of the rental in excess of the amount thus reserved. McPherson *v.* Atlantic etc. R. Co., 66 Mo. 103.

**1. Rule in Massachusetts and a Few Other States.**—In the following cases it is *held* that the balance only, after all just and equitable allowances, is the sum for which the garnishee ought to be held. Allen *v.* Hall, 5 Met. (Mass.) 263, 266; Green *v.* Nelson, 12 Met. (Mass.) 567; Nutter *v.* Framingham etc. R. Co., 132 Mass. 427; Boardman *v.* Cushing, 12 N. H. 105; Wheeler *v.* Emerson, 45 N. H. 526, 528; Farmers & Merchants' Bank *v.* Franklin Bank, 31 Md. 404.

**2.** "The right of set-off, where a part only of the debtors on the one side are creditors on the other, was formerly doubted, but is now well established in courts both of law and equity." Hathaway *v.* Russell, 16 Mass. 473, 475. *Citing* 1 Atk. 100; 3 Ves. Jr. 248; 4 D. & E. 123.

In Brown *v.* Warren, 43 N. H. 430, 436, SARGENT, J., says that the assumption contained in the above quotation from Hathaway *v.* Russell is entirely erroneous, and although three English cases (1 Atkins 100; 3 Ves. Jr. 248, and 4 D. & E. 123) are cited as authority therefor, none of them fully sustain the position, and so far as any of them do sustain it they have been

terial in these States that the matter which it is sought to set off should be in the nature of an actual indebtedness at the time of garnishment, if it has accrued at the time of the garnishee's answer upon a contract existing before service.[1]

But the more general rule in respect to credits is that the demand to be set off must be due the garnishee in the same right as that in which he is sought to be charged,[2] and must arise out

overruled, both in England and in this country. *Citing* Addes *v.* Knight, 2 Merivale 121; Dale *v.* Cook, 4 John. (N. Y.) Ch. 11.

A garnishee summoned on account of an individual liability to the defendant may set off his proportionate share of a debt due from the defendant to himself and another jointly. Hathaway *v.* Russell, 16 Mass. 47; Nutter *v.* Framingham etc. R. Co., 132 Mass. 427. And with the leave of the joint owner of the credit he will be entitled to a set-off to the full extent of the demand. Hathaway *v.* Russell, 16 Mass. 47; Nutter *v.* Framingham etc. R. Co., 132 Mass. 427. Where several persons are summoned as garnishee in respect to an indebtedness upon which they are jointly and severally liable, any one of them may set off his individual claims against the defendant. Hathaway *v.* Russell, 16 Mass. 47.

1. Boston Type etc. Co. *v.* Mortimer, 7 Pick. (Mass.) 166; Farmers & Merchants' Bank *v.* Franklin Bank, 31 Md. 404; Lynde *v.* Watson, 52 Vt. 648; Strong *v.* Mitchell, 19 Vt. 644; Boardman *v.* Cushing, 12 N. H. 105.

Where a banking institution summoned as garnishee answered that it had discounted certain notes which were endorsed by the defendant before the service of process and upon which the liability of the defendant as endorser had become fixed before final answer by the garnishee, and the maker and endorsers of the notes were all insolvent, the fact that such liability of the defendant was not fixed until after the service of the process will not preclude the garnishee from setting off the amount of such notes against the sum owing by it to the defendant. Lannan *v.* Walter (Mass.), 20 N. E. Rep. 196.

**2. Demands Must be Mutual.**—The garnishee is only entitled to set off mutual demands, and to be mutual they must be due to and from the same persons in the same capacity. Brown *v.* Warren, 43 N. H. 430; Field *v.* Walkins, 5 Ark. 672.

A garnishee cannot set off against a liability to a copartnership a demand against an individual member of the defendant firm. Norcross *v.* Benton, 38 Pa. St. 217.

Nor can he set off against his individual liability to the defendant a demand in favor of a copartnership of which he is a member. Gray *v.* Badgett, 5 Ark. 16.

And one of several copartners who have been summoned as garnishees in respect to a firm liability, cannot set off his individual claims against the defendant. Wells *v.* Mace, 17 Vt. 503.

Nor can a debt due the several partners individually as legatees be set off in such case. Blanchard *v.* Cole, 8 La. 160.

A demand in favor of the garnishee as administrator of another's estate cannot be set off against his individual liability to the defendant. Thomas *v.* Hopper, 5 Ala. 442; Woodward *v.* Tupper, 58 N. H. 577.

But an executor summoned as garnishee of a legatee may set off an indebtedness due from such legatee to the testator's estate. Strong's Exr. *v.* Bass, 35 Pa. St. 333; Nickerson *v.* Chase, 122 Mass. 296.

A, having a claim against another, assigned it to B, C and D, his creditors and attorneys, to pay them for their services in a certain suit pending, and balance remaining to be paid to A. The amount of the claim was afterwards received by B, when he was summoned as garnishee of A. *Held*, that B might set off his individual claims against A for services other than those which said assignment was intended to secure, and could retain for C and D also, enough to satisfy their claims for services in the suit mentioned, but not to pay a note held by them against A, growing out of other transactions. While the assignment was joint in form, yet the interests of the assignees were several, and either might maintain an action to

of a contract, express or implied,[1] and be one existing in favor of the garnishee,[2] and upon which a liability has accrued,[3] at the

enforce his rights. Manufacturers' Bank *v.* Osgood, 12 Me. 117.

But in Brown *v.* Warren, 43 N. H. 430, 437, it is said that the practice of setting off one judgment against another is not confined to judgments founded on mutual debts.

**1. Must Arise Out of Contract** — Keyls *v.* Milwaukee & C. R. Co., 25 Wis. 691, 694.

A verbal promise to pay a debt due from the defendant to a third person, although void under the statute of frauds, may be pleaded by the garnishee by way of set off against a liability due from him to the defendant, as such promise is not made absolutely void by the statutes, but is a personal privilege which he may waive; another cannot plead it for him, nor compel him to plead it. Cahill *v.* Bigelow, 18 Pick. (Mass.) 369; McCoy *v.* Williams, 1 Gilm. (Ind.) 584.

A garnishee cannot deduct out of the effects and credits in his hands a demand against the defendant for money paid on the illegal sale of intoxicating liquors; such claim not being founded on contract, but arising solely from the violation of law. Thayer *v.* Partridge, 47 Vt. 423.

A tax is neither an express nor implied contract. It does not grow out of any transactions between the parties; but is a duty imposed by arbitrary law, predicated upon the relations of the individual to the body politic. Neither does it partake of the character of a judgment. Therefore, *held*, that a town summoned as garnishee could not set off against a liability to the defendant for professional services an unpaid town tax due from said defendant. Johnson *v.* Howard, 41 Vt. 122; Hibbard *v.* Clark, 56 N. H. 155. And see Pierce *v.* City of Boston, 3 Met. (Mass.) 520; Perry *v.* Washburn, 20 Cal. 318.

Where it is sought to reach by garnishment certain promissory notes of the defendant, in the hands of the garnishee, an answer that before service he had by the authority of the defendant collected the money due upon such notes, and applied the sum so collected upon an indebtedness due the garnishee from the defendant, will constitute a good defence. Ellison *v.* Tuttle, 26 Tex. 283.

But payment to a creditor of the defendant without the knowledge of the latter will not discharge the garnishee, although the defendant, after service of the process, ratified the transaction. Sturtevant *v.* Robinson, 18 Pick. (Mass.) 175.

**2. Demand Must be Owned by and Due to Garnishee at Time of Service.**— Pennell *v.* Grubb, 13 Pa. St. 552; Parsons *v.* Root, 41 Conn. 161.

A garnishee answered that he would have been indebted to the defendant in a larger amount than the plaintiff's judgment, but before the service of garnishment one H, who held a note against said defendant for a larger sum than the garnishee's debt, proposed to sell said note to garnishee, who consented to take it to the extent of his indebtedness to defendant, the amount of which was not then ascertained; that the note, which had been mislaid, was to be delivered to him when found, but nothing was said about an indorsement being antedated to correspond with the agreement. *Held*, that the plaintiff was entitled to judgment against the garnishee on his answer. Self *v.* Kirkland, 24 Ala. 275. And see Dyer *v.* McHenry, 13 Iowa 527.

By the service of the process upon the garnishee, the creditor acquires a lien upon the debt attached in his hands, which cannot be affected by rights of set off subsequently acquired. Farmers' Bank *v.* Gettinger, 4 W. Va. 305; Wheeler *v.* Emerson, 45 N. H. 526; Strong's Exr. *v.* Bass, 35 Pa. St. 333, 334; Farmers & Merchants' Bank *v.* Franklin Bank, 31 Md. 404.

Notes of a bank purchased after garnishment, for the purpose of using them as a set off in such proceeding, will not avail as a defence. And the rule will not be changed by a statute requiring the bank to receive its notes in payment of debts due it. Farmers' Bank *v.* Gettinger, 4 W. Va. 305; Seamon *v.* Bank, 4 W. Va. 339.

A judgment and costs incident thereto, recovered by a garnishee against defendant subsequent to service of the process, may be set off against the garnishee's liability, if it appears that the same were obtained without fraud, and upon a demand existing at the date of service. Smith *v.* Stearns, 19 Pick. (Mass.) 20.

3. Wheeler *v.* Emerson, 45 N. H. 526, 528; Self *v.* Kirkland, 24 Ala.

time of service of the process. And garnishment, being a proceeding at law, only legal debts, as distinguished from claims of an equitable nature, are in general available for such defence.[1]

Where it is sought to charge the garnishee in respect to goods in his custody, as the property of the defendant, whether he will be entitled to set off claims of his own is dependent upon the existence of a lien thereon in his favor, or some right, as against the owner by contract, by custom or otherwise, to hold the goods, or to retain the possession of them, in security of some debt or claim.[2] If it appears by his answer that the garnishee has a

275; Roig *v.* Tim, 103 Pa. St. 115.

A note not due at the time of service of garnishment cannot be set off against the garnishee's liability to the defendant, though the same become due before answer. Edwards *v.* Temple, 2 Harr. (Del.) 322.

Claims of third persons against the defendant which the garnishee had agreed to pay, before service upon him, in part consideration of a lease, may be set off against a liability for rent under such lease, although not paid until after service of the garnishment. Rowell *v.* Felker, 54 Vt. 526.

**Liability as Surety or Endorser.**—A mere contract of suretyship cannot be made a matter of set off. To entitle a surety to set off his liability as such he must, before service, have made the defendant his debtor by payment of the liability before service of process. He is not entitled to such set off where at the time of service his liability is contingent and uncertain in amount, although the note fall due and be paid by the garnishee before answer. Yongue *v.* Linton, 6 Rich. L. (S. Car.) 275; Ingalls *v.* Dennett, 6 Me. 79; Roig *v.* Tim, 103 Pa. St. 115.

Such rule is not changed by reason of judgment having been rendered against the garnishee on account of his suretyship before service of garnishment. Field *v.* Watkins, 5 Ark. 672. Nor by the payment of such judgment after service of garnishment. Watkins *v.* Field, 6 Ark. 391.

A garnishee is not entitled to set off his liability as accommodation endorser for the defendant on a promissory note not due at the time of the service of the process, although the note fall due and be paid by the garnishee before answer. Martin *v.* Solomons, 10 Rich. L. (S. Car.) 533.

And where the note had fallen due and was protested for non-payment before answer, *held* that the garnishee could not avail himself of such liability by way of set off except by payment thereof before garnishment. Taylor *v.* Gardner, 2 Wash. (U. S.) 488.

But where a fund has been assigned, or property delivered to the surety as security for his liability under contract of suretyship, he will be entitled to a lien upon such fund, or property, to the extent of such liability, even though it be contingent at the time of the service of process whether he will be required to pay the same or not. St. Louis *v.* Regenfuss, 28 Wis. 144; Strong *v.* Mitchell, 19 Vt. 644; Stedman *v.* Vickery, 42 Me. 132; Dryden *v.* Adams, 29 Iowa 195; Cox *v.* Russell, 44 Iowa 556.

Under the rule in Massachusetts a liability by contract before service, which afterwards becomes fixed by an actual payment by necessity before answer, may be set off by the garnishee; but not if at the time of answer it is contingent whether the liability will ever be enforced. So *held* where the garnishee, having endorsed a note for the defendant before service of garnishment, was subsequently compelled to pay the same before answer in consequence of the defendant's failing to pay it. Boston Type etc. Co. *v.* Mortimer, 7 Pick. (Mass.) 168.

1. Loflin *v.* Shackelford, 17 Ala. 455; Self *v.* Kirkland, 24 Ala. 275; Weller *v.* Weller, 18 Vt. 55; Edson *v.* Sprout, 33 Vt. 77.

**2. Set off of Claims Against Property in Garnishee's Possession.**—Allen *v.* Hall, 5 Met. (Mass.) 263; Curtis *v.* Norris, 8 Pick. (Mass.) 280.

Where one who had formerly been a copartner of the defendant was summoned as garnishee in respect to partnership property in his possession, *held* that the plaintiffs were not entitled to judgment for one-half of such property or the value thereof, but only for

mere naked possession of the goods, without any special property or lien, so that the defendant might lawfully take them out of his custody, then they will stand charged in his hands, and he has no greater right to charge them with a debt of his own by way of set-off, than he would have had if the goods had been taken into actual custody by the officer at the time of the attachment.[1]

*b. Proceedings in Principal Case.*—To render a judgment against one as garnishee a sufficient protection to him against a subsequent liability for the same debt, there must, first of all, be a valid judgment against the defendant.[2] The garnishee is bound, therefore, if the defendant has not appeared, to enquire into the validity of the proceedings in the principal case, so far as they pertain to the jurisdiction of the court to render judgment therein.[3] The invalidity, however, must appear upon the face of the record; at least if the court be one of general juris-

such sum as defendant might be entitled to after an accounting between the partners. Cox *v.* Russell, 44 Iowa 556.

A factor who has made advances to his consignor on goods sent to him to sell has a lien upon the goods in his hands for the sum so advanced and for commissions due him, and is entitled to set off the same against a garnishment in favor of the creditor of the consignor. Baugh *v.* Kirkpatrick, 54 Pa. St. 84; Ronan *v.* Dewes, 17 Mo. App. 306-309.

1. Caldwell *v.* Stewart, 30 Iowa 379.

A mere creditor who happens to have in his hands specific articles of property belonging to his debtor has no lien upon them by virtue of such indebtedness, and if he would avail himself of them to secure his own debt, he must attach them like any other creditor. Brewer *v.* Pilkin, 11 Pick. (Mass.) 298.

By statute in South Carolina, in garnishment proceedings against an absent debtor, the garnishee is given a lien upon all property in his custody for the payment of its owing by the defendant. Mitchell *v.* Byrne, 6 Rich. L. (S. Car.) 171.

Under the rule that an attorney has a lien for his professional services upon all moneys in his possession belonging to his client he will be entitled to retain out of funds in his hands an amount due him under a written obligation of such client to pay him for professional services in a suit pending, where a part of the services had been performed in good faith and he stands ready to perform the balance. Randolph *v.* Randolph, 34 Tex. 181.

2. **Valid Judgment Against Defendant Necessary.**—Whitehead *v.* Henderson, 4 S. & M. (Miss.) 704; Kellogg *v.* Freeman, 50 Miss. 127; Pierce *v.* Carleton, 12 Ill. 358; s. c., 54 Am. Dec. 405; Harmon, Exr. *v.* Birchard, 8 Blackf. (Ind.) 418; Matheny *v.* Earl, 75 Ind. 531; Newman *v.* Manning, 89 Ind. 442; Barton *v.* Smith, 7 Iowa 85; Bean *v.* Barney, 10 Iowa 498; Tell *v.* Knight, 15 Iowa 370; Washburn *v.* New York etc. Co., 41 Vt. 50.

Garnishment proceedings are ancillary to the principal case and if the judgment therein is invalid they will go down with it. Iron Cliffs Co. *v.* Lahais, 52 Mich. 394; Withington *v.* Southworth, 26 Mich. 381.

If the want of jurisdiction does not appear of record at the time of answer by the garnishee, he may raise the objection in an amendment to his answer or when summoned on *scire facias*. Thayer *v.* Tyler, 10 Gray (Mass.) 164; Pratt *v.* Cunliff, 9 Allen (Mass.) 90.

3. **Garnishee Must Enquire as to Jurisdiction.**—Whitehead *v.* Henderson, 4 S. & M. (Miss.) 704; Matheny *v.* Galloway, 12 S. & M. (Miss.) 475; Kellogg *v.* Freeman, 50 Miss. 127; Pierce *v.* Carleton, 12 Ill. 358; s. c., 54 Am. Dec. 405; Empire Car Roofing Co. *v.* Macey, 115 Ill. 390; Schoppenhast *v.* Bollman, 21 Ind. 280.

Where jurisdiction of the defendant is based upon the attachment of property, the garnishee may show that the attachment is invalid. Flash *v.* Paul, 29 Ala. 141.

Garnishee may show that judgment on which garnishment under execution is based was rendered by default before

diction.[1] And this obligation to defend does not extend to mere errors and irregularities in the proceedings for which the judgment against the defendant might be reversed on error.[2] The jurisdiction of the court being established, any judgment it may render will sufficiently protect the garnishee, notwithstanding such errors, and his protection against a subsequent liability being the only ground for permitting his interference in such proceedings, he has no cause to complain that the judgment which is made the basis for charging him could be avoided by the defendant on appeal.[3] And if "the defendant is personally before the court, the garnishee is not interested in the jurisdiction or legality of the proceedings, or in their practical regularity as against the defendant, and cannot be heard to complain."[4]

*c. Pendency of Other Proceedings.*—Where there are several garnishments in respect to the same fund in the hands of the garnishee, the rights of the several creditors are to be determined by the priority of their respective attachments.[5] In such case

expiration of time for appearance of defendant, and therefore void. France *v.* Evans, 90 Mo. 74.

1. Sadler *v.* Prairie Lodge, 59 Miss. 572.

2. **But Cannot Object to Mere Errors.**—Lomerson *v.* Hoffman, 4 Zab. (N. J.) 674; Whitehead *v.* Henderson, 4 Smed. & M. (Miss.) 704; Atcheson *v.* Smith, 3 B. Mon. (Ky.) 502; St. Louis & C. Ins. Co. *v.* Cohen, 9 Mo. 416, 441; Pierce *v.* Carleton, 12 Ill. 358; s. c., 54 Am. Dec. 405; Empire Car Roofing Co. *v.* Macey, 115 Ill. 390; Houston *v.* Walcott, 1 Iowa 86; Henny Buggy Co. *v.* Patt, 73 Iowa 485; Schoffenhast *v.* Bollman, 21 Ind. 280, 285; Flash *v.* Paul, 29 Ala. 141; Gunn *v.* Howell, 35 Ala. 144; Reynolds *v.* Collins, 78 Ala. 94; Douglass *v.* Neil, 37 Tex. 528; Coil *v.* Haven, 30 Conn. 190.

In an action against a non-resident copartnership, commenced by attachment and garnishment, the fact that the individual names of the partners composing the firm do not appear in the proceedings, cannot be taken advantage of by the garnishee. Hollingsworth *v.* Hammond, 30 Ala. 668.

A return of service of summons in the original case, which is so defective that on appeal it would warrant a reversal of the judgment, will not avail the garnishee as a defence. Security Loan Assn. *v.* Weems, 69 Ala. 584; Schneitman *v.* Noble, 75 Iowa 120.

Defects in the attachment bond and writ, not affecting the jurisdiction of the garnishment proceeding, are not subject to objection by the garnishee. Camberford *v.* Hall, 3 McCord (S.Car.) 345; Linden *v.* Arnold, 4 Strobh. (S. Car.) 290.

3. Lomerson *v.* Hoffman, 4 Zab. (N. J.) 674; Atcheson *v.* Smith, 3 B. Mon. (Ky.) 502; Pierce *v.* Carleton, 12 Ill. 358; s. c., 54 Am. Dec. 405; Houston *v.* Walcott, 1 Iowa 86; Camberford *v.* Hall, 3 McCord (S. Car.) 345; Schoppenhast *v.* Bollman, 21 Ind. 280, 285.

A garnishee in attachment is not bound to superintend a defence for the defendant, and is not answerable for such defects and irregularities in the proceedings as relate only to the mutual rights of the original parties. Harmon *v.* Birchard, 8 Blackf. (Ind.) 418; Pounds *v.* Hammer, 57 Ala. 342; Kimball *v.* Plant, 14 La. 511.

4. Drake on Attach. (6th ed.), § 693; Washburn *v.* New York etc. Co., 41 Vt. 50.

Objections to the attachment bond, or to the non-residence of the defendant as ground for attachment, or to amendment of the affidavit for attachment, by the correction of a misnomer of the defendant, cannot be raised by the garnishee after the appearance of the defendant. Baltimore etc. R. Co. *v.* Taylor, 81 Ind. 24.

5. Eastman *v.* Newman, 59 N. H. 581, 582; Farmers' Bank *v.* Beaston, 7 Gill & J. (Md.) 421; s. c., 28 Am. Dec. 226; Talbot *v.* Harding, 10 Mo. 350; McCabb *v.* Tyler, 2 Cranch (C. C.) 199; Wilder *v.* Weatherhead, 32 Vt. 765; Prentiss *v.* Danaher, 20 Wis. 311, 318.

But in Georgia, under a statute of

it becomes necessary to the protection of the garnishee that he disclose in his answer the pendency of the prior attachment, or make special plea for a stay of proceedings on the subsequent garnishment, for if he suffer judgment to go against him in the junior proceeding, he cannot plead the same in bar of a prior garnishment.[1] The law requires him in such case to exhaust all legal means to avoid judgment against him on the subsequent garnishment, and to preserve the fund in his hands for the prior lien, and if judgment is erroneously rendered against him, it is his duty to appeal therefrom.[2] But it is not necessary that a disclosure be made of subsequent garnishments. If, in a prior proceeding, the garnishee has been charged for the full amount of the debt or property of the defendant in his hands, he should disclose such fact and secure his discharge.[3] But if he makes payment to a prior garnishing creditor before he has perfected his lien by judgment against the garnishee, it will not avail as a defence to subsequent garnishments.[4] The pendency of garnishment proceedings constitutes a good ground for the abatement or at least the discontinuance of a subsequent action by the creditor in respect to the same debt or property.[5] And contrary to the

that state, the creditor first obtaining judgment against the garnishee is entitled to priority. Hall *v.* Daniel, 62 Ga. 620.

Two actions brought by different plaintiffs against the same defendant, and in which the same person was summoned as garnishee, were pending in court. In the second action no service was made upon the defendant, and he did not appear. The first action was left off the docket for non-payment of the clerk's fees, and the trustee in that action was subsequently discharged as of a previous term, without notice to the plaintiff. The first action was subsequently restored to the docket, and the order discharging the garnishee vacated. *Held*, that the pendency of the second action did not show such an intervening right as to prevent the garnishee being charged. Mortland *v.* Little, 137 Mass. 339.

**1. Garnishee Must Disclose Senior Garnishments.**—Farmers' Bank *v.* Beaston, 7 Gill & J. (Md.) 421; s. c., 28 Am. Dec. 226; Prentiss *v.* Danaher, 20 Wis. 311, 318; Royer *v.* Fleming, 58 Mo. 438.

2. Johann *v.* Rufener, 32 Wis. 195.

It was formerly *held* that if the property in the hands of the garnishee were subsequent to the service of process upon him, taken out of his hands by an officer under a junior writ of attachment, such fact would constitute no defence to the garnishee, it being his duty to keep possession of them. Parker *v.* Kinsman, 8 Mass. 486; Dispatch Lines etc. *v.* Bellany Mfg. Co., 12 N. H. 205, 338. But more recent authorities hold that the subsequent seizure of property in the garnishee's hands under a junior writ of attachment, will constitute a good defence. Ronan *v.* Dewes, 17 Mo. App. 306, 309. But if the garnishee would avoid liability on this account, he must make a full disclosure of all the facts in his answer. Ronan *v.* Dewes, 17 Mo. App. 306, 309.

3. Bullard *v.* Hicks, 17 Vt. 198. But if the garnishee fails to disclose in his answer a liability or payment under a prior garnishment, and goes to trial under a general denial of indebtedness, he will not be permitted to prove such fact upon the trial. Royer *v.* Fleming, 58 Mo. 438.

If the garnishee fails to make disclosure of such fact in his answer, he is guilty of laches, and the court may refuse to modify an order previously made, requiring the garnishee to pay the whole amount of the judgment debt, notwithstanding proof that the debtor has been so charged. Everdell *v.* Sheboygan etc. R. Co., 41 Wis. 395.

4. Wilder *v.* Weatherhead, 32 Vt. 765.

**5. Garnishment as a Defence to Ac-**

ordinary rule that *lis pendens* in a foreign court cannot be pleaded, such defence will be good in a suit against the garnishee in a State other than that where the garnishment proceeding is pending.[1] And if the debtor has been compelled to pay a judgment against him as garnishee, such judgment will constitute a bar to any subsequent action on the same debt, either in the same[2] or in a foreign jurisdiction.[3] And, generally, garnishment may be pleaded in abatement of a prior action by the garnishee's creditor in another court, if in the same jurisdiction and regulated by the

**tion by Garnishee's Creditor.**—Embree *v.* Hanna, 5 Johns. (N. Y.) 101; Crawford *v.* Clute, 7 Ala. 157; s. c., 41 Am. Dec. 92; Mars *v.* Virginia Home Ins. Co., 17 S. Car. 514.

The pendency of garnishment proceedings, either in the same or in a foreign jurisdiction, whether before or after judgment therein, if the same has not been paid by the garnishee, is pleadable in abatement only, and cannot be set up in bar of the action or any part thereof. Irvine *v.* Lumbermen's Bank, 2 W. & S. (Pa.) 190, 209; Fitzsimmon's Appeal, 4 Pa. St. 248; Near *v.* Mitchell, 23 Mich. 382.

In Pennsylvania, under more recent statutes, such plea is receivable only for the purpose of setting the facts upon the record, and thus enable the court to so frame the judgment as to protect the rights of the parties, and does not have the effect to abate the action. Kase *v.* Kase, 34 Pa. St. 128; Brown *v.* Scott, 51 Pa. St. 357.

A judgment in favor of a defendant in a suit by his creditor, commenced subsequent to service of garnishment upon him, is not conclusive upon the plaintiff in the garnishment proceeding. Webster *v.* Adams, 58 Me. 317.

Where debtors of an insolvent have been sued by their creditor's assignee after being garnished, they should ask leave to file a supplemental disclosure setting up the alleged assignment. And they should notify the plaintiffs in the garnishment proceeding to defend the suit brought by the assignee. Butler *v.* Wendell, 57 Mich. 62. Or the debtor may plead the prior garnishment in abatement of the action by the assignee. Clise *v.* Freeborne, 27 Iowa 280.

1. Irvine *v.* Lumbermen's Bank, 2 W. & S. (Pa.) 190, 208; American Bank *v.* Rollins, 99 Mass. 313, 314; Roche *v.* Rhode Island Ins. Assn., 2 Ill. App. 360.

In Embree *v.* Hanna, 5 Johns. (N. Y.) 101, an action was commenced in Maryland, and the garnishee there, being subsequently arrested in New York by his creditor, the defendant to the suit in New York was allowed to plead in defence the garnishment pending in Maryland. CHIEF JUSTICE KENT said: "The attachment of the debt in the hands of the defendant fixed it there in favor of the attaching creditors; the defendant could not afterwards lawfully pay it over to the plaintiff. The attaching creditors acquired a *lien* upon the debt binding upon the defendant, and which the courts of all other governments, if they recognize such proceedings at all, cannot fail to regard. . . If we were to disallow a plea in abatement of the pending attachment, the defendant would be left without protection, and be obliged to pay the money twice; for we may reasonably presume that if the priority of the attachment in Maryland be ascertained, the courts in that state would not suffer that proceeding to be defeated by the subsequent act of the defendant going abroad and subjecting himself to a suit and recovery here. The present case affords a fair opportunity for the settlement and application of a general rule on the subject."

2. Updegraff *v.* Spring, 11 S. & R. (Pa.) 188; Wallace *v.* McConnell, 13 Pet. (U. S.) 136, 151.

3. Embree *v.* Hanna, 5 Johns. (N. Y.) 101; Wheeler *v.* Raymond, 8 Cow. (N. Y.) 311; Irvine *v.* Lumbermen's Bank, 2 W. & S. (Pa.) 190, 208.

A judgment against one as garnishee in a state court in favor of a private creditor of a corporation, will constitute a bar to subsequent proceedings of the same character in a federal court in favor of the United States. Beaston *v.* Farmers' Bank, 12 Pet. (U. S.) 102, 135; Prentiss *v.* Danaher, 20 Wis. 311, 318.

As to when garnishment may be pleaded in abatement or bar of an action in a foreign jurisdiction, see note to

same system of procedure;[1] but not if the suit is pending in a court of another jurisdiction.[2]

Notwithstanding the right to assert such defence, however, the garnishee may, through a failure to plead at all, or to plead in time, subject himself to a double liability.[3] If he has been garnished prior to the commencement of suit by his creditor, he must interpose such defence *in limine*, and not rely upon proof of such facts upon trial;[4] so, also, if, after suit by his creditor, he is garnished in another jurisdiction, the pendency of the prior suit must be promptly shown by special plea or disclosed in his answer in the garnishment proceeding.[5] And where a defendant in a suit pending is garnished, he must as soon as possible plead such fact in abatement of the suit by his creditor.[6] But if, after doing all that the law requires of him to preserve the rights of the parties, a garnishee has been compelled to pay his debt, such payment should be a good defence to his further prosecution either by his creditor or the plaintiff in the garnishment proceeding.[7]

*d. Disclosure of Adverse Interests.*[8]—Analogous to the garnishee's obligation to resist the appropriation of the defendant's property in his hands to the payment of plaintiff's demand with-

Andrews *v.* Herriot, 4 Cow. (N. Y.) 508, 521.

1. Grosslight *v.* Crisup, 58 Mich. 531; Gager *v.* Watson, 11 Conn. 168; Whipple *v.* Robbins, 97 Mass. 107, 108; American Bank *v.* Rollins, 99 Mass. 313, 314.

2. Whipple *v.* Robbins, 97 Mass. 107; American Bank *v.* Rollins, 99 Mass. 313; Greenwood *v.* Rector, Hempst. (U. S.) 708; McRee *v.* Brown, 45 Tex. 503.

In Wallace *v.* McConnell, 13 Pet. (U. S.) 136, 151, an action was commenced in the district court of the United States for Alabama, and by proceedings subsequently instituted in one of the State courts of Alabama the defendant was summoned as garnishee of the plaintiff, whereupon the pendancy of the garnishment proceedings was pleaded *puis darrein continuance* in the United States court, and a demurrer to this plea was *held*, by the United States Supreme Court, to have been properly sustained.

3. Whipple *v.* Robbins, 97 Mass. 107; McRee *v.* Brown, 45 Tex. 503.

4. Prentiss *v.* Danaher, 20 Wis. 311.

The pleading of such fact being in abatement or in the nature of a plea *puis darrein continuance*, they should be specially pleaded, and evidence thereof is not admissible under a plea of payment or general denial. Updegraff *v.* Spring, 11 S. & R. (Pa.) 188; Near *v.* Mitchell, 23 Mich. 382.

In making such a plea the garnishee must sufficiently state the facts in relation to the proceeding to enable the court to determine as to the jurisdiction of the court, whether a valid attachment has been made, and whether the entire indebtedness is bound thereby. Crawford *v.* Slade, 9 Ala. 887; Irvine *v.* Lumbermen's Bank, 2 W. & S. (Pa.) 190, 207; Maynard *v.* Nekervis, 9 Pa. St. 81.

5. Whipple *v.* Robbins, 97 Mass. 107.

6. Grosslight *v.* Crisup, 58 Mich. 531.

7. Eddy *v.* O'Hara, 132 Mass. 56.

But in Roche *v.* Rhode Island Ins. Assn., 2 Ill. App. 360, 364, where subsequent to the commencement of garnishment proceedings in Illinois, the defendant in the Illinois case began an action against the garnishee in Wisconsin, and, notwithstanding the pendency of the prior garnishment proceeding was interposed as a defence, recovered judgment therein, *held* that such judgment afforded no defence to the garnishee.

8. See under "LIABILITY OF GARNISHEE," subdivisions "In Cases of Negotiable Paper" and "As Affected by Assignment."

out authority of law, and resting upon the same grounds, is his duty to interpose against a judgment charging him as a debtor of the defendant, the claims of third persons who are not parties to the proceeding. This duty arises, of course, only when the garnishee has knowledge of such adverse interests; and if, before receiving notice thereof, he is adjudged to pay his debt to the garnishing creditor, such judgment will be conclusive upon the rights of the claimant.[1] If, therefore, an assignee or transferee would avoid such summary appropriation of his property, he must duly notify the debtor of his interest, at least before it has been condemned to the use of the plaintiff;[2] and the garnishee having received such notice, he is bound to make full disclosure thereof to the court, or stand chargeable to the assignee upon the same indebtedness in a subsequent action.[3]

*e. Defendant's Exemption Rights as a Defence.*—A garnishee is not chargeable for property in his possession or debts by him owing to the principal defendant which are, by law, exempt from execution or attachment if in the hands of the principal defendant;[4] nor is he chargeable as garnishee for wages due the principal defendant which are by law exempt from attachment.[5] There are two distinct methods of procedure as to how such exemptions can be claimed. One is that the garnishee can plead

1. Walters *v.* Washington Ins. Co., 1 Iowa 404; s. c., 63 Am. Dec. 451; McCord *v.* Beatty, 12 Iowa 299; McPhail *v.* Hyatt, 29 Iowa 137, 141; Richards *v.* Griggs, 16 Mo. 416.

2. Wood *v.* Partridge, 11 Mass. 487.

3. Foster *v.* White, 9 Port. (Ala.) 98; Kimbrough *v.* Davis, 34 Ala. 583; Bunker *v.* Gilmore, 40 Me. 88; Larrabee *v.* Knight, 69 Me. 320; Black *v.* Brisbin, 3 Minn. 360; Walters *v.* Washington Ins. Co., 1 Iowa 404; s. c., 63 Am. Dec. 451; McCord *v.* Beatty, 12 Iowa 219; Large *v.* Moore, 17 Iowa 258.

If the fact of assignment is known to the garnishee at the time of answer, and he fails to disclose it, he will not be permitted to offer proof thereof upon the trial of an issue on his answer. Fowler *v.* Williamson, 52 Ala. 16.

4. Grey *v.* Ehrgood, 31 Pa. St. 329; Wilson *v.* Bartholmew. 4 Cush. (Mass.) 314. See also VIII., 1, *supra.*

Exemptions apply to specific chattels, and not to their proceeds, when sold or converted into money. So when property by law exempt from attachment, is insured and is destroyed by fire, the insurance company is liable as garnishee. Wooster *v.* Page, 54 N. H. 125.

**Damages.**—Delay in shipping household goods was caused by garnishment of a railroad company where neither the company nor the officer who held the execution knew they were exempt, but as soon as the officer so learned he released them. *Held*, that the delay was no cause for recovery of damages against either the officer or the company. Hynds *v.* Wynn, 71 Iowa 594.

5. Bliss *v.* Smith, 78 Ill. 359; Hoffman *v.* Fitzwilliam, 81 Ill. 521; Chicago etc. R. Co. *v.* Ragland, 84 Ill. 375; Welker *v.* Hintze, 16 Ill. App. 326; Bailie *v.* Mosher, 72 Ga. 740; Hall *v.* Hartwell, 142 Mass. 447; Church *v.* Holcovet, 45 Mich. 41.

In Maryland the law is that the amount of wages exempt shall be computed by including all which are earned up to the time of trial. Hagerstown Bank *v.* Weckler, 52 Md. 30.

Exemption laws not retroactive; so liability of monthly wages to garnishment is dependent upon the service of process with relation to the act of February 24th, 1875. Moore *v.* McCown, 64 Ga. 617.

If garnishee pay over money to the principal defendant before trial, he does so at his peril. Hagerstown Bank *v.* Weckler, 52 Md. 30.

Exemption applies only to wages earned the month immediately preceding the service of process. Haynes *v.* Hussey, 72 Me. 448.

them as a defence,[1] the other, that an exemption is a purely personal right which cannot be negotiated or transferred, and that such defence must be set up by the principal defendant,[2] who in such case is a proper party to the suit, and should be permitted to claim and show his exemptions.[3] By either method of pro-

Conductor of passenger or freight train is not such a journeyman mechanic or day laborer as that his wages are exempt from garnishment under section 3554 of the Code. Miller *v.* Dugas, 77 Ga. 386.

Wages of clerk and book-keeper not subject to garnishment. Lamar *v.* Clisholm, 77 Ga. 306.

In Staples *v.* Keister, 8 S. E. Rep. (Ga.) 421. it is *held* that money due a physician for professional services is not exempt "as proceeds of the homestead," although he used in earning it a horse and medicine which were exempt.

Wages earned after time of service of process are not held thereby. Thomas *v.* Gibbons, 61 Iowa 50; Burlington etc. R. Co. *v.* Thompson, 31 Kan. 180; s. c., 47 Am. Rep. 497.

Garnishment binds only wages due at the time of service of process, and does not reach amounts subsequently earned even under a prior contract of employment. Burlington etc. R. Co. *v.* Thompson, 31 Kan. 180.

The provisions in Maine R. S., ch. 86, § 2, authorizing a further service upon trustees, may have its full and fair effect without applying it to cases in which the garnishee's indebtment would have been securely held by the first service, had it not been specially exempted from attachment by another section of the same statute; thus, a creditor who has procured the detention of a laborer's wages in the hands of his employer, by the first service of a trustee process, cannot, by making a second service after the lapse of a month, deprive the laborer of the exemption of some portion of his wages, granted in ch. 86, § 55. Collins *v.* Chase, 71 Me. 434.

**Fraudulent Intent.**—A contract made by a principal defendant after service of process with intent on his part to defeat the garnishment proceedings, when it does not appear that the garnishee participated in the fraudulent intent, will not by reason of such wrongful intent on the part of the defendant, cause the garnishee to be held liable. Alexander *v.* Pollock, 72 Ala. 137.

1. Lock *v.* Johnson, 36 Me. 464.

Property which appears to be exempt by the answer of the garnishee, cannot be charged. Daniels *v.* Morr, 75 Me. 398; Davenport *v.* Swan, 9 Humph. (Tenn.) 186; Chicago etc. R. Co. *v.* Ragland, 84 Ill. 375; Chicago etc. R. Co. *v.* Mason, 11 Bradw. (Ill.) 525; Schenk *v.* Griffin, 5 Gill (Md.) 399; Winterfield *v.* Milwaukee etc. R. Co., 29 Wis. 589; Mutt *v.* Jones, 33 Kan. 112; Drake on Attach., § 480; Staniels *v.* Raymond, 4 Cush. (Mass.) 314.

The failure of garnishee to set up exemption of the defendant's wages does not debar him from seting up such exemption after the money has been paid into court. Smith *v.* Johnston, 71 Ga. 748; *compare* Randolph *v.* Little, 62 Ala. 397.

Garnishee need not set up the exemption laws of another State unless the property is also exempt by the law of the State where the garnishee has been summoned. Mumper *v.* Wilson, 2 Am. St. Reps., note 241; Roche *v.* Rhode Island Ins. Assn., 2 Ill. App. 360; Moore *v.* Chicago etc. R. Co., 43 Iowa 385; Leiber *v.* Union Pacific R. Co., 49 Iowa 688; Mooney *v.* Union Pacific R. Co., 60 Iowa 346; Burlington etc. R. Co. *v.* Thompson, 31 Kan. 180; s. c., 47 Am. Rep. 497; Morgan *v.* Neville, 74 Pa. St. 52; overruling Pierce *v.* Chicago etc. R. Co., 36 Wis. 283.

A judgment in such case will be a good defence in an action by principal defendant. East Tenn. etc. R. Co. *v.* Kennedy, 83 Ala. 463; Moore *v.* Chicago etc. R. Co., 43 Iowa 385; Buchanan *v.* Hunt, 33 Hun (N. Y.) 329.

2. Conley *v.* Chilcote, 25 Ohio St. 324; Osborn *v.* Schutt, 67 Mo. 714; Moore *v.* Chicago etc. R. Co., 43 Iowa 385; Jones *v.* Tracy, 75 Pa. St. 417.

As to when this rule does not apply, see Smith *v.* Dickinson, 58 Iowa 444.

3. Chilcote *v.* Conley, 36 Ohio St. 545.

If the garnishee has notice that the property is by law exempt from execution or attachment he should bring it to the notice of the court, who, upon motion, will make the defendant a party to

cedure, if the garnishee has notice of the exemption and fails to bring it to the notice of the court, the judgment rendered will be no bar to a suit by the defendant;[1] and this, even though the defendant does not raise the question,[2] and it has been held that he must exercise reasonable diligence to ascertain if the property is allowable as an exemption.[3]

If the principal defendant delays asserting his claim to exemption until after judgment has been rendered against the garnishee, the exemption is lost and cannot afterwards be asserted.[4] It is the duty of a defendant to furnish the garnishee with information and means to prove the fact of exemption or himself to prove it, and if judgment is erroneously given against the garnishee, it is his right and duty to have it set aside, or to appeal from it, or he is bound by the judgment against the garnishee, and cannot impeach it collaterally.[5]

**5. The Effect of the Answer.**—The effect which the answer of the garnishee is entitled to receive is governed largely by the particular statutes and methods of practice in the different States. In Tennessee and Rhode Island it is held to be conclusive, and the facts disclosed by the garnishee determine his liability.[6] And

the suit. Chilcote *v.* Conley, 36 Ohio St. 545.

While the statute of Nebraska in garnishment proceedings after judgment does not require that notice be served on the judgment debtor, yet the court may require such notice to be given before the garnishee files his disclosure, that the debtor may have an opportunity to plead the exemption of the property from garnishment. Union Pac. R. Co. *v.* Smersh, 36 N. W. Rep. (Neb.) 139.

In Alabama the claim of exemption must be filed and verified by affidavit, and it may be interposed at any time before the debt is condemned in the hands of the garnishee, but subject to reasonable regulation by the court. Todd *v.* McCravey, 66 Ala. 315.

And it is *prima facie* correct, and when its validity depends on the time when the debt was contracted the creditor must affirmatively prove the time for which he contends. Todd *v.* McCravey, 66 Ala. 315; Muzzy *v.* Tuttle, 30 Kan. 49; Pioneer Co-operative Co. *v.* Eagle & Phœnix Mfg. Co., 67 Ga. 38.

1. Lyon, J.: "Knowing the indebtedness was exempt it was not only the right of the company, but very probable it was its duty, for self-protection, to interpose the defence, and this more especially after Patterson had personally requested him to do so. The following authorities are to the same effect. Some, but not all of them are founded upon statutes requiring the garnishee to interpose the defence if the property sought to be reached by process is exempt. But it is believed that such statutes are merely declaratory of the law as it existed before they were enacted. Gery *v.* Ehrgood, 31 Pa. St. 329; Staniels *v.* Raymond, 4 Cush. (Mass.) 314; Davenport *v.* Swan, 9 Humph. (Tenn.) 186; Lock *v.* Johnson, 36 Me. 464; Clark *v.* Averill, 31 Vt. 512; Drake on Attach., § 479." Winterfield *v.* Milwaukee etc. R. Co., 29 Wis. 589.

Cases cited in note 1, p. 1224, are to the same effect; also Morgan *v.* Neville, 74 Pa. St. 52. As to notice to principal defendant, see Bolton *v.* Penn. Co., 88 Pa. St. 263.

2. Clark *v.* Averill, 31 Vt. 512; Winterfield *v.* Milwaukee & St. P. R. Co., 29 Wis. 589. *Compare* Osborne *v.* Schutt, 67 Mo. 712.

3. Chicago & A. R. Co. *v.* Ragland, 84 Ill. 375.

4. Randolph *v.* Little, 62 Ala. 396, overruling Webb *v.* Edwards, 46 Ala. 17.

5. Wigwall *v.* Union C. & M. Co., 37 Iowa 129.

6. **Effect of Answer.**— Moore *v.* Green, 4 Humph. (Tenn.) 299; Moses

in Michigan, the same effect is given to the answer in proceedings before justices of the peace.[1] But under the statutes of most of the States, the garnishee's disclosure does not preclude the plaintiff from showing the former's liability by evidence *aliunde*.[2]

Whatever rule obtains, however, as to the conclusiveness of the answer of the garnishee, the cases are generally agreed that when the facts thus disclosed constitute the only evidence upon which the question of liability is to be determined, there must be a clear admission of indebtedness or of the possession of property belonging to the defendant, or a disclosure of facts from which such conclusion is warranted, before the garnishee can be charged.[3]

But it is not necessary that there be an express admission of indebtedness. If the facts disclosed would warrant a judgment against the garnishee in a suit by the defendant, or reveal the possession of property under a transaction which, though binding upon the defendant, is fraudulent as to the plaintiff, it will be

McMullin. 4 Coldw. (Tenn.) 242; Raymond *v.* Narragansett Tinware Co., 14 R. I. 310.

Such was the rule formerly in Maine, Massachusetts and Minnesota, and collateral evidence was not admissible either to prove or disprove the garnishee's liability. Kelly *v.* Bowman, 12 Pick. (Mass.) 383; Comstock *v.* Farnum, 2 Mass. 96; Lamb *v.* Franklin Mfg. Co., 18 Me. 187; Cole *v.* Sater, 5 Minn. 468.

But under more recent statutes in Massachusetts, either party may allege and prove any material fact not stated or denied in the answer. Gouch *v.* Tollman, 10 Cush. (Mass.) 104.

And in Maine and Minnesota, the plaintiff may now controvert the answer and show the garnishee liable independently of the facts stated therein. Maine Rev. Sts., ch. 86, § 29; Kelley *v.* Weymouth, 68 Me. 197; Minnesota Gen. Sts., ch. 66, § 175.

1. Thomas *v.* Sprague, 12 Mich. 120; Wellover *v.* Soule, 30 Mich. 481; Lorman *v.* Phœnix Ins. Co., 33 Mich. 65; Walker *v.* Detroit etc. R. Co., 49 Mich. 446.

2. Bebb *v.* Preston, 1 Iowa 460; Fearey *v.* Cummings, 41 Mich. 376.

3. **Must Clearly Admit Liability to Warrant Judgment.**—Moore *v.* Green, 4 Humph. (Tenn.) 299; Moses *v.* McMullin, 4 Coldw. (Tenn.) 242; Pickler *v.* Rainey, 4 Heisk. (Tenn.) 335, 339; Piquet *v.* Swan, 4 Mason (U. S.) 443, 460; Richards *v.* Stephenson, 99 Mass. 311; Rich *v.* Reed, 22 Me. 28; Mason *v.* McCampbell, 2 Ark. 506, 511; Presnall *v.* Mabry, 3 Port. (Ala.) 105; Hurst *v.* Home Protection Ins. Co., 81 Ala. 174; Smith *v.* Clarke, 9 Iowa 241; Hibbard *v.* Everett, 65 Iowa 372; Brainard *v.* Simmons, 67 Iowa 646; King *v.* Carhart, 18 Ga. 650; Wright *v.* Foord, 5 N. H. 178; People *v.* Johnson, 14 Ill. 342; Pierce *v.* Carleton, 12 Ill. 358, 365; s. c., 54 Am. Dec. 405; Cairo & St. L. R. Co. *v.* Killenberg, 82 Ill. 295; Meadowcroft *v.* Agnew, 89 Ill. 469; Barnes *v.* Wayland, 14 La. Ann. 791; Holton *v.* South Pac. R. Co., 50 Mo. 151; Bell *v.* Strow, 59 Mo. 118; Townsend *v.* Cass Circuit Judge, 39 Mich. 407; Looman *v.* Phœnix Ins. Co., 33 Mich. 65; McRee *v.* Brown, 45 Tex. 503; Davis *v.* Paulette, 3 Wis. 300.

Neither the statute nor the allegation of the plaintiff creates any presumption in advance that the garnishee has possession of the goods, effects or credits of the principal defendant in his possession, for which he must relieve himself by answer. Cardany *v.* New England Fur Co., 107 Mass. 116; Porter *v.* Stephens, 9 Cush. (Mass.) 530, 535; Morse *v.* Marshall, 22 Iowa 290, 292.

The affirmative statements in the answer are to receive full credit, unless there are other facts and circumstances disclosed, inconsistent therewith, to overcome such direct and affirmative statements. Plummer *v.* Rundlett; 42 Me. 365.

sufficient to charge him,[1] notwithstanding his denial of indebtedness.[2] So, also, the garnishee may be charged if he answer evasively or refuse to answer any material interrogatory,[3] or if he admits enough to make him *prima facie* chargeable, and pleads some special matter in avoidance, but fails to show facts sufficient to relieve himself from the liability admitted.[4] But if, upon a full disclosure, it is left doubtful whether the garnishee is liable to the defendant, he is entitled to be discharged.[5] And

Where the garnishee in his answer neither admits nor denies his liability, but states all the facts, and leaves the courts to decide the matters of law arising thereon, there can be no judgment against him on his answer, unless there clearly appears therefrom facts sufficient to justify the court in pronouncing such judgment. Williams *v.* Jones, 42 Miss. 270; United States *v.* Langton, 5 Mason (U. S.) 280.

**1. When Sufficient to Charge Garnishee.**—Mann *v.* Buford, 3 Ala. 312; s. c., 37 Am. Dec. 691.

**2.** Not the garnishee's conclusions, but the facts stated by him in his answer, determine this liability. Bebb *v.* Preston, 1 Iowa 460; Smith *v.* Clarke, 9 Iowa 241; Man *v.* Buford, 3 Ala. 312; s. c., 37 Am. Dec. 691; Lamb *v.* Franklin Mfg. Co., 18 Me. 187; Moor *v.* Towle, 38 Me. 133; Donnelly *v.* O'Connor, 22 Minn. 309.

Where a garnishee states facts sufficient to charge him, but draws therefrom a wrong conclusion, the court may disregard the conclusion of law and render such judgment as the facts warrant. Ordway *v.* Remington, 12 R. I. 319.

Where the garnishee expresses an opinion that at the time of the service of the summons he had no property of the defendant in his possession or control, but upon full disclosure develops facts showing that such opinion is incorrect, the case is not one which calls for the trial of the issue, but the garnishee may be charged upon his answer. Farmers & Mechanics' Bank *v.* Wells, 23 Minn. 475.

**3.** See sub-tit. "Garnishee's Refusal to Answer," *supra.*

**4.** See sub-tit. "Certainty and Sufficiency of the Answer," *supra.*

**5. Garnishee Discharged When Answer Leaves Liability Doubtful.**—Morse *v.* Marshall, 22 Iowa 290; Church *v.* Simpson, 25 Iowa 408; Hibbard *v.* Everett, 65 Iowa 372; Driscoll *v.* Hoyt, 11 Gray 404; United States *v.* Langton, 5 Mason (U. S.) 280, 281; Pierce *v.* Carleton, 12 Ill. 358; Brown *v.* State, 7 Hump. (Tenn.) 112; Williams *v.* Jones, 42 Miss. 270; King *v.* Ellis, 18 Ga. 650; Cole *v.* Sater, 5 Minn. 468; Schafer *v.* Vizena, 30 Minn. 387.

A garnishee cannot be charged upon a disclosure which admits neither an indebtedness nor the possession of property belonging to the defendant. Ball *v.* Young, 52 Mich. 476.

Nor where it is too ambiguous to show whether any indebtedness exists, or, if so, to whom. Spears *v.* Chapman, 43 Mich. 541.

Nor where he makes such admission, but shows *prima facie* title thereto in some third person. Sexton *v.* Amos, 39 Mich. 695; Lyon *v.* Kneeland, 58 Mich. 570.

A garnishee who answers that he has received a check with authority to receive the amount and pay it over to the defendant upon certain conditions, which have been performed, but does not state, and is not asked whether he has received the money upon the check, is not chargeable. Lane *v.* Felt, 7 Gray (Mass.) 491.

An answer by the garnishee that he executed a negotiable note or bill to the defendant, but does not know where it is, or who holds it, will not warrant a judgment against him. Huff *v.* Mills, 7 Yerg. (Tenn.) 41; Turner *v.* Armstrong, 9 Yerg. (Tenn.) 412.

The facts stated in the answers of several garnishees cannot be put together to make out a case against one of them. The liability of each rests on his own answer. Moore *v.* Green, 4 Humph. (Tenn.) 299.

But the answer and admission of one partner upon process of garnishment, where both have been regularly served with process, will bind the other. Anderson *v.* Wanzer, 5 How. (Miss.) 587; s. c., 37 Am. Dec. 170.

So also where the process was issued against the firm the answer of one member will be binding, but not of

no liability can be predicated upon the answer if, at the time it is made, the court is without jurisdiction, either of the principal case or of the garnishee.[1]

As to the weight that the answer of the garnishee is entitled to receive against evidence produced upon the trial of an issue thereon, the decisions are not so harmonious. In some of the States it is held that if the answer is controverted, the issue to be tried is simply one of indebtedness *vel non*, which may be established by proof entirely independent of the garnishee's disclosure,[2] unless introduced in evidence by the plaintiff, in which case it has the effect only of an admission on the part of the garnishee, and is governed by the same rules as any other admission.[3] In Massachusetts, the plaintiff is confined to proof of such facts only as are not stated nor denied by the garnishee in his disclosure.[4] But the rule which more generally prevails is that that the answer makes for the garnishee a *prima facie* case, which must be overcome by competent evidence on the part of the plaintiff before the garnishee can be charged;[5] that it is entitled to the force and effect that would be given to a bill in chancery, the facts which it admits being regarded as established, but its statements in denial of liability, while not binding upon the plaintiff, must be overcome by satisfactory evidence.[6]

**6. The Issue on the Answer.**—That the process may be more effectual in the subjection of the defendant's property to the payment of his debts, the plaintiff, if unwilling to accept the garnishee's denial of indebtedness, is generally permitted to take issue thereon, and establish his liability, if he can, by evidence *aliunde*.[7]

The method by which such issue is raised varies in the several

issue to the partner individually. Bean *v.* Barney, 10 Iowa 498.

1. Iron Cliffs Co. *v.* Lahais, 52 Mich. 31; Hosley *v.* Scott, 59 Mich. 420; Ettelsohn *v.* Fireman's Fund Ins. Co., 64 Mich. 331.

2. **Effect of Answer on Trial of Issue.**—Myatt *v.* Lockhart, 9 Ala. 91; Lehman *v.* Hudmon, 79 Ala. 532, 535; Hess *v.* Shorb, 7 Pa. St. 231.

3. Myatt *v.* Lockhart, 9 Ala. 91.

In Wisconsin, the answer of the garnishee, if introduced in evidence, is entitled only to the weight of other pleadings in the case. Beck *v.* Cole, 16 Wis. 95.

4. Gouch *v.* Tolman, 10 Cush. (Mass.) 104; Tryon *v.* Merrill, 116 Mass. 299. And the same effect is given to the answer as against an adverse claimant. Clinton *v.* Natl. Bank *v.* Bright, 126 Mass. 535.

5. Mason *v.* McCampbell, 2 Ark. 506, 511; Britt *v.* Bradshaw, 18 Ark. 530, 432; Ellison *v.* Tuttle, 26 Tex. 283; Plummer *v.* Rundlett, 42 Me. 365; Kelly *v.* Weymouth, 68 Me. 197. Kergin *v.* Dawson, 1 Gilm. (Ill.) 86; Rippen *v.* Sehone, 92 Ill. 229; National Bank *v.* Lake Shore etc. R. Co., 21 Ohio St. 221, 230; Fearey *v.* Cummings, 41 Mich. 376.

6. Allen *v.* Hazen, 26 Mich. 142: Page *v.* Smith, 25 Me. 256, 264; Moore *v.* Towle, 38 Me. 133; Britt *v.* Bradshaw, 18 Ark. 530, 532.

7. Fearey *v.* Cummings, 41 Mich. 376. Bebb *v.* Preston, 1 Iowa 460; National Bank *v.* Lake Shore etc. R. Co., 21 Ohio St. 221, 230.

Until issue has been taken thereon by proper pleading, the answer is conclusive as to the garnishee's liability, and evidence cannot be received to contradict the same. Inman *v.* Jones, 42 Miss. 270.

The only method by which the

States.[1] But whatever the procedure by which it is made up, it seems to be generally conceded that the plaintiff is not to be held to an allegation of the garnishee's liability upon any specific ground,[2] nor to a specific denial of the facts stated in the an-

answer of a a garnishee can be contradicted is by the proof of facts upon an issue properly joined. The credibility of a garnishee cannot be impeached by showing him to be unworthy of belief. Barnes *v.* Wayland, 14 La. Ann. 803.

But in Minnesota, upon the examination of a garnishee, testimony other than that of the garnishee himself may be received for the purpose of corroborating or explaining the answer, or of developing facts additional to those disclosed by him. Leighton *v.* Heagerty, 21 Minn. 42; Langdon *v.* Thompson, 25 Minn. 513.

In Alabama, upon appeal by a garnishee from the judgment of a justice of the peace against him in a contest on his answer, the case stands in the circuit court as if there had been no contest, and the plaintiff must tender an issue in writing, and until he does so he cannot claim judgment against the garnishee. Lehman *v.* Hudmon, 79 Ala. 532.

**1. Issue on the Answer, How Taken.**—In some of the States the issue is raised by an affidavit filed by plaintiff, setting forth wherein he believes the answer untrue. Myatt *v.* Lockhart, 9 Ala. 91, 94; Ables *v.* Miller, 12 Tex. 111; Ellison *v.* Tuttle, 26 Tex. 283.

In Alabama, such affidavit may be made by plaintiff's attorney. Faulks *v.* Heard, 31 Ala. 516. But in Texas it must be made by the plaintiff. Givens *v.* Taylor, 6 Tex. 320.

In Alabama, a notice of contest, filed at the term at which answer is made, will be sufficient to raise an issue upon the truth of the answer without further pleading, although the statute provides that a suggestion shall be filed by plaintiff of the grounds upon which he claims liability on the part of the garnishee. Marston *v.* Carr, 16 Ala. 325.

In Indiana, the statute provides that after an order has been made requiring the garnishee to appear and answer, the proceedings shall be without further pleadings, upon the oral examination, and testimony of the parties and witnesses. Corbin *v.* Goddard, 94 Ind. 419.

In Kansas, if the garnishee fails to answer, or if his answer is unsatisfactory to the plaintiff, the latter may commence an action against him in his own name by filing a petition, and thereupon proceedings may be had as in other actions. Dassler's Comp. Laws, Kan. 1885, § 4029.

By failing to give notice of suit immediately after the garnishee's answer the plaintiff does not waive his right to contest the same. Exchange Bank *v.* Gulick, 24 Kan. 359.

In California a similar practice obtains, but the plaintiff must first obtain leave of court to commence such action. Parker *v.* Page, 38 Cal. 522; Hartman *v.* Olvera, 51 Cal. 501.

In Minnesota, if the plaintiff is dissatisfied with the answer, he may file a supplemental complaint alleging the facts upon which he seeks to charge the garnishee and make the garnishee a party defendant. Gen. Stats. Minn., ch. 66, § 175.

In Wisconsin, if the plaintiff desires to contest the truth of the garnishee's answer, he must, within twenty days after the same has been filed, serve notice on the garnishee that he elect to take issue thereon, in which case the plaintiff's affidavit for garnishment constitutes the complaint and the garnishee's affidavit the answer thereto, and the issue thus formed is tried as a civil action. Rev. Stats. Wis. 1878, §§ 2759, 2763; Platt *v.* Sauk County Bank, 17 Wis. 222.

In Michigan, as in Wisconsin, the issue is framed by the plaintiff's affidavit for a writ of garnishment and the garnishee's denial of the facts stated therein; and either party may have a trial by filing a demand therefor with the clerk of the court within ten days after answer by the garnishee. Howell's Statutes, Mich., 1882, section 8069; Fearey *v.* Cummings, 41 Mich. 376.

**2.** Generally the statutes require no more than a general denial. Turner *v.* Rosseau, 21 Ga. 240; Bates *v.* Forsyth, 64 Ga. 232; Thompson *v.* Allen, 4 Stew. & P. (Ala.) 184; Moore *v.* Jones, 13 Ala. 296; Freese *v.* Co-operative Coal Co., 67 Iowa 42; Henny Buggy Co. *v.* Patt, 73 Iowa 485.

A bill of particulars of what facts the plaintiff expects to establish cannot be claimed by the garnishee as a matter of right, and the dealings between

swer.[1] But if he tenders an issue of liability based upon a particular state of facts, the proofs upon the trial will be limited to such issue, and the plaintiff can recover upon no other ground.[2] It would seem to be good practice, however, and but just to the garnishee, that the plaintiff be required to state the facts upon which he relies to establish the former's liability with sufficient certainty to enable him to prepare his defence.[3]

Where the facts pleaded by the plaintiff would not, if proven, make the garnishee liable, or are irrelevant or immaterial, or the allegations are not sufficiently specific, the pleading may be attacked by the garnishee after the manner of other pleadings.[4]

him and the principal debtor must be presumed to be peculiarly within his knowledge. Strong *v.* Hollon, 39 Mich. 411.

In Imperial Fire Ins. Co. *v.* Shimer, Admr., 96 Ill. 580, where the parties proceeded to trial upon the issue as made by plaintiff's affidavit for garnishment and the garnishee's answer, *held* that a replication to the answer, if necessary at all, was thereby waived. And see Singer *v.* Townsend, Admx., 53 Wis. 126, 226.

1. Empire Car Roofing Co. *v.* Macey, 115 Ill. 390.

The court may in its discretion direct what issue shall be tried. Adkins *v.* Watson, 12 Tex. 199.

Where the garnishee answers that he is indebted to the defendant on a note, but that he does not know whether the same is now held by him, the issue presented is whether the defendant held the note at the date of service, and the proper traverse of the answer is an allegation by the plaintiff that he did so hold it. Smith *v.* Wellborn, 73 Ga. 131.

2. Freese *v.* Co-operative Coal Co., 67 Iowa 42; Britt *v.* Bradshaw, 18 Ark. 530.

3. Atkins *v.* Watson, 12 Tex. 199; Twelve *v.* Lodano, 15 Ala. 732, 734.

Such practice seems to be contemplated, at all events by the statutes in those States where the proceedings supplementary to the answer are in the nature of an action against the garnishee. Gen. Stats. Minn., tit. 10, ch. 66, § 175; Exchange Bank *v.* Gulick, 24 Kan. 359; Parker *v.* Page, 38 Cal. 522.

But in Davis *v.* Mindenhall, 19 Minn. 149, *held* that the validity of a bill of sale under which the garnishee claimed title to property received from the defendant might be determined in such proceedings and shown to be fraudulent as to creditors of the defendant, such fact being alleged in the pleading filed by plaintiff contesting the answer of the garnishee.

Argumentative, vague and desultory averments presenting no direct issue on the truth of the answer are insufficient as a traverse, and should be stricken out on motion. Sanders *v.* Miller, 60 Ga. 554.

It is important to the garnishee, who has come under no obligation to the plaintiff, and is sought to be coerced into the relation of a debtor to him, that the issue should be specific. Fowler *v.* Williamson, 52 Ala. 16.

But if the garnishee permits the case to proceed to trial upon a simple denial of the truth of his answer, without objection to the sufficiency of such pleading, he cannot object to the introduction of evidence thereunder upon the ground that it presented simply a conclusion of law upon which no issue could be joined. Ruby *v.* Schee, 51 Iowa 424.

A replication which presents no denial of the truth of the answer is not sufficient to put the same in issue. Truitt *v.* Griffin, 61 Ill. 26.

A denial of the garnishee's answer is sufficient, if it states a cause of action under the rules applicable to a petition under the code. Groschke *v.* Bardenheimer, 15 Mo. App. 353.

4. McDonald *v.* Moore, 65 Iowa 171; Ruby *v.* Schee, 51 Iowa 422; Corbin *v.* Goddard, 94 Ind. 419.

The plaintiff's denial of the garnishee's answer to interrogatories stands in the place of a petition, and its sufficiency is to be tested by the same rules, both in respect to pleading and practice. If the garnishee demur to the denial for misjoinder of several matters in one count, and after the demurrer is overruled answers over, he will be *held* to have waived the defect. Union Bank of Trenton *v.* Dillon, 75 Mo. 380.

The allowance of amendments to the pleadings after the issues are made up is within the discretion of the court.[1]

Unless the time is limited by statute, the plaintiff may take issue on the answer within any reasonable time after the same is filed and before the garnishee is discharged.[2] What is a reasonable time must, of course, depend largely upon the circumstances of the particular case.[3] It may be at the same term of court as that at which the answer is made,[4] or at a subsequent term, when consistent with the rights of the parties.[5] Unless the statute requires special notice of the fact, the garnishee will be charged with notice of any pleading filed by the plaintiff at the same term;[6] but if the answer is not controverted until a term subsequent to that at which it is filed, he is entitled to notice.[7]

The nature of the issue that may thus be raised varies in the different States, but in the majority the plaintiff may allege and prove any state of facts which will show a liability, on the part of the garnishee, of a nature that can be subjected to the payment of his demand under this process.[8] He may, notwithstanding the denial of the garnishee, insist upon proving a liability to the defendant arising out of express contract, or show him chargeable by reason of transactions that are collusive and fraudulent;[9] and to this end he may, if necessary, take issue on the truth of the statements made in the answer.[10] But garnishment, being a legal proceeding, and governed by the rules affecting the trial of actions at law, only legal, as distinguished from purely equitable, issues can generally be plead.[11] And an issue in the nature of

1. Butman *v.* Hobbs, 35 Me. 227.

In a proper case amendments may be allowed even after appeal to the supreme court, and the case is remanded for a new trial. Bebb *v.* Preston, 3 Iowa 325.

2. **When Issue on Answer Must be Taken.**—Smith *v.* Wellborn, 73 Ga. 131.

If the plaintiff submit the matter of the garnishee's liability for decision upon his answer, and the court decide it, it will then be too late to take issue on the answer. Mahoney *v.* McLean, 28 Minn. 63.

And if the plaintiff neglects to take issue upon the answer within a reasonable time, or move for judgment thereon, the garnishee may on motion have the proceedings dismissed. Selz *v.* First Nat. Bank, 55 Wis. 225.

3. Smith *v.* Wellborn, 73 Ga. 131.

Where the plaintiff fails for several terms to take proper steps to bring the transferee into court to contest the right to the fund in the hands of the garnishee, the garnishee is entitled to a discharge. Mock *v.* King, 15 Ala. 66.

4. Smith *v.* Wellborn, 73 Ga. 131.

5. Vincent *v.* Wellington, 18 Wis. 168; Banks *v.* Hunt, 70 Ga. 741.

6. Chase *v.* Foster, 9 Iowa 429.

7. Lockhart *v.* Johnson, 9 Ala. 223; Marston *v.* Carr, 16 Ala. 325; Kienne *v.* Anderson, 13 Iowa 565.

8. **What Issue May be Tendered.**—The plaintiff cannot select a part of the answer on which to take issue; the only proper issue is one of indebtedness *vel non*. Myatt *v.* Lockhart, 9 Ala. 91.

But where the garnishee had made two separate answers, one general and the other special, it has been *held* that the plaintiff may take issue simply on the general denial, and is not obliged to put specific questions to explain the matters stated in the special answer. Bebb *v.* Preston, 3 Iowa 325.

9. Lamb *v.* Stone, 11 Pick. (Mass.) 527; Fearey *v.* Cummings, 41 Mich. 376.

10. Fearey *v.* Cummings, 41 Mich. 376.

11. Lamb *v.* Stone, 11 Pick. (Mass.) 527; Lackland *v.* Garesche, 56 Mo. 267; Sheedy *v.* Second Nat. Bank, 62 Mo. 17, 24; Attwood *v.* Hale, 17 Mo. App.

an independent cause of action in favor of the plaintiff against the garnishee cannot be tried therein;[1] nor one intended to charge the garnishee in any other capacity than that in which he has been summoned.[2] In Massachusetts, no issue can be raised upon the truth of the answer, and the plaintiff must show the garnishee liable, if at all, upon a state of facts not inconsistent with his disclosure.[3]

**7. The Trial.**—When the answer of the garnishee is controverted by the plaintiff, a case is generally docketed as against the garnishee,[4] and the issue thus formed is tried as in ordinary suits at law;[5] and either party may demand a trial to a jury.[6] At such stage in the proceeding the plaintiff is not necessarily the moving party. The garnishee now occupies a relation to the proceeding similar in most respects to what he would if sued by his creditor, and if he desires a speedy disposition of the cause, he may notice the same for trial.[7] Generally, the issue is not

81; Sears *v.* Thompson, 72 Iowa 61; Fearey *v.* Cummings, 41 Mich. 376; Illinois Cent. R. Co. *v.* Weaver, 54 Ill. 319; Webster *v.* Steele, 75 Ill. 544; Davis *v.* Mindenhall. 19 Minn. 149.

But in Ivens *v.* Ivens, 30 La. Ann. 249, it is *held* that the validity of the garnishee's title to property in his possession can only be attacked by a direct action.

1. Sears *v.* Thompson, 72 Iowa 61.

2. Frizzell *v.* Willard, 37 Ark. 478; Lane *v.* Felt, 7 Gray (Mass.) 491.

3. Gouch *v.* Tollman, 10 Cush. (Mass.) 104.

4. **The Trial.**—A statute permitting the garnishment proceeding to be docketed as a separate suit is permissive, not mandatory, and a failure to follow the statute in such respect will not render the judgment invalid. Fasquette *v.* Dennis, 55 Mich. 305; Garland *v.* McKittrick, 52 Wis. 261; Cohn *v.* Tillman, 66 Tex. 98.

Where several persons are summoned as garnishees as being severally indebted to the defendant in attachment, the correct practice is to docket separate suits against each garnishee, so that the suit against each may be proceeded with independently of the others, and the plaintiff is entitled to have this done upon proper showing being made by motion. Farmers' Bank *v.* Brooke, 40 Md. 249.

5. Graves *v.* Cooper, 8 Ala. 811, 816; Beck *v.* Cole, 16 Wis. 99; Elwood *v.* Crowley, 64 Iowa 68, 70.

But where the procedure in garnishment proceedings is prescribed by statute, its provisions must be followed Field *v.* Shoop, 6 Ill. App. 485.

6. Walker *v.* Bradley, 2 Ark. 578, 593; Dewitt *v.* Baldwin, 1 Root (Conn.) 138; Cole *v.* Sater, 5 Minn. 468, 473; Cahoon *v.* Malone, 102 Ind. 251; King *v.* Ellis, 18 Ga. 650; Welch *v.* Alligood, 22 Ga. 618; Beck *v.* Cole, 16 Wis. 95; Ferall *v.* Farnen, 67 Md. 85.

But the right to a jury trial may be waived by consenting to try the case to the court, and this consent will relate to all issues then in the case, or as they may arise upon further pleadings as authorized by law. Henny Buggy Co. *v.* Patt, 73 Iowa 485.

7. The fact that the garnishee is entitled to have the issue on his answer tried the succeeding term after the plaintiff obtains judgment against the defendant will not entitle him to have the proceeding dismissed because it was not brought to trial, when the cause has not been noticed for trial by either party. Vincent *v.* Wellington, 18 Wis. 159.

The lapse of one or more terms between service of the process and judgment against the garnishee will not amount to an abandonment of the proceeding. Phillips *v.* Germon, 45 Iowa 101.

But in Blake *v.* Hubbard, 45 Mich. 1, where the proceedings against the garnishee were allowed to rest for two years, until plaintiffs had obtained a decree on a bill in aid of execution, and then attempt to bring the garnishment issue to a bearing, *held* that the proceedings could not have been kept open with-

deemed ripe for trial until judgment has been recovered against the defendant;[1] but if jurisdiction of the cause be dependent upon the liability of the garnishee, the garnishment proceeding may properly be disposed of first.[2] Being in its nature an auxiliary proceeding, the trial must take place in the court having jurisdiction of the original suit.[3]

The rules of evidence which obtain in ordinary actions obtain in this proceeding. Upon the plaintiff rests the burden of establishing, by a preponderance of the evidence, the facts upon which his charge of liability on the part of the garnishee is based;[4] and if he fail in this the garnishee is entitled to be discharged.[5] In support of his averments, he may generally offer in evidence the answer of the garnishee,[6] or such portions thereof as may be

out either a formal continuance or some action equivalent to consent by the garnishee. To the same effect is the case of Webber *v.* Bolte, 51 Mich. 113, where the plaintiff delayed bringing the issue with the garnishee to trial for fifteen months.

1. Conway *v.* Iowa Circuit Judge, 46 Mich. 28.

The issue on the answer may be tried on the same day as the principal case if the garnishee is willing. But the latter cannot be forced to trial within two days after the trial of the principal case; and if the defendant appeals from the judgment rendered therein, a judgment in the garnishment proceedings may be stayed until the appeal is disposed of. Crippin *v.* Fletcher, 56 Mich. 386.

2. Wilson *v.* Bank of Louisiana, 55 Ga. 98.

3. McGuire *v.* Pitts' Sons, 42 Iowa 535.

The garnishee cannot have a change of venue to the county of his residence. Miller *v.* Mason, 51 Iowa 239; Smith *v.* Dickson, 58 Iowa 444.

Where the process is issued by a justice of the peace in aid of an execution previously rendered before him, the defendant is not entitled to have a change of venue on account of the prejudice of the justice of the peace before whom the proceeding is pending. Garland *v.* McKittrick, 52 Wis. 261.

4. **Burden of Proof on Plaintiff.**—Ellison *v.* Tuttle, 26 Tex. 283; East Line etc. R. Co. *v.* Terry, 50 Tex. 129; Kergin *v.* Dawson, 6 Ill. 86; Rippen *v.* Schoen, 92 Ill. 229; Field *v.* Malone, 102 Ind. 251, 257; Sevier *v.* Throckmorton, 33 Ala. 512.

A "declaration and claim of exemption" duly made and filed for record under the Alabama statute, Code, § 2813, is *prima facie* correct, and imposes on a contesting creditor the *onus* of establishing its incorrectness, or invalidity; and when its validity depends on the time when the debt was contracted, the creditor must affirmatively prove the time for which he contends. Todd *v.* McCravey's Admr., 77 Ala. 469.

Where it appears by the answer of the garnishee that the defendant had assigned, prior to the garnishment, the obligation upon which the garnishee was indebted to him, if the plaintiff takes issue on the answer, upon the ground that such assignment is fraudulent, the burden is upon him to prove that fact. Thomas *v.* Shingles, 32 Miss. 261.

5. East Line etc. R. Co. *v.* Terry, 50 Tex. 129; Givens *v.* Taylor, 6 Tex. 315; Sanders *v.* Miller, 60 Ga. 534; Laschear *v.* White, 88 Ill. 43; Gordin *v.* Moore, 62 Miss. 493.

6. **Answer as Evidence.**—Drake *v.* Buck, 35 Iowa 472; Fairfield *v.* McNany, 37 Iowa 75.

But the answer will be evidence only against parties to the proceeding. Pitts *v.* Mower, 18 Me. 363.

Answer is not competent evidence on trial of an issue raised by an intervenor who claims the credit in the hands of the garnishee under an assignment from the defendant. Easley *v.* Gibbs, 29 Iowa 129.

Where the disclosure of the garnishee sets out the giving of a warranty deed to certain lands by the garnishee to the defendant for a consideration named, the answer will be competent evidence for the plaintiff in proof of the execution of such deed, and of the consideration for which it was given. Allen *v.* Hazen, 26 Mich. 142.

favorable to his case,[1] and any other competent testimony or documentary evidence tending to prove the issue on trial.[2] The judgment and proceedings against the defendant in the principal case are competent evidence against the garnishee, unless for

1. If an answer contain admission of fact beneficial to the plaintiff, he may read the same in evidence, and such offer will not preclude him from disproving other portions thereof. Prentiss *v.* Danaher, 20 Wis. 311.

But when the answer is offered by the plaintiff for the purpose of contradicting the garnishee's testimony as a witness upon the trial, the garnishee is entitled to have the whole of his answer read to the jury. Godden *v.* Pierson, 42 Ala. 370.

2. **Other Evidence for Plaintiff.**—Thompson *v.* Stewart, 3 Conn. 171, 182.

The issue to be tried in such proceeding is that formed by the answer of the garnishee and the plaintiff's proceeding controverting the same, or otherwise charging the garnishee with liability. Fowler *v.* Williamson, 52 Ala. 16.

The fact of the indebtedness of the defendant to the plaintiff is not involved in the trial of such issue. Jones *v.* Pope, 6 Ala. 154.

Where the garnishee is summoned and has answered in respect to his indebtedness to a copartnership, evidence of indebtedness to an individual member of such firm is not admissible. Harvey *v.* Mix, 24 Conn. 406.

The deposition of the garnishee may be taken either before or after service upon the defendant, because the defendant is not a party to the issue between the plaintiff and the trustee. Jones *v.* Roberts, 60 N. H. 216.

The principal defendant is not a party to the suit of the plaintiff against the garnishee, in such case so as to exclude him, under the rule at common law, as a witness against the garnishee on that ground. Wallace *v.* Blanchard, 3 N. H. 395.

Where the property in respect to which it is sought to charge the garnishee consists of works of art, evidence of the value of the property is not only admissible, but necessary to support a judgment against the garnishee. Keppel *v.* Moore (Mich.), 33 N. W. Rep. 449.

Where an insurance company is summoned to answer as a garnishee, on the allegation that the company is liable to the judgment debtor upon a policy of insurance, and the company denies such liability, on a trial of this issue it is competent for the garnishing creditor to give in evidence the affidavits made in proof of loss, as tending to show a compliance with the provisions of the policy by the assured. Imperial Fire Ins. Co. *v.* Shimer, 96 Ill. 580.

**In Case of Fraud.**—If the issue be upon the validity of any instrument upon which the garnishee relies for his discharge, the plaintiff may show the course of dealing between the parties and all transactions relating to the property, or credit in controversy. Cummings *v.* Fearey, 44 Mich. 39; Henny Buggy Co. *v.* Patt, 73 Iowa 485.

Where it is sought to charge a garnishee with the value of goods alleged to have been transferred to him by defendant in fraud of creditors, *held* proper to allow defendant to testify to a conversation between him and the garnishee showing their fraudulent purpose. Risser *v.* Rathburn, 71 Iowa 113.

**Declarations of Garnishee as Evidence.**—The declarations of the garnishee either before or at the time of service of process upon him respecting transactions between him and the defendant are not admissible on behalf of the plaintiff. Maynards *v.* Cornwell, 3 Mich. 309.

Nor is he estopped by reason of such declarations from denying liability to the defendant in his answer or upon trial of an issue. Lewis *v.* Prenatt, 24 Ind. 98; Phillipsburg Bank *v.* Fulmer, 31 N. J. L. 52; Warden *v.* Baker, 54 Wis. 49.

But where the affidavit for garnishment alleged that the garnishee, while in possession of the defendant's property, had induced the plaintiff to postpone the suit by representations that he would be taken care of and his claim paid as soon as the property was sold, *held* that evidence was admissible to prove the statements of the affidavit. Keppel *v.* Moore (Mich.), 33 N. W. Rep. 499.

Neither are his declarations out of court admissible on trial of an issue between the plaintiff and an adverse

some reason they are shown to be void.[1] But the record of a judgment against the garnishee or other proceedings in justice courts is not admissible in proof of his liability in an appealant court, where the proceeding is triable *de novo*.[2]

When the plaintiff has rested his case, the garnishee may rebut the plaintiff's evidence by proof of any facts material to the issue on trial, and which are admissible under the ordinary rules of evidence.[3] He is a competent witness in his own behalf,[4] but his answer as garnishee is not evidence for him for the same reasons that exclude all admissions as evidence for the party making them.[5] The garnishee will not, however, be permitted to make proof of any defence which might have been, but was not set up in his answer.[6] Nor can he introduce evidence contradicting his answer.[7]

claimant. Phillips *v.* Thurber, 56 Ga. 393.

Declarations of an employe of one summoned as garnishee as to the indebtedness of the garnishee to the principal defendant are not admissible upon the trial of an issue upon the garnishee's answer, when made to a third person, and such employe was not the agent of the garnishee with respect to the indebtedness. Baltimore etc. R. Co. *v.* Gallahue Admr., 12 Gratt. (Va.) 655; s. c., 65 Am. Dec. 254.

**Declarations of Defendant.**—The declarations of the defendant, who has absconded, with reference to transactions between him and the garnishee, are not admissible against the latter on behalf of the plaintiff. Enos *v.* Tuttle, 3 Conn. 247.

But they are admissible on behalf of the garnishee. Dewit *v.* Baldwin, 1 Root (Conn.) 138.

A writing found among the defendant's papers after his decease, tending to prove his ownership of certain notes in controversy is admissible for that purpose. Beach *v.* Swift, 2 Conn. 269.

**Declarations of Third Persons.**—Where N, in the presence of B, deposited a cotton receipt of B with K, to hold for N as collateral security for a debt due by B to N, it is not competent on a trial of garnishment proceedings against K, sued out on an action against S, to prove by the sayings of B that the debt for which the deposit was made as collateral, was an account made by B with S. Nor was the answer of B to a summons of garnishment served upon him in the same case admissible to prove that fact. Strupper *v.* King, 49 Ga. 328.

**1. Judgment Against the Defendant, Evidence Against Garnishee.**—Schoppenhast *v.* Bollman, 21 Ind. 280, 285; Pierce *v.* Carlson, 12 Ill. 358; Empire Co. *v.* Macey, 115 Ill. 390; Strong *v.* Hollon, 39 Mich. 411.

But such judgment being a part of the record in the principal case, it is not necessary for the plaintiff either to allege or prove that fact. Henny Buggy Co. *v.* Patt, 73 Iowa 485.

**2.** Lehman *v.* Hudmon, 79 Ala. 532; Strauss *v.* Ayers, 87 Mo. 348; Cairo etc. R. Co. *v.* Kellenberg, 92 Ill. 142.

But in Michigan the garnishee's answer, made on oath and subscribed to in justice's court on the trial of the cause on appeal to the circuit court. Newell *v.* Blair, 7 Mich. 103; Wellover *v.* Soule, 30 Mich. 481.

**3. Evidence for Garnishee.**—Kelley *v.* Weymouth, 68 Me. 197.

**4.** Vaughn *v.* Sherwood, 1 Root (Conn.) 507.

The garnishee is a competent witness upon the trial of an issue between the plaintiff and one claiming the fund in his hands under an assignment from the defendant. Wilson *v.* Hanson, 20 N. H. 375.

**5.** Myatt *v.* Lockhart, 9 Ala. 95; Price *v.* Mazange, 31 Ala. 701; Keep *v.* Sanderson, 12 Wis. 352.

**6.** Whetcroft *v.* Buford, 2 Cranch (C. C.) 96; Baker *v.* Mix, 3 Cranch (C. C.) 1; Weil *v.* Posten, 77 Mo. 284.

If the garnishee relies upon a general denial of indebtedness, and issue is taken thereon, he cannot upon the trial of such issue offer evidence of an assignment by the defendant. Fowler *v.* Williamson, 52 Ala. 16.

**7.** Woodbridge *v.* Winthrop, 1 Root (Conn.) 557; Wingate *v.* Nutter, 17 N.

Whether the garnishee is to be charged or not is to be decided "according as, on a just view of all the facts, the weight of evidence and of conviction, shall fairly preponderate."[1] If the answer neither positively admits nor denies liability, it may be established when aided by other evidence.[2] But if the plaintiff seeks to show liability by proof of facts contradictory of the material statements of the answer, unless, as in Alabama, the issue is to be determined independently of that instrument, the answer is to be weighed with the other evidence produced upon the trial, and greater or less weight given to its statements, according to the rule that obtains in the particular State as to the effect that should be given to it,[3] and the degree of credibility of which the court or jury may deem it worthy.[4] If the answer contain improbable or contradictory statements, its weight as evidence will be affected accordingly, whatever effect the statute may provide shall be given to it.[5]

H. 256; Weil *v.* Posten, 77 Mo. 284.

Whether the garnishee shall be permitted on the trial to show errors or mistakes in his answer, rests with the discretion of the court. Allen *v.* Hazen, 26 Mich. 142.

While a garnishee's general denial of indebtedness to his principal may be treated as a pleading, yet, where, before issue joined, he has been subject to a long examination as to the particulars of his dealings with the principal, running through a course of years, he may, in his evidence on the trial after issue joined, explain and correct mistakes in his former answers, without amending such answers as though they were parts of pleading. Kluber *v.* Wright, 52 Wis. 303.

1. **Rule as to Proof of Garnishee's Liability on Trial of Issue.**—Porter *v.* Stevens, 9 Cush. (Mass.) 530, 535; Leland *v.* Sabin, 27 N. H. 74; Keigin *v.* Dawson, 1 Gilm. (Ill.) 86, 89.

2. Lyon *v.* Kneeland, 58 Mich. 570.

Where the answer admits the possession of a sum of money collected upon certain notes placed in the garnishee's hands by the defendant, but claim the right, under agreement with the defendant, to apply the same upon an indebtedness due him, the production of a receipt over the garnishee's own hand showing that he was to account for and pay over such money to the defendant will warrant a judgment for the plaintiff, if the garnishee offers no sufficient evidence in rebuttal or explanation. Ellison *v.* Tuttle, 26 Tex. 283.

If the answer is introduced in evidence it has the effect only of an admission of a party, and is governed by the same rules as any other admission. Myatt *v.* Lockhart, 9 Ala. 91, 95.

3. See sub-tit. "Effect of the Answer," *supra*.

4. Kelley *v.* Weymouth, 68 Me. 197; Porter *v.* Stevens, 9 Cush. (Mass.) 530; Prentiss *v.* Danaher, 20 Wis. 311, 319.

The credit and weight to which the answer of the garnishee is entitled should be left to the jury; and the court is not authorized to instruct the jury in relation thereto. Drake *v.* Buck, 35 Iowa 472, 474; Schwab *v.* Gingerick, 13 Ill. 697.

5. Under a statute of Maine, providing that the answer and statements of a trustee shall be deemed true, in deciding how far he is chargeable, until the contrary is proved, the court *held*, in Kelly *v.* Weymouth, 68 Me. 197, that "if, on the face of the disclosure, the falsehood of a part of the statements therein contained is apparent upon comparison with other portions of the disclosure and with facts alleged and proved, the court or jury should act in accordance with their convictions thus derived from such comparison. No statute, no rule of law requires court or jury to decide adversely to its own conclusions as to the facts in controversy. No statute, no rule of law, is to be found compelling any court or jury to determine that the balance of evidence is in favor of one party, when, on full consideration of the proofs adduced, it is satisfied that the balance is in favor of the other party.

**8. Proceedings as to Adverse Claimants.**[1]—Generally, the garnishee is chargeable only in respect to property and credits to which the defendant has the legal title at the time of the service of the garnishment.[2] If, before service thereof, the defendant has transferred or encumbered his interest in the subject of the attachment, the rights of the plaintiff will be affected accordingly.[3] When, therefore, the garnishee discloses in his answer that another person has or claims to have a superior interest to that of the plaintiff in the property or credit in respect to which he has been summoned as garnishee,[4] the plaintiff cannot have judgment subjecting the same to the payment of his demand until the defendant's title has been established by such further proceedings as are proper for the determination of that question.[5] The proceedings must be of such a nature as will conclude the

1. See subdivisions under "Liability of Garnishee," "In Case of Negotiable Paper," and "As Affected by Assignment," *supra*.

2. Dix *v.* Cobb, 4 Mass. 508; Payne *v.* Mayor, 4 Ala. 333; s. c., 37 Am. Dec. 744; Connoley *v.* Cheesborough, 21 Ala. 166; Sheldon *v.* Hinton, 6 Ill. App. 216, 224; Fay *v.* Sears, 111 Ill. 154; McArthur *v.* Garman, 71 Iowa 34; Cram *v.* Shackleton, 64 N. H. 44.

Jonathon and John are not in contemplation of law the same; and an amendment of proceedings in garnishment so as to substitute one for the other in the name of the principal defendant, cannot be sustained as against an intervening claimant whose rights were acquired in good faith before the amendment was made. Moore *v.* Davis, 58 Mich. 25.

A judgment against a garnishee defendant does not bind his actual creditors where his indebtedness is due another than defendant; and there is no need of a motion to vacate such a judgment, unless, perhaps, where the debt was itself a judgment, and proceedings to collect it had been stayed. First Nat. Bank *v.* Mellen, 45 Mich. 413.

3. Littlefield *v.* Smith, 17 Me. 327; Porter *v.* Bullard, 26 Me. 448; Williams *v.* Pomeroy, 27 Minn. 85; Daniels *v.* Clarke, 38 Iowa 556, 559; Manning *v.* Mathews, 70 Iowa 503; Ives *v.* Addison, 39 Kan. 172.

4. **Disclosure of Adverse Interest Suspends Judgment Until Determined.**—Unless the adverse interest claimed in the property as disclosed by the garnishee is superior to the rights of the plaintiff therein, the court will not order that such claimant be noticed to appear. Cahoon *v.* Levy, 4 Cal. 243.

Courts of law will notice and protect the interests of equitable holders of choses in action, and particularly so in garnishment proceedings which are of an equitable character. Hodson *v.* McConnell, 12 Ill. 170; Carr *v.* Waugh, 28 Ill. 418; McDonough *v.* Hanifan, 7 Ill. App. 47.

Although the assignee cannot maintain an action at law, and has not notified the garnishee. Wakefield *v.* Martin, 3 Mass. 558; Gardner *v.* Hoeg, 18 Pick. (Mass.) 168.

Where the garnishment was served upon a corporation in respect to the shares of stock of one of its stockholders, and the answer disclosed a transfer of the shares on the books of the corporation some months subsequent to the service of the garnishment, *held* that the court should have required the transferee to appear and state the nature of his claim, as he might possibly be able to show that he had some equitable right to the stock. Chesapeake etc. R. Co. *v.* Paine, 29 Gratt. (Va.) 502.

Where the answer of the garnishee shows *prima facie* that the defendant never had any interest in the property in respect to which it is sought to charge him, but that the same is the separate property of another, *held* that such disclosure did not authorize a notice to such third person, requiring him to appear and contest with the plaintiff his right to the property in question, and that if such notice be issued, it may be treated by him and by the court as a nullity. Saunders Admr. *v.* Garrett, 33 Ala. 454.

5. Connoley *v.* Cheesborough, 21 Ala. 166; Mobile etc. R. Co. *v.* Whit-

third person from asserting any claim thereafter to the property in controversy,[1] for the law will not permit the garnishee without fault on his part to be placed in such a situation that he will be compelled to pay the same debt twice.[2] The question cannot be determined by the plaintiff taking issue on the answer, and contesting such claimant's right to the property in his absence;[3] but the latter must be made a party to the proceeding in such manner as the law of the State provides.[4]

If, when duly served with notice, however, the alleged claimant fails to appear and contest with the plaintiff his right to the property or credit in controversy, his default may be entered of

ney, 39 Ala. 468; Molton *v.* Escott, 50 Ala. 77; Burnell *v.* Weld, 59 Me. 423; Kellog *v.* Waite, 99 Mass. 501, 502.

Where a garnishee answers that certain effects, which he admits are in his hands, are going to the debtor of the plaintiff or to the heirs of F, but that he is informed the debtor has no interest in them, except as the agent of the heirs of F, no judgment can be rendered upon the answer, but the heirs of F should be summoned to contest with the plaintiff the fact of the garnishee's indebtedness. Marston *v.* Carr, 16 Ala. 325.

Where the answer shows the debt in the garnishee's hands is payable to a third party, it is sufficient in itself to protect the garnishee until proceedings are taken by the plaintiff to bring such third party into court. Mansfield *v.* Stevens, 31 Minn. 40.

But the disclosure of an alleged interest in the property in another than the defendant will not warrant the discharge of the garnishee without the consent of the plaintiff, or a waiver of his right to contest with such claimant the title to the property. Eastern *v.* Lowery, 29 Ala. 454; National Commercial Bank *v.* Miller, 77 Ala. 168. But see Mansfield *v.* Evans, 31 Minn. 40.

If a savings bank, summoned as trustee in a trustee process, answers that it has funds on deposit in the defendant's name as trustee for a third person, and, in answering an interrogatory, states that it has been informed and believes that the fund belongs to the third person, the latter is not precluded from appearing and disclaiming all rights to the fund, and, upon a finding that he has no right or interest in the fund, the trustee is properly chargeable. Mortland *v.* Little, 137 Mass. 339.

Pending proceedings in determination of the title of a claimant to the debt attached, the garnishee must hold the money until such contest is decided and any disposition of it by him before that time will be at his peril. Saller *v.* Ins. Co., 62 Ala. 221.

The garnishee may properly be ordered to pay the money into court pending the determination of an issue with a claimant to the fund. Germania Savings Bank *v.* Plusser (La.), 5 So. Rep. 75.

Where, pending the trial of an issue with a third person as to his title to property in the hands of a garnishee, the claimant gained possession thereof and converted it to his own use, the plaintiff may, if the garnishee is insolvent, maintain an action on the case against the claimant. Aderholt *v.* Smith, 83 Ala. 486.

**1. Rights of Adverse Claimants, How Determined.**—Levy *v.* Miller, 38 Minn. 526; Emery *v.* Davis, 17 Me. 252, 255; Payne *v.* Mayor, 4 Ala. 744; s. c., 37 Am. Dec. 744; Jordan *v.* Harmon, 73 Me. 259, 261; Look *v.* Brackett, 74 Me. 347.

**2.** Emery *v.* Davis, 17 Me. 252, 256; Jordan *v.* Harmon, 74 Me. 259, 261; Iglehart *v.* Moore, 21 Tex. 501; Daniels *v.* Clark, 38 Iowa 556, 559.

**3.** Burnell *v.* Weld, 59 Me. 423, 425; Sheppard *v.* Buford, 7 Ala. 90; Johnson *v.* Thayer, 17 Me. 401.

In a controversy between the plaintiffs in trustee process and a claimant under an assignment from the defendant, merely as to the validity of the assignment, an agreed statement of facts as to the circumstances of the assignment, including the character of the claim assigned, need not be signed by the trustee. Segee *v.* Downes, 143 Mass. 240.

**4. Proceedings to Make Adverse Claimant a Party.**—Andrews *v.* Union Bank, 21 Ala. 576; Molton *v.* Escott, 50 Ala. 77; Legro *v.* Staples, 16 Me. 252; Crone *v.* Braun, 23 Minn. 239.

It is incumbent upon the attaching creditor in such case to take the necessary steps to bring the claimant into court, and if he fails to do so, and the claimant is not made a party, the garnishee should be discharged. Boyd *v.* Cobbs, 50 Ala. 82; Look *v.* Brackett, 74 Me. 347.

If, instead of causing such notice to issue,he causes claimant to be garnished, such action will be regarded as an abandonment or discontinuance of the proceeding against the first garnishee, which will entitle him to a discharge. Edwards *v.* Levisohn, 80 Ala. 447.

The plaintiff may have an order making a claimant a party at any time before the termination of the suit, and such order may be made at the term at which judgment is recovered against the defendant, although subsequent to the term at which the answer of the garnishee was filed. Camp *v.* Hatter, 11 Ala. 151.

But when the case has been argued and presented to the court for a final decision upon the disclosure alone, it is too late for a motion to summon in the assignee. Johnson *v.* Thayer, 17 Me. 401; Jordan *v.* Harmon, 73 Me. 259.

In Alabama, it is the duty of the court to cause notice to issue to such claimant. Eastern *v.* Lowery, 29 Ala. 454.

If the claimant be a non-resident, so that personal service cannot be made upon him, service may be made by publication. Sheppard *v.* Buford, 7 Ala. 90. But where the court made an order directing that an alleged claimant "should be made a party, and that notice should be served on him," without prescribing how it should be served; it will be construed as meaning personal service within the State; and service without the State will be insufficient to confer jurisdiction over an absent and non resident claimant or assignee of the debt garnished. Levy *v.* Miller, 38 Minn. 526.

**When Claimant May Intervene.**—Unless authorized by statute, a claimant to the property in the hands of the garnishee cannot intervene in the garnishment proceeding. Pennsylvania Steel Co. *v.* New Jersey Southern R.Co., 4 Houst. (Del.) 572; Mansfield *v.* Stevens, 31 Minn. 40; Wimer *v.* Pritchart, 16 Mo. 252. But see Sims *v.* Goettle, 82 N. Car. 269; Blair *v.* Puryear, 87 N. Car. 101.

A claimant has no standing in court unless he has been admitted by order of the court. The commissioner is an officer of the court; and his power is limited to the determination of the rights of such persons as were parties at the time of his appointment. Rowell *v.* Felker, 54 Vt. 526.

But where a claimant appears, and is treated by the court and parties as a party to the end of the proceedings, it is then too late to object that no formal order making him a party was entered. Williams *v.* Pomeroy, 27 Minn. 85.

In some of the States, any party who can satisfy the court that he has an interest in the property in controversy may be allowed to intervene and contest with the plaintiff the title of the same. Webster *v.* Farnum, 60 N. H. 288; Kean *v.* Doerner, 62 Md. 475.

In Iowa, under a statute of that State, when the garnishment is on attachment, any person other than the defendant may, before the appropriation of the debt or property to the payment of plaintiff's demand, present his petition, under oath, to the court, disputing the validity of the attachment, and stating a a claim to, or interest in or lien upon the same, and setting forth the facts upon which such claim or lien is founded, and therefore the petitioner's claim shall be investigated in a summary manner; but the court may empanel a jury to enquire into the facts. Iowa Code 1873, § 3016. Under such provisions, *held*, that an assignee of the debt due from the garnishee might intervene even after judgment against the garnishee in justice's court, from which an appeal had been taken by the defendant to the circuit court. Daniels *v.* Clarke, 38 Iowa 556. To the same effect, see Wolfe *v.* Vette, 17 Mo. App. 36. Such a statute, however, will not authorize a claimant interpleading when the garnishee has been summoned on execution. Wimer *v.* Pritchart, 16 Mo. 252. But in Edwards *v.* Cosgro, 71 Iowa 296, *held*, that under the joint operation of the above statute, and section 3051, Iowa Code, 1873, providing that garnishments on execution shall be effected in the same manner, and that the proceedings shall be the same as in garnishment on attachment, third parties, who claim the property or money in the hands of one summoned by garnishment on execution, may intervene at any time before the money is paid over to the plaintiff; and such right is not affected by the fact that the amount garnished may have been credited by the court upon the judgment.

record, and the question of the garnishee's liability determined as though no claim under the transfer disclosed by the garnishee was made.[1]

But if the claimant appears when summoned, he should be required to make proper allegation of his claims in writing, agreeably to the rules of pleading, so that issue may be joined thereon, and a trial had.[2] The only proper issue in such case is such third person's right to the debt or property which the plaintiff seeks to reach in the hands of the garnishee.[3] A claimant

In Massachusetts, it was formerly *held* that if an assignee or transferee would have his rights protected in the property attached, he must furnish evidence of his title to the garnishee, and upon the latter was imposed the duty of disclosing such interest, and the evidence thereof thus received in his answer. Foster *v.* Sinkler, 4 Mass. 450; Wood *v.* Partridge, 11 Mass. 488; Hawes *v.* Langton, 8 Pick. (Mass.) 67.

But now it is provided by statute that one who claims the effects or credits in the hands of the garnishee under an assignment for the defendant may appear and maintain his right thereto, although the garnishee does disclose the assignment in his answer. Dennis *v.* Twitchell, 10 Met. (Mass.) 180.

And it is no objection to the admission of a claimant as a party to the proceeding that his interest in the property is merely equitable. Marvel *v.* Babbitt, 143 Mass. 226.

The claimant may appear and assert his right to the property as well where the garnishee admits his liability by default as by answer, and it is no objection that he appears for the first time on *scire facias*. Stone *v.* Russell, 11 Gray (Mass.) 226; Boylen *v.* Young, 6 Allen (Mass.) 582.

Where the answer of the garnishee showed that there were two endorsees of the note in respect to which he has been garnished, both should be summoned to contest the plaintiff's right, before judgment can be rendered against the garnishee. Evans *v.* Norman, 14 Ala. 662.

It was error to make a garnishee a party to the issue, and subject him to the expense and costs, when he made no claim to the fund and was in no default. Fish *v.* Keeney, 91 Pa. St. 138.

**1. Effect of Claimant's Default.**—Evans *v.* Norman, 14 Ala. 662; Saller *v.* Insurance Co. etc., 62 Ala. 221; Emery *v.* Davis, 17 Me. 252; Randall *v.* Way, 111 Mass. 506.

Where a transferee is duly notified of the garnishment proceedings, and fails to appear and assert his rights, he will be estopped thereafter from setting up any claim against the garnishee. Smoot *v.* Ketchum, 23 Ala. 659.

But the default of such claimant will not warrant judgment against the garnishee, unless it admits an indebtedness to the defendant. Mobile etc. R. Co., 39 Ala. 468.

**2. Pleadings, and Issue on Intervenors' Claims.**—Scott *v.* Stattsworth, 12 Ala. 25; Reynolds *v.* Collins, 78 Ala. 94, 97.

Where no issue of fact is taken upon an interpleader in a proceeding by garnishment, but a demurrer is filed to the same, the facts alleged in the interpleader will be deemed admitted, and no proof of them is required; and the rendition of judgment against the garnishee for the sum claimed is virtually sustaining the demurrer. Meadowcroft *v.* Agnew, 89 Ill. 470; Alamo Ice Co. *v.* Yancy, 66 Tex. 187.

An insufficient complaint of a claimant who has been allowed to intervene, may be cured by the answer of the plaintiff. McMahon *v.* Merrick, 33 Minn. 262.

**3.** Boylen *v.* Young, 6 Allen (Mass.) 582; Blackman *v.* Smith, 8 Ala. 203; Peck *v.* Stratton, 118 Mass. 406; Moors *v.* Goddard, 147 Mass. 287; Dalton *v.* Dalton, 48 Me. 42.

A claimant of funds in the hands of a trustee, permitted by an interlocutory order of court to appear for the purpose of contesting the plaintiff's right to the funds, will not be allowed to defeat the plaintiff's prior right if his own title be shown to be invalid. Davis *v.* Fogg, 58 N. H. 159.

An intervenor cannot show for the purpose of defeating the garnishment that there were no goods, effects or

will not be permitted to take advantage of errors in the proceeding against either the defendant or the garnishee,[1] but must rely upon the strength of his own claim; and this he has the burden to maintain by competent evidence.[2] If he fails in this,

credits in the hands of the garnishee at the date of service of process. Clark *v.* Gardner, 123 Mass. 358.

1. Blackman *v.* Smith, 8 Ala. 203; Germania Savings Bank *v.*Penser (La.), 5 So. Rep. 75.

2. **Evidence of Claimant's Title, Burden of Proof.**—Clark *v.* Few, 62 Ala. 243; Reynolds *v.* Collins, 78 Ala. 98; Donnelly *v.* O'Connor, 22 Minn. 309; North Star Boot & Shoe Co. *v.* Ladd, 32 Minn. 381; Haynes *v.* Thompson, 80 Me. 125; Poole *v.* Carhart, 71 Iowa 37.

**As to Priority of Claim.**—The transferee of a debt, when summoned as a party to this proceeding, stands precisely in the condition of a purchaser from the debtor in attachment, and in consequence of this relation is compelled to show that his title to the attached debt accrued before the lien of the attachment was rendered effectual by the summons of the garnishee. And a mere production of a note made by the garnishee with an assignment endorsed on it by the defendant is not sufficient to show that the note was assigned prior to the service of the garnishment. Camp *v.* Hatter, 11 Ala. 151, 155.

Where a bank received from C certain notes and collateral security for a loan, and collected the notes and paid the loan out of the proceeds, and had money left, and the bank was garnished as the debtor of C,and there was no proof by an intervenor claiming the money under an assignment to him, *held* that it was an error to discharge the garnishee on motion of the intervenor. National Bank of Galena *v.* Chase, 71 Iowa 120.

But in Horn *v.* Booth, 22 Ill. App. 385, *held* that the burden is on the plaintiff to prove that an assignment was made subsequent to the garnishment. And see Bassett *v.* Garthwaite, 22 Tex. 230.

An intervenor will be entitled to judgment if he makes a *prima facie* case, and the plaintiff fails to rebut his evidence by competent testimony. Easley *v.* Gibbs, 29 Iowa 129, 131.

An assignment of a chose in action which is not complete at the time of service of garnishment upon the debtor will not give title to the assignee as against the garnishing creditor. Miller *v.* O'Bannon, 4 Lea (Tenn.) 403; Robertson *v.* Baker, 10 Lea (Tenn.) 300.

Where the maker of a negotiable promissory note is summoned as a garnishee of the payee or endorser, the plaintiff in the attachment is not entitled to a judgment of condemnation, if it appears that the note, either before or after the service of the attachment, has been transferred or endorsed over to a third person before its maturity for value, and without actual notice to him of the attachment. Cruett, Garnishee, *v.* Jenkins, 53 Md. 217.

**As to Validity of Title.**—The claimant must not only show an assignment of the debt to him from the defendant, but must allege and prove the validity of the transfer. Scott *v.* Stottsworth, 12 Ala. 25.

If the assignee appears upon notice and claims the funds and is examined as a witness, it is his duty to state fully and clearly the circumstances connected with the assignment, and the consideration for which it was made, and if he refuses to do so, and gives only vague, indefinite and sweeping answers, his claim may be justly viewed with suspicion and declared invalid. Thompson *v.* Reed, 77 Me. 425.

In a contest between an attaching creditor and a trustee in an assignment for the benefit of creditors, there being no proof of actual fraud in the execution of the assignment, and the debt of the attaching creditor not then being in existence, the recitals of the assignment, as to the existence of debts, are sufficient to sustain it. But, if the debt of the attaching creditor was antecedent and existing, the existence of debts must be shown by the assignee by evidence other than the recitals of the assignment, and the existence of other debts than that of the attaching creditor must be proved. Reynolds *v.* Collins, 78 Ala. 94.

But where an assignment bore a date prior to the garnishment process, purporting to have been made upon a valuable consideration, was properly executed, and was admitted in evidence without objection, *held* that fraud

and the garnishee is accordingly charged, he will be concluded by the judgment rendered in any subsequent suit between him and the garnishee.[1] But if the issue is determined in favor of the claimant, judgment should be rendered discharging the garnishee, and the claimant left to pursue his remedy against him the same as though no garnishment proceeding had been instituted.[2]

Not only is the claimant or intervenor such a party as will entitle him to an appeal, but the proceeding upon such issue is so far independent of the main action or of the garnishment proceeding, that an appeal may be taken from the judgment therein while the garnishment proceedings are still pending.[3] The recovery of costs accruing on the trial of such issue will, as a rule, be awarded the successful party.[4]

**XI. THE JUDGMENT—1. Garnishee Not Liable to Judgment in Some States.**—In the States of Arkansas, Kentucky, Kansas, Nebraska, New York, Ohio, and perhaps others, no judgment can be rendered against the garnishee as such, but the garnishment creates a lien in favor of plaintiff—operates as an assignment of the fund or property held by the garnishee, upon which, if the plain-

would not be presumed and that the burden of impeaching the good faith or validity of the assignment, was upon the party asserting its invalidity. Sheldon *v.* Hinton, 6 Ill. App. 216; Horn *v.* Booth, 22 Ill. App. 385.

Evidence that the claimant knew of the plaintiff's claim, and of his effort to reach the funds in the hands of the garnishee, is not admissible upon the question of the *bona fides* of the assignment to the intervenor. Sullivan *v.* Langley, 124 Mass. 267.

A claimant of the funds in the hands of the garnishee may show that the principal defendant acted in the matter merely as the claimant's agent. Sheehan *v.* Marston, 132 Mass. 161.

**Answer as Evidence on Trial with Claimant.**—The answer of the garnishee is not evidence for a claimant upon the trial of an issue with the plaintiff. Scott *v.* Stottsworth, 12 Ala. 25. The claimant cannot complain, however, that the plaintiff was allowed to read the evidence to the jury. Reynolds *v.* Collins, 78 Ala. 94; Morrell *v.* Rogers, 1 Me. 328.

In Massachusetts, the answer is to be taken as true, although the adverse claimant has appeared, even as to facts stated upon opinion aud belief. First Nat. Bank *v.* Bratt, 126 Mass. 535.

But in Easley *v.* Gibbs, 29 Iowa 129, *held* that the answer of the garnishee is not admissible in evidence in behalf of the plaintiff as against an intervenor.

In Illinois, the intervenor is confined to proof of such facts as are not stated nor denied by the garnishee. Meadowcroft *v.* Agnew, 89 Ill. 469.

After the disclosure of the garnishee a motion to discharge the garnishee was denied. *Held*, that this order did not conclude the claimants, who were subsequently allowed to intervene as such, from invoking the same remedy. McMahon *v.* Merrick, 33 Minn. 262.

Notwithstanding the burden as to such issue is on the intervenor, the plaintiff is entitled to open and close to the jury. Grady's Admr. *v.* Hammond, 21 Ala. 427.

**1. Effect of Judgment.**—Stevens *v.* Dillman, 86 Ill. 233.

When the garnishee has disclosed an assignment to a third person, and the assignee is summoned in and made a party to the suit, the very question to be tried and determined is, whether there is any valid contract upon which the assignee can claim. And if his title is adjudged not to be good, and the garnishee is adjudged to pay to the creditor of the assignor, he will be fully protected by such judgment, because he may offer it in evidence against the assignee, it being between the same parties. Legro *v.* Staples, 16 Me. 252; Emery *v.* Davis, 17 Me. 252, 255. And see Fisk *v.* Weston, 5 Me. 410.

2. Carpenter *v.* McClure, 37 Vt. 127.

3. See subdivision "Appeals."

4. See subdivision "Costs."

tiff desires judgment, he is entitled to a general right of action in another suit.[1] In the garnishment proceeding under this system, the garnishee is a witness, and on his default is liable to attachment of his person and contempt.[2] Where the garnishee is found indebted, he may be ordered to pay or turn over to the court the debt or property of the defendant's found to be due; but such an order when made in a proceeding before judgment in the principal suit has not the effect of a judgment, and cannot be enforced by execution.[3] The garnishee may be compelled to obey the order, however, in a clear case under the penalty for failure to obey.[4]

**2. Personal Judgment Against the Garnishee.**—Garnishment is a proceeding *quasi in rem*, and a personal judgment may be avoided by the garnishee in most States under provisions of the statute by his paying the amount due or handing over the property of the defendant to the court.[5] The garnishee should not be made a purchaser of the goods of the defendant in his hands. If a personal debt of the defendant's is garnished, the judgment therefor against a garnishee cannot be distinguished in its effects from any other judgment for a like amount; but the judgment should always, as far as possible, guard the garnishee from personal liability.[6]

1. Bank *v.* Pugsley, 47 N. Y. 368; Hollingsworth *v.* Fitzgerald, 16 Neb. 492; Board of Education *v.* Scoville, 13 Kan. 17; St. Louis etc. R. Co. *v.* Richter, 48 Ark. 349; Giles *v.* Hicks, 45 Ark. 271; Smith *v.* Gown, 3 Met. (Ky.) 171; Griswold *v.* Popham, 1 Duv. (Ky.) 170; Wilcher *v.* Shea, 13 Bush (Ky.) 128; Secor *v.* Witter, 39 Ohio St. 218.

2. See "Default."

3. Board of Education *v.* Scoville, 13 Kan. 17; Mull *v.* Jones, 33 Kan. 112; Atlantic etc. R. Co. *v.* Hopkins, 4 Cent. L. J. 173, note; Rice *v.* Whitney, 12 Ohio St. 358; Edgarton *v.* Hanna, 11 Ohio St. 323; Welch *v.* Pittsburgh, 11 Ohio St. 569; Bank of Rochester *v.* Bank of Sandusky, 6 Ohio St. 254; Rodman *v.* Henry, 17 N. Y. 482; Bank *v.* Pugsley, 47 N. Y. 368; Parker *v.* Paige, 38 Cal. 522; Arthur *v.* Hale, 6 Kan. 161.

When such order is made after judgment against the defendant, it is enforceable by execution. Clark *v.* Foxworth, 14 Neb. 241; Burlington etc. Co. *v.* Chicago Lumber Co., 18 Neb. 303.

4. Bank *v.* Pugsley, 47 N. Y. 368.

Bank *v.* Pugsley, 47 N. Y. 368, also holds that the garnishee can only be held for failure to turn over specific personal property or money upon order of the court, and cannot be punished for failure to pay a debt, otherwise imprisonment for debt would be revived. So also in Hageman *v.* Tong Lee, 12 Nev. 331, where it is *held* that plaintiff's right must be clear and indisputable.

5. Bickle *v.* Chriseman's Admr., 76 Va. 678; in the Matter of Dawson, 110 N. Y. 114.

Where the sheriff absconds the loss falls on plaintiff. In Matter of Dawson, 110 N. Y. 114.

Where the garnishee elects not to turn over the property or money to the court, he subjects himself to liability to personal judgment, which is not discharged by his turning over the property of the defendant which is less in amount than the judgment against him. Burlington etc. R. Co. *v.* Hall, 37 Iowa 620.

The garnishee has an option to turn over the property or suffer personal judgment for the same, and if he turns over the property of the defendant under conditions, they must be recognized and carried out by the court. Buckhan *v.* Wolf, 58 Iowa 601.

A discharge of the garnishee because he has no interest in the property does not release the property. Simmons *v.* Woods, 144 Mass. 385.

6. When payable in property other

In other States, before a garnishee can be personally bound, he must be charged upon a writ of *scire facias*, based upon the garnishment judgment and issued from the court in which the garnishment proceedings were had. Where this method prevails, the garnishee cannot be bound without valid service of the garnishment process, a judgment charging the garnishee entered, and a valid service of the *scire facias*.[1] If the whole case has been determined upon issues and evidence prior to the first judgment, the proceedings will not be again overhauled on *scire facias*.[2] The first judgment, however, need only charge the garnishee as debtor, and the determination of the amount due left to the hearing on *scire facias*.[3]

**3. Form and Contents of the Judgment.**—Judgment against the garnishee should guard all his rights and leave him in no more unfavorable condition towards the plaintiff than he occupies to the defendant.[4]

The judgment may be entered up at the same time or after judgment has been entered against the defendant, and may be either a part of the judgment in the main case or distinct. In Massachusetts, it is required to be a part of the judgment against

than money, the judgment should provide that in case of failure to turn over the property or money, the garnishee shall be liable to general execution. Ransom *v.* Stanbury, 22 Iowa 334. See also Lorenz, Admrs., *v.* King, 38 Pa. St. 93.

Not proper to render and unconditional judgment against the garnishee, and make him purchaser of the property without his consent. Hawthorn *v.* Unthank, 52 Iowa 507.

Where the garnishee refuses to furnish certificate designating the amount and description of the property, personal judgment may be rendered against him for their value, which must be satisfied as far as possible out of the property of the defendant in his hands. Carter *v.* Kohland, 13 Oreg. 615.

But the judgment must in general be for a specific thing. Sherman *v.* Cohen, 2 Spear (S. Car.) 529; Talbot *v.* Tarleton, 5 J. J. Marshall (Ky.) 641.

A personal judgment may be rendered against a garnishee who has received by fraudulent conveyance the property of a judgment debtor in excess of the debt of the plaintiff. Sutton *v.* Hasey, 58 Wis. 556.

Must issue from court in which garnishment proceedings had. Gray *v.* Thrasher, 104 Mass. 375; Osgood *v.* Thurston, 23 Pick. (Mass.) 110; Gibson *v.* Davis, 22 Vt. 374.

1. Goode *v.* Holcombe, 37 Ala. 94; Lowry *v.* Clements, 9 Ala. 422; M. & E. R. Co. *v.* Hartwell, 43 Ala. 508; William *v.* Van Meter, 19 Ill. 293; Mich. Cent. R. Co. *v.* Keohane, 31 Ill. 144; Iron Cliffs Co. *v.* Lahair, 52 Mich. 394.

2. Jarvis *v.* Mitchell, 99 Mass. 530.

3. Jarvis *v.* Mitchell, 99 Mass. 530.

The garnishee can ordinarily make any defence on the return of the writ that he could have made to the original summons. Hogshead *v.* Carruth, 5 Yeager (Tenn.) 227; Brown *v.* Tweed, 84 Mass. 566.

4. **Provisions of Judgment Required by the Nature of the Debt.**—The judgment must not exceed judgment against the defendant. Timmons *v.* Johnson, 15 Iowa 23.

Judgment for such excess is erroneous, but not void. Bigalow *v.* Barre, 30 Mich. 1.

Should show what the indebtedness is for. Speak *v.* Kinsey, 17 Tex. 301.

Any lien of the garnishee should be protected in the judgment by provision providing for the payment of his lien out of the proceeds of the sale of the property. Hawthorne *v.* Unthank, 52 Iowa 507.

If the debt depends on a contingency the judgment cannot be made final and binding till the contingency happens. Battell *v.* Lowry, 46 Iowa 49.

Judgment against a garnishee on promissory notes should require that

the defendant.[1] In Illinois, judgment must be entered in the name of the defendant against the garnishee for the use of the judgment creditors of the defendant.[2]

Where the garnishment judgment is rendered separately, it must be complete in itself without reference to anything else, and for a thing certain.[3] It must show a valid judgment against the defendant,[4] and compliance with essential statutory requirements.[5] These things must be complied with and shown by the record, otherwise their correctness will not be presumed. The answer of the garnishee should also be made part of the judgment by being incorporated or by sufficient description as to its purport.

**4. Void and Voidable Proceedings.**—If the garnishment proceedings are void for want of jurisdiction of either the defendant or the garnishee, no valid judgment can be rendered, and the garnishee will not be shielded as against the defendant by payment on any such proceeding. If the main action upon which the garnishment is based is void, the garnishment is also void. The garnishee can take advantage of any defect in the main action, which is jurisdictional; but if the court has the power to render judgment against both himself and the defendant, no matter how erroneous the exercise of that power may be, the judgment will at once bind and protect the garnishee. Likewise, the garnishment judgment may be binding on the defendant, even where the

the plaintiff either indemnify the garnishee or surrender the notes. Seals *v.* Wright, 37 Iowa 171; Shuler *v.* Bryson, 65 N. Car. 201; Myers *v.* Beeman, 9 Ired. (N. Car.) 116.

Decree should provide for the discharge of a garnishee for amount paid in favor of attaching creditor. Atcheson *v.* Smith, 3 B. Mon. 502, 505; Jones *v.* Tracy, 75 Pa. St. 417.

1. Jarvis *v.* Mitchell, 99 Man. 530.

2. National Bank of America *v.* Indiana Banking Co., 114 Ill. 483; Webster *v.* Steele, 75 Ill. 544.

3. Cunningham *v.* Hogan, 136 Mass. 407; Lee *v.* Ryall, 68 Ala. 354; Emanuel *v.* Smith, 38 Ga. 602; Arnold *v.* Gullatt, 68 Ga. 810; Gibbon *v.* Bryan, 3 Bradw. (Ill.) 298; Lowry *v.* Clements, 9 Ala. 422; Case *v.* Moore, 21 Ala. 758; Drake Attach. § 712.

4. Johnson *v.* Johnson, 26 Ind. 441; Smith *v.* Cahoon, 37 Me. 281; Suydam *v.* Huggeford, 23 Pick. (Mass.) 465; Washburn *v.* New York etc. Co., 41 Vt. 50; Miller *v.* Williams, 30 Vt. 386.

Must not precede judgment against the defendant. Bryan *v.* Dean, 63 Ga. 317; Case *v.* Moore, 21 Ala. 758; Whorley *v.* Memphis etc. R. Co., 72 Ala. 20.

5. **As to Service.**—Failure to show service, either personal or by publication, is fatal to the judgment. Newman *v.* Manning, 89 Ind. 422; Cariker *v.* Anderson, 27 Ill. 358; Laidlaw *v.* Morrow, 44 Mich. 547; Edwards *v.* Levinshon, 80 Ala. 447; Johnson *v.* Johnson, 26 Ind. 441; Toledo etc. R. Co. *v.* McNulty, 34 Ind. 531.

The only legitimate evidence of the attachment is to be found in the return of the writ. Connor *v.* Pope, 18 Mo. App. 86.

Where the record shows some notice erroneously determined by the court to be sufficient, that determination does not render the judgment void. Openheim *v.* Pittsburgh etc. R. Co. 85 Ind. 471.

Where the record shows notice by publication, proof of publication presumed. Pierce *v.* Carleton, 12 Ill. 358.

Where the record shows the defendant to have been personally before the court the garnishee is neither required nor in condition to examine into jurisdictional questions touching the defendant. But where the defendant is not personally present the garnishee is required to examine and know that the court has jurisdiction. Ohio etc. R. Co. *v.* Alvey, 43 Ind. 180.

garnishee might have defeated the judgment by taking advantage of errors therein.[1]

**5. Judgment Upon Default.**—When the garnishee fails to respond to the summons or at any other stage of the proceedings, he is

Action brought in wrong county void. Roberts *v.* Roberts, 1 Marsh. (Ky.) 247.

1. The garnishee may attach the proceedings in the main case if void, and judgment rendered upon void proceedings against defendant will not protect him nor bind garnishee. Empire Car Roofing Co. *v.* Macey, 115 Ill. 390; Pierce *v.* Carleton, 12 Ill. 358; note to 46 Am. Dec. 344; O'Rourkee *v.* Chicago etc. R. Co., 55 Iowa 332.

Where void for want of jurisdiction in the principal action the plea of payment of no avail in another garnishment proceeding by another plaintiff. Laidlaw *v.* Morrow, 44 Mich. 547.

The garnishee cannot take advantage of mere errors in proceedings against the defendant. See "Appeal"; Security Association *v.* Weems, 69 Ala. 584; s. c., 46 Am. Dec. 344, note; Cowan *v.* Lowry, 7 Lea (Tenn.) 620; Warner *v.* Conant, 24 Vt. 357; s. c., 58 Am. Dec. 178; Oppenheim *v.* Pittsburgh etc. R. Co., 85 Ind. 471; Fisher *v.* Williams, 56 Vt. 586; Russell *v.* Worts, 6 Vroom (N. J.) 316.

An order upon the garnishee to pay the debt and turn over property to the court if made in proceedings subsequent to judgment cannot be collaterally attached. Wilson *v.* Burney, 8 Neb. 39.

But the garnishee may take advantage of errors in the garnishment proceedings. See "Appeal."

Recitals of the principal judgment may be attacked because of fraud. Pierce *v.* Winter Iron Works, 32 Ala. 68.

But as a general rule in most of the states recitals of jurisdictional facts are conclusive and cannot be collaterally impeached. Gunn *v.* Howell, 27 Ala. 663; s. c., 62 Am. Dec. 712.

Proceedings had on return of the writ cannot be questioned on *scire facias*, which is a collateral proceeding. Kelly *v.* Tibbals, 53 Pa. St. 408.

**When Proceedings Void.**—If parties in the main case are too indefinite, the judgment is void. Pierce *v.* Carleton, 12 Ill. 358; Varnell *v.* Spur, 55 Ga. 132; Iron Cliffs Co. *v.* Lahair, 52 Mich. 394.

Judgment upon evidence insufficient to charge the garnishee is merely erroneous. Rotzern *v.* Cox, 22 Tex. 62; Fort, Admr. *v.* Strohecker, 58 Ga. 262.

Judgment against the garnishee before the time fixed by the latter to appear and answer is void. Scott *v.* Patrick, 44 Ga. 188; Towner *v.* George, 53 Ill. 168.

Where the clerk forgets or omits to sign the summons, judgment against the garnishee is void. Sheppard *v.* Powers, 50 Ala. 377.

Where judgment is wrongly docketed the defect does not make it void. Drake *v.* Leighton, 33 N. W. Rep. (Wis.) 81; Cohn *v.* Tillman, 66 Tex. 98.

Slight excess in the amount charged against the garnishee over the amount of the judgment is merely erroneous. Bigelow *v.* Barre, 30 Mich. 1.

Judgment rendered against the garnishee after the death of plaintiff is only voidable. Coleman *v.* McAnulty, 16 Mo. 173; 57 Am. Dec. 229.

An erroneous judgment against the garnishee is binding upon the defendant even when the garnishee might have prevented the judgment because of errors contained therein. Leonard *v.* New Bedford etc. Bank, 116 Mass. 210; Howard *v.* McLaughlin, 98 Pa. St. 440.

The garnishee may on his part waive declaration, second process and proofs. Bigelow *v.* Barre, 30 Mich. 1.

But see Elder *v.* Hasche, 67 Wis. 654, and cases cited.

Where the service is void and garnishee or defendant afterwards appear, judgment upon waiver of defective service of the garnishment process, implied by garnishee's coming in and answering to the summons, binds and protects him. Stevens *v.* Dillman, 86 Ill. 233; Memphis etc. R. Co. *v.* Whorley, 74 Ala. 264.

But payment of a judgment by default rendered upon a defective service upon the garnishee will not protect him in its payment. Simpson *v.* Malden, 109 Mass. 313; Downs *v.* Fuller. 2 Met. (Mass.) 135; Leonard *v.* Bryant, 11 Met. (Mass.) 370.

In Wisconsin, the rule is that the garnishee cannot by his appearance correct the defect in service of garnish-

in default.[1] In those States where the garnishment process creates no more than a lien, and where no judgment can be taken against the garnishee, his default will only charge him as a witness, and not as a party to an action;[2] his appearance is compelled by attachment of his person, and his default renders him liable to contempt.[3] But more usually garnishment is regarded as an action in the general sense, and the garnishee as a party liable to the full extent of the amount claimed of him not in excess of the amount for which the defendant is sued.[4] In some States the default of the garnishee is not construed to admit or confess an indebtedness, but the amount claimed must be proved;[5] and if the garnishee owes nothing, he has a right to presume that in his absence nothing will be proved against him.[6]

Upon the default of a garnishee, a conditional judgment may

ment. Elder *v.* Hasche, 67 Wis. 654, and cases cited.

An appearance by the defendant afterwards will not make valid a process of garnishment void for want of service. Iron Cliffs Co. *v.* Lahair, 52 Mich. 394. This case also holds that replevin lies for property seized under void garnishment proceedings.

1. See 46 Am. Dec. 345, note; Drake Attach., § 658, e.

Failure to answer statutory questions will constitute a default. Freeman *v.* Miller, 51 Tex. 443.

Where garnishee appears and answers, but is defaulted for failure to answer one of the statutory questions, defects in service are immaterial. Freeman *v.* Miller, 51 Tex. 443.

An evasive answer may be treated as a nullity. See "ANSWER."

A failure to answer puts the garnishee in default, same as refusal to appear. Scamahorn *v.* Scott, 42 Iowa 529. In such case default may be claimed at any subsequent term. Langford *v.* Ottumwa Water Power Co., 53 Iowa 415; Robinson *v.* Starr, 3 Stew. (Ala.) 90.

Judgment by default may be rendered when the case is reached and garnishee does not appear. Wall *v.* Shippard, 30 Ga. 923; Lehman *v.* Hudmon (Ala.), 4 So. Rep. 741; Gibbons *v.* Cherry, 53 Md. 144.

But the appearance of the defendant or an adverse claimant for the fund in the hands of the garnishee will prevent default against the garnishee. Gifford *v.* Rockett, 119 Mass. 71.

In Jones *v.* Tracy, 75 Pa. St. 417, it is *held* that the defendant may come in and claim his exemption, but the defendant cannot prevent the default against the garnishee for all in excess of the exempted sum.

Appearance and answer of a qualified agent of foreign corporation will prevent any default against the corporation, even where agent has no knowledge of the debt sought. Lorman *v.* Phœnix Ins. Co., 33 Mich. 65.

Where plaintiff undertakes to compel the garnishee to answer no default can be claimed afterwards. Thompson *v.* Silvers, 59 Iowa 670.

If a garnishee refuses to answer before the term as the statute requires, but makes appearance at the term, he cannot be put in default. Niel *v.* Perkins, 53 N. H. 429.

An answer made by the garnishee at any time before final judgment against defendant will prevent default. Arnold *v.* Gullatt, 68 Ga. 810.

2. Giles *v.* Hicks, 45 Ark. 271. Smith *v.* Gower, 3 Metc. (Ky.) 178.

3. Smith *v.* Gower, 3 Metc. (Ky.) 178; Sherman *v.* Cohen, 2 Strobh. (S. Car.) 553; Hibernia Savings & Loan Society *v.* Superior Court, 56 Cal. 265. See also Brown *v.* Moore, 61 Cal. 432.

4. McConnell Trustee Process, § 467; Code, Iowa, § 2984; Post *v.* Bowen, 35 Md. 232; s. c., 46 Am. Dec. 345, note; Lyman *v.* Beam, 6 Whart. (Pa.) 181; Jones *v.* Tracy, 75 Pa. St. 417; Whiteside *v.* Tunstall, 17 Ill. 258; Sarlouis *v.* Freeman's Ins. Co., 45 Md. 241; Wilson *v.* Phillips, 5 Ark. 184.

5. Lewis *v.* Faul, 29 Ark. 470; Wingfield *v.* McLane (Ark.), 3 S. W. Rep. 439; St. Louis etc. R. Co. *v.* Richter (Ark.), 3 S. W. Rep. 57; Talbott *v.* Tarleton, 5 J. J. Marsh. (Ky.) 641.

6. Lewis *v.* Faul, 29 Ark. 470.

be rendered; but before final judgment and execution can issue, there must be a service of *scire facias* or some other process as the statute may provide, summoning for a second time the garnishee to appear and show cause why judgment should not be pronounced upon him.[1]

Whatever presumptions attach to the amount the garnishee is to be charged with upon his default, no presumption of regularity attaches to the process against him; and in order to have judgment by default, all the steps prescribed by law as preliminary to a final judgment must be shown to have been strictly complied with by affirmative proof.[2]

The court may, in the exercise of its legal discretion, and on sufficient showing, set aside judgment by default, but the garnishee must also, in addition to excusing his default, show that he has a meritorious defence.[3]

**1.** Conditional judgment only can be rendered upon first default, and second summons must be had. Hora *v.* Jackel, 59 Ill. 139.

In Iowa the second summons requiring the garnishee to appear and show cause why final judgment should not be pronounced upon his default, is not a *scire facias*. Duncan *v.* Sangano Fire Ins. Co., 35 Iowa 20. And hence need not be served ten days before the term, but the required ten days' notice may be served during the term. Langford *v.* Ottumwa Water Power Co., 53 Iowa 415.

**2.** Where no notice of time and place when and where garnishee's answer was to be taken there is ground for vacating the judgment. Thomas *v.* Hoffman, 62 Iowa 125. And appearance in response to second summons to show cause, etc., will not cure such defect of jurisdiction in first instance. Padden *v.* Moore, 58 Iowa 703.

Judgment by default void if taken before time has elapsed to answer. Randolph *v.* Peck, 4 Ala. 389.

Failure of the writ to designate the cause in which the garnishee is summoned prevents default. Johnson *v.* McCutchings, 43 Tex. 553.

**Proof of Service.**—Positive proof of service necessary. Johnson *v.* Delbridge, 35 Mich. 437, and cases cited; Sun Mut. Ins. Co. *v.* Seelingson, 59 Tex. 3. Written acknowledgment of service accepted without proof of authenticity of signature will not avail. Johnson *v.* Delbridge, 35 Mich. 437.

Where the summons was not supported by the affidavit required by statute. Clark *v.* Gaither, 6 Ala. 139.

Personal service upon an agent of a corporation at any other than the "usual place of business of such agent or clerk" is not valid. Lehigh Valley Ins. Co. *v.* Fuller, 81 Pa. St. 398.

There can be no default against the garnishee upon a mere service of the attachment without the tender of issue. Griswold *v.* Popham, 1 Duv. (Ky.) 170; Lehman *v.* Hudmon, 79 Ala. 532.

**3.** Defaults have been set aside in following instances: Where garnishee misled by assurances of adverse parties, and hence absent. Homans *v.* Coombe, 2 Cranch (C. C.) 681; Jones *v.* Tracy, 75 Pa. St. 417.

Where it was impossible for garnishee to get access to the original papers, which were withdrawn from the clerk's office, and garnishee therefore not able to answer. Carhart *v.* Rou, 15 Ga. 186.

But it was *held* not to be enough to set aside final judgment rendered upon default, that the garnishee, being engaged in a public office, did not observe that he was served in an individual capacity, and supposed that the city attorney would attend to the matter. Anderson *v.* Graff, 41 Md. 602. In this case application was made after the term, and court *held* that to set aside a default after the term required a strong case.

The court will act more freely in setting aside default if the garnishee himself, by motion, seeks to have it set aside, than if he wait till summoned on *scire facias* or final judgment. Field *v.* Wood, 9 Iowa 249; Atlantic Ins. Co. *v.* Wilson, 5 R. I. 479.

Must show both excuse and meri-

**6. Judgment Upon the Answer.**—Where the answer of the garnishee is neither traversed nor denied by either party to the principal suit, judgment depends wholly upon the legal import of the answer, and the answer becomes an essential part of the judgment.[1] If not satisfied, opposing parties have every opportunity to make further examination of the garnishee, and hence, if left to pass judgment upon the answer, the court will discharge the garnishee unless his liability and its amount clearly appears.[2] Not the garnishee's opinion as to his own liability, but the facts disclosed by him in his answer, determine whether he is to be charged or not without regard to whether he admits or denies liability.[3]

**7. Discharge of the Garnishee.**—A party duly summoned as garnishee, and responding to such process by appearance, is regarded as continuing before the court for judgment, and can only be released by some formal termination of the garnishment proceeding.[4] He cannot discharge himself by a voluntary payment to the plaintiff or defendant,[5] nor presume upon the neglect of the

torious defence to have default set aside. Wilson *v.* Phillips, 5 Ark. 184; Fifield *v.* Wood, 9 Iowa 249; Parmenter *v.* Childs, 12 Iowa 22.

On removing a default, the court should fix the time and place for taking the answer of the garnishee. Goodrich *v.* Hopkins, 10 Minn. 162.

1. Price *v.* Thomason, 11 Ala. 875, holds that the answer must be incorporated with the judgment, or made part of it by direct reference.

The parties waive all exception to the answer as made where the court is permitted to enter judgment upon the answer without objection, or if adverse party moves for judgment upon the answer. Budges *v.* North, 22 Ga. 53; Price *v.* Thomason, 11 Ala. 875; Leigh *v.* Smith, 5 Ala. 583.

Where no issue joined, the answer must be taken as true, and judgment is determined by its contents. Cairo etc. R. Co. *v.* Hindman, 85 Ill. 522; Rankin *v.* Simonds, 27 Ill. 352; Hurst *v.* Home etc. Ins. Co., 81 Ala. 174; Walters *v.* Washington Ins. Co., 1 Iowa 414; Chicago etc. R. Co. Killenberg, 82 Ill. 295; Meadowcroft *v.* Agnew, 89 Ill. 470.

If plaintiff does not make out a *prima facie* case on issue joined, the court may withdraw the issue and pass judgment upon the answer. Saunders *v.* Miller, 60 Ga. 554.

2. Garnishee will be discharged if his liability does not clearly appear. Price *v.* Carleton, 12 Ill. 358; Lorman *v.* Phœnix Ins. Co., 33 Mich. 65; Hurst *v.* Home etc. Ins. Co., 81 Ala. 174; Padden *v.* Moore, 58 Iowa 703; Brainard *v.* Simmons, 67 Iowa 646; Morse *v.* Marshall, 22 Iowa 290; Hibbard *v.* Everett, 65 Iowa 372; Meadowcroft *v.* Agnew, 89 Ill. 470; Field *v.* Malone, 102 Ind. 251; Edwards *v.* Goulding, 133 Mass. 78; Seward *v.* Arms, 145 Mass. 195.

But where the garnishee appears to be chargeable, he must avoid liability by proof of facts put in issue by him. Butman *v.* Hobbs, 35 Me. 227.

Where the answer shows conversion he should be charged. Fogg *v.* Worster, 49 N. H. 503.

But the garnishee must not be discharged upon his answer before plaintiff has had an opportunity to controvert the same. Hess *v.* Short, 7 Pa. St. 231; Michigan Cent. R. Co. *v.* Keohane, 31 Ill. 145.

3. Donelly *v.* O'Connor, 22 Minn. 309; Mann *v.* Buford, 3 Ala. 312; Perine *v.* George, 5 Ala. 641; Baker *v.* Moody, 1 Ala. 315.

4. Graves *v.* Cooper, 8 Ala. 811, 814; Bostwick *v.* Beach, 18 Ala. 80.

5. A garnishee paying the debt before judgment, does so at his peril. Hughes *v.* Monty, 24 Iowa 499; Myers *v.* McHugh, 16 Iowa 335; Stroup *v.* Sullivan, 2 Ga. 275; s. c., 46 Am. Dec. 389. Any payment of the debt before the garnishee is required or compelled to do so by judgment, leaves the garnishee still liable to an assignee of the judgment creditor, and it is immaterial

plaintiff to proceed.[1] Acts of the plaintiff which amount to abandonment of the proceeding, as a failure to file interrogatories, or to take other steps necessary for obtaining the answer of the garnishee within the time allowed by the statute,[2] or an attachment of the defendant's property by actual seizure,[3] or undue delay of the plaintiff in proceeding to judgment after answer by the garnishee,[4] will constitute sufficient cause for an application for discharge. So, too, the garnishee may become entitled to a discharge upon the failure of the plaintiff to obtain judgment against the defendant,[5] or the dis-

whether the garnishee had notice of the assignment or not. Brown *v.* Ayres, 33 Cal. 525; Countryman *v.* Boyer, 3 How. Pr. (N. Y.) 386; Robinson *v.* Weeks, 6 How. Pr. (N. Y.) 161; Richardson *v.* Ainsworth, 20 How. Pr. (N. Y.) 530.

So also in Illinois, where the process by garnishment creates a fund out of the amount held by the garnishee, in which all creditors share *pro rata*, the garnishee cannot be discharged till all the creditors have shared. Bank of America *v.* Indiana Banking Co., 114 Ill. 484; Warne *v.* Kendall, 78 Ill. 598.

So long as third parties have a right to intervene under the statute the garnishee may remain before the court, and he cannot be released nor protected in making payment under stipulation between plaintiff and defendant when another creditor has actually commenced proceedings in the original suit. The commencement of such proceeding imparts constructive notice to the garnishee. Ryan *v.* Burkam, 42 Ind. 507.

1. The garnishee cannot presume upon his discharge without an order to that effect where plaintiff has failed to file interrogatories in time. The garnishee must move that such interrogatories be stricken out, and then move to be himself discharged. Ashley *v.* Dunn, 4 Ark. 516.

2. Where plaintiff gets an order to take the deposition of garnishee, but does not do so in the time allowed, the garnishee is entitled to his discharge at a succeeding term. Demenitt *v.* Estes, 56 N. H. 313.

So where a garnishee has been served, but, living in another county, is entitled to have his answer made on commission to take deposition; if the commission is not sued out, he has a right to presume that the proceedings have been abandoned. Cohn *v.* Tillman, 66 Tex. 98.

3. A plaintiff cannot hold the same property by garnishment and actual attachment at the same time. He may elect whether to summon a party as garnishee or hold the goods. An attachment made after garnishment discharges the garnishee. Clapp *v.* Rogers, 38 N. H. 435.

So also a creditor who levies his execution on land discharges the garnishee. Fowler *v.* Spelman, 1 Root (Conn.) 295. See also Belknap *v.* Gibbens, 54 Mass. 471; Brown *v.* Webber, 60 Mass. 569; Lucas *v.* Nichols, 71 Mass. 319.

4. Garnishment proceedings dismissed because kept open two years without formal continuance or any action equivalent to consent on the part of the garnishee. Blake *v.* Hubbard, 45 Mich. 1.

But if garnishee does not move to dismiss, and accepts fees for continuance, he continues still before the court. Weber *v.* Bolte, 51 Mich. 113; Keily *v.* Bertrand (Mich.), 34 N. W. Rep. 675.

A delay of fourteen years in prosecuting the writ *held* to be sufficiently accounted for. Cookson *v.* Turner, 2 Binn. (Pa.) 453.

Mere omission to take preliminary judgment so long as no judgment yet rendered against the defendant will not discharge the garnishee. Bostwick *v.* Beach, 18 Ala. 80.

Where the garnishee makes no effort to have the case brought to trial after issue joined, the failure of plaintiff to do so will not entitle the garnishee to be discharged. Vincent *v.* Wellington, 18 Wis. 159.

5. Case *v.* Moore, 21 Ala. 758; Bostwick *v.* Beach, 18 Ala. 80; Housmans *v.* Heilbron, 23 Ga. 186; Collins *v.* Friend, 21 La. An. 7; Rose *v.* Whaley, 14 La. An. 374; Proseus *v.* Mason, 12 La. 16; Railroad *v.* Todd, 11 Heisk. (Tenn.) 549; Roberts *v.* Barry, 42 Miss. 260; Kel-

solution of the attachment for any cause;[1] or by stipulation between the parties;[2] and in some of the States he may claim a discharge by furnishing bail or bond,[3] or upon the death of the defendant,[4] or his commission of an act of insolvency.[5] And the death of the garnishee before answer will operate as a discharge of his estate from liability under this process.[6]

**8. Force and Effect of the Judgment.**—As a general rule, the judgment for and against the garnishee is a *res adjudicata*[7] between him and the plaintiff, and a bar *pro tanto* as against the defendant. The defendant is not concluded by any issue tried in the garnishment proceeding,[8] and as against the defendant the garnishee can

logg *v.* Freeman, 50 Miss. 127; Sun Mut. Ins. Co. *v.* Seeligson, 59 Tex. 3; Rowlett *v.* Lane, 43 Tex. 274; Washburn *v.* New York & V. M. Co., 41 Vt. 50.

1. Mitchell *v.* Watson, 9 Fla. 160.

2. A payment of the debt by the garnishee, under stipulation of parties, amounts to an assignment of the claim so far as the garnishee is concerned, and entitles him to a judgment of discharge. Daniel *v.* Daniel, 62 Miss. 352; Platen *v.* Byck, 50 Ga. 247; Borden *v.* Nobie, 26 Kan. 599.

So the effect of a stipulation by which the garnishee undertakes to pay from the funds in his hands such judgment as may be recovered against the defendant will discharge the garnishee. Sutro *v.* Bigelow, 31 Wis. 527.

3. McConnell on Trustee Process, § 15; Woodward *v.* Adams, 9 Iowa 474.

Bail releases the garnishee entirely, Jackson's App., 2 Grant (Pa.) 407, and may be entered by defendant, garnishee or a claimant of the fund in the garnishee's hands. Jackson's App., 2 Grant (Pa.) 407; Blyler *v.* Kline, 64 Pa. St. 130.

4. Decease and insolvency of estate of the principal debtor prevents any judgment against the garnishee, and operates to discharge him. Seals *v.* Halloway's Admr., 77 Ala. 344, and numerous cases cited; Drake Att. 459; Farnsworth *v.* Page, 17 N. H. 334.

Death of the defendant and distribution of his estate dissolves the garnishment. Witmarth *v.* Richmond, 65 Mass. 463; Loring *v.* Folger, 73 Mass. 505.

But where the death of defendant occurs after final judgment, the garnishment is not disclosed. Fitch *v.* Rowe, 4 S. & R. (Pa.) 557.

5. Butler *v.* Mullen, 100 Mass. 453.

Civil death of corporation before final judgment will dissolve attachment. Farmers & Merchants' Bank *v.* Little, 8 W. & S. (Pa.) 207.

But the effect of the appointment of a receiver for the defendant is not to dissolve the garnishment where it does not appear how garnishee's indebtedness arose or whether he was served before or after the receiver was appointed. Graham *v.* O'Neill, 24 Wis. 34.

6. Death of garnishee discharges the process. Tate *v.* Morehead, 65 N. Car. 681.

But plaintiff is entitled, by virtue of lien acquired, to present his claim against the estate of the garnishee. Rollins *v.* Robinson, 35 N. H. 381; Chapman *v.* Gale. 32 N. H. 141.

If the garnishee dies after making answer judgment upon his uncontroverted answer may be made as of the term at which he answered. Hall *v.* Henry, 3 N. H. 61; Patterson *v.* Buckminster, 14 Mass. 144.

7. Tyford *v.* Demenit, 32 N. H. 234. See VIII., 8, *supra.*

Falsehood and fraud in the disclosure will not entitle the plaintiff to reopen the matter as against the garnishee. Brown *v.* Dudley, 33 N. H. 511.

Where the garnishee is discharged before determination of the merits the plaintiff may summon the garnishee again. Marsh *v.* Phillips, 77 Ga. 436.

But the plaintiff is not concluded by a discharge of the garnishee from again garnishing and charging him in an official capacity. Vaughn *v.* Morrison, 55 N. H. 580.

Where garnishee is discharged because the property is not subject to garnishment process, the judgment will be no bar. Boyle *v.* Maroney, 73 Iowa 70; s. c., 5 Am. St. Rep. 857.

8. Winthrop *v.* Carleton, 8 Mass. 456; Kellogg *v.* Waite, 99 Mass. 501; St. Louis etc. Co. *v.* Richter, 48 Ark. 350;

only show that he has been compelled, or is under compulsion by valid process of law, to deliver up the effects or debt of the defendant in his hand.[1] The defendant is concluded by the garnishment judgment only, as the same is a credit and payment in whole or in part. The defendant can recover more or less than the amount recovered by the plaintiff, and will not be concluded, even where the garnishee has successfully contested his claim against the plaintiff on the ground that he was not indebted to the defendant.[2] In order to have the judgment operate as a discharge against the defendant, the garnishee must show at least a valid judgment against himself in the garnishment proceeding. Some authorities more than this require that the judgment must be satisfied by payment to operate as a bar,[3] and others require that the taking of the property on execution alone will protect the garnishee. But a garnishment judgment, until reversed on appeal, is placed on the same footing as any other judgment when offered as a defence to defendant's action, and cannot be collaterally impeached,[4] except to show that the garnishee suffered judgment by wilful default and failure to make answer disclosing the exemption rights of the defendant, or the intervening rights of other parties, and failed to notify such interested parties of the pendency of the proceedings.[5] The garnishee is

Denny *v.* Metcalf, 28 Me. 389; Puffer *v.* Graves, 26 N. H. 256; Ingraham *v.* Olcock, 14 N. H. 243; Ruff *v.* Ruff, 85 Pa. St. 333; note in 46 Am. Dec. 345.

1. Noble *v.* Merrill, 48 Me. 140; Denny *v.* Metcalf, 28 Me. 389; Puffer *v.* Graves, 26 N. H. 256; Ingraham *v.* Olcock, 14 N. H. 243; 46 Am. Dec. 341, note.

Confession of debt by garnishee, as due the wrong party, renders him still liable to the rightful creditor, not a party to the proceedings. Illustrated by payment on process of garnishment of debt of the husband by a bank from funds deposited for the wife. Townsend *v.* Webster etc. Bank, 143 Mass. 147.

2. Vaughn *v.* Morrison, 55 N. H. 580; Ruff *v.* Ruff, 85 Pa. St. 333; Puffer *v.* Graves, 26 N. H. 256.

3. In order to protect the garnishee there must be actual satisfaction of the judgment against him. Cook *v.* Field, 3 Ala. 53; s. c., 36 Am. Dec. 437, note; Sharpe *v.* Wharton, 85 Ala. 225; 1 Drake Att. 708, for authorities *pro* and *con*. "If an unexecuted judgment against a garnishee would be a bar to a suit against him by the original creditor, it might happen that he would not be compelled to pay the debt at all, as the judgment of the attaching creditor might never be enforced." Ormond *v.* Rundlett, 13 Pick. (Mass.) 511; Farmer *v.* Simpson, 6 Tex. 303; Brannow *v.* Noble, 8 Ga. 549; Hammett *v.* Morris, 55 Ga. 644; Brown *v.* Summerville, 8 Md. 444; Lowry *v.* Lumberman's Bank, 2 W. & S. (Pa.) 210; s. c., 46 Am. Dec. 345; *contra*, McAllister *v.* Brooks, 22 Me. 80; s. c., 38 Am. Dec. 282.

Payment of the judgment protects the garnishee even when the judgment is subsequently reversed on appeal for irregularities. Duncan *v.* Ware, 5 Stew. & P. (Ala.) 119; Gunn *v.* Howell, 35 Ala. 144; Atcheson *v.* Smith, 3 B. Mon. (Ky.) 502; Webb *v.* Miller, 24 Miss. 638; Houston *v.* Walcott, 1 Iowa 86. Not necessary for garnishee to wait until coerced by execution. Mills *v.* Stewart, 12 Ala. 90; 46 Am. Dec. 341, note; Troyer *v.* Schweizer, 15 Minn. 242.

4. McAllister *v.* Brooks, 22 Me. 80; Stadler *v.* Parmelee, 14 Iowa 175; St. Louis etc. R. Co. *v.* Richter, 48 Ark. 350; Harrison *v.* Pender, Busb. (N. Car.) 78; s. c., 57 Am. Dec. 573; Skinner *v.* Moore, 2 Dev. & B. (N. Car.) 30 Am. Dec. 155; Cochran *v.* Fitch, 1 Sandf. Ch. (N. Y.) 142; Allen *v.* Watt, 79 Ill. 284; Home Ins. Co. *v.* Kirk, 23 Ill. App. 19; Moore *v.* Chicago etc. R. Co., 43 Iowa 385.

5. Casey *v.* Davis, 100 Mass. 124; Burns *v.* Marland Mfg. Co., 80 Mass.

bound to protect the exemption rights of defendant and rights of other parties of whose claims the garnishee has knowledge, and if he does not do so, the judgment will not protect him.[1] If he makes disclosure, and is erroneously charged, it is his duty to appeal.[2] This possibility of a double liability may be avoided under various statutory regulations by giving notice to the parties interested to come in and defend themselves,[3] or by the

487; Wardle *v.* Briggs, 131 Mass. 578; Andros *v.* Herring, 5 Mass. 210; Wilkinson *v.* Hall, 72 Mass. 568; Whippe *v.* Robbins, 97 Mass. 107; Randall *v.* May, 111 Mass. 506; Bibb *v.* Tomberlin, 1 Duv. (Ky.) 186.

The general rule is that a stranger to the suit may disclose that the garnishee had other facts within his knowledge which would have discharged him as trustee if such facts had been disclosed to the court, and of course such parties can go further and show collusion and fraud. Andrews *v.* Herring, 5 Mass. 210; Wilkinson *v.* Hall, 72 Mass. 568; Whipple *v.* Robinson, 97 Mass. 107; see also Smith *v.* Dickson, 58 Iowa 444.

Adverse claimants are under no necessity to apply to vacate the judgment rendered upon a false answer of the garnishee, but they may do so and have the judgment vacated, in which case the money paid to plaintiff will be held by him as trustee for use of the claimants. First Nat. Bank *v.* Mellen, 45 Mich. 414.

1. Large *v.* Moore, 17 Iowa 258; Smoot *v.* Esdava, 23 Ala. 659; s. c., 58 Am. Dec. 310; Cook *v.* Arthur, 11 Ired. (N. Car.) 407; Daniels *v.* Marr, 75 Me. 398; Bickle *v.* Chrisman's Admr., 76 Va. 678, 692.

But where the garnishee does not have knowledge of the assignment or intervening rights, he will be protected by the judgment against all parties. Bostwick *v.* Bryant (Ind.), 16 N. E. Rep. 378; Colburn *v.* Currens, 1 Bush (Ky.) 243; Stockton *v.* Hall, Hard. (Ky.) 160; Anderson *v.* Young's Exrs., 21 Pa. St. 443.

Actual assignment of the debt before garnishment may be set up and proved by others, whether the garnishee had knowledge or not. Williams *v.* Pomeroy, 27 Minn. 85.

If the debt had been assigned after garnishment process served, the garnishee may ignore the same. Goodwin *v.* Bethel Steam Mill Co., 76 Me. 468.

If at any time before final judgment the garnishee discovers the exemption rights of defendant or other intervening rights, he must set up the same. Union Pac. R. Co. *v.* Smersh, 22 Neb. 751; s. c., 46 Am. Dec. 343, note; Drake Att. 451; McPhail *v.* Hyatt, 29 Iowa 137; Field *v.* McKinney, 60 Miss. 673; Alams Ice Co. *v.* Yabcy, 66 Tex. 187.

Where a certain class of debts are sometimes exempt and sometimes not, the garnishee must inform himself correctly. Chicago etc. R. Co. *v.* Ragland, 84 Ill. 375; Chicago etc. R. Co. *v.* Mason, 11 Bradw. (Ill.) 525.

Exemption laws of another State having no territorial force, garnishee need not disclose that property exempt by law of place of contract when such is not the law of the forum. Moore *v.* Chicago etc. R. Co., 43 Iowa 385; Newell *v.* Hayden, 8 Iowa 140. But see Pierce *v.* Chicago etc. R. Co., 36 Wis. 283, and note on same, 2 Am. St. Rep. 241.

Assignee distinguished from rival claimant and persons standing on equal property. Field *v.* Malone, 102 Ind. 252.

2. Stockton *v.* Hall, Hard. (Ky.) 161; Saunders' Admr. *v.* Garrett, 33 Ala. 554. This case takes the ground that such a judgment is void, and hence the garnishee would not be protected in paying it.

But see Wood *v.* Milford etc. Inst., 58 N. H. 184, where court says: "If defendants should not have been charged as garnishees they are not on that account liable, for the property which the law has taken from them, to payment of plaintiff's board in suits against plaintiffs" in a case where a bank was garnished in a suit against a guardian for his ward's board, the action having been brought after the guardianship was revoked.

3. Where the garnishee does not give notice to the defendant to defend his own exemption rights, as allowed by statute, he takes upon himself the risk of its appearing that his creditor had a just defence against plaintiff at another suit by the defendant. Batton *v.* Pennsylvania Co., 88 Pa. St. 261.

The operation of the statutes in Ala-

garnishee's making full disclosure, turning what is due over to the court, thus discharging himself at once, and leaving the court to determine to whom that which is thus turned over shall go. But even in such case if the garnishee pays into court or to the sheriff without the knowledge of interested party property which he knows to be exempt, or not to be due the defendant, he will not be protected.[1]

**XII. CONFLICT OF LAWS.**—The proceeding by garnishment is a part of the remedy, and hence depends wholly upon the law of the forum or the place where action is brought. No rule of interstate comity requires the enforcement of the garnishment laws of another State. This applies to property exempt from garnishment as well as to the mode of procedure;[2] the exemption laws of a State have no extra-territorial force. Such laws cannot, therefore, avail a debtor in a garnishment proceeding against him in another State. A State will, however, where it has jurisdiction of the parties, prevent a creditor from following the property of one of its own citizens out of the State and there subjecting property, which is exempt to the defendant, by the laws of his domicile. No State can allow its own laws and, policy to be annulled in such manner by parties within its jurisdiction. Where it has jurisdiction of both plaintiff and defendant, the former will be enjoined from attaching in another State property which is exempt by the law of the domicile.[3] A valid

bama is to prohibit and make void a judgment against a garnishee who discloses an adverse claimant, until such claimant is brought before the court and issue formed between him and plaintiff. Edwards *v.* Levinshon, 80 Ala. 447; Wicks *v.* Branch Bank at Mobile, 12 Ala. 594; Security Loan Association *v.* Weems, 69 Ala. 584. See also Smoot *v.* Eslava, 23 Ala. 659; Saunders' Admr. *v.* Garrett, 33 Ala. 454.

In Wisconsin the rule is, that simple notice to the defendant is not enough. The garnishee must tender the defence of the case to him. Saveland *v.* Green, 36 Wis. 613; Adams *v.* Filer, 7 Wis. 306; s. c., 73 Am. Dec. 410; Plummer *v.* Warsaw Boom Co., 36 Wis. 619.

Such notice and request to defend puts the whole responsibility upon the real parties in interest; Dupont *v.* Davies, 35 Wis. 361; Stanley *v.* Goodrich, 18 Wis. 509; and binds privies also who acquire their interest *pendente lite.* Plummer *v.* Warsaw Boom Co., 36 Wis. 619.

Where the defendant's exemption rights are not involved, he is not entitled to notice of the garnishment proceedings where garnishment was before judgment rendered in the principal suit. Smith *v.* Dickson, 58 Iowa 444.

But where the garnishment proceedings are begun after judgment, the court may properly require notice to be given to the defendant, and better practice requires that it should do so. U. P. R. Co. *v.* Smersh, 22 Neb. 751.

1. Bickle *v.* Chrisman's Admr., 76 Va. 678.

But where money which is exempt has been paid into court and applied on the judgment, the defendant may lose his rights as against the garnishee if he has knowledge of the same and is not reasonably prompt and diligent to protect his rights. Illif *v.* Arnot, 31 Kan. 672.

2. East Tenn. etc. R. Co. *v.* Kennedy, 83 Ala. 462; Stevens *v.* Brown, 20 W. Va. 450; Leiber *v.* Union Pac. R. Co., 49 Iowa 688; Sturtevant *v.* Robinson, 18 Pick. (Mass.) 175; Mumper *v.* Wilson, 72 Iowa 163; s. c., 2 Am. St. R. 238; 23 Cent. L. J. 157.

3. Vol. 3, p. 523, note. Freeman Execution (2nd ed.) 209; Mumper *v.* Wilson, 72 Iowa 163; Snook *v.* Snetzer, 25 Ohio St. 516; Keyser *v.* Rice, 47

judgment against the garnishee in another State is as binding as any other judgment. It is, however, regarded as the judgment of a court of limited jurisdiction; for even when rendered by a court of general jurisdiction, "the rule is that where a court of general jurisdiction has a special authority conferred upon it by statute, it is *quoad hoc* an inferior or limited court."[1] The judgment in such cases must, when it is sought to be enforced, show substantial compliance with all that is necessary to make such a judgment valid and binding; nothing will be presumed when the entries fail to show that the court kept within its powers.[2]

Wherever property becomes vested in another person than the defendant by the law of the domicile of the latter, the law of the domicile will control as to property held by garnishee in another State. This rule is of wide application, and involves recognition in one State of all the laws which vest property in another State, whether the estates of decedents or assignments, bankruptcy laws[3] and the like. The domicile of the garnishee does not give the courts of his State jurisdiction over the debt he owes to a party in another State, and is not sufficient to sustain an action

Md. 203; Feager *v.* Landsley, 69 Iowa 725; 2 Am. St. Rep. 240, note; 23 Cent. L. J., note 157; Wilson *v.* Josephs, 107 Ind. 490.

1. Shivers *v.* Wilson, 5 Har. & J. (Md.) 130; s. c., 9 Am. Dec. 497.

2. The affirmation of this principle when applied to garnishment proceedings, as in all summary proceedings based upon a statute, is that everything required by the statute essential to the exercise of the right is necessary to the jurisdiction of the court, and must appear in the record of its proceedings. Gunn *v.* Howell, 27 Ala. 663; s. c., 62 Am. Dec. 785, and note p. 791.

3. Under this principle, where a party dies intestate in Louisiana, his property passes to his brother, there being no children. Under the laws of New Hampshire the father would have taken. The brother and the father both being citizens of New Hampshire, the brother cannot be garnished in New Hampshire as the debtor of the father, the property having been *held* by the New Hampshire court to have vested in the brother according to the laws of Louisiana. Leach *v.* Pittsburg, 15 N. H. 137.

Transfer to assignee in bankruptcy in another State before the service of the process of garnishment entitles the garnishee to discharge only when the defendant is a foreign creditor and resident of the State in which the assignment is made. No rule of comity can require the courts of one State "to give effect to a foreign law of bankruptcy, in such a manner as to deprive its own citizens of the remedy which the laws of the State gives him against the property of foreign debtors which may be found in this country." Dalton *v.* Currier, 40 N. H. 237, and numerous cases there cited and reviewed.

But the assignee cannot be held by process of garnishment, and an assignment in good faith made under the laws of the State where the defendant is domiciled, thus defeated because some of the debtor's property is in other States, whose policy it may be to give effect to their own laws in preference to the laws under which the assignment was made; such an assignment will not be set aside because it fails merely for the reason to convey all the assignee's rights. Frink *v.* Buss, 45 N. H. 325.

Where the principal action is between citizens of one State, the garnishee is a resident of another, and before service of process upon the garnishee the defendant makes a valid assignment under the insolvency laws of his State, the garnishee cannot be charged. Hoag *v.* Hunt, 21 N. H. 106. In such cases neither the policy nor laws of the domicile of the garnishee are involved and the laws of the State where the principal suit is had determines absolutely except as to the remedy as stated in our opening paragraph.

*in rem.*[1] This is not determined by his domicile, but by the *situs* of the property which he holds. The pendency of a foreign suit may be pleaded in abatement *pro tanto*, to a domestic suit upon the same cause of action, but not a foreign personal action to an action *in rem.*[2]

**XIII. Aid of Equity in Garnishment.**—The rights and liabilities which accrue to the respective parties to this proceeding being of statutory creation, the remedy given by the statute will generally be deemed exclusive,[3] and the aid of a court of equity cannot be invoked to supply any deficiency therein, nor in any manner enlarge the same.[4] The attaching creditor, therefore, cannot maintain a bill in chancery pending the garnishment proceeding, and before judgment against the defendant, to set aside a conveyance of property alleged to be fraudulent as to defendant's creditors, and invoke the restraining power of such court to preserve the same in the hands of the garnishee, even though it be charged that the rights of the garnishee therein were acquired in fraud of creditors.[5] Nor can an independent suit in equity be maintained after judgment is recovered to establish and enforce an attachment thus served, either upon the ground that the remedy under the statute is inadequate, or that equity has concurrent jurisdiction.[6] Unless provided otherwise by statute, garnishment acts only upon property or credits in the hands of the garnishee, to which the defendant has a legal title, and cannot generally be employed when the property sought to be subjected is so situated as to require the equitable powers of the court to place in that situation.[7] But the remedy is not so ex-

Where it was found that the property vested in the assignee in bankruptcy under the laws of Massachusetts it was *held* immaterial whether the principal defendant had obtained his discharge in insolvency or not. In such case the fact of the assignment discharged the garnishee in New Hampshire. Smith *v.* Brown, 43 N. H. 44.

Debts, rights and choses in action attach to the person of the creditor and not to the debtor. 21 Cent. L. J. 425, Inter State Garnishments.

Non resident garnishees cannot, therefore, be garnished unless they hold property of the defendant or are bound to pay him in the State where garnished. 21 Cent. L. J. 425; Drake Attach. 474; Freeman Executions 410.

1. Story Conflict of Laws 549, note.

2. Wharton Conf. of Laws, 787.

3. **Aid of Equity in Garnishment.**—Moies *v.* Sprague, 9 R. I. 541; Godding *v.* Pierce, 13 R. I. 532; Carr *v.* Lee, 44 Ga. 376; Indah *v.* Judd, 1 Conn. 309.

4. Wolf *v.* Tappan, 5 Dana (Ky.) 361; Jones *v.* Huntington, 9 Mo. 249; Bigelow *v.* Andreas, 31 Ill. 332; Taylor *v.* Gillman, 23 Tex. 515; Arthur *v.* Battle, 42 Tex. 159.

The remedy is exclusive of any other which is independent in itself or merely cumulative. Godding *v.* Pierce, 13 R. I. 532.

Reves *v.* Cooper, 12 N. J. Eq. 223; Eberhart *v.* Gilchrist, 11 N. J. Eq. 167; Danaher *v.* Prentiss, 22 Wis. 311.

The plaintiff cannot enjoin proceedings under execution on a judgment recovered by the defendant in a court of another jurisdiction than that where the garnishment is pending. Arthur *v.* Battle, 42 Tex. 159.

5. Bigelow *v.* Andress, 31 Ill. 322; Kimball *v.* Lee, 43 N. J. Eq. 277.

6. Almy *v.* Platt, 16 Wis. 169. But see Smith *v.* Wright, 6 Blackf. (Ind.) 550.

7. Thurber *v.* Blanck, 50 N. Y. 80; Price *v.* Brady, 21 Tex. 614; Drake *v.* Hornison, 69 Wis. 69; s. c., 2 Am. St. Rep. 717.

The attachment of the interest of one member of a partnership by the gar-

clusive that it will not admit a proceeding auxiliary to itself.[1] If a garnishee is fraudulently putting his property out of the reach of legal process for the purpose of defeating the collection of the judgment which he anticipates will be rendered against him, equity will interfere to prevent the consummation of such a wrong upon plaintiff's rights.[2] And a garnishee cannot invoke the aid of a court of equity to avoid payment of a judgment in garnishment proceedings to which he has been subjected through his own negligence; but if judgment has been rendered through fraud, accident or mistake, and the law court is unable to relieve him, he will be entitled to the aid of the court of chancery.[3]

**XIV. Appeals.**—Garnishment is a general cause of action, and is not a special proceeding.[4] It raises an issue separate and distinct from the issue in the main action, and involves different parties. Appeal from such proceedings may therefore be had on a general authority granted by statute as upon any other cause of action.[5] Being separate and distinct, the two cases may be brought to the appellate court on separate writs of error.[6]

**1. Effect of Appeal.**—The appeal of the garnishment proceedings has no effect on the main case;[7] but the appeal of the principal

nishment of his copartner will not entitle the creditor to maintain an action in equity against the firm for an accounting to ascertain the extent of the defendant's interest therein. Treadwell *v.* Browne, 43 N. H. 290. But see Henderson *v.* Alabama Gold Life Ins. Co., 72 Ala. 32.

1. Godding *v.* Pierce, 13 R. I. 532, 534; Bigelow *v.* Andres, 31 Ill. 322; Falconer *v.* Freeman, 4 Sand. Ch. (N. Y.) 565.

2. Moore *v.* Kidder, 55 N. H. 488.

In Wisconsin, under a general statute authorizing the granting of an injunction pending proceedings in an action, when it appears that "the *defendant* is doing or threatens, or is about to do, some act in violation of the plaintiff's rights respecting the subject of the action, and tending to render the judgment ineffectual," *held*, that an injunction might be granted against an insolvent garnishee who threatened to dispose of the property in his hands, which it was alleged belonged to the defendant. Malley *v.* Altman, 14 Wis. 22; Almy *v.* Platt, 16 Wis. 169.

3. Day *v.* Welles, 31 Conn. 344; Rhode Island Exchange Bank *v.* Hawkins, 6 R. I. 198; Oregon Railway *v.* Gates, 10 Oreg. 574; Danaher *v.* Prentiss, 22 Wis. 311; Reeves *v.* Cooper, 12 N. J. Eq. 223.

But a garnishee may have injunction perpetually enjoining plaintiff's judgment against him where anything has occurred since his answer which would furnish a legal defence to any liability to the defendant. Cottrell *v.* Varnum, 5 Ala. 229; s. c., 39 Am. Dec. 323.

4. Allen *v.* Partlow, 3 S. Car. 417; Pupke *v.* Meador, 72 Ga. 230.

Garnishee may appeal, although the main action is not appealed. Albachten *v.* Chicago etc. R. Co., 42 N. W. Rep. (Minn.) 86.

5. Garnishment is not a collateral issue so as to be within the discretion of the court to allow the appeal. Appeal lies as a matter of right. Strickland *v.* Maddox, 4 Ga. 393.

An appeal lies from an order discharging a garnishee. Bebb *v.* Preston, 1 Iowa 460.

The final action of a justice of the peace sitting as a court, and acting in his judicial capacity in a proceeding by garnishment, is clearly a judgment and within the contemplation of the statute allowing "any person aggrieved by any judgment of a justice of the peace" to appeal. Patterson *v.* Harlan, 12 Ark. 161; Kayser *v.* Bauer, 5 Kan. 202.

6. Case cannot be consolidated, and may be brought on distinct writs of error. Pupke *v.* Meador, 72 Ga. 230.

7. Cowan *v.* Lowry, 7 Lea (Tenn.) 620.

action by the defendant operates to suspend the garnishment proceedings when both are properly superseded by the filing of bond,[1] and a reversal of the judgment in the main case also reverses the garnishment judgment whether an appeal was taken therefrom or not.[2]

"At common law, a writ of error (and an appeal under the statute is a substitute for the common law writ of error) was a supersedeas of execution from the time of its allowance." The statutes requiring appeal bond change this rule; and whereas under the common law rule the mere appeal of the principal action would stay both the garnishment proceedings and the principal action, the operation of such statutes is not to stay or hinder the enforcement of either by mere appeal without bond. The garnishee who has been compelled to pay to the plaintiff while the appeal of the main case is pending, but not superseded, will be protected as any person who pays a valid subsisting judgment against him as garnishee. If the case should be reversed, the defendant will be entitled to restitution from the plaintiff, not from the garnishee.[3]

All this applies to appeals by the defendant. When the plaintiff appeals, the effect upon the garnishee is different. If the garnishee has been discharged, the plaintiff must make a distinct appeal of the garnishment proceedings, or the appeal of the principal case will not affect a garnishee discharged before such appeal be taken.[4] A distinct appeal is also necessary where the garnishees admit an indebtedness but are discharged because the defendant was the successful party in the lower court. The garnishee cannot afterwards be charged on the same writ, even after reversal of the principal judgment.[5]

In Massachusetts, where judgment against both defendant and garnishee must be made at the same time, the plaintiff must on his appeal have the case continued for judgment against the defendant. Jarvis *v.* Mitchell, 99 Man. 530.

A joint judgment against five garnishees may be appealed on the same writ of error. Sulter *v.* Brooks, 74 Ga. 401.

1. Kaylor *v.* Brunswick, 6 Heisk. (Tenn.) 235; Kennedy *v.* Tierney, 14 R. I. 528.

2. Rowlett *v.* Lane, 43 Tex. 274.

Judgment in the garnishment proceeding being collateral, can only be reversed by the same process by which the principal judgment is reversed. Todd *v.* Darling, 11 Me. 34.

3. Montgomery Gas Light Co. *v.* Merick, 61 Ala. 36. See also Mead *v.* Doe, 18 Wis. 31; Atcheson *v.* Smith, 3 B. Mon. (Ky.) 502.

4. Boynton *v.* Foster, 48 Mass. 415.

5. Brown *v.* Tuppeny, 24 Kan. 29. But where no steps are taken to discharge the garnishee, or to dissolve the attachment, on the part of the defendant, judgment in favor of the defendant does not discharge the garnishee where, on appeal, judgment is recovered in favor of the plaintiff. Dolby *v.* Tingley, 9 Neb. 412; Chase *v.* Foster, 9 Iowa 429.

But where plaintiff does not take steps to have the case reviewed, the garnishee is entitled to his discharge. State *v.* Cunningham, 9 Neb. 146.

Payment of a judgment after notice of an appeal properly taken, will not discharge the garnishee. Drake on Attach. 411; Sherwood *v.* Davis, 17 Ala. 312; Danforth *v.* Rupert, 11 Iowa 551.

Where the plaintiff in the principal suit prayed an appeal at the time an order dissolving an attachment was made, and perfected his appeal a few

**2. Who May Appeal.**—The plaintiff, defendant and garnishee, are all entitled to appeal, also any other persons who may come in or be brought into the garnishment proceedings.[1] But parties to the action can only appeal so far as their substantial rights and interests are affected. The defendant cannot appeal from that which alone affects the garnishee.[2] Nor, on the other hand, can the garnishee take advantage of any errors in the judgment against the principal defendant.[3] But the parties, in order to take advantage of errors, must appeal each for himself.[4] The garnishee cannot come in on the defendant's appeal and escape the effect of proceedings against himself, which he has not appealed from.[5] Nor can the garnishee appeal from the action of the court dismissing a petition of intervention of a third party claiming the fund.[6] On the other hand, it is error to allow the defendant on appeal, or *certiorari* by the garnishee, to intervene and contest either the judgment rendered on the principal cause of action, or against the garnishee, unless the matter has arisen since the rendering of the judgment, in which case it is the right of the defendant to intervene.[7]

**3. From What Appeal Lies.**—The universally recognized principle applicable to garnishment as to all other actions is that an appeal can only be taken from a final order or judgment which affects a substantial right.[8] Where there is a final disposition of the

hours afterwards, and caused official notice of the fact to be given the garnishee, who had in the meantime paid his debt to the defendant, before receiving the actual notice, *held* that the garnishee was bound to take notice of all that was done in court in reference to the attached fund, and must be *held* under the circumstances to have had constructive notice that an appeal had been prayed and granted. Puff *v.* Hutcher, 78 Ky. 146.

1. Where the liability of other garnishees would be increased by the discharge of one, they all have such interest as to appeal from the discharge of their cogarnishee. Creasap *v.* Bower, 41 Iowa 210; Germania Savings Bank *v.* Penser, 5 So. Rep. 75.

An assignee disclosed by the answer of the garnishee, and notified according to the statute, to contest with the plaintiff, has the right to appeal. All parties to the proceedings aggrieved by the judgment of the court may appeal. Johnson *v.* Burnett's Admr., 12 Ala. 744.

2. Cowan *v.* Lowry, 7 Lea (Tenn.) 620; Chandler *v.* Fond du Lac, 56 How. Pr. (N. Y.) 449.

3. Scoffedhast *v.* Bollman, 21 Ind. 280; Schwab *v.* Madison, 49 Ind. 329; 46 Am. Dec. 344, note; Hannas Syndics *v.* Lauring, 10 Mart. (La.) 568; s. c., 13 Am. Dec. 339; Atcheson *v.* Smith, 3 B. Mon. (Ky.) 502; Henny Co. *v.* Patt, 73 Iowa 485. The defendant may, however, appeal from the judgment against the garnishee where his right to fund involved. Sinard *v.* Gleason, 19 Iowa 165; but only where his objection goes to the debt sued on. Fanning Minnesota etc. R. Co., 37 Iowa 379.

The garnishee can appeal on the ground that judgment was rendered prematurely against the defendant. Atcheson *v.* Smith, 3 B. Mon. (Ky.) 502.

4. Atcheson *v.* Smith, 3 B. Mon. (Ky.) 502.

5. Bryant *v.* Bigelow, 9 Lea (Tenn.) 135.

6. The plea of intervention should have notified the garnishee of a claimant, and the garnishee should have amended his answer, setting up such third person's rights, and then, if charged, he could have appealed from the erroneous determination of such matters as his answer raised. Alamo Ice Co. *v.* Yancy, 66 Tex. 187.

7. Cowan *v.* Lowry, 7 Lea (Tenn.) 620.

8. What may be a final order affect-

rights of the parties to the garnishment proceeding, appeal is, in fact, the *only* remedy.[1] Where the attempt is made to appeal that which is not subject to appeal, the proper course is to have the proceeding dismissed by motion.[2]

Other matters which cannot be appealed are such as lie within the peculiar discretion of the lower court,[3] or where the lower court acts upon evidence which is not or cannot be brought before the appellate court.[4]

ing a substantial right as to one party may not be such as to another party. An order discharging the garnishee before judgment against the defendant may be appealed by the plaintiff, because the latter might otherwise lose the lien acquired by the garnishment. He may appeal before the principal case is determined. Nat. Bank *v.* Chase, 71 Iowa 120; Turpin *v.* Coates, 12 Nev. 321. But the defendant cannot in general appeal from an order charging the garnishee made before judgment. Birchfield *v.* Harris, 9 Nev. 382. Not even where the statute gives the court power to order that property capable of manual delivery be turned over to the sheriff. See also Miller *v.* Noyes, 34 Kan. 13. In general, a ruling in favor of a claimant is a mere interlocutory order, and cannot be appealed until embodied in the final judgment. Gifford *v.* Rockett, 119 Mass. 71; Hayes *v.* Stewart, 23 Vt. 622; Lindsey *v.* Malone, 23 Pa. St. 24.

But where a court refuses to vacate proceedings in garnishment made after final judgment, such ruling is a final order which the defendant may appeal. Carlyle *v.* Smith, 36 Kan. 614.

The defendant may, after judgment in the principal action, appeal an order of the court fixing the amount of the garnishee's liability, and directing him to pay the same into court. Furstenheim *v.* Adams, 42 Ark. 283.

Other orders regarded as final and affecting substantial rights are as follows: An order adjudging the garnishee liable for contempt for not paying over money. Tong *v.* Lee, 12 Nev. 331.

An order erroneously allowing costs against both garnishee and defendant, and made after judgment in the principal suit and at another term. Pogel *v.* Meilke, 60 Wis. 248.

But where the judgment for costs was made before the final judgment terminating the case, it is not appealable. Walmer *v.* Shulenberger, 23 Ind. 454.

An order of the court dismissing the garnishee upon the furnishing of bail by the defendant cannot be appealed. Allen *v.* Partlow, 3 S. Car. 417.

Nor can an order permitting plaintiff to traverse the answer of the garnishee. Vincent *v.* Wellington, 18 Wis. 159.

Nor an order permitting the garnishee to file a plea in bar. Barr *v.* Perry, 3 Gill (Md.) 314.

Nor order allowing garnishee to amend his answer. Crerar *v.* Milwaukee etc. R. Co., 35 Wis. 68.

An order to plaintiff to pay over an amount of money paid by garnishee upon a judgment vacated because of a false answer, is collateral and not appealable. First National Bank *v.* Mellen, 45 Mich. 413.

There can, in general, be no appeal until the final determination of the cause. Reed's Ap., 71 Pa. St. 378.

1. It is error for a succeeding judge of a lower court to rescind a final order made by his predecessor. Appeal is the only remedy in such case. Durant *v.* Staggers, 2 N. & McC. (S. Car.) 488.

Appeal, and not equity, will relieve the garnishee against an erroneous judgment in favor of the garnisher, and from an action at law by a third party to recover the same fund. Carroll *v.* Parker, 57 Tenn. 269.

The garnishee cannot after the term, be relieved from a judgment against himself in excess of his indebtedness if he does not appeal. Burlington etc. R. Co. *v.* Hall, 37 Iowa 620.

2. Furstenheim *v.* Adams, 42 Ark. 285.

3. Lindsley *v.* Malone, 23 Pa. St. 24; Lehigh Valley Ins. Co. *v.* Fuller, 81 Pa. St. 398; Smith *v.* Brown, 5 Cal. 118.

Discretion of court in allowing and disallowing costs is not reviewable. Hawkins *v.* Graham, 128 Mass. 20; Johnson *v.* Blanks, 68 Tex. 496. See COSTS.

4. Brown *v.* Ridgway, 10 Barr (Pa.)

**4. What Errors Will be Considered.**—If the trial court has committed error, it must be further shown that the complaining party has made the proper effort to have the same corrected in the court below. He cannot, for the first time in the appellate court, call attention to errors which he allowed to remain unnoticed, or did not except to in the lower court.[1] And except, perhaps, in the case of appeals to *nisi prius* courts, from justices of the peace, the appellate court will only proceed upon the case made in the lower court. The appellate court will not relieve from the effect of a judgment where a party has failed to avail himself of a good defence in the lower court. His defence cannot be enquired into for the first time on appeal.[2]

**5. The Record.**—The appellate court can only proceed upon the record before it, and for error of law clearly appearing upon the face of the record.[3] There are some things, however, which the record must show, and the case cannot stand unless the record does affirmatively show them.[4] The record of a case on appeal in garnishment is sufficient when it shows the process by which the garnishee is brought into court; that judgment was rendered against the garnishee either by default, upon the answer or upon issue joined; and judgment against the defendant.[5] The answer, if any is made, and the judgment depends thereon, should be stated in substance or incorporated into the record by reference in the entry of the court, by bill of exceptions, or set out in full in the judgment.[6]

The failure of the record to set out either the original judgment or the execution under which the garnishment proceedings were had, has also been found fatally defective where the record purports to be full.[7]

42; Gidding's Appeal, 81 Pa. St. 75; Illiff *v.* Arnott, 31 Kan. 672; Lexington etc. R. Co. *v.* Ford Plate Glass Co., 84 Ind. 516; Field *v.* Malone, 102 Ind. 251.

1. Smith *v.* Chapman, 6 Port. (Ala.) 365; Daniel *v.* Hoffer, 6 Ala. 296; Terry *v.* Lindsay, 3 Stew. & P. (Ala.) 317; Eason *v.* Gester, 31 Iowa 475; Robison *v.* Saunders, 14 Iowa 539.

Appellate court can only proceed upon exceptions filed and allowed. Phillips *v.* Megquier, 17 Me. 28.

Motion to set aside or quash the proceedings is not necessary. Mears *v.* Adreon, 31 Md. 229. But see Eason *v.* Gester, 31 Iowa 475; Robison *v.* Saunders, 14 Iowa 539.

A question of jurisdiction may be set up at any stage. Coleman's Appeal, 75 Pa. St. 442.

2. Groome *v.* Lewis, 23 Md. 137; s. c., 87 Am. Dec. 563; Groome *v.* Lewis, 23 Ind. 137; Raborg *v.* Hammond, 2 H. & G. (Md.) 42; Powles *v.* Dilly, 9 Gill (Md.) 22; Boyd *v.* Chesapeake & O. Canal Co., 17 Md. 195; Peters *v.* League, 13 Md. 58.

The application of a claimant of the fund in the hands of the garnishee must be made and heard for the first time in the court below. Knights *v.* Paul, 11 Gray (Mass.) 225.

3. Miller *v.* Wilson, 86 Tenn. 496; Pickler *v.* Rainey, 4 Heisk. (Tenn.) 335.

Where it is the duty of the garnishee to disclose the facts concerning an alleged assignment, but he does not state facts enough to show the assignment to be valid, the judgment will not be disturbed. Richards *v.* Smith, 75 Mass. 315.

4. Miller *v.* Wilson, 86 Tenn. 496.

5. Gunn *v.* Howell, 27 Ala. 663.

6. Gunn *v.* Howell, 27 Ala. 663.

7. Miller *v.* Wilson, 86 Tenn. 496.

As to sufficient showing that judgment in the principal suit had been ren-

Other matters than as above stated must be made of record by bill of exceptions. Any error, however, which is apparent upon the face of the record requires no bill of exceptions to bring it up for review.[1] But the question must be necessarily and clearly presented by the record.[2]

We have seen that if the entries showing judgment upon the answer of the garnishee show that there was an answer, and that the garnishee admitted an indebtedness, and the extent of that indebtedness, this will be sufficient to sustain the judgment. In such a case the answer itself will not be treated as a part of the record unless made so by bill of exceptions.[3] The test of the question as to whether the answer is necessarily a part of the record appears to be whether the necessary recitals of the record directly refer to the answer, and are sufficient to identify that to which they refer as the answer. Hence, reference in the judgment entry to an answer verified as such by affidavit, and appended to the transcript, will make it part of the record.[4]

As a rule, the court will adopt that construction of the record which will make it consistent and regular. When, for example, the entry recites that the answer "was filed within the time prescribed by law," and the filing mark shows it to have been filed afterwards, the court on appeal will presume that the answer was oral, and afterwards reduced to writing and filed, which construction would make the proceeding regular.[5]

**6. Assignment of Errors.**—The errors claimed in the record must be pointed out and claimed specifically in the appellate court. It is the duty of counsel, not of the court, to bring up the matters to be determined. A general assignment of error is allowable; as, for instance, "that the court erred in rendering judgment as shown by the record;" but such an assignment of error will not raise every question of error that the record may contain. Such an assignment confines the court to enquiries as to jurisdiction,

dered before judgment was taken against the garnishee, see Jackson *v.* Shipman, 28 Ala. 488. But *certiorari* may correct the defect without reversal. Blair *v.* Rhodes, 5 Ala. 648.

Record must show judgment against the garnishee. Johnson *v.* McCutchings, 43 Tex. 553; Bean *v.* Barney, 10 Iowa 498; Toll *v.* Knight, 15 Iowa 370.

1. Brown *v.* Tuppeny, 24 Kan. 29; Dexter *v.* Cochran, 17 Kan. 447.

2. Page *v.* Smith, 25 Me. 262; Brainerd *v.* Shannon, 60 Me. 342; Fitzsimmons *v.* Carroll, 128 Mass. 401.

3. Bostwick *v.* Beach, 18 Ala. 80; Rankin *v.* Simonds, 27 Ill. 352.

4. Corbitt *v.* Pynes, 45 Ala. 258; Curry *v.* Woodward, 44 Ala. 305; Easton *v.* Lowery, 29 Ala. 454; Fortune *v.* State Bank, 4 Ala. 385.

Also when it was clear from the minute entry that the answer at length was made part of the record. Jones *v.* Howell, 16 Ala. 396; Gaines *v.* Bierne, 3 Ala. 114.

Two answers by the same garnishee may be considered a part of the record, and construed together as one answer, when the latter answer is properly made part of the record, and makes direct reference to the first, and both are identified. Wicks *v.* Branch Bank of Mobile, 12 Ala. 596.

5. Prout *v.* Grout, 72 Ill. 457; Lindsay *v.* Malone, 23 Pa. St. 24.

The following matters have been considered as evidence, and hence within the rule: The affidavit required of the plaintiff necessary to procure the attachment. Foster *v.* Jones, 1 McCord (S. Car.) 116; depositions taken in a

and such errors apparent upon the face of the record as would have the effect of annulling the judgment.[1]

**7. Action of Appellate Court Upon the Record.**—Ordinarily, where the record shows error, the case is sent back for retrial. But where the record clearly shows what action the court below should have taken, the appellate court will make the order which the lower court should have made. In one case it was held that where a claimant to the fund in the hands of the garnishee fails to establish his claim, judgment will be ordered by the appellate court against the garnishee whose answer admits his indebtedness, even after such garnishee had been discharged by the lower court.[2] So an order charging the garnishee will be changed directly by the appellate court to an order of discharge where judgment had been rendered upon an answer of the garnishee disclosing a valid assignment of his debt.[3] If any of the grounds or reasons upon which the court below could have acted were correct, its action will be sustained although it may have based its action on another and wrong reason.[4]

Where all the evidence is before the appellate court and contains nothing to justify judgment against the garnishee, the judgment will be reversed.[5] So, also, where the special verdict of a jury would entitle the garnishee to his discharge.[6]

**8. Certiorari.**—*Certiorari* may be had to bring up the record itself for the correction of proceedings not according to law. It may be auxiliary to an appeal to remedy the defect in case the transcript does not accord with the record. This writ has thus been applied to garnishment to make it appear whether the record of the lower court showed that judgment had been rendered against the defendant in the principal suit, where the record before the appellate court showed judgment against the garnishee, but no judgment against the defendant.[7] Independently of appeal, the writ may be used to correct an error in the judgment of a lower court made by a magistrate, requiring additional attachment security before issuing garnishment.[8] Also, where exempt property is held, the defendant may secure its release by this means.[9] *Certiorari* will also lie to quash the proceedings where the judgment has been satisfied,[10] but if the defendant had

rule to open judgment in the court below. Lehigh Valley Ins. Co. *v.* Fuller, 81 Pa. St. 398; Calhoun *v.* Logan, 10 Har. (Pa.) 46.

Satisfaction of the judgment in garnishment. Minard *v.* Lawler, 26 Ill. 302.

1. Falconer *v.* Head, 31 Ala. 513. See also Freeman *v.* Grist, 1 Dev. & B. (N. Car.) 217.

2. Donnelly *v.* O'Connor, 22 Minn. 309.

3. Taylor *v.* Lynch, 71 Mass. 50, note.

4. Bigelow *v.* Bane, 30 Mich. 1.

5. Kiggins *v.* Woodke, 34 N. W. Rep. (Iowa) 789.

6. Kiggins *v.* Woodke, 34 N. W. Rep. (Iowa) 789.

7. Blair *v.* Rhodes, 5 Ala. 648.

As to *certiorari* generally as applied to garnishment, see Gidding's Appeal, 81 Pa. St. 72.

8. Gregory *v.* Clark, 73 Ga. 542. *Certiorari* and not appeal, is the remedy applicable to such case.

9. Wilson *v.* Bartholomew, 45 Mich. 41.

10. Baldwin *v.* Merrill, 8 Humph.

due notice and ample time to assert his rights in the court below, *certiorari* will not avail him.[1]

**9. Amendment and Correction of the Record.**—The appellate court can only proceed on the record before it, and the contents of the record must be determined by the court below. The appellate court, will, however, make the judgment conform to the record, and is the only power by which errors of a judicial nature can be corrected.[2] The record cannot be corrected after the judgment is affirmed by the appellate court. This merges the judgment of the lower court in that of the higher, and thus precludes amendment of the record by the lower court.[3] On suggestion of an imperfect or incorrect record, the appellate court will continue the case till the lower court makes the proper correction,[4] or it may order the case sent back for correction without affirming.[5] *Certiorari* may also be invoked to bring the record of the lower court up, and if the record of the lower court shows the defect in the judgment to have been merely formal and capable of being supplied from the record, the appellate court will make the correction and affirm the judgment.[6]

**XV. Costs—1. General Rule.**—A garnishee is entitled to all his costs and charges as ascertained and taxed by the judgment of the court, unless he resorts to unnecessary and protracted litigation, or colludes with the defendant to defeat creditors. If the garnishee is found not to be indebted, and to have nothing of the defendant's property in his hands, or if the amount found due from him is not equal to the amount of the costs, the garnishee will be immediately entitled to judgment against the plaintiff for the amount or balance of costs, without waiting for a *scire facias* to be brought against him.[7] Where, however, the debt of the garnishee is sufficient, judgment for costs cannot be entered against the plaintiff; but the garnishee is expected and entitled to reimburse himself out of the property of the defend-

(Tenn.) 132 (in which case the limitation of time from the rendering of the judgment *held* not to apply).

In North Carolina, where the right of appeal is lost without default on the part of the garnishee, and he has merits, he may invoke the writ of *recordari*. Carmer *v.* Evers, 80 N. Car. 56. See also Bouv. Law Dict.

1. State *v.* Bermundez, 2 So. Rep. (La.) 425.

2. Durant *v.* Staggers, 2 N. & McCord (S. Car.) 488.

3. Randolph *v.* Little, 62 Ala. 398; Stephens *v.* Norris, 15 Ala. 79.

4. A stipulation made for convenience, admitting inadvertently, as facts, statements injurious to one of the parties, and not in accord with the premises, may be relieved against, but the whole stipulation must be stricken out. Welsh *v.* Noyes (Colo.), 14 Pac. Rep. 317; Richardson *v.* Musser, 54 Cal. 196; Becker *v.* Lamont, 13 How. Pr. (N. Y.) 23.

5. Randolph *v.* Little, 62 Ala. 398.

6. Blair *v.* Rhodes, 5 Ala. 648.

7. Jarvis *v.* Mitchell, 99 Mass. 530; *citing* Rev. Stats. Mass., ch. 109, § 50; McLaughlin *v.* Western R. Co., 12 Cush. (Mass.) 131; Miller *v.* Carrier, 11 Gray (Mass.) 19.

Under the terms of the general statute giving costs to the successful party, the costs of the garnishment proceeding should be taxed against the defendant or the plaintiff, and not against the garnishee. Hannibal & St. J. R. Co. *v.* Crane, 102 Ill. 249; Sulter *v.* Brooks, 74 Ga. 401.

ant in his hands.[1] The costs of the garnishment proceeding are finally taxed against the losing party in the principal suit, and are a part of the recovery of the plaintiff.[2] If the garnishee is found to be indebted in a sum sufficient to pay both the judgment and the costs, it will not be error to charge the garnishee with the costs.[3]

It is variously decided as to whether the garnishee can demand his fees in advance.[4]

**2. Costs Incurred by Fault or Neglect of Garnishee.**—As a general rule, the garnishee is liable for all costs incurred through his fault. A garnishee will be liable for the costs where he needlessly compels a third party claiming the fund in his hands to interplead;[5] where he brings action in a higher court where the costs were greater when the case would more naturally fall within the scope of a lower court, the garnishee will be liable;[6] or where he refuses to pay into court the amount found due from him, thereby compelling plaintiff to institute further proceedings.[7] Other examples might be mentioned.[8] It matters not that the garnishee may be entitled to discharge: he may still be made liable, out of his own means, for the costs needlessly incurred by himself or by others for reason of his neglect or fault.[9] Transactions intended to hinder, delay or defraud creditors will make the garnishee liable for costs without regard to whether he is discharged or not.[10]

**3. Costs When Garnishee Contests.**—Where judgment is taken upon the answer of the garnishee and no issue joined, he is en-

As soon as discharged, the garnishee may have execution against the plaintiff for his costs. Kellogg *v.* Waite, 99 Mass. 501.

1. Holbrook *v.* Waters, 19 Pick. (Mass.) 356; Baker *v.* Lancashire Ins. Co., 52 Wis. 193; Hannibal & St. J. R. Co. *v.* Crane, 102 Ill. 249.

2. Hannibal & St. J. R. Co. *v.* Crane, 102 Ill. 249.

3. Burlington etc. R. Co. *v.* Taylor, 81 Ind. 24; Whitney *v.* Kelley, 67 Me. 377; Wagon Co. *v.* Peterson, 27 W. Va. 315; Frederick *v.* Easton, 40 Pa. St. 419.

But costs cannot be decreed against a garnishee unless it affirmatively appears that the property in his hands is sufficient to pay the amount claimed and the costs. Talbott *v.* Tarleton, 5 J. J. Marsh. (Ky.) 641.

It is, upon its face, error for the court to render judgment against the garnishee for the full amount disclosed in his answer and for costs besides. Prout *v.* Grout, 72 Ill. 457.

When the garnishee makes default he cannot be charged with costs unless more is proved against him than the amount of plaintiff's claim. Johnson *v.* Delbridge, 35 Mich. 437; Graham *v.* Moore, 7 B. Mon. (Ky.) 53; Langford *v.* Ottumwa Water Power Co., 53 Iowa 415.

4. May demand his fees in advance. Westphal *v.* Clark, 42 Iowa 371. And while nonpayment of the fees will excuse the failure of the garnishee to attend, it will not excuse his failure to testify if he does attend. Stockberger *v.* Lindsay, 65 Iowa 471. Same in Illinois. *Contra*, Goodrich *v.* Hopkins, 10 Minn. 130.

5. Little Wolf River Co. *v.* Jackson, 66 Wis. 43.

6. Wearne *v.* Haynes, 13 Nev. 103.

7. Wearne *v.* Haynes, 13 Nev. 103.

8. Randolph *v.* Little, 62 Ala. 397; Hanson *v.* Butler, 48 Me. 81.

Failure of the garnishee to turn over the property or money found due, thus indicating his preference to personal judgment, will not make him liable for costs. Moore *v.* Lowrey, 25 Iowa 336.

9. Hanson *v.* Butler, 48 Me. 81.

10. Smith *v.* Brown, 43 N. H. 44; Gutterson *v.* Morse, 58 N. H. 529; Hills *v.*

titled to his costs.[1] But if he fails to disclose the full amount of the indebtedness due to the defendant as found upon issue joined, the garnishee will be liable.[2] As a general rule, costs should be taxed against a garnishee who contests his liability without success;[3] but the outcome of a trial of an issue of fact against the garnishee does not always determine his liability for costs; it lies in the discretion of the court to divide or to award the costs to either party.[4] Even upon a jury trial, the court may tax costs upon its own view of the evidence, and in a manner inconsistent with the findings of the jury.[5]

**4. In Case of Appeal of Garnishment Proceedings.**—Where the garnishee who is charged appeals to a higher court, and the judgment is there affirmed, he can have no costs, accrued after the judgment, from which he has appealed.[6] If he is successful in his appeal, he is entitled to all his costs.[7] But where the lower court adjudges in favor of the garnishee, and the case is reversed on the appeal of the plaintiff, the garnishee is entitled to all the costs of the appeal as well as those incurred in the lower court.[8] The garnishee is only liable to such costs *as he himself makes* through his own fault.

**5. Liability of Intervening Claimant.**—An adverse claimant in a garnishment proceeding is a party, and entitled to costs or otherwise, as the case may be, under the general provisions of the statute.[9] If liable for costs, he is liable from the time he appears till he is defeated on the merits of his claim.[10]

**6. As Between Plaintiff and Defendant.**—It has been shown that primarily the costs come out of the fund in the hands of the garnishee, and that when he has funds of the defendant in his hands no judgment for costs can be taxed against the plaintiff.[11] Otherwise the garnishee is entitled to judgment against the plaintiff for costs which can afterwards be taxed against the defendant according to the final outcome of the principal suit. Where the plaintiff commences a garnishment proceeding in good faith, and

Smith, 28 N. H. 369; Kent *v.* Hutchins, 50 N. H. 92.

1. Huff *v.* Mills, 7 Yerg. (Tenn.) 42; Prout *v.* Grout, 72 Ill. 457; Little Wolf River Co. *v.* Jackson, 66 Wis. 43.

2. Webster Wagon Co. *v.* Home Ins. Co., 22 W. V. 314; Newlin *v.* Morse, 26 Pa. St. 102; Thompson *v.* Allen, 4 Stew. & P. (Ala.) 184.

3. Strong *v.* Hollon, 39 Mich. 411; Thompson *v.* Allen, 2 Stew. & P. (Ala.) 18; Newlin *v.* Morse, 26 Pa. St. 102.

4. Kellogg *v.* Waite, 99 Mass. 501; Wolff *v.* Bank of Commerce, 10 Mo. App. 586.

5. Kent *v.* Hutchins, 50 N. H. 92.

6. Ball *v.* Gilbert, 12 Met. (Mass.) 405; Kellogg *v.* Waite, 99 Mass. 501; Croxford *v.* Mass. Cotton Mills, 15 Gray (Mass.) 72; Morrison *v.* McDermott, 6 Allen (Mass.) 122.

7. Lorman *v.* Phœnix Ins. Co., 33 Mich. 65.

8. Holbrook *v.* Waters, 19 Pick. (Mass.) 356; Kellogg *v.* Waite, 99 Mass. 502; Ball *v.* Gilbert, 12 Met. (Mass.) 405. But see Phillips *v.* Wilson, 1 Pinn. (Wis.) 513.

9. Mahoney *v.* McLean, 28 Minn. 63; Kirby *v.* Corning, 54 Wis. 599; Camp *v.* Hatter, 11 Ala. 151; Seals *v.* Holloway's Admr., 77 Ala. 344.

In the absence of statute he is entitled to his costs. Winnie *v.* Lenawee Circuit Judge, 42 N. W. Rep. (Mich.) 278.

10. Peabody *v.* Maguire, 79 Me. 573.

11. See first section under this heading.

for sufficient cause, he may recover his costs of the defendant, even though the garnishee be discharged, and the costs may be taxed as other costs to the losing party.[1] The matter lies in the discretion of the court, however, and it may tax them to one or both parties substantially as in an equitable proceeding.[2]

**7. The Judgment as to Costs.**—The fixing of the costs is judicial, and hence is a necessary part of the judgment.[3] Omitted items cannot be supplied after the term at which the judgment is rendered.[4]

The garnishee is entitled only to such costs *as are adjudged to be due.* Costs for travel and attendance are allowed to the garnishee without express order of the court;[5] but other fees which lie in the discretion of the court to grant cannot be claimed afterwards unless found due and fixed by the judgment of the court.[6]

**8. What Costs May be Allowed.**—It is not necessary, under this head, to notice more than is held to come under the general provisions of the statute. As soon as a garnishee is charged or discharged, and his further attendance upon court is unnecessary, he is entitled to no subsequent costs for travel and attendance.[7] He has no such interest in the proceedings after his own liability has been determined to entitle him to further costs. Under the general provisions of the statute, attorney's fees may be allowed.[8] They may be legitimately a part of the necessary expense incurred by the garnishee. The court may refuse them altogether, and its discretion is not reviewable on appeal.[9]

1. Leighton *v.* Colby, 56 Me. 79 (This case under a statute which overrules White Mountain Bank *v.* West, 46 Me. 15); Sulter *v.* Brooks, 74 Ga. 401.

But where plaintiff pursues a groundless claim he must in any event pay the costs thereof. Hurd *v.* Fogg, 22 N. H. 98.

2. White *v.* Kilgore, 78 Me. 324.

3. Speak *v.* Kinsey, 17 Tex. 301.

4. Selz *v.* First Nat. Bank, 60 Wis. 246; Ladd *v.* Couzins, 52 Mo. 454.

5. Schwerin *v.* Degraff, 19 Minn. 359.

6. Schwerin *v.* Degraff, 19 Minn. 359; Adams *v.* Penzell, 40 Ark. 531.

In case where no judgment can be rendered for or against either party, as where defendant dies before judgment can be rendered against him, and his estate decreed to be administered in insolvency, *held* that no party could recover any costs, it being impossible under such circumstances for the court to determine what order to make. Farnsworth *v.* Page, 17 N. H. 334.

Where the proceeding is void and no judgment can be rendered the garnishee can recover no costs. Kaufman *v.* Hude, 37 Mich. 123.

7. Hawkins *v.* Graham, 128 Mass. 20; Kellogg *v.* Waite, 99 Mass. 502.

Where an appeal is taken the garnishee is to be allowed fees at such term of court where appeal is pending. Holbrook *v.* Waters, 19 Pick. (Mass.) 356.

8. O'Reilly *v.* Cleary, 8 Mo. App. 186; Johnson *v.* Blanks, 68 Tex. 496; Holbrook *v.* Waters, 19 Pick. (Mass.) 354; Barber *v.* Andrews, 2 Root (Conn.) 250.

In Holbrook *v.* Waters, 19 Pick. (Mass.) 356, *held* that attorney's fees are to be distinguished from counsel fees where statute provides "for counsel fees."

*Held* not to apply to *upholding* an answer which had been traversed. Darnell *v.* Wood, 9 S. E. Rep. (Ga.) 282.

9. Rollins *v.* Allison (Vt.), 10 Atl. Rep. 201; Johnson *v.* Blanks and Holbrook *v.* Waters, above; Hawkins *v.* Graham, 128 Mass. 20.

But an appeal lies to determine the

A garnishee summoned twice on the same execution will be allowed his fees on both writs.[1]

**GAS.**—(See CAMPHENE.)[2]

**GAS COMPANIES.**


1. Definition, 1268.
2. Public or Private Corporations, 1268
3. Constitutionality of Charters, 1269.
4. Stock of Gas Companies, 1271.
5. Officers, 1271.
6. Contracts of Municipalities, 1271.
7. Gas-Fixtures, 1273.
8. Negligence, 1273.
   (*a*) *Generally*, 1273.
   (*b*) *Negligence in the Care of Pipes, etc.*, 1273.
   (*c*) *Contributory Negligence*, 1275.
9. Use of Streets and Highways, 1276.
   (*a*) *Generally*, 1276.
   (*b*) *Exclusive Privilege*, 1277.
   (*c*) *Franchise*, 1280.
10. Nuisance, 1280.
11. Estoppel, 1282.
12. Duty to Supply Gas, 1283.
   (*a*) *Deposits*, 1285.
   (*b*) *Damages for Refusal to Furnish Gas*, 1286.
   (*c*) *Fraudulent Taking*, 1286.
   (*d*) *Larceny*, 1287.
13. Evidence, 1287.
14. Municipal Control of Gas Business, 1288.
15. Actions By and Against Gas Companies, 1289.
   (*a*) *Assumpsit*, 1289.
   (*b*) *Mandamus*, 1289.
   (*c*) *Injunction*, 1290.
16. Insurance, 1290.
17. Taxation, 1291.


**1. Definition.**—A gas company is a corporation in the enjoyment of certain rights and privileges under public laws.[3]

**2. Public or Private Corporations.**—A gas company is not strictly a public corporation.[4] Some of the decisions hold, however,

construction of a statute concerning attorney's fees. Darnell *v.* Wood, 9 S. E. Rep. (Ga.) 282.

1. Ellison *v.* Ralston, 19 Mo. App. 537.

2. In an exception in a policy of fire insurance that the company will not "be responsible for loss or damage by explosion, except for such loss or damage as shall arise from explosion by gas," "gas" means ordinary illuminating gas. It does not include an inflammable and explosive vapor evolved in the process of extracting oil from shoddy. Stanley *v.* Weston Ins. Co., L. R., 3 Ex. 71.

In a lease of lands to be occupied and worked for petroleum, rock or carbon oil, and for no other purpose, the lease to be null and void, if no oil is found in paying quantities within four years, "oil" does not include natural gas. Truby *v.* Palmer (Pa.), 4 Cent. Rep. 925; s. c., 10 East. Rep. 497.

3. In Williams *v.* Mutual G. Co., 4 Am. & Eng. Corp. Cas. 66, SHERWOOD, J., says: "These rights and privileges are granted that corresponding duties and benefits might enure to the citizens when the rights and privileges conferred should be executed. The benefits are the compensation for the rights conferred and privileges granted and are more in the nature of convenience than necessity. And the duty of such a corporation imposed can not therefore be likened to the innkeeper or common carrier but more nearly approximates that of the telegraph, telephone or mill owner."

4. "The manufacture and sale of gas is a business which may be prosecuted or discontinued at the will of the party engaged in it. We discover no reason for subjecting the maker of gas to duties or liabilities beyond those to which the manufacturers and venders of other commodities are subjected by the rules of law." *Per curiam*, in McCune *v.* Norwich City G. Co., 30 Conn. 521.

In New York Cent. etc. R. Co. *v.* Metropolitan G. L. Co., 63 N. Y. 326, MILLER, J., says: "There is nothing in the charter of the appellant (the gas company) which entitles it to exemption from the power of eminent domain as exercised under the statute in acquiring real estate. It is a private manufacturing corporation which furnishes gas to individuals as agreed. This of itself does not make it a public corporation."

Action was brought to recover the

that a gas company, exercising its rights under State law and local ordinances, and having connected its pipes with those of individuals, is of a public nature, and bound to supply consumers on reasonable conditions.[1]

**3. Constitutionality of Charters.**—A special act for the incorporation of a gas company in a city is not unconstitutional by reason of the existence of a general law for the organization of such companies in any city, village or town.[2] Nor is a charter conferred by special act of the legislature authorizing a natural gas company to conduct gas to any city, town or village, within a radius of thirty miles, by mains, for the purpose of selling and supplying it for lighting streets, public parks, dwellings and other buildings therein, unconstitutional.[3]

amount of a tax assessed upon a gas light company. The ground of contention was that the defendants were a *quasi* public corporation, and came within the principle on which turnpike, railroad, canal, and other like corporations, established for the convenience and accommodation of the public, are *held* to be exempt from ordinary taxation in the cities or towns where they own property. *Held* that they were not a *quasi* public corporation. Commonwealth *v.* Lowell G. L. Co., 12 Allen (Mass.) 77. In this case it was contended by counsel that the defendants were a *quasi* public corporation. But BIGLOW, C. J., who delivered the opinion of the court, said: "We fail to see that the defendants can be properly regarded as a corporation of this character. No public duty is imposed upon them, nor are they charged with any public trust. They are authorized to make and distribute gas for their own profit and gain only. They are not bound to sell and dispose of it to anyone, either for public or private use or consumption. It is entirely at their own option whether they will exercise their corporate rights and privileges at all; and if they undertake to manufacture and dispose of gas, the extent to which they shall carry on their business is left to their own election. Nor is any power conferred upon them to take private property, not previously appropriated to a public use, for the purpose of exercising and enjoying their franchise. The only right or privilege given them is to dig up public streets and ways for the purpose of laying down their mains and pipes."

1. Williams *v.* Mutual G. Co., 52 Mich. 499; s. c., 4 Am. & Eng. Corp. Cas. 66; N. O. G. L. Co. *v.* Louisiana L. Co., 115 U. S. 650; s. c., 10 Am. & Eng. Corp. Cas. 639.

The conducting by gas pipes of illuminating gas for the purpose of sale, and to supply gas for lighting the streets, public parks and dwellings of the city of Rochester, by the plaintiff under a special charter authorizing them to take private property upon making compensation therefor, such business is a "public use" within the meaning of the constitution of New York, and plaintiff's charter was *held* to be constitutional. Bloomfield & Rochester Natural G. Co. *v.* Richardson, 63 Barb. (N. Y.) 437.

2. People *v.* Bowen, 21 N. Y. 517.

3. Bloomfield etc. G. Co. *v.* Richardson, 63 Barb. 437. In this case the question presented was whether the right thus sought to be acquired by the corporation is a public use so that the legislature is authorized in furtherance of it to exercise the right of eminent domain and to confer the power to exercise that right upon the company. TALCOT, J., who delivered the opinion, said: "It is well settled that in order to constitute a public use within the meaning of the constitution it is not necessary that the improvement should directly benefit the people of the whole State; but the direct public benefit contemplated may be confined to a particular community. Such is the case in regard to many highways and especially in cases where the the right to exercise the power of eminent domain in that particular case has been conferred upon persons authorized to conduct water from a distance to supply particular localities, and the case of grounds taken for burial places. (See act of May 9th, 1870.) Nor is it

essential to the exercise of this right that the taking of the property in question should be absolutely necessary to accomplish the object.

It is said by the CHANCELLOR, in the case of Beekman *v.* Saratoga R. Co., 3 Paige (N. Y.) 45, before referred to: "It belongs to the legislature to determine whether the benefit to the public is of sufficient importance to justify their exercise of the right of eminent domain in thus interfering in the private right or rights of individuals. . . . But if the public interest can in any way be promoted by the taking of private property it must rest in the wisdom of the legislature to determine whether the benefit to the public will be of sufficient importance to render it expedient for them to exercise the right of eminent domain. It is upon this principle that the legislatures of several of the States have authorized the condemnation of lands of individuals for mill sites.

Upon the same principle of public benefit not only the agents of the government, but also individuals and corporate bodies, have been authorized to take private property for the purpose of making public highways, turnpikes, roads and canals, of erecting and constructing wharves, roads and establishing ferries, of draining swamps and marshes, of bringing water to cities and villages. In all such cases the object of the legislative grant of power is the judicial question. That is to say, a case may be supposed, in fact such cases have arisen, where the legislature has assumed to pass enactments, the effect of which, if valid, was merely to divest one citizen of his property for the benefit of another without the semblance of any public benefit. When such a case arises where the absence of all pretence of public benefit is clear and palpable, it will be, of course, the duty of courts to declare the act unconstitutional and void, not as an authorized taking of private property for public use, but as an attempt to take it for private use. But in order to authorize a court thus to interpose its veto upon a legislative act, it must be clear and manifest that no public use was contemplated or public benefit is to result.

The provision of the constitution referred to does not purport and was not designed to define or limit the nature of the use for public benefit derived from the contemplated improvement, whether such improvement is to be affected directly by the agents of the government through the medium of corporate bodies or of individual enterprise." The principles stated by the chancellor as quoted were afterwards substantially reiterated by the court of errors in the case of Bloodgood *v.* Mohawk etc. R. Co., 18 Wend. (N. Y.) 9, and again by the court of appeals in the Buffalo & N. Y. R. R. Co. *v.* Brainard, 5 Seld. (N. Y.) 100, where it is said: It belongs to the legislative power of the government to determine for what public purposes private property shall be taken and the necessity or expediency of such appropriation. These principles undoubtedly constitute the law of this State and furnish the rule by which the provision of the contitution, limiting the right to take private property for public use is to be interpreted. Unquestionably, to a certain limited extent, the constitutionality of an act of the legislature assuming to confer this right is a judicial question.

The provision of the constitution referred to does not support, and was not designed to define or limit, the nature of the use for which private property can be taken, but only to require absolutely that in all cases where the property was taken for a public use, just compensation should be provided for and made. If these suggestions are correct, it will be seen that the power of the court, on questions of this character, is circumscribed within very narrow limits. If the act which confers the right to take private property has for its object, or one of its objects, the promotion of an enterprise which we can see may be for the public benefit, or in the language of the judgment of the court of errors may constitute a "public improvement" and it at the same time provides for the payment of a full compensation to be ascertained in the manner pointed out by the constitution, the power of the legislature to make the law must be affirmed, whatever may be thought of the propriety of its exercise."

**Title of Act to Express Object of Law.**—The constitution (art. 115, 116 of 1852 of Louisiana) requires the object of every law to be expressed in the title. The defendant's charter was extended for twenty years from 1875, by an act passed in 1860, and entitled "An act to extend the area of gas lighting in the city of New Orleans and to reduce the price now paid by gas companies." It was *held* that such extension was unconstitutional and void and no rights

**4. Stock of Gas Companies.**—A contract made by a city with an established gas company, by which the company were given the exclusive privilege, for a term of years, and until notice, of lighting the city with gas, and also the right to lay down their pipes and extend their apparatus through the streets, etc., of the city, and in consideration thereof agreed to furnish to the city gas at half the price they charged to their private customers, does not give such a right to the gas company as will stop the city corporation from subscribing to the stock of a new gas company whose object was to introduce gas into the same city.[1]

**5. Officers**—(See NEGLIGENCE, *post*).—A gas company is liable for materials furnished by the president and used by the company.[2] The superintendent of a gas company, in its relations to customers, has authority to waive a regulation of the company requiring applications for a supply of gas to be in writing.[3]

**6. Contracts of Municipalities.**—Cities may be empowered, by articles of incorporation, to contract with a gas company for the lighting of its streets, public buildings, etc., and may exercise such power, within the limits of its franchise, according to its own discretion.[4]

Where a municipal corporation enters into the business of manufacturing and selling gas, it acts as a private corporation,

accrued thereunder to defendants because not disclosed in the title of the act; and it was *held* further that by the act of legislature the plaintiff company, under the title of "An act to incorporate the Crescent City Gas Light Co.," was not unconstitutional nor repugnant to art. 114 of the constitution of 1868, similar to the former article because it was not disclosed in the title that the exclusive and sole right to make and vend gas in the city of New Orleans was conferred thereby. Crescent City G. Co. *v.* New Orleans G. Co., 27 La. An. 138.

1. Memphis City *v.* Dean, 8 Wall. (U. S.) 64.

**Subscription to Stock.**—Under the statute of Pennsylvania, authority was given to the supreme court to incorporate gas companies, and it was *held* that before the court could proceed to exercise these powers and incorporate a gas company, the association must have been already formed and all the stock subscribed for. *In re* Petition of F. H. Gibbs, 3 Pittsburgh (Pa.) 499.

**Payment of Subscription.**—In action by a gas company against one of the original subscribers thereto for the amount of his subscription, the defendant claimed that his subscription had been fully paid by the conveyance to the company of his interest in certain coal lands, and he had transferred them at once to the gas company, and that the company had agreed to receive his interest in the same as a payment by him for his stock; it was *held* that this agreement was illegal, and no defence in this action as against subsequent stockholders, unless they were informed of the fact when they subscribed or affirmed it afterwards, and that this arrangement was not a valid payment for the stock, which should have been in actual money. Bailey *v.* Pittsburgh etc. G. Co., 69 Pa. 334.

2. Brown *v.* La Crosse City G. Co., 21 Wis. 51.

3. Shepherd *v.* Milwaukee G. Co., 11 Wis. 234.

4. Indianapolis *v.* Indianapolis G. Co., 66 Ind. 396; N. O. G. Co. *v.* Louisiana L. Co., 10 Am. & Eng. Corp. Cas. 639; 115 U. S. 650.

**Illegal Provisions.**—Where contracts for supplying gas to a city contained illegal provisions respecting the exemption of the gas company's property from taxation and the payment of money out of the sinking fund of the city devoted by law to other purposes, it was *held* that this was no defence to an action for the price of gas supplied to the city under such contracts; that

and not as a local sovereign, and does not legislate, but contracts, and is as much bound by its engagements as is a natural person, and the legislature has no power to authorize the city to violate its charter.[1]

The inability of a municipal corporation to pay an indebtedness, incurred under a contract made by competent authority with a gas company, cannot defeat an action thereon, neither can the corporation annul such a contract by notifying the company that it cannot and will not pay the indebtedness which will be incurred by its execution.[2]

under their charter the city could contract for lighting the streets with gas and could bind itself for the payment of the price agreed upon. Neb. City *v.* Neb. City G. Co., 9 Neb. 339.

**Quality of Gas.**—Where a gas company agrees to furnish a city with gas as cheap per cubic foot and of as good quality as is furnished in the large cities, it will be obliged at all times to furnish gas as cheap as it was furnished at the same time in said cities and not at the price for which it was sold in those cities at the time the agreement was made. Worcester G. Co. *v.* Worcester, 110 Mass. 353. Also, Great Cent. G. Co. *v.* Tallis, 3 Gas J. 5; Forquay G. Co. *v.* Carter, 32 Gas J. 490; Great Cent. G. Co. *v.* Clarke, 11 Com. B. (N. S.) 811; 13 Com. (N. S.) 838; 11 Gas J. 89–763.

1. Western Saving Fund Soc. of Phila. *v.* Phila., 31 Pa. St. (7 Casey) 185.

The Philadelphia gas works were constructed by private individuals and were afterwards taken possession of by the city and the stocks replaced by certificates of loan which were issued by the city to the stockholders, and the gas works were held by trustees, who were to have full control and management of such works and were to create a sinking fund to pay off the certificates and the interest on the loans. By a latter ordinance a chief engineer of the gas works was provided, who should be the head of the gas department and directing that all moneys received for gas should be paid to such officers as such engineer should designate. On the petition of the creditors an injunction was issued, restraining the city gas of Philadelphia from attempting to take possession of the gas works or from interfering with the trustees in the control and management of the said works, and it was *held* that the contracts which a municipal corporation may make for the purpose of supplying the inhabitants with gas light in their houses are made by such corporation in its capacity as a private corporation, and not by virtue of its powers of local sovereignty and cannot be impaired because it may deem it for the benefit of its citizens to do so. Western Sav. Fund Soc. of Phila. *v.* Philadelphia, 31 Pa. St. (7 Casey) 175.

**Contract Ultra Vires.**—The plaintiffs, when about to erect their gas works in the village of Elmira, obtained leave from the village trustees, who were the commissioners of highways, to lay gas pipes under the village streets upon condition that the plaintiffs should furnish gas to the village at a certain rate. *Held*, by PARKER, J., that the contract was *ultra vires* on the part of the trustees and that the plaintiff could recover what the gas was worth; that the village has no proprietary interest in the streets, but holds them in trust for the benefit of the community and has no power by contract to embarrass its legislative powers even for the sake of a benefit to itself. Elmira G. Co. *v.* City Elmira 2 Albany L. J. 392.

**Contract Made in Compliance with Vetoed Ordinance.**—Where a contract with a gas company to light the streets of a city was duly executed by the president of the city council under an ordinance directly empowering him to make such contract and such ordinance was vetoed by the mayor, but not within the time required by law, it was *held* that such contract was valid. Penna. Globe G. Co. *v.* Scranton, 97 Pa. St. 538.

2. Davenport G. Co. *v.* City of Davenport, 13 Iowa 229. In an action against the defendant to recover the price of gas furnished it, the city filed an answer alleging that the gas furnished by the plaintiff was used by the department of parks, that the appropriation for that department had been exhausted, and that the debt had been

**7. Gas Fixtures.**—Gas burners, chandeliers and gasaliers may be fixtures.[1] But ordinarily, they are not so considered.[2]

**8. Negligence**—(*a*) *Generally.*—A gas company is bound to exercise such care, skill and diligence in all its operations, and in the transaction of all branches of its business, as is called for by the delicacy and difficulty of the nature of its business.[3]

(*b*) *Negligence in the Care of Machinery.*—Gas companies are bound to supply pipes of sufficient strength to stand all lawful uses to which the public streets in which they are laid may be

incurred, if at all, by that department in excess of the amount appropriated; but it was *held* that these facts constituted no defence to the action, and that the answer was frivolous. New York Mutual G. Co. *v.* City of N. Y., 49 How. (N. Y.) Pr. 227 (1875).

A contract existed between the defendants and the plaintiffs whereby the former were to furnish the city at a stated price per month gas light for its streets, and the plaintiffs undertook to rescind this contract by a resolution of the common council, approved by the mayor, declared said contract to be at an end, and notified the defendants of said action. And it was *held* that this was not a rescission of the contract, as the company had not assented, but only a breach for which the gas company, in a proper action, would be entitled to recover adequate damages. Nebraska City *v.* Neb. City G. Co., 9 Neb. 339.

**Contracts Generally.**—A special contract for continuing to supply gas will not be binding on the company unless in writing and under the corporate seal. Smith *v.* London G. Co., 7 Grant 112; London G. Co. *v.* Vestry of Chelsea, 8 C. B., N. S. 215; 9 Gas J. 292.

**Lowest Bidder.**—Contract to supply coal to Philadelphia gas works need not necessarily be awarded to the lowest bidder. Hacker *v.* Philadelphia, 6 Phila. 94. No action lies for failure of aldermen to award contract to lowest bidder. East River G. Co. *v* Donnelly, 32 N. Y. (Super. Ct.), 25 Hun 614.

1. Funk *v.* Brigaldi, 4 Daly (N. Y.) 359; Sewell *v.* Augustin, 18 Law Times (N. S.) 300; Keeler *v.* Keeler, 31 N. J. Eq. 181, 191; Johnson *v.* Wiseman, 4 Metc. (Ky.) 357.

2. In Vaughan *v.* Haldeman, 33 Pa. St. 522, chandeliers and side brackets were *held* not fixtures. So also to pendent gas burners, which in Montague *v.* Dent, 10 Rich. L. (S. Car.) 135, were *held* not to pass by a sheriff's conveyance of the freehold. In Elliott *v.* Bishop, 10 Ex. Ch. 512, it was *held* that a tenant could remove them. Wall *v.* Hind, 4 Gray (Mass.) 256. In Shaw *v.* Lenke, 1 Daly (N. Y.) 487, they were *held* not to pass to the purchaser of an estate. Town *v.* Fiske, 127 Mass. 125; Lawrance *v.* Kemp, 1 Duer (N. Y.) 363; Heyshem *v.* Dettre, 89 Pa. St. 506; Jareche *v.* Philharmonic Society, 79 Pa. St. 403; Guthrie *v.* Jones, 108 Mass. 191; Pa. Mut. L. Co. *v.* Thackara, 13 Rep. 731; Rogers *v.* Crow, 40 Mo. 91; Hays *v.* Doane, 3 Stock. (N. J.) 84.

3. Chrisholm *v.* Atlantic G. Co., 57 Ga. 28; Hally *v.* Boston G. Co., 8 Gray (Mass.) 123; s. c., 69 Am. Dec. 233; Emerson *v.* Lowell G. Co., 3 Allen (Mass.) 410; Butcher *v.* Providence G. Co., 12 R. I. 149; Dillon *v.* Washington G. Co., 1 McArthur (U. S.) 626.

**Failure to close the service pipe** admitting gas to a building on discontinuing gas to the occupant is negligence. Lanigan *v.* New York G. Co., 71 N. Y. 29.

**Failure to make a proper inspection** within a reasonable time after a notice of a leak is given is negligence. Mose *v.* Hastings etc. G. Co., 4 Fost. & Fin. 324.

**Covering Gasometer.**—It is negligence to cover a gasometer instead of leaving it open and not to make a proper examination of it before using it. Sauvage *v.* English G. Co., 4 Gas J. 136.

**Filling Trench.**—It is also negligent to fill up a trench so imperfectly that when subsequent rains come it settles into a dangerous hole. Dillon *v.* Washington G. Co., 1 McArthur (U. S.) 626.

**Meter.**—It is also negligent not to keep a proper supply of water in a meter. Hecker *v.* London G. Co., 32 Gas J. 781.

**Opening in Sidewalk.**—It is negligence to maintain a dangerous opening in the sidewalk. Buesching *v.* St. Louis G. Co., 73 Mo. 219.

put, and they are responsible for all damages resulting from the breaking of the pipes in consequence of such use.[1]

**Explosions.**—In Hampton *v.* Cradley Heath G. Co., 14 Gas J. 606, the plaintiff was asked by a neighbor to turn on the gas, and that he went with a light to the cellar, and that the gas thereupon exploded and he was badly injured. The explosion was caused by the leakage from a large crack in the main pipe, which the plaintiff claimed was caused by the negligence of the defendants' servants in putting in the pipe. The defendants denied that there was any such negligence, and claimed that the plaintiff himself was negligent. *Held*, that the defendants could only be held liable for the consequence of the accident if it was caused by their negligence, of course including that of their workmen; that if in inserting the service pipe it had been so laid as to cause the crack, or so that the ordinary traffic passing over the pipe caused the crack, they would be liable, but they would not be liable if the cracking of the pipe was a pure accident caused by a change in the weather or by the sinking of the earth in mining operations; and that, even if the cracking of the pipe was due to this negligence, they would not be liable to the plaintiff if he, by his own negligence, contributed to the accident. Rapson *v.* Cubitt, Carrington & Marsham 4; 9 Meeson & Welsby 710; Hulett *v.* Pudsey G. Co., 28 Gas J. 663.

**When a Question for the Jury.**—In an action for damages for injuring the plaintiff's landing stage, it appeared that it was set on fire and burned by an escape of the defendant's gas, which the plaintiffs alleged was set on fire by a gas fitter who was making a connection without having turned off the gas, it was *held* that it was a question for the jury to decide upon the evidence, which was conflicting, and a verdict was found for the plaintiffs. Mersey Docks & Harbor Board *v.* Liverpool U. S. Co., 26 Gas J. 327; Chadwick *v.* Corporation of Wigan, 28 Gas J. 562. Defendant's workingmen were engaged in connecting a gas pipe. The gas took fire from a light which they were using. They claimed that there was no smell of gas. *Held*, that the question whether such action on the part of the working men was negligent was for the jury. Ellis *v.* London G. Co., 32 Gas J. 849. Gas escaped from the company's pipes into premises where lights were known to be burning. The gas men requested that the lights should be put out, but the plaintiff claimed gas found entrance through an open window nearly level with the trench from the main after a hole had been made in the main for the ejection of the service pipe. *Held*, that whether the defendants' men were negligent was a question for the jury. Blenkiron *v.* Gt. Cent. G. Consumers' Co., 2 Fost. & Fin. 437; 2 Gas J. 292; 3 L. T. R. 317; Farquharson *v.* Alliance & D. G. Co., 22 Gas J. 1085; Butcher *v.* Providence G. Co., 12 R. I. 149; Chrisholm *v.* Atlantic G. Co., 57 Ga. 28; Cleveland *v.* Spier, 16 C. B., N. S. 399; Fare *v.* Bath G. Co., 25 Gas J. 566; Boothman *v.* Mayor, etc., 20 Gas J. 585; Han. *v.* Wymouth G. Con. Co., 18 Gas J. 186.

**Negligence and Torts of Agents.**—A gas company is liable for a tortious seizure of property by its agent to secure it for a gas bill. Smith *v.* Bermingham & S. G. Co., 1 Adolph & El. 526; 3 Nev. & Man. 771. But the company is not liable for the negligence of a servant of a consumer even though it permit him to put in pipes. Flint *v.* Glouster G. Co., 3 Allen (Mass.) 343; 9 Allen (Mass.) 552. A master is not liable to a servant injured by a gas explosion occurring in the ordinary course of the servant's employment. Warren *v.* Wilder, 20 Gas J. 892. In action for damages for injuries received from the explosion of gas it appeared that the defendants had introduced gas into a house occupied by the plaintiff by means of pipes leading through the cellar wall, and that an escape of gas occurred of which the company were promptly notified; that they at once sent one of their servants, a common laborer, to ascertain where the leak was, and that he lighted a match in the cellar, causing a terrific explosion, by which the house was blown to pieces and the plaintiff seriously injured; and it was *held* that the evidence of the defendants' negligence was clear and decisive, and that the defendants were liable for the injury. Lannen *v.* Albany G. Co., 46 Barb. 264; s. c., 44 N. Y. 459; Parry *v.* Smith, L. R., 4 Com. Pl. D. 325; 33 Gas J. 899; Devine *v.* Tarrytown etc. Co., 29 N. Y., Super. Ct. 26.

1. Brown *v.* New York G. Co., Anth. N. P. Cas. (N. Y.) 351.

(*c*) *Contributory Negligence.*—Contributory negligence will be inferred from the fact of permitting a servant to enter a room full of gas with a light; and the fact that the servant had been previously allowed so to do will not make it safe or prudent to allow him to do so again.[1] Entering a sewer filled with gas with a light is negligence.[2] It may be contributory negligence to turn on gas in a house during repairs.[3]

MERRICK, J., in delivering the opinion in the case of Emerson *v.* Lowell G. Co., 3 Allen (Mass.) 410, said: "It was the duty of the defendants, as it is of all incorporated companies which are invested for their own profit and advantage with the great and important privilege of supplying the community with light for private habitations, and for other places devoted to public or private use, to exercise due care and diligence in keeping it constantly under their control and preventing it from escaping into a dwelling house or place of business where the inmates or occupants are in such case involuntarily subjected to its effects, whether they are positively injurious or merely disgusting and offensive. But if its effect is noxious as well as disagreeable, that is a reason why the diligence required to take care of and control it should be still more active and unremitting."

As a gas company is in charge of a dangerous material, it is bound itself to exercise due care proportioned to the risk, and also to use similar care in preventing careless interference with its pipes by others. If the earth about its pipes is disturbed by others in constructing sewers in the streets, it is bound to see that the earth so disturbed is put back again, so as to afford sufficient support for its pipes, and if it fails to do this and the gas escapes from its pipes and passes through the sewers into the house of others, the company will be liable for the injuries caused thereby. Butcher *v.* Providence G. Co., 12 R. I. 149.

It is negligence of a gas company for its employe to go into a cellar where gas is escaping with a light, and the company is responsible for an explosion caused thereby. Lannen *v.* Albany G. Co., 46 Barb. (N. Y.) 264; 44 N. Y. 459. A gas fitter who carelessly allows gas to escape is liable to one injured by an explosion thereof. Parry *v.* Smith, L. R., 4 Com. Pl. D. 335; 38 Gas J. 899. See also CONTRIBUTORY NEGLIGENCE, *post.*

**Shutting Off Fire.**—A failure to have the gas shut off from all localities within the field of a great conflagration is not negligence. Hutchinson *v.* Boston G. Co., 122 Mass. 219.

**Service Pipes.**—A gas company is bound to close its service pipes when it disconnects its supply to a customer, and if injury results from its failure to perform this duty, it will be liable for damages caused solely by such neglect. Lanigan *v.* N. Y. G. Co., 71 N. Y. 29.

**Inspection of Mains.**—A gas company is bound to keep such reasonable inspection of its mains as will enable it to detect when there is such an escape of gas from imperfection of the pipes as may lead to danger of explosion. Moore *v.* Hastings & St. L. G. Co., 4 F. & F. 324.

**Escape of Deleterious Substances.**—Gas companies are also bound to prevent deleterious substances from escaping from their manufactories upon the premises of their neighbors. Carhart *v.* Auburn G. Co., 22 Barb. (N. Y.) 297; Pottstown G. Co. *v.* Murphy, 39 Pa. St. 257.

1. Lanigan *v.* New York G. Co., 71 N. Y. 29; Burrows *v.* March G. Co., 5 Exch., 67 L. R., 7 Exch.; Sauvage *v.* English G. Co., 4 Gas J. 136.

2. Oil City G. Co. *v.* Robinson, 13 Rep. 253; Brown *v.* New York G. Co., Anth. N. P. (N. Y.) Cases 351.

3. Papson *v.* Cubitt, 9 M. & W. 710; Hampton *v.* Cradley Heath G. Co., 14 Gas J. 606; Lannon *v.* Albany Gas Co., 46 Barb. (N. Y.) 264; 44 N. Y. 459.

**Remaining in a House.**—To remain in a house full of gas. Hally *v.* Boston G. Co., 8 Gray (Mass.) 123; Hunt *v.* Lowell G. Co., 1 Allen (Mass.) 343.

**Noxious Stenches.**—In an action for damages against a manufacturer of illuminating gas for injury to the plaintiff's premises from noxious stenches, coal tar, gas, lime and other offensive results of the defendant's business which he negligently allowed to escape upon the plaintiff's premises, the defendant

**9. Use of Streets and Highways**—(*a*) *Generally.*—In Great Britain, express legislative sanction is necessary to warrant the laying down of *gas pipes* in the public highways,[1] and so in this country it is also considered that the right to the use of the public streets of a city by a gas company, for the purpose of laying down its pipes, is a franchise which can be granted only by the legislature of some local or municipal authority empowered to confer it.[2]

cannot escape liabilty by proving that the plaintiff produced other noxious odors in his own business which contributed to render them unwholesome; unless it is also shown that the injury complained of was the result of the combination of both of the noxious odors and those created by the defendant's works were not independently offensive. Brown *v.* Illins, 27 Conn. 84.

**Giving Notice.**—It is the duty of consumers to give notice of a leak of gas, and failure to do this within a reasonable time is contributory negligence. Hunt *v.* Lowell G. Co., 1 Allen (Mass.) 343; Parkin *v.* Wirksworth G. Co., 26 Gas J. 946.

**Explosion.**—The plaintiff's tenant in possession, during the night, smelling gas, took a candle and went into the basement of the house. The gas ignited from the candle and exploded, causing damage to the plaintiff's house, and it was *held* that the burden of proof was on the plaintiff to show that the injury was caused by the defendant's negligence, and that the negligence of the tenant did not contribute materially thereto. Bartlett *v.* Boston G. Co., 122 Mass. 209. In an action for damages for injury to the plaintiff's premises from an explosion of gas which escaped from the defendant's main pipe into a cellar of the plaintiff's store, which had been excavated by them beyond the curb line under the highway, contrary to the city ordinance, it was *held* that the illegal excavation constituted such contributory negligence on the part of the plaintiffs as would prevent them from maintaining the action. Strawbridge *v.* City of Phil., 13 Rep. 216.

**Plaintiff a Minor Child.**—A child cannot maintain an action against a gas company for injury occasioned to it at night by the gas escaping from their gas pipes in the streets opposite the house over which the child and its father have no control, without proving want of ordinary care on the part of the company in keeping the pipes in repair, and ordinary care on the part of itself and father. Hally *v.* Boston G. Co., 8 Gray 123; Smith *v.* Boston G. Co., 129 Mass. 318; Lannen *v.* Albany G. Co., 46 Barb. (N. Y.) 264.

**Negligence of Third Persons.**—In Schemerhorn *v.* Metropolitan G. L. Co., 5 Daly (N. Y.) 144, it was *held* that a plumber employed by plaintiff to find a gas leak was not the plaintiff's agent, so as to make his negligence in going with a light into a cellar full of gas that of plaintiff. The court took the view that where a man sustains an injury from the separate negligence of two persons employed to do separate things, he may sue either or both.

1. Regina *v.* Sheffield G. Co., 22 Eng. Law & Eq. 518; Ellis *v.* Sheffield G. Co., 23 L. J., Q. B. 42; Galbreath *v.* Armour, 4 Bell App. Cas. 374; Queen *v.* G. Co., 2 El. & El. 651; Queen *v.* Charlesworth, 16 Queen's B. 1012; Regina *v.* Train, 9 Cox Cr. Cas. 180; Boston *v.* Richardson, 13 Allen (Mass.) 146; Thompson *v.* Sunderland G. Co., L. R., 2 Ex. Div. 429.

2. State *v.* Cincinnati G. Co., 18 Ohio St. 262; Milhan *v.* Sharp, 15 Barb. (N. Y.) 210, per EDWARDS, P. J.; Norwich G. L. Co. *v.* Norwich City G. Co., 25 Conn. 19 (1865); Smith *v.* Metropolitan G. Co., 12 How. (N. Y.) Pr. 187; People *v.* Bowen, 30 Barb. (N. Y.) 24. The right to use the public streets of a city for the purpose of laying gas pipes therein is a franchise which the State alone can confer. Jersey City G. Co. *v.* Dwight, 29 N. J. Eq. 242; Regina *v.* Longton Gas Co., 2 El. & El. 650; 8 Gas J. 165; 9 G. J. 114; 29 L. J., M. C. 118; 2 Law T. 14; 8 Cox C. C. 317. An ordinance of a municipal corporation which prohibited the defendants and every other person from opening or digging up any paved street for the laying of gas mains or pipes between Dec. 1st and March 1st, is a regulation, and not a restraint of trade, and within the power of the city authorities, and

(*b*) *Exclusive Privileges.*—The council of a city have no power to grant to any person or corporation the exclusive use of the streets for laying gas pipes without direct authority from the legislature.[1]

The legislation may, however, grant the exclusive privilege to

does not conflict with the powers of a gas company chartered before the passage of the ordinance, and required by its charter to furnish gas and lay mains, etc., along the streets, upon application from the owners of property, but an ordinance which prohibits the gas company from digging up any paved street in order to introduce the gas into premises on the opposite side of the street to that on which the gas pipes are laid, is an unreasonable exercise of authority, and consequently not within the power of the board, commissioners, etc. No Liberties *v.* No Liberties G. Co., 12 Pa. St. 318. But on petition for leave to file an information in the nature of a *quo warranto*, to deprive a gas company of the franchise of laying its pipes and distributing gas through the streets of Detroit, it was *held* that the "exercise of the power of using streets for laying gas pipes was an easement rather than a franchise, and a matter peculiarly local in its character, and which should always be to a reasonable extent under municipal supervision," and that it is a mere grant of authority which, coming from private owners or public agents, rests in contract or licence only. People *v.* Mutual G. L. Co., 38 Mich. 154; Mitc. G. Co. *v.* Wimbladon, 30 Gas J. 600.

**Gas Pipes in Country Highways.**—The right to lay gas pipes in a country highway is not such a use of the highway as was contemplated at the time of the condemnation. There is a greater variety in the uses to which city streets are put than in those to which country highways are put, and in city streets the laying of gas pipes is considered legitimate subject of course to municipal regulation. See Mills on Em. Dom., § 55; Bloomfield G. Co. *v.* Calkins, 62 N. Y. 386; s. c., 1 N. Y. Super. Ct. 541; Kelsey *v.* King, 32 Barb. (N. Y.) 410.

In Boston *v.* Richardson, 13 Allen 160, GRAY, J., says: "Whether a town or its officers, or any other persons, would have the right without express authority from the legislature to lay gas pipes in the highways is not so clear. In Great Britain it has been *held* that they could not. It is unnecessary to consider how far the rule would apply in this State, for it is certain that the use of gas and railways was not contemplated in Massachusetts when G and B acquired their titles, and cannot influence the construction or interest of those titles. We are not aware that such powers have been exercised in Massachusetts except by virtue of express statutes; and it is well settled that when land, once duly appropriated to a public use which requires occupation of its whole surface, is applied by authority of the legislature to another similar public use no new claim for compensation, unless expressly provided for, can be sustained by the owner of the fee."

In Galbreath *v.* Armour, 4 Bell App. Cas. 374, it was *held* that the fee of a public highway continues in the proprietor of the land over which the way has been made, and that, although the highway may for forty years have been under the control and superintendence of the general road trustees and the proprietor is entitled to prevent the opening of the way for the purpose of laying down gas or water pipes, the proprietor of the soil of a public highway, allowing certain of the conterminous feuars to break up the way for laying down the pipes, during a period of ten years, is not thereby precluded from questioning similar acts by other feuars.

1. State *v.* Cincinnati G. Co., 18 Ohio St. 262; State *v.* Milwaukee G. Co., 29 Wis. 454; People *v.* Bowen, 30 Barb. (N. Y.) 24; 21 N. Y. 517; Crescent G. Co. *v.* New Orleans G. Co., 27 La. An. 148; Des Moines G. Co. *v.* City of Des Moines, 44 Iowa 505; Jersey City G. Co. *v.* Dwight, 29 N. J. Eq. 242; Chartered G. Co. *v.* Great Cent. G. Consumers' Co., 1 Gas J. 322; Memphis etc. G. Co. *v.* Williams, 9 Heisk. (Tenn.) 314; Citizens' G. & Mining Co. *v.* Elwood, 20 Am. & Eng. Corp. Cas. 263; Grand Rapids Electric Light Co. *v.* Grand Rapids etc. Co., 21 Am. & Eng. Corp. Cas. 270.

In Citizens' G. & Mining Co. *v.* Elwood, 20 Am. & Eng. Corp. Cas. 263,

ELLIOTT, J., said: "A municipal corporation cannot grant to any fuel or gas supply company a monopoly of its streets. There is nothing in the nature or business of such a company making its uses of the streets necessarily exclusive. The spirit and policy of the law forbids municipal corporations from creating monopolies by favoring one corporation to the exclusion of others. It is probably true that a municipal corporation may make a contract with a gas company for supplying light to the public lamps for a limited time, even though it be for a number of years. On this point, however, there is some conflict; but there is no conflict on the proposition that, in the absence of express legislative authority, a municipal corporation cannot grant to any corporation the exclusive privilege of using its streets. There is, we know, much conflict among the authorities upon the question of the power of the legislature to grant an exclusive right to a gas company to use the highways of a municipal corporation; and under our constitution it is very doubtful whether the legislature possesses such authority. But we are not here concerned with that phase of the question, since the legislature has not attempted to vest an exclusive privilege in any corporation. Upon the direct question before us, there is a remarkable uniformity in the decisions of the courts. Indianapolis *v.* Indianapolis G. L. & C. Co., 66 Ind. 400; Norwich G. L. Co. *v.* Norwich C. G. Co., 25 Conn. 19; State *v.* Cincinnati G. L. & C. Co., 18 Ohio St. 293; State *v.* Columbus G. L. & C. Co., 34 Ohio St. 572; Memphis *v.* Memphis W. Co., 5 Heisk. (Tenn.) 495; State *v.* Milwaukee G. L. Co., 29 Wis. 454; Garrison *v.* Chicago, 7 Biss. (U. S.) 480; Illinois & St. L. R. & C. Co. *v.* St. Louis & P. E. Co., 2 Dill. (U. S.) 70; Brenham *v.* Brenham Water Works Co., 67 Tex. 542; s. c., 20 Am. & Eng. Corp. Cas. 207; Richmond County G. L. Co. *v.* Middletown, 59 N. Y. 231; Davenport *v.* Kleinsmidt (Mont.), 16 Am. & Eng. Corp. Cas. 301; Meadville F. G. Co. *v.* Meadville N. G. Co., 3 Cent. Rep. 921; 2 Dill. Mun. Corp. (3rd ed.), § 693."

**Grant of Exclusive Privilege of Lighting City with Gas Does Not Deprive City of Power to Contract for Electric Light.** —Parkersburg G. Co. *v.* City of Parkersburg (W. Va.), 4 S. E. Rep. 650, decides that the grant by a city to a gas company of the privilege of lighting the city with gas does not deprive the city of the power to contract with an electric light company for lighting the city with electric lights. The court say:

"We have already shown that the grant of an exclusive privilege will not be implied. It is equally well settled that such privilege, when legally granted, will not be extended beyond its obvious meaning. Thus, in Parrott *v.* City of Lawrence, 2 Dill. (C. C.) 332, it was *held* that the exclusive right to build a bridge at a given point would not prevent the establishment of a ferry near the same point. In Bridge Propr. *v.* Hoboken, 1 Wall. (U. S.) 116, it was decided that an exclusive right to build a bridge at a certain point was not infringed by the establishment of a bridge for the passage of a railway alone. In Emerson *v.* Com., 108 Pa. St. 111, the court decided that the franchises of two charters—the one, the Fuel Gas Company, incorporated for the purpose of supplying 'heat to the public from gas within the city of Pittsburgh; and the other, the Pennsylvania Fuel Company, incorporated for the purpose of supplying heat to the public within the city of Pittsburgh by means of natural gas, conveyed from such adjoining counties as may be convenient'—were not identical, and therefore not necessarily hostile to each other, under the statute granting an exclusive privilege to the company first chartered. The effect of the decision in this case is that the grant of an exclusive right to one company to supply the city of Pittsburgh with manufactured gas is not infringed by the grant of the right to another company to supply the same city with natural gas.

"In 1868 the city of Saginaw made a contract with the gas light company, giving it the exclusive right to light the street lamps and supply the inhabitants with gas for thirty years. In 1886 the city council passed a resolution accepting a proposition from an electric light company for city and commercial lighting. Upon a bill filed by the gas company to restrain the city and electric light company from carrying out the contract with the latter, it was decided in G. Co. *v.* City of Saginaw (Mich.), 16 Am. & Eng. Corp. Cas. 562, that said contract with the gas company, so far as it attempts to give an exclusive right to supply gas for thirty years, was a monopoly, and could not be enforced, and that the plaintiff was not entitled

gas companies to furnish gas to a municipal corporation for a term of years.[1] But the general grant of power in the charter of a city to cause it to be lighted with gas, while it carries with it, by implication, all such powers as are clearly necessary for the proper and convenient exercise of the authority expressly conferred, does not authorize the city council to grant to any person or corporation an exclusive right to use the streets of the city for the purpose of laying down gas pipes for a term of years, and thereafter until the works shall be purchased from the grantee by the city. The power to light the city would authorize the

to any relief. BROWN, J., in the conclusion of his opinion in that case, says: 'The plaintiff took nothing by its franchises but the privilege of lighting the streets with gas; and this it will continue to enjoy, so far as its patrons prefer the use of gas to electricity. But its claim to the exclusive privilege of lighting the city by all methods of illumination cannot be supported upon legal principles.'

"Without multiplying authorities or further discussion, I am of opinion, upon the decisions above referred to, and the reasons given in the opinions in those cases, that, even if it were conceded that the ordinance aforesaid passed by the council of the city of Parkersburg on Dec. 2nd, 1864, has been a legitimate exercise of its power, the facts alleged by the appellee, the gas company, in its bill in this suit, do not entitle it to the relief prayed."

Searl *v.* Abrahan (Iowa), 35 N. W. Rep. 612, was an action for injunction brought by a private citizen to restrain the mayor and council of a city from entering into a contract to have the streets lighted by electricity; it was alleged that a prior contract had been made with a gas light company, which was yet in force, and that, by making the second contract, the city would increase its indebtedness; but it was not shown that the gas light company had the ability or desire to perform its contract, nor that the city or the plaintiff would sustain any substantial injury by the contemplated act. *Held*, that without such showing, an injunction would not be granted.

**Illegal Combination of Gas Companies.**—A city ordinance authorized the defendant, the Mutual Gas Light Co., to lay pipes in its streets upon condition that such gas company would not enter into combination with any other gas company concerning rates to be charged for gas. *Held*, that an agreement with another gas company in the same city for a division of territory to be lighted was a violation of this condition, but that such breach of the condition did not work a forfeiture of the right to lay pipes and use the streets granted by the city of Detroit *v.* Mutual G. Co., 5 N. W. Rep. 1039 (Mich.) 1880.

1. Louisville G. Co. *v.* Citizens' G. Co., 10 Am. & Eng. Corp. Cas. (Ky.) 671.

The legislature of Louisiana has the right to grant a gas company the sole and exclusive right to manufacture and sell gas in New Orleans for fifty years. Crescent City G. L. Co. *v.* New Orleans G. L. Co., 27 La. An. 138.

The charter of a gas company provided that "said company shall have power and full and exclusive authority to manufacture, make and sell gas . . . for the purpose of lighting the city of Milwaukee . . . provided no permanent injury shall be done to any street . . . agreeably to the terms and conditions of a contract now existing between the city of Milwaukee and" one Lockwood. By the terms of this contract the city granted said Lockwood the exclusive right to make all necessary excavations and to lay pipes for conducting gas through the streets for the term of fifteen years from the date of the contract. *Held*, that the legislature had conferred upon the gas company the exclusive privilege to manufacture and sell gas in Milwaukee without limitation of time, and that the reference to the contract with Lockwood did not restrict the privilege granted to fifteen years. State *v.* Milwaukee G. L. Co., 29 Wis. 454; State *v.* Columbus G. Co., 34 Ohio St. 572.

The legislative grant of a privilege to erect, establish and construct gas works, and make and vend gas in a municipality for a term of years, does not, however, exempt the grantees from

council to contract for gas, and to grant the contracting party the use of the streets, but not the authority to make such use exclusive for a determinate future period.[1]

(*c*) *Is a Franchise.*—Where the legislature grants to a gas company the right to use the streets of a city subject to the condition of obtaining the consent of the local authorities, and this consent has been obtained, the company is vested with the right to use the street as a franchise conferred by the State.[2]

**10. Nuisance.**—It is difficult to define a nuisance with reference to the manufacture of gas. Gas making necessarily involves the production of vapors, odors and fluids that are offensive and in-

the imposition of a licence tax for the use of the privilege conferred. Memphis G. Co. *v.* Taxing District of Shelby Co., 3 Am. & Eng. Corp. Cas. 411; s. c., 109 U. S. 398.

1. Indianapolis *v.* Indianapolis G. Co., 66 Ind. 396. In Richmond G. L. Co. *v.* Middletown, 59 N. Y. 228, the board of the town corporation was authorized to cause the streets to be lighted with gas whenever they deemed it necessary to have any of the streets so lighted, to contract with the plaintiff company to furnish and lay down gas pipes and to furnish lamp posts and lamps, and to supply the same with gas. This was *held* by the majority of the court of appeals not to confer the power on the board to make a contract which should be absolutely binding on the town for a fixed term of years. It was also *held* that the contract was terminated by repeal of the act under which the contract was made. GROVER, J., says: "The power conferred [on the town] was like the other powers conferred upon the officers of this and the other towns of the State subject to modification or repeal by subsequent legislation, and the board of town auditors could not by any contract prevent or at all control the action of the legislature in this respect. . . . The contract became void for want of authority when the power to light the streets was taken away by the repeal of the act. If the town could deprive the legislature of this power for five years by entering into a contract with the plaintiff for that time, it might for one hundred years by contracting for that period. The act shows that it was intended to vest a discretion at all times in the board whether any and which of the streets should be lighted with gas. The board could, therefore, contract for a supply during its pleasure."

In the Norwich G. L. Co. *v.* Norwich City G. Co., 25 Conn. 19, the plaintiffs claimed to have the exclusive right to the use of the streets and public places of the city of Norwich for the purpose of laying down gas pipes and distributing gas therein, for the period of 15 years, and sought an injunction to restrain the defendant, a rival company, from using the streets for a similar purpose. Plaintiffs claim to an exclusive right to the use of the streets was based upon an act of the city council in terms giving such exclusive privilege. The court decided that while the act of the city council was a licence which would protect the plaintiffs from a prosecution for a public nuisance for digging up the streets in order to lay down pipes, it was inoperative (from want of power in the city) to confer upon them an exclusive right to the use of the streets for this purpose.

2. Brooklyn *v.* Jourdon, 7 Abb. (N. C.) 23. The right of a gas company to lay its pipes in the streets of a city is a franchise, and can only be conferred upon a corporation by the legislature. State *v.* Cincinnati G. Co., 18 Ohio St. 262; Jersey City G. Co. *v.* Dwight, 29 N. J. Eq. 242.

**City Need Not Sell Franchise.**—A gas company inhibited by its charter from digging up the streets of the city until the consent of the city government is obtained, can not be enjoined by a taxpayer of the city on the ground that the act of incorporation is void, that the right to grant permission to lay down pipes in the streets is vested in the city and is of great value, and if sold would realize a large pecuniary benefit to the city. The corporation of a city has an undoubted right to give permission to a company to lay down their pipes beneath the surface of the streets as a means of supplying citizens with an in-

jurious to health; yet gas is a necessity to a community, and its manufacture is certainly not *per se* a nuisance.[1]

Gas companies, authorized by charter to erect their gas works and to carry them for the purpose of manufacturing gas for the public, are responsible in damages for the ordinary and usual smells that usually proceed from such works, if they constitute

creased supply of gas. Smith *v.* Metropolitan G. Co., 12 How. Pr. (N. Y.) 187; Norwich G. Co. *v.* Norwich G. Co., 25 Conn. 24. They are not obliged to sell such permission or treat it as a part of the city property which is to be used for purposes of city revenue. Nor is this power to authorize the laying down of gas pipes a part of city property to which the corporate authority of the city is to resort for purposes of revenue. Smith *v.* Metropolitan G. Co., 12 How. Pr. (N. Y.) 187.

**Easement.**—In Providence G. Co. *v.* Thurber, 2 R. I. 15, it is decided that the right of a gas company to lay pipes was an easement, not a licence merely. Where a licence was given to lay pipes it was held good until revoked by the owner of the land or his grantees; and that the employment, by such grantees, of another gas company to furnish gas through the pipes thus laid was not a revocation of such licence, even though such other gas company disconnected the pipes from the first company's main, and connected its own main with them. Poughkeepsie G. Co. *v.* Citizens' G. Co., 27 N. Y. Super. Ct. 214. A licence to lay pipes on land is irrevocable after they are laid and expenses are incurred thereby; and a subsequent grantee of the land with notice is bound thereby. Rome G. L. Co. *v.* Meyerhardt, 61 Ga. 287; City of Brooklyn *v.* Jourdan, 7 Abbott's N. Cas. (N. Y.) 23; State of Ohio *v.* Cincinnati G. L. & C. Co., 18 Ohio St. 262; Jersey City G. Co. *v.* Dwight, 29 N. J. Eq. 242; People *ex rel* Maybury *v.* Mutual G. L. Co. of Detroit, 38 Mich. 154; State of Ohio *v.* Cincinnati G. L. & C. Co., 18 Ohio St. 262; Sheffield United G. Co. *v.* Sheffield Consumers' Co., 2 Gas J. 362; Ottawa G. Co. *v.* Thompson, 39 Ill. 598.

1. In Tilly *v.* Slough G. Co., 17 Gas J. 331, Bramwell, J. defines a nuisance as "a thing which would offend an ordinary man and not a delicate-nosed person."

In Columbus G. L. & C. Co. *v.* Freeland, 12 Ohio St. 392, it was *held* that the question was to be decided by a jury, that plaintiff was entitled to enjoy his property as before the gas works were put up, and that it was not contributory negligence in him not to cement his well when he found its water to be affected. It was *held* error to instruct the jury that the degree of comfort to which plaintiff was entitled in the enjoyment of his property was that ordinarily enjoyed by other persons in his neighborhood, otherwise similarly situated, because the real question for the jury to decide was not the comparison of his condition with that of his neighbors, but whether the acts of the gas company caused plaintiff actual damage.

**Corruption of Wells.**—Where a manufacturer of illuminating gas negligently left noxious substances, such as coal tar, gas, lime, etc., on his land which was washed by the rain along the surface of the ground into his neighbor's well, corrupting the water, he is liable for the injury, and it makes no difference whether the noxious substances were washed along the surface of the ground or were soaked into the soil and were carried along under the ground by the natural diffusion and percolation of the water. Brown *v.* Illius, 27 Conn. 84; Millington *v.* Richards G. Co., 25 Gas J. 215; s. c., L. T. 65.

A lessee may recover for an injury to his well by the corruption of the water by gas. Sherman *v.* Fall River Iron Works, 5 Allen (Mass.) 213. And it has been *held* that a municipal corporation is liable for the corruption of water by its gas works. Shuter *v.* The City, 3 Phila. (Pa.) 228.

A keeper of a livery stable without a licence and in violation of law cannot recover damages for injury of his business by the corruption by gas of a well used by him; but the fact that he has no licence is no bar to an action by him for a nuisance to his real estate. Evidence that the corruption of the water is due to other causes than gas may be given, as affecting the amount of damages, although it will not bar the action. Sherman *v.* Fall River Iron Works, 5 Allen (Mass.) 213. In Mil-

a nuisance, and the fact that they are not negligent does not protect them from liability.[1]

**11. Estoppel.**—Giving a railway company, desirous of laying tracks, wrong information of the location of its gas pipes might estop a gas company from tearing up a track laid over their pipes; but not where the information given to the railway company was by the gas company's book-keeper, he not being such an agent

lington *v.* Richards, 23 Gas J. 215, the liability of directors of a gas company for polluting the water of a well was affirmed.

**Corrupting Rivers.**—In Carhart *v.* Auburn G. L. Co., 22 Barb. (N. Y.) 297, the noxious substances percolated through the ground into a river whose waters they corrupted. *Held*, that a lower proprietor had a right to the use of the water in an unpolluted state.

In Rex *v.* Medley, 6 Car. & P. 292, where directors of a gas company were indicted for fouling a river so that the fish died and the water was rendered unfit to drink, *held* that "the question for the jury was whether the special acts of the particular company complained of amounted to a nuisance; that the circumstance that by the diminution of fish a considerable number of fishermen were thrown out of employ, was not of itself sufficient ground to sustain such indictment; and that the directors were answerable for an act done by their superintendent and engineer, under a general authority to manage the works, though they were personally ignorant of the particular plan adopted, and though such plan be a departure from the original and understood method, which the directors had no reason to suppose had been discontinued"—and the directors were held guilty. Manhattan G. Co. *v.* Barker, 7 Robt. (N. Y.) 523.

The fact that complainant is stockholder in the gas company complained of does not estop him from maintaining an action against the company. Hendrie *v.* Lea Bridge etc. Co., 21 Gas J. 949, 989.

**Low Chimney—Smoke.**—In Grange *v.* Pately Bridge G. & W. Co., 14 Gas J. 309, it was *held* that the plaintiff could not recover damages for injury caused by the erection of a low chimney in an adjoining lot, which sent smoke and cinders upon his premises and damaged his well. But in Ottowa G. L. Co. *v.* Thompson, 39 Ill. 598, where a gas company, in the manufacture of illuminating gas, creates smells, smokes and noxious odors, so annoying to a person residing near the gas works as to render his premises uncomfortable for habitation, it was *held* that this constituted a private nuisance. Pottstown G. Co. *v.* Murphy, 39 Pa. St. 257; People *v.* New York G. Co., 64 Barb. (N. Y.) 55; 6 Lans. (N. Y.) 467; Carhart *v.* Auburn G. Co., 22 Barb. (N. Y.) 297.

1. Pottstown G. Co. *v.* Murphy, 39 Pa. St. 257; Ottawa G. Co. *v.* Thompson, 39 Ill. 598; Carhart *v.* Auburn G. Co., 22 Barb. (N. Y.) 297; Hunt *v.* Lowell G. Co., 8 Allen (Mass.) 69; Cleveland *v.* Citizens' G. Co., 20 N. J. Eq. 201; Wragg *v.* Commercial G. Co., 33 Gas J. 119; Broadbent *v.* Imperial G. Co., 7 House L. Cas. 600; 5 Gas J. 342; 9 Gas J. 751; Imperial G. Co. *v.* Broadbent, 7 De Gex, McN. & G.; 5 Jur., N. S. 319.

**An indictment** against a gas company for creating a nuisance by unwholesome smells, smoke and stenches in conducting its business will not lie against a corporation which has been authorized by the legislature of a State to manufacture gas to be used for lighting streets and buildings in a city, and which has under such authority erected gas works and made and distributed gas therefrom, when such buildings and processes of gas company are of the best description and its servants are careful, and it has used due care and diligence in the business. It may be that private persons can maintain an action for damages, but the people are barred by the act of the legislature from making a public complaint by indictment for such cause, while the defendants conduct their business with skill, science and care. People *v.* N. Y. G. Co., 64 Barb. (N. Y.) 55; 6 Lans. (N. Y.) 467.

**Noxious Sewer Gases.**—In an action against a gas company for damages for injury to the plaintiff's health caused by the escape of gas from the main pipe in the street from which it passed through various sewers and drains

as could bind his company by a representation as to the location of its pipes.[1] Twenty years' use of the road without objection will not estop the State from questioning the right to use the street for gas purposes.[2]

**12. Duty of Gas Company to Supply Gas.**—Whether or not a gas company is bound, independent of contract or statutory obligation, to supply gas to any person who has made the necessary preparation to receive it, and offered to comply with all the just and reasonable rules and regulations of the company, is a question on which there seems to be some diversity of judicial opinion. Some cases hold that a gas company, incorporated for the purpose of lighting the streets and buildings of a city or town, is not obliged to supply gas to all persons having buildings situated on the line of its pipes, upon their tendering a reasonable compensation and agreeing to comply with such reasonable regulations as the company has established.[3]

into the house of the plaintiff, it was *held* that the defendants were equally liable whether the plaintiff was injured and made sick by the defendants' gas alone or by gases generated in the sewer and drain through which it passed, if the same were carried by defendants' gas into the house, provided defendants were and plaintiff was not guilty of negligence. Hunt *v.* Lowell G. Co., 8 Allen (Mass.) 169.

**Obstructing Highways.**—It is an indictable nuisance to obstruct or to employ others to obstruct a public highway or footway by placing earth and bricks thereon, taking up the pavement and opening trenches for purpose of laying down service pipes, for the supply of gas from public mains to private houses, unless those who do or authorize such acts have parliamentary powers for the purpose. Such acts cannot be justified by the occupiers of houses as an exercise of the right of every householder to make such a temporary obstruction or foot way as may be necessarily incident to the enjoyment of his property. Regina *v.* Longton G. Co., 2 El. & El. 650; 8 Gas J. 165; 9 Gas J. 114; 29 Law J., M. C. 118; 2 Law T. 14; 8 Cox C. C. 317; Regina *v.* Colne Valley G. Co., 29 Gas J. 498, 781; 30 Gas J. 218; Ellis *v.* Sheffield G. Co., 2 El. & Bl. 757.

1. Davenport Cent. R. Co. *v.* Davenport G. Co., 43 Iowa 301.

2. State *v.* Cincinnati G. Co., 18 Ohio St. 262.

**Limiting Boundaries.**—In an action of contract to recover the price of gas supplied for the city lights under a contract with the city authorities, the execution of which is not disputed, it was *held* that a city ordinance, or "a city contract, designed for a city at large, operates throughout its boundaries, whatever their change," and that the wording of the contract made with the plaintiff included the additions of the city; and that, as this suit was brought to recover for the amount claimed as due for gas furnished to the defendant in its enlarged boundaries, when it "appeared without dispute that for a long series of years the plaintiff had claimed, exercised and been supported in the exclusive right of occupying, under and by virtue of this contract, the new, as well as the old city limits," the gas company should be estopped from seeking to limit its operation for the purposes of this suit. St. Louis G. Co. *v.* City of St. Louis, 46 Mo. 121.

3. McCune *v.* Norwich City G. Co., 30 Conn. 521; Com. *v.* Lowell G. L. Co., 12 Allen (Mass.) 75; Paterson G. L. Co. *v.* Brady, 27 N. J. L. 245; Houlgate *v.* Surrey Consumers' G. Co., 8 Gas J. 261; Hoddeson G. & C. Co. *v.* Haselwood, 6 C. B., N. S. 238: Commercial Bank *v.* London G. Co., 20 U. C., Q. B. 233; Pudsey Coal G. Co. *v.* Bradford, L. R., 15 Eq. 157.

In the case of McCune *v.* Norwich City G. Co., 30 Conn. 521, it was decided that in the absence of any contract, express or implied, and where the charter of the company contains no provision on the subject, a gas company is under no more obligation to continue

According to some authorities at common law, a gas company is bound to supply gas to all persons who have made the necessary preparations to receive the same,[1] especially where the gas company has been awarded the exclusive right and privilege of vending gas.[2]

to supply its customers than the vendors of any other commodities. BIGLOW, C. J., in the case of Com. *v.* Lowell G. L. Co., 12 Allen 75, said: "No public duty is imposed upon gas companies, nor are they charged with any public trust. They are authorized to make and distribute gas for their own profit and gain only. They are not bound to sell and dispose of it to anyone either for public or private use or consumption. It is entirely at their own option whether they exercise their corporate rights and privileges at all; and if they undertake to manufacture and dispose of gas, the extent to which they shall carry on the business is left to their own election. Nor is any power conferred upon them to take private property not previously appropriated to a public use for the purpose of exercising and enjoying their franchise. The only right or privilege given to them is to dig up public streets and ways for the purpose of laying down their mains and pipes."

1. Shepard *v.* Milwaukee G. L. Co., 6 Wis. 539; New Orleans G. L. & B. Co. *v.* Paulding, 12 Rob. (La.) 378; G. L. Co. of Balt. *v.* Colliday, 25 Md. 1; Spratt *v.* South Metropolitan G. Co., 17 Gas J. 663; Bedding *v.* Imperial G. L. & C. Co., 7 Gas J. 418; Penuy *v.* Rossendale Union G. Co., 14 Gas J. 927.

2. New Orleans G. L. & B. Co., 12 Rob. (La.) 378. In the case of G. L. Co. of Baltimore *v.* Colliday, 25 Md. 1, it seems that the company was the only one incorporated in the city for the manufacture of gas and therefore it enjoyed a monopoly in that branch of business. WEISEL, J., who delivered the opinion of the court, said: "Those who were induced to fit their houses for the introduction and use of gas could look only to this company for their supply, and it was upon its proffers and in accordance with its prescribed terms and rules that the necessary tubings and fittings were placed in their houses. In considering the question of the obligation of a party or company of this character to continue the supply of gas to a customer such matters cannot well be overlooked."

Gas light companies which possess, by virtue of their charters, power and privileges which others cannot exercise, and the statutory duty is imposed upon them to furnish gas, on payment of all moneys due from applicants, may be compelled by *mandamus* to furnish gas to persons who have a right to receive it and who offer to comply with the general conditions on which the company supplies them. People *v.* Manhattan G. L. Co., 45 Barb. (N. Y.) 136.

The late case of Williams *v.* Mutual G. Co., 52 Mich. 499; s. c., 50 Am. Rep. 266, goes still further and holds that a gas company, although it has no exclusive right to supply the city, is bound to supply gas to all persons who require it upon payment or reasonable security. SHERWOOD, J., who delivered the opinion, said: "This corporation is authorized and permitted to do business in Detroit only upon the ground of public convenience, and that benefits may accrue to its citizens. It is true that neither by the charter of the company, its articles of association, or the by-laws of the city, authorizing its existence there, has it the exclusive right to manufacture and sell gas. It is, however, within the experience of us all, and I may say, I think, with great propriety, within the judicial knowledge of the courts, that the manufacture and supply of inflammable gas, for the purpose of lighting cities, villages, stores, hotels and dwellings is not a domestic or family manufacture. It is carried on almost exclusively by public or associated capital, and to make it a paying industry, requires the exercise and enjoyment of certain rights and franchises only to be acquired from municipal or State authority. Associations of this kind, as has been well said, 'are not like trading and manufacturing corporations, the purview of whose operations is as extensive as commerce itself, and whose productions may be transported from market to market throughout the world.' It is not a trading corporation; its product is designated for the citizen, and the extent to which it is used depends upon house consumption in the immediate neighborhood and community in which

They are also bound to repair all leaks in their pipes, and if they fail to perform this they will be liable for damages resulting therefrom.[1]

Gas companies cannot refuse to furnish gas to a person because he refuses to pay a former bill or a bill contracted in different premises.[2] Nor can they shut off the gas on the ground that there are arrears due from a former occupant of the premises.[3]

(*a*) *Deposits.*—The company may demand a reasonable deposit to secure payment for gas that may be consumed.[4] A deposit of unreasonable size cannot be demanded.[5]

the manufacture is wrought. It is in the strictest sense a local commodity and not commercial. It can only be used by consuming it, and hence can have no place with articles of trade. The success of the company greatly depends upon the necessity of the citizens in the vicinity of its location, and its operations may seriously affect the public policy and individual convenience of the community. The nature of the article made, the objects of the company, its relations to the community and the rights and privileges it must necessarily exercise give the company a public character, and to a certain extent a monopoly, which can never be tolerated only upon the ground of some corresponding duty to meet the public wants. . . . The duty of the company toward the citizens, and that of the citizen toward the company is somewhat reciprocal, and any rule or regulation, or course of dealing between the parties which does not secure the just rights of both, ought not to be adopted and cannot receive the sanction of the courts." Section 11 of the English act of 1871 provided that a gas company on being required so to do, should give and continue to supply gas for any premises within twenty-five yards of their mains and render such pressure in the mains as should be prescribed. It was held that the company was bound not only to supply gas at the required pressure, but also to all who come within the description contained in the act. Commercial G. Co. *v.* Scott, L. R., 10 Q. B. 400.

**Non-payment of Bill.**—Where a gas bill is due and unpaid the company has the right to stop the flow of gas until it is paid. Pearson *v.* Phœnix G. Co., 12 Gas J. 69; Morey *v.* Metropolitan G. L. Co., 38 N. Y. Super. Ct. 185; People *ex rel v.* Manhattan G. L. Co., 45 Barb. (N. Y.) 136; G. L. Co. of Baltimore *v.* Colliday, 25 Md. 1; Commercial Bank *v.* London G. Co., 20 U. C., Q. B. 233.

**Application for gas** may be made by a clerk on behalf of his employer. Shepherd *v.* Milwaukee G. L. Co., 11 Wis. 234.

1. Hunt *v.* Lowell G. Co., 3 Allen (Mass.) 418; Brown *v.* N. Y. G. Co., Anth. N. P. Cas. (N. Y.) 351; Schermerhorn *v.* Metropolitan G. Co., 5 Daly (N. Y.) 144; Lannen *v.* Albany G. Co., 44 N. Y. 459; Oil City G. Co. *v.* Robinson, 99 Pa. St. 1; Burrows *v.* March G. Co., L. R., 5 Ex. Cas. 67. Affirmed in 7 Ex. Cas. 96.

**Meter for Each Floor.**—A gas company is not bound to furnish a separate meter for each floor of a house, unless the owner or occupants put in separate or independent service pipes to connect with the meter. Ferguson *v.* Metropolitan G. Co., 37 How. Pr. (N. Y.) 189.

**Stop-Cocks Outside Building.**—It is not bound to place stop-cocks in its pipes outside the building of its consumer, unless the statute imposes that duty upon it. Holden *v.* Liverpool N. G. Co., 3 C. B. 1. But gas companies may be required to make at their own cost such changes in the location of their pipes as the public convenience of safety requires. Matter of Petition of Deering, 93 N. Y. 36.

2. G. L. Co. of Baltimore *v.* Colliday, 25 Md.; Loyd *v.* Washington G. Co., 1 Mackey (D. C.) 331.

3. Morey *v.* Metropolitan G. Co., 38 N. Y. Super. Ct. 185.

4. Dicks *v.* Equitable G. Co., 8 Gas J. 328; Littlewood *v.* Same, 8 Gas J. 541; Samuel *v.* Cardiff G. Co., 18 Gas J. 192; Ford *v.* Brooklyn G. L. Co., 3 Hun (N. Y.) 621; Shepard *v.* Milwaukee G. L. Co., 6 Wis. 539.

5. Fowler *v.* Chartered G. Co., 17 Gas J. 908; Halfhide *v.* Worthing G. Co., 22 Gas J. 328.

A complaint was made by the plaintiff that the defendants, after having

(*b*) *Damages for Refusal to Furnish Gas.*—In an action for damages for unlawful cutting off the supply of gas, the law allows the loss of profits to be assessed as damages only when such loss can be traced directly to the immediate breach of contract or omission of duty declared upon.[1]

(*c*) *Fraudulent Taking of Gas.*—The statutes of some States make it a misdemeanor to connect the gas pipes in the street and building, and to take gas without having it pass through the meter, with the malicious intent of preventing the company from discovering it.[2]

taken and accepted the security agreed upon between them and the plaintiff for gas to be supplied to him, had failed to continue such supply, contrary to the provisions of the Metropolitan Gas act of 1860. It appeared that the security taken was a demand note signed by the plaintiff, that immediate payment was demanded and the gas cut off, as the plaintiff requested a short delay in payment, and it was *held* that as the security for the payment of the defendant's bill still existed, their refusal to supply was not authorized by the statute. Fowler *v.* Chartered G. Co., 17 Gas J. 908. But in Spratt *v.* South Metropolitan G. Co., 7 Gas J. 663, the plaintiff kept a public house, and, having applied to the gas company to be supplied with gas, they refused to do so unless he previously paid a deposit of £12, which he declined to do, and in consequence, his house remained unlighted with gas, and he brought an action against the company for damages for their refusal to supply gas. The company's act of incorporation gave them no authority to demand the deposit, and it was *held* that the company had no right to demand the payment of any sum of money for laying on gas, but was bound to enter into a contract to supply gas to those in their district who required it, and the action could be maintained.

1. Morey *v.* Metropolitan G. Co., 38 N. Y. Super. Ct., 6 J. & S. 185. The plaintiff was *held* in Shepard *v.* Milwaukee G. Co., 15 Wis. 318 to be entitled to such damages as would compensate him for his pecuniary loss, and also for the inconvenience and annoyance experienced by him in his mercantile business arising out of defendant's refusal to furnish gas to him.

The loss of profits from possible boarders is too remote to be included as damages for shutting off gas from a boarding house. Morey *v.* Metropolitan G. L. Co., 38 N. Y. Super. Ct. 185. On breach of contract to supply gas, the jury in establishing damages may consider the loss by depreciation of the value of real estate. G. L. Co. *v.* Colliday, 25 Md.

2. On the trial of an indictment under the statutes of the State of New York, which make it a misdemeanor to connect the gas pipes in the street and building, and to take gas without having it pass through the meter, a demurrer was sustained on account of an imperfection in the indictment, and it was *held* by BROWN, J., that "to convict the defendant upon this indictment the prosecution would be bound to prove: 1. The incorporation of the gas light company. 2. That the company was supplying him by means of a pipe for conducting it with illuminating gas, which was consumed at the burners mentioned in the indictment. 3. That a meter there provided for the measuring and registering the quantity of gas consumed at the burners. 4. That the defendant connected the pipe which supplied the burners with a service pipe in such manner as to be calculated to supply the gas to the burners without passing through the meter. 5. That the act of so connecting the pipes was done with intent to injure or defraud the company;" but that the company supplied gas would afford evidence of intent to defraud in such case. People *v.* Wilber, 4 Park. Crim. Cas. (N. Y.) 19.

**Damages for Fraudulent Taking.**—The plaintiffs in their declaration alleged that the defendants bored into certain gas pipes of the plaintiffs and affixed their pipes thereto, and kept them so affixed for a long time without the knowledge of the plaintiffs, by means whereof large quantities of the plaintiffs' gas flowed out of their pipes; that the defendants maliciously contriving to prevent the plaintiffs from discover-

(*d*) *Larceny.*—Larceny of gas may be committed by connecting a pipe or rubber tube with the mains, and using the gas therefrom.[1]

**13. Evidence.**—The fact that the agent of a gas company does not know or believe gas is injurious to the health of a person inhaling it is not admissible as tending to show negligence of the company in laying its pipes, and such agent is competent to testify as an expert. Nor can a physician, who had no experience as to the effect of gas on the system, testify in regard thereto as an expert. A man familiar with digging for gas pipes may testify how long it takes ordinarily to dig through frozen ground for such a purpose, such testimony bearing on the question of diligence of the company in stopping a leak.[2]

A witness may testify as to the effect of leaking gas upon vegetation.[3] A superintendent's books of account are admissible in an action for wages by him against the company.[4]

ing the trespasses so committed till six years should have elapsed, fraudulently, and without the plaintiffs' knowledge, cut off from the plaintiffs' gas pipes the pipes of the defendants so affixed thereto, and fraudulently and without plaintiffs' knowledge stopped and plugged up the gas pipes of the plaintiffs where the defendants' pipes had been so affixed, by means whereof the plaintiffs were prevented from discovering the trespasses until six years from their commission had elapsed, and thereby the remedy of the plaintiffs by action became barred; and it was *held* that the declaration set out a good cause of action. Imperial G. L. & C. Co. *v.* London G. L. Co., 10 Exch. 39.

In an action against the defendant to recover the value of gas which the defendant was alleged to have used, and which at the same time was not registered by the meter in consequence of its having been tampered with, it appeared that the defendant in 1844 increased the number of burners used by him, but that the amount of gas measured by the meter sensibly diminished; that in 1850 the meter was tested by the gas inspector and found to be correct; that it was afterwards discovered that the water in the meter was kept too low and a part of the machinery had been so that the gas did not register; that it was a simple matter to discover the fact that the water was too low in the meter; and it was *held* that the plaintiff could recover for any gas so used before the date of the inspection in 1850. Imperial G. Co. *v.* Porter, 5 Gas J. 372, 403.

1. Regina *v.* White, 20 Eng. L. & Eq. 585; Queen *v.* Firth, L. R., 1 Crown Cas. Res. 172; Regina *v.* Mitchell, 22 Gas J. 137; Regina *v.* Jenkins, 5 Gas J. 214.

A person was indicted for stealing a quantity of gas from a gas company. He only paid the company for the amount that was indicated by the meter placed on the premises; but by means of stop-cocks and pipes he intercepted large quantities of gas which did not pass through the meter. He was convicted of larceny. *Held*, that the conviction was good, and there is nothing in the nature of gas to prevent it being the subject of larceny. Reg. *v.* White, 1 C. L. R. 489; 22 L. J., M. C. 123; Dears. C. C. 203.

2. Emerson *v.* Lowell G. Co., 3 Allen (Mass.) 410.

3. Bloofield etc. G. Co. *v.* Cokins, 1 N. Y. Super. Ct. 549. In an action against a gas light company for damages for injury to the plaintiff's premises by noxious odors, etc., from their gas works, a witness for the plaintiff was asked: "Give your views of the damage done to Graham's premises on account of the gas works?" and it was *held* that his evidence was admissible. Ottowa G. Co. *v.* Graham, 35 Ill. 346.

4. Symonds *v.* G. Co., 11 Beav. 283.

**Words, "Shut off the gas,"** refer to shutting it off from houses, not from streets. Bartlett *v.* Boston G. Co., 117 Mass. 533.

**Evidence that illness** is due to other causes than gas not admissible. Hunt

**14. Municipal Control of Gas Business.**—Although cities usually have no express authority from the legislature to lay gas pipes through its streets, it has, by its act of incorporation, the right to legislate fully in regard to lighting the streets, and such power would, by implication, give it authority to direct, by ordinance, that gas pipes should be laid in the streets for the purpose of lighting them.[1]

*v.* Lowell G. Co., 1 Allen (Mass.) 343; 8 Allen (Mass.) 169; Emerson *v.* Lowell G. Co., 3 Allen (Mass.) 410.

**Admissions and Declarations.**—In an action against a gas light company to recover damages for an injury to the plaintiff's health, caused by an accidental escape of gas from a main pipe through various sewers and drains into the plaintiff's house, if the defendants introduce that one of their agents went to the different houses where the smell of gas was perceived, and especially to a house in the vicinity of the plaintiff's house, and did not find gas escaping in great or dangerous quantities, for the purpose of showing that gas was not escaping in great or dangerous quantities, evidence of the occupant of one of such houses that he informed him that there was enough gas in his cellar to blow up the house if he should go down with a light, is admissible for the purpose of contradicting him. Hunt *v.* Lowell G. L. Co., 3 Allen (Mass.) 418.

**Evidence as to Water Coming Into Cellar.**—In an action brought by the plaintiff to recover damages sustained by the defendant's negligence in laying gas pipes in the streets, whereby water was let into plaintiff's premises, evidence at the trial that the water did not come from the ditch in which the pipes were laid, but from the sewer, and that the injury was the result of the defective sewerage system in that neighborhood, was *held* to be admissible under the general issue. Schaus *v.* Manhattan G. L. Co., 14 Abbott's Pr. R. (N. Y.) 371; 36 N. Y. Super. Ct. 262.

1. Strawbridge *v.* Philadelphia, 13 Rep. 216. In Foster *v.* Phila. G. W. Trustees, 12 Phila. (Pa.) 511, the power of the trustees of the Philadelphia gas works to regulate meters, etc., was affirmed. An ordinance of a municipal corporation, which prohibited the defendants and every other person from opening or digging up any paved streets for the purpose of laying gas mains or pipes between Dec. 1st and March 1st, is a regulation and not a restraint of trade, and within the power of the city authorities, and does not conflict with the powers of a gas company chartered before the passage of the ordinance and required by its charter to furnish gas and lay mains, etc., along the streets upon application from the owners of property. No Liberties *v.* No Liberties G. Co., 12 Pa. St. 318; St. Louis G. L. Co. *v.* St. Louis, 46 Mo. 121; State *v.* Ironton G. Co., 37 Ohio St. 45.

**Right of City to Buy Gas Works.**—St. Louis *v.* St. Louis G. Co., 70 Mo. 69, 5 Mo. App. 484; Wheeling G. Co. *v.* Wheeling, 8 W. Va. 320.

**Legislative Supervision.**—The charter of the Columbus Gas Light Co., granted prior to the adoption of the new constitution, gave them the exclusive right to supply the city with gas for twenty years, and there was no reference or restriction in the charter as to the price of gas. An act was afterwards passed by the legislature which, by its terms, was to apply to all companies then manufacturing gas for sale, and restricted the charge for meter rent. The defendants claimed that they were not subject to the operation of this statute, and asserted their right to charge meter rent contrary to the provisions of the statute; but it was *held* that an action of *quo warranto* could be maintained and that the company were subject to legislative control and the act restricting the price of meters, and that corporations invested with franchises to subserve the public interest were subject to legislative control and supervision unless it clearly appeared from the terms of the charter that it was the intention to exempt them from such interference. Atty. Gen. *v.* Columbus G. L. etc. Co., 34 Ohio St. 572.

**Inspection of Gas Meters.**—The legislature of Ohio passed an act creating the office of inspector of gas meters, etc., whose salary was to be paid by assessment upon the various gas companies in the State. The plaintiffs refused to pay the assessment made upon them in the manner provided by the statute, and claimed that it was illegal and con-

**15. Actions By and Against Gas Companies**—(*a*) *Assumpsit.*—A gas company may maintain *assumpsit* for gas supplied to the occupiers of a wharf, and it is not necessary in such case that there should have been any contract by deed executed by the company.[1] A corporation created for the purpose of supplying gas may maintain *assumpsit* for a breach of a contract by the defendant to accept gas from year to year at a certain rate per annum, the consideration being alleged to be the promise of the company to supply it on those terms, such promise by the company, though not under seal, is valid, and a good consideration.[2] A gas company may be sued in *indebitatus assumpsit* for goods sold and delivered, though the contract be not under seal and is a parol contract executed. The contract may be implied or express, as in cases of *assumpsit* with individuals.[3]

(*b*) *Mandamus.*—*Mandamus* lies to compel municipal officers to audit a gas bill;[4] to compel the assessment of a tax to pay a gas company for land taken from it for street purposes;[5] and to compel the company to supply gas.[6]

trary to the section of the constitution which provides that taxes should be assessed upon property by a uniform rule. But it was *held* that the act was constitutional; that the assessment upon the plaintiffs was not a tax for purpose of general revenue, but was a charge for a special purpose growing out of supervisory power of the State over their business, and was not a tax on property. Cincinnati G. L. & C. Co. *v.* State of Ohio, 18 Ohio St. 237.

1. London G. Co. *v.* Nicholls, 2 Car. & P. 365 (N. P.) (1825).

2. Church *v.* Imperial G. Co., 6 Ad. & E. 846.

3. Beverly *v.* Lincoln G. Co., 6 Ad. & E. 829.

**Guaranty.**—A gas company may maintain *assumpsit* for gas guaranteed by hotel receiver. Hibernian G. Co. *v.* Pavy, 4 Ir. L. R. 453.

4. San Francisco G. Co. *v.* Supervisors, 11 Cal. 42.

5. People *v.* Syracuse Common Council, 78 N. Y. 56.

6. People *v.* Manhattan G. L. Co., 45 Barb. (N. Y.) 136.

**Arbitration.**—A gas company may be compelled to appoint arbitrators by *mandamus.* St. Louis *v.* St. Louis G. L. Co., 70 Mo. 69.

**Payment of Judgment.**—Where a gas company had obtained judgment against the city of New Orleans for the price of gas supplied to the city, and the latter sold the franchise of a horse railway company and the exclusive privilege of running horse cars through the streets of New Orleans for a large sum, it was *held*, that a *mandamus* requiring the city to appropriate the proceeds of such sale for the payment of the plaintiff's judgment would not lie, the city council having a discretionary power to use said sum to pay the bonded debt of the the city. New Orleans G. L. Co. *v.* Mayor, 32 La. An. 268.

**Generally.**—State *v.* New Orleans G. L. Co., 25 La. An. 413; Richmond G. Co. *v.* Middleton, 59 N. Y. 228.

**Quo Warranto.**—A petition for leave to file an information in the nature of a *quo warranto* to deprive a gas company of the franchise of laying its gas pipes and distributing gas through the streets, on the ground that the company had violated the terms of an agreement with the city, imposing conditions against making combinations with other companies and in other respects, was denied. People *ex rel* Maybury *v.* Mutual G. L. Co., Detroit 38 Mich. 154.

An information in the nature of a *quo warranto* against a gas company in its corporate name to test their right to the exclusive use of the streets of a city for their gas pipes, and their right to charge a certain price for their gas supplied to the said city, can not be sustained, the process having been served against the company as a corporation and the defendants having appeared and pleaded in its corporate capacity and the corporate franchise of a corporation is intended to be drawn in question, the

(*c*) *Injunction.*—Where, by an amendment to the charter of a gas company authorizing it to lay pipes through the streets and public grounds of a city, it is provided that the right shall be exclusive, except against such other persons as may be authorized by legislature, such provision is held to constitute a monopoly, which is not entitled to protection in equity, and an injunction will not be allowed to prevent another company from laying down its gas pipes.[1]

And a court of equity will not enjoin the common council of a city from repealing a prior ordinance authorizing the erection of gas works. This would be an interference by the judicial with the legislative department of the government. And the fact that the ordinance sought to be repealed is claimed to be a contract makes no difference.[2]

**16. Insurance.**—An insurance company that pays a loss by fire occasioned by the negligence of a gas company is subrogated to the rights of the owner of the property destroyed to secure remuneration from the gas company.[3]

process must be brought against the individuals who are claimed to be usurping such franchise. Ohio *v.* Cincinnati G. L. etc. Co., 18 Ohio 262.

**Jury Trial.**—The plaintiff complained that the defendant had established opposite to his dwelling house gas works which emitted an injurious and unwholesome odor and which greatly injured his house and destroyed the comfort of himself and family and demanded damages, and an injunction restraining the defendant from continuing to manufacture gas. The injunction was refused and the court entered judgment for damages for the plaintiff against the objections of the plaintiff who demanded a trial by jury, and it was *held*, that he was entitled to have his action tried by a jury. Dorr *v.* Dansville G. L. Co., 25 N. Y. 274.

1. Des Moines G. Co. *v.* Des Moines 44 Iowa 505.

**Digging up the Street to Lay Pipes Will Not be Enjoined.**—Atty. Gen. *v.* Cambridge Consumers' G. Co., L. R., 4 Ch. 71; Same *v.* Sheffield G. Co., 3 De Gex, McN. & Gord. 304; Sheffield United G. Co. *v.* Sheffield Consumers' G. Co., 2 G. J. 360; Chartered G. L. Co. *v.* Great Cent. G. Con. Co., 1 Gas J. 322. Poughkeepsie G. Co. *v.* Citizens' G. Co., 27 N. Y. Super. (20 Hun) 214; 9 N. Y. Wk. Dig. 431; Memphis G. Co. *v.* Williamson, 9 Heisk. (Tenn.) 314; Rome G. Co. *v.* Meyerhardt, 61 Ga. 287.

*Contra*, see City of Brooklyn *v.* Fulton Mun. G. Co., 7 Abb. New Cas. (N. Y.) 19; Jersey City G. Co. *v.* Dwight, 29 N. J. Eq. 242; Chapman *v.* Crags G. Co., 13 Gas J. 448; Atty. Gen. *v.* Mayor of St. Helens, Michael & Will's G. and Water Supply, 11; Lowden *v.* Drightington etc. Co., 29 Gas J. 927; Hirst *v.* Longwood G. Co., 30 Gas J. 596.

**Disputes Between Company and Consumer.**—When a dispute arises between the company and a consumer the latter is entitled to have his rights investigated by the courts. In such case an injunction will be granted to prevent the cutting off of the supply of gas until the cause can be tried. Sickles *v.* Manhattan G. Co., 64 How. Pr. (N. Y.) 33; 66 How. Pr. (N. Y.) 304, 314.

2. Norwich G. Co. *v.* Norwich City G. Co., 25 Conn. 19.

3. Commercial Union F. I. Co. *v.* Lister, 23 Gas J. 364.

**Two Policies.**—Where an insurance company with two policies insures both fixtures and meters, and the meters are injured by the fire, the company is liable for the injury. N. Y. G. L. Co. *v.* Mechanics' F. I. Co., 2 Hall (Super. Ct.) N. Y. 108.

**Exception in Policy.**—A policy of insurance against fire excepted from the risk any loss by explosion, or any damage occasioned by or resulting from any explosion of "steam, gunpowder, gas, etc." In an action upon the policy it appeared that an explosive mixture of whisky vapor and atmosphere had come

**17. Taxation.**—The mains of a gas company are appurtenant to its lots, and are only taxable therewith unless provided otherwise by statute.[1] The word machinery includes gas pipes and meters, and they are taxable as machinery.[2]

**GASOLINE.**—See note 3.

**GATHER.**—See note 4.

in contact with the flame of a gas jet, from which it ignited and exploded, whereby a fire was caused which destroyed the insured property, and it was *held* the plaintiff could not recover. United Life, Fire & Mar. Ins. Co. *v.* Foote, 2 Ins. L. J. 190. Sup. Ct. Cincinnati (1873), Stanley *v.* Western Ins. Co., L. R., 3 Exch. 71.

1. Capital City etc. Co. *v.* Ins. Co., 51 Iowa 31; Fall River *v.* County Comrs., 125 Mass. 567.

2. Commonwealth *v.* Lowell etc. Co., 12 Allen (Mass.) 75; Providence G. Co. *v.* Thurber, 2 R. I. 15; People *v.* Brooklyn Assessors, 39 N. Y. 81.

**Generally.**—A company that agrees to furnish a city with gas free of charge cannot collect from the city the money it pays the United States for taxes on such gas. G. Co. *v.* Pittsburgh, 101 U. S. 219. A gas company may be exempt from taxation under an act exempting manufacturing companies from taxation. Nassau G. L. Co. *v.* Brooklyn, 25 Hun (N. Y.) 567.

The paid-up capital stock of the N. O. G. L. Co. is taxable. It is to be valued at its market price. N. O. City G. L. Co. *v.* Board of Assessors, 31 La. An. 475; Memphis G. L. Co. *v.* State, 6 Cold. (Tenn.) 310; G. Co. *v.* Charter Oak Ins. Co., 19 Abb. L. J. 501.

A gas company filed with the assessors, as required by law, a statement of the value of their property for the purposes of taxation, from which it appeared that their capital stock was $750,000, of which the sum of $520,000 had been actually paid in and had been invested in real estate and improvements, and that the company's debts were $192,000, but that their stock had no actual market value, and that its actual value would exceed 90 per cent. of its par value. The assessors thereupon assessed the personal property of the gas company as of the value of $200,000. On a writ of *certiorari* brought by the gas company, it was *held* that the assessment was properly made, that there was sufficient evidence upon which the assessors could make their valuation, and that the value of the stock of a gas company was not to be determined by ascertaining what its actual assets and liabilities would realize upon a dissolution of the corporation, but the privileges, rights, patents, and franchise must also be considered, and that the writ must be dismissed. People *v.* Steele, 1 Sheldon (N. Y. Super. Ct.) 345.

The surplus of a company is taxable, although certificates thereof have been distributed among shareholders. People *v.* Board of Assessors, 76 N. Y. 202.

Against a claim for gas furnished a city, the latter cannot set off the claimant's unpaid taxes. Nebraska City *v.* Neb. C. H. G. L. etc. Co., 9 Neb. 339.

In Pennsylvania a stock company to make gas owned real estate and fixtures. It was *held* that they were exempt from taxation. Coatesville G. Co. *v.* County of Chester, 97 Pa. St. 476. See also Westchester G. Co. *v.* County of Chester, 30 Pa. St. 232.

A legislative grant to establish gas works and make and vend gas, does not exempt company from imposition of licence tax in Memphis. G. L. Co. *v.* Shelby Co., 3 Am. & Eng. Corp. Cas. 411; s. c., 109 U. S. 398.

3. S ordered a barrel of "puroline" from a dealer in petroleum, who filled the order by delivering a barrel of gasoline of 74 degrees gravity, marked, as required by statute, "Explosive and dangerous." The gasoline exploded and S brought suit against the dealer for damages. It was *held* that the dealer had not been guilty of deception. Puroline and gasoline are both petroleum products; the difference in danger between them is so slight and insignificant that it is hardly measurable or perceptible, and it appears that in the trade orders for puroline are almost usually filled by delivering 74-degree gasoline. Socola *v.* Chess Carley Co. (La.), 1 So. Rep. 824.

4. A clause in a lease reserving to the lessee "the right to gather crop after the expiration of the lease," entitles him to free ingress and egress, so far as

**GELDING**—(See CATTLE; HORSE).—A horse that has been castrated.[1]

**GEM**—(See notes on CABINET and COLLECTION).[2]

**GENERAL.**—Common to many or the greatest number; having a relation to all; common to the whole.[3]

is necessary to gather and remove the crop, but does not entitle him to hold over, after the expiration of the term, for that purpose. Stoddard *v.* Waters, 30 Ark. 156.

A devise of a tract of land, together with "all crops thereon, whether gathered or growing at the time of my death," passes not only the crops of the year in which the testator died, but those of the preceding year remaining on the land, and those brought there from other plantations to be stored. Carnagy *v.* Woodcock, 2 Munf. (Va.) 234; s. c., 5 Am. Dec. 470.

1. Brisco *v.* State, 4 Tex. App. 219.

An indictment for the larceny of a horse, under a statute prescribing punishment for the theft of a "horse, mare, gelding," etc., is sustained by proof of the theft of a gelding, the term "horse" being a generic term which includes gelding. Reg. *v.* Aldridge, 4 Cox C. C. 143; People *v.* Butler, 2 Utah 504; State *v.* Donnegan, 34 Mo. 67; Baldwin *v.* People, 1 Scam. (Ill.) 304.

On the contrary it has been *held* that "the term is used in the statute distinctively from the word horse, and a conviction for the theft of a horse upon the proof of taking feloniously a gelding would be as incongruous as that of stealing a mule or an ass upon a similar indictment." Jordt *v.* State, 31 Tex. 571; Turley *v.* State, 3 Humph. (Tenn.) 323; Hooker *v.* State, 4 Ohio 348. Evidence is inadmissible that in the common understanding of the community horse includes gelding. The statute has made the distinction. Turley *v.* State, 3 Humph. (Tenn.) 323.

But the term "horse" used in an affidavit in support of a motion for a continuance will be understood in its popular sense, and the continuance will not be refused on the ground that the charge is the theft of a gelding. Trevinio *v.* State, 1 Tex. App. 72.

So where the indictment is for the theft of a gelding and the witnesses use the terms "horse" and "gelding" interchangeably, it is not error for the court to refuse to instruct the jury that if the proof showed the larceny of a horse they must acquit, the owner having testified that the beast was a gelding. State *v.* Ingram, 16 Kan. 14.

An indictment for the larceny of a gelding is not sustained by proof of larceny of a ridgling, i. e. a horse half castrated. Brisco *v.* State, 4 Tex. App. 219.

2. The word "gem," applied to a special form of gun is not a fancy word within the meaning of an act prescribing the kind of words that may be registered as trade marks. "Originally, no doubt," said COTTON, L. J., "in the English language the word 'gem,' as applied to guns, would have been a fancy word, but the word has now got what one may call a slang meaning, and it is not uncommon to hear things spoken of as 'gems,' not as indicating that they are in any way connected with precious stones or jewels, but as indicating that they are very good." *In re* Arbenz, 35 Ch. Div. 248; s. c., 35 W. R. 527.

3. A general meeting of creditors is a meeting of all the creditors, not of a particular class or locality. It does not, in an attachment act, include only those resident in the state. Matter of Bonnaffe, 23 N. Y. 169.

**General Agent.**—See AGENCY.

**General Demurrer.**—See DEMURRER.

**General deposit** "is where the money deposited is not itself to be returned, but an equivalent in money (that is, a like sum is to be returned); such a deposit is said to be equivalent to a loan. Talladega Ins. Co. *v.* Sanders, 43 Ala. 138.

**General Election.**—An election of officers throughout a State. State *v.* King, 17 Mo. 511. An election to fill an office upon the expiration of a full term, as distinguished from a special election, which is to supply a vacancy occurring before the expiration of a term. Kenfield *v.* Irwin, 52 Cal. 164.

**General Field.**—See COMMON.

**General Fund.**—See FUND.

**General Issue.**—See PLEADING.

**General Legacy.**—See LEGACY.

**General Malice.**—See MALICE.

**General Retainer.**—"A general retainer merely gives a right to expect

## GENERAL AVERAGE.

1. Definition, 1293.
2. Indiscriminate Use of Term, 1294.
3. General Average Act, 1294.
   (a) *Definition*, 1294.
   (b) *Characteristics of*, 1295.
4. General Average Loss, 1296.
   (a) *Definition*, 1296.
   (b) *Division of*, 1296.
   (c) *Jettison*, 1297.
   (d) *Damages Incident to Jettison*, 1298.
   (e) *Damage to Cargo from Forced Discharge*, 1299.
   (f) *Damage to Cargo from Other Causes*, 1300.
   (g) *Voluntary Stranding*, 1300.
   (h) *Expenditure—Port of Refuge Charges*, 1300.
   (i) *Expenditure—Deviation*, 1303.
   (j) *Expenditure—Salvage*, 1303.
   (k) *Expenditure—Money Raised Abroad*, 1303.
5. General Average Contribution. 1305.
6. Value of Contributory Interests, 1306.
7. Adjustment, 1306.
8. Enforcement of Claim, 1306.

**1. Definition.**—When a ship and cargo are exposed together to the common peril of a maritime adventure, each shall run its own separate risk of such losses as are accidental; but if a sacrifice, either of property or money, is made for the sake of averting the loss of all, that sacrifice should be replaced by the ratable contribution of all.[1] This is the principle upon which general

professional service when requested, but none which is not requested. It binds the person retained not to take a fee from another against his retainer; but to do nothing except what he is asked to do, and for this he is to be distinctly paid." Bank *v.* Hawkins, 6 R. I. 206.

**General Ship.**—"When the masters and owners of a ship engage with separate merchants to convey their goods to the place of her destination, the contract is said to be for conveyance in a general ship." Smith Merc. L. (9th ed.) 296. As opposed to a chartered ship. Repalje *v.* L. Law Dict. See Ward *v.* Green, 6 Cow. (N. Y.) 173.

**General Supervision.**—"The power of 'general supervision of the health of the city' is very indefinite, and when it is found to be the principal power conferred on a board of health, it is evident that the council of the city designed to comprehend more than a mere authority to examine into the condition of the health of the city and advise the measures necessary for its preservation." It includes power to rent a building for a hospital, to protect the city from infection by cholera. Aull *v.* City of Lexington, 18 Mo. 401.

**General Tenancy.**—In a statute defining tenancy from year to year to include "all general tenancies in which the premises are occupied, by the consent, either express or constructive, of the landlord," *general tenancy* means "such tenancies only as are not fixed and made certain by the agreement of the parties." Brown *v.* Bragg, 22 Ind. 122.

**General Verdict.**—"A finding by the jury in the terms of the issue or issues referred to them." Sidd's Pr. 978; Settle *v.* Alison, 8 Ga. 208.

**General Warranty.**—See WARRANTY.

**General Interest.**—"In speaking of matters of public and general interest, the terms 'public' and 'general' are sometimes used as synonyms, meaning merely what concerns a multitude of persons. But in regard to the admissibility of hearsay testimony a distinction has been taken between them, the term *public* being strictly applied to that which concerns *every member* of the state, and the term general being confined to a lesser, though still a considerable, portion of the community." Taylor on Ev. (8th ed.) § 609.

1. Lowndes on General Average, Int. (3rd ed.) pt. 44.

It is termed general average because it falls upon the gross amount of ship, freight and cargo, in contradistinction to particular average, which is borne by the owner of the subject on which it falls. Coster *v.* The Phœnix Ins. Co., 2 Wash. (U. S.) 51; 1 Bouv.

average is founded,[1] and which may be defined as a contribution made to a common loss which has been incurred for the common benefit.[2]

**2. Indiscriminate Use of the Term.**—The phrase, general average, is susceptible of three uses, and is indiscriminately used both in common parlance and in judicial decisions to indicate either a general average act, a general average loss, or a general average contribution.[3]

**3. A General Average Act**—(*a*) *Definition.*—A general average act is an intentional[4] act on the part of the master,[5] out of the course of his ordinary duty,[6] done on account of the common

Law Dict. 175. See Arnould on Mar. Ins. (6th ed.) 919, and Lowndes on General Average, Int., for an account of the history, etymology and origin of general average, and Gourlie (Am.), Lowndes (Eng.), for practical hints on adjustments in both countries and on the continent as well.

Though the principle herein set forth has been recognized in England for many years, the English decisions are of no greater antiquity than our own. There are no reported cases to be found in the books earlier than the beginning of this century. Birkley *v.* Presgrave, 1 East 220, is the first case.

1. The doctrine of general average contribution is founded upon the principles of equity and natural justice. McAndrews *v.* Thatcher, 3 Wall. (U. S.) 372; Nimick *v.* Holmes, 25 Pa. St. 366. And not upon contract or the relations created by contract. Pierie *v.* The Middle Dock Co., 11 Asp. 388.

2. The Law of Merchant shipping, Foarde, p. 90; 3 Kent's Com. 232.

3. Gourlie on Gen. Av. 2; Arnould on Mar. Ins. (6th ed.) 846; Carver on Carriage by Sea, § 365.

4. There must be a deliberate sacrifice to appease the exigency of the crisis as distinguished from the chance result of the operation. Arnould on Marine Ins. (6th ed.) 848; Kemper *v.* Holliday, 34 L. J., Q. B. 233.

General average cannot exist without unintentional sacrifice. Johnson *v.* Chapman, 35 L. J., C. P. 23; The Star of Hope, 9 Wall. (U. S.) 203.

Property lost by a mere peril of the sea, and without any action on the part of man, gives no claim to contribution. Ross *v.* The Active, 2 Wash. (U. S.) 226.

The voluntariness of the loss is the foundation of the claim. 2 Parsons' Mar. Ins. 210.

There must be an intent, a deliberate purpose to sacrifice the thing or to put it in a situation in which the danger of eventual destruction would be incurred. Walker *v.* U. S. Ins. Co., 11 S. & R. (Pa.) 61; Lee *v.* Grinnell, 5 Duer (N. Y.,) 411.

5. Whilst, generally speaking, the act ought to be performed under the direction or with the authority of the master, his presence does not, it would seem, appear to be essential to the sacrifice, if in point of fact it was necessary, and the measures taken be reasonably prudent in view of that necessity. Carver on Carriage by Sea, § 374; Price *v.* Noble, 4 Taunt. 123; Manus' Case, 12 Co. R. 63.

But the crew are not authorized to make a jettison without the consent of the master. The Nimrod, 1 Ware (U. S.) 9.

6. If the master be competent, and if an emergency actually existed, calling for a decision, and if he appears to have arrived at that decision with due deliberation, by the exercise of fair skill and discretion, with no unreasonable timidity, and with an honest intention to do his duty, the sacrifice will be deemed to have been necessary for the common safety, because the person to whom the law entrusts authority to decide upon and make it, has duly exercised that authority. Lawrence *v.* Minturn, 17 How. (U. S.) 100. In the absence of proof to the contrary, the presumption is in favor of the master. The Star of Hope, 9 Wall. (U. S.) 234; Patten *v.* Darling, 1 Cliff. (U. S.) 254.

The necessity of the act must be forced on the master by the immediate danger threatening the vessel. Gourlie on Gen. Av. 6.

If the sacrifice of the property is not required as a measure of escaping from an impending peril, its sacrifice is a

adventure,[1] to avert a total loss of the whole,[2] under circumstances in which it is the only alternative.[3]

(*b*) *Characteristics of.*—Necessity,[4] good faith[5] and suc-

mere waste and wrongdoing, and can give no claim for contribution. The Gratitude, 3 Rob. Adm. 240. And though the act itself be free from wrongdoing and highly meritorious, no claim for general average can arise unless its commission be necessary to escape from an impending peril. Dabney *v.* N. E. Ins. Co., 14 Allen (Mass.) 300.

1. If there be no common danger existing, or if no common benefit be contemplated, the act which entails the loss cannot give a right to contribution. Johnson *v.* Chapman, 35 L. J., C. P. 23; Walker *v.* The U. S. Ins. Co., 11 S. & R. (Pa.) 61.

A common danger must occur in which all interests participate. Barnard *v.* Adams, 10 How. (U. S.) 270; Delano *v.* Cargo of The Gallatin, 1 Woods (U. S.) 644.

The danger must be that of total loss or destruction, imminent in character and common to both ship and cargo. Harnsen *v.* The Bank of Australia, L. R., 7 Exch. 39.

When there is a danger to a part of the adventure only, a sacrifice of a part cannot be recovered against the whole. Nesbit *v.* Lushington, 4 T. R. 783.

2. Barnard *v.* Adams, 10 How. (U. S.) 270; Columbia Ins. Co. *v.* Ashby, 13 Pet. (U. S.) 331.

3. Arnould on Mar. Ins. (6th ed.) 856.

But in general the only alternative necessary is that of a total loss. Gourlie on Gen. Av. 7.

The object always is to incur a partial loss and to risk a minor and contingent danger to avoid the more probable and certain loss of the whole. Caze *v.* Reilly, 3 Wash. (U. S.) 298.

4. The Gratitudine, 3 Rob. Adm. 240.

If goods are thrown overboard unnecessarily by the master, though he has acted in good faith, there is no claim for general average. Myers *v.* Baymour, 10 Pa. St. 114. Dabney *v.* N. E. Ins. Co., 14 Allen (Mass.) 300.

Nor is there any claim for general average for goods jettisoned if the proximate cause of the disaster could have been prevented by the exercise of rea sonable care and skill. Bentley *v.* Bustard, 16 B. Mon. (Ky.) 643.

The abandonment of a voyage from necessity is not a general average act. Williams *v.* Suffolk Ins. Co., 3 Sumn. (U. S.) 510.

Nor is the jettison of goods made necessary by spontaneous combustion, their own inherent defect, fermentation or vice. Johnson *v.* Chapman, 35 L. J., C. P. 23; The Superb, 1 Wall. Jr. (C. C.) 642.

If the thing which is purposely destroyed could not itself by any means whatever be saved, then it may be said that there is no voluntary sacrifice at all, for the destruction was only hastened. 2 Parsons' Mar. Ins. 414.

Where the thing said to be voluntarily destroyed or abandoned is in such a state by reason of a peril peculiar to itself, that if the act of supposed sacrifice had not been done, it must shortly have been destroyed without the rest of the common adventure being lost, the act of slightly hastening the moment of loss is not a general average act. Shepherd *v.* Kottgen, L. R., 2 C. P. D. 585; The Adele Thackera (N. Y.), 24 Fed. Rep. 809; Nickerson *v.* Tyson, 8 Mass. 467.

But see Sonsmith *v.* The J. P. Donaldson (Mich.), 21 Fed. Rep. 671.

Where the property is still valuable and capable of being saved if the storm should abate, but is from its position in especial danger, its sacrifice in order to save the vessel is a general average act. The Marganthe Blanca (Pa.), 12 Fed. Rep. 728.

If at the time of making the sacrifice there was no possibility of saving the cargo, there can be no general average. Crockett *v.* Dodge, 12 Me. 190.

If the vessel be run ashore when there was no possibility of saving her, there can be no claim for general average. Meech *v.* Robinson, 4 Whart. (Pa.) 360.

5. Good faith will be presumed in the absence of proof to the contrary. Lawrence *v.* Minturn, 17 How. (U. S.) 100; The Star of Hope, 9 Wall. (U. S.) 234; Patten *v.* Darling, 1 Cliff. (U. S.) 254.

A consultation between officers and crew may be highly proper in cases which admit of delay and deliberation, but if the propriety and necessity of the

cess[1] are requisite. There must be a common danger, imminent and apparently inevitable, a voluntary sacrifice made to avoid it, and success in the attempt.[2] The motive of sacrifice is the essential in the act, not the intention in relation to the fate of the thing sacrificed.[3] When the vessel and cargo are in a common peril, and the master, to avoid a greater peril, selects another and a lesser peril, he may recover as per general average.[4] And so if he enter a bay without a pilot when the danger of remaining outside is greater than that of running in.[5]

The doctrine of general average is founded on principles of equity and natural justice.[6] The owner of a vessel is not entitled to contribution for damages sustained, or expenses incurred, by perils of the sea, if she was unseaworthy when she left port.[7]

**4. General Average Losses**—(*a*) *Definition.*—A general average loss is the result of a general average act.[8]

(*b*) *Division.*—Losses conveniently average themselves under the distinct heads of sacrifice and expenditure.[9]

act be otherwise shown sufficiently, that is an end to the objection of its want. Columbia Ins. Co. *v.* Ashby, 13 Pet. (U. S.) 343.

But it is not indispensable; a case of imminent danger will not admit of it. 3 Kent's Com. *233; Sims *v.* Gurney, 4 Binn. (Pa.) 503; Birkley *v.* Presgrave, 1 East 220. But see The Nimrod, 1 Ware (U. S.) 914.

1. The rule has passed away and the practice is almost if not quite unknown. 2 Parsons' Mar. Ins. 410.

It is the safety of the property and not the voyage which constitutes the foundation of the claim. Columbia Ins. Co. *v.* Ashby, 13 Pet. (U. S.) 331; Gray's Water., 2 S. & R. (Pa.) 228.

When there is nothing saved there can be no contribution in any case. The Star of Hope, 9 Wall. (U. S.) 229; Patten *v.* Darling, 1 Cliff. (U. S.) 254.

General average can only arise when the sacrifice for the common benefit has accomplished its object. Williams *v.* Suffolk Ins. Co., 3 Sumn. (U. S.) 510; McAndrews *v.* Thatcher, 3 Wall. (U. S.) 370.

It is the deliverance from an immediate peril by a common sacrifice that constitutes the essence of the claim. Columbia Ins. Co. *v.* Ashby, 13 Pet. (U. S.) 331; Barnard *v.* Adams, 10 How. (U. S.) 270.

The attempt to avoid the peril must be, to some practical extent, successful. The Star of Hope, 9 Wall. (U. S.) 229; Patten *v.* Darling, 1 Cliff. (U. S.) 254.

Some definite advantage must have sprung from it and a final preservation must ensue. Lee *v.* Grinnell, 5 Duer (N. Y.) 441.

2. Barnard *v.* Adams, 10 How. (U. S.) 270; Columbia Ins. Co. *v.* Ashby, 13 Pet. (U. S.) 331; The Star of Hope, 9 Wall. (U. S.) 233.

3. Caze *v.* Reilly, 3 Wash. (U. S.) 298; Sims *v.* Gurney, 4 Binn. (Pa.) 513.

4. O'Conner *v.* The Ocean Star, 1 Holmes (U. S.) 248; The Watchful, Brown's Adm. (U. S.) 469.

The greater and more imminent the peril, the more meritorious is the claim for contribution, when the sacrifice was voluntary and contributed to save associated interests from impending danger. Delano *v.* Cargo of The Gallatin, 1 Woods (U. S.) 644; Barnard *v.* Adams, 10 How. (U. S.) 270.

There may be a choice of perils even when there is no possibility of perfect safety. The Star of Hope, 9 Wall. (U. S.) 233.

5. The Star of Hope, 9 Wall. (U. S.) 203, 233; Rea *v.* Cutler, 1 Sprague (D. C.) 135.

6. McAndrews *v.* Thatcher, 3 Wall. (U. S.) 372; Nimick *v.* Holmes, 25 Pa. St. 366; Slater *v.* Hayward Rubber Co., 26 Conn. 128.

7. Wilson *v.* Cross, 33 Cal. 60.

8. Gourlie on Gen. Av. 2.

9. Arnould on Mar. Ins. (6th ed.) 856. This division, besides serving the purposes of order, coincides with the difference of principles on which sacrifice and expenditure respectively are

(*c*) *Jettison.*—Loss by jettison,[1] seems likely to have been the earliest occasion of a claim in the nature of general average.[2] The ancient as well as the present rule in regard thereto is that a jettison of cargo, which satisfies the conditions required of a general average act, becomes a loss to be distributed over the whole adventure as general average.[3]

This is the well established rule with regard to underdeck cargo. But with regard to deckload there is an ancient exception, formerly well established, but which has now become more or less restricted, viz, that goods carried on a ship's deck, if thrown overboard, are, generally speaking, not made good by contribution, though if saved they must, like everything else, contribute.[4] And the present rule is that, when goods are carried on deck in pursuance of a general custom, they will be contributed for in general average.[5] But in the absence of custom, if the loss be

adjusted. Arnould on Mar. Ins. (6th ed.) 857.

1. Jettison is the throwing overboard of a part of the cargo or any article on board a ship, or the cutting away of masts, spars, sails or other furniture for the purpose of lightening or relieving the ship in case of necessity or emergency. Gourlie on Gen. Av. 74.

The goods must be thrown overboard; they must be thrown overboard to lighten the ship, and not from caprice; they must be thrown overboard for the sake of all, and not because the ship is too heavily laden to prosecute her course under ordinary circumstances. Abbott on Shipping (11th ed.) 6, 1, 1.

2. Arnould on Mar. Ins. (6th ed.) 857.

3. Arnould on Mar. Ins. (6th ed.) 857. But a jettison is permitted only in a case of extreme necessity. The Gratitudine, 3 C. Rob. 24; Lawrence *v.* Minturn, 17 How. (U. S.) 100.

If the unseaworthiness of the vessel at the time of sailing caused or contributed to produce the necessity of jettison, the vessel will be liable for the full value of the goods thrown overboard. Dupont *v.* Vance, 19 How. (U. S.) 162; Lawrence *v.* Minturn, 17 How. (U. S.) 100.

To recover contribution for jettison the sacrifice must be voluntary, if the goods have, through sea peril, become practically irrecoverable and valueless, subsequently cutting them loose will not sustain a claim for contribution. The Adele Thackera (N. Y.), 24 Fed. Rep. 809.

When the shipper has been prejudiced by the jettison of his goods, the court may look into the facts of the case and determine whether the owners have appointed a competent master and whether that master has used reasonable skill and judgment in encountering the peril of the sea. And where a jettison has been necessary through the conduct of the master, concurring with a peril of the sea, whether that conduct was reasonably skillful, judicious and prudent. The Hettie Ellis (La.), 22 Fed. Rep. 350; The Adele Thackera (N. Y.), 20 Fed. Rep. 303, 507.

To make a jettison of cargo the subject of a general average contribution, the facts must be established that there was a maritime peril; that the sacrifice was made to a avert a danger common to the whole adventure, and that such sacrifice was voluntary and successful. Johnson *v.* Chapman, 19 C. B. (N. S.) 563.

4. Lowndes on Gen. Av. (4th ed.) 51. The reasons for the exception being that they were, *prima facie*, not in their proper place and that they were in the way of the ropes and interfered with making ship. The changes in the construction of vessels, the introduction of steam and the custom of carrying certain cargoes, wholly or partly on deck, have materially changed the former practice. Gourlie on Gen. Av. 85; Lowndes on Gen. Av. (4th ed.) 63; Harris *v.* Moody, 30 N. Y. 266.

5. Wood *v.* Phœnix Ins. Co. (Pa.), 1 Fed. Rep. 235; The Nettie Ellis (La.), 20 Fed. Rep. 507; Hazelton *v.* Manhattan Ins. Co. (Ill.), 12 Fed. Rep. 159; Gould *v.* Oliver, 4 Bing. N. C. 134; Johnson *v.* Chapman, 35 L. J., C. P. 23; Gillett *v.* Ellis, 11 Ill. 579; Meaher *v.*

attributable solely to the fact that the goods were carried on deck, and their owner had consented to their being there, he has no recourse against the master, owner or vessel for their jettison.[1] When the jettison is of cargo stored in a deckhouse, proper forecastlehouse, the rule of contribution must largely depend upon the physical construction of the apartment.[2]

When the unseaworthiness of the vessel, at the time of sailing on the voyage, caused or contributed to produce the necessity for the jettison, the vessel is liable for the whole value of the goods thrown overboard.[3] The loss should be contributed for though it happens to articles described as perishable.[4]

Goods jettisoned still belong to their former owners, and if recovered from the sea, may be reclaimed by them on paying salvage expenses.[5] Freight which, but for the jettison, the ship owner would have received for the carriage of the goods jettisoned, must be made good to him by a general average contribution.[6]

(*d*) *Damages Incident to Jettison.*—If a part of a ship be sacrificed, masts cut away, anchors hove overboard, cables cut, gun and ship stores jettisoned for the general safety, contribution will be made therefor.[7] The general rule is that all ordinary

Lufkin, 21 Tex. 383; Harris *v.* Moody, 4 Bosw. (N. Y.) 210; Harris *v.* Moody, 30 (N. Y.) 270.

The underwriter on hull is liable to contribute for jettison of deck load when the custom or usage of the trade in which the vessel is employed is to carry part of her cargo on deck. Hazelton *v.* Manhattan Ins. Co. (Ill.), 12 Fed. Rep. 159.

And though a jettison of deck cargo may not be a general average act in the sense of imposing an obligation to contribute on the part of others the ship owner must do so, when the whole cargo, both above and below deck, belongs to the same person and has been so stored by agreement, expressed or implied. Johnson *v.* Chapman, 35 L. J., C. P. 23; The Schooner May *v.* Eva (N. J.), 6 Fed. Rep. 628; The Watchful, Brown's Adm. (U. S.) 469.

But the rule is otherwise when the goods belong to different persons. Wright *v.* Marwood, 7 Q. B. Div. 62; Van Sickle *v.* The Schooner Thos. Ewing, Crabbe 405. Or when statutory instructions are imposed and violated. Lowndes on Gen. Av. (4th ed.) 62.

1. Lawrence *v.* Minturn, 17 How. (U. S.) 114.

2. Gourlie on Gen. Av. 91, 92; Lowndes on Gen. Av. 63.

3. Dupont *v.* Vance, 19 How. (U. S.) 162; Lawrence *v.* Minturn, 17 (U. S.) 114.

4. Griswold *v.* Union Ins. Co., 3 Blatchf. (U. S.) 234; Maggrath *v.* Church, 1 Cai. (N. Y.) 196.

5. Arnould on Mar. Ins. (6th ed.) 864.

6. Arnould on Mar. Ins. (6th ed.) 864.

7. Arnould on Mar. Ins. (6th ed.) 866; Potter *v.* Prov. etc. Ins. Co., 4 Mason (U. S.) 298; Patten *v.* Darling, 1 Cliff. (U. S.) 254.

Cables cut away or anchors slipped to avoid being separated from convoy are not the subject of general average in *England*, though they are so in the United States and on the Continent. 2 Phillips Ins., No. 1308; Arnould on Mar. Ins. (6th ed.) 866.

If any part of the ship or her tackle be applied for some purpose different from its ordinary use, the loss is a general average loss. Harmon *v.* Bank of Australia, L. R., 7 Exch. 39; Robinson *v.* Price, 2 Q. B. Div. 91; Baily Gen. Av. 73, 74.

Sails deliberately let go or masts cut in order to right a vessel when she is on her beam ends follow the same rule. Arnould on Mar. Ins. (6th ed.) 868.

But not so if sails or spars are carried away by the wind in consequence of crowding sail to escape from an en-

loss and damage sustained by the ship, happening immediately from the storm or perils of the sea, must be borne by the ship owners; but all those articles which were made use of by the master and crew out of the ordinary course for the benefit of the whole concern, and other expenses incurred, must be paid as general average.[1]

Damage, which is incident to a jettison, so that the jettison cannot be made without incurring it, must be regarded as a part of the loss by jettison, and included in the general average.[2]

(*e*) *Damage to Cargo Through Forced Discharge.*—It is not necessary that the goods should have been thrown away; they may have been put in boats, or on rafts, or landed onto the beach; and if that has been done for the general safety, and if they be damaged or lost in consequence, the loss is a general average loss.[3]

When the repairs of a vessel at a port of refuge necessitate the partial or complete discharge of the cargo, any damage the cargo may sustain, whether by handling or by unavoidable exposure to

emy or a lee shore. Arnould on Gen. Av. (6th ed.) 868.

But the ship must be sufficiently provided at the outset, having regard to what might be anticipated, or the ship owner will not be allowed to treat as a general average sacrifice the destruction of other things used in order to supply a want. Carver on Carriage by Sea, § 385; Robinson *v.* Price, 2 Q. B. Div. 91, 295.

1. Birkley *v.* Presgrave, 1 East 220. See note to Birkley *v.* Presgrave, 1 East 220.

Indus. Leading Cases Mercantile & Mar. Law.

It is not enough that the things have been used on an extraordinary occasion, or one which has exposed them to unusual danger in all cases. Press of canvas carried to escape from a privateer, whereby spars were injured, or damage done in a fight with a privateer, are losses which rest where they fall. Covington *v.* Roberts, 3 B. & P., N. S. 378; Power *v.* Whitmore, 4 M. & S. 141; Taylor *v.* Curtis, 6 Taunt. 608.

Goods voluntarily and without fraud given up to pirates by way of composition, are to be compensated for in general average. Hicks *v.* Palinton, Moore 297.

But if forcibly taken, the rule is otherwise. Nesbitt *v.* Lushington, 4 T. R. 783.

2. Damage done by water which unavoidably goes down ship's hatches or other openings made for the purpose of a jettison. Columbia Ins. Co. *v.* Ashby, 13 Pet. (U. S.) 343.

Or by the entry of water through the aperture on a mast being cut away. Maggrath *v.* Church, 1 Cai. (N. Y.) 166; Salter *v.* Ocean Ins. Co., 14 Johns. (N. Y.) 138.

3. Carver on Carriage by Sea, § 376; Henner *v.* Monro, 4 Mart., N. S. (La.) 449; Lewis *v.* Williams, 1 Hall (N. Y.) 430.

The difficulty in such cases is to determine whether the goods have been taken out of the ship for the general safety or for their peculiar benefit, in the hope of securing and saving them. If the latter has been the object, the damage sustained by the goods owing to the exposure is not a matter of contribution. If the former, it is. Carver on Carriage by Sea, § 376; Witteridge *v.* Norris, 6 Mass. 125.

Where ship and cargo are sunk together, and are in common peril of destruction, and expenses incurred in raising both together, and such expenses are a common benefit to both, the cargo contributes. Kemp *v.* Halliday, L. R., 1 Q. B. 520.

And such expense may be general average, whether the cargo be floated with or separate from the ship, provided that such floating be one continuous operation for the joint benefit. Kemp *v.* Halliday, L. R., 1 Q. B. 520.

weather or other peril, is made good in general average.[1]

(*f*) *Damage to Cargo from Other Causes.*—When the danger, to avert which the sacrifice was made, has resulted from the fault or vice of the cargo itself, an innocent party, whose property has been sacrificed, may be entitled to contribution.[2]

(*g*) *Voluntary Stranding.*—The voluntary stranding of a vessel, when required and designed for the common safety of the associated interests, constitutes a case for general average contribution.[3]

(*h*) *Expenditure.*—With regard to general average expenditure, the rule is that whenever, under extraordinary circumstances of dan-

1. Gourlie on Gen. Av. 214; Gregory *v.* Orrall (Mass.), 8 Fed. Rep. 287.

But a ship is not justified in discharging a large amount of cargo, or in incurring a long delay for the purpose of making permanent repairs when comparatively slight and temporary repairs, reasonably sufficient to complete the voyage, could be made speedily and with small change of cargo. The Queen (N. Y.), 28 Fed. Rep. 755.

The same rule applies to the charges of unconditioning the discharged packages when the damage to be repaired is caused by the handling. The Star of Hope, 9 Wall. (U. S.) 203.

Articles lost overboard while discharging cargo, and because of such discharge, are entitled to contribution. Hathaway *v.* The Sun Ins. Co., 8 Bosw. (N. Y.) 33.

Ice lost by melting in consequence of putting in a new mast at a port of refuge is to be paid in general average, but such loss as happens in consequence of the mere delay in the port will not be compensated for. Libby *v.* Gage, 14 Allen (Mass.) 261.

If the cargo be landed and stored in order to repair the vessel so that she may proceed on her voyage, and while thus stored is destroyed by fire, it must be paid for in general average; but if the cargo was landed and stored because it was damaged, or if both causes concur and necessitate the landing, no allowance is due for the loss by fire. The Mary, 1 Sprague (U. S.) 204.

2. Where a cargo of coal was on fire and water was poured upon it to avert a general loss, with the result that the coal which was wetted had to be discharged and sold at a port of refuge, it was *held* that there must be a contribution to the freight thereby lost. Pine *v.* The Middle Dock Co., 44 L. T. 426.

But if the owner of the thing sacrified be himself in fault and was the cause of the danger which necessitated the sacrifice, he must bear his own loss. Johnson *v.* Chapman, 19 C. B., N S. 563; Pine *v.* The Middle Dock Co., 4 Asp. Mar. Cas. 388; The Mary, 1 Sprague (U. S.) 204.

So where the removal of the cargo increased an incipient decay and hastened a partial destruction, it is not a case of general average. Bond *v.* The Supert, 1 Wall. Jr. (C. C.) 335.

Or where the goods are inherently prone to decay, or deteriorate, during a delay in a port of distress, the owner cannot claim general average. Bond *v.* The Supert, Wall. Jr. (C. C.) 335.

Where property that has been displaced by a storm is valuable, and capable of being saved if the storm abates, is from its position an especial source of danger to the vessel, its sacrifice in order to save the vessel is a voluntary sacrifice and its loss the subject of general average. The Margarethe Blanca (Pa.), 12 Fed. Rep. 728.

But if the goods have, through sea peril, become practically irrecoverable and valueless, subsequently cutting them away will not sustain a claim for contribution. The Adele Thackera (N. Y.), 24 Fed. Rep. 809.

Loss or damage to cargo by pouring water down a hatch to extinguish a fire, or by scuttling the vessel, is a general average loss. Nelson *v.* Belmont, 5 Duer (N. Y.) 323; Lee *v.* Grinnell, 5 Duer (N. Y.) 400; Nimick *v.* Holmes, 25 Pa. St. 366.

Damage done by causes incident to jettison are general average losses. Columbia Ins. Co. *v.* Ashby, 13 Pet. (U. S.) 343; Saltus *v.* Ocean Ins. Co., 14 Johns. (N. Y.) 138; Maggrath *v.* Church, 1 Cai. (N. Y.) 196.

3. Patten *v.* Darling, 1 Cliff. (U. S.)

ger to both ship and cargo, a voluntary sacrifice of money is made in order to save both ship and cargo, by the expenditure of which both ship and cargo are saved, the person who has made the voluntary sacrifice is entitled to call upon others, whose property has been saved by the voluntary sacrifice made on their behalf, as well as his own, for general average contribution.[1]

266; Columbia Ins. Co. *v.* Ashby, 13 Pet. (U. S.) 343; Barnard *v.* Adams, 10 How. (U. S.) 302.

Although the ship be totally lost, yet if the stranding be voluntary and designed for the common safety, and if it resulted in saving the cargo, the case is a proper one for general average as regards the property saved. Columbia Ins. Co. *v.* Ashby, 13 Pet. (U. S.) 343; Barnard *v.* Adams, 10 How. (U. S.) 270; Sims *v.* Gurney, 4 Binn. (Pa.) 513; The Bales of Cotton, 8 Blatchf. (U. S.) 221; Patten *v.* Darling, 1 Cliff. (U. S.) 254.

If the voluntary act of the master and crew is the direct occasion, the efficient motive and cause of the stranding, the loss becomes one of general average. The Star of Hope, 9 Wall. (U. S.) 203; Caze *v.* Reilly, 3 Wash. (U. S.) 298.

It is sufficient if the master slips his cable to let the vessel go ashore to avoid a total loss. Sturgess *v.* Cary, 2 Curt. (U. S.) 59.

Accidentally striking on a rock will not change the intent. Rae *v.* Cutler, 1 Sprague (D. C.) 204; s. c., rev., 7 How. (U. S.) 729; Sims *v.* Gurney, 4 Binn. (Pa.) 513; Walker *v.* U. S. Ins. Co., 11 St. R. (Pa.) 61.

But if it be rendered necessary by an unjustifiable deviation or negligent act of the master, the loss must be attributed to that fault rather than to sea peril. The Portsmouth, 9 Wall. (U. S.) 682; O'Conner *v.* The Ocean Star, 1 Holmes (U. S.) 248.

If the master give the vessel a direction to a part of the shore where she could lie more safely, the sacrifice will be regarded as a voluntary act, even though the vessel be lost, provided that the cargo be thereby saved. Patten *v.* Darling, 1 Cliff. (U. S.) 254.

This doctrine is denied in some jurisdictions, but is the settled law in the United States courts, and is believed to rest upon the solid foundations of reason and justice. Caze *v.* Reilly, 3 Wash. (U. S.) 298; Sims *v.* Gurney, 4 Binn. (Pa.) 513.

The question of contribution ordinarily turns on the fact of a voluntary stranding for the good of all concerned, or to promote the general safety. Caze *v.* Reilly, 3 Wash. (U. S.) 309; O'Conner *v.* The Ocean Star, 1 Holmes (U. S.) 248.

If the will of man did in some degree contribute to the stranding of a ship, this is enough to constitute the stranding a voluntary act within the meaning of the commercial law. The Star of Hope, 9 Wall. (U. S.) 203. For special instances *pro* and *con* see McAndrews *v.* Thatcher, 3 Wall. (U. S.) 347; Rathbone *v.* Fowler, 6 Blatchf. 294; s. c., 12 Wall. (U. S.) 162; The Bales of Cotton, 8 Blatchf. (U. S.) 294.

As to what is a stranding and what not, under the English law, see Maude & Pollock on Merchant Shipping (4th ed.), p. 496.

As to voluntary stranding, see Lowndes on Gen. Av. (4th ed.), p. 120; Arnould on Ins. (6th ed.) 870; Carver on Carriage by Sea, § 387; Hendricks *v.* Australian Ins. Co., L. R., 9 C. P. 460.

1. Ocean St. C. Co. *v.* Anderson, 13 Q. B. Div. 651; Kemp *v.* Holliday, 34 L. J., 2 Q. B. 233; McAndrews *v.* Thatcher, 3 Wall. (U. S.) 369.

There are two main questions which determine whether any given expenditure ought to found a claim for contribution on general average: 1. Want of an extraordinary nature. 2. If so, was it incurred for the safety of both ship and cargo? Arnould on Mar. Ins. (6th ed.), p. 877.

If both these questions be answered in the affirmative, then the expenditure ought to be made good to the party who has incurred it. If either or both be answered in the negative, then the expenditure comes under the head of those petty averages which the shipowner must himself bear without any claim on the adventure, or it constitutes a particular average loss. Arnould on Mar. Ins. (6th ed.) 877.

Extra expenses of the voyage through meeting with bad weather, or at the loading point to avoid bad weather, or

owing to quarantine or embargo, are not treated as general average expenditures. Nelson *v.* The Bank of Victoria, L. R., 2 Q. B. 203; DaCosta *v.* Newnham, 2 T. R. 407.

If ship and cargo are in peril and the master can avoid the danger by incurring extraordinary expenses, as by putting into a port of refuge, or by employing men or other vessels to render assistance, the money which he properly pays or becomes liable to pay in these ways are general average expenditures. Carver on Carriage by Sea, § 392.

As to the difference between ordinary and extraordinary pilotage, see Aberklom *v.* Price, 7 Q. B. Div. 129.

Where a vessel is accidentally stranded the expense incurred in enabling her to complete her voyage is a general average act. McAndrews *v.* Thatcher, 3 Wall. (U. S.) 367; Bedford Ins. Co. *v.* Parker, 2 Pick. (Mass.) 1. As the expenses of refloating the vessel the hire of extra hands to pump the water out of the ship, the expenses of lighterage. McAndrews *v.* Thatcher, 3 Wall. (U. S.) 367; Plantamour *v.* Staples, 1 Fed. Rep. 611, note.

Where a vessel meets with disaster and bears up for a port of distress, wages and provisions of master, officers and crew are chargeable as general average, as is also any expense necessarily incurred during her detention for the benefit of all concerned. Potter *v.* Ocean Ins. Co., 3 Sumn. (U. S.) 27; Hobson *v.* Lord, 92 U. S. 397; The Star of Hope, 9 Wall. (U. S.) 236; Columbia Ins. Co. *v.* Ashby, 13 Pit. (U. S.) 331; Pope *v.* Nickerson, 3 Story (U. S.) 465. Detention occasioned by capture follows the same rule. Leavenworth *v.* Delafield, 1 Cai. (N. Y.) 573.

Where a vessel disabled at sea puts into a port of refuge for repairs the ordinary expenses, including pilotage, towage, quarantine dues, dockage, wharfage, surveys on ship and cargo, cost of unloading, storing and reloading cargo, and an allowance for wages of crew and provisions from the moment of departure from the course of the voyage until its renewal, or so long as its renewal remains in expectancy, are chargeable to general average. The Joseph Farwell (Ala.), 31 Fed. Rep. 844.

Where the interests are temporarily separated, as by unloading and storing the cargo in order to repair the vessel, and it is expected to reload the cargo and complete the voyage, then even though by reason of unforeseen circumstances, as the inability to repair the vessel and make her seaworthy again, this expectation is not realized, the entire expense of saving and protecting the different interests until the hope of reuniting them is abandoned are chargeable to general average. The Joseph Farwell (Ala.), 31 Fed. Rep. 844.

The cost and expenses incident to repairs to vessel incurred in the expectation of continuing the voyage, are not chargeable to general average when the voyage is subsequently abandoned. The Joseph Farwell (Ala.), 31 Fed. Rep. 844.

Expenses arising out of capture, such as delay in making claim for vessel and cargo, and the necessary costs incurred to obtain a release, are charges which will be allowed for as general average. Speyer *v.* N. Y. Ins. Co., 3 Johns. (N. Y.) 88; Jumel *v.* Mar. Ins. Co., 7 Johns. (N. Y.) 412; Kingston *v.* Girard, 4 Dall. (Pa.) 274. Ransom paid in good faith is also allowed for. Douglas *v.* Moody, 9 Mass. 548; Sansom *v.* Ball, 4 Dall. (Pa.) 459; Maisonnaire *v.* Keating, 2 Gall. (U. S.) 325.

But the expense of freeing the master from arrest for his individual debt is not general average. Dobson *v.* Wilson, 3 Camp. 480.

Nor are the expenses of delay at the termination of the adventure. Dunham *v.* Comm. Ins. Co., 11 Johns. (N. Y.) 315.

The quarantine dues of the port are a subject of general average, but hospital charges for sick sailors are not. Hathaway *v.* The Sun Ins. Co., 8 Bosw. (N. Y.) 33; Hugg *v.* Balt. etc. Co., 35 Md. 414.

Consumption of fuel by a steamer on bearing away from port of distress is admitted in general average. Gourlie on Gen. Av. 243.

But it is not so with detention occasioned by an embargo. McBride *v.* Mar. Ins. Co., 7 Johns. (N. Y.) 431; The Nathaniel Harper, 3 Sumn. (U. S.) 542.

If a ship be obliged to put into an intermediate port for repairs, the following expenditures will be allowed for in general average: The charge of entering the harbor. Vorrell *v.* Columbia Ins. Co., 3 Cranch (C. C.) 83. Towing into port. The Star of Hope, 9 Wall. (U. S.) 203, 237. Surveyor's bill and port charges, unloading and docking for repairs. The Star of Hope, 9 Wall. (U. S.) 237; Hobson *v.* Lord, 9

(*i*) *Deviation.*—Deviation occurring in consequence of a tempest which, though the vessel is intact, will, in the judgment of the master, seriously endanger the safety of the vessel, cargo and crew, will constitute an average charge.[1]

(*j*) *Salvage.*—The compensation due salvors for their services of time, money and material, and often exposure of life, in saving a wrecked or stranded ship, without necessarily possessing all the elements of general average,[2] is usually assessed upon a similar basis.

(*k*) *Money Raised Abroad.*—All expenses attendant upon raising

Md. 397. Extra expense in keeping her afloat. Hobson *v.* Lord, 92 U. S. 397. Hire of anchors, chains, boats and other necessary apparatus, as well as expenses of warehousing and reloading after repairs have been completed. The Star of Hope, 9 Wall. (U. S.) 203, 237; Potter *v.* Ocean Ins. Co., 3 Sumn. (U. S.) 27; The Mary, 1 Sprague (U. S.) 17.

But expenses occasioned by ordinary decay of vessel during the voyage, requiring her to put into an intermediate port, must be paid for by the vessel owner. Ross *v.* The Active, 2 Wash. (U. S.) 226. But see Hustin *v.* Phœnix Ins. Co., 1 Wash. (U. S.) 400.

1. Gourlie on Gen Av. 240.

But the rule is otherwise if occurring because of contrary winds simply interfering with the progress of the vessel. Gourlie on Gen. Av. 240; Lawrence *v.* Minturn, 17 How. (U. S.) 109.

The master must exercise discretion in regard to putting into a port of refuge. Soule *v.* Rodocanachi, Newb. Adm. (U. S.) 504.

He is allowed a large discretion however and need not go to the nearest port. The Sarah, 2 Sprague (U. S.) 31.

Underwriters or shippers of cargo will hardly examine too critically the acts of the master which, though prompted by excessive caution, produced certain safety at a small sacrifice. Gourlie on Gen. Av. 241.

The cargo is not to be charged with any expense incurred in respect to it, after the voyage has been broken up and abandoned. The Ann D. Richardson, 1 Abb. Adm. (U. S.) 501; Sparks *v.* Kittridge, 9 Law Rep. 318.

The expenses and cost of repair of a vessel in a port of necessity do not make a case of general average as against cargo, when it is found impossible to proceed on the voyage which is broken up at the port. Myers *v.* The Harriet, 2 Whart. Dig., Adm. (E. D. Pa. 1848), p. 48, § 140.

2. Sansom *v.* Bell, 4 Dall. (U. S.) 462; Peters *v.* The Warren Ins. Co., 1 Story (U. S.) 468; Vansyckle *v.* The Thomas Ewing, Crabbe 405; The Congress, 1 Biss. (U. S.) 42; The Antelope *v.* Tyson, 1 Lowell (D. C.) 133.

The right may arise through services at sea, whereby the adventure is saved from destruction or loss, or by the rescue from captors. Williams *v.* Suffolk Ins. Co., 3 Sumn. (U. S.) 270, 510; Heyliger *v.* N. Y. Fire Ins. Co., 11 Johns. (N. Y.) 85.

Human life is not a subject for contribution through general average. The Emblem, 2 Ware (U. S.) 68.

But if life is saved in connection with property, it is proper for the court to take notice of the fact and increase the salvage accordingly. Gourlie on Gen. Av. 379, note.

The costs of the suit brought by all the salvors jointly against all the property saved may be allowed in general average. Peters *v.* Warren Ins. Co., 1 Story (U. S.) 463.

Masters may compromise salvage claims in small cases, or when they cannot communicate with their owners, but their actions may be scrutinized. Houseman *v.* Cargo of Sch. North Carolina, 15 Pet. (U. S.) 40.

The pilot's extra services while the vessel is aground, as also the labor and services of other vessels to float the stranded ship, are matters of general average compensation. Hathaway *v.* Sun Ins. Co., 8 Bosw. (N. Y.) 33.

But the contributor by general average is not necessarily bound by the amount paid by the ship owner; the question is one for the jury. Anderson *v.* The Ocean St. Co., 10 App. Cas. 107.

Hire of extra hands to pump a ship after springing a leak, is allowed in general average both in England and

money abroad for general average purposes ought, on principle, to be made good by general average contribution.[1]

the United States. Berkley *v.* Presgrave, 1 East 219; Orrok *v.* Comm. Ins. Co., 21 Pick. (Mass.) 456.

But the expense of hiring extra hands in room of those of the crew who have deserted is not, it seems, allowed in *England*. Plummer *v.* Wildman, 3 M. & Sel. 482.

Nor are gratuities promised to seamen in order to encourage them to do their duty. Harris *v.* Watson, Reakes N. P. 72; Frazer *v.* Hatton, 2 C. B., N. S. 512.

Nor will injury done to a donkey engine by being constantly employed in keeping down a leak be allowed in general average. Harrison *v.* The Bank of Australia, 7 L. R., Exc. 39.

The remuneration which the ship owner is obliged to pay for the services rendered in getting a stranded ship afloat, gives a claim for remuneration, provided that such services appear to be for the joint benefit of ship and cargo. Kemp *v.* Holliday, 34 L. J., Q. B. 223. With the limitation, however, that the burden thus thrown upon the cargo must not be greater than the cost of saving it by itself. Kemp *v.* Holliday, 34 L. J., Q. B. 233.

Where the cargo has been discharged and is in a place of safety, and subsequent operations are undertaken to save the ship, the expense must fall upon the ship owner. Job *v.* Langton, 26 L. J., Q. B. 97; Walthur *v.* Mavrozani, L. R., 5 Ex. 119.

With regard to the treatment of complex salvage operations, the law of both England and the United States is in a somewhat unsatisfactory condition. See Lowndes on Gen. Av. (4th ed.) 147, 617.

In the United States the rule seems to be that goods are still at risk and liable to contribute until entirely disconnected from the enterprise. Nelson *v.* Belmont, 5 Duer (N. Y.) 310; McAndrews *v.* Thatcher, 3 Wall. (U. S.) 347.

The general rule is that where the cargo continues under the control of the master, so that it may be taken on board for the purpose of prosecuting the voyage, the common interest remains. McAndrews *v.* Thatcher, 3 Wall. (U. S.) 347.

For a resume of the rules of marine adjusters, see Gourlie on Gen. Av. 396, 400

The English cases are collated and examined by Mr. Lowndes. Lowndes on Gen. Av. (4th ed.) 147–181. See also Carver on Carriage by Sea, §§ 397–401.

Where a vessel in the course of her voyage becomes stranded upon the bank of a river or harbor, and the circumstances are such as to show that there is no danger to be apprehended from her lying there, the expense of getting her off is not the subject of general average contribution. The Alcona (Ill.), 9 Fed. Rep. 172.

Where the cargo of a stranded steamer was saved by wreckers, and by them transported in different lots and in a different vessel, to a place of safety and there stored, such service was *held* to be a continuous service and all property saved liable to contribute, although part of the service was performed after a part of the cargo had been stored in a place of safety. Coast Wrecking Co. *v.* Phœnix Ins. Co. (N. Y.), 7 Fed. Rep. 236.

Where the captain of a sunken boat reshipped a part of his cargo in another vessel, consigned to agents of his own with instructions not to deliver to the original consignees, except upon their giving a general average bond, and having returned to the port of shipment did not notify the consignor, *held*, that this was evidence of his intention not to separate that portion of the cargo from the burden of general average, and that it was liable to contribution, notwithstanding the sunken vessel was raised, returned to the nearest port of safety for repairs and did not again take on board that part of her cargo, and did not complete the voyage. Mitchell Trans. Co. *v.* Patterson (Tenn.), 22 Fed. Rep. 49.

The expense of raising and towing a sunken and disabled vessel to a port of repair, no matter by whom paid, should be considered as a part of the loss, and it is immaterial that a part of this cost has been contributed upon an adjustment in general average. Wallace *v.* Thames etc. Ins. Co. (Mich.), 22 Fed. 66.

1. Arnould on Mar. Ins. (6th ed.) 888; Gourlie on Gen. Av. 357.

And this includes exchange, interest or discount on bills and maritime interest in case of bottomry.

The premium also for insuring sums

**5. General Average Contribution.**—General average contribution is a division of the loss among those benefited.[1] All that is ultimately saved out of the adventure, consisting of ship, freight and cargo, contributes to make good the general average loss, provided it was actually at risk at the time and under the circumstances in which the loss was incurred.[2]

thus advanced for general average purposes are allowed when the insurance is for the protection of a stranger, but if it be the ship owner who insures the premiums are payable by the cargo. Arnould on Mar. Ins. (6th ed.) 888.

If the master is not supplied with funds sufficient to defray the expenses at the port of distress and cannot borrow on the personal credit of his owners or himself, he may borrow the necessary sum pledging as security the vessel and, if needs be, the goods. The Fortitude, 3 Sumn. (U. S.), 228; The Star of Hope, 9 Wall. (U. S.), 203.

Where it is found impossible to procure the necessary amount, recourse is often had to the sale of the cargo. The Star of Hope, 9 Wall. (U. S.) 203.

But the master has no authority to pledge the cargo without the consent of the shipper or consignee where it appears from the port where the vessel entered in distress that the cargo could have been forwarded in another vessel and that it was for the interests of the shipper that it should have been forwarded instead of hypothecated. The Julia Blake, 107 (U. S.) 426.

1. Gourlie on Gen. Av. 2.

2. Arnould on Mar. Ins. (6th ed.) 888.

Goods landed before a jettison or goods taken on board after a jettison do not contribute because they were not exposed at the time of the jettison to a community of risk and were not saved thereby. Arnould on Mar. Ins. (6th ed.) 888.

All property exposed to the risk of stranding must contribute. Mutual Ins. Co. *v.* The George, Olcot's R. 157.

All goods laden on board for the purpose of traffic, by "goods" is meant all wares of cargo for sale laden on board. Hill *v.* Patton, 8 East 373.

The rule is that all merchandise put on board for the purposes of traffic is liable to be brought into contribution. Brown *v.* Stapyleton, 4 Bing. 119.

All property on board at the time of the jettison and saved, unless attached to the person of the passengers is brought into contribution. Harris *v.* Moody, 30 N. Y. 266; McAndrews *v.* Thatcher, 3 Wall. (U. S.) 374; Columbia Ins. Co. *v.* Ashby, 13 Pet. (U. S.) 331.

Including government property. U. S. *v.* Ames, 1 Wood. & M. (U. S.) 81; U. S. *v.* Wilder, 3 Sumn. (U. S.) 308; The Davis, 10 Wall. (U. S.) 18.

But only at cost price. Brown *v.* Stapyleton, 4 Bing. 119.

Bank bills are regarded as property. Harris *v.* Moody, 30 N. Y. 266.

Wearing apparel and goods, if attached to the person, do not contribute, but anything of this character carried as cargo or deposited with the master would be liable with the other interests in general average. Columbia Ins. Co. *v.* Ashby, 13 Pet. (U. S.) 331; McAndrews *v.* Thatcher, 3 Wall. (U. S.) 374.

Specie and bank bills are liable to contribute, but not so bills of exchange and drafts which are mere evidence of value giving no interest by possession simply. The Emblem, 2 Ware (U. S.) 68; Bevan *v.* The Bank of U. S., 4 Whart. (Pa.) 301.

Provisions for the crew and passengers are not liable to contribute. Brown *v.* Stapyleton, 4 Bing. 110.

It is only property saved which can be made to contribute. Simonds *v.* White, 2 Barn. & C. 805; Scudder *v.* Bradford, 14 Pick. (Mass.) 13.

Goods on deck contribute if saved but if lost by jettison, they are not entitled to contribution. Doidge *v.* Bartol, 5 Me. 286; Cram *v.* Akin, 13 Me. 229.

But if carried according to the custom of trade and stand in the usual way they are entitled to contribution if lost. Harris *v.* Moody, 30 N. Y. 266; Hazelton *v.* Manhattan Ins. Co. (Ill.), 12 Fed. Rep., 159; The Hattie Ellis (La.), 20 Fed. Rep., 507.

The liability of the cargo to contribute does not continue after it has been completely separated from the vessel so as to leave no community of interest remaining. McAndrews *v.* Thatcher, 3 Wall. (U. S.) 372; but see The Joseph Farwell (Ala.), 31 Fed. Rep. 844.

**6. Value of Contributory Interests.**—In ascertaining the value of the ship, the present rule of practice is to take the ship at her value at the port of departure less a reasonable deduction for wear and tear up to the time of the disaster.[1]

The freight pending at the time of the loss contributes, and if wages or provisions are subsequently expended to save freight, such expenses are to be deducted in ascertaining the amount to which freight is to contribute.[2]

As a general rule, the goods sacrificed as well as the goods saved, if the vessel arrives at the port of destination, are to be valued at the clear net price they would have yielded, after deducting freight, at the port of discharge.[3]

**7. General Average Adjustment.**—Usually, the proper time and place for adjusting the general average is upon arrival at the port of destination,[4] and an adjustment, when so made, is binding upon the parties;[5] but this rule is not absolute, and accidental circumstances affecting the actual and practical closing of the adventure may make the port of distress the proper place of

Goods jettisoned do not contribute for any damage afterwards to the value of the cargo. Nelson *v.* Belmont, 5 Duer (N. Y.) 310.

So, also, the owner of the cargo cannot be held to contribute towards the expense of repairs of a vessel when the cargo is in safety and receives no benefit therefrom. Sparks *v.* Kittridge, 9 Law Rep. 318; Bedford Ins. Co., *v.* Parker, 2 Pick. (Mass.) 9.

1. 1 Parsons on Ship. and Adm., 448. Humphreys *v.* Union Ins. Co., 3 Mason (U. S.) 439; The George, Olc. Adm. 162; Gray *v.* Waln, 2 S. & R. (Pa.) 229.

What this reasonable deduction should be is to be estimated by recourse to the best evidence which the case admits of. The George, Olc. Adm. 162.

As to the value stated in the policy of insurance, see The Star of Hope, 9 Wall. (U. S.) 203.

The adjustment is to be made in the same manner whether the ship, freight and cargo belong to the same or different persons. Spafford *v.* Dodge, 14 Mass. 66, 79; Jumel *v.* Mar. Ins. Co., 7 Johns. (N. Y.) 412, 425.

If the ship be sold, her contributory value is the price fetched. The George, Olc. Adm. 162; Bell *v.* Smith, 2 Johns. (N. Y.) 98.

As to the loser of the equipments of the vessel, such as masts, cables and sails, it is usual to deduct one third from the price of the saved articles as being of greater value than the articles lost. Strong *v.* N. Y. etc. Ins. Co., 11 Johns. (N. Y.) 323.

2. The Mary, 1 Sprague (U. S.) 204. Brown *v.* Lull, 2 Sumn. (U. S) 448.

The freight actually gained or earned at the time the voyage is broken up should be the basis for the rule of contribution. Maggrath *v.* Church, 1 Cai. (N. Y.) 196; Columbia Ins. Co. *v.* Ashby, 13 Pet. (N. Y.) 331.

If the vessel be captured, freight will be chargeable up to the day of such capture. Leavenworth *v.* Delafield, 1 Cai. (N. Y.) 573.

As to the usage at the port of N. Y. See Rathbone v. Fowler, 6 Blatchf. (U. S.) 294.

3. The Nathaniel Hooper, 3 Sumn. (U. S.) 542; Tudor *v.* McComber, 14 Pick. (Mass.) 34.

Where the property is reshipped and forwarded to the port of destination, it is to be valued at that port. Barnard *v.* Adams, 10 How. (U. S.) 270.

If the ship and cargo perish utterly, an adjustment must be made with reference to the values existing at the time that the expenditures were made. Douglas *v.* Moody, 9 Mass. 458.

As to the practice of underwriters, see Gourlie on Gen. Av. (Am.); Lowndes on Gen. Av. (Eng.)

4. Gourlie on Gen. Av. 423.

5. Loring *v.* Neptune Ins. Co., 20 Pick. (Mass.) 411; Peters *v.* Warren Ins. Co., 3 Sumn. (U. S.) 393.

adjustment.[1] The making of an average statement by adjustors is not an award by arbitrators.[2]

**8. Enforcement of Claim.**—The goods of the shipper may be retained by the master or owner until their share of the contribution is paid or secured;[3] but the lien is a qualified lien dependent upon possession.[4] The district parts of the United States have jurisdiction in the enforcement of claims for general average contribution.[5]

The claim for contribution is founded on principlse of justice, and may be brought in a court of equity or a court of law.[4]

1. Barnard *v.* Adams, 10 How. (U. S.) 270.

Where a final separation of vessel and cargo have taken place, the port of disaster becomes the proper place for the adjustment of the general average loss. McLoon *v.* Cumming, 73 Pa. St. 98.

Parties stipulating to pay general average adjusted "according to the established usages and laws of a state," are bound by the agreement. Fowler *v.* Rathbones, 12 Wall. (U. S.) 102.

2. The Alpine (N. Y.), 23 Fed. Rep. 815.

A general average bond will not be invalidated when the evidence in the case does not show satisfactorily that there was either ignorance or error on the part of the signers. The John M. Chambers (La.), 24 Fed. Rep. 383.

As to the effect of adjustment at foreign ports, see Peters *v.* Warren Ins. Co., 3 Sumn. (U. S.) 393; Strong *v.* N. Y. Ins. Co., 11 Johns. (N. Y.) 323; Loring *v.* Neptune Ins. Co., 20 Pick. (Mass.) 411.

3. U. S. *v.* Wilder, 3 Sumn. (N. Y.) 310; Strong *v.* N. Y. etc. Ins. Co., 11 Johns. (N. Y.) 323; Scaife *v.* Tobin, 3 Barn. & Ad. 523.

The master may cause the sale of the merchandise saved. Dupont *v.* Vance, 19 How. (U. S.) 169; Strong *v.* N. Y. etc. Ins. Co., 11 Johns. (N. Y.) 323.

The ship owner is entitled to receive his full loss by a peril incurred without troubling himself about any remedy over. Potter *v.* Prov. etc. Ins. Co., 4 Mason (U. S.) 301; Watson *v.* Mar. Ins. Co., 7 Johns. (N. Y.) 57; Dupont *v.* Vance, 19 How. (U. S.) 178.

4. The lien is terminated by a delivery to the consignee. Cutter *v.* Rae, 7 How. (U. S.) 729; Dike *v.* The St. Joseph, 6 McL. (U. S.) 574.

The consignee by accepting the cargo does not necessarily become personally liable for general average. Scaife *v.* Tobin, 3 Barn. & Ad. 523.

3. The general maritime law enforces a contribution in default of any return of a contract, upon the ground of justice and equity, and is the only mode of remedy in many cases. The George, Olc. Adm. 96; U. S. *v.* Wilder, 3 Sumn. (U. S.) 308; The Packet, 3 Mason (U. S.) 255. As where both ship and cargo are owned by the same person. Dupont *v.* Vance, 19 How. (U. S.) 178; Potter *v.* Prov. etc. Ins. Co., 4 Mason (U. S.) 298.

The owner of the cargo jettisoned has a maritime lien on the vessel for its contributive share in adjustment, which may been forced by proceedings in rem. Dupont *v.* Vance, 19 How. (U. S.) 178.

And the jurisdiction extends to the enforcement of contribution on a bond given for general average. Gloucester Ins. Co. *v.* Yonger, 2 Curt. (U. S.) 323; Coast Wrecking Co. *v.* Phœnix Ins. Co. (N. Y.), 7 Fed. Rep. 236.

It is said in Cutler *v.* Rae, 7 How. (U. S.) 729, that admiralty has no jurisdiction *in personam* in general average, but the question of jurisdiction did not arise. The Morning Mail (Ky.), 17 Fed. Rep. 545; The Monte A. (N. Y.), 12 Fed. Rep. 336.

The consignee by accepting the goods does not become personally liable for general average, but the rule is otherwise if he be the owner or had become personally liable, in which case the suit may be instituted in the admiralty. Henny on Adm. Juris. and Proced., p. 323.

4. Dupont *v.* Vance, 19 How. (U. S.) 178; Berkley *v.* Presgrave, 1 East 220; Price *v.* Noble, 4 Taunt. 123.

**Authorities.**—Lowndes on General Average (Eng.); Gourlie on General Average (Am.); Arnould on Mar. Ins.; Parsons on Mar. Ins.; Carver on Carriage by Sea.

**GENTLE.**—See note 1.
**GENTLEMAN.**—See note 2.
**GENUINE.**—See note 3.
**GETTING OUT.**—See note 4.
**GIFTS.**—See ADVANCEMENTS.

I. Definition, 1309.
II. An Executed Contract, 1309.
III. Who Can Make a Gift, 1309.
IV. Undue Influence, 1310.
V. Gifts Inter Vivos, 1313.
1. *Essentials*, 1313.
2. *Must be Completely Executed*, 1313.
3. *Delivery*, 1314.
*a. Delivery to Third Party for Donee*, 1318.
*b. Delivery Where the Property Is Already in Possession of the Donee*, 1319.
*c. Constructive Delivery*, 1320.
4. *What May be Given*, 1320.

**1.** In a warranty that a horse is gentle, "the word 'gentle' does not in its ordinary or legal sense import that the horse has received any particular training or teaching, but only that he is docile, tractable and quiet." He may be well broken, and yet not gentle; and proof of a warranty that he was well broken is a variance from a declaration on a warranty of gentleness. Bodurtha *v.* Phelon, 2 Allen (Mass.) 347.

**2.** The term gentleman "is a vague one, and gives no information." "Originally, the term 'gentleman' signified a man of gentle blood, but the use of the term has become changed, and it is often applied to denote persons of all ranks, from the upper down to the very lowest verge of the middle class." GROVE, J., in Smith *v.* Cheese, 1 C. P. D. 60. See 1 Blackstone's Com. 406; Williams' Case, 1 Ch. Div. 577.

A statute requiring a description of the occupation of the person making or giving a bill of sale, and of the witnesses attesting the same to be filed, is not complied with by describing a clerk in a government office as "gentleman." "Gentleman" is not an occupation; it is rather a station. Allen *v.* Thomson, 1 H. & N. 15. This was followed in Tuton *v.* Sanoner, 3 H. & N. 280, where one formerly an attorney was, at the time of the attestation made by him, an attorney's clerk, was described as "gentleman." Sutton *v.* Bath, 3 H. & N. 382. And see Moss *v.* Heavyside, 7 D. & R. 772. But a person who has no occupation may well be described as "gentleman." Moorewood *v.* S. Y. R. & R. D. Co., 3 H. & N. 798; L. & W. Loan & Discount Co. *v.* Chase, 12 C. B. N. S. 730; Gray *v.* Jones, 14 C. B. N. S. 743; Smith *v.* Cheese, 1 C. P. D. 60.

**3.** In a warranty given on a sale of a note made by O, that it is "the genuine note of O," "genuine" imports "that the note was not false, fictitious, simulated, spurious, counterfeit, or, in short, that the apparent maker did make and deliver the note." It imports nothing in regard to its collectibility, or its legal effect or operation. A breach of the warranty is not shown by proof that O was an infant when the note was made and became payable. Baldwin *v.* Van Deusen, 37 N. Y. 487.

Where warrants on a county treasurer are required by statute to be sealed with the county seal, no warrant not so sealed is genuine, within the meaning of a guaranty made upon a sale to a citizen of another state. Smeltzer *v.* White, 2 Otto (U. S.) 390.

**4.** Towing a boat across a river to a wharf is within the meaning of the terms "getting out," in an act creating a lien for labor done "in the building, repairing, getting out, furnishing or equipping," of a boat. The words "getting out," "construed with reference to the building or repairing of a boat, are broad enough to cover all those services or expenses which might be necessary to put her afloat when finished, and to place her in a situation that would enable her to begin her business of navigating the river. They are not necessarily to be confined to building or repairing. A boat may be laid up for a season and then brought out again. 'Bringing out a boat' is a common phrase among boatmen; it is usually applied to the building of a new boat; it may also be understood as applying to a boat newly repaired, or newly brought out when merely laid up for a season; and the phrase 'get-

5. *Gift of the Donor's Promissory Note or Check*, 1320.
6. *Forgiveness of Debt*, 1321.
7. *Choses in Action. Equitable Assignments*, 1322.
8. *Declarations of Trust*, 1323.
9. *Savings Bank Books*, 1324.
10. *Deeds of Gift*, 1331.
11. *Acceptance by Donee*, 1331.
12. *Qualified or Conditional Gifts*, 1332.
13. *Gifts Between Husband and Wife*, 1333.
14. *Gifts Between Parent and Child*, 1334.
15. *Proof of Gift*, 1336.
16. *Effect of Gift*, 1359.
a. *As Between the Parties*, 1339.
b. *As to Bona Fide Purchasers*, 1340.
c. *As Against Creditors*, 1341.
VI. Gifts Causa Mortis, 1341.
1. *Definition*, 1341.
2. *What May be Given*, 1342.
3. *Expectation of Death*, 1346.
4. *Delivery*, 1347.
5. *Acceptance*, 1351.
6. *Effect of Execution*, 1351.
a. *Between Donor and Donee. Revocation*, 1351.
b. *As to Third Parties*, 1352.
7. *Qualified Gifts*, 1353.

**I. Definition.**—A gift is the voluntary transfer of a thing without consideration. A transfer of the title to property to one who receives it without paying for it.[1] The term was originally applied to the creation of an estate-tail, but in this country it is generally confined to voluntary transfers of personal property.[2] Courts have, however, spoken of such transfers of real estate as gifts.[3]

**II. An Executed Contract.**—While a gift does not come within the usual definition of a contract on account of the absence of a consideration,[4] yet every gift which is made perfect by delivery is in the nature of an executed contract, for it is founded on the mutual consent of the parties in reference to a right or interest passing between them.[5]

**III. Who Can Make a Gift.**—*Mental Capacity.*—Of all property transfers, a gift should be made in the exercise of a proper mental capacity, as the giver receives no benefit from the transaction. The tests of mental capacity in the matter of gifts *inter vivos* are the same as those in ordinary contracts, while in the matter of gifts *causa mortis* the capacity required would more nearly resemble that required in making a will.[6] Any person, *sui juris*,

ting out' a boat may be taken in a similar sense." Madison Co. Coal Co. *v.* Steamboat Colona, 36 Mo. 446. The terms "getting out" do not include services rendered in unloading the vessel in port. Gibbons *v.* Barker, 40 Mo. 253.

1. Bouv. Law Dict., title "Donatio"; Schouler's Pers. Prop. (2nd ed.) 254.

2. 2 Bl. Com. 316; 1 Parsons' Contracts (6th ed.) 234.

The California Civil Code defines a gift as a transfer of personal property made voluntarily and without consideration.

3. Allison *v.* Burns, 107 Pa. St. 50; Hester *v.* Hester, 13 Lea (Tenn.) 189; Hardesty *v.* Richardson, 44 Md. 617; Freeman *v.* Freeman, 43 N. Y. 34; Kurtz *v.* Hibner, 55 Ill. 514.

4. A contract is an agreement upon sufficient consideration to do or not to do a particular thing. 2 Bl. Com. 442; Story Contr. 1, 2 Kent Com. (12th ed.) 449, note 6.

5. 2 Kent Com. 438. The idea of a gift implies both giver and taker; an acceptance as well as a delivery; the minds of the parties must meet. A gift is strictly a contract. Atty. Gen. *v.* Merrimack Mfg. Co., 14 Gray (Mass.) 586. Gifts when made perfect by the delivery of the things are executed contracts. Grover *v.* Grover, 24 Pick. (Mass.) 26.

6. 2 Schouler's Pers. Prop. §§ 59

acting freely, fairly, and with sufficient knowledge, has the power to make a gift of any part of his property. [1]

**IV. UNDUE INFLUENCE.**—Freedom of will and good faith are as essential to the validity of a gift as in other contracts. Where fraud, force or undue influence exists, the party wronged can have the gift annulled. Actual fraud need not, in many cases, be proven, in order to invalidate a gift. Where a confidential relation exists between the donor and donee, as in case of parent and child, guardian and ward, attorney and client, physician and patient, a gift obtained by the person standing in such relation is *prima facie* void and the burden of proof is thrown on the donee to show that the gift was the free, voluntary, unbiassed act of the donor.[2]

The English courts go further than those in this country. It seems to be the accepted law there that persons standing in a

141; Crum *v.* Thornley, 47 Ill. 192; Van Deusen *v.* Rowley, 8 N. Y. 358.

1. Kekewich *v.* Manning, 1 De Gex, M. & G. 187; 50 Eng. Ch. 175; Martin *v.* Funk, 75 N. Y. 134; Jones *v.* Lock, L. R. 1 Ch. 25, 28.

**Infants.**—While an infant may not make a binding gift, except as to articles of trifling value, a gift by an infant is not necessarily void, as under some circumstances the gift may be so much for his benefit that he will be chargeable as for necessaries for the price of an article he is to give away. Ryder *v.* Wombwell, L. R., 3 Ex. 90. See Harvey *v.* Carroll (Tex.), 10 S. W. Rep. 334.

**Married Woman.**—The power of a married woman to give away her chattels is at common law very limited. Carleton *v.* Lovejoy, 54 Me. 445. See Bourne *v.* Fosbroke, 18 C. B., N. S., 515, where it was *held* that a wife, though living apart from her husband, cannot lawfully dispose by gift of property acquired by her during coverture. Her powers are much enlarged by statutes in all the States, her ability to give *inter vivos* and *causa mortis* being the same as her contract and testamentary powers. Jones *v.* Brown, 34 N. H. 439.

2. 1 Story Eq. Jur., §§ 307–323; Schouler's Dom. Rel. 184, 189, 193, 270; Ledell *v.* Starr, 5 C. E. Green (N. J.) 274; Garvin *v.* Williams, 44 Mo. 465; Yosti *v.* Laughran, 49 Mo. 594; Boyd *v.* De La Montagnie, 73 N. Y. 498, 502; Hoghton *v.* Hoghton, 15 Beav. 278; Lake *v.* Ranney, 33 Barb. (N. Y.) 49; Forman *v.* Smith, 7 Lans. (N. Y.) 443; Ferguson *v.* Lowery, 54 Ala. 510; Jennings *v.* McConnell, 17 Ill. 148; Cadwallader *v.* West, 48 Mo. 483; Hall *v.* Knappenberger, (Mo.) 11 S. W. Rep. 239; Nesbit *v.* Lockman, 34 N. Y. 167; Whipple *v.* Barton, 63 N. H. 613; Whitehead *v.* Kennedy, 69 N. Y. 462; Matter of Will of Smith, 95 N. Y. 516, 523; Whipple *v.* Barton, 63 N. H. 612; Parker *v.* Parker (N.J.), 16 Atl. Rep. 537.

**Undue Influence.**—B, an aged man, blind and crippled, being possessed of considerable real estate and a large amount of personal property, invited his brother to come from Illinois and live with him and take charge of his business. He came and assumed the entire management of his affairs. A few months afterward, and while this relation existed, gifts and transfers of private securities and U. S. bonds to the amount of nearly $50,000 was made by B to his brother. At the time B had two other brothers, a wife and numerous nephews and nieces living, as also grandchildren, offspring of a deceased natural son who had lived in the house with him. It was *held* that the influence which the donee possessed and the circumstances of the case were sufficient to throw the burden of proof on the donee that the influence was not unduly exercised. Todd *v.* Grove, 33 Md. 188.

Successive transfers of mortgages were procured by a nephew from his uncle a few days before his death and while in an enfeebled condition. The uncle was eighty-two years old and made his home with his nephew and was said to be estranged from his other relatives. The transfers were *held* to be open to suspicion and the burden of proof on the beneficiary to show their fairness. Duncombe *v.* Richards, 46 Mich. 166.

One F, a few days before his death, made a gift of all his money and executed a will devising all his other property to one H, a Roman Catholic priest, who had for six years been his pastor and father confessor and had attended him constantly in that capacity during an illness of a year's duration which preceded his death. No relative of F was with him during all this time and he had no advice from any source except such as H gave. F lived as a single man, and sometimes, though not always, represented himself to be such, but H had heard a rumor that he had a wife in Ireland. He, however, made no enquiry to ascertain the fact, and never suggested to F that he ought to provide for her. H gave the money to the archbishop of the church, who gave it to a convent. In an action by the widow and child of F against H, the archbishop and the convent, to set aside the gift and recover the money, *held* that it was the duty of H, before accepting the gift, to have ascertained the facts as to F's reported marriage and satisfied himself either that F had no family or that he was determined to disregard his family ties and obligations, and as H had not done this, the gift could not stand. The fact that he had no selfish motive and received no personal benefit from the transaction did not relieve him of this duty. Ford *v.* Hennessy, 70 Mo. 580.

The fact of the influence exerted is more often gathered from all the circumstances surrounding the donor, his health, age and mental condition, how far he was dependent upon and subject to the control of the person benefited, the opportunity which the donee had to exercise his influence and the disposition of the donor to be subject to it. The fact of influence by the donee over the donor having been established, it is not necessary to show by absolute evidence that this was exerted by the donee at the time the gift was made. Sears *v.* Shafer, 2 Selden (N. Y.) 268.

In an action by an administrator to recover a sum of money given by his intestate to the defendant on the ground that the money was obtained by the undue influence of the defendant it appeared that the woman was eighty-four years of age, was sick much of the time, weak in mind and memory and broken down; that the gift was a large portion of the donor's estate; that the defendant was not a relative of the donor but was her physician and attended her frequently; that he had charge of all her business and was consulted by her in all her affairs. The jury were instructed that when a fiduciary or confidential relation is established between a donor and a donee, a case arises for watchfulness on the part of those who have to pass on the validity of the gift to see that this confidence is not abused by the exercise of undue influence; that the law viewed such transactions with jealousy, and if the donor's mind was enfeebled with disease, though not to the extent of producing mental unsoundness, and the donor acted without independent and disinterested advice, and such a gift was a large portion of all the donor's estate and operated to deprive those having a natural claim to the donor's bounty from benefit from the donor's estate, these circumstances, if proved and unexplained, would authorize the jury to find the gift void through undue influence, without proof of the specific acts or conduct of the donee, and where the donee was a witness and other evidence was introduced, the whole matter was for the determination of the jury, and the general burden on the plaintiff, taking all the evidence, natural presumptions and inference together, to establish the proposition of undue influence. *Held*, that these instructions were sufficiently favorable to the defendant. Woodbury *v.* Woodbury, 141 Mass. 329.

The fact that the donor is old and is the grandfather and employer of the donee does not establish such a confidential relation as to raise the presumption of fraud. Cornell *v.* Cornell, 75 N. Y. 91.

Where a stepmother conveyed certain property to her stepsons, it not appearing that they managed her property, or that she relied on their advice in business matters, *held* that the utmost burden on the donees was to show that when she conveyed the estate she understood the act. Earle *v.* Chace, 12 R. I. 374.

A, who had but little property, married a woman worth nearly $10,000. He was a man of strong will, and shortly after the marriage she conveyed to him through a trustee one undivided half of her property, the remainder to him if he survived her. She subsequently obtained a divorce from him. *Held*, that he should be required to surrender the interest conveyed to him. Golding *v.* Golding, 82 Ky. 51.

confidential relation towards others cannot entitle themselves to hold benefits which those others have conferred on them, unless they can show to the satisfaction of the court that the persons by whom the benefits have been conferred had competent and independent advice in conferring them.[1]

Where a person stands in a relation of special confidence towards another, and has had with him some transactions from which he derives benefit, such transactions will not be sustained in equity, unless it was fair in itself, and its nature and effect fully understood, and the burden of proof is on the person claiming the benefit of the transaction to show these facts.

Where a debtor understandingly and deliberately conveys away his property to hinder and defraud his creditors, a court of equity will not lend him its aid to recover it back, but when a party is guilty of an independent fraud in receiving and retaining the property, the court is inclined to the opinion that the recipient should not be allowed to avail himself of the fact that the conveyance was in fraud of creditors in a suit to recover the property back. Nichols *v.* McCarthy, 53 Conn. 299.

Where a man who was usually in poor health, shortly after coming of age made a deed nominally in consideration of $15 for real estate worth $13,000, being a greater part of his property, when he was so ill that it was not believed that he would recover, to a woman who had become a member of the same household when the grantor was four months old, and who had nursed him in infancy and in sickness, and instructed him when young; who testified that her feelings to him as a mother were very strong; who had managed his property and in whom he had confided, *held*, upon a bill in equity to set the conveyance aside, that the burden was on the respondent to show that the transaction was fair and honest, and that the deed was not produced by undue influence. Worrall's Appeal, 110 Pa. St. 349.

A child is presumed to be under parental influence so long as the dominion of the parent lasts, and when a parent seeks to maintain a gift from such a child, it lies on the parent to disprove the exercise of such influence. Baldock *v.* Johnson, 14 Oreg. 542.

Aged parents having confidence in their son deeded to him all their property. The judge found that the parents did not know the contents of the deed, and would not have executed it if they had, but did not find any fraudulent conduct or intent on the part of the son. *Held*, that the deed was properly set aside. Weller *v.* Weller, 44 Hun (N. Y.) 172.

A father deeded lands to his son, to the exclusion of three other children. There was no evidence of fraud or persuasion on the part of the son. *Held*, that the deed should not be annulled, because at the time the father was living at the son's residence, that he was of intemperate habits and bad health, and it appeared that his motive may have been violent prejudice against his other children. Nailor *v.* Nailor (D. C.), 3 Cent. Rep. 777.

Where the giver is disqualified by age from active business, and the defendant is his agent and adviser, the gift may be received as a matter of law by the administrator of the deceased giver without proof of unsoundness of mind. An instruction that he can recover unless it appears affirmatively and conclusively that at and before the transfer the decedent was fully advised in the matter and voluntarily made the gift was properly refused. Hall *v.* Krappenberger (Mo.), 6 S. W. Rep. 381. Ordinarily the burden of proving fraud is on the party setting it up. Priest *v.* Way, 87 Mo. 16.

1. Rhodes *v.* Bate, L. R., 1 Ch. Ap. 252; Smith *v.* Key, 7 H. of L. Cas. 772; Griffiths *v.* Robbins, 3 Md. 191.

A gift made by a child to his parent before the parental authority has terminated, is presumed to have been made under parental influence, and therefore not valid, and the burden of proof lies on the parent to rebut this presumption by showing that the child had independent advice, or was otherwise placed in a position to exercise an independent judgment as to the gift. Wright *v.* Vanderplank, 8 DeG. M & G. 133.

Although a gift made to a person standing in a confidential relation to the donor, as by a patient to a physician, may be voidable. Yet if, after the con-

Gifts are divided into two general classes: gifts *inter vivos* and gifts *causa mortis*.

**V. GIFTS INTER VIVOS—Definition.**—Gifts *inter vivos*, or simple gifts, are such as one party makes to another, without the expectation of death as a moving cause.[1]

**1. Essentials.**—It is essential to the validity of a gift that the donor must be competent to contract, there must be freedom of will, the gift must be complete with nothing left undone, the property must be delivered by the donor and accepted by the donee, and the gift must go into immediate and absolute effect.[2]

**2. The Gift Must be Completely Executed.**—If anything remains to be done to complete the gift, what is undone cannot be enforced, it being without consideration. If left incomplete, there exists a *locus pœnitentiæ*, and what has been done may be reversed. If not completed during the lifetime of the donor, his death revokes the part which has been performed. It is therefore necessary to the validity of a gift, that the transaction be fully completed, that nothing essential remains undone.[3]

An agreement to give without consideration, or for the consideration of love and affection only, transfers no title to the property and does not give a right to sue for damages, or to compel

fidential relation has ceased to exist, the donor intentionally elects to abide by it, it cannot be impeached after his death, even if it is not proved that the donor was aware that the gift was voidable at his election. Mitchell *v.* Homfray, 8 L. R., Q. B. Div. 587.

1. 2 Schouler's Pers. Prop., § 64; 1 Bouv. Law Dict., (15th ed.), 711.

2. Where a gift is intended *in præsenti*, and is accompanied with such delivery as the nature of the property will admit, and the circumstances and situation of the parties render reasonably possible, it operates at once; and the delivery may be to a bailee as well as to the donor personally; but if there be only an intention to give and no delivery, it will be inchoate and imperfect, and the property will not pass. Nolen *v.* Harden, 43 Ark. 307; s. c., 51 Am. Rep. 563.

An absolute gift, which will divest the donor's title, requires a renunciation on his part, and the acquisition on the part of the donee, of all the title to, and interest in, the subject of the gift. Irish *v.* Nutting, 47 Barb. (N. Y.) 370. See Smith *v.* Ferguson, 90 Ind. 229; s. c., 46 Am. Rep. 216.

3. Pearson *v.* Pearson, 7 Johns. (N. Y.) 26; Dickeschild *v.* Exchange Bank, 28 W. Va. 340; Richardson *v.* Hadsall, 106 Ill. 476; Phipps *v.* Hoke, 16 Ohio St. 586; Hayden *v.* Hayden, 142 Mass. 448; Allen *v.* Polereczky, 31 Me. 338; Craig *v.* Kittredge, 46 N. H. 57; Helfenstein's Estate, 77 Pa. St. 328; s. c., 18 Am. Rep. 449; Lambert *v.* Overton, 13 W. R. 227.

The trustees of the Smith Charities placed $500 on deposit with a savings bank, to the credit of "William M. Hayden, payable only to the order of Smith Charities," and took from Hayden his note for $500, payable in five years, or on demand at any time. Three days before the expiration of the five years, the trustees voted to voluntarily surrender the note, but took no step in pursuance thereof. The plaintiff immediately issued trustee process against Hayden, defendant, and Smith Charities and the savings bank, as trustees. *Held*, there was no evidence of a completed gift, and the trustees were properly discharged. Hayden *v.* Hayden, 142 Mass. 448.

A gave written directions to B, who had charge of the funds standing in A's name in a savings bank, to draw from the bank a certain sum and give it to C. The paper was presented to B, who declined to draw the money, although afterwards verbally requested by A to do so. After A's death, B was appointed executor of his will, and was again requested to pay the money, but re-

a completion of the agreement. It is a *nudum pactum*.[1] For this reason, a promissory note intended purely as a gift by the maker cannot be enforced.[2] The expression of a promise to make a gift for a specified benevolent object is not binding unless the transfer is made and the gift completed.[3] This principle must not, however, be confounded with voluntary subscriptions for charitable purposes, where the mutual promises of the several subscribers are held to be a sufficient consideration to support an action to enforce the promise.[4]

Equity will not interfere to perfect a defective or imperfect gift, nor convert such a gift into a declaration of trust merely on account of the imperfection.[5]

**3. Delivery.**—Delivery of the property in question, with the intention to give, is absolutely necessary to the validity of the gift. The owner must part with his dominion and control of the thing before the gift can take effect. There must be an actual and positive change of possession.[6] Words of gift are not sufficient.

fused. *Held*, in an action by C against B, that there was no evidence of a perfected gift by A in his lifetime. Gerry *v.* Howe, 130 Mass. 350.

1. Irons *v.* Smallpiece, 2 B. & Ald. 551; Bunn *v.* Markham, 7 Taunt. 224; Cotteen *v.* Missing, 1 Madd. 176; Carpenter *v.* Dodge, 20 Vt. 595; Pope *v.* Dodson, 58 Ill. 360; Johnson *v.* Stevens, 22 La. Ann. 144; Pennington *v.* Gittings, 2 Gill & J. (Md.) 208; Pitts *v.* Mangum, 2 Bailey (S. Car.) 588.

If A say to B, "I will give you the corn growing in that field," it is not a valid gift without a delivery, and if B enter on the field when the corn is ripe and cut and carry it away, he is a trespasser. Noble *v.* Smith, 2 Johns. (N. Y.) 52; Fink *v.* Cox, 18 Johns. (N. Y.) 145; Noble *v.* Smith, 2 Johns. 52.

2. Williams *v.* Forbes, 114 Ill. 167. See *post*, under the heading WHAT MAY BE GIVEN.

3. Phelps *v.* Pond, 23 N. Y. 69, 78; Harris *v.* Clark, 3 Comst. (N. Y.) 93; Appeal of Waynesburg College, 111 Pa. St. 130; s. c., 56 Am. Rep. 252.

4. 2 Bl. Com. 441; Watkins *v.* Eames, 9 Cush. (Mass.) 539; Mirick *v.* French, 2 Gray (Mass.) 420.

5. Young *v.* Young, 80 N. Y. 422; s. c., 36 Am. Rep. 634.

6. Brantley *v.* Cameron, 78 Ala. 72; Nolen *v.* Harden, 43 Ark. 307; s. c., 51 Am. Rep. 563; Frisbie *v.* McCarty, 1 Stew. & P. (Ala.) 56; Dole *v.* Lincoln, 31 Me. 422; Scott *v.* Lauman, 104 Pa. St. 593; Taylor *v.* Staples, 8 R. I. 170; Cox *v.* Sprigg, 6 Md. 274; Noble *v.* Smith, 2 Johns. (N. Y.) 52; Carleton *v.* Lovejoy, 54 Me. 445; Jackson *v.* Twenty-third St. Railway Co., 88 N. Y. 520; Pope *v.* Burlington Savings Bank, 56 Vt. 284; s. c., 48 Am. Rep. 781; Roberts *v.* Draper, 18 Ill. App. 167; Nickerson *v.* Nickerson, 28 Md. 327, 332; Sewell *v.* Glidden, 1 Ala. 52; Thomas *v.* DeGraffenried, 17 Ala. 602; Connor *v.* Trawick, 37 Ala. 289; Anderson *v.* Baker, 1 Ga. 595; Wyche *v.* Greene, 11 Ga. 159; Carswell *v.* Ware, 30 Ga. 267; Evans *v.* Liscomb, 31 Ga. 71; People *v.* Johnson, 14 Ill. 342; Allen *v.* Polereczky, 31 Me. 338, Carleton *v.* Lovejoy, 54 Me. 445; Hanson *v.* Millett, 55 Me. 184; Isaac *v.* Williams, 3 Gill (Md.) 278; Hitch *v.* Davis, 3 Md. Ch. 266; Carradine *v.* Collins, 15 Miss. 428; Blakey *v.* Blakey, 9 Ala. 391; Wheatley *v.* Abbott, 32 Miss. 343; Read *v.* Spaulding, 42 N. H. 114; Dilts *v.* Stevenson, 17 N. J. Eq. 407; Grangiac *v.* Arden, 10 Johns. (N. Y.) 293; Taylor *v.* Fire Dept., 1 Edw. (N. Y.) 294; Downey *v.* Smith, 2 Dev. (N. Car.) Eq. 535; Minchin *v.* Merrill, 2 Edw. (N. Y.) 333; Huntington *v.* Gilmore, 14 Barb. (N. Y.) 243; Hunter *v.* Hunter, 19 Barb. (N. Y.) 631; Woodruff *v.* Cook, 25 Barb. (N. Y.) 505; Gillespie *v.* Burleson, 28 Ala. 551; Mechling's App., 2 Grant (Pa.) 157; Kidder *v.* Kidder, 33 Pa. St. 268; Baker *v.* Avant, 1 Nott. & M. (S. Car.) 218; Carpenter *v.* Dodge, 20 Vt. 595; Ewing *v.* Ewing, 2 Leigh (Va.) 337; Irons *v.* Smallpiece, 2 B. & Al. 551; Hawkins *v.* Blewitt, 2 Esp. 663; Little *v.* Willets, 55 Barb. (N. Y.) 125; Reeves *v.* Capper, 5 Bing. (N. Car.) 136; Peeler *v.*

They alone convey no title and are not the basis of any action.[1]

The circumstances must be such as to show that a present gift is intended. A gift to take effect at a future time is void.[2] The delivery, however, need not be simultaneous with the words of gift, but may precede or follow them.[3]

The delivery must be in accordance with the nature of the things given. When reasonably convenient, there should be a manual delivery. Where the articles are numerous, and not easily taken in the hand, it may be sufficient for the donor to point them out to the donee and allow him to take them. In, case of bulky articles, at least a declaration of gift in plain terms. accompanied by a reminder on the part of the donor, and an acceptance on the part of the donee, is sufficient. It is not necessary that such articles be moved in such cases if the donor relinquishes the possession to the donee.[4]

Guilkey, 27 Tex. 356; Bourne *v.* Fosbrooke, 18 C. B., N. S. 515; Schick *v.* Grote (N. J.), 5 Cent. Rep. 826.

1. Grangiac *v.* Arden, 10 Johns. (N. Y.) 293; Ewing *v.* Ewing, 2 Leigh 337; Kidder *v.* Kidder, 33 Pa. St. 268; Brewer *v.* Harvy, 72 N. Car. 176, Wheatley *v.* Abbott, 32 Miss. 343; Sewell *v.* Glidden, 1 Ala. 52; Singleton *v.* Cotton, 23 Ga. 261; Spencer *v.* Vance, 57 Mo. 427; Trough's Estate, 75 Pa. St. 115.

2. Shower *v.* Pilck, 4 Ex. 478; Vogel *v.* Gast, 20 Mo. App. 104; Scales *v.* Mande, 6 De G. M. & G. 43; Nickerson *v.* Nickerson, 28 Md. 327; Egerton *v.* Egerton, 17 N. J. 419; Kidder *v.* Kidder, 33 Pa. St. 268; Vogel *v.* Gast (Mo. App.), 2 West. Rep. 418; Zimmerman *v.* Streeper, 75 Pa. St. 147.

3. Though the delivery of the property is essential to the consummation of the gift, it need not be simultaneous with the words of donation, but may either precede or succeed them. If it preceeds the words of donation, so that the property is already in the possession of the donee, no new delivery is necessary. If it succeeds such words, it makes perfect that which was before inchoate. Carradine *v.* Carradine, 58 Miss. 286, s. c., 38 Am. Rep. 287.

4. Nolen *v.* Harden, 43 Ark. 307; s. c., 51 Am. Rep. 563; Boyan *v.* Finlay, 19 La. Ann. 94; Allen *v.* Cowan, 23 N. Y. 502; Kellogg *v.* Adams, 51 Wis. 138; Harris *v.* Hopkins, 43 Mich. 272; 38 Am. Rep. 180; Tierney *v.* Corbett, 2 Mackey (D. C.) 264; Winter *v.* Winter, 9 W. R. 747.

**Delivery.**—The plaintiff and her brother lived with their father on his farm. The brother, on account of the infirmities of the father, had the whole management of the farm, and provided for the common table of the household. The carriage was kept in the carriage house when not in use. The father called the members of the family into the dining room, and in the presence of all gave the carriage to the plaintiff, requesting all to witness the gift. The defendant, who was brother of the plaintiff, afterwards took the carriage off, claiming that his father afterwards gave it to him. *Held*, that if there was under the facts of the case a declaration of gift in plain terms, and a surrender and acceptance of dominion, it was a sufficient delivery. Fletcher *v.* Fletcher, 55 Vt. 325; s. c., 45 Am. Rep. 627. See also Poullain *v.* Poullain (Ga.), 4 S. E. Rep. 81.

A father invested in bonds for the benefit of his daughter, who lived at a distance, but, at the request of the daughter, kept the bonds in his own possession and under his control. The bonds never passed into her hands, but he collected the interest on them and remitted it to her. He also sent her a letter, stamped as a contract, to the effect that if she did not want the bonds, he would pay her the value. *Held*, that, as there had been no delivery, the transaction did not constitute a gift. If a gift is imperfect at law, and for that reason cannot be enforced, a court of equity will not aid the donee by construing it into a declaration of trust. Flanders *v.* Blandy, 45 Ohio St. 108.

To constitute a valid gift of personal property, there must be an actual delivery of the property, or some act must

be done which is in law equivalent to such delivery. The donor said to his wife: "I give you these bonds, and I show you how to cut off the coupons, so that you may know how to do it yourself, and use the money for your living;" but he did not deliver the bonds to her, but placed them in a safe, in a drawer to which she had no access, and himself drew the proceeds from time to time. Afterwards, at his request, an account based on the bonds, was opened at the bank in his wife's name, but he, using her name, drew the money as before. *Held*, there was no gift, and that the bonds were subject to his debts. Peters *v.* Ft. Madison Construction Co., 69 Wis. 576.

A father who held a note and mortgage executed by his daughter, signed a release thereof and placed it, with the note and mortgage, in his safe. All the papers remained in the safe until alter his death. *Held*, that the release never took effect for want of delivery. Brunn *v.* Schuett, 59 Wis. 260; s. c., 48 Am. Rep. 499.

A executed an assignment of a certificate of deposit to B, and gave it to his attorney, saying "it was for B." The attorney keeps it in his safe, and does not give it to B till after A's death. The gift was void for want of delivery. Scott *v.* Lauman, 104 Pa. St. 593.

T placed in two envelopes certain coupon bonds; he endorsed upon each of the envelopes a memorandum signed by him to the effect that a certain number of the bonds therein contained belonged to his son W, and the residue to his son J, but that the interest to become due was "reserved and owned" by him during his life, and that at his death "they belong absolutely and entirely to them and their heirs." T exhibited the packages to the wife of one of the sons, with statements that he believed in this way he had made an effectual disposition of the bonds. The envelopes were kept in a safe which T had given to W's son, but which T had reserved a right to use, and in a pigeon hole where W's papers were kept. When the interest became due, T cut off the coupons and collected them. W never exercised any control over the bonds as against his father. *Held*, that the bonds were never legally delivered, and the gift was not perfected or valid. Young *v.* Young, 80 N. Y. 422; s. c., 36 Am. Rep. 634.

Upon the death of a testator ten Austrian bonds were found among other securities in a box at his house with the following indorsement: "The first five numbers of these Austrian bonds belong to and are H. D.'s property," signed by the testator. H. D. was his housekeeper, and the key of the box was kept in her custody. *Held*, that as there had been no actual transfer or delivery of the bonds to her they still remained part of the testator's assets. Trimmer *v.* Darby, 25 L. J., Ch. 424.

Household furniture owned by A was subject to mortgage. At the foreclosure sale of the property under the mortgage it was purchased by B, a nephew of A. He went into the house and calling his aunt into the parlor, pointed out the sofa, chairs, table and other articles which he had purchased, and which were in the room, and told her that he gave her those, and all the other articles which he had purchased that day. None of the articles were moved. *Held* to be a good delivery, and that the property became hers. Allen *v.* Cowan, 23 Me. 502.

A slave owner gave to her sister, then present, a negro girl, also present, saying to the girl: "There is your mistress," pointing to her sister; "you must be a good girl and obedient to her." This was a sufficient delivery. Waring *v.* Edmunds, 11 Md. 424.

Where a piano, which had been given to the plaintiff by her grandmother, remained in the house of the latter, being used, however, by the plaintiff, who did not reside in the same house, it was *held* that the gift was not accompanied by delivery of possession, which would enable the plaintiff to maintain an action of replevin for the property after it had passed into the hands of a third person. Willey *v.* Backus, 52 Iowa 401.

In an action for the conversion of ten $5,000 U. S. bonds which T claimed had been given him by L, it appeared that L placed the bonds in an envelope which he marked "Joe Trow's property," and placed it in L's husband's safe. He directed T if anything happened to him to take the contents of the safe to the safe deposit company and keep the bonds himself. T drew the interest on them for three years and a half. Other witnesses testified that T at one time in his presence cut off the coupons, and that L declared that he had given T the bonds. *Held*, not to establish an executed gift at the time of placing the bonds in the en-

After the gift is made complete by delivery, it is not necessary that the donee shall retain possession of the property. The subsequent possession by the donor, while it may throw suspicion on the transaction as being in fraud of creditors, if satisfactorily explained, will not divest the donee of the title to the property when it has once been lawfully acquired by him.[1]

velope. Whether the gift was afterwards completed, was a question for the jury. Trow *v.* Shannon, 78 N. Y. 446.

One S purchased and paid for thirty shares of defendant's stock, directing the treasurer at the time to set it aside in the name of Y, plaintiff's testator, and that he (S) would let him know whether to deliver it to Y, and what to do with it at some future time. The treasurer issued a receipt stating that he had received the purchase price from Y, which receipt came into the possession of the latter, in what way it did not appear. Y had married a niece of S, lived in his family, and had adopted a child in whom S took a special interest. Afterwards S told Y that he could make the shares but twenty-seven, and as the receipt had been made out to him he would want an order for the three shares. Y thereupon gave an order directing the company to transfer three shares of the stock then held by him as S might direct. No certificate of the stock was ever issued. When a dividend had been declared thereon, S directed Y to go to the office for it, that he had had the dividends made out in his name, and they would support or help support the child, and the dividends were paid to Y by the direction of S until the death of Y. After the stock had been thus placed in the name of Y, his wife died; he married again, and his second wife ceased to care for the child. In an action to compel defendant to issue the plaintiff a certificate of the stock, *held* (ANDREWS, Ch. J., and FINCH, J., dissenting), that there was no valid gift of the stock, as it was clearly not the intent of S to vest the title in Y for himself, but to create a trust for the benefit of the child, nor was it his intent that Y should control the stock. Jackson *v.* Twenty-third St. Ry. Co., 88 N. Y. 520.

Delivery is a transfer of possession, either by actual tradition from hand to hand, or by an expression of the donor's willingness that the donee should take when the chattel was present, and in a situation to be taken by either party. Caldwell *v.* Wilson, 2 Spear (S. Car.) 75.

Where a mother had loaned her daughter money to buy property for which the daughter and her husband had given notes, and three weeks before her mother's death she told her daughter that she wanted her to have what she had put in the place, and the daughter thereupon removed a trunk containing the notes to another room, and on the night of her death the mother said that what she had let her have she wanted her to have; but the daughter did not have the key to the trunk, and the notes were not removed from the trunk till after the mother's death, *held*, not a good gift for want of delivery. Lampson *v.* Monroe (Me.), 2 N. E. Rep. 453.

A donation *inter vivos*, duly accepted by the donee, need not be accompanied by any other delivery. This case is decided under the provisions of the Civil Code of Louisiana. Rauxet *v.* Rauxet, 38 La. An. 669.

Delivery must be according to the nature of the thing. It must be an actual delivery so far as the subject is capable of delivery. It must be *secundum subjectam materiam*, and be the true and effectual way of obtaining the command and dominion of the subject. If the thing be not capable of actual delivery, there must be some act equivalent to it. The donor must part not only with the possession, but with the dominion of the property. 2 Kent Com. 439.

A clear intention on the part of the donor to give, acted upon by the donee, constitutes a valid gift. Danby *v.* Tucker, 31 W. R. 578, dissenting from Irons *v.* Smallpiece, 2 B. & Ald. 551.

1. Whitford *v.* Horn, 18 Kan. 455. Where a watch was given to a child and afterwards taken back, to keep till the child was older and better able to take care of it, and the donor wore it till his death. Ector *v.* Welch, 29 Ga. 443; Danley *v.* Rector, 10 Ark. 211; Ivey *v.* Owens, 28 Ala. 641; Easly *v.* Dye, 14 Ala. 158.

*a. Delivery to Third Party for Donee.*—The delivery need not be directly to the donee, but may be to a third party for him. If the delivery to the third party is simply for the purpose of delivering it to the donee, as agent or messenger of the donor, the gift is not complete till the subject of the gift actually is delivered to the donee. Until the gift is so completed by delivery to the donee, the donor can revoke the agent's authority and resume possession of the gift.[1]

As the authority of an agent is revoked by the death of his principal, if the agent has not delivered the gift to the donee before the death of the donor, his authority to make the delivery ceases, and the gift fails for want of completion and delivery.[2]

Where the delivery to the third person is to him in the capacity of trustee for the donee, and not as agent of the donor, such delivery completes the gift, and the subsequent death of the donor will not revoke it. To constitute such a case the circumstances should show a full relinquishment of dominion over the property to the trustee for the purposes of the trust, so that the trustee shall not be the agent of the donor, but shall act for the donee instead.[3] In cases of gifts in trust of this nature, the

If A tells B that a carriage and horses then present are his, and gives her a bill of sale, and takes $1 to bind the bargain, it is a good delivery, and it is immaterial that A, at B's request, keeps the carriage and horses. Tierney *v.* Corbett, 2 Mackey (D. C.) 264.

1. Scott *v.* Lauman, 104 Pa. St. 593; Wells *v.* Tucker, 3 Binn. (Pa.) 366; Marston *v.* Marston, 21 N. H. 491; Hill *v.* Stevenson, 63 Me. 364; People *v.* Johnson, 14 Ill. 342; Smith *v.* Ferguson, 90 Ind. 229; s. c., 46 Am. Rep. 216; Bedell *v.* Carll, 33 N. Y. 581; Irish *v.* Nutting, 47 Barb. (N. Y.) 370; Dexheimer *v.* Gautier, 34 How. Pr. 472.

2. Phipps *v.* Hope, 16 Ohio St. 586; Allen *v.* Polereczky, 31 Me. 338; Craig *v.* Kittredge, 46 N. H. 57; Scott *v.* Lauman, 104 Pa. St. 593.

The donor handed a pocket book containing the note of a third party and other papers to his sister, to be delivered to the intended donee the next time she saw him. She did not see him, and the delivery was not made till after the donor's death. *Held*, that the authority to deliver was revoked by the death of the donor, and the note belonged to his estate. Sessions *v.* Moseley, 4 Cush. (Mass.) 87.

The plaintiff claimed title to a lot of coin worth over $7,000 by gift. The evidence tended to show that on the day before the alleged donor died he told the father to take possession of the coin, which was pointed out—that it was a gift to the plaintiff; the father took possession accordingly, but before the plaintiff had any further connection with the matter the donor died. It did not appear that he made the gift because of any fear of impending death. *Held*, not sufficient to constitute a gift, the authority of the father to deliver to the son being terminated by the donor's death. Dickeschild *v.* Exchange Bank, 28 W. Va. 340.

Whether a direction from the donor to a bailee of goods to deliver them to the donee consummates the gift, unless the order be executed, *quære*. Vogel *v.* Gast, 20 Mo. App. 104.

3. Minchin *v.* Merrill, 2 Edw. Ch. 333; Neufville *v.* Thomson, 3 Edw. Ch. (N. Y.) 92; Dresser *v.* Dresser, 46 Me. 48; Hill *v.* Stevenson, 63 Me. 364; Blanchard *v.* Sheldon, 43 Vt. 512; Rinker *v.* Rinker, 20 Ind. 185; Kekewich *v.* Manning, 1 De G. M. & G. 176; Stone *v.* Hackett, 12 Gray (Mass.) 227; Love *v.* Francis (Mich.), 5 West. Rep. 753.

If such a trust is created, the gift will be valid, although it is not contemplated that the delivery be made till after the death of the donor. A person delivered certain U. S. bonds and money to another, with directions for the latter to give the same to certain children of the former upon his death, and the person to whom the bonds and

donor may provide that the trustee shall retain possession of the property during the life of the donor or settlor, and at his death deliver it to the donee. It has also been held that the donor may lawfully provide that the income from the property may be paid to the settler during his life.[1]

*b. Where the Property Is in Possession of the Donee.*—If the subject of the gift is already in the possession of the donee, the law does not require the useless ceremony of a delivery back to the donor in order that it may be redelivered to the donee. It is sufficient that the donee continues to hold it as owner, and be able to show that the donor has relinquished dominion over it in his favor. The gift is then complete.[2]

money were so delivered received them, agreeing to execute the trust. *Held*, that this was a sufficient delivery to constitute and complete the gift, and that upon the death of the donor an action would lie in favor of said children against the trustee, upon the refusal to execute the trust, and against the administrator of the estate of the donor to whom the trustee had delivered the bonds and money. Wyble *v.* McPheters, 52 Ind. 393.

M, a few months before his death, made the following indorsement upon each of two notes held by him: "I transfer the within note as a gift to Miss Agnes Morrison," and handing the notes to his nephew, directing him to put them away, and give them to the assignee after his death. M informed Miss Morrison that he had given her the notes. In an action by the assignee to recover possession of the notes after his death, a verdict for the plaintiff was sustained on appeal, on the ground that the facts were sufficient to constitute a valid gift. Meriwether *v.* Morrison, 78 Ky. 572.

A married woman delivered money to a third party accompanied by instructions that after her death the donee should use it for the support of her husband if he survived her, and the balance, if any, after his death, should be used to pay for masses in church, *Held*, that the acceptance of the gift constituted a valid trust, and not a mere agency perishable by the donor's death. Gilman *v.* McArdle, 99 N. Y. 451.

1. See above cases. Also Bostwick *v.* Mahaffy, 48 Mich. 342; Ellison *v.* Ellison, 6 Ves. 656. *Ex parte* Pye, 18 Ves. 140.

A delivery, without consideration, of shares in railroad corporations with blank assignments endorsed thereon, upon trust to pay the income to the settlor for life, and at his death to transfer the shares to certain charitable objects, is valid and will be upheld in equity against the settlor's widow claiming the share which the law allows her in property of which he died possessed. Stone *v.* Hackett, 12 Gray (Mass.) 230.

In the above case the court says: "The key to the solution of the question raised in this case is to be found in the equitable principle, now well established and uniformly acted on by courts of chancery, that a voluntary gift or conveyance of property in trust, when fully completed and executed, will be regarded as valid, and its provisions will be enforced and carried into effect against all persons except creditors or *bona fide* purchasers without notice. It is certainly true that a court of equity will lend no assistance towards perfecting a voluntary contract or agreement for the creation of a trust, nor regard it as binding so long as it remains executory. But it is equally true that if such an agreement or contract be executed by conveyance of property in trust, so that nothing remains to be done by the grantor or donor to complete the transfer of title, the relation of trustee and *cestui que trust* is deemed to be established and the equitable rights and interests arising out of the conveyance, though made without consideration, will be enforced in chancery. See *post*, under heading DECLARATIONS OF TRUST.

The following cases, however, decide or intimate that a gift which does not contemplate the delivery of the property by the holder to the donee till after the death of the donor cannot be sustained as a gift *inter vivos*. Allen *v.* Polereczky, 31 Me. 338; Craig *v.* Kittredge, 46 N. H. 57; Phipps *v.* Hope, 16 Ohio St. 586; Busby *v.* Byrd, 4 Rich. Eq. (S. Car.) 9.

2. The testator before his death

*c. Constructive Delivery.*—In some cases the delivery necessary to transfer the ownership of property by gift may be made by delivery of the means of obtaining the property, as a delivery of the key to a trunk or chest; or of a room or warehouse, accompanied by words of gift of the contents of the receptacle. In such cases the delivery of the key is said to be a constructive or symbolic delivery of the contents. And the transaction must show that, by the act of delivering the key, the owner intended to make the gift of the articles to which it was the means of access.[1] When the gift is thus completed, it is not rendered invalid from the fact that the donee did not use the key to remove or even handle the subject of the gift.[2]

**4. What May be Given.**—As a rule, property of every kind, both corporeal and incorporeal, choses in action, as well as those in possession, may be subject of a valid gift.[3]

**5. Gift of the Donor's Promissory Note or Check.**—A promissory note is but the promise to pay money in the future, and if made and delivered purely as a gift, is without consideration, and cannot be enforced at law or equity, either against the maker, or against his estate after his death, except in the hands of a *bona fide* holder for value, without notice of the want of consideration.

placed certain notes in the possession of his married daughter for safe keeping. Subsequently he told her she might have them, but there was no further delivery. He did not afterwards call on her for small sums of money on account of the notes, as he had previously been accustomed to do. *Held*, that the gift of the notes to the daughter was perfect and irrevocable. Wing *v.* Merchant, 57 Me. 383.

A barge, while in the possession of the donee and worked by him as servant of the owner, was given him by the owner. Afterwards the donee worked it and paid the wages of the crew on his own account until the owner's death. The court *held* that the property thereby became vested in the donee. Winter *v.* Winter, 9 W. R. 747; 101 Eng. Com. Law 997. See also Tenbrook *v.* Brown, 17 Ind. 410; Southerland *v.* Southerland, 5 Bush (Ky.) 591; Waring's Admr. *v.* Edmonds, 11 Md. 424; Carradine *v.* Carradine, 58 Miss. 286; 38 Am. Rep. 287; Prov. Inst. for Savings *v.* Taft, 14 R. I. 502.

1. Guest *v.* Homfrey, 2 Aikens 79; Smith *v.* Smith, 2 Strange 955; Jones *v.* Selby, Prac. in Ch. 300; Noble *v.* Smith, 2 Johns. (N. Y.) 52; Hunter *v.* Hunter, 19 Barb. 631.

In Marsh *v.* Fuller, 18 N. H. 360, the donor was ill at the plaintiff's house. She delivered to the plaintiff certain keys, and at the same time said: "I give you the chest that is over to Sergeant Rowe's and all that is in it." *Held*, a valid gift of the chest and its contents.

2. A woman confined to her bed delivered to the plaintiff, who had taken care of her for many years, the keys of her bureau and trunks, accompanied by words of gift. *Held*, that the delivery of the keys and the language of the donor carried out his intention, and placed the donee in possession of the means of assuming absolute control of the contents at her pleasure, and constituted a valid gift of the coin and jewelry in the trunks and bureau; and the fact that the trunks and bureau were not removed or even handled was not a controlling circumstance. Cooper *v.* Burr, 45 Barb. (N. Y.) 9.

3. Kekewich *v.* Manning, 50 Eng. Ch. 175; Michener *v.* Dale, 23 Pa. St. 59; Ellis *v.* Secor, 31 Mich. 185; s. c., 18 Am. Rep. 178; Gibson *v.* Hibbard, 13 Mich. 214; Sanborn *v.* Goodhue, 28 N. H. 48; Stewart *v.* Hidden, 13 Minn. 29; Brogan *v.* Finley, 19 La. Ann. 94; Bond *v.* Bunting, 78 Pa. St. 210; Martin *v.* Funk, 75 N. Y. 134.

The subject of the gift must, however, be certain, and it has been held that no binding gift can be made of

Such a note is but a promise to make a gift in the future, and the gift is not completed till the note is paid. It can be revoked any time before payment, and death will revoke it.[1]

So the gift of one's check is incomplete until the check has been paid. The check may be revoked by the donor, and the death of the drawer defeats the gift so far as it concerns the donee. A check is not an appropriation of so much of the drawer's money in the possession of the bank, but a request or order to the bank to pay the payee or order the amount specified when presented. Till so presented or recognized by the drawee, the transaction is not complete.[2]

As, in a bond under seal, the seal imports a consideration, a voluntary bond, intended as a gift, can be enforced.[3]

**6. Forgiveness of Debt.**—A debt due the donor from the donee may be forgiven as a gift. And when the transaction is complete, the gift is extinguished, and cannot afterwards be enforced. The debt may be forgiven by the donor giving the donee a receipt in full for the amount, stating that it was intended as a gift. Although receiving part of a sum due from the debtor is not a sufficient consideration for cancelling the whole debt, yet an intention to give a debt to the debtor fully acted on will accomplish that purpose.[4] The intention to give must be accompanied by some action showing that the intention is accomplished,

property not *in esse* at the time of the attempted gift. Egerton *v.* Egerton, 17 N. J. Eq. 419; Butler *v.* Scofield, 4 J. J. Marsh. (Ky.) 139.

1. 2 Kent Com. 438; Williams *v.* Forbes, 114 Ill. 167; Blanchard *v.* Williamson, 70 Ill. 647; Johnston *v.* Griest, 85 Ind. 503; Arnold *v.* Franklin, 3 Ill. App. 141; Fink *v.* Cox, 18 Johns. (N. Y.) 145; Pitts *v.* Mangum, 2 Bailey (S. Car.) 588.

A promissory note given to a college to aid in the foundation of an endowment fund, where no consideration for the note is advanced, is only a written promise to make a gift at a future time, and it cannot be enforced by the donee unless it has, prior to any revocation, entered into engagements or made expenditures based on the promise, so that it must suffer loss or injury if the note is not paid. Simpson Centenary College *v.* Tuttle, 71 Iowa 596.

2. Jones *v.* Lock, L. R., 1 Ch. App. 25; Carr *v.* Silloway, 111 Mass. 24; Simmons *v.* Cincinnati Sewing Society, 31 Ohio St. 457; Appeal of Waynesburg College, 111 Pa. St. 130; s. c., 56 Am. Rep. 252. Cloyes *v.* Cloyes, 36 Hun 145.

A father put a check into the hands of his son, nine months old, saying, "I give this to baby for himself," and then took back the check and put it away. Shortly afterwards the father died and the check was found among his effects. *Held*, there was no valid gift to the son. Jones *v.* Lock, L. R., Ch. App. 25.

A woman voluntarily gave a check to a friend. The payee immediately presented it to the banker for payment. The banker refused to pay it, although the drawer had enough money deposited in the bank to pay the amount. On the next day before the check was cashed the donor died. It was *held* that as everything in their power had been done by both donor and donee of the check to make the gift complete, and the failure had arisen solely from the acts of third parties, the gift was an effectual gift and the donee was entitled to be paid out of the assets in the possession of the executor of the donor. Bromley *v.* Brunton, L. R., 6 Eq. 275. See, however, Gerry *v.* Howe, 130 Mass. 350.

3. Sherk *v.* Endress, 3 W. & S. (Pa.) 256; Mack's Appeal, 64 Pa. St. 231; Yard *v.* Patton, 1 Harris (Pa. St.) 278.

4. Gray *v.* Barton, 55 N. Y. 68; Lee

as by giving up the note or evidence of indebtedness, or giving a receipt for the amount. The balancing of the books of account and giving a receipt for the amount in full would be sufficient to constitute a gift of the debt, but not a balancing of the book alone, as then there would be no delivery to complete and perfect the gift.[1]

**7. Gifts of Choses in Action**—*Equitable Assignments.*—It seems, formerly, to have been the doctrine that the gift of a chose in action, unless by some document payable to bearer, required an assignment or some equivalent transfer, and that the transfer must be actually executed.[2] It is now held, with substantial unanimity, that a written assignment is not necessary in such cases, and that the delivery of a chose in action under such circumstances as would constitute a gift of personal property in possession, amounts to an equitable assignment of the property represented, which the courts will recognize and uphold. Thus the delivery of a bond, certificate of stock or note to the donee, with the intention of transferring to him the right of property, is sufficient to constitute a gift.[3]

*v.* Boak, 11 Gratt. (Va.) 182; Moore *v.* Darton, 4 De G. & Sm. 517.

1. Bishop on Contracts, § 50, note; Gray *v.* Barton, 55 N. Y. 68; Ellsworth *v.* Fogg, 35 Vt. 355; Draper *v.* Hitt, 43 Vt. 439; Larkin *v.* Hardenbrook, 90 N. Y. 333.

Indorsements on a note with the intention of giving the maker the amount endorsed, is a valid gift. Green *v.* Langdon, 28 Mich. 221. A son owed his father on a note; the father gave the son a receipt for part of the amount, stating that it was a gift, and that he would endorse it on the note, but he did not do so. *Held*, a complete gift. Carpenter *v.* Soule, 88 N. Y. 251.

A release of a bond and mortgage executed by the mortgagee and kept in his safe until his death is not valid for want of delivery. Brunn *v.* Schuett, 59 Wis. 261; s. c., 48 Am. Rep. 499.

If a promissory note is returned by the payee to the maker as a gift, it is not essential to the validity of the gift that the payee should endorse it. And where a debt is thus voluntarily released by the creditor, a subsequent promise to pay it, made by the debtor, is without consideration. Hale *v.* Rice, 124 Mass. 292.

2. 2 Kent Com. 439; Bond *v.* Bunting, 78 Pa. St. 210.

3. Lee *v.* Magrath, 10 L. R., W. 45; Grover *v.* Grover, 24 Pick. (Mass.) 261; Bates *v.* Kempton, 7 Gray (Mass.) 382; Wing *v.* Merchant, 57 Me. 383; Jones *v.* Deyer, 16 Ala. 221; Dunbar *v.* Woodcock, 10 Leigh (Va.) 628; McNulty *v.* Cooper, 3 Gill & J. (Md.) 214; Stewart *v.* Hidden, 13 Minn. 29; Penfield *v.* Thayer, 2 E. D. Smith (N. Y.) 305; Camp's Appeal, 36 Conn. 88; Letts *v.* Letts (Mich.), 41 N. W. Rep. 99; Succession of Moore (La.), 4 So. Rep. 460.

Any act on the part of the owner of a chose in action, showing not only a present intention to transfer, but that he regarded himself as having carried his intention into effect, is sufficient without written evidence of the transaction. Malone's Estate, 13 Phila. (Pa.) 313.

A nonnegotiable note may be the subject of a valid gift without indorsement or assignment. Lee *v.* Magrath, 10 L. R. Iowa 45.

In Hill *v.* Sheibley, 64 Ga. 529, it was *held* that the delivery of a nonnegotiable written instrument without more is not sufficient to prove a gift. This was, however, decided under the section of the code which provides that "to constitute a valid gift there must be an intention to give by the donor, acceptance by the donee, and delivery of the article given, or some act accepted by law in lieu thereof." Code Ga., § 2657.

A delivered to his niece, living with him, a certificate for ten shares of the stock of an insurance company, standing in his own name, stating that he

**8. Declarations of Trust.**—The title to choses in action, as well as that to any other class of property, may be voluntarily transferred, in another manner, without even delivery, and that is by a declaration of trust. The title to a chattel can ordinarily be transferred by way of gift, as we have heretofore seen, by delivery of the article, actually or constructively, to the donee, or to some person in trust for him. It is also possible for the donor to constitute himself a trustee for the donee. In order to do this, it is only necessary for the owner, in clear and unequivocal language, or by acts amounting to the same thing, to declare that he henceforth holds the chose in action or property as trustee for the donee. When this is duly executed by the owner by an act intending to be binding on himself, equity will uphold it, whether the property be legal or equitable, or whether it be capable of transfer or not.[1]

If the trust is perfectly created, so that the donor or settlor has nothing more to do to create it, and the party seeking to enforce it has no need of further conveyance from the settlor, and nothing is required of the court but to give effect to the trust as an executed trust, it will be carried into effect, although it was without consideration, and the possession of the property was not changed. But if the transaction was incomplete, and its final completion is asked for in equity, if the undertaking is voluntary, the court will not execute it.[2]

If the donor or settlor does not propose to make himself a trustee, the trust is not completed or created. There must be no further act contemplated by the donor. An intention or an

made her a present of it. Afterwards the company issued forty shares additional stock, representing surplus earnings. These he delivered to the niece, saying they were hers. The dividends were drawn by A till his death, but whether he paid them over to the niece or whether she knew anything about them did not appear. *Held*, that the delivery of the certificates with an intention to pass the title amounted to an equitable assignment of the shares which a court of equity would uphold. The fact that the charter and by-laws of the company provided that transfers of stock shall be made only at the office of the company, by the shareholder or his attorney on surrender of the certificate, does not alter the case. This provision only relates to the legal title. In an equitable assignment the assignor retaining the legal title becomes trustee for the assignee. Reed *v.* Copeland, 50 Conn. 472; s. c., Am. Rep. 663.

1. See Kekewick *v.* Manning, 1 De G. M. & G. 176, and Jones *v.* Lock, L. R., 1 Ch. 25, where this doctrine is fully discussed. Also *ex parte* Pye, 18 Ves. 140; McFadden *v.* Jenkyns, 1 Hare 458; Penfield *v.* Mould, L. R., 4 Eq. 562; Thorpe *v.* Owen, 5 Beav. 224; Wilcocks *v.* Harrington, 5 Ir. Ch. 38; Draiser *v.* Bereton, 15 Beav. 221; Steele *v.* Waller, 28 Beav. 466; Paterson *v.* Murphy, 11 Hare 88; Owens *v.* Owens, 8 C. E. Green (N. J.) 60; Vandenberg *v.* Palmer, 4 Kay & J. 204; Crawford's Appeal, 61 Pa. St. 52; Osterman *v.* Baldwin, 6 Wall. 116; Ellis *v.* Secor, 31 Mich. 185; Urann *v.* Coates, 109 Mass. 581.

2. Ellison *v.* Ellison, 6 Ves. 656; Beach *v.* Keep, 18 Beav. 285; McFadden *v.* Jenkyns, 1 Hare 458; Bridge *v.* Bridge, 16 Beav. 315; Badgley *v.* Votrain, 68 Ill. 25; Cox *v.* Sprigg, 6 Md. 274; Lane *v.* Ewing, 31 Miss. 75; Owens *v.* Owens, 23 N. J. Eq. 60; Howard *v.* Savings Bank, 40 Vt. 592; Bunn *v.* Winthrop, 1 Johns. Ch. (N. Y.) 329; Scales *v.* Maude, 6 De G. M. & G. 43; Stone *v.* Hackett, 12 Gray (Mass.) 227;

agreement to constitute himself a trustee, the settlor contemplating some further act to give it effect, is not sufficient. The donee, being a volunteer, the courts will not compel a completion. If the donee intended to make a valid gift, but the gift as such fails for want of completion or other defect, the courts will not convert such imperfect or defective gift into a declaration of trust merely on account of the imperfection or defect.[1]

The trust may be valid, although the person to be benefited has no knowledge of the act at the time it is done, provided he accepts and ratifies it when he is notified.[2]

**9. Gifts of Savings Bank Books.**—On the principle of equitable assignments, above noticed, it has been held that the delivery by

Donaldson *v.* Donaldson, 1 Kay 771.

1. Jones *v.* Lock, L. R., 1 Ch. 25; Lister *v.* Hodgson, L. R., 4 Eq. 30; Tiernan *v.* Poor, 1 Gill & J. (Md.) 217; Dillinger *v.* Llewelyn, 4 De G. F. & J. 517; Shaw *v.* Burney, 1 Ired. Eq. 148; Antiobus *v.* Smith, 12 Ves. 39; Penfield *v.* Mould, L. R., 4 Eq. 562; Disher *v.* Disher, 1 P. Wms. 204; Yarborough *v.* West, 10 Ga. 471; Lloyd *v.* Brooks, 34 Md. 27; Crompton *v.* Vassar, 19 Ala. 259; Acker *v.* Phœnix, 4 Paige (N. Y.) 305; Forward *v.* Armstead, 12 Ala. 124; Lauterman *v.* Abernethy, 47 Ill. 437; Baltimore Retort & Fire Brick Co. *v.* Mali, 65 Md. 93; Young *v.* Young, 80 N. Y. 422.

2. Neilson *v.* Blight, 1 Johns. (N. Y.) 205; Cumberland *v.* Codrington, 3 Johns. Ch. (N. Y.) 229; Hosford *v.* Mervin, 5 Barb. (N. Y.) 51; Brabrook *v.* Boston Five Cent Savings Bank, 104 Mass. 231.

**Declarations of Trust.**—"A parol declaration of trust of personalty may be perfectly valid, even if voluntary. If I give any chattel, that of course passes by delivery; and if I say expressly or impliedly that I constitute myself a trustee of the personalty, that is a trust executed and capable of being enforced without consideration." Cransworth L. C. in Jones *v.* Locke, L. R., 1 Ch. 25.

Where the author of a gift retains the legal dominion over the subject of the gift in himself, but fully and completely declares himself to be trustee of the property for the purposes indicated, then he will be treated as trustee and the object of his bounty will be given the benefit of the trust. In all such cases the declaration of the trust is considered in a court of equity as equivalent to an actual transfer of the legal interest in a court of law. For the purpose of establishing such trust, however, the evidence must be clear and unmistakable, both of the intent and of the execution of that intent. Taylor *v.* Henry, 48 Md. 550.

"A man may transfer his property without valuable consideration in one of two ways: He may either do such acts as amount to a conveyance or assignment of the property, and thus completely divest himself of the legal ownership, in which case the person who by those acts acquires the property takes it beneficially or by trust, as the case may be; or the legal owner of the property may by one or other of the modes recognized as amounting to a valid declaration of trust, constitute himself a trustee, and without actual transfer of the legal title, may so deal with the property as to deprive himself of the beneficial ownership, and declare that from that time forward he will hold it in trust for the other person. It is true he need not use the words 'I declare myself a trustee,' but he must do something which is equivalent to it, and use expressions which have that meaning; for however anxious the court may be to carry out a man's intention, it is not at liberty to construe words otherwise than according to their proper meaning." Jessel, M. R., in Richards *v.* Dalbridge, L. R., 18 Eq. Cas. 11.

"I think it very important indeed to keep a clear and definite distinction between those cases of imperfect gifts and cases of declarations of trust. The doctrine of declarations of trust should not be extended to supplement what would be otherwise imperfect gifts." Hall V. C., in Moore *v.* Moore, 43 L. J., Ch. App., N. S. 623.

In Young *v.* Young, 80 N. Y. 422; s. c., 36 Am. Rep. 634, it was *held* that the transactions in the case did not

the donor to the donee of a savings bank deposit book standing in the name of the donor, is a complete and valid gift of the deposit, if such was the intention of the donor.[1]

The deposit of one's own money in a savings bank in the name of another, or in his own name as trustee for another, under such circumstances as will show that a gift was intended, and as to raise a presumption that the donee has accepted the gift, is sufficient to pass the title to the donee on the principle of a declaration of trust, although the book remains in possession of the donor. The acceptance need not be simultaneous with the deposit.[2]

The mere fact that one deposits money in the name of another, or in his own name, in trust for another, is, at least, not conclusive evidence of a valid gift, and in some cases is held not sufficient without further evidence of the intention of the depositor to carry with it the title to the fund. Such deposits are frequently made without any intention of making a gift of the deposit, and for the convenience of the depositor, as where, by the rules of the bank, the amount which can be deposited on one

constitute a valid declaration of trust, stating as overruled Morgan *v.* Malleson, L. R., 10 Eq. Cas. 475, and Richardson *v.* Richardson, L. R., 3 Eq. Cas. 686, the circumstances of which cases were similar.

A father made an assignment of stock to his attorney with instructions to have it transferred to his daughter, but it was not done. *Held*, the gift not complete, and after the donor's death equity would not order the transfer, but if the father had declared that he would hold the stock in trust for the daughter, equity would enforce it though voluntarily created. Baltimore Retort & Fire Brick Co. *v.* Mali, 65 Md. 93.

Where the guardian of an estate, descending from a mother to her minor daughter, paid the accumulated income thereof to the ward's father, who was entitled to it as tenant by the curtesy, and the father, on receiving it, and often afterwards, said to the guardian and others that the money was his daughter's, his declarations were *held* competent to prove an executed gift of the money to the daughter in an action by the daughter, after she became of age, against the executrix of the father's will. Buck *v.* Henderson (Pa.), 4 Cent. Rep. 697.

A purchased bonds which he caused to be registered in B's name, and the income from which, as it accrued, he deposited in B's name. A declared at various times that he wanted to create a fund for B's benefit. A retained possession of the bonds, and they were found among his papers after his death. *Held*, that B took title thereto by gift. *Re* Townsend, 5 Dem. (N. Y.) 147.

In Morgan *v.* Malleson, L. R., 10 Eq. 475, a donor made the following memorandum: "I hereby give and make over to M an India bond, value £1,000." He signed it and delivered it to M, but did not hand over the bond. This was *held* to constitute a good declaration of trust, and that M was entitled to the bond. This case is directly overruled by Warriner *v.* Rogers, L. R., 16 Eq. 340. In this latter case the donor delivered to the donee a box—retaining the key—containing what purported to be a written memorandum of gifts. *Held*, not to constitute a declaration of trust, but an imperfect gift which the court would not enforce. In order to give validity to a declaration of trust of property, it is necessary that the donor should have absolutely parted with his interest in the property, and have effectually put such interest beyond his own reach.

1. Tillinghast *v.* Wheaton, 8 R. I. 536; Prov. Inst. for Savings *v.* Taft, 14 R. I. 502; Camp's Appeal, 36 Conn. 88; Hill *v.* Stevenson, 63 Me. 364; Penfield *v.* Thayer, 2 E. D. Smith (N. Y.) 309.

2. Blasdel *v.* Locke, 52 N. H. 238; Kerrigan *v.* Rantigan, 43 Conn. 17; Howard *v.* Savings Bank, 40 Vt. 597;

book is limited.[1] It is impossible to reconcile all the decisions on these points. A number of the leading cases are gathered together in the notes, which will show the different views of the courts as to the requirements necessary to constitute valid gifts of savings bank books.

If the circumstances show the intention to have been, not to create a trust, but to make a testamentary disposition of the fund, the owner meanwhile retaining the legal title, and the control and benefit of the money, the trust will not be enforced.[2]

The fact that the donor reserves the right of withdrawal of the funds does not prevent the trust from being valid. Such a provision is consistent with the duties of a trustee.[3]

Gardner *v.* Merritt, 32 Md. 78; Gerrish *v.* New Bedford Savings Bank, 128 Mass. 159; s. c., 35 Am. Rep. 365.

1. Robertson *v.* Ring, 72 Me. 140; s. c., 39 Am. Rep. 308; Brabrook *v.* Boston Five Cent Savings Bank, 104 Mass. 228; Marcy *v.* Amazeen, 61 N. H. 131; Northrop *v.* Hale, 72 Me. 275; Pope *v.* Burlington Savings Bank, 56 Vt. 284; s. c., 48 Am. Rep. 781; Murray *v.* Cannon, 41 Md. 466; Taylor *v.* Henry, 48 Md. 550.

2. Smith *v.* Speer, 34 N. J. Eq. 336.

3. Barker *v.* Frye, 75 Me. 29.

**Gifts of Savings Bank Books.**—A B deposited in a savings bank a sum of money in his own name, and a like sum in the name of "A B in trust for C D," who was his daughter; and always retained the pass books in his own possession. In a suit by the daughter, after his death, against the bank, or the sum deposited by him as trustee for her, parol evidence was offered to show that both deposits were his money, and that one was made in his daughter's name because the amount of both exceeded the sum which the law allowed the bank to hold for a single depositor. *Held*, that the evidence was admissible, notwithstanding that a by-law of the bank, asserted to by A B, provided that any depositor might designate at the time of deposit for whose benefit the same was made, and should be bound by such conditions; and that, upon the facts the plaintiff could not recover. Even if the form of the deposit is to be taken as conclusive proof of the existence of an intention that the money should be hers, the execution of that intent was not so far complete as to operate to pass the title. Acceptance on the part of the donee is necessary. Brabrook *v.* Boston Five Cent Savings Bank, 104 Mass. 228.

One who has deposited money in the savings bank in the name of another person, to avoid attachment, may maintain an action for it in his own name, if he did not intend to make a gift or transfer to that person, and if he has tendered the pass book to the bank, although he has given no bond of indemnity, and has told the bank that the other person refused to transfer the book to him. Broderick *v.* Waltham Savings Bank, 109 Mass. 149. See also Davis *v.* Lewanee Savings Bank, 53 Mich. 163.

S deposited in a savings bank a sum of money belonging to her, stating at the time that she wanted the amount deposited in trust for the plaintiff. The account was so entered, and a pass book given to S containing a similar entry. The plaintiff was a distant relative. S kept the deposit and the interest accumulated except that S drew one year's interest. The plaintiff was never informed of the deposit. *Held*, that the transaction constituted a valid declaration of trust and passed the title to the deposit, S constituting herself a trustee; the retention of the pass books, which were simply vouchers for the property, must be deemed to have been as trustee, and was not inconsistent with the completeness of the trust, and notice to the *cestui que trust* was not necessary. Martin *v.* Funk, 75 N. Y. 134.

A grandmother, from time to time during a period of five years, deposited money in five different savings banks to the credit of her grandchildren, the accounts being in the name of each, a minor, the deposits being subject to her order, or that of her daughter. About the time she began to make the

deposits, she declared that "she was going to put the money in the bank for the children." It did not appear who the statement was made to, or whether the children or anyone interested knew of the deposits. *Held*, that the moneys deposited were completed gifts which she had no desire to countermand, and that the donees were entitled to the money. The control of the deposits retained by the depositor, was a control for the benefit of the children, the same as a guardian depositing money of his ward would retain control of it, and for the protection of the donees, and not such control as would leave a *locus pœnitentiæ* in the donor. Gardner *v.* Merritt, 32 Md. 78. See, however, Taylor *v.* Henry, 48 Md. 550, where the fact of the supposed donor retaining control of the fund was considered as evidence to prove that no gift was intended. In this case the money was deposited in the joint names of both parties.

Two savings bank books were left by A B at his death, one of which stood in his own name, and the other in the name of "J B order of A B." J B was A B's son. On the last page of both books were orders signed by A B directing the treasurer of the bank to pay the balance on each book to J B at the decease of A B. The books were left with the treasurer. A B had access to them, and other sums were deposited and drawn out by him. J B never had possession of the books, and had no knowledge of them during his father's life. *Held*, not to constitute a valid gift of the money represented by the books. Burton *v.* Bridgeport Savings Bank, 52 Conn. 398.

A widow with a considerable estate and no children, deposited in a savings bank $250 in her own name as trustee for W, who was a boy 13 years old, whose parents were near neighbors and friends, and who was accustomed to do errands for her, being almost daily at her house for that purpose, she often giving him presents in return. Shortly after making the deposit, she told the boy's parents that she had deposited that amount in the bank for him, and again alluding to it, said that W would need the money for his education. She kept the book herself, and two years thereafter drew out a part of the money, and a year later drew out the balance with accrued interest, signing receipts in her own name and appropriating the money to her own use. She died four years later, leaving a will in which no allusion was made to the deposit, and nothing was given to W. *Held*, by a majority of the court, that she made a complete gift of the money to W at the time of the deposit, and could not afterwards revoke it. The money was recovered from her estate. Minor *v.* Rogers, 40 Conn. 512.

Possession by a stranger of a savings bank book in the name of another constitutes no evidence of a right to draw the funds, and without more does not justify the bank in paying; although a by-law of the bank says that all payments made on presentation of the book will be binding on the depositor. Smith *v.* Brooklyn Savings Bank, 101 N. Y. 58; s. c., 54 Am. Rep. 653.

Where, after one's death, savings bank books are found among his effects, showing deposits in the names of different persons, in the absence of evidence of the sources from which the money was derived, the claims of those interested must be determined by the names on the books. Gaffney *v.* Public Administrator, 4 Dem. (N. Y.) 22.

A delivery to a donee of a savings bank book, with an intent to give the donee the deposits represented thereby, is a good delivery, and vests an equitable title to such deposits in the donee, without an assignment, though by the rules of the bank the money can only be withdrawn or transferred by the depositor to his administrator, or by some person presenting the book, accompanied by an order signed by the depositor in the presence of an attesting witness. Hill *v.* Stevenson, 63 Me. 364.

F informed the treasurer of a savings bank that she desired to make a deposit for each of four grandchildren, naming B as one, to which she proposed to make additions from time to time, and expressed the hope that with the accumulated interest, the deposits might amount to enough to be of advantage to them when they should reach a suitable age to take charge of the money. She wanted "to do something for the children." The treasurer gave her pass books in the names of each of the grandchildren, and entered in each, and in the bank books, "subject to the order of F during her lifetime." Subsequently she informed B of what she had done, and that the money was intended for him and the other children, and she made other deposits and withdrew one dividend. Afterwards F took

the several books to the bank and informed the treasurer "that the time had come when she desired to make such a change in the terms of the deposits made for her grandchildren . . . as would give them full control over them, and the amounts on each book become the absolute property of the parties named therein, and her right to control them should cease. Her expressed wish was, that her claim over the amount of the deposits should be withdrawn as to each case, and the books so changed that they would stand in the names of the grandchildren, without any restriction whatever," and the treasurer then and there, at her request, erased from the pass books and bank books the original entry, "subject to the order of F." She notified B by letter of this change, and that the pass books would be delivered the first time they met. B replied with the request that the books might be sent to him. A short time before F's death she delivered the pass books to W. A. F., with a written order to enable him to draw the amount of each deposit. *Held*, (1) That the deposit in the first instance created a valid trust, and that F controlled the same in trust for B. (2) That the acts and declarations of F at the time of the change in the entry upon the books show a complete and executed gift, and divested F of any interest in the deposit as trustee or otherwise, and that she thereafter held the pass book in trust for B. (3) That, as W. A. F. subsequently took the book without consideration, and with full knowledge of the plaintiff's prior title, he took it subject to that trust, and that it is necessary to B for the more beneficial enjoyment of his gift. Barker *v.* Frye (in equity), 75 Me. 29.

B, the plaintiff's executor, deposited $800 in the defendant savings bank in the name of C, but payable to himself. He took a deposit book, which he kept and controlled. He withdrew a little more than half of it, and in a few months directed the treasurer of the bank to add to the first entry, "Payable to S. Barlow," so as to make it read, "Payable to S. Barlow, during his life, and after his death to Marion Cushing." B made his will before the deposit, in which was this provision: "I hereby confirm all gifts I have made or shall make to any of my children." C was a grandchild. It did not appear that B did or said anything else in relation to the deposit, or that indicated an intention to hold the pass book in trust for C. A by-law printed in the pass book provided that no deposit could be withdrawn without the production of the book. The bank had no communication with C, and understood that B was the depositor, and so treated him. C had no knowledge of the transaction. *Held:*

1. There was no delivery, no acceptance, and therefore the deposit could not be sustained as a gift *inter vivos*.

2. The bank did not hold the money as trustee for C.

3. The donor did not declare himself a trustee, and did nothing equivalent to that; hence, there was no trust relation between him and the claimant. Pope *v.* Burlington Savings Bank, 56 Vt. 284; s. c., 48 Am. Rep. 781.

Where A deposited money in a savings bank in the name of B without a declaration of trust at the time, or subsequently, and retained the deposit book in his possession until his death, *held* that, in the absence of proof of any act or declaration under the pressure of immediate or impending death, or of proof of any delivery, or intent to give, the deposit in the bank in B's name belonged to A's estate and not to B. Robinson *v.* Ring, 72 Me. 140; s. c., 39 Am. Rep. 308.

R deposited a sum of money in a savings bank in the name of her nephew N, with a memorandum that the deposit can be paid to R. She retained the deposit book in her possession and drew out the dividends and part of the principal during her lifetime. At her death, the deposit book was passed to the administrator. *Held*, in a suit in equity by N against the administrator of R, for the amount of the deposit at R's death, that that evidence *aliunde* as to the intention of R in making the deposit is admissible to vary the effect of the entries in the deposit book. Northrop *v.* Hall, 72 Me. 275.

H deposited a sum of money in a savings bank in the name of E, "subject to the order of H." A few days afterward H asked E to come to his house, showed him the deposit book, said he was going to give it to him, and delivered it temporarily into his possession. H then said he would keep the book for E, as he had a safe, and took it and put it into the safe. On the same day, by E's request, H signed and delivered to E a paper certifying that the money was for him. H never drew the interest upon

the deposit, but allowed it to accumulate during his life, doing nothing to assert a personal ownership. E gave seasonable notice to the bank that he should claim the money; but the bank paid the same to H's administrator. *Held*, in an action by E against the bank, after the death of H, for the amount of the deposit, that the jury were authorized to find a completed gift of the money by H to E; and that the bank had sufficient notice thereof. Eastman *v.* Woronoco Savings Bank, 136 Mass. 208.

A deposited a sum of money in a savings bank in the name of B, in whose name the pass book, which A kept in his possession, was issued, and the following condition was annexed: "Interest to be paid on order of A. Principal to be drawn by B after decease of A." A never had any communication with B in regard to the matter, and B did not know of the deposit until after the death of A. The by-laws of the bank provided that money deposited should be drawn only by the depositor or some person by him legally authorized, and that no payment should be made to any person without the production of the pass book; and that any depositor might designate, at the time of making the deposit, the period for which he desired the same should remain, and the person for whose benefit it was made, and should be bound by such condition annexed to his deposit. *Held*, in an action by the executor of A's will against the bank for the amount of the deposit, in which action B intervened as a claimant of the fund, under the Pub. Sts. ch. 116, § 31, that there was not a perfected gift of the fund to B, and that the executor was entitled to it. Sherman *v.* New Bedford Five Cent Savings Bank, 138 Mass. 581.

To constitute a gift of a sum of money deposited in a savings bank by one person in the name of another, without the latter's knowledge, the depositor retaining possession of the deposit book, the money must be deposited with the intention of making a gift of it to the person in whose name it is put, and it must be accepted by him. Upon the question of the intention of a person who has deposited money in a savings bank in the name of another, without the latter's knowledge, retaining the deposit book himself, a letter from the treasurer of the bank to the depositor, who has also deposited money therein in his own name, notifying him that a certain sum was standing to his credit in the bank on which he was not entitled to interest because in excess of $1,000, and, after the death of the depositor, his declarations relating to the deposit are competent in an action by the person in whose name the deposit was made against the bank.

Upon the question of the intention of a person who has deposited money in a savings bank in the name of A, without his knowledge, in holding the deposit book, the taking of an order on the bank signed by A for the payment of a certain sum to the depositor, and, after the latter's death, his declarations and letters respecting it, preceding and accompanying it, are competent in an action by A against the bank.

In an action against a savings bank by a person in whose name a sum of money had been deposited, without his knowledge, by another, it appeared that an order on the bank for the payment of a certain sum to the depositor, to be signed by the plaintiff, came to him in a letter, which was not in the writing of the depositor, but was signed in his name by another person, whose agency was not shown; and that this order was signed by the plaintiff, and returned to the depositor. This letter was excluded. *Held*, that it should have been admitted.

In an action against a savings bank by a person in whose name a sum of money has been deposited in the bank by another, no exception lies to the exclusion of declarations of the depositor, in relation to making his will, after the gift of the money so deposited was completed. Scott *v.* Berkshire County Savings Bank, 140 Mass. 157.

A deposited in a bank $1,000 in trust for B. In a suit by the administrator of A against the bank B was admitted as claimant and testified in his own behalf that A, after depositing the money "told me just before he died that it was there, and it was mine," and "the last time he spoke of it he said it was there, and it was mine." *Held*, that these statements, if believed, were sufficient as a matter of law, to justify a finding for the claimant. Alger *v.* North End Savings Bank, 146 Mass. 418, decided March, 1888.

A deposit of money in the bank in the name of another, subject to the right of the depositor to take the income during his life, to which arrangement the donee assents, constitutes a valid gift *inter vivos* if the donor intended it as

a present gift, though he retains the bank book. Smith *v.* Bank (N. H.), 9 Atl. Rep. 792.

Mere evidence that A stated to B that he, A, had given his wife a savings deposit and bank book, and that it was hers, *held* insufficient without proof of delivery to establish a gift. With delivery of the book it would have been a perfect gift. Hoar *v.* Hoar, 5 Redf. (N. Y.) 637.

A deposited money in the defendant savings bank in the name of B. A retained the book till his death and it was found among his papers. It did not appear that B knew of the gift, she having died previous to A's decease. *Held*, a perfect gift. Howard *v.* Savings Bank, 40 Vt. 597.

A, with intent to make a gift to his two sons, R and J, delivered to each of them a check on a savings bank, payable four days after his death. He stated that he wanted to control the money as long as he lived in order to collect the interest. He delivered the pass books to R, telling him he would need them in order to draw the money, and he did not think them safe where they were and wanted R to take care of them. *Held*, that the transaction did not constitute a valid gift. The delivering of the checks did not transfer the funds, nor did the delivering of the pass books, as the decedent did not part with his control of them. Curry *v.* Powers, 70 N. Y. 212.

A B deposited in a savings bank a sum of money belonging to her in the name of "A B, trustee for C D," and always retained the pass book. C D did not know of the deposit till after the death of A B. A by-law of the bank provided that no one should receive his deposit without producing his book. A suit was brought against C D, in which the bank was summoned as trustee and the administrator of A B's estate appeared as claimant. *Held*, that the administrator was entitled to the money as against the plaintiff. The plaintiff offered evidence to prove the intent of A B to create a trust in favor of C D, but the court *held* that such evidence was rightfully excluded, as if such intent was established she did not do what was necessary to carry the intent into effect. Clark *v.* Clark, 108 Mass. 522.

A husband deposited certain money in a savings bank in the joint names of himself and wife. There was no proof of a delivery of the book, and no evidence of a gift beyond the fact that he once said he would have no more to do with it. *Held*, the deposit was not hers. Schick *v.* Grote, 47 N. J. Eq. 352.

Where a deposit in a savings bank, made by one in his own name as trustee for another, continues in his own possession until his death, his personal representatives are entitled to it on his death, and not the person named as *cestui que trust*. If, however, the depositor intends money at time of deposit to be a gift to such other person, and declares the gift to him, and he assents to it, the gift is perfect, although he keeps the book himself. Alger *v.* North End Savings Bank (Mass.), 5 N. E. Rep. 893.

The fact that one deposits his money in a bank in another's name, but subject to the depositor's order, without notice to the other party, and retains control of the fund, does not amount to a gift of the money; nor is it sufficient evidence of an intention to create a trust. Marcy *v.* Amazeen, 61 N. H. 131.

A deposited money in a savings bank and received a pass book in which the amount was credited to B. The money belonged to A, who retained possession of the book. B died without having been informed of the fact of the deposit. *Held*, that A could compel B's administrator to draw out the money and pay it to A. Orr *v.* McGregor, 43 Hun (N. Y.) 528.

A deposited money in a savings bank "in trust" for certain relatives, and told them of it, saying he could control it while he lived, and that after his death it was theirs. Just before A died, he told those relatives to take the deposit books after his death and make the transfers. *Held*, that there was not a perfected gift, and that A's administrator was entitled to the money. Nutt *v.* Morse, 142 Mass. 1.

**Life Insurance Policies.**—The delivery of a policy of life insurance without a transfer or assignment will not carry with it a right to the funds, although it may possibly give a right to retain the policy itself. Bond *v.* Bunting, 78 Pa. St. 210; Rummens *v.* Hare, 1 Ex. D. 169.

A man insured his life and delivered the policy to his wife, on condition that she paid the premiums. She took the policy and paid the premiums out of her separate estate. He afterwards devised all his property to the plaintiff, who was his executrix, in trust for his children.

**10. Deeds of Gift.**—At common law, a gift by deed may be valid although the property is not delivered to the donee. A deed imports a consideration, and the presence of this implied consideration is sufficient to pass the title. This is not because the deed is a symbolic delivery of the article, but on the principle of estoppel.[1] It is necessary that the deed be delivered if the property is not.[2]

Unless the writing is a technical deed, under seal, it would not alone be sufficient to constitute a gift. A statement in writing, without a seal, that one person gives an article to another, unless the article is delivered, will not transfer the title to it.[3] Such a writing may, however, be used as evidence that a gift was intended, or of other facts necessary to constitute a gift.[4]

**11. Acceptance by Donee.**—A gift, like any other contract, executed or unexecuted, is a mutual transaction, and an acceptance on the part of the donee is necessary for its completion. Slight evidence of acceptance is all that is ordinarily required, and in

*Held*, that the policy passed under the will to the plaintiff, as there was no assignment in writing. Howes *v.* Prudential Assurance Company, 49 L. T., N. S. 133.

A father took out a policy of insurance in his own favor on the life of his minor son, to whom he promised to give the policy at his majority. The son having married, asked that it be given him before that time, and that it be made payable to his wife. The father acquiescing, delivered the policy to the son. It was afterwards redelivered to the father, in order that it might be changed to run to the wife, and he forwarded it through the local agent with a written request that it be changed accordingly. The company substituted a policy drawn in the wife's favor, and sent it to the local agent, who received it on or about the day the assured died, and afterwards delivered it to the father, who retained it and filed a bill to enjoin the company from paying it to the wife. *Held*, that the gift of the insurance was perfected by the delivery of the policy, the order of substitution and the subsequent transfer without objection, and that the bill would not lie. Chrittenden *v.* Phœnix Mutual Life Insurance Co., 41 Mich. 442.

One about to be married effected an insurance on his life, intending it to be for his intended wife, whom he afterwards married, but at her request, prompted by motives of delicacy, he did not have it made payable to her, but to his representatives. He, however, up to his death, always spoke of the policy as intended for his wife. After their marriage, he handed to his wife a box in which he placed the policy, and which also contained papers belonging to both husband and wife. The box remained under the control of the wife until after the husband's death. He died intestate. *Held*, that there was a sufficient delivery of the policy to the wife to entitle her to the entire proceeds. Madeira's Appeal (Pa.), 4 Atl. Rep. 908.

1. Williams Pers. Prop. 33, 35; Carr *v.* Burdiss, 1 C. M. & R. 282, 288; Irons *v.* Smallpiece, 2 B. & Ald. 552; Foster *v.* Mitchell, 15 Ala. 571; McWillie *v.* Van Vacter, 35 Miss. 428; McEwen *v.* Troost, 1 Sneed (Tenn.) 186; Connor *v.* Trawick, 37 Ala. 289; Gordon *v.* Wilson, 4 Jones (N. Car.) L. 64; Hildebrant *v.* Brewer, 6 Tex. 45; Hope *v.* Hutchins, 9 Gill & J. (Md.) 77; Baxter *v.* Bailey, 8 B. Mon. (Ky.) 336.

2. Martin *v.* Ramsey, 5 Humph. (Tenn.) 349; Reid *v.* Butt, 25 Ga. 28; Blakey *v.* Blakey, 9 Ala. 391; Payne *v.* Powell, 5 Bush (Ky.) 248; Taylor *v.* Taylor, 2 Humph. (Tenn.) 597.

3. Miller *v.* Miller, P. Wms. 356; Antrobus *v.* Smith, 12 Ves. 39, 46; Edward *v.* Jones, 1 My. & Cr. 226; Dillon *v.* Coppin, 4 My. & Cr. 647, 671; Cotteen *v.* Missing, 1 Madd. Ch. 176; Caswell *v.* Ware, 30 Ga. 267; Evans *v.* Lipscomb, 31 Ga. 71.

4. Nicholas *v.* Adams, 2 Whart. (Pa.) 17.

the case of gifts entirely beneficial to the donee, his acceptance is presumed. On this principle, acceptance by an infant is presumed, although at law unable to contract. In the absence of evidence to the contrary, acceptance is presumed upon the delivery of the goods.[1] In some cases, it is at least strongly inferred that an acceptance will not be presumed unless the donee knew of the gift during the lifetime of the donor.[2]

**12. Qualified or Conditional Gifts.**—A gift may sometimes be accompanied by a condition or qualification and still be valid. If the condition is a condition precedent imposed by the donor, it must be performed before the title can vest in the donee.[3] A usual condition is that the donee shall pay certain debts of the donor. Such a condition is held not to invalidate the gift.[4] A condition that upon the happening of a certain event the property shall revert to the donor has been held to render the gift invalid.[5]

1. Peirce *v.* Burroughs, 58 N. H. 302; Pope *v.* Burlington Savings Bank, 56 Vt. 284; Howard *v.* Savings Bank, 40 Vt. 597; De Levillain *v.* Evans, 39 Cal. 120; Goss *v.* Singleton, 2 Head (Tenn.) 67; Howard *v.* Copley, 10 La. An. 504; Fletcher *v.* Fletcher, 55 Vt. 325; 45 Am. Rep. 627.

No acceptance by a child is necessary. Howard *v.* Copley, 10 La. An. 504. Where a donation has been made to a child by one who was formerly his tutor, the donor is estopped from afterwards bringing an action to annul the gift on the ground of nonacceptance. Barnebe *v.* Suaer, 18 La. An. 148.

2. Clark *v.* Clark, 108 Mass. 522; Scott *v.* Berkshire Co. Savings Bank, 140 Mass. 157; Pope *v.* Burlington Savings Bank, 56 Vt. 284.

A wanted to get some money of B. B sent him a check for the amount as a gift. A wrote to B thanking him for the money, saying that he would gladly repay it at an early opportunity, and hoped to be able to do so soon. *Held* to be a loan and not a gift. Hill *v.* Wilson, L. R., 8 Ch. 888.

A tells B he may select and have one of two heifers. There is no gift till B has made his selection. Brink *v.* Gould, 7 Lans. (N. Y.) 425. See also Ventress *v.* Brown, 34 La. An. 448.

3. Berry *v.* Berry, 31 Iowa 415; Eskridge *v.* Farrar, 31 La. An. 718.

4. A gave goods to B on condition that certain debts should be paid from the proceeds. Part of the goods were sold and the debts paid. *Held*, that the other creditors of the donor had no claim on the remainder, the gift having been originally valid against creditors. Riegel *v.* Wooley, 81 Pa. St. 227.

5. Irish *v.* Nutting, 47 Barb. (N. Y.) 370. A right to borrow reserved will not invalidate a gift. Nor a reservation of interest. Doty *v.* Willson, 47 N. Y. 580. See, however, Young *v.* Young, 80 N. Y. 422; s. c., 36 Am. Rep. 634, where the question was raised as to whether the remainder of a chattel may be created and given by the donor's carving out a life estate for himself, and transferring the remainder without the intervention of a trustee. A reservation that the donor might continue to use a horse, which was the subject of the gift, will not invalidate it. Bennett *v.* Cook (S. Car.), 6 S. E. Rep. 28.

A reservation in a deed of gift of personal property that the donor should not be debarred or prevented from holding, using or enjoying the property granted, and all the profits arising therefrom during her natural life, does not qualify the absolute character of the grant, except so far as to enable the donor to use either the subject granted or its increase during her life, though the donor remained in possession till her death. Hope *v.* Hutchins, 9 Gill & J. (Md.) 77.

A gave B a mare supposed to be with foal, stipulating that if it should prove with foal the colt should be A's. B sold the mare to C, not informing him of the reservation. *Held*, that this was a valid reservation, and that C had only the right which the vendee or the bailee of goods would have, whether he was or was not informed of the reservation, and that A might recover the colt

**13. Gifts Between Husband and Wife.**—Although, at common law, gifts from husband to wife made during coverture are not valid, for being by law one person, she cannot take from him, equity will sustain such gifts, and in the absence of statutes forbidding them, they are recognized as valid, whether made with or without the intervention of a trustee.[1]

Such a gift must be clearly proven. He must use words which clearly indicate that he has divested himself of all beneficial interest in the subject matter of the gift. Such words need not be technical, and may be spoken either at the time of the gift or afterwards.[2]

Actual and visible change of possession can hardly be required to establish a gift between husband and wife where they are both living together. If she accepts the property, and exercises such control over it as is usual where a wife owns such property originally, it is sufficient.[3]

A wife may make a valid gift to her husband provided the intent clearly appears, and the transaction is not tainted with constructive fraud by reason of undue influence arising from the confidential relation existing between them.[4]

in an action against C. Wolf *v.* Estab, 7 Ind. 448.

Property delivered subject to be reclaimed in case the donor should return from abroad, if not to belong to the person to whom it is delivered, is not a gift. Walden *v.* Dixon, 7 B. Mon. (Ky.) 170.

1. Mews *v.* Mews, 15 Beav. 529; Grant *v.* Grant, 34 Beav. 623; Jennings *v.* Davis, 31 Conn. 138; Darby *v.* Ryan, 44 Conn. 518; Gilligan *v.* Lord, 51 Conn. 565; Wheeler *v.* Wheeler, 43 Conn. 503; Shuttleworth *v.* Winter, 55 N. Y. 624; Kingdom *v.* Bridges, 2 Kan. 67; Draper *v.* Jackson, 16 Mass. 480; Marshall *v.* Jaquith, 134 Mass. 138; Whiton *v.* Snyder, 88 N. Y. 299; Armitage *v.* Mace, 96 N. Y. 538; Woodson *v.* McClelland, 4 Mo. 495; Cummings *v.* Freidman, 65 Wis. 183; Manny *v.* Rixford, 44 Ill. 129.

2. Grant *v.* Grant, 34 Beav. 623; Walker *v.* Hodge, 2 Swanst. 92; Dills *v.* Stevenson, 17 N. J. Eq. 407; Martin *v.* Smith, 25 W. Va. 579.

3. Davis *v.* Zimmerman, 40 Mich. 25; Ivey *v.* Owens, 28 Ala. 641; Ector v. Welch, 29 Ga. 443; Turner *v.* Brown, 6 Hun (N. Y.) 331.

4. Hatch *v.* Hatch, 9 Ves. 292; Farmer *v.* Farmer, 39 N. J. Eq. 211; Bradish *v.* Gibbs, 3 Johns. Ch. (N.Y.) 523; Smyley *v.* Reese, 53 Ala. 89; Cain *v.* Ligon, 71 Ga. 692; s. c., 51 Am. Rep. 281.

**Gifts Between Husband and Wife.**—A widow files her bill as administratrix of her deceased husband, claiming as her own certain bonds, which she avers were given to her by her intestate husband before and in consideration of marriage. *Held*, (1) that she is an incompetent witness to prove the gift or delivery of said bonds, and objection to her competency may be made for the first time in the appellate court. (2) To sustain such gift it must be shown by clear, unequivocal and convincing proof that the donor delivered the bonds or property to the donee with an intention to part absolutely with the title and possession of it. Martin *v.* Smith, 25 W. Va. 579.

Although a gift from a wife to her husband will generally be regarded as in accordance with her wishes, yet when the wife assails the gift as the result of improper influence over her by him, the character of the gift and the circumstances surrounding the transaction may be sufficient to establish improper influence, although actual fraud may not be proven. Golding *v.* Golding, 82 (Ky.) 51.

A gift by a wife to her husband may be inferred from circumstances, as when, for example she permitted him to manage her property and receive the profits and issues and expend the surplus for ten years without question. In such case the question whether there

**14. Gifts Between Parent and Child.**—Where a parent delivers property to his child, and allows the child to retain the possession and use of it, the presumption is that it was intended as a gift or an advancement. This is particularly so if the delivery is on or about the time the child becomes of age or marries, the presumption being that it was a gift or advancement, rather than a loan.[1]

While in case of an alleged gift between members of the same family, the presumption is always strongly in favor of the continued possession of the father as the head of the family; yet, where there is sufficient proof of a gift from a father to a child, fully executed by delivery, it will be upheld, and is irrevocable.[2]

Where a gift is made by a child to a parent before the parental authority and dominion have terminated, is to be presumed to be

was a gift of such profits and issues is a question for the jury. The presumption of a gift between a husband and wife is stronger than between strangers. McLure *v.* Lancaster, 24 S. Car. 273; s. c., 58 Am. Rep. 259.

A note taken by the husband from the sale of his property, payable to his wife, is *prima facie* evidence of a gift to her. Love *v.* Francis, 5 West Rep. (Mich.) 758.

A gave his wife a savings bank book intending that the deposit should be hers. By force he took the book from her and drew the money despite her protest. *Held*, that she could recover the money. Brown *v.* Brown, 40 Hun (N. Y.) 418.

On the question whether a man made to his wife a gift of a note he may testify as to his intent. Pritchard *v.* Hirt, 39 Hun (N. Y.) 378.

A husband being in failing health transferred his bank account to the joint names of himself and his wife, and directed the bankers to honor checks drawn either by himself or his wife, and he afterwards paid in considerable sums to this account. All checks were afterwards drawn by the wife at the direction of the husband, and the proceeds were applied in payment of household and other expenses. The husband never explained to her what his intention was in transferring the account, but he remarked to the bank manager, at the time of the transfer, that the balance of the account would belong to the survivor of himself and his wife. After the death of the husband, which took place a few months after the transfer, she claimed to be entitled to the balance. *Held*, that the transfer of the account was not intended to be a provision for the wife, but merely a mode of conveniently managing her husband's affairs and consequently she was not entitled to the money. Marshall *v.* Crutwell, L. R., 20 Eq. 328.

In Massachusetts, where there is a statute prohibiting gifts from husband to wife, except of certain specified classes of property, it was *held* that a husband may, notwithstanding the statute, give his wife personal property of any kind, which, if unrevoked by him during his lifetime, will after his death give her a valid title to the property against his heirs. He may revoke the gift at any time, creditors may attach it as his property, and the wife can maintain no action at law in regard to it during his lifetime. To establish gifts of this description there should be clear, satisfactory and incontrovertible evidence, not only of the gift and delivery of the property, but of the separate custody of it by the wife. Marshall *v.* Jaquith, 134 Mass. 138.

1. Nichols *v.* Edwards, 16 Pick. (Mass.) 62; Betts *v.* Francis, 30 N. J. L. 152; Rich *v.* Mobley, 33 Ga. 85; Whitfield *v.* Whitfield, 40 Miss. 352; Hollowell *v.* Skinner, 4 Ired. (N. Car.) 165.

2. Kellogg *v.* Adams, 51 Wis. 138; s. c., 37 Am. Rep. 815; Harris *v.* Hopkins, 43 Mich. 272; s. c., 38 Am. Rep. 180.

**Gifts Between Parent and Child.**—If apparel is put on a boy, it is a gift in law. Haynes' Case, 12 Coke 113.

The delivery of money by one person to another, to whom the former has placed himself *in loco parentis*, is presumed to be a gift in law, and not a loan, and the

burden of proof is on any party who contends that it is a loan. Cox *v.* Bennett, 18 W. R. 519.

Where a father placed property in the possession of his son about the time he became of age, and suffered him to continue such possession uncontrolled for some time, *held* that a gift would be inferred, which could only be rebutted by express evidence that the transaction was a mere loan. Hollowell *v.* Skinner, 4 Ired. (N. Car.) L. 165; Skinner *v.* Skinner, 4 Ired. (N. Car.) L. 175; Lyler *v.* Eckhart, 1 Binn. (Pa.) 378; Young *v.* Glendenning, 6 Watts (Pa.) 509.

Where a father furnishes a house for a married son, and transfers possession of the furniture to the son, without any qualification at the time, a presumption arises that it was a gift, but it is a presumption of fact for the jury, and not one of law for the court. Betts *v.* Francis, 30 N. J. L. 152.

A father said to his son that he might have a certain colt if he would raise it. There was other evidence tending to show that the father intended the son to have the colt, but there was no evidence of delivery. *Held*, the title to the colt did not pass. Medloch *v.* Powell, 96 N. Car. 499.

A father loaned money and took a note and mortgage, payable to the daughter. *Held*, the delivery of these instruments to the father enured to the benefit of the daughter by way of advancement. Cerney *v.* Pawlot, 66 Wis. 262.

A father having purchased a piano, had it moved into his house, and two months afterwards, on the birthday of his daughter, made a birthday party, and in a formal and public manner presented it to her. The piano was not moved, and remained in the house where both resided. The gift was valid, and could not be attached as the father's property. Ross *v.* Draper, 55 Vt. 403.

So where a father, in the presence of his family, formally presented to his son a carriage in the carriage house, it is sufficient. Fletcher *v.* Fletcher, 55 Vt. 325.

A father branded certain cattle in his son's name, with the intention of making the son a gift of the cattle. He also had the brand recorded. *Held*, a sufficient symbolic delivery of the cattle. Hillebrent *v.* Brewer, 6 Tex. 45.

A father gave his daughter, then of age and living in his family, a female calf, whose dam had died, if she would bring it up, and she brought it up by hand and it was fed on the father's farm, and after it became a cow the milk was used in his family. No charge was made by the father for the board of the daughter or for the keeping of the cow, nor by the daughter for her work or for the milk of her cow. *Held*, that there was a sufficient proof of a gift and delivery to show property in his daughter as against a creditor of the father. Martrich *v.* Linfield, 21 Pick. (Mass.) 325.

Evidence that a decedent had stated positively that she had given certain specified property to her sons and had previously declared an intent to give it, and that one of the sons remained at her house until her death, warrants a finding of a complete gift *in præsenti*, and at all events a finding that all parties understood that there was a complete gift with no intention of revocation, and such possession as was possible. Harris *v.* Hopkins, 43 Mich. 272; s. c., 38 Am. Rep. 180.

To constitute a valid gift by a husband of his interest in the property of his wife to her children, the evidence must show that he either delivered such property, or assigned his interest therein to such children, or that he had made promises in reference thereto which he could not at any time legally revoke. Daubenspeck *v.* Biggs, 71 Ind. 255.

As to the presumption whether a delivery of property to a child is a gift or an advancement, see tit. ADVANCEMENT, vol. 1, p. 218. See also Wallace *v.* Riddick, 119 Ill. 151.

Where the donee of personal property was under the age of 21, and lived with his father, the donor, the possession of the donor of the gift is consistent with the donee's right, and is not even presumptive evidence of fraud. Sewell *v.* Glidden, 1 Ala. 52; Rector *v.* Danley, 14 Ark. 304; Snow *v.* Copley, 3 La. An. 610; Van Deusen *v.* Rowley, 8 N. Y. 358; Thacker *v.* Saunders, 1 Busb. (N. Car.) Eq. 145.

Where no fraud is shown, the voluntary relinquishment by the father to the son is good as against the donor's subsequent creditors. Randall *v.* Lang, 23 Ala. 751.

Where a son embarked in business and received money of his father for which he gave his father a note, such a loan cannot be changed into a gift by loose declarations of the father that he gave the money to the son. Where the

made under parental influence, and, therefore, invalid, and the burden of proof lies on the parent to rebut this presumption. Such a gift, though originally invalid, may be confirmed without any express act of confirmation, all that is requisite being proof of a deliberate, fixed and unbiassed determination on the part of the child that the gift shall not be impeached, which determination may be shown by the lapse of time during which the transaction is allowed to stand, or by other circumstances.[1]

**15. Proof of Gift.**—A gift is a fact, and, like any other fact, is a question for the jury.[2]

The mere fact of a delivery and acceptance, or permission to take, followed by possession, is not, of itself, considered sufficient to establish a gift, as these may be equally consistent with a loan or sale. The intention of the parties, as well as the acts done, are necessary in determining the character of the transaction. If, however, all the circumstances are such as indicate that a gift is intended, and such as usually accompany a gift, inducing the donee to believe that a gift was intended, the title to the goods will pass, although it was the secret intention of the donor not to make a gift. Full proof of circumstances sufficient to constitute a gift make the subsequent declarations that a gift was not intended inadmissible; but if the circumstances are equivocal, an explicit declaration of the donor's intention, made afterwards, is competent.[3]

The right to a gift largely depends on the meaning and intention of the donor as gathered by all the circumstances of the case. The situation, relation and circumstances of the parties, and of the subject matter of the gift, may be taken into consideration in determining the intent to give and the fact as to delivery.[4] Any circumstances which tend to show that the gift was a natural, reasonable act, such as strong affection of the donor for the donee, especially if the donee had previously done

father takes from the son an obligation to pay, the idea of a gift is not sustained. Roland *v.* Schrack, 29 Pa. St. 125.

1. Wright *v.* Vanderplank, 8 De G. M. & G. 133.

2. Hunt *v.* Hunt, 119 Mass. 474; Helm *v.* Martin, 59 Cal. 57; Thomas *v.* De Graffenreid, 17 Ala. 602; Boudreau *v.* Boudreau, 45 Ill. 480; Spouse *v.* Littlejohn, 22 S. Car. 358; Wing *v.* Merchant, 57 Me. 383; Hess *v.* Brown, 111 Pa. St. 124.

Whether the delivery of intoxicating liquor by an unlicenced saloon keeper to one who received and drank it was intended by the parties to be a sale or a gift, is a question of fact to be determined from all the evidence, and an instruction that "if the same was not then and there declared to be a gift, the law implies an agreement to pay the reasonable value thereof, and the transaction is a sale" is erroneous. Keiser *v.* State, 82 Ind. 379. See also French *v.* Smith, 58 N. H. 323.

3. Schouler Pers. Prop. 293; Betts *v.* Francis, 1 Vroom (N. J.) L. 152; McKane *v.* Bonner, 1 Bailey (S. Car.) 113; Minchin *v.* Merrill, 2 Edw. Ch. (N. Y.) 333. As where a father delivered money to his son under such circumstances as render it uncertain whether the transaction was a loan or a gift. Doty *v.* Willson, 47 N. Y. 580.

4. Taylor *v.* Henry, 48 Md. 550; Cooper *v.* Burr, 45 Barb. 9; Hepworth *v.* Hepworth, L. R., 11 Eq. 10. See, however, Priest *v.* Way, 87 Mo. 16.

the donor a favor,[1] the marriage of a daughter, or the setting up housekeeping by a married daughter;[2] the fact that the donor stood *in loco parentis* to the donee, although not legally adopted,[3] are circumstances favoring the sustaining of a gift. Also declarations of intention to give on the part of the donor before the time of the gift, the statements of the donor afterwards, if not made in his own interest, the continued use of or dominion over the article with the consent of the donor.[4]

On the other hand, circumstances showing that the donee, by reason of his confidential relations with the donor, had access to the property, and could have taken it without the owner's permission, possession without consent of the owner, the owner's previous acts or declarations inconsistent with giving, the fact that the donor retains the right to use or reclaim, or any circumstances which may indicate that a loan was intended, may be used to show that there was no gift.[5]

1. Rhodes *v.* Childs, 64 Pa. St. 18.

2. Nichols *v.* Edwards, 16 Pick. 62; Carter *v.* Buchanan, 9 Ga. 539; Rich *v.* Mobley, 33 Ga. 85; Betts *v.* Francis, 30 N. J. Law 152.

3. Cox *v.* Bennett, 18 W. R. 519; Fowkes *v.* Pascoe, 10 L. R., Ch. 343.

4. Rhodes *v.* Childs, 64 Pa. St. 18; McCluney *v.* Lockhart, 1 Bailey (S. Car.) 117; Doty *v.* Willson, 47 N. Y. 580; Strong *v.* Bird, L. R., 18 Eq. 315; Spouse *v.* Littlejohn, 22 S. Car. 358; Harris *v.* Hopkins, 43 Mich. 272.

5. Grey *v.* Grey, 47 N. Y. 552; Prickett *v.* Prickett, 20 N. J. Eq. 478; Hatton *v.* Jones, 78 Ind. 466; Roland *v.* Schrack, 29 Pa. St. 125; Nichols *v.* Edwards, 16 Pick. (Mass.) 62; Miller *v.* Eatman, 11 Ala. 609; Rich *v.* Mobley, 33 Ga. 85; Willie *v.* Backus, 52 Iowa 401; Selleck *v.* Selleck, 107 Ill. 401; Stevens *v.* Stevens, 2 Redf. (N. Y.) 265.

Where stock stood in a testator's name on the books of the corporation, the facts that the certificate is found in the executor's possession, and that the testator gave him a power of attorney to receive and assign any scrip or dividend due him from the company, are not conclusive evidence of a gift of the stock to the executor. Smith *v.* Burnet, 34 N. J. Eq. 219; s. c., 35 N. J. Eq. 314.

Where plaintiff's evidence tended to show that the property had been purchased by her brother (a minor who had been emancipated by his father some time before the purchase), and that it had then been *formally presented* to her by her brother in the presence of friends, *held*, that what was said on that occasion was admissible in evidence as a part of the *res gestæ;* and that the general circumstances of the family at the time might be shown to corroborate the direct testimony in relation to such alleged purchase and presentation. Wambold *v.* Vick, 50 Wis. 456.

A transfer of personalty in the nature of a bequest cannot be set aside merely because it shows an unnatural disposition on the donor's part and is wrong in morals, so long as there is no evidence that it was brought about by fraud or undue influence, and that the grantor was of a sufficiently sound mind to dispose of his property. Twist *v.* Babcock, 48 Mich. 513.

Where there is plenary proof of a gift, subsequent declarations of the donor that it was not intended are inadmissible. That chattels claimed by the defendant under the gift were in his possession at the death of the decedent donor who was living with him at the time, may be considered as showing completion of the gift without visible transfer. Bennett *v.* Cook (S. Car.), 6 S. E. Rep. 28.

A man and his wife filed a bill against the wife's father for the specific performance of an alleged oral agreement by him to convey them the premises on which they lived when the dwelling house thereon should be ready for occupancy. The father claimed that complainants held as tenants merely. *Held*, that the fact that taxes were assessed against the father was not conclusive evidence

against complainants, and that the payment of such taxes by the son in law was a significant fact in their favor. Fairfield *v.* Barbour, 51 Mich. 57.

**Weight of Evidence**—In an action for money loaned (the complaint also containing a count for money had and received, etc.) the defendant and one M testified (in effect) that they applied to H (the plaintiff's intestate) for loans of money to purchase certain stock (the defendant one hundred, and M fifty shares); that H assented, and gave M a check for the money with which to purchase the stock, including one hundred shares for himself; that M purchased the stock, and that, a day or two thereafter, the defendant, M and H being together, and M having the certificate of shares in his possession, the defendant and M proposed to give their notes for the money advanced to them, and that H declined to receive the notes, and told them that he made them a present of the stock; and that M thereupon handed to defendant his one hundred shares, gave H his, and took fifty shares himself. Depositions of these two witnesses were also read in evidence, in which (as was claimed by the plaintiff) the witnesses gave a different account of the transaction. At the close of the evidence, the court in effect instructed the jury that the mere application of M and the defendant to H to make the loan, and the consent of H to such application, did not necessarily constitute a loan from H to the defendant, or from H to M, if H all the time intended the transaction to be a gift and not a loan. The verdict was for the defendant. *Held*, that the facts testified to tended to show that the transaction was a gift and not a loan, and that the instruction was correct and applicable to the evidence; that if, as contended by appellant, each of the witnesses contradicted himself and was contradicted by the other, the jury was the sole judge of the weight to be given to their entire testimony and to every part thereof, and that therefore the verdict could not be disturbed. Helm *v.* Martin, 59 Cal. 57.

When a married man, with a wife living, and a family of legitimate children, lives apart from them in illegal intercourse with another woman, by whom he has an illegitimate child, and makes a conveyance of real estate for the benefit of that child, with remainder to the mother, and another conveyance to the mother for her own benefit, and the child dies, and it is not shown that the grantor was incapable of making the deeds, either by reason of the weak state of his intellect, or by reason of intoxication at the time of execution, or that there was fraud or undue influence, a court of equity will, after the death of the grantor, sustain the conveyances in favor of the mother as against the legitimate children. Conley *v.* Nailor, 118 U. S. 127.

Where a person bids off property at an administrator's sale in his own name, and pays for it with his own means, and the deed, by his consent, is made to him and his son, then twenty-four years old, and living with him, the transaction in making the deed will amount to a voluntary settlement of one half of the property by the father upon the son, beyond the power of the former afterward to retract. Eckert *v.* Gridley, 104 Ill. 306.

Where an absolute gift has been made as an advancement, the parties may subsequently, by mutual agreement, resettle the terms of the advancement so as to make it a gift for life only. Harper *v.* Parks, 63 Ga. 705.

Defendants having let a job to plaintiffs for a specified price, it was agreed between them that $5,000 thereof should be retained by defendants for a purpose for which, for aught that appears to the contrary, it has been employed. The agreement for the retention was repeatedly recognized, and at length completely carried out by the co-operation of the parties. *Held*, that this is effectual as a gift of the $5,000, or an abatement of that sum from the contract price. Butler *v.* Bohn, 31 Minn. 325.

**Parol Gifts of Real Estate.**—To take a parol gift of land out of the operation of the statute of frauds, the gift must be shown by proof which is credible and of such weight and directness as to make out the facts alleged beyond a doubt. The evidence must designate the land, must show open, notorious, exclusive possession taken and maintained in pursuance of the gift; that the improvements which constitute the consideration were made on the faith of the promised conveyance, and that compensation in damages would be inadequate.

Where the contracting parties are not parent and child, such gift may be proved by the acts and declarations of the parties, either together or separate-

**16. Effect of Gift**—*a. As Between the Parties.*—As between the parties to the transaction, the effect of a gift, if completely executed, is to effectually transfer the full title and ownership of the property from the donor to the donee, as much so, as if the article had been sold for a valuable consideration. It is not then

ly; and, if the contract be of recent date, the above rules will be more rigorously applied than if a long time has elapsed and the donee has been in continuous adverse possession for many years.

In an action of ejectment the defence was a parol gift to the defendant, A, of the lot by B, his uncle. In support of this, A introduced the testimony of eight or ten witnesses to the effect that B erected a house on the lot in 1867, and that while the building was going up he stated that it was being built for A; that to several of the witnesses he said he had money of A's in his hands, which he was using to build the house, and that when it was completed he intended to give the lot to A; that to others B stated, after the house was finished and A had taken possession, that he had given A the lot as a gift, and it was his. A retained open, notorious and exclusive possession of the premises for about fifteen years, without any claim being made by B or his representatives. During this time he built a kitchen, pig pen and chicken house, laid a board walk, sodded the yard and set out trees. After B's death his residuary legatees claimed the premises and brought ejectment.

*Held*, that the evidence was sufficient to support a parol gift to A, and to take the case out of the operation of the statute of frauds; and that, in view of the long time which had elapsed, the death of B, and the consequent incompetency of A as a witness, it would be inequitable to oblige him to resort to his action at law for damages. Allison *v.* Burns, 107 Pa. St. 50.

A father made a parol gift of land to his son, and the latter entered into possession and made valuable improvements in reliance upon such gift. *Held*, the gift was irrevocable in equity, and a conveyance of the land would be decreed. Hardesty *v.* Richardson, 44 Md. 617; s. c., 22 Am. Rep. 57; Freeman *v.* Freeman, 43 N. Y. 34; Kurtz *v.* Hibner, 55 Ill. 514.

Where a son goes into possession of his father's lands and makes improvements, a jury is not to infer from that, in the absence of other evidence, that the father gave him the land. Loose declarations of the father in casual conversations calling it his son's property, without any explanation as to how it came to be his, are not sufficient evidence of a gift. Hugus *v.* Walker, 12 Pa. St. 173.

One who is induced to enter on and improve land by a parol promise that the land shall be settled on him as a gift or advancement, will not be evicted until compensation has been made him for betterments which he has made on the property. Hedgepeth *v.* Rose, 95 N. Car. 41.

A parol gift of lands for which a deed was intended to be given, is not valid against a subsequent purchaser from the donor, although the donee is in possession at the time of the conveyance. Giebner *v.* Patterson (Pa.), 5 Cent. Rep. 723.

Possession of lands under parol gift by unqualified donee in fee, is adverse to the donor. International Bank of St. Louis *v.* Fife (Mo.), 14 West. Rep. 765.

As between father and son, or son in law, possession of land alone, under promise of gift, is not sufficient to entitle donee to specific performance. But where the donee has accepted the promise, entered into possession of the land, made improvements upon faith of it, and thus changed his condition, the donor will be required to make good the gift. It is otherwise, however, where donee made improvements not in reliance upon the gift. Anderson *v.* Scott (Mo.), 14 West. Rep. 502.

Parol gift of land followed by actual possession does not give title to land maintainable at law. Walsh *v.* McIntyre (Md.), 11 Cent. Rep. 530.

Legal title to land does not pass by parol gift by father to son, and making valuable improvements by donee. Decree of specific performance is necessary to pass legal title so as to recover in ejectment suit by heir of donee against subsequent purchaser from donor. Howell *v.* Elsberry (Ga.), 5 S. E. Rep. 96.

in the power of either the donor or the donee to revoke it without the consent of the other.[1]

The gift is not revoked or annulled by a subsequent will or codicil making a different disposition of the property.[2] Nor does it affect the validity of the gift that the property had been previously bequeathed by will.[3]

The gift binds the donor's legal representatives as well as himself, and after the death of the donor they cannot revoke it if completely executed. The donor's executor or administrator have no authority over it, and nothing to do with it, unless the estate is insolvent and the gift was made in fraud of creditors. The property given forms, ordinarily, no part of the decedent's estate.[4]

If the property is delivered to a trustee for the benefit of the donee, the trustee, if he accepts the trust, must execute it, and the *cestui que trust* has a right of action against him if he does not. The donor or settlor has no control over it unless some reservation is lawfully made in the trust. So, in case of a valid declaration of trust, like other gifts when completely executed, it is irrevocable.[5]

*b. As to Bona Fide Purchasers.*—A gift is not valid against

1. Fulton *v.* Fulton, 48 Barb. (N. Y.) 581; Faxon *v.* Durant, 9 Met. (Mass.) 339; Kerrigan *v.* Rautigan, 43 Conn. 17; Sanborn *v.* Goodhue, 28 N. H. 48; Kellogg *v.* Adams, 51 Wis. 746; Ellison *v.* Ellison, 6 Ves. 656; Kekewich *v.* Manning, 1 De G. M. & G. 176; Sanborn *v.* Goodhugh, 28 N. H. (8 Fost.) 48; Sargeant *v.* Baldwin (Vt.), 6 N. E. Rep. 281.

Nor can it be revoked in part. Minor *v.* Rogers, 40 Conn. 512.

2. McKane *v.* Bonner, 1 Bailey (S. Car.) 113; Sanborn *v.* Goodhue, 28 N. H. (8 Fost.) 48; Marston *v.* Marston, 21 N. H. (1 Fost.) 491.

3. Parker *v.* Ricks, 8 Jones (N. Car.) 447.

4. Van Deusen *v.* Rowley, 4 Seld. (N. Y.) 358; Barton *v.* Gainer, 3 H. & N. 387; Stone *v.* Hackett, 12 Gray (Mass.) 227; Gardner *v.* Merritt, 32 Md. 78; Howard *v.* Savings Bank, 40 Vt. 597; Marsh *v.* Fuller, 18 N. H. 360.

On April 26th, 1878, H owed F $1,131.16 payable in four years, secured by bond and deed of trust. On March 7th, 1879, F by formal deed assigned this debt to B F, trustee, for the benefit of certain children and grandchildren of F, and delivered the bond to such trustee. On May 25th, 1880, H procured from F a receipt for $400 to apply as a credit on the bond, but *nothing had in fact been paid* thereon, nor was there *in fact anything due from* F to H. On November 29th, 1881, without the consent of the trustee or beneficiaries, F executed and acknowledged a formal release of the deed of trust which had been executed to secure the $1,131.16. F, having died soon afterwards, the trustee B F brought suit in chancery to annul and set aside said receipt and release, and to enforce payment of the balance of the debt remaining unpaid, by sale of the trust property. *Held*,

1. That an assignment of a chose in action is not one of the writings required by our recording acts to be recorded.

2. That F having by absolute deed of assignment assigned the debt of $1,131.16 and delivered the bond to the trustee, the assignment became irrevocable, and he had no longer any control over it, and that said "receipt" and "release" were both inoperative against the trustee and the beneficiaries in the deed of assignment.

3. That a court of equity has jurisdiction of a suit brought to annul and set the receipt and release aside. Fleshman *v.* Hoylman, 27 W. Va. 728.

5. Wyble *v.* McPheters, 52 Ind. 393; Miller *v.* Billingsly, 41 Ind. 480; Kekewich *v.* Manning, 1 De G. M. & G.

*bona fide* purchasers without notice of the gift, unless, perhaps, when the circumstances of the sale are such as should have put the purchaser on his guard as to change of ownership.[1]

*c. Validity as Against Creditors.*—The chief exception to the validity of executed gifts is that in favor of creditors. The ground on which creditors may impeach the validity of a gift is that of fraud. By the statute 13 Eliz., ch. 5, gifts of goods and chattels, as well as of lands, made with the intent to hinder, delay or defraud creditors, were void against the person injured by the fraud. This statute has been substantially re-enacted in almost every State, and is probably common law in such States as have not formally enacted it.[2]

The general principle of law is that, in order to make a conveyance fraudulent as to creditors, and void on that account, both the grantor and grantee shall have participated in the fraudulent intent. This rule, however, does not apply to cases of voluntary conveyances or gifts. As the donee is a volunteer, obtaining the property without consideration, the courts will not assist him in retaining the subject of the gift against the claims of creditors whom the donor has attempted to defraud by making the gift. It is, therefore, sufficient, in order to avoid a gift against creditors, to prove that the donor intended to hinder, delay or defraud creditors thereby.[3] With this exception, the same principles of law apply in cases of avoiding gifts in favor of either existing or subsequent creditors, which hold good in other fraudulent conveyances or transfers of property.[4]

**VI. Gifts Causa Mortis—1. Definition.**—A gift *causa mortis*, or in expectation of death, is a gift made by a person in sickness who, apprehending his dissolution near, delivers or causes to be delivered to another the possession of any personal goods to

176; Stone *v.* Hackett, 12 Gray (Mass.) 227.

A gift from parent to child can no more be revoked by the donor than any other gift. Smith *v.* Smith, 7 C. & P. 401; Pierson *v.* Heisey, 19 Iowa 114; Kellogg *v.* Adams, 51 Wis. 138; Wambold *v.* Vick, 50 Wis. 456; Kerrigan *v.* Rantigan, 43 Conn. 17; Grangise *v.* Arden, 10 Johns. 293; Kranz *v.* Kroger, 22 Ill. 74; Jones *v.* Lock, L. R., 1 Ch. 25.

1. Stone *v.* Hackett, 12 Gray (Mass.) 227; Black *v.* Thornton, 31 Ga. 641.

2. 2 Kent Com. 440.

3. Story Eq. Jur. 351, 355; Clark *v.* Chamberlain, 13 Allen (Mass.) 257; Clark *v.* Depew, 25 Pa. St. 509; Mohawk Bank *v.* Atwater, 2 Paige (N. Y.) 54; Spaulding v. Blythe, 73 Ind. 93; Lee *v.* Figg, 37 Col. 328; Foley *v.* Bitter, 34 Md. 646; Lassiter *v.* Davis, 64 N. Car. 498; Hitchcock *v.* Kiely, 41 Conn. 611; Laughton *v.* Harden, 68 Me. 208; Watson *v.* Riskamire, 45 Iowa 231; Beecher *v.* Clark, 12 Blatchf. (U. S.) 256; Stearns *v.* Gage, 79 N. Y. 102; Bibber *v.* Mathis, 52 Tex. 406; Goodman *v.* Wineland, 61 Md. 499; Carter *v.* Grimshaw, 49 N. H. 100; Iles *v.* Cox, 83 Ind. 577; Bohannan *v.* Combs, 79 Mo. 305; Cumbaugh *v.* Kugler, 2 Ohio St. 373; Young *v.* White, 25 Miss. 146.

A father gave his son a calf. The son kept it two years and a half at his own expense. When it was attached by a creditor of the father for a debt contracted before the gift was made. *Held*, that after the creditor had slept on his rights so long, and the son had enhanced the value of the gift, the court would not apply the principle that a man must be just before he is generous. Allen *v.* Knowlton, 47 Vt. 512.

4. See title Fraudulent Conveyances.

keep as his own in case of the donor's decease. A gift of a chattel or chose in action, made by a person in his last illness, or *in periculo mortis*, subject to the implied conditions that if the donor recovers, or if the donee die first, the gift shall be void.[1]

**2. What May be Given.**—It would appear, by the definition above quoted, that only personal property can be given in this manner. It has also been stated by the courts that real estate cannot be included in a gift *causa mortis*.[2] In a recent case before the supreme court in New York, however, a delivery of a deed of real estate was sustained as such a gift. The question as to whether land was a proper subject for a gift was not raised.[3]

By the law, as it stands at present, all kinds of personal property, with few exceptions, may be the subject of a valid gift *causa mortis*, whether the property be corporeal or incorporeal. The doctrine of equitable assignments, above noticed, applies to such gifts of choses in action as well as in gifts *inter vivos*.[4]

**1.** 2 Bl. Com. 514; Bouv. Law Dict.; Smith *v.* Ferguson, 90 Ind. 229; s. c., 46 Am. Rep. 216.

Three things are necessary to a gift *causa mortis*. 1st. It must be in view of the donor's death. 2nd. The donor must die of the peril. 3rd. There must be a delivery. Grimes *v.* Hone, 49 N. Y. 17; s. c., 10 Am. Rep. 313; Emery *v.* Clough, 63 N. H. 552; Kiff *v.* Weaver, 94 N. C. 274; s. c., 55 Am. Rep. 601; Smith *v.* Ferguson, 90 Ind. 229; s. c., 46 Am. Rep. 216; Parcher *v.* Savings Inst., 78 Me. 470; Taylor *v.* Henry, 48 Md. 550; Dickeschild *v.* Exchange Bank, 28 W. Va. 340.

Gifts *causa mortis* occupy a middle ground between gifts *inter vivos* and legacies. It differs from an ordinary gift in being revocable although the property may have been fully delivered, and only becomes fully operative upon the death of the donor. In England, by statute, it is liable to legacy tax. It differs from a legacy in not being required to be made under the forms required for a will, probate is unnecessary and the executor's assent is not required. 2 Kent Com. 444–448; Emery *v.* Clough, 63 N. H. 554.

Such transfers of property are not, as a rule, favored by the courts, for the reason that they are open to the objections of uncertainty, which the law seeks to avoid, in reference to wills, by its strict provisions and precautions as to their execution and proof. Great strictness and clear proof are therefore required to establish such gifts, and they can only be upheld when the intention of the donor is clear and definite, and such intent is fully carried out by execution. Parsons' Contracts (6th ed.) 2237; Gano *v.* Fish, 43 Ohio St. 462; s. c., 54 Am. Rep. 819; Delmotte *v.* Taylor, 1 Redf. (N. Y.) 417; Hatch *v.* Atkinson, 56 Me. 324; Marshall *v.* Berry, 13 Allen (Mass.) 43, note.

**2.** Meach *v.* Meach, 24 Vt. 591; Gilmore *v.* Whitesides, Dudley (S. Car.) 13.

**3.** On May 8th, 1883, the plaintiff, being very sick and expecting to die, executed a warranty deed of the premises and delivered it to a third person with directions to deliver it to the defendant, a nephew, after the death of the plaintiff. May 22nd, 1883, the plaintiff, being annoyed by the remonstrances and objections of other nephews and nieces, directed the third person to deliver the deed to the defendant. And it was on May 24th, delivered to him and by him recorded. *Held*, that the gift was *causa mortis* and not *inter vivos*, and was revoked by the plaintiff's recovery from sickness. Curtiss *v.* Barrus, 38 Hun (N. Y.) 165.

**4.** Duffield *v.* Elwes, 1 Beigh, N. S. 497; decided in 1827, overruling many contrary decisions. Hunt *v.* Beach, 5 Madd. Ch. 351; Veal *v.* Veal, 27 Beav. 303; Rankin *v.* Weguelin, 27 Beav. 309; Druke *v.* Heiken, 61 Cal. 346; s. c., 44 Am. Rep. 553; Brown *v.* Brown, 18 Conn. 410; Chase *v.* Redding, 13 Gray (Mass.) 418; Harris *v.* Clark, 2 Barb. (N. Y.) 94; Warring *v.* Edmonds, 11 Md. 424; Westerlo *v.* De Witt, 36 N. Y. 340; Turpin *v.* Thompson, 2 Metc. (Ky.)

It is not settled, generally, in this country, whether the delivery of a certificate of stock, without some assignment of the shares, is a good gift *causa mortis*. It seems, in England, that it is not.[1] Nor is such a gift good in New Jersey.[2] In New York, a delivery of certificates of stock is good as a gift *causa mortis*, without an assignment, or without a completed transfer of the legal title.[3]

There may also be doubt as to whether a person may transfer the whole of his property as a *donatio causa mortis*. In a Vermont case, it is held that such a gift may include the whole of the donor's property.[4] In Pennsylvania, it is decided in one case that the principal part may be given;[5] but in another, that the whole may not be so disposed of as being of a testamentary character, and contrary to the spirit of the law of wills.[6] A *dictum* in Massachusetts agrees with the latter view, that such a gift can apply only to certain specific articles, and not to a disposition of the donor's estate.[7]

The principal exception to the rule that all kinds of personal property, including choses in action, may be given *causa mortis* is that of the donor's own promissory notes. While notes of a third person, payable to the donor, may be thus given, his own notes cannot be. The mere promise of the maker, being a *nudum pactum*, cannot be recovered on as a gift *causa mortis* any more than a gift *inter vivos*.[8]

Bills, bonds and promissory notes, and all other evidences of debt, although payable to order, and not endorsed, may be given. Where a bond or promissory note, secured by a mortgage, is given, the mortgage goes with the bond or note, although the mortgage is not mentioned in the transfer, and is kept in the donor's possession.[9]

421; Austin *v.* Mead, 15 L. R., Ch. Div. 651; Sessions *v.* Moseley, 4 Cush. (Mass.) 87; Caldwell *v.* Renfrew, 33 Vt. 213; Bates *v.* Kempton, 7 Gray (Mass.) 382; Champney *v.* Blanchard, 39 N. Y. 111; Wing *v.* Merchant, 57 Me. 383, 429.

1. Moore *v.* Moore, L. R., 18 Eq. 474; Pennington *v.* Gittings, 2 Gill & J. (Md.) 208; Lambert *v.* Overton, 13 W. R. 227.

2. Egerton *v.* Egerton, 17 N. J. Eq. 419.

3. Walsh *v.* Sexton, 55 Barb. 251.

The donor owned sixty shares of stock in a corporation and executed an assignment of twenty shares which he delivered to his wife to be delivered to the plaintiff. *Held*, sufficient and the administrator was ordered to make the legal transfer. Grimes *v.* Hone, 55 Barb. (N. Y.) 251.

4. Meach *v.* Meach, 24 Vt. 591.

5. Michener *v.* Dale, 23 Pa. St. 59. See Dickeschild *v.* Exchange Bank, 28 W. Va. 341.

6. Headley *v.* Kirby, 18 Pa. St. 326.

7. Marshall *v.* Berry, 13 Allen (Mass.) 43.

8. Antrobus *v.* Smith, 12 Ves. 39; Pennington *v.* Gittings, 2 Gill & J. (Md.) 208; Blanchard *v.* Williamson, 70 Ill. 647; Parish *v.* Stone, 14 Pick. (Mass.) 198; Holliday *v.* Atkinson. 5 B. & C. 501; Drury *v.* Smith, 1 P. Wms. 404; Raymond *v.* Sellick, 10 Conn. 484; Smith *v.* Kittridge, 21 Vt. 238; Smith *v.* Smith, 30 N. J. Eq. 564; Vorhees *v.* Woodhull, 33 N. J. Law 482; Harris *v.* Clark, 3 N. Y. 93; Dodge *v.* Pond, 23 N. Y. 69; Starr *v.* Starr, 9 Ohio St. 74; Candor & Handerson's Ap., 27 Pa. St. 119; Flint *v.* Pattee, 33 N. H. 520; Second Nat. Bank *v.* Williams, 13 Mich. 282; Brown *v.* Moore, 3 Head (Tenn.) 671.

9. Turpin *v.* Thompson, 2 Metc.

The donor's own check may be given, but until payment or acceptance by the bank, the transaction is incomplete, and the death of the drawer before payment or acceptance operates as a revocation of the gift, unless the donee, prior to the donor's death, had negotiated it to one who received it for value, without notice.[1]

It has been held that a life insurance policy, payable to the

(Ky.) 420; Waring *v.* Edmonds, 11 Md. 424; Wright *v.* Wright, 1 Cow. (N. Y.) 598; Grover *v.* Grover, 24 Pick. (Mass.) 261; Sessions *v.* Moseley, 4 Cush. (Mass.) 87; Bates *v.* Kempton, 7 Gray (Mass.) 382; Coutant *v.* Schyler, 1 Paige (N. Y.) 316; Kipp *v.* Weaver, 94 N. Car. 274; s. c., 55 Am. Rep. 601; Brown *v.* Brown, 18 Conn. 414.

A promissory note payable to order and not endorsed is the subject of a gift *causa mortis*, and such a gift carries with it the mortgage by which it is secured. Druke *v.* Heiken, 61 Cal. 346; s. c., 44 Am. Rep. 553.

A certificate of deposit, payable to donor's order and not endorsed but delivered to a third person for the donee, in anticipation of death, is a good gift *causa mortis*, and passes to the donee. Connor *v.* Root, Colo., Mch. 1888.

1. Hewitt *v.* Kaye, 6 L. R., Eq. 198; Beak *v.* Beak, 13 L. R., Eq. 489; Simmons *v.* Savings Society, 31 Ohio St. 457; Second National Bank *v.* Williams, 13 Mich. 282; Matter of Smither, 30 Hun (N. Y.) 632; Tate *v.* Hibbert, 2 Ves. Jr. 111; Rolls *v.* Pearce, L. R., 5 Ch. Div. 730; Beals *v.* Crowley, 59 Cal. 665.

**Quære** whether a bank check can be the subject of a *donatio causa mortis?* See Walter *v.* Ford, 74 Mo. 195; s. c., 41 Am. Rep. 312.

A certificate of deposit payable to bearer may be given. Brooks *v.* Brooks, 12 S. Car. 422.

A certificate of deposit in these terms—

"EVANSVILLE NATIONAL BANK,

"EVANSVILLE, IND., Sept. 8, 1875.

"H. M. Chaney has deposited in this bank twenty-three thousand five hundred and fourteen $\frac{70}{100}$ dollars, payable in current funds, to the order of himself, on surrender of this certificate properly endorsed, with interest at the rate of six per cent. per annum, if left for six months.

"$23,514.70. HENRY REIS,
"Cashier."

—may, as a subsisting chose in action be the subject of a valid gift, if the person therein named endorse and deliver it to the donee, and thus vest in him the whole title and interest therein, or so deliver it without endorsement, as to divest the donor of all present control and dominion over it, and make an equitable assignment of the fund, which it represents and describes. Basket *v.* Hassell, 107 U. S. 602.

A debt due the donor from the donee may be given. Gardner *v.* Gardner, 22 Wend. (N. Y.) 526; Blasdel *v.* Locke, 52 N. H. 238.

The holder of notes of her grandson destroyed them, afterwards stating that she expected to live only a short time, and in the event of her death did not desire him to be obliged to pay them. *Held*, a valid gift of the amount of the notes, and that the acceptance of the donee would be presumed. Darland *v.* Taylor, 52 Iowa 503.

A delivery of a check on the donor's banker, in his last illness, payable "to ——— or bearer," and signed by the donor, is an adequate gift of the amount if the donee receives the money from the banker in the donor's lifetime, or before the banker had notice of the donor's death; or if the donee negotiates the check for a valuable consideration, or in payment of a debt; but such check will not operate as an appointment of so much if the donee retains it in his possession till after the donor's death. Tate *v.* Hibbert, 2 Ves. Jr. 111.

A lady, during the night in which she died, signed and handed to a trustee of a charity, established by herself, a check for £600 for the use of the charity. The lady died, before morning, so that the check could not possibly be cashed before the testator's death. *Held*, that there was no *donatio causa mortis*, and that the money belonged to the personal estate of the deceased. Hewitt *v.* Kaye, L. R., 6 Eq. 198.

An uncle on his death bed had delivered to his nephew a check for £4,000.

legal representatives of the assured, can be given *causa mortis* by delivery of the policy without an assignment.[1]

So a delivery to a donee, or to a third person for him, of a savings bank book, containing entries of deposits to the credit of the donor, with the intent to give the donee the deposits represented by the book, is a complete gift of the deposits, although unaccompanied by an assignment.[2]

and with it his banker's pass book. The check was not presented until after the donor's death. *Held*, that the intended gift failed. Beak *v.* Beak, L. R., 13 Eq. 489.

A husband being resident at St. Remo, in Italy, in his last illness drew his checks on his London bankers payable to order, and gave them to his wife, who endorsed them to her bankers at St. Remo and paid them into their bank. The checks were not presented for payment in London till after his death. *Held*, the checks were good gifts *causa mortis*, and that the widow was entitled to the proceeds. Rolls *v.* Pearce, L. R., 5 Ch. Div. 730.

On the day before he died the plaintiff's testator delivered to the defendant, with the intention of giving it to her, a bank check drawn by another to testator's order and endorsed in blank by him. The check was not presented for payment until after the testator's death. *Held*, a valid gift. Burke *v.* Bishop, 27 La. Ann. 465; s. c., 21 Am. Rep. 567.

1. Gourley *v.* Leisenbigler, 51 Pa. St. 345; Witt *v.* Amis, 1 B. & S. 109; Amis *v.* Witt, 33 Beav. 619.

2. Pierce *v.* Boston Five Cent Savings Bank, 129 Mass. 425; Tillinghast *v.* Wheaton, 8 R. I. 536; Hill *v.* Stevenson, 63 Me. 364; Camp's Appeal, 36 Conn. 88.

A deposit in a savings bank may be the subject of a gift *causa mortis*, and the gift may be proved by the delivery of the bank book, although unaccompanied by an assignment. A donee *causa mortis* of a savings bank book may maintain an action in the name of the administrator of the estate of the donor, and without his consent, against a bank to recover the amount deposited. A, in contemplation of death, delivered to B a sealed package, informing B that it contained money and savings bank books, with directions what was to be done with the property. On A's death, B opened the package and found therein a sum of money and certain savings bank books, with a writing signed by a A, stating where he wished to be buried, and that whatever was left, besides paying all bills and expenses, was to be divided among certain persons named. *Held*, that there was a valid gift *causa mortis* to B in trust. Pierce *v.* Boston Five Cent Savings Bank, 129 Mass. 425; s. c., 37 Am. Rep. 371.

*Contra*, McGonnell *v.* Murray, 3 Ired. Eq. R. 460; Ashbrook *v.* Ryon, 2 Bush (Ky.) 228; Walsh's Appeal (Pa.), 15 Atl. Rep. 450.

It has been suggested that the cause of the difference in the decision of these two cases from the law as stated in the text, is the fact that in some savings banks the pass book is not balanced every time a deposit is made or money drawn, as is usually customary, but while the deposits are entered when made the book is only balanced periodically, and this is not supposed to represent the exact amount on deposit, which the books as ordinarily kept do. They are hardly different from the pass books of banks of deposit, which it is not claimed will change the title to the money on deposit by delivery. 2 Schouler Pers. Prop., §§ 172, 173. See Beak *v.* Beak, L. R., 13 Eq. 489.

S on the 3rd of April, 1877, being sick at the time, gave C a written order on a savings bank, for the payment to him of a sum of money on deposit in said bank in her name. A memorandum was added, "The book must be sent with this order." At the same time she gave C a written order on G, in whose possession her book of deposit then was, requesting G to deliver said book to C. The order for the payment of the money was presented at the bank by C without the bank book, and he was told the money was there, and the order was in proper form, but could not be paid till the book was produced. S died on the 10th of July, 1877, at a different place from that where the order was given. In an action by C against the administrator of S to recover the amount of the order, the above facts were proven, but there was no proof

**3. Expectation of Death.**—It is essential to the validity of a gift *causa mortis* that it be made in expectation or contemplation of the death of the donor. They can only be made by a person who believes his end to be near, and who makes the gift in view of, and because of, his approaching death.[1]

It is not necessary that the apprehension of death shall come from illness. It may arise from infirmity or old age, or from external and anticipated danger.[2] It must, however, be more than a vague, groundless, uncertain apprehension. The donor must be in a condition to fear approaching death from a proximate or impending peril, or from illness which precedes dissolution.[3]

Where a gift is made during the last illness of the donor, and a short time before his death, it is presumed to be a gift *causa mortis*, and not *inter vivos*, and, consequently, revocable by the recovery of the donor. The burden of proof is on those who would show it to be a gift *inter vivos*, and, therefore, absolute and irrevocable.[4]

that C ever had the bank book in his possession, or that he ever made any efforts to get it; nor did it appear of what disease S died, or what was her disease at the time the order was given. *Held*, that standing as the money did in the name of S at the bank when she died, it devolved upon her legal representative, he having properly possessed himself of it, and the plaintiff had no enforceable claim against the defendant or the fund. Conser *v.* Snowden, 54 Md. 175; s. c., 39 Am. Rep. 368.

1. Tate *v.* Hibbert, 2 Ves. Jr. 111; Blount *v.* Burrow, 1 Ves. Jr. 546; Thomson *v.* Dougherty, 12 Serg. & R. (Pa.) 448; Clark *v.* Depew, 25 Pa. St. 509; Gannard *v.* Eslava, 20 Ala. 732; Trimble *v.* Ratcliffe, 9 B. Mon. (Ky.) 511; Hawkins *v.* Moffit, 10 B. Mon. (Ky.) 81; Lawson *v.* Lawson, 1 P. Wms. 441; Gourley *v.* Linsenbigler, 51 Pa. St. 345; Rhodes *v.* Childs, 64 Pa. St. 18; Robinson *v.* Ring, 72 Me. 144; Case *v.* Dennison, 9 R. I. 88; Irish *v.* Nutting, 47 Barb. (N. Y.) 370; Sheegog *v.* Perkins, 4 Baxter (Tenn.) 273; Gars *v.* Simpson, 4 Cold. (Tenn.) 288; Knott *v.* Hogan, 4 Metc. (Ky.) 99.

2. 2 Kent Com. 444; Grymes *v.* Hone, 49 N. Y. 17.

Old age and feeble health is not sufficient foundation for a gift *causa mortis*. The apprehension must be of imminent death, and not of death as the possible result of sickness. Robson *v.* Jones, 3 Del. Ch. 51.

3. Michener *v.* Dale, 23 Pa. St. 59; Gourley *v.* Linsenbigler, 51 Pa. St. 345; Linsenbigler *v.* Gourley, 56 Pa. St. 166; Smith *v.* Dorsey, 38 Ind. 451; Craig *v.* Kittridge, 46 N. H. 57; Dexheimer *v.* Gautier, 5 Rob. (N. Y.) 216; Irish *v.* Nutting, 47 Barb. 370.

Nichols *v.* Adams, 2 Whart. (Pa.) 17, a leading case on gifts *causa mortis* in general, is criticised as going too far in stating that it is not indispensable that a gift *causa mortis* should be made *in extremis*.

In Tennessee it has been *held* that the anticipation of death to a soldier enlisting in the army was sufficient foundation for a gift. Gars *v.* Simpson, 4 Cold. (Tenn.) 288. See Virgin *v.* Gaither, 42 Ill. 39. In New York it has been decided to the contrary in a similar case. Irish *v.* Nutting, 47 Barb. 370; Sheldon *v.* Button, 5 Hun (N. Y.) 110. See also Gourley *v.* Linsenbigler, 51 Pa. St. 345, holding such gift void.

If one deposits money to be given to a charity if he never returns from an intended long journey, it is not a gift *causa mortis*, although the donor never returns. Roberts *v.* Draper, 18 Ill. App. 167.

The expectation or apprehension must be of death, and not of sickness or disability. First National Bank *v.* Balcom, 35 Conn. 351.

4. Gardner *v.* Parker, 3 Madd. 184; Lawson *v.* Lawson, 1 P. Wms. 441; Emery *v.* Clough, 63 N. H. 553; Rhodes *v.* Child, 64 Pa. St. 18; Allen *v.* Polereczky, 31 Me. 338; Candois Appeal,

It is not necessary that there should be any express qualification in the transfer or delivery to make it a gift *causa mortis*. It may be inferred to be such from the attending circumstances, although the written transfer and the delivery be absolute.[1]

**4. Delivery.**—The subject of a gift *causa mortis* must be delivered, or the gift is not complete or valid.[2]

The law as to the kind of delivery required is substantially the same as in gifts *inter vivos*. As a rule, the best delivery of which an article is capable is necessary.[3] A delivery by symbol, when

27 Pa. St. 119; Thompson *v.* Thompson, 12 Tex. 327.

A person two days before his death gives another a bond saying, "There, take that and keep it." This was *held* a gift *causa mortis* and not *inter vivos*. Gardner *v.* Parker, 3 Madd. 184. But if it appears that an absolute and irrevocable gift was intended, the fact that the donor was on his death-bed, expecting to die, would not convert it to a gift *causa mortis*. Edwards *v.* Jones, 1 N. Y. & Cr. 226.

1. Grymes *v.* Hone, 49 N. Y. 17.

2. Moore *v.* Moore, L. R., 6 Eq. 474; Singleton *v.* Cotton, 23 Ga. 261; McKenzie *v.* Downing, 25 Ga. 669; Bradley *v.* Hunt, 5 Gill & J. (Md.) 54; Smith *v.* Downey, 3 Ired. (N. Car.) Eq. 268; Campbell's Estate, 7 Pa. St. 100; Emery *v.* Clough, 63 N. H. 552; Daniel *v.* Smith, 64 Cal. 346; Taylor *v.* Henry, 48 Md. 550; Darland *v.* Taylor, 52 Iowa 503; McCord *v.* McCord, 77 Mo. 166; s. c., 46 Am. Rep. 9; Conser *v.* Snowden, 54 Md. 175; s. c., 39 Am. Rep. 368; Robson *v.* Jones, 3 Del Ch. 51; Kiff *v.* Wilson, 94 N. Car. 274; s. c., 55 Am. Rep. 601; Smith *v.* Ferguson, 90 Ind. (N. Car.) 229; s. c., 46 Am. Rep. 216; Daniel *v.* Smith, 64 Cal. 346; Chevallier *v.* Wilson, 1 Tex. 161; Drew *v.* Hagerty (Me.), 17 Atl. Rep. 63; Fearing *v.* Jones (Mass.), 20 N. E. Rep. 199; Yancey *v.* Field (Va.), 8 S. E. Rep. 721.

This is so even if the thing to be given is so situated that at the time it is out of the donor's power to get it. Case *v.* Dennison, 9 R. I. 88.

"It is not enough merely to show that the dying person intended to make the gift, and that she designated with proper distinctness what was to be given and to whom. It is necessary, also, to show that the intention was carried into effect, and that the gift was consummated by an actual or effective delivery." AMES, J., in Coleman *v.* Parker, 114 Mass. 30.

Several hours before the death of W. he stated to the nurse in attendance upon him that his pocket book was "under the bed, just under his shoulders," and requested her to "take it and give it [with its contents] to his wife when she came." Nothing was done towards complying with the request until some hours after W's death, when his body was moved, and the nurse took the pocket book from the place described and handed it to another person to be given to the widow of the deceased if she should come, and otherwise to be sent to her. *Held*, that the possession did not pass from W during his life. Wilcox *v.* Matteson, 53 Wis. 23; s. c., 40 Am. Rep. 754.

S, being informed of his approaching death, told his attendants that he had $950 under his pillow and in his coat pocket. He wanted $200 to go to a niece and $100 to an old servant, and the rest to his wife. One of the attendants found the money and counted it in the presence of S, but he gave no further directions. *Held*, not a gift. Newton *v.* Snyder, 44 Ark. 42; s. c., 51 Am. Rep. 587.

A woman was the owner of certain articles of property situated in two rooms occupied by herself and her husband. While lying in bed, and *in extremis*, she called the plaintiff, and after giving directions as to the disposition of certain articles, said: "All the rest of my things I give to you. . . . I want you to take all these things and use them." And she made other declarations to the same effect. The declarations were made in the morning and she died in the afternoon. All the articles remained in use in the rooms as before the declaration, and for some time after the death of the donor. *Held*, there was no valid gift, as there was not sufficient delivery of the property. Turner *v.* Brown, 6 Hun (N. Y.) 331.

3. Smith *v.* Downey, 3 Ired. 268;

the thing itself can readily be handed over, as by giving a key to a box or jewel case as a symbol, when the receptacle or its contents might have easily passed from hand to hand, is generally held insufficient.[1]

There must be some act done to change the possession from the donor to the donee. The donor must relinquish the posses-

Miller *v.* Jeffress, 4 Gratt. (Va.) 472; Ward *v.* Turner, 2 Ves. 471; Westerlo *v.* DeWitt, 36 N. Y. 340; Lamson *v.* Monroe (Me.), 6 East. Rep. 160.

1. Shargold *v.* Shargold, 2 Ves. 431; Bunn *v.* Markham, 7 Taunt. 224; Powell *v.* Hellicar, 26 Beav. 261; Reddell *v.* Dobree, 10 Sim. 244.

Although delivery of the key to a warehouse or other place of deposit, where cumbrous articles are kept, may constitute a sufficient constructive or symbolical delivery of such articles, it is well settled that the delivery of the key to a trunk, chest or box, in which valuable articles are kept, which are capable of being taken into the hand, and which may be delivered by being passed from hand to hand, is not a valid delivery of such articles. The rule is that the delivery must be as perfect and complete as the nature of the articles will admit of. Where constructive delivery may be sufficient for large or cumbersome articles, it will not be for small articles capable of a more perfect and complete delivery. Hatch *v.* Atkinson, 56 Me. 324.

Gifts *causa mortis* have the nature of a legacy, and the policy of our law does not favor them while there is provision, by the statute of wills and the law of descents, for the transmission of all property rights.

G was a man of advanced age, having a wife and daughters by a first wife, and, by the present wife, a son, with whom he boarded. His property consisted partly of a farm and stock thereon, but mostly of promissory notes of various amounts. Before his last sickness he had expressed a desire "that his children should have his notes and his son should have his farm." On the morning of the day of his death, and in the presence of a daughter's husband, herself and sister, G called the daughter and said to her: "My notes are in a little box on the bureau there; I want you to take them and divide them equally among you children." He told her to get the key to the box, and she got the key and tried it in the box, and gave the key to her husband for safe keeping. After his death intestate, she took the box and did not divide the notes, but returned them to the administrator, and they were appraised and held as part of the estate. In an action by the daughters, claiming for themselves and the son the notes and their proceeds, as against the administrator and the widow, *held*, 1. These facts do not show such a delivery as constitutes a valid gift *causa mortis*. 2. These notes and their proceeds are assets of the estate, and the widow is entitled to her proper part thereof. Gano *v.* Fisk, 43 Ohio 462; s. c., 54 Am. Rep. 819.

A symbolical gift will not answer. To constitute a gift of this kind the donor must not only give, but he must deliver, and that delivery must be actual where the subject of the gift is capable of actual transfer. Cutting *v.* Gilman, 41 N. H. 147. See, however, Coleman *v.* Parker, 114 Mass. 30. In that case the court said, "This term 'delivery' is not to be taken in such a narrow sense as to import that the chattel or property is to go literally into the hands of the recipient and to be carried away. There are many articles which might be made the subject of a *donatio causa mortis*, in which a manual delivery of that kind might be inconvenient or impracticable. We have no doubt that a trunk with its contents might be effectually given and delivered in such a way by a delivery of the key, not as a symbolical delivery, but because it is the means of obtaining possession." In the same case, however, it was *held* that the taking the key of a trunk from the place where it was kept, and putting the goods into the trunk and returning the key to its place, at the request of the owner in his last illness, apprehending death, and expressing the desire to make a gift of the trunk and contents *causa mortis*, is not a delivery sufficient for that purpose.

The delivery by the decedent of the key of her desk, and the actual delivery to her mother of the letter of a third person containing a full description of the notes and bonds held by him as agent

sion.[1] The donee must not only take possession, but retain it until the death of the donor. If it again comes into the donor's possession, it raises the presumption that the gift is revoked.[2]

So necessary is delivery to the validity of a gift of this kind that it has been held that where the property is already in the donee's possession or in the hands of a third party, there is no gift for want of the needed delivery to complete it.[3]

Delivery may be made to a third person for the donee, and such delivery will be sufficient, although the donor dies before

of the decedent, is a sufficient delivery to make the gift *causa mortis* complete. The arbitrary rule requiring an assignment and delivery of the *identical thing*, in order to make such a gift valid, has been abandoned. Stephenson *v.* King, 81 Ky. 425; s. c., 50 Am. Rep. 172.

A dying person told her servant to take the keys of her dressing case, and to deliver her watch and the trinkets which it contained to the plaintiff. The servant took the keys and kept them in her possession until after the death of her mistress. *Held*, not a sufficient delivery. Powell *v.* Hellicar, 26 Beav. 261.

1. Wilcox *v.* Matteson, 53 Wis. 23; s. c., 40 Am. Rep. 754; Newton *v.* Snyder, 44 Ark. 42; Westerlo *v.* De Witt, 36 N. Y. 340; Hawkins *v.* Blewitt, 2 Esp. 663; Bunn *v.* Markham, 7 Taunt. 224.

It is necessary to the validity of such a gift that there must be an actual delivery of the subject of the gift to the donee, such as will transfer the possession to him. Smith *v.* Ferguson, 90 Ind. 229; s. c., 46 Am. Rep. 216.

It is not a gift *causa mortis* where one, a few days before his death, delivers his bank book to another requesting him to deliver it to the donee at his death, but not parting with the present control of it. Daniel *v.* Smith, 75 Cal. 548.

A, who had quarrelled with his wife, during his last illness and about two weeks before his death, endorsed over to B bonds worth $22,000, and constituting nineteen-twentieths of A's personal estate. There was no evidence of a delivery and the bonds were found after A's death among his effects. *Held*, not a gift, and that A's widow was entitled to her distributive share of the bonds. Seabright *v.* Seabright, 28 W. Va. 412.

Where the donor told A that certain notes which he pointed at in a basket were for B, and others for C and directed A to take them to D for safe keeping, and said these notes with the will would make the children all equal. *Held*, a valid gift *causa mortis*. Shackleford *v.* Brown, 89 Mo. 546.

S, in anticipation of death, said that she gave her uncle all her money, and that it was all his. She died soon after. The uncle had from time to time received money from her, deposited it in a savings bank and retained the bank book in his possession. *Held*, not a valid *donatio causa mortis*, as there was no evidence of any delivery of the book or the money. French *v.* Raymond, 39 Vt. 623.

2. Cutting *v.* Gilman, 41 N. H. 147; Craig *v.* Craig, 3 Barb. Ch. (N. Y.) 76; Emery *v.* Clough, 63 N. H. 552; Bunn *v.* Markham, 7 Taunt. 224.

To constitute a good gift *causa mortis*, there must be complete delivery and retention of possession by the donee. Dunbar *v.* Dunbar, 80 Me. 152.

3. It is not the possession of the donee, but the delivery to him by the donor, which is material. An after acquired possession or a previous and continuing possession of the donee, although by the authority of the donor, is insufficient. Cutting *v.* Gilman, 41 N. H. 147.

Where a father in his last illness placed a package of money in the possession of his son to take care of, and some days afterward directed the son, in case he should not get well, to take the money and, after paying funeral expenses, etc., to divide the remainder equally between himself and certain of his brothers and sisters; *held*, that the only delivery ever made by the father being by way of bailment, and not in execution or contemplation of a gift, there was no *donatio causa mortis*. McCord *v.* McCord, 77 Mo. 166; s. c., 46 Am. Rep. 9. See also Case *v.* Dennison, 9 R. I. 88; Miller *v.* Jeffress, 4 Gratt. (Va.) 472; French *v.* Raymond,

the third person hands the article to the donee.[1] It has been held, however, if the delivery is to an agent of the giver, to be held by him, and the delivery only to be made after the donor's death, it will be insufficient.[2] The delivery may be to a trustee for the donee, and if received by the trustee, he takes it subject to the trust, and is liable to the *cestui que trust* for its performance.[3]

An instrument in writing, or a deed of gift, although delivered, will not operate as a gift *causa mortis*. The delivery of the writing will not amount to a delivery of the property. Such a writing, if it could change the ownership of the property as a *causa mortis*, would amount practically to a will, without having the formalities required by law.[4]

39 Vt. 623. *Contra*, Southerland *v.* Southerland, 5 Bush (Ky.) 591.

1. Drury *v.* Smith, 1 P. Wms. 401; Michener *v.* Dale, 23 Pa. St. 59; Jones *v.* Deyer, 16 Ala. 221; Dresser *v.* Dresser, 46 Me. 48; Doll *v.* Lincoln, 31 Me. 422; Wells *v.* Tucker, 3 Binn. (Pa.) 366; Sessions *v.* Moseley, 4 Cush. (Mass.) 87; Conner *v.* Root, 11 Colo. 183; Borneman *v.* Sidlinger, 15 Me. 429.

2. Delivery to a third person for a donee is as effective as delivery to the donee; but delivery to an agent as agent, for the giver to perform the act or make the delivery only after the death of the donor, would amount to nothing. Newton *v.* Snyder, 44 Ark. 42; s. c., 51 Am. Rep. 587. See also Farquarson *v.* Cave, 2 Coldw. (Ky.) 356, 367; McCord *v.* McCord, 77 Mo. 166; 46 Am. Rep. 9; Shackleford *v.* Brown, 89 Mo. 546.

To constitute a valid *donatio causa mortis*, there must be actual delivery of the subject of the gift in the lifetime of the donor. Delivery to an agent, with directions to him to deliver to the donee after the death of the donor, and if he should recover, then to return the property to the donor, is insufficient. Walter *v.* Ford, 74 Mo. 195; s. c., 41 Am. Rep. 312.

A *donatio causa mortis* must, during the life of the donor, take effect as an executed and complete transfer of his possession of the thing and his title thereto, although the right of the donee is subject to be divested by the actual revocation of the donor, or by his surviving the apprehended peril, or by his outliving the donee, or by the insufficiency of his estate to pay his debts. If, by the terms and conditions of the gift, it is to take effect only upon the death of the donor, it is not such a *donatio*, but is available, if at all, as a testamentary disposition. Where, therefore, during his last illness, and when he was in apprehension of death, the person named in a certificate made thereon the following indorsement—

"Pay to Martin Basket, of Henderson, Ky.; no one else; then not till my death. My life seems to be uncertain. I may live through this spell. Then I will attend to it myself.

"H. M. CHANEY."

—and then delivered it to Basket, and died at his home in Tennessee. *Held*, that Basket, by such indorsement and delivery, acquired no title to or interest in the fund. Basket *v.* Hassell, 107 U. S. 602. See, however, Sessions *v.* Moseley, 4 Cush. (Mass.) 187, where the court says: "Where one in apprehension of death delivers a thing to another, to be given by him to a third person after the death of the donor, and on such donor's death the thing is delivered accordingly to the donee designated, and accepted by him, this is a valid gift *causa mortis*.

3. Dresser *v.* Dresser, 46 Me. 48; Wells *v.* Tucker, 3 Binn. (Pa.) 366; Clough *v.* Clough, 117 Mass. 83; Pierce *v.* Boston Savings Bank, 129 Mass. 425.

The property may be delivered to one of several donees for the use of all. Dresser *v.* Dresser, 46 Me. 48.

4. Tate *v.* Hibbert, 2 Ves. jr. 120; Basket *v.* Hassell, 107 U. S. 602; Nicholas *v.* Adams, 2 Whart. (Pa.) 17; Taylor *v.* Taylor, 2 Humph. (Tenn.) 597.

A written instrument not duly attested as a will, by which a sum of money is given to another for certain purposes named, which is signed and delivered in expectation of death by the

**5. Acceptance.**—Like other gifts, there must be an acceptance on the part of the donee to complete the gift. This acceptance is also in case of a beneficial gift often taken for granted and assumed; but if it is shown that there is no acceptance, the gift fails. This acceptance may be by the donee after the donor's death, especially in cases where the delivery is to a third party for the benefit of the donee.[1]

**6. Effect of Execution**—*a. Between Donor and Donee—Revocation.* —The principal difference between gifts *inter vivos* and those *causa mortis*, is in the fact that, while the former, when completely executed, is absolute and irrevocable, the latter, although all the requirements as to delivery, etc., have been complied with, the gift is conditional, and may be revoked by the donor or by operation of law. Notwithstanding the possession passes at once to the donee at the time the gift is made, the donor may at any time annul and revoke it by ordering a return of the property and resuming possession.[2]

The recovery of the donor from the particular illness or peril which existed at the time the gift was made, and which was the cause of the gift, will of itself cause a revocation of it. If he afterwards die from some other cause, before taking any steps to reclaim the property, it will belong to his estate, and not to the donee.[3] So also if he should die from the same disease, pro

party at whose request it is made, and which is shown by the attending circumstances not to be intended as a gift *inter vivos*, cannot give effect to the intended gift as a *donatio causa mortis*.

1. A man in expectation of death caused a written instrument to be made by which he gave to A a certain sum of money for certain purposes named, and for the purpose of carrying out its provisions, delivered to him a savings bank book with an order for the payment of the deposits, which made up only a smaller portion of the sum named in the instrument. The donor, when asked where the remainder was, said it was in his trousers pocket, turning in his bed and looking towards the closet in which his trousers were, and that E, who owned the house, and who was present, would give it to him. After the donor's death E delivered the money to A. *Held*, that there was no gift. McGrath *v.* Reynolds, 116 Mass. 566; Reddell *v.* Dobree, 10 Sim. 244; Darland *v.* Taylor, 52 Iowa 503; Sessions *v.* Moseley, 4 Cush. (Mass.) 87; Cutting *v.* Gilman, 41 N. H. 147.

2. Jones *v.* Selby, Prec. Ch. 300; Merchant *v.* Merchant, 2 Bradf. (N. Y.) 432; Bunn *v.* Markham, 7 Taunt. 230; Wigle *v.* Wigle, 6 Watts (Pa.) 522; Parker *v.* Marston, 27 Me. 196. The leading case is Jones *v.* Selby, Prec. Ch. 300, in which a gift *causa mortis* was put on the same footing as a will in this respect. The donor may revoke the gift because the death, which was the cause of the gift, has not taken place.

The refusal of the custodian to return the property at the demand of the donor will not prevent the revocation of the gift. Merchant *v.* Merchant, 2 Bradf. Sur. (N. Y.) 432.

A subsequent will made by the donor bequeathing to another what has already been given as a *causa mortis* will not revoke the gift. The will only speaks from the death of the testator, and at his death the gift which before was ambulatory like the will became absolute and irrevocable. Jones *v.* Selby, Prec. Ch. 300; Hambroke *v.* Simmons, 4 Russ. 25; Nicholas *v.* Adams, 2 Whart. (Pa.) 17; Emery *v.* Clough, 63 N. H. 552; Merchant *v.* Merchant, 2 Bradf. (N. Y.) 432.

3. Grymes *v.* Hone, 49 N. Y. 17; s. c., 10 Am. Rep. 313; Weston *v.* Hight, 17 Me. 287; Drury *v.* Smith, 1 P. Wms. 404; Blount *v.* Burrow, 1 Ves. Jr. 546.

viding there was an intervening recovery.[1]

The death of the donee before the donor will also revoke the gift and restore the ownership of the property to the donor.[2]

The title to the property passes from the donor to the donee at the time of delivery, defeasible only during the lifetime of the donor. His death perfects the title of the donee by terminating the donor's right or power of revocation. The subject of the gift then becomes the absolute property of the donee—subject to creditor's rights. It passes directly from the donor to the donee; is not subject to probate; is not liable to contribution with legacies, in case the assets of the estate of the donor are not sufficient to pay them in full, and the administrator or executor has no control over the property given unless needed to pay debts.[3] It cannot be taken to pay the expenses of administration. If the administrator converts it, he is liable at suit for its value.[4]

If the gift be a promissory note or a negotiable chose in action, and the party liable thereon pays the administrator without requiring the voucher to be produced, he is still liable to the donee.[5]

*b. As to Third Parties.*—A gift *causa mortis* is not valid against the claims of creditors. They have claims superior to volunteers.

The only property which a man can lawfully give away, or voluntarily dispose of without consideration, is the balance remaining after paying his debts. One must be just before he is generous. If the assets of the estate of the donor are not suffi-

1. In Conser *v.* Snowden, 54 Md. 175; s. c., 39 Am. Rep. 368, the court said there was a serious failure of proof as to the disorder of which the alleged donor died, and it was essential, to make the attempted gift an effective gift *mortis causa*, that the donor should die of the very disorder with which she was suffering when the gift was made, and that there should be no intervening recovery.

Where the donor suffering from a paralytic stroke so far recovers as to make a journey and manage his property and business, the gift fails. Staniland *v.* Willott, 3 Mac. & G. 684.

But a gift of this kind will not be disturbed by the alternation of hope and despair. Nicholas *v.* Adams, 2 Whart. (Pa.) 17.

2. Merchant *v.* Merchant, 2 Bradf. (N. Y.) 432.

3. Emery *v.* Clough, 63 N. H. 552; Doll *v.* Lincoln, 31 Me. 422; Doty *v.* Willson, 47 N. Y. 580; Chase *v.* Redding, 13 Gray (Mass.) 418; Basket *v.* Hassell, 107 U. S. 602; Marshall *v.* Berry, 13 Allen (Mass.) 46; 1 Williams Exr. 686, n. 1.

"A gift may be made, by one in present contemplation of death, of money or other property capable of passing by delivery. To give effect to such a donation, there must be a clear and manifest intention of the donee to give, a subject capable of passing by delivery, and an actual delivery at the time, in contemplation of death, such a delivery is inchoate and does not become perfect till the death of the donor. It is revocable by the donor during his life, and if he recovers from his sickness or other cause of apprehended death under which the donation is made, the gift is void. But where there is such a gift and actual delivery at the time, and the expected death of the donor ensues, the gift is complete, and vests the property in the donee presently without its passing through the administrator or executor, and is liable to be diverted only in favor of creditors of the donor." Cutting *v.* Gillman, 41 N. H. 151.

4. Westerlo *v.* Dewitt, 36 N. Y. 340; Grant *v.* Tucker, 18 Ala. 27; Michener *v.* Dale, 23 Pa. St. 59.

5. House *v.* Grant, 4 Lans. (N. Y.) 296.

cient to pay his debts, the administrator can recover the subject of the gift.[1]

If needed to pay debts and taken by the administrator for that purpose, and there is a residuum after payment of the debts, it goes to the donee, and not to the intestate estate.[2]

**7. Qualified Gifts.**—There may be especial qualifications annexed to a gift besides those already mentioned. A common qualification or condition is that the donee shall pay the expenses of the donor's funeral. Such a gift is held good.[3]

1. Ward *v.* Turner, 2 Ves. 434; Drury *v.* Smith, 1 P. Wms. 406; Michener *v.* Dale, 23 Pa. St. 59; Chase *v.* Redding, 13 Gray (Mass.) 418; Borneman *v.* Sidlinger, 15 Me. 429.

2. Kiff *v.* Weaver, 94 N. Car. 274; s. c., 55 Am. Rep. 601.

3. Pierce *v.* Five Cent Savings Bank, 129 Mass. 425; Clough *v.* Clough, 117 Mass. 85; Curtis *v.* Portland Savings Bank, 77 Me. 151; Hills *v.* Hills, 8 M. W. 401.

Such a gift may be made with the condition that it be accepted in full for the donee's share of the donor's estate. In such case the donee cannot claim a distributive share of the estate without surrendering the gift. Currie *v.* Steele, 2 Sandf. (N. Y.) 542.

**Resulting Trust.**—The plaintiff's intestate, a few hours before her death, desiring to give money to certain parties, gave her check to the defendant, and assigned to him two bank accounts; and at the same time gave him directions as to the disposition of the greater part of the money, saying nothing as to the balance. The defendant reduced the money into possession in the lifetime of the intestate, and after her death made the payments directed by her. *Held*, in an action by the administrator to recover the money, that so far as the money was directed to be paid to specific persons, the gift was complete, but as to the balance there was no gift. Beals *v.* Crowley, 59 Cal. 665.

A testator, at the time of making his will, delivered to the executor named in the will a promissory note payable to the order of the testator, with directions to deliver it to the maker provided the maker did not contest his will, otherwise the future executor was to collect it and pay the proceeds to his widow. *Held*, a good gift *causa mortis*. Woodburn *v.* Woodburn, 23 Ill. App. 289.

**Domicile.**—The validity of a gift is to be determined by the law of the place where it is made, and not by the law of the domicile of the donor. Emery *v.* Clough, 63 N. H. 552.

**Gifts by Married Women.**—A married woman has no more power to make a gift *causa mortis* than she has to make a will, and where the statutes require assent of the husband to a wife's will, the assent must be given to a gift *causa mortis*. Jones *v.* Brown, 34 N. H. 439.

**Evidence.**—To constitute a *donatio causa mortis* the evidence must be clear. The burden of proof is necessarily on the donee, as, in the first place, so many opportunities and such strong temptations present themselves to unscrupulous persons to pretend death-bed donations, that there is always danger of having an entirely fabricated case set up; and secondly, without any imputation of fraudulent contrivance, it is so easy to mistake the meaning of a person languishing in mortal illness, and by a slight change of words to convert the expressions of intended benefit into an actual gift of property, and no case of this description ought to prevail unless it is supported by evidence of the clearest and most unequivocal character. Cosnahan *v.* Grice, 15 Moore P. C. C. 215; Conklin *v.* Conklin, 20 Hun (N. Y.) 278; Hyslep *v.* Gymer, 1 Ad. & El. 162.

A gift by a man in his last sickness to a person in attendance upon him will be viewed with suspicion and will not be sustained without full and conclusive evidence. Shirley *v.* Whitehead, 1 Ired. (N. Car.) Eq. 130.

A gift *causa mortis* must be satisfactorily proved. A delivery is essential, but possession does not prove delivery where the claimant had opportunity of wrongful possession. The testimony of the donee unsupported will not prove such a gift. Kenney *v.* Public Administrator, 2 Bradf. (N. Y.) 319; Conklin *v.* Conklin, 20 Hun (N. Y.) 278.

Where the circumstances are such as to indicate an intention to make a testamentary gift and the intention fails

for want of proper attestation, a *donatio causa mortis* will not be presumed. *In re* Patterson, 12 W. R. 941; 10 L. T., N. S. 801.

Possession of the property alone will not establish a gift, especially when the claimant had opportunity of obtaining wrongful possession before or just after the owner's decease. Delmotte *v.* Taylor, 1 Bradf. Sup. (N. Y.) 41; Cutting *v.* Gilman, 41 N. H. 147.

Where a promissory note was shown to have been in the possession of and owned by the payee within four or five days of his death and there was no evidence of transfer in his life time, but about two weeks after his death his widow was in possession of it as her own, and she subsequently negotiated it to the plaintiff, and it appeared that the payee died intestate and indebted, and no letters of administration had been issued, *held*, that it was to be inferred under these circumstances that the note belonged to the payee at the time of his death, and the widow, not being his legal representative nor the owner of the note, had no right to transfer it to the plaintiff. Lounsbury *v.* Depew, 28 Barb. (N. Y.) 44.

Defendant, upon settlement with his father, was found indebted in the sum of $425, for which he gave his note. In an action upon the note brought by the personal representative of the father after his death, the defendant at the trial produced the note cancelled. He testified that it had not been paid or satisfied. It appeared that he had access to his father's papers. *Held*, on the facts, that the possession of the note was not evidence of its discharge. Gray *v.* Gray, 47 N. Y. 552.

Where there are circumstances attending an alleged gift, which reasonably excites suspicion as to whether there was a gift in fact, the proof must be such as to remove suspicion. The burden of proving a gift of personal property by a decedent is much heavier when the alleged gift was *causa mortis* than when it was one *inter vivos*. When the gift claimed is a gift *causa mortis*, it must be proved by strong and clear evidence. Lewis *v.* Merritt, 42 Hun (N. Y.) 161; Dickeschild *v.* Exchange Bank, 28 W. Va. 341.

Though a bond or a note be delivered to a person, and the donor signs an indorsement on it in these words: "For value received I assign all my right to, title and interest in this bond or note to donee," naming him, yet such a gift may be shown by the surrounding circumstances to have been a gift *causa mortis* and not *inter vivos*. If such a gift is of a very large amount and nearly the whole of the donor's personal estate, the court will require most clear and satisfactory proof of the gift as well as the delivery of the bond and note; and it will require much less evidence from the surrounding circumstances to show, if the gift was established, that it was a gift *causa mortis* and not *inter vivos*. Dickeschild *v.* Exchange Bank, 28 W. Va. 341.

A *donatio causa mortis* is a conditional gift, depending on the contingency of expected death. To constitute a *donatio causa mortis*, it must appear that the gift was made in view of the donor's death, that it is conditioned to take effect only on his death by his existing disorder, and there must be a delivery of the subject of the donation. The equitable owner of bills, bonds and promissory notes can maintain an action on them in his own name, so the assignee of an unendorsed bond or note may bring an action on it in his own name. The possession of an unendorsed negotiable note, payable to bearer, raises the presumption that the person producing it on the trial is the rightful owner thereof. Bills, bonds and promissory notes, and all other evidences of debt, although payable to order and not endorsed, may be given as *donationes causa mortis*, and the donee may sue on them in his own name. Where a bond secured by a mortgage is given as a *donatio causa mortis*, the mortgage goes with the bond, even without a formal transfer of the security. In an action by an administrator to recover certain bonds of his intestate, which the defendant alleged were given him as a *donatio causa mortis*, the defendant having possession of the bonds is not required to prove the gift by more than a preponderance of evidence. While an administrator is estopped to deny the validity of an assignment of personal property made by his intestate in fraud of creditors, he is not estopped to deny a *donatio causa mortis*. A *donatio causa mortis* partakes somewhat of the character of a testamentary disposition, but the assent of the personal representative is not essential to its validity. If needed to pay debts, it may be recovered by the representative, but if there be a *residuum* of the gift after the payment of the debts, it goes to the

**GIN-HOUSE.**—See note 1.

**GIST.**—The cause for which an action will lie; the ground or foundation of a suit, without which it would not be maintainable; the essential ground or object of a suit, and without which there is not a cause of action.[2]

**GIVE.**—(See GIFTS).[3]

donee, and not to the intestate's estate. Cliff *v.* Weaver, 94 N. Car. 272; s. c., 55 Am. Rep. 601.

**Authorities of Gifts.**—There is no legal treatise devoted exclusively to gifts. Schouler's Pers. Prop. (2nd ed., 1884) gives several chapters to the subject. For Declarations of Trust, see Lewin on Trusts (8th ed., 1885) and Perry on Trusts (8th ed., 1888). See also article on The Formation and Validity of Voluntary Trusts, 18 Am. Law Review 379.

1. "A 'gin-house' is an edifice which, like a barn, is of a permanent and substantial kind, and is well known in communities where cotton is grown as the building to which seed cotton is carried from the field, and where the seeds are separated by the machine called a gin from the lint or wool." Accordingly, under a bungling statute which required special description of structures other than a shop, store, warehouse or building, which were specially constructed or made to keep goods, ware or merchandise or other valuable thing, a gin-house did not require additional description of its purpose. Stone *v.* State, 65 Ala. 115.

2. First Nat. Bank of Flora *v.* Burkett, 101 Ill. 394.

3. The word "give" (*do*, *dedi*) was the apt word of conveyance in deeds of feoffment and gift. 2 Bl. Com. 310, 316. "The legal effect of the term *dedi* is derived from feudal times. So long as a tenure was created by the use of this term, and the feoffee and his heirs held of the feoffor and his heirs by certain services, the law held the latter to warrant and defend the land, which was the consideration of these services. But after subinfeudations were abolished by the statute of *quia emptores* and the feoffee, instead of holding of the feoffor, held of the chief lord of the fee, by the word 'give' (*dedi*), the feoffor only was bound to warranty and not his heirs. But this covenant thus raised by implication of law in feoffment does not arise from the use of the same term in instruments which derive their efficacy from the statute of uses." Allen *v.* Sayward, 5 M. 227; s. c., 17 Am. Dec. 221; Bates *v.* Foster, 59 M. 157; 2 Bl. Com. 300; and see Frost *v.* Raymond, 2 Caines 188.

A contract by which a miller agreed to "take" a farmer's wheat and "give" him flour, one barrel for 4 36-60th bushels, is a sale and not a bailment. "The term 'give' requires some act of the defendant which shall pass the property in the flour to the plaintiffs. As a word of contract, it demands something more than the redelivery of the plaintiff's wheat in the form of flour. It implies that the property in the thing to be given is in the donor until changed by delivery. The word does not import a mere gratuity, since the defendant was to give superfine flour for, *i. e.* in consideration of, or as an equivalent for, the wheat taken by him from the plaintiffs." Norton *v.* Woodruff, 2 N. Y. 153.

The word, however, ordinarily imports a gratuity. An action cannot be sustained upon a writing under seal in these terms: "This is to show that I allow to give W. J. $200, to be paid in two years after date." It expresses a mere intention to give and upon its face shows a want of consideration. Harman *v.* James, 7 Ind. 263. So in an act prohibiting the selling or giving of intoxicating liquors to minors, "sell" and "give" are not synonymous. "Can it be doubted," said the court, "that in their ordinary and familiar signification, in their accepted and known sense, the words 'sell' and 'give' have not the same meaning, but are commonly used to express different modes of transferring the right to property from one person to another; a sale meaning a transfer for a valuable consideration; a gift signifying a gratuitous transfer without any equivalent." Parkinson *v.* State, 14 Md. 184.

Where, by way of compromise of differences over the estate of a decedent, his heirs agreed to "give" his widow a certain sum of money and a lot of ground in lieu of all her claims, the word was held, so far as related to the

**GLASS.**—See note 1.

money, to mean "pay," and as to the real estate "convey"; and the heirs were bound to make a good title. Carter *v.* Alexander, 71 Mo. 585. "The word 'give' is of the largest signification, and is applicable as well to real as personal estate." Hooper *v.* Hooper, 9 Cush. (Mass.) 129.

An action for a penalty for having received a reward *to give* a vote is not sustained by proof of receiving a reward for having given a vote. Huntingtown *v.* Gardiner, 1 B. & C. 300.

**Give and Bequeath.**—"The words 'give and bequeath' in a testamentary paper import a benefit in point of right to take effect upon the decease of the testator and proof of the will, unless it is made in terms to depend upon some contingency or condition precedent. It may be postponed, there may be no assets to answer it, it may not take effect in possession and enjoyment; but in the meantime, the right will vest, to take effect according to the terms of the will." Eldridge *v.* Eldridge, 9 Cush. (Mass.) 516; Dale *v.* White, 33 Conn. 297; and see Daly's Lessee *v.* James, 8 Wheat. (U. S.) 538.

These words are sufficient to pass real estate in a will. O'Toole *v.* Browne, 3 E. & B. 572.

**Give Credit.**—"In consideration of E. R. & Co. *giving credit* to D. J., I hereby engage to be responsible," etc., is a good guaranty. "Giving credit" is equally applicable to future as to past credit. Edwards *v.* Jevons, 8 C. B. 436. So it was *held* in Brown *v.* Batchelor, 1 H. & N. 255, where the terms of the guaranty were: "In consideration of the credit given by B. & E., I hereby agree to guarantee the payment," etc.

**Give a Deed.**—In an agreement for the sale of real estate, an agreement "to give a deed of" the premises is fulfilled by executing a conveyance without warranty or personal covenants. Ketchum *v.* Evertson, 13 Johns. (N. Y.) 359; s. c., 7 Am. Dec. 384.

**Give Evidence.**—In a bill of exceptions, the words "This was all the evidence *offered* in the cause" are not equivalent to "This was all the evidence *given*," etc. B. O. & C. R. Co. *v.* Barnum, 79 Ind. 261.

**Give in His Vote.**—This phrase means "vote," and its use in an indictment for fraudulent voting is sufficient. It does not mean to offer to vote, and does not render the indictment equivocal. State *v.* Moore, 3 Dutch. (N. J.) 105.

**Give Information.**—An indictment for depositing in the mail a letter giving information where and how an article designed to prevent conception could be procured, is not sustained where the letter itself gives no information, except when taken together with a decoy letter, in reply to which it was written, and which pretended to come from a person who had no existence. United States *v.* Whittier, 2 Dill. (C. C.) 35.

**Give a Lease.**—Where two agree, the one to *give* and the other to *take* a lease of a house, the duty of preparing, executing and tendering the lease is upon the former. Walker *v.* Kelly, 24 U. C., C. P. 174.

**Not Given.**—Under a statute providing that "A party excepting to the giving of instructions, or the refusal thereof, shall not be required to file a formal bill of exceptions, but it shall be sufficient to write at the close of each instruction 'Refused and excepted to,' or 'Given and excepted to.'" "Not given and excepted to" is insufficient. "For the charges may not have been given because the court was not asked to give them, in which case they could not be said to have been refused." Manhattan L. Ins. Co. *v.* Doll, 80 Ind. 113.

1. Under an act relieving common carriers from liability for the loss of *inter alia* articles of glass, contained in any parcel or package delivered to be carried for hire, unless the nature and value of the article has been declared by the person sending or delivering the same, smelling-bottles are "glass" within the act. Bernstein *v.* Boxendale, 6 C. B., N. S. 251. But the term does not apply to the glass which covers a lace corporal that has been framed for exhibition. Treadwin *v.* G. E. R'y Co., L. R., 3 C. P. 308.

"Cut glass" in a customs act includes all glass that has been "cut" by the process of grinding, and is not confined to that to which the term is applied in trade and commerce, and which has been cut in a particular manner. Binns *v.* Lawrence, 12 How. (U. S.) 9.

"Glass—with care—this side up" upon a box containing a glass bottle of oil or cloves, is sufficient notice of the nature and value of the contents to charge a carrier for any loss occasioned by his disregard of such directions. Hastings *v.* Pepper, 15 Pick. (Mass.) 41.

**GO.**—See note 1.

**GOLD.**—See DIG, DOLLAR, JEWELRY.[2]

**GOOD.**—(See BILL OF LADING, CHECKS.) Perfect; valid; suitable; proper; genuine; collectible.[3]

1. In a statutory provision that upon the death of a husband or wife, one-half of the common property of the couple "shall go" to the survivor, "go" means "vest." Broad *v.* Broad, 40 Cal. 493.

Where it is agreed that a paper shall go in evidence, it should be considered in evidence whether read in evidence or not. "Shall go in evidence" is tantamount to "shall be considered in evidence."

"'**Going off Large**' is when the wind blows from some point abaft the beam or over the quarter of the ship. Going 'before the wind' is when the wind is free, comes over the stern and the ship's yards are braced square across." The Indiana and Buffalo, 1 Newb. (U. S.) 121; The Pacific & Brig Fashion, 1 Newb. (U. S.) 8; and see Fashion *v.* Ward, 6 McLean (U. S.) 152.

2. In an act imposing a license tax upon those trading in "gold or silver plate," gold does not mean pure gold but a mixture of gold and alloy, and the tax being graded by the weight of the gold sold, the weight of the article is to be taken and not that of the gold contained therein. Young *v.* Cook, L. R., 3 Ex. Div. 101.

An act releasing inn-keepers from liability for the loss of articles of gold and silver manufacture by any guest, when he shall have a safe suitable for their custody, applies to gold and silver watches and watch chains, usually worn by the guest about his person. Stewart *v.* Parsons, 24 Wis. 241.

A promissory note for a certain number of dollars payable "in gold or its equivalent," may be discharged by a payment in gold, or by a payment of so many dollars in legal tender notes as are equal in value to the number of dollars named in the note in gold. Holt *v.* Given, 43 Ala. 612.

3. **Good Behavior.**—See BEHAVIOR.

**Good Cattle.**—Cattle inherently sound. Parks *v.* O'Conner, (Tex.) 8 S. W. Rep. 108.

**Good Cause.**—(See CAUSE). A statute that directs that a court may do a thing on good cause shown, vests a discretion in the court. Kerchner *v.* Singletary, 15 S. Car. 535; Kendall *v.* Briley, 86 N. Car. 54; People *v.* Sessions, 62 How. Pr. (N. Y.) 415.

**Good Character.**—(See CHARACTER.) Under an act imposing a penalty upon persons who, for the purpose of obtaining a liquor license, make use of a certificate of good character knowing it to be false, the fact that the person using such a certificate lives in a state of concubinage does not justify a conviction. "The fact of a man living with a woman without marrying her may possibly admit of some palliating circumstances. It does not follow, therefore, that because the appellant knew that he was not married to the widow, he must have known that the certificate which he obtained was false." Leader *v.* Yell, 16 C. B. N. S. 584.

**Good and Collectible.**—See COLLECTIBLE, and also GOOD NOTE, *infra*.

**Good Condition.**—In a statute providing that "there shall be kept and maintained in good and sufficient condition and repair a common jail in each county," "the words 'good condition' do not merely refer to its security, but to its sanitary condition and its capacity to render prisoners reasonably comfortable. It is impossible to say it is in good condition when it is filthy and unhealthy. In would be a perversion of language to say that because it was in a condition to safely keep prisoners, it was therefore in a good condition." Stuart *v.* LaSalle Co., 83 Ill. 346.

**Good Consideration.**—"A good consideration is such as that of blood or of natural love and affection, when a man grants an estate to a near relation, being founded on motives of generosity, prudence and natural duty." 2 Bl. Com. 297; 4 Kent's Com. 464; Vanhorn's Lessee *v.* Harrison, 1 Dal. (Pa.) 138; Corwin *v.* Corwin, 9 Barb. (N. Y.) 225. A consideration founded on a relation of concubinage is a good and not a valuable consideration. Potter *v.* Gracie, 58 Ala. 307.

"Good consideration" in the sixth section of 13 Eliz., c. 5, is construed to mean valuable consideration. Twyne's Cas., 3 Co. 80; s. c., 1 Sm. Ld. Cas. 1; May on Fraudulent Conveyances 246; Johnson *v.* Legard, 6 M. & S. 60; Cunningham *v.* Dwyer, 23 Md. 231. "There are, in law, two kinds of consideration, good, which is natural love and

affection; and valuable, which is money or marriage. The word good is used in this law as applied to cases which it does not mean to embrace; but from the evident meaning and object of the law to protect creditors from dispositions by debtors of their property with intent to defraud them, and from dispositions which might produce that effect by conveying it to the wives, children, relations or friends; all courts both of law and equity have considered the word good as meaning valuable consideration." Magniac *v.* Thompson, 1 Baldw. (U. S.) 358; s. c., 7 Pet. (U. S.) 361.

"Good consideration" in the third section of the Statute of Frauds is given the same interpretation. Hodgson *v.* Butts, 3 Cr. (U. S.) 157; Killough *v.* Steele, 1 St. & P. (Ala.) 267.

**Good and Convenient.**—See CONVENIENT.

**Good and Convenient Court House.**—A board of supervisors who have power to purchase land and build and keep in repair a good and convenient court house, have the power to plant shade trees. Allgood *v.* Hill, 54 Miss. 666.

**Good Current Money** is not merely money good as currency, but constitutional and lawful money. Moore *v.* Morris, 20 Ill. 255.

**Good and Sufficient Deed**—There is considerable variation in the interpretation of these terms as used in contracts for the sale of real estate, arising out of the difference in the nature of the tribunals before which the questions involved have arisen and the nature of the actions in which the phrase has come up for construction. The cases range themselves along two lines, one interpreting the expression as having reference solely to the form and quality of the instrument of conveyance, the other as implying perfection of title. The distinctions, so far as drawn, and the discrepancies in the decisions are best observed by a collection of the authorities.

In Clute *v.* Robison, 2 Johns. (N. Y.) 613, Kent, C. J., said: "A covenant to execute and deliver a good and sufficient deed of a piece of land does not mean merely a conveyance good in point of form. That would be a covenant without substance, but it means an operative conveyance; one that carries with it a good and sufficient *title* to the lands conveyed." This case was followed in Carpenter *v.* Bailey, 17 Wend. (N. Y.) 244, where a plea of failure of title was held good in an action for consideration money, though an intent was there gathered from the terms of the contract that a good title was to be given.

The decision of Clute *v.* Robison was distinguished in Gazley *v.* Price, 16 Johns. (N. Y.) 269, as representing the equitable doctrine, and Spencer, C. J., said: "The plaintiff bound himself to only give a good and sufficient deed for the premises. This relates merely to the validity and sufficiency of the conveyance in point of law, to pass whatever right the plaintiff had in the lands to the defendant. The case of Van Eps *v.* The Corporation of Schenectady (12 Johns. 442), was very well considered: and we there *held* that by an agreement to give a deed, no greater duty or obligation was created than to execute a conveyance or assurance of the property without warranty or personal covenants: and several cases were referred to in support of the proposition. The additional words 'a good and sufficient' cannot alter the construction of the agreement; they denote only the species of deed to be given, and have no reference to the title to be conveyed. Indeed they only go to designate more clearly the quality of the deed, but they fail entirely to point out the kind of warranty which should be annexed to the acquisition of the title." Followed in Parker *v.* Parmley, 20 Johns. (N. Y.) 130.

The earlier doctrine, however, seems to have prevailed in New York. "Whatever may be the language of a vendor, in a contract for the sale of lands, the law implies an understanding that he has and will convey a good title. . . I have no hesitation therefore in holding that, under a covenant, like that in this case, to execute 'a good and sufficient deed of conveyance' of land a vendee has a right, if he discovers the title to be defective, to refuse to receive it." Burwell *v.* Jackson, 9 N. Y. 535. "A covenant to cause to be conveyed by a good and sufficient warrantee deed is not complied with by the mere giving of a warrantee deed, where the grantor has no title to the land or where his title is imperfect. It must be a deed good and sufficient both in form and substance, to convey a valid title to the land which the covenantor has agreed should be conveyed." Everson *v.* Kirtland, 4 Paige (N. Y.) 538. But this case was in chancery, where the rule is that the court "will not decree the

specific performance of a contract of sale, if the vendor cannot make a good title, although the contract has made no provision as to covenants of warranty to be inserted in the conveyance. An exception, however, to the rule, exists where, by the contract of sale, the vendee expressly assumes the risk as to the title, or agrees to take such a title as the vendor is able to give." Bates *v.* Delaware, 5 Paige (N. Y.) 307; Bower *v.* Vickers, 1 Gr. Ch. (N. J.) 526.

The strict construction was at first adopted in New Jersey. "The agreement was to give a good and sufficient deed. Now a good deed means a good deed and not a good title. . . As the words 'good and sufficient deed' have a meaning in themselves, which is neither doubtful or ambiguous, we have no right by any rules of construction, to depart from the plain meaning of the word 'deed' and to stretch it to mean title, which is of so much larger and more comprehensive import, unless there was something else in the same instrument or in the attendant circumstances to demonstrate that the parties by the word deed meant and intended title." Barrow *v.* Bispham, 6 Halst. (N. J.) 119.

"In examining them (the New York cases) it will be found that the language in some was 'a conveyance of land' and in others 'a purchase of lands,' both of which expressions were adjudged to refer to the title and not merely to the instrument of conveyance. But . I apprehend that this court took a more correct and rational view of the question in Barrow *v.* Bispham, 6 Halst. 119. . . If this was entirely an open question in this court, I confess I should strongly incline to adopt the construction given by Judge Kent and the court of errors in Clute *v.* Robison. The intention of the parties to a contract, as gathered from its terms, should govern its construction. Now I undertake to say that in a written contract for the sale and purchase of lands the phrase 'a good and sufficient warranty deed' will be understood by more than nine-tenths of mankind, not excepting the legal profession, to mean a good and sufficient title; that if a person intended to sell and another to buy a doubtful or uncertain title, or anything less than a good and sufficient legal title, in reducing their contract to writing, they would not use this phrase, but would define the interest bargained for. The substance of these contracts is in general the estate bargained for and not the deed which is only the mode of conveying it. And a good and sufficient deed of conveyance for lands conveys to my mind the idea of a good and sufficient title to such lands. If these words unexplained and unqualified are to be referred only to the character of the instrument, a covenant to make such a deed may be performed without conveying the shadow of an estate or interest." Nevins, J. The court in this case found an intent in the contract outside of the words in question to convey a good title. Tindall *v.* Conover, 1 Spencer (N. J.) 214; s. c., 40 Am. Dec. 220; s. c., on appeal, 1 Zab. (N. J.) 651.

The terms were held to import a good title, one free from incumbrance, in Brown *v.* Gammon, 14 Me. 276; Cogan *v.* Cook, 22 Minn. 137; Greenwood *v.* Ligan, 11 S. & M. (Miss.) 615; Feemster *v.* May, 13 S. & M. (Miss.) 275. A contract to make a good and sufficient deed is for a conveyance in fee simple with covenant of warranty. Tremain *v.* Liming, Wr. (O.) 644.

But in the following cases the phrase under consideration was *held* to refer only to the validity of the deed, its form and execution, and not to the validity of the title to be conveyed. Joslyn *v.* Taylor, 33 Vt. 470; Brown *v.* Cavilland, 6 Cal. 566; Aiken *v.* Sanford, 5 Mass. 499; Tinney *v.* Ashley, 15 Pick. (Mass.) 546.

In construing this term in a statutory power given to executors and administrators, the court said: "There ought to be a liberal construction of an act made for such equitable and beneficial purposes, as that under consideration. Now when a man undertakes to make 'a good and sufficient deed' of his real estate, ought it not to be understood, not only that it shall be good and sufficient to convey, but also to secure by the usual covenants against a defect of title? And why should not the expression in the act receive the same construction? I see nothing absurd, inconsistent or unreasonable, in giving such a power, and the existence would, I am persuaded, in many instances, enable an executor or administrator to sell on better terms." The administrator or executor would be personally liable on his covenants beyond the statute. Summer *v.* Williams, 8 Mass. 181.

**Good Drawer.**—Evidence that a horse is a good drawer is sufficient to support a warranty that he is a good drawer

and pulls quietly in harness. The former includes the latter. Colthard *v.* Puncheon, 2 D. & R. 10.

**Good Habits.**—In a representation by an applicant for insurance that his habits are and always have been good, "the epithet 'good' does not mean that his habits were absolutely correct according to the strict rules of ethics, but that they were and had always been ordinarily good." Galbraith *v.* Arlington Mut. Ins. Co., 12 Bush (Ky.) 29.

**Good Health.**—(See HEALTH INSURANCE.) In an application for insurance "the statement that he (the applicant) was in good health does not import that he was entirely free from infirmity, but simply that he was in a reasonably good state of health, and that his life was such as might be insured with ordinary safety and upon common terms." Galbraith *v.* Arlington Mut. Ins. Co., 12 Bush (Ky.) 29. "The epithet 'good' is comparative. It does not require absolute perfection. When, therefore, one is described as being in good health, that does not necessarily nor ordinarily mean that he is absolutely free from any and every ill which 'flesh is heir to.' . . . In applying terms somewhat indifferent, reference should be had to the business to which they relate. . . . The most important question on applications for life insurance is, whether the proponent is exempt from any dangerous disease, one which frequently terminates fatally." Where the insured, at the time of renewing his insurance, is not affected with any disease other than those mentioned in his original declaration, and those have not become so aggravated as to make his condition substantially different from what it was when he was first insured, he is in good health within the meaning of the policy. Peacock *v.* N. Y. Life Ins. Co., 20 N. Y. 293.

**Good and Lawful Men.**—These words in the caption of an indictment comprehend every necessary qualification in such case prescribed by law. Bond *v.* State, 1 M. & Y. (Tenn.) 143; s. c., 17 Am. Dec. 795; Jerry *v.* State, 1 Blackf. (Ind.) 396. Their use is sufficient without further enumeration of qualifications. State *v.* Price, 6 Halst. (N. J.) 203. "These words are to be understood according to the subject-matter relative to which they are applied. In this instance the words are used as forming an inquest; and an inquest formed of good and lawful men must be of freeholders. *Liberales et legales homines* are the terms which have always been used in the *venire facias*, and their legal import and signification is freeholders, without just exception. 3 Bl. Com. 352; 4 Bl. Com. 350." State *v.* Glasgow, Conf. Rep. (N. Car.) 138; s. c., 2 Am. Dec. 629.

**Good and Merchantable.**—A warranty that machine cards were good and merchantable is not supported by proof that they are equal to any in America. Goulding *v.* Skinner, 1 Pick. (Mass.) 162.

**Good Note.**—(Collectible.) A guaranty that a note is good is in law a contract that the maker is solvent, and that the amount can be collected by due course of law. Cooke *v.* Nathan, 16 Barb. (N. Y.) 342. It is incumbent on the holder in order to charge the guarantor to prove that payment could not be enforced against the maker. Curtis *v.* Smallman, 14 Wend. (N. Y.) 231.

Good and collectible are words of similar import. "The accepted test of the goodness of a note is capability of being collected independent of any voluntary act of payment on the part of the maker, and the case of ordinary diligence on the part of the holder is implied where diligence would avail." Cowles *v.* Peck, (Conn.) 24 Rep. 529; s. c., 10 At. Rep. 569. The reference is solely to financial responsibility. Weil *v.* Schwartz, (Mo.) 4 West. Rep. 774. A good note is a collectible note, and one whose maker is insolvent, but which is secured by mortgage and indorsement, is such. Polk *v.* Frash, 61 Ind. 206; s. c., 28 A. R. 669.

In the expression "good negotiable promissory note and bank bill" in an indictment, "good" means "genuine" rather than "available to ensure payment." Com. *v.* Stone, 4 Metc. (Mass.) 48.

Payment in *good* notes must be in negotiable notes. McArthur *v.* Winslow, 6 U. C. Q. B. 149.

**Good Reason.**—Under a statute forbidding the carrying of concealed weapons, except where the person doing so had *good* reason to apprehend an attack, it is erroneous to instruct the jury to acquit if they find that the defendant had *reason* to apprehend an attack. Baker *v.* State, 49 Ala. 350.

**Good Security.**—Under a trust to invest "until a purchase of lands could be found, in government funds or other good securities," bank stock and South sea stock were *held* not to be good securities because they depended on the

**GOOD FAITH.**—Consists in an honest intention to abstain from taking any unconscientious advantage of another, even through the forms or technicalities of law, together with an absence of all information or belief of facts which would render the transaction unconscientious.[1] By "good faith" as judicially interpreted is meant a purchase made, not merely for a consideration, but also without notice to the purchaser of an adverse claim to the property by others.[2] (See BONA, SALE.)

management of directors, and are subject to losses. Not so, however, of bank and South sea annuities, whose principal was guaranteed by the government. Trafford *v.* Boehm, 3 Atk. 440.

An award of arbitrators that the plaintiff should pay the defendant certain sums of money, and if he gave the defendant good and sufficient security for the payment, possession of the land in dispute should be delivered to him, describes too indefinitely the nature of the security, and is void for uncertainty. Jackson *v.* Delong, 9 Johns. (N. Y.) 43.

**Good Title.**—A good title is a perfect title, free and clear from any legal exception or charge thereon. Gillespie *v.* Broas, 23 Barb. (N. Y.) 370.

A good title is such a title as the court of chancery would adopt as sufficient ground for compelling specific performance. "By a stipulation for a good title must be understood, not such a title as would support a verdict for the purchaser in an action of ejectment against a mere stranger, but such a one as would enable the purchaser to hold the property against any person who might probably challenge his right to it. Jeakes *v.* White, 6 Exch. 873; s. c., 14 Eng. L. & Eq. 350.

**Good Watch.**—In a representation on which insurance is made that a good watch was kept, "good" means "suitable," "proper," "adapted to the exigencies of the case." Parker *v.* Bridgeport Ins. Co., 10 Gray (Mass.) 302.

1. Gress *v.* Evans, 1 Dak. T. 399.

2. Kellar *v.* Stanley, 5 S. W. Rep. 480 (Ky.), where it was *held* that the purchaser from a plaintiff in an action against a defendant constructively summoned, before the latter had entered his appearance and moved for a re-trial of the action was a purchaser "in good faith," it not being shown that he had any notice of the defendant's claim.

In the Statute of Limitations the words "good faith" must receive a practical common sense construction. The statute was intended to protect a purchaser of land who bought and paid his money under the belief that he was acquiring title. This is the construction it has heretofore received, and it is undoubtedly correct. . . The fact that a purchaser may err in judgment, or do an act that another, under like circumstances, might not do, is not enough to impeach the good faith of the transaction. Where the purchase is made with an honest purpose, although the real title is not acquired, the good faith cannot be questioned." Winters *v.* Haines, 84 Ill. 588–9.

So in Woodward *v.* Blanchard, 16 Ill. 432–3, in discussing the same statute it is said: "'Good faith' is doubtless used here in its popular sense, as the actual, existing state of the mind; whether so from ignorance, skepticism, sophistry, delusion, fanaticism, or imbecility, and without regard to what it should be from given legal standards of law or reason. So I understand the current of decisions upon these and similar questions of acts, under statutes of limitations." It is also remarked that "What is color of title is matter of law, and when the facts exhibiting the title are shown, the court will determine whether they amount to color of title. But the good faith of the party in claiming under such color is purely a question of fact, to be found and settled as other facts in the case." *Ibid* 430.

See to the same effect Rawson *v.* Fox, 65 Ill. 200. "*Good faith*" within the meaning of this statute, I understand to be the opposite of *fraud* and of *bad* faith; and its non-existence, as in all other cases where fraud is imputed, must be established by proof." McConnel *v.* Street, 17 Ill. 254.

In an act regulating state selections upon unsurveyed public lands protecting the rights of holders in "land sold to purchasers in good faith under the laws of the State," these words mean such selections as have been made according to the conditions of the State laws under which they purport to have

**GOODS** (See BONA, CHATTELS, FRAUDULENT CONVEYANCES, EFFECTS, FIRE INSURANCE, FRAUD (statutory), HOUSEHOLD, MARINE INSURANCE, MERCHANDISE, SALE, WARES, and the various crimes against personal property)—means primarily chattels, real as well as personal. It is generally, however, applied to movables only, or to personalty, including choses in action as well as in possession. In some contexts it has a still more restricted meaning, being synonymous with merchandise, things for sale.[1]

been made, and which have been sold in a manner which would have passed the title had it then been in the State. Toland *v.* Mandell, 38 Cal. 30.

"Fairness and good faith," in a sale, mean "that fair dealing which usually characterizes business transactions. They are used as the antithesis of *male fides*. . . The words are used in their common and popular acceptation, and not in a technical sense." Morgan *v.* Hazlehurst Lodge, 53 Miss. 683.

Where a mortgagor in possession executes a second mortgage upon the property in which the prior mortgage is recited, the second mortgage is not a mortgagee "in good faith" against whom the prior mortgage without delivery of possession is by statute voidable. "Want of notice is an essential element of *good faith*, or *bona fides*, as these terms are used in registry statutes, and in equity jurisprudence." Tolbert *v.* Horton, 31 Minn. 518.

In the dissenting opinion it is said: "No doubt under most circumstances the expression 'purchaser in good faith' implies want of notice of prior conveyances, but not always or necessarily so. This depends on the nature of the case and the object of the statute. You cannot in every case inject into a statute which uses the term 'purchaser in good faith' the additional term 'without notice.' Sanders *v.* McAffee, 42 Ga. 250; Thornton *v.* Bledsoe, 46 Ala. 73. 'Good faith' is the opposite of 'bad faith.' 'Bad faith' implies fraud or wrong motive."

So in Gregory *v.* Thomas, 20 Wend. (N. Y.) 19, it is said: "To say that a man takes *in good faith* when he acts with notice, and of course, under conscious hostility to another who has before taken a similar title, would be a legal solecism."

Under the provision of the New York Code authorizing the court where, upon appeal from a judgment, an undertaking requisite to stay execution has been given, to exempt by order from the lien of such judgment real estate upon which it is a lien, and to direct an entry on the docket of judgment that it is "secured on appeal" and declaring that thereupon such judgment shall cease, during the pendency of the appeal, to be a lien upon the property so exempted "as against purchasers and mortgagees in good faith," one who has, during the pendency of the appeal, taken a mortgage "in good faith" upon property so exempted, in payment of an antecedent debt, is protected, and his mortgage has a preference over the judgment. "It was not requisite for them to have parted with value at the time, provided they took their mortgage fairly and honestly, and, for full value." Union Dime Savings Inst. *v.* Duryea, 67 N. Y. 84.

And in interpreting the same provision in Browner *v.* Loomis, 17 Hun. (N. Y.) 442, it is said: "What then is the meaning of '*good faith*' as used in this statute? It can only mean that the mortgagee must have taken his mortgage without any design to defraud the plaintiffs in the judgment, or anybody else, and upon some *bona fide* consideration either present or past."

1. **"Goods, Biens, Bona,** includes all chattels as well real as personal." Co. Litt. 118 *b*; Shepherd Touch. 97.

"For many purposes money is included within the terms goods and chattels, which comprehend all a man's personal or movable property." Seymour *v.* Dascombe, 12 Wend. (N. Y.) 486.

**In Wills, Deeds and Grants.**—"The word goods is *nomen generalissimum* and, when construed in the abstract, the term will embrace all the personal estate of the testator, as bonds, notes, money, plate, furniture, etc. And such is its effect by the canon law as well as the common law, which seems to have adopted the former. . . Such is the effect of the word 'goods' in all cases where the bequest is of 'goods' generally. And this proposition is only

untrue where the testator, instead of bequeathing his goods generally, restricts the import of the word by limiting its effect to those in a particular situation, as by specifically bequeathing all his goods in his house at A.; in such and in the like instances coming within the same reason, since the goods given are connected with the subject, in its nature showing the sense in which the term was used by the testator, where the term will be controlled and limited in its signification. 1 Roper on Legacies 189. The effect of the term 'goods and chattels' is the same in a deed of assignment for the benefit of creditors, unless there is something in the instrument indicative of an intention to restrict the general import of the words. The intention of the parties governs as well in deeds as wills, unless the import of the deed is restrained by well defined technical rules of construction. The term 'goods and chattels' includes *choses in action* as well as those in possession. 12 Co. 1; 1 Atk. 182. The term 'chattels' is more comprehensive than 'goods,' and will include animate, as well as inanimate, property; and so of the term effects; for the term 'goods' will not embrace fixtures, but the word effects may. Dowdel *v.* Hamm, 2 Watts (Pa.) 61; Williams on Exrs. (6th Am. ed.) 1178; Ryall *v.* Rolle, 1 Atk. 180; Critchton *v.* Symes, 3 Atk. 62; Anon., 1 P. Wms. 267; Moore *v.* Moore, 1 Bro. C. C. 128; Roe *v.* Bird, 2 Wm. Bl. 1301.

A bequest of "all monies, goods, chattels, clothing, etc., my property," will pass stock. "In the construction of wills of personal estate, the jurisdiction of courts of equity being concurrent with that of the ecclesiastical courts, courts of equity follow the rule of the canon law, which is founded upon the civil law. By the canon law, the word 'goods,' and equally the word 'chattels,' taken simply and without qualification, comprise the whole personal estate of every description. This is a distinction stated in the third volume of Swineburn 930; and a reference is made to cases in equity which seem to break in upon this position, showing that such cases proceeded upon the particular language of the wills upon which they arose. The question, therefore, in the present case is not whether the words used are sufficient to comprise stock, but whether those words are by the context of the will so qualified that an intention is manifested on the part of the testator to exclude stock." Kendall *v.* Kendall, 4 Russ. 360. "The words 'goods and movables' may include bonds unless there is something in context of the whole will to restrain or qualify the construction." Jackson *v.* Robinson, 1 Yeates (Pa.) 101; s. c., 1 Am. Dec. 293; Anon., 1 P. Wms. 267; Moore *v.* Moore, 1 Bro. C. C. 127. *Bona mobilia* of the civil law includes *all* movables. *Ibid.*

A bequest of goods and chattels passes debts due. Bennet *v.* Batchelor, 1 Ves. 64. But debts due do not pass by a *grant* of the goods and chattels of a felon. Rex *v.* Sutton, 1 Saund. 273; Mayor of Southampton *v.* Richards, 1 Sid. 142; Ld. Northampton *v.* Ld. St. John, 2 Leon 56. Nor do stock and money in the funds. Rex *v.* Capper, 5 Price 217.

By a grant of *omnia bona* leases pass not, otherwise in wills, for it is a legacy whereof the civilians are judges, and they hold that *bona* comprehends all chattels. Postman *v.* Willis, 1 Cro. 386. See Cook *v.* Bosinger, 4 Mod. 156; 1 Dyer 5*b*.

Where the bequest is of "all my goods" *at a particular place* the legacy is restricted to such things as savor of the locality, as furniture, plate, linen, bank notes and ready money. And under such a bequest, choses in action do not pass. Chapman *v.* Hart, 1 Ves. Sr. 273; s. c., Ambl. 68; Green *v.* Symonds, 1 Bro. C. C. 129*n*; Moore *v.* Moore, 1 Bro. C. C. 128; Jones *v.* Sefton, 4 Ves. 166; Ld. Hertford *v.* Ld. Lowther, 7 Beav. 1.

The word "goods," if coupled with other words of a limited signification, will be restrained to things *ejusdem generis*. Williams on Exrs. (6th Am. ed.) 1182.

Goods and chattels in and about a dwelling-house and out-houses at A include running horses there. Gower *v.* Gower, Ambl. 61; s. c., 2 Eden 201.

The term is often used in wills by those unacquainted with technical terms to mean estate. Wyatt *v.* Sadler's Heirs, 1 Munf. (Va.) 548.

**In Criminal Statutes.**—See in general on this subject under their respective titles the different crimes affecting personal property.

"In the strictest sense of the common law, 'personal goods' are movables belonging to, and the property of, some person, which have an intrinsic value. . . . In a more large and liberal sense, the term 'goods' may

embrace movables, not having an intrinsic value, such as choses in action and monied securities, notes, bonds and other debts and evidences of debts. . . . But, in construing penal statutes, courts of law have often, in favor of the citizen, interpreted the word 'goods' in its strictest sense; and, indeed, in capital felonies, have sometimes in favor of life adopted a far more limited meaning, savoring too often of unseemly nicety, if not of extravagant refinement." In the common law definition of larceny "'personal goods' has always been construed to mean such movables only as have an intrinsic value, and therefore as not comprehending mere choses in action. The common law did not deem the latter the subject of larceny, because they were not of any intrinsic value, and did not import any property in possession of the person from whom they were taken." But "the natural sense of the terms of the act ought to be adopted unless the context affords clear proof of some more restrictive application of them. . . . We are now construing a public statute; and if we can perceive that the words of the statute in common and legal understanding are large enough to comprehend bank notes, and the policy of the statute applies to them with at least the same force that it does to 'personal goods,' in the most restrictive sense of the terms, we are bound to give that interpretation which carries the word to the extent of the mischief." Story, J., in U. S. *v.* Moulton, 5 Mason (U. S.) 537. But see U. S. *v.* Davis, 5 Mason (U. S.) 356.

It is not necessary to constitute articles goods that they should be offered for sale. State *v.* Brooks, 4 Conn. 449.

**In Other Statutes.**—Goods, in an act of parliament, include personal actions as well as goods in possession. Ford & Seldon's Case, 12 Co. 1. Leaseholds and buildings thereon are not "goods and effects" within the meaning of an attachment act. "The word 'goods' is always used to designate wares, commodities and personal chattels. The word effects is the equivalent of the word movables." Vandergrift's App., 83 Pa. St. 126. Choses in action are not "goods, effects and credits" within such an act. Perry *v.* Coates, 9 Mass. 537; Gore *v.* Clisby, 8 Pick. (Mass.) 555. As debts due from third person. Purves *v.* Lex., (Pa.) 7 Cent. Rep. 891. Nor is land assigned for the benefit of creditors. Gore *v.* Clisby, 8 Pick. (Mass.) 555.

In an act relieving shipowners from liability for loss or damage by fire, unless it occurs through design or negligence, "goods" includes personal baggage. "Webster defines 'goods' to mean personal or movable estate. In Jacobs' Law Dictionary, and also in Tomlin's, it seems to be held synonymous with chattels. In Bouvier's Law Dictionary it is said that this term will sometimes include money, valuables, securities and other merely personal effects, and that, used in a will, it will pass the whole personal estate, including even stocks in the funds, and such is the common understanding of the meaning of the word. It is generally understood to mean personal estate as distinguished from the realty.

"It sometimes has a restricted meaning, depending upon the circumstances under which it is used. I am not aware that among the business of commerce or among seafaring men, this term has any signification different from that in common use. It is undoubtedly true that in some cases of marine insurance, an insurance of 'goods and merchandise' has been held to cover only such cargo as was laden on board the vessel for the purposes of commerce. But in all these cases this result has been reached not so much from the force of the terms used as from the presumed intention of the parties as gathered from the circumstances of the case." Chamberlain *v.* Western Trans. Co., 44 N. Y. 305.

A passenger's baggage is within the terms "articles, goods and things" in an act regulating a railway company's liability for negligence. Cohen *v.* S. E. Ry. Co., 2 Ex. D. 253.

The capital stock of a corporation is not goods and chattels within the meaning of a chattel mortgage act. Williamson *v.* So. N. J. Ry. Co., 11 C. E. Gr. (N. J.) 403.

In an act providing for execution from justices' courts, goods and chattels refer to personal chattels only, and do not include leaseholds. Putnam *v.* Westcott, 19 Johns. (N. Y.) 73.

In a bankruptcy act, the term goods is not confined to tangible property; it will include an interest in a newspaper. Longman *v.* Tripe, 5 B. & P. 67. But not fixtures. Horn *v.* Baker, 9 East 215.

Bonds and mortgages are goods in an act giving a right of action against ex-

ecutors and administrators for conversion by their decedents. Terhune *v.* Exrs. of Bray, 1 Harr. (N. J.) 54.

Gravel to be used in repairing a road is goods, ware and merchandise within the meaning of a toll act. Coulton *v.* Ambler, 13 M. & W. 403.

Silver dollars are "goods, wares, and merchandise" within the meaning of an act requiring a permit from the custom house to land such. It cannot be doubted that money, and, of course, foreign coin, falls within the description of 'goods' at common law, and a legacy of 'goods' would *ex vi termini* carry money or coin, unless that construction were repelled by the context. And coin, dollars and bullion are considered in commercial transactions as 'goods and merchandise,' and may be insured as such in a policy of insurance. In point of fact, too, dollars are often imported as 'wares and merchandise,' that is to say, as property not to pass merely as currency but to be bought and sold as a marketable commodity at varying prices, unless, therefore, there is something in the context of the statute from which it can be inferred that the legislature did not use the words in their ordinary import, I think I am bound to interpret them in that sense." Story, J. The Elizabeth and Jane, 2 Mas. (C. C.) 407. But the appurtenances of a ship are not within this act. The goods, wares and merchandise, "are such only as are designed for sale, or to be applied to some use or object distinct from the *bona fide* appropriation to the use of the ship in which they are imported. United States *v.* A Chain Cable, 2 Sumn. (C. C.) 362.

The same construction is put upon these terms in the revenue laws generally. Weld *v.* Maxwell, 4 Blatchf. (C. C.) 136.

**In Contracts.**—A mortgage on "goods in store" does not include a safe kept in the store not for sale, but for private use. "The term goods when used in contradistinction to real estate would doubtless include all kinds of movable personal property and even bills, notes, certificates of stock, etc. But it cannot be supposed to have that extent in the case of this chattel mortgage.

"The question here is one of intent; and we think it quite clear that when a merchant speaks of the goods in his store, he must be generally understood to have reference only to the merchandise and commodities kept on hand for the purposes of sale, unless there be some peculiar reason which does not appear in this case to give the word a broader signification." Curtis *v.* Phillips, 5 Mich. 112. So where a lease made the rent a lien upon "any and all goods, ware and merchandise" then in or thereafter to be put in, on or about the buildings, these terms do not include teams and wagons of the lessee used by him to deliver goods to his customers, nor notes and accounts due to him and kept in the building. Van Patten *v.* Leonard, 55 Ia. 520; s. c., 24 Am. Law Jour. 30.

Goods and chattels in an attachment bond conditioned to return property condemned includes land, real estate being chattels for the payment of debts. Hays *v.* Bouthalier, 1 Mo. 347.

"Let A have the amount of $5 in goods and I will settle with you next week," is not an order for the delivery of goods, within a forgery act; it is a mere authority to sell on the credit of the drawer. Horton *v.* State, 53 Ala. 488.

A guaranty for "goods supplied" to another means "goods to be supplied." Hood *v.* Grace, 7 H. & N. 494.

A sale by a merchant of his stock of goods in a certain town does not pass all his personal effects there, but evidence may be introduced to show of what the stock sold consisted. Knight *v.* Parker, 25 Ill. 593.

**In Insurance Policies.**—A policy upon a stock of goods such as are usually kept in country stores covers all articles within the description, though they include some which are generally prohibited except at special rates. Pindar *v.* Kings Co. Ins. Co., 36 N. Y. 648.

**Goods in Trust** in a policy cover goods of customers in the possession of a warehouseman. Walters *v.* Monarch F. & L. A. Co., 5 E. & B. 870.

The term in marine insurance, means merchandise, things for sale. 1 Parsons on Marine Ins. 521. It includes specie and bullion. DaCosta *v.* Firth, 4 Burr. 1966; Am. Ins. Co. *v.* Griswold, 14 Wend. 399. But it does not cover articles stowed on deck. Allegre's Admrs. *v.* Md. Ins. Co., 2 G. & J. 136; s. c., 20 A. D. 424, or a sloop in tow. Oteri *v.* Home Ins. Co., McGloin (La.) 198.

**In Pleading.**—The term in the general count for goods sold and delivered may include a building standing on the land of another and which is personal property. "The word 'goods' as a technical term of the law is *nomen generalis-*

**GOOD-WILL.**—Is defined as being "the advantage or benefit which is acquired by an establishment beyond the mere value of the capital stock, funds or property employed therein, in consequence of the general public patronage and encouragement which it receives from constant or habitual customers on account of its local position or common celebrity or reputation for skill or affluence or punctuality or from other accidental circumstances or necessities, or even from ancient partialities or prejudices."[1] And is nothing but the chance of being able to keep the business which has been established; the sale of a mere chance which vests in the purchaser nothing but the possibility that a preference which has usually been extended may continue.[2]

It is not every vocation followed by man that has a good-will connected with it that courts will recognize and protect. (The good-will of any business must be a matter subject of valuation different from other like dealers.) Such good-will is measured by the value placed upon that which may be special about a business or the mode of conducting it, or the place in which it is conducted, or the place of business as to give it peculiar prominence and profit in the estimation of business men.[3]

"There is considerable difficulty in deciding accurately what is included under this term good-will; it seems to be that species of connection in trade which induces customers to deal with a particular firm. It varies almost in every case, but it is a matter distinctly appreciable which can be preserved (at least to some

*simum*, and has a very extensive meaning. In a will where there is nothing to restrain its operation it includes all the personal estate of the testator. 1 Jarman on Wills 692. In a strict sense, as the word is understood in the construction of penal statutes, it is limited to movables belonging to the property of some person, which have intrinsic value, and does not include securities which are not valuable in themselves but merely represent value. United States *v.* Moulton, 5 Mason (U. S.) 544.

"This building was movable property, belonging to the plaintiff and the other proprietors, and falls within the strict common law definition of the term 'goods' as given in U. S. *v.* Moulton. In construing agreements the application of the term is often restricted, but in its legal sense, as answering to the law term 'biens,' it includes all tangible personal property and even living animals." Keyser *v.* School District, 35 N. H. 477. This term in the common counts includes cattle. Weston *v.* McDowell, 20 Mich. 353; lottery tickets, Yohe *v.* Robertson, 2 Whart. (Pa.) 155; stock, Lawton *v.* Hickman, 9 Q. B. 563; but not fixtures. Lee *v.* Risdon, 7 Taunt. 188.

In an action of trespass for taking goods, chattels, and effects, the value of fixtures taken may be recovered. Pitt *v.* Shew, 2 B. & Al. 206.

Private papers are goods within Mass. Gen. Stats. c. 143, s. 10. "It is argued that replevin does not lie for private papers, the statute only mentioning 'goods.' How extensive the word 'goods' or 'goods and chattels' is to be understood in any instance must depend on the subject-matter and the context. 'Goods' may include everything but what descends to the heir. Com. Dig. Biens C. D. Dane Abr. c. 13, a. 13, s. 1. Choses in action may pass by that name. Ford & Seldon's Ca., 12 Rep. 1; Ryal *v.* Rowles, 1 Ves. Sr. 348." Whenever detinue lay at common law, replevin may be maintained under this act. Gibbs *v.* Usher, 1 Holmes (U. S.) 348.

1. 1 Story's Partnership, § 99; see, also, Carey *v.* Gunnison, (Iowa) 17 N. W. Rep. 881.

2. Barber *v.* Conn., etc., Ins. Co., (N. Y.) 15 Fed. Rep. 312.

3. Fay *v.* Fay, (N. J.) 6 Atl. Rep. 12.

extent), if the business be sold as a going concern, but which is wholly lost if the concern is wound up, its liabilities discharged and its assets got in and distributed.[1]

Good-will as property is intangible, and merely an incident of other property.[2]

The opinion of Lord Eldon is an oft quoted one claiming that good-will is simply "the possibility that the old customers will resort to the old place."[3]

In Churton *v.* Douglas, Johns. Eng. Ch. 174, the following language is used: "It was argued that, in Shakle *v.* Baker, 14 Vesey 468, Cruttwell *v.* Lye, 17 Vesey 335, and Kennedy *v.* Lee, 3 Meri. 452, Lord Eldon has laid down the principle that an assignment of the good-will of a trade, *simpliciter*, carries no more with it than the advantage of occupying the premises which were occupied by the former firm, and the chance you thereby have of the customers of the former firm being attracted to those premises. But it would be taking too narrow a view of what is there laid down by Lord Eldon to say that it is confined to that. Good-will, I apprehend, must mean every advantage — every positive advantage if I may so express it, as contrasted with the negative advantage of the late partner not carrying on the business himself — that has been acquired by the old firm in carrying on its business, whether connected with the premises in which the business was previously carried on, or with the name of the late firm, or with any other matter carrying with it the benefit of the business. When Lord Eldon in speaking of a nursery garden or a locality which the customers must frequent to look at the flowers and other things, and when Sir Thomas Plumer, in another case, in speaking of a retail shop which a person must enter in order to buy the goods there exposed—they are only, as it appears to me, giving those as illustrations of what good-will is. But it would be absurd to say that, where a large wholesale business is conducted, the public are mindful whether it is carried on at one end of the Strand or the other, or in Fleet street, or in the Strand or any place adjoining, and that they regard that, and do not regard the identity of the house of business, namely, the firm."[4]

**Name in Trade.** — In Hudson *v.* Osborne,[5] the bankrupt had a place of business designated and known as "Osborne House," of which the plaintiff became the owner, in pursuance of proceedings in bankruptcy against defendant, whose name was Osborne; and he was enjoined from designating his place of business, after his discharge, as "Osborne House."

C. W. D. & Co., a copartnership, who had built up an extensive trade and acquired a great reputation as dealers in seeds, grains and plants, which were sold with labels attached bearing the firm

1. Wedderburn *v.* Wedderburn, 22 Beav. 84.
2. Rawson *v.* Pratt, 91 Ind. 9.
3. Cruttwell *v.* Lye, 17 Ves. 335. See Buckingham *v.* Waters, 14 Cal. 223. The Succession of Journe, 21 La. Ann. 391.
4. Churton *v.* Douglas, Johnson's Eng. Ch. 174.
5. 39 Law J. Ch. (N. S.) 79.

name, made an assignment for the benefit of creditors, and plaintiff purchased all the stock, and, connecting C. N. P., formerly of the firm of C. W. D. & Co., with him in business, continued the business of C. W. D. & Co. at the old stand, which was leased from the owner for that purpose. C. W. D. formed a corporation and resumed business under the old name, and it was held that plaintiff, who had never carried on the business under the name of C. W. D. & Co., could not restrain C. W. D. & Co. from carrying on business under that name, or from receiving and using mail addressed to C. W. D. & Co.[1]

Where one, John Douglas, formerly a member of the firm of John Douglas & Co., had sold all his share in the good-will of the partnership to his former partners, he was restrained from using the firm name of John Douglas & Co., although his own name was John Douglas, and he was associated with others in partnership; and in passing upon the case, the vice-chancellor said that if the old firm had been merely "John Douglas," and there had been a sale by an individual of that name of all his share in the good-will of the firm, he could not again set up the old firm of "John Douglas," and be at liberty to trade under such misrepresentations.

"The name of a firm is a very important part of the good-will of the business carried on by the firm. A person says, I have always bought good articles at such a house of business; I know it by that name, and I send to the house of business identified by that name for that purpose. There are cases every day in this court with regard to the use of the name of a particular firm, connected generally, no doubt, with the question of trade-mark. But the question of trade-mark is, in fact, the same question. The firm stamps its name upon the articles. It stamps the name of the firm which is carrying on the business on each article as a proof that they emanate from that firm; and it becomes the known firm to which applications are made, just as much as when a man enters a shop in a particular locality. And when you are parting with the good-will of a business, you mean to part with all that good disposition which customers entertain towards the business identified by the particular name or firm, and which may induce them to continue giving their custom to it. . . . That the name is an important part of the good-will of a business is obvious, when we consider that there are at this moment large banking firms and brewing firms and others in this metropolis which do not contain a single member of the individual name expressed in the firm."[2]

**Restraints on Vendor.**—The sale of the good-will of a business does not imply a contract on the part of the vendor to not again engage in a similar business.[3] And in the absence of any express

1. Iowa Seed Co. *v.* Dorr, 70 Iowa 481.
2. Churton *v.* Douglas, Johnson's Eng. Ch. 174. See Rogers *v.* Nowvill, 3 De G. M. & G. 614.
3. Cattrell *v.* Babcock, etc., Co., 54 Conn. 22; Bergamini *v.* Bastian, 35 La. Ann. 60; Hanna *v.* Andrews, 50 Iowa 462; Bassett *v.* Percival, 5 Allen

stipulations to the contrary, the vendor may lawfully establish a similar business at the next door, and by advertisement, circular, card and personal solicitation, invite all the world, including the old customers of the vendor, to come there and purchase of him, being very careful always, when addressing individuals or the public, either through the eye or ear, not to lead anyone to believe that the articles which he offered for sale were manufactured by the vendee, or that he was the successor to the business of the old firm, or that vendee was not carrying on the business formerly conducted by the vendor.[1]

**Personal Solicitation.** — That the old customers may be solicited by advertisement and general circulars, courts are substantially agreed, but some stop at that and bar personal solicitation.[2]

In Labouchere *v.* Dawson,[3] Lord Romily laid down the rule that the seller of a business with its good-will may, in the absence of any express agreement to the contrary, carry on the same business wherever he pleases, and solicit customers in any public manner, but that he must not apply to any of the old customers, privately, by letter, personally or by traveller, asking them to continue their custom with him, and not to deal with the vendee.

In Ginesi *v.* Cooper,[4] it was distinctly laid down that a trader who had sold his business, and the good-will of it, could not deal with the old customers.

In Walker *v.* Mattram,[5] this holding was extended to a case where the good-will had been sold, not by the trader himself, but by his trustee in bankruptcy; but it was held, upon appeal, that this rule could not apply to compulsory sales.[6]

But the present tendency of the law is contrary to this, and to deny the vendor personal access to the old customers would put him at such a disadvantage as to endanger his success. Such prohibition must come from positive agreement and not from inference.[7]

In Pearson *v.* Pearson,[8] A sold to B all his interest in a certain business. A afterwards engaged in a similar business, and B sought to restrain A from issuing a certain circular, and from privately, by letter or personally, or by a traveller, asking any person who, prior to the date of the sale to B, was a customer or correspond-

(Mass.) 345; Cruttwell *v.* Lye, 17 Ves. 344; White *v.* Jones, 1 Abb n. s. (N. Y.) Pr. 337; Davies *v* Hodgson, 25 Beav. 177; Churton *v.* Douglas, 1 Johns. Eng. Ch. 176; Howe *v.* Searing, 6 Bosw. (N. Y.) 354; Dayton *v.* Wilkes, 17 How. Pr. (N. Y.) 510; Cook *v.* Callingridge, Jacob 607.

1. Hanna *v.* Andrews, 50 Iowa 462; Bassett *v.* Percival, 5 Allen (Mass.) 345; Churton *v.* Douglas, 1 Johns. Eng. Ch. 174; Cattrell *v.* Babcock, etc., Co., 54 Conn. 122; Hoxie *v.* Chaney, 143 Mass. 592.

2. Burrows *v.* Foster, 32 Beav. 18; Labouchere *v.* Dawson, L. B. 13 Eq. Cas. 322; Ginesi *v.* Cooper, 14 Ch. Div. 596; Leggott *v.* Barrett, 43 Law. T. 641.

3. L. B. 13 Eq. Cas. 322.

4. 14 Ch. Div. 599.

5. 19 Ch. Div. 355.

6. See Pearson *v.* Pearson, L. R. 27 Ch. Div. 145.

7. Cattrell *v.* Babcock, etc., Co., 54 Conn. 122.

8. L. R. 27 Ch. Div. 145.

ent of the old business, to deal with A or not to deal with B. The court refused to sustain the injunction, maintaining that by fair means the vendor may solicit the old customers in any manner at his command.

In Cook *v.* Callingridge,[1] Lord Eldon said that after a sale the partners would be at full liberty to carry on the same trade and business; that those who buy the good-will, buy it with full knowledge that it is liable to the chance of the partners not retiring from trade and carrying off the customers of the old establishment.

In Bergamini *v.* Bastian,[2] there was a sale of a commercial establishment together with the good-will thereof. "Holding as we do," say the court, "that he was not in the least precluded by any stipulation in his contract with the plaintiff from resuming the keeping of a saloon and lunch-house in any portion of the city, we must recognize his right to resort to ordinary means of advertising his business, and to other modes of soliciting patronage or custom."

Where one partner in a firm purchased of his partners all their interests "in the property, assets, money, good-will and all other property of every name and nature, in and to the firm of Kalamazoo Wagon Company," the other partners will be restrained by injunction from carrying on business under the name of the "Kalamazoo Buggy Company," and using circulars similar to those used by the partner purchasing the original business.[3]

**Injunction.** — An injunction will lie to restrain one person from assuming the name of another's newspaper to impose upon the public and to supplant the latter person in the good-will of his paper.[4]

A continuing partner may be enjoined from using the old firm name, so as to give third persons good cause to believe that the retired partner was still in the firm; the latter in selling out to the former not having mentioned the good-will.[5]

**Partnership for Term.**—A person forming a copartnership with another, having agreed to leave at the end of the term, cannot, on retiring, claim an interest in the good-will of the business.[6]

**Use of Vendor's Name.** — The sale of good-will does not transfer to the vendee any right to use the name of the vendor;[7] but it does justify him in advancing his own interests by referring to himself as the "successor to" his vendor.[8]

**Barter and Sale.**—Good-will connected with any trade or occupation is a valuable right, and may be made the subject of barter and sale,[9]

1. Jacob 607, reported in Collyer on Partnership 174.
2. 35 La. Ann. 60.
3. Myers *v.* Kalamazoo Buggy Co., 54 Mich. 215.
4. Bell *v.* Locke, 3 Paige (N. Y.) 75.
5. McGowan, etc. Co., *v.* McGowan, 22 Ohio St. 370.
6. Van Dyke *v.* Jackson, 1 E. D. Smith (N. Y.) 419.
7. Reeves *v.* Denicke, 12 Abb. n. s. (N. Y.) Pr. 92.
8. Weed *v.* Peterson, 12 Abb. n. s. (N. Y.) Pr. 178.
9. Carey *v.* Gunnison, (Iowa) 17 N. W. Rep. 881; Wallingford *v.* Burr, 17

and may be bequeathed;[1] but it has been held that the legatee of a deceased partner's share in the good-will of the partnership business could not sue the surviving partners for a sale of the good-will and payment of his share, although the bequest had been assented to by the executors, but this case was decided in acknowledgment of the rule that the surviving partner was entitled to everything which gave a salable value to the good-will.[2]

A partner of the old firm will be permitted to retain the good-will upon payment of the full value thereof to his copartner.[3]

**Assets.**—The good-will of a business is a part of its assets,[4] and goes to the personal representatives.[5]

"The name or style of the firm Banks & Co., was an asset of the partnership, and if the whole concern and the whole good-will had been sold, this was a trade-mark or asset which might have been sold with it.[6]

"The whole or a substantial part of the trade may consist of good-will, leaving the renewal of contracts with the old connection of the firm unaffected; in such case the good-will is the identical source of profit which operates both before and after dissolution."[7]

Perhaps the earliest example of good-will in the books appears on the question whether or not profits of a newspaper subsequent to the testator's death were part of personal estate. Lord Hardwicke decided in the affirmative, saying: "This has been resembled to the case of a shoemaker, and in that case, suppose the dealing has been extensive and carried on in partnership and with the father's stock, the son, who is executor, would be accountable. Suppose the house was a house of great trade, he must account for the value of what is called the good-will of it."[8]

In Bradbury *v.* Dickens,[9] the court on a dissolution of a literary partnership, ordered the right to use the name "Household Words," to be sold, and the proceeds to be distributed with other assets of the firm.[10]

Neb. 137; Fay's Admr. *v.* Fay, (N. J.) 6 Atlantic Rep. 12; Herefort *v.* Cramer, 7 Colo. 483; Cruess *v.* Fessler, 39 Cal. 336; Beal *v.* Chase, 31 Mich. 490; Morse *v.* Hutchins, 102 Mass. 439; Churton *v.* Douglas, Johns. Eng. Ch. 174; Banks *v.* Gibson, 11 Jur. 680; Johnson *v.* Helleley, 34 Beav. 63; Hitchcock *v.* Coker, 6 Ad. & El. 438; Turner *v.* Major, 3 Gif. 442; Cruttwell *v.* Lye, 17 Ves. 335; Shackle *v.* Baker, 14 Ves. 468; McFarland *v.* Stewart, 2 Watts (Pa.) 111; Holden's Admr. *v.* McMakin, 1 Pars. Eq. Cas. (Pa.) 270; Musselman's Appeal, 62 Pa. St. 81; Dougherty *v.* VanNostrand, 1 Hoff. Ch. (N. Y.) 68.

1. Hitchcock *v.* Coker, 6 A. & E. 438; Smith *v.* Everett, 27 Beav. 446.
2. Robertson *v.* Quiddington, 29 Beav. 529.
3. Sheppard *v.* Boggs, 9 Neb. 257.
4. Wallingford *v.* Burr, 17 Neb. 137; Sheppard *v.* Boggs, 9 Neb. 258; Hathaway *v.* Bennett, 10 N. Y. 108.
5. Fay's Admr. *v.* Fay, (N. J.) 6 Atl. Rep. 12.
6. Banks *v.* Gibson, 11 Jur. 680.
7. Willett *v.* Blanford, 1 Hare 253.
8. Gibblett *v.* Read, 9 Mod. 460.
9. 27 Beav. 53.
10. Hogg *v.* Kirby, 8 Ves. 215; Bell *v.* Locke, 8 Paige (N. Y.) 75; Holden's Admr. *v.* McMakin, 1 Pars. Eq. (Pa.) 270.

The good-will of a mercantile or other business is property, for which, in a proper case, the purchaser is liable.[1]

**Locality.** — As a rule, it may be said that good-will is never an incident of a stock of merchandise; but, generally speaking, it is an incident of locality or place, of the store-room or place of business.[2] The same is true of the good-will of an inn or tavern, and does not exist independently of the house in which it is kept.[3]

An unexpired lease of a house and the good-will of a business established therein were sold in a creditor's suit, with the consent of a creditor of the lessee with whom the lease had been deposited as a security, and brought a less sum than the amount of the debt, and the master of rolls says: "The good-will of the business is nothing more than an advantage attached to the possession of the house, and the mortgagee, being entitled to the possession of the house, is entitled to the whole of that advantage. I cannot separate the good-will from the lease."[4]

The good-will of a business is frequently of no value at all, except in connection with the place of business; "this, however, is by no means always the case. The value of the good-will of a newspaper, for example, attaches to its name, and is scarcely, if at all, dependent on the place of publication."[5]

**Of Professional Men.**—It has been asserted that "good-will" has no application to the learned professions;[6] but whatever may be the objections to the sale of the practice of a professional person, it is clear that such sales have long been recognized, and at this late day, it may be well to consider their lawfulness settled.[7]

**GORGE.**—A defile between hills or mountains—that is, a narrow throat or outlet from a region of country.[8]

1. Wallingford, *et al.*, *v.* Burr, 17 Neb. 137.

2. Rawson *v.* Pratt, 91 Ind. 9.

3. Elliots' Appeal, 10 P. F. Smith (60 Pa. St.) 161.

4. Chissum *v.* Dewes, 5 Russ. 29; and to same effect see Dougherty *v.* VanNostrand, 1 Hoff. Ch. (N. Y.) 68; Williams *v.* Wilson, 4 Sand. Ch. (N. Y.) 379.

5. 2 Lindley on Part. (Ewell) 860.

6. Austen *v.* Boys, 4 Jur. (N. S.) 721; s. c., 2 De G. & J. 626; Chandler *v.* Chandler, 2 Jac. 225. "The term good-will seems wholly inapplicable to the business of a solicitor, which had no local existence, but is entirely personal, depending upon the trust and confidence which persons may repose in his integrity and ability to conduct their legal affairs."

7. Bunn *v.* Guy, 4 East 190; Hoyt *v.* Holley, 39 Conn. 326; Warfield *v.* Booth, 33 Md. 63; Whitaker *v.* Howe, 3 Beav. 383.

8. Where an action had been brought in which the plaintiff sought to recover from the defendants for obstructing a water-course, whereby his cellar was flooded and property destroyed, it appeared by the evidence that the only water flowing down the alleged water-course was the temporary accumulations of rain-falls, and that it was simply a passage-way for surface water. It further appeared that the configuration of the ground was such that the surface water, falling upon quite a tract of land, passed off through this passage-way; that in time of heavy rains the accumulation formed a large stream of water, the outflow of from one thousand to twelve hundred acres. This passage-way, which was from three to five feet in depth, and from thirty to fifty feet in width passed through the city of Concordia. Lots were laid out across it, and the obstruction complained of consisted of a store built on one of these lots and across this passage-

way. Judgment was entered for the defendant and on error the court affirmed the judgment. BREWER, J., after discussing the general rule concerning surface water, that the lower estate owes no duty to the higher, but the owner of each may use or abandon surface water as he pleases, proceeding as follows: "Like other general rules, it has some exceptions, and the effort was to bring this case within one of those exceptions—the one noticed by this court in the case of Palmer *v.* Waddell, (22 Kan. 352). In reference to this exception the district court charged as follows: 'The rule that the owner of a tract of land may obstruct the flow of surface water across his land appears to and does have an exception, which is where surface water, having no definite source, is supplied from the falling rains and melting snow from a hilly region or high bluffs, and owing to the natural formation of the surface of the ground is forced to seek an outlet through a *gorge* or ravine, and by its flow assumes a definite or natural channel, and escapes through such channel regularly during the spring months of every year, and in seasons of heavy rains; and such has always been the case so far as the memory of man runs.' The language just read is that of the supreme court of this State and you are instructed that the word '*gorge*,' as here used, means a defile between hills or mountains, that is a narrow throat or outlet from a region of country. If, therefore, a man owns a piece of land upon which there is a '*gorge*,' as thus defined, he has no right to dam it up so as to destroy or injure the region of country to which such gorge is an outlet. A ravine is defined by Webster to be a deep and narrow hollow, usually worn by a stream or torrent of water; a *gorge*, a mountain cleft. The language which I have heretofore cited to you from the opinion of the supreme court as creating an exception to the general right of a party to obstruct the natural flow of surface water, must be taken to mean that where the outlet to the surface water which falls on a considerable region of country is over a tract of land owned by a person, and such water has worn a well defined channel over the land of such person, and such land lies between hills, so that there is no other natural or reasonable outlet for such surface water, then the person owning the said tract may not dam up such channel, and flow the water back on land situated above. But if a channel which conducts surface water only runs through a level tract of country, where there is room for such surface water to spread out and flow in other directions, and is not 'forced,' in the language of the supreme court, to seek an outlet through a *gorge*, then under such circumstances such channel may be obstructed by a person, who does so for the purpose, in good faith, of the better enjoyment of his own land, and without malicious motives, and he would not under such circumstances be liable for damages which might be occasioned thereby." Upon this construction rests the claim of error, and that claim substantially is, that by the explanations and definitions attached to the language of this court, the conditions upon which the exception to the general rule depends were grossly exaggerated, and, in fact the exception deprived of any practical application in this prairie State. Counsel says that there are no mountains in Kansas, and under the district court's interpretation, the conditions of the exception do not here exist. The ruling of the district court was correct. The explanation of the language of this court was, in view of the facts of the case, appropriate, and well calculated to present to the jury the true nature and condition of the exception. We shall not stop to criticise every sentence, nor do we assert that some expressions might not mislead in some cases. But the instruction brings out very clearly the distinction which, in this case was necessary to guide to a correct conclusion. In this State, outside of a few level bottoms along the Kaw and other streams, the general configuration of the surface is rolling prairie. The elevation is not high and the depression is not deep. These do not run in parallel lines. There is no uniformity in elevation or depression. There is a gradual slope in one direction or another. From this very unevenness and irregularity, it often happens that the surface water from a large tract tends and flows toward and over a single depression into the creeks and streams. In times of heavy rains a large body of water may thus flow. But this of itself does not make a water course. The owner of land in this depression is under no legal obligations to receive this flow of water, and may fill up the depression. By so doing the

flow is simply spread over a larger surface or along the next lower depression. There is no large accumulation of stagnant water. No body of tillable land is turned into a swamp and rendered unfit for agricultural purposes. The water is not forced to take this outlet. Deprived of this it readily flows off in another. On the other hand, it sometimes happens, as in the Palmer *v.* Waddell case, that in a hilly country the melting snows and falling rains on a large tract form an accumulation of surface water which must flow through some defile or *gorge* between the hills; or if that be closed, must remain on the tract, stagnant water, rendering valuable lands useless. In such cases there appears a public necessity to forbid the obstruction of such channel. And if the defile may not be closed, then the torrent, which of right comes through it, has acquired so much of the characteristics of a natural stream as to be entitled to flow undisturbed through any distinct and well-defined channel which it may have cut through level lands to the river or lake. Now that which sustains this lower channel is not the fact that much water flows in it, but because of the impossibility of obstruction or dispersion before the stream reaches it. Suppose, for instance, a tract of a thouand acres nearly level, but with a slight incline toward one corner. Undisturbed, quite a volume of water in a heavy rain might accumulate and flow towards this corner—a much larger volume, in fact, than any which would accumulate in a hilly tract of only five hundred acres. Yet in the one case it would not be just to call the passage-way across the corner a water-course, for dispersion of the water is easy and without danger of destruction of any considerable amount of land; while in the other, as dispersion would be impossible and the accumulation must form a stream, it might be just to hold it possessed of all the essential attributes of a water course. In short the only exception to the rule concerning surface water is where necessity compels it. Now in the case at bar the testimony discloses no such hilly country as accumulates a large volume of water and necessarily discharges it in a single stream through a *gorge* or defile. The general slope and incline doubtless cause a large flow of water in times of heavy rain along this depression, but the surface on either side of it is comparatively level. If it be filled up the flowing water will simply spread over a wider surface. Indeed it would seem that, since the flood out of which this action arose, the city has partially, if not wholy, filled up this depression and turned the flow in another direction.

There was no danger of flooding any considerable tract of land, none in fact except perhaps a small portion of the depression just above the obstruction. No body of land would be rendered swampy or unfit for tillage or other use. No interests of agriculture demanded that this passage-way for surface water should be kept open. Indeed, there was no certainty that the owners of nearly all the lands drained by this passage-way might not for farm purposes appropriate, and without much difficulty except in case of extraordinary rains, all the surface water falling on their respective tracts. Again, for a water-course, there must be a channel, a bed to the stream, and not merely low land or a depression in the prairie over which water flows. It matters not what the width or depth may be, a water-course implies a distinct channel, a way cut and kept open by running water, a passage whose appearance different from that of the adjacent land, discloses to every eye on a mere casual glance the bed of a constant or frequent stream . . . . It is very clear from the evidence that this depression lacked these essential features of a water-course. Along its bottom the grass grew as elsewhere; a little coarser and thicker, perhaps, but with that as the only difference. Mowing machines were run in it. The turf was not cut through and a distinct channel worn in the soil by the running water. Doubtless anyone looking at it in connection with the surrounding land, and noticing its lower level, would perceive that it was a passage-way for surface water, but one examining it disconnected from its surroundings would not instantaneously perceive that it was a water-course—that it was a channel cut and kept open by frequent flow of water. In this respect, therefore, as in that previously noticed, this passage-way lacked the distinctive attributes of a water-course. We have given this case much examination, and are satisfied that the verdict of the jury is correct; and while, as suggested, every expression in the instruction of the court may not be strictly correct, yet it so presented to the jury the distinctions

**GOTTEN.**—Past participle of the verb to get. To procure; supply; furnish.[1]

between a mere passage-way for surface water and a water-course that they could not have been misled." Gibbs *v.* Williams, 25 Kan. 214; s. c., 37 Am. Rep. 241.

A similar view has been taken in a New Jersey case, in which the facts were a follows: There was a pond on a side of a hill, and below this pond was the stable lot of the defendant, and still lower down was the lot and dwelling house of the plaintiff. The pond was not fed by a spring, nor from any subterranean source, but was formed altogether from rains and melting snows, and occasionally it was entirely dry. It never ran over except in times of heavy showers, and then, with the other surface water falling on the contiguous land, it passed down in a slight hollow or depression over the premises of the defendant, and so on to other lands below them. This water, in its natural condition, did not go upon the land of the plaintiff. The defendant, a short time before the commencement of this suit, built a stable on his lot, and located it over this hollow through which the water before mentioned was discharged, and this obstacle turned the course of the water so that it ran onto the lot, and into the cellar of the dwelling house of the plaintiff. For the damage thus occasioned, the suit was brought, but the court *held* that no action lay, Whelpley, C. J., saying, after stating the general rule, that there is no such thing known to the law as a right to any particular flow of surface water, *jure naturæ:* "How far it may be necessary to modify this general proposition in cases in which, in a hilly region, from the natural formation of the surface of the ground, large quantities of water in times of excessive rains, or from the melting of heavy snows, are forced to seek a channel through "*gorges*" or narrow valleys, will probably require consideration when the facts of the case shall present the question. It would seem that such anomalous cases might reasonably be regarded as forming exceptions to the general rule . . Applying then the doctrine above indicated to the facts of the present case, the conclusion must be that upon the proof made at the trial, the plaintiff was not entitled to recover. The water diverted by the building of the defendant was altogether surface water, and he, therefore, had a legal right to obstruct and to turn aside its course. If the plaintiff has suffered from such an act, it is *damnum absque injuria.* Nor is her case helped by the circumstance that a portion of the water in question came from the pond which was proved to exist, because no more waste water was discharged by reason of this reversion than there would have been if it had not been there. It was merely the rain water flowing from the surface of the pond, as it would have done if the superfices had been land instead of water. Nor does it seem to me that there is any significance in the fact that there was an appreciable channel for this surface water over the land of the defendant and into which it naturally ran. On every hill-side numbers of such small conduits can be found, but it would be highly unreasonable to attach to them all the legal qualities of water-courses. I am not willing to adopt a doctrine which would be accompanied with so much difference." Bowlsby *v.* Speer, 31 N. J. Law 351.

1. An act was passed in England, 35 & 36 Vict., C. 76, § 17, which declared: "Where the amount of wages paid to any of the persons employed in a mine to which this act applies depends on the amount of the mineral gotten by them, such persons shall, unless the mine is exempted by a secretary of state, be paid according to the weight of the mineral gotten by them, and such mineral shall be truly weighed accordingly. Provided always, that nothing herein contained shall preclude the owner, agent or manager of the mine from agreeing with the persons employed in such mine that deductions shall be made in respect of stones other than mineral contracted to be gotten, which shall be sent out of the mine with the mineral contracted to be gotten," etc. Under this act a colliery company made a contract with their men, by which it was declared that the "mineral contracted to be *gotten*," should be coal of a certain size, which was to be paid for at one shilling and sixpence a ton, that heading slack should be paid for at seven pence per ton, and that no other slack should be paid for. The rule was to weigh the coal at the pit's mouth; it was then carried to a distance and thrown on a

screen, and the weight of the slack which passed through the screen was ascertained by a person in the defendant's employ. Wages were paid according to the weight of the coal as ascertained at the pit's mouth after deducting therefrom the weigh of the slack which had gone through the screen. An action having been brought to recover the difference between the wages so ascertained and the wages computed on the full weight of coal taken at the pit's mouth, the court *held* that the object of the act was to limit freedom of contract, and that the *mineral contracted to be gotten* within the meaning of the statute was coal, and that slack being part of such coal, deductions in respect of it were unauthorized; therefore so much of the contract as related to such deductions was void, and that the plaintiffs were entitled to recover, Lord Esher, M. R., saying: "There is a clause that no slack will be paid for except that sent out as heading slack, and that all other slack will be deducted from the different places in proportion to their loading. It seems to me that this is an endeavor to give a meaning to the words in the statute as to deductions which those words, according to their ordinary meaning, will not bear. If it is true, as was suggested, that this act was not intended to interfere with freedom of contract, then the men have bound themselves, and would have to perform their part of the agreement. But I think it clear, with great respect for the opinion of Lord McLaren, in Hynd *v.* Spowart (22 Scottish Law Rep. 702), that the object of the act was to limit freedom of contract. I do not think that a contract which is in some parts inconsistent with the act is altogether illegal; my view is that where such a contract is made, the act makes not the contract, but so much of it as relates to the deductions, void. It seems to me that the section contains a positive enactment that if wages are to depend on the amount of mineral *gotten*, then the only measure of the amount of the wages is the weight of the mineral *gotten*. But those who drew the act wished that there should be power to make some deductions, and they specified the cases in which this might be done, namely, where stones are brought up or materials other than 'mineral contracted to be *gotten*,' etc., . . . If it were not for this proviso, no deductions could be made, and no deductions can be made except those expressly mentioned. The mineral *contracted to be gotten* is the mineral the men are *employed to get*, and if they are employed to get coal, such things as clay or ironstone would be matters about which deductions might be agreed to. Construing the contract as I do, it is an agreement to *get coal*, and slack is a part of the mineral contracted *to be gotten*, and the stipulations with regard to deductions for slack are not authorized. It seems to me that the parties themselves so understood the matter from the fact that the whole of the coal, whether clean coal or slack, was weighed at the mouth of the pit. The coal was sent out from that spot, and sorted and divided into clean coal of a certain size and slack, and then by the amount of the latter the deductions were determined. I am of opinion these are deductions that are not allowable, because slack is part of the mineral contracted to be *gotten*. The contract must, therefore, be carried out without the deductions, and the men are entitled to be paid the full price. Two cases have been relied on, the principal of which is the Scotch case to which I have referred. I cannot agree with the conclusion of the Lord Ordinary in that case. In my opinion the contract in such a case as the present does not become illegal altogether because the deductions agreed on are not authorized, but that part of it must be rejected. There seems to me to be nothing in the statute to authorize the statement that the spirit of the act was that the miner should be paid for salable coal. I do not see what the miner has to do with the market, and I cannot follow that case and hold that the men are not employed to get the dross, or as it is called in this case, "slack," as part of the mineral contracted to be *gotten*. In my judgment, directly it is shown, that the case is within the section, and deductions are claimed by the owner, it lies on him to show that the coals are weighed according to the terms of the act so as to justify the deductions. In that view it seems to me that in this case the place of weighing fixed was the pit's mouth, and until that was altered the weight could not be ascertained at any other place, whether in presence of any one on behalf of the men or not. The effect, therefore, is that there was a weighing to ascertain the whole amount of the coal, but none which entitled the owner

to make any deductions." Bourne *v.* The Netherseal Colliery Co., L. R. 20 Q. B. D. 606.

The Scottish case cited above arose under a similar contract, and the court *held* that the contract was valid and consistent with the Coal Mines Regulation Act, § 17, McLaren, Lord Ordinary, saying: "It is contended on behalf of the pursuers and the body of miners represented by them that when the statute supposes a contract depending on the amount of mineral *gotten* by the miner, the quantity or amount referred to is the mineral turned over by the miner at the working face where he carries on his industry. Their view, as I understand it, is that the mineral when put into the hutches at the working face is, in a question between master and miner, to be taken as being in a deliverable state, and that while the mineral is not to be weighed until it is taken to the pit head, the wages are to be ascertained as if the hutches were weighed at the working face. The weighing of the mineral at the pit head is, in the pursuer's view, an operation to be performed for the purpose of ascertaining the amount *gotten* at the working face, and while they do not dispute the right of the master to make deductions on account of improper filling, they object to the ascertaining of the amount of such deductions in the only accurate and trustworthy way, namely, by the use of a weighing machine. The defenders contend that the coal or mineral may be considered as '*gotten*' (or in a deliverable condition) in a question between master and miner either at the working face or at the pit head according to agreement, and that it is a matter to be settled by agreement (with which in their view the statute does not interfere) whether the master shall take over the coal as '*mineral gotten*' at the place where it leaves the hand of the miner or at the place where the final operation is to be performed, of weighing and discharging the coal into the railway trucks. In either case the miner's wages are to be calculated from the weight of the mineral agreed to be *gotten*, 'truly weighed,' and this true weighing is, according to the defenders' argument, the one object which the legislature had in view in this enactment. The defenders say that 'round coal' is the only mineral which they can work commercially; they profess only to get from their men 'round coal over the scree,' and they say that they are not *bound* to pay wages for the excavation of dross, however produced, but only for the production of round coal over the scree. In other words, they deem that they are at liberty to contract to pay wages only on the net weight of the salable coal turned out from their pit. . . . According to the best opinion I can form of the intention of the legislature, I conceive that it was not intended by these enactments to interfere materially with freedom of contract between master and miner, or to prescribe regulations except in so far as such interference or regulation is necessary to the accomplishment of the object that the quantity of the *mineral gotten* should be determined by weight. . . . Under such a system the miner is paid wages upon the whole salable coal which he sends to the pit head, and is not paid upon the dross or small coal which falls through the scree, and is not the subject of the contract. The argument against such a contract is in my view merely technical. It is that a contract to pay upon 'round coal over the scree' is in form a different thing from a contract to pay upon the weight of the coal '*gotten*' by the miner, although in the ascertainment of the weight no real difference could exist. The argument presupposes that the words 'mineral *gotten*' in the statute have one uniform and invariable signification. . . . But a moment's consideration will show that at least two forms of contract are valid under the statute. There may be a contract to pay upon the weight of the gross output of coal and dross taken together, and there may be a contract to pay upon the weight of a hutch fairly filled with coal, dross being deducted under the provision relating to foreign material and improper filling. . . . We have, then, two meanings of the expression 'mineral *gotten*,' or two contracts covered by that expression, equally valid and regular under the statute. . . . Whether the separation of the salable mineral contracted to be *gotten* from the unsalable is effected in the act of winning the coal, or by an operation subsequently performed, appears to me to be immaterial. The dross may in a sense be *mineral gotten* by the miner, but it is not the mineral which he is employed to get, and therefore under the proviso of the statute it is properly rejected in the computation

**GOVERNMENT.** — Used as a noun. The form of policy in a State; the mode or system according to which the legislative, executive and judicial powers are vested and exercised; a system of laws and customs.[1] Also the control, direction, regu-

of wages on the basis of weight. . . I think that in this case 'round coal over the scree' is the 'mineral contracted to be *gotten*,' and I find nothing in the statute which obliges the employer either to contract for the getting of dross or to pay wages upon the weight of dross when dross is not contracted to be '*gotten*.'" Hynd *v.* Spowart, 22 Scottish Law Reporter 702.

1. The Encyclopædic Dict. *Sub Voce.* A suit was brought against the District Township of Holman, Iowa, upon three warrants drawn by the president of said township, upon its treasurer, payable out of the contingent fund. The township filed an answer, in which it averred, *inter alia*, that it was a municipal and political corporation, incorporated under the laws of Iowa, and prohibited under the Const. of Iowa (Art. II, § 3) from incurring indebtedness to an amount exceeding five per cent. on the taxable property of the corporation; that at the time this debt was incurred; the township had no money or assets, and that it had no money in its treasury wherewith to pay these orders; that at the time this indebtedness accrued for which these orders were issued the indebtedness of the township far exceeded the constitutional limit of five per cent.; and that therefore the said orders were void. The plaintiff demurred, on the ground that the facts stated were not sufficient to constitute a defence, inasmuch as they show that the said defendant, as a matter of law, is not a political or municipal corporation, but a *quasi-corporation*, created and existing for school purposes only. The court overruled the demurrer, DAY, J., saying: "Article II, section 3 of the Constitution is as follows: 'No county or other political or municipal corporation shall be allowed to become indebted in any manner, or for any purpose, to an amount in the aggregate exceeding five per centum on the value of the taxable property within such county or corporation, to be ascertained by the last state or county tax lists, previous to the incurring of such indebtedness.' Whether there is any shade of difference, and if so, what, between the words "political" and "municipal," as above used, it is not material to the question in hand to inquire. The only question with which we are now concerned is whether either designation includes the defendant. School district townships are by positive declaration of the statute made corporations, and as such they have power to hold property, become parties to suits and contracts, and do other corporate acts.' Laws 1862, ch. 172, § 5. Appellee concedes that school district townships in this State are public corporations, but denies that that they are political or municipal corporations. 'Public corporations are such as are created for political purposes, as counties, cities, towns and villages; they are invested with subordinate legislative powers, to be exercised for local power connected with the public good, and such powers are subject to the control of the legislature of the State.' 2 Kent's Com., page 275. In Bouvier's Law Dictionary a municipal corporation is defined to be 'a public corporation, created by *government* for political purposes, and having subordinate and local powers of legislation: *e. g.*, a county, town, city.' The word 'municipal' strictly applies only to what belongs to a city; cities by the Romans, being called *municipia*. We, however, attach to the word a more extensive meaning. We call *municipal law*, not the law of a city only, but of the State, and the word is used in contradistinction to international. An offence against the law of nations is an international offence, but one committed against a particular State is a municipal offence. See Bouvier's Law Dictionary. In Angell and Ames on Corporations it is declared that the word 'corporation' is oftentimes significant of a community clothed with extensive civil authority; and a community of that kind is sometimes called a *political*, sometimes a *municipal* and sometimes a *public* corporation. It is generally called public when it has for its object the *government* of a portion of the State. From the foregoing it would seem that the words 'political,' 'municipal,' and 'public,' when applied to corporations are used in a synonymous sense. *Government*, in a political sense, signifies that form of fundamental rules, by which the members of

a body politic regulate their social action, and the administration of public affairs, according to established constitutions, laws and usages. Young's Science of Government, page 13. The objects of *government* are almost as varied as the wants of man, and they constantly increase with the progressive steps of civilization. Our whole governmental history shows that the education of those who must ultimately assume the direction of the affairs of *government* constitutes one of the most important objects of legislation. It has been uniformly a part of the land system of the United States to provide for public schools. By the ordinances of congress . . . . it was made a specific condition that a section of each township should be permanently applied for the use of public schools." The judge then cites various acts of congress and the constitution and acts of assembly of Iowa, and closes thus: "Enough has been said to show that the district townships are most important governmental auxiliaries. Indeed, without them, or some substitute for them, the State could not successfully provide for the educational wants of its people. To these corporations, it is quite apparent, from the foregoing review, a portion of the powers of the State government has been delegated. They are, therefore, political corporations, and are within the inhibition of article II, section 3 of the Constitution." Winspear *v.* Dist. Tp. Holman, 37 Iowa 542.

**Foreign Government.** — Where a power was given by a will to trustees to invest "upon any of the stocks or funds of the government of the United States of America, or of the government of France, or any other foreign government," it was *held* to authorize investment in New York and Ohio stocks, and Georgia bonds, the court, Jessel, M. R., saying: "I am of opinion that the trustees were authorized to make these investments. In the first place, there is no doubt that they acted *bona fide*, and that in construing this investment clause, containing a power to invest in the stocks or funds of a 'foreign government,' they read it in the same sense as ordinary business men would read, that is, as an authority to invest in foreign securities generally; and unquestionably, as a matter of fact, securities such as these are usually included by business men under the head of 'foreign securities.' But the question is whether the term 'foreign government' really includes States forming part of what is known as the government of the United States? Each of these States is ruled over by a government—an actual government in every sense of the word. Why, then, should it not be regarded as a foreign government, that is, a government not under the jurisdiction of this country, for that is the meaning of the word 'foreign'? That being so, the word 'foreign' is satisfied, and the word 'government' is also satisfied. But it is said that the 'foreign government' referred to by the testator is one of a peculiar character, and that, in order to ascertain what sort of government it is to which he refers, you must apply the maxim, *noscitur a sociis*. Why, when a man makes use of the word 'government' generally, should he be *held* to mean a government of a peculiar character, simply because in the context he mentions certain governments specifically—and to which of the *socii* are you to refer? Here the *socii* vary enormously. For instance, the attributes of the 'government of France' vary in most important particulars from those of the 'Government of the United States of America.' To say that I am to take one only of the *socii* as a guide to what the testator means by the word 'government,' cannot be right. I am not prepared to define precisely what investments the testator means by 'stocks or funds of a *foreign government*;' but it is an acknowledged fact that the stocks or funds of the government of Bavaria, for instance, though it is subordinate to the government of *Germany*—just as the governments of *Georgia* or *Ohio* are subordinate to the government of the *United States of America*—are 'stocks or funds of a *foreign government*;' and no one would say that a trustee having power to invest in the securities of a *foreign government* was chargeable for a breach of trust for having invested in the stocks or funds of the government of Bavaria. It seems to me that you must give a fair workable interpretation to the words the testator has used, and that there is no reason why the words, 'or any other *foreign government*,' should not be extended to the *governments* of the *States of America* separately. I hold, therefore, that the trustees were justified in making these investments." Cadett *v.* Earle, L. R., 5 Ch. Div. 710.

**De Facto Government.**—The meaning of these words has been considered in a series of cases, arising out of the events of the late civil war between the United States of America and the Confederate States. Thus on the question as to the right of a stockholder in the Petersburg Railroad Company, chartered by the State of Virginia, the said stockholder being a citizen and resident of the State of Pennsylvania to recover the dividends declared by the directors of the said railroad during the war, which dividends had been confiscated by the Confederate States government, and paid to them under compulsion, the court, Chase, C. J., said: "The company claims (1) that payments of dividends, made under the same act, to the receiver and the purchasers, must be upheld as valid payments; and (2) if this claim be disallowed, then that the liability of the company was only to pay, on demand, the dividends . . . . in such currency as was necessarily received, and no demand having been made except by the commencement of this suit after that currency had become wholly worthless, no decree can now be made against the company. The first of these propositions rests upon the premises that the confederate organization was a *government de facto*, and that acts in obedience to its authority must be presumed to have been done under the compulsion of superior force, by reason of which the actors are discharged from all ulterior responsibility. Of this it may be observed, in the first place, that the term *de facto*, as descriptive of a government, has no fixed and definite sense. It is, perhaps, most correctly used as signifying a government completely, though only temporarily established in place of the lawful or regular government, occupying its capital and exercising its power. Examples of this kind of *de facto governments* are found in English history; some in the violent seizure and temporary possession of royal power, and one, so conspicuous that the world can never lose the sense of it, the establishment of the commonwealth and the protectorate in place of the monarchy. In this sense, certainly, the rebel government was never a *de facto government*. It never held the national capital. It never asserted any authority to represent the nation. It was only what it professed to be—a revolutionary organization seeking to establish a confederacy of States, disconnected from the United States, and dependent wholly for success upon the success of the revolution. The term, however, is often used, and perhaps more frequently in a sense less precise, as signifying any organized government established for the time over a considerable territory, in exclusion of the regular government. A *de facto government* of this sort is not distinguishable in principle from other unlawful combinations. It is distinguishable in fact mainly by power, and in territorial control, and by the policy usually adopted in relation to it by the national government. Treason in England is not committed against the lawful government by acts of hostility done in support of a *de facto government*, strictly so called. This is the rule established by the statute, 11 Henry VII., passed with influence to the frequent changes in the royal authority during the civil wars of York and Lancaster. And the reason of the rule, doubtless, extended to acts done under the parliament and the protector, while in possession of the supreme authority in England, though the benefit of it was denied to many, and in a most conspicuous instance to Sir Henry Vane. And it may well be doubted whether in this country treason against the United States would be committed in obedience to a usurping president and congress, exercising unconstitutional and unlawful power at the seat of the national government. But it cannot be maintained that acts against the king committed in obedience to an usuper temporarily in possession of a part of the kingdom would not be treason in England, or that levying war against the United States by persons, however combined and confederated, (even though successful in establishing their actual authority in several States), would not be treason here. What effect, then, is to be given to acts done under the authority of an insurgent body, actually organized as a government, and actually exercising the powers of a government, within a large extent of territory, not merely in hostility to the regular and lawful government, but in complete exclusion of it from the whole territory subject to the insurgent control? It is not easy to give a general answer to this question. On the one hand it is clear that none of its acts in hostility to the regular government can be recognized as lawful; on the other, it is equally clear that

transactions between individuals, which would be legal and binding under ordinary circumstances, cannot be pronounced illegal and of no obligation, because done in conformity with laws enacted or directions given by the usurping power. Between these extremes of lawful and unlawful, there is a large variety of transactions to which it is difficult to apply strictly any general rule, but it may be safely said that transactions of the usurping authority, prejudicial to the interests of citizens of other States excluded by the insurrection and by the policy of the national government from the care and oversight of their own interests within the States in rebellion, cannot be upheld in the courts of that government. In the case before us, for example, Mrs. Keppel was the undoubted owner of three hundred and four shares of the stock of the Petersburg Railroad Company, and was clearly entitled to her just proportion of its earnings. But she was denounced as an alien enemy by the Confederate government. She was excluded from all control of her stock, and all receipt of dividends. And more than this, the stock was sequestrated, or, rather confiscated, and partly sold, and the dividends paid to the purchasers, and to a person called a receiver, appointed under the rebel authority. Can it be maintained that her right to the dividends upon her stock was defeated by these transactions? We think not. We cannot regard the Confederate government as a *de facto government* in any such sense that its acts are entitled to judicial recognition as valid. On the contrary, we are obliged to regard it as a combination or unlawful confederacy organized for the overthrow of the national government, and its acts, for the confiscation or sequestration of the private property of the citizens of the United States, as null and of no effect. The appointment of the receiver, the sales of the stock, the payment of the dividends, must all be regarded as part of the process of sequestration or confiscation, and all as equally void." Keppel's Admrs. *v.* The Petersburg R. Co., Chase's Dec. (U. S.) 167, 207.

So in Mississippi on the question of the payment of a tax by a treasury note issued under the authority of the legislature of that State, while forming one of the Confederate States, and made thereby payable for all taxes except the military tax, the treasury note was held illegal and void, the court, PEYTON, J., saying: "It is insisted by the counsel for the defendant in error, that the government of the State of Mississippi, during the late disastrous war, was at least a *government de facto*, whose obligations devolved upon the succeeding government. The terms *de facto*, as descriptive of a government, have no well fixed and definite sense. It is, perhaps, most correctly used as signifying a government completely, though only temporarily, established in the place of the lawful or regular government, occupying its capital and exercising its power, and which is ultimately overthrown and the authority of the government *de jure* re-established. Guided by this rule, neither the government of the Confederate States nor the several governments of any of the States, composing the Confederacy, can properly be said to be a *de facto* government, from the date of secession to the overthrow of the Confederate government. As to the Confederate government, it never held the national capital. It never asserted any authority to represent the nation. It was only what it professed to be—a revolutionary organization, seeking to establish a Confederacy of States, and dependent wholly for success upon the success of the revolution. But it never has been held that those participating in a rebellion, which had only extended its authority over part of a country, had established a *de facto government*. As to the government of this State, it was not overthrown by the former lawful government of the State, but by the arms of the United States; and when thus overthrown, it was not succeeded by the re-establishment of the authority of the former *government de jure*, for the reason that the government was wholly destroyed by the establishment of the new government under the ordinance of secession. But the terms *de facto*, when employed as descriptive of government, are often used, and perhaps more frequently in a sense less precise than that above indicated, as signifying any organized government, established for the time over a considerable territory, in exclusion of the regular government. A *de facto* government of this sort is not distinguishable in principle from other unlawful combinations. It is distinguishable in fact mainly by power, and in territorial control, and by the policy usually adopted in relation to it by the national government.

With respect to such a government, it is clear that none of its acts in hostility can be recognized as lawful. Yet it is equally clear that transactions between individuals, which would be legal and binding under ordinary circumstances, cannot be pronounced illegal and of no obligation because done in conformity with laws enacted or directions given by the usurping power. Between the extremes of lawful and unlawful there is a large variety of transactions, to which it is difficult to apply strictly any general rule." Thomas *v.* Taylor, 42 Miss. 651, 703.

Again, upon the question whether a debt due by a citizen of one State to a citizen of another, and confiscated by an enactment of the Confederate States, enforced as a law by the State of the debtor, was still due and payable to the creditor, the court *held*, that the debt was still due. FIELD, J., saying: "The defendant, however, takes the ground that the enactment of the Confederate States is that of an independent nation, and must be so treated in this case. His contention is substantially this: that the Confederate government, from April, 1861, until it was overthrown in 1865, was a 'government *de facto*,' complete in all its parts, exercising jurisdiction over a well defined territory, which included that portion of Virginia where the deceased resided; and as such *de facto government* it engaged in war with the United States; and possessed and was justified in exercising within its territorial limits, all the rights of war which belonged to an independent nation, and, among them, that of confiscating debts due by its citizens to its enemies. In support of this position, reference is made to numerous instances of *de facto governments* which have existed in England and in other parts of Europe and in America; to the doctrines of jurists and writers on public law respecting the powers of such governments, and the validity accorded to their acts; to the opinion of this court in Thorington *v.* Smith (8 Wall. U. S. 1); and in the Prize cases, 2 Black (U. S.) 635; to the concession of belligerent rights to the Confederate government; and to the action of the States during our own revolutionary war and the period immediately following it. We do not question the doctrines of public law which have been invoked, nor their application in proper cases; but it will be found upon examination that there is an essential difference between the government of the Confederate States and those *de facto* governments. The latter are of two kinds. One of them is such as exists after it has expelled the regularly constituted authorities from the seats of power and the public offices, and established its own functionaries in their places, so as to represent in fact the sovereignty of the nation. Such was the government of England under the commonwealth established upon the execution of the king, and the overthrow of the loyalists. As far as other nations are concerned, such a government is treated as in most respects possessing rightful authority; its contracts and treaties are usually enforced; its acquisitions are retained; its legislation is in general recognized; and the rights acquired under it are, with few exceptions, respected after the restoration of the authorities which were expelled. All that counsel say of *de facto* governments is justly said of a government of this kind. But the Confederate government was not of this kind. It never represented the nation. It never expelled the public authorities from the country. It never entered into any treaties, nor was it ever recognized as that of an independent power. It collected an immense military force, and temporarily expelled the authorities of the United States from the territory over which it exercised an usurped dominion, but in that expulsion the United States never acquiesced; on the contrary, they immediately resorted to similar force to regain possession of that territory and re-establish their authority, and they continued to use such force until they succeeded. It would be useless to comment upon the striking contrast between a government of this nature, which, with all its military strength, never had undisputed possession of power for a single day, and a government like that of the commonwealth of England under parliament or Cromwell. The other kind of *de facto governments*, to which the doctrines cited relate, is such as exists where a portion of the inhabitants of a country have separated themselves from the parent State and established an independent government. The validity of its acts, both against the parent State, and its citizens or subjects, depends entirely upon its ultimate success. If it fail to establish itself permanently, all such acts perish

with it. If it succeed, and become recognized, its acts, from the commencement of its existence, are upheld as those of an independent nation. Such was the case of the State governments under the old confederation on their separation from the British Crown. Having made good their declaration of independence, everything they did from that date was as valid as if their independence had been at once acknowledged. Confiscations, therefore, of enemies' property, made by them, were sustained, as if made by an independent nation. But if they had failed in securing their independence, and the authority of the king had been re-established in this country, no one would contend that their acts against him, or his loyal subjects, could have been upheld as resting upon any legal foundation. No case has been cited in argument, and we think none can be found, in which the acts of a portion of a State unsuccessfully attempting to establish a separate revolutionary government have been sustained as a matter of legal right. As justly observed by the late Chief Justice in Shortridge *v.* Macon, Chase's Dec. (U. S.) 136, decided at the circuit, and in all material respects, like the one at bar: 'Those who engage in rebellion must consider the consequences. If they succeed, rebellion becomes revolution, and the new government will justify its founders. If they fail, all their acts hostile to the rightful government are violations of law, and originate no rights which can be recognized by the courts of the nation whose authority and existence have been alike assailed.' . . . There is nothing in the language used in Thorington *v.* Smith (8 Wall. 1), which conflicts with these views. In that case the Confederate government is characterized as one of paramount force, and classed among the governments of which the one maintained, by Great Britain in Castine, from September, 1814, to the treaty of peace in 1815, and the one maintained by the United States in Tampico during our war with Mexico, are examples. Whilst the British retained possession of Castine, the inhabitants were held to be subject to such laws as the British government chose to recognize and impose. Whilst the United States retained possession of Tampico, it was *held* that it must be regarded and respected as their territory. The Confederate government, the court observed, differed from these temporary governments, in the circumstance that its authority did not originate in lawful acts of regular war; but it was not, on that account, less actual or less supreme; and its supremacy, while not justifying acts of hostility to the United States, 'made obedience to its authority in civil and local matters not only a necessity, but a duty.' All that was meant by this language was, that as the actual supremacy of the Confederate government existed over certain territory, individual resistance to its authority then would have been futile, and therefore unjustifiable. In the face of an overwhelming force, obedience in such matters may often be a necessity, and in the interests of order, a duty. No concession is thus made to the rightfulness of the authority exercised. Nor is there anything in the decision of this court in the Prize Cases, 2 Black (U. S.) 635, which militates against the views expressed. It was there simply *held*, that when parties in rebellion had occupied and held in a hostile manner a portion of the territory of the country, declared their independence, cast off their allegiance, organized armies, and commenced hostilities against the government of the United States, war existed; that the president was bound to recognize the fact and meet it without waiting for the action of congress; that it was for him to determine what degree of force the crisis demanded, and whether the hostile forces were of such a character as to require him to accord to them the character of belligerents; and that he had the right to institute a blockade of ports in their possession, which neutrals were bound to recognize. It was also *held*, that, as the rebellious parties had formed a confederacy, and thus become an organized body, and the territory dominated by them was defined, and the president had conceded to this organization in its military character belligerent rights, all the territory must be regarded as enemy's territory, and its inhabitants as enemies, whose property on the high seas would be lawful subjects of capture. There is nothing in these doctrines which justified the Confederate States in claiming the *status* of foreign States during the war, or in treating the inhabitants of the loyal States as alien enemies. . . . It is unnecessary to pursue the subject further. Whatever *de facto* character may be as-

cribed to the Confederate government consists solely in the fact that it maintained a contest with the United States for nearly four years, and dominated for that period over a large extent of territory. When its military forces were overthrown it utterly perished, and with it all its enactments. Whilst it existed it was regarded, as said in Thorington *v.* Smith, 8 Wall. (U. S.) 1, 'as simply the military representative of the insurrection against the authority of the United States.' . . . Whilst thus holding that there was no validity in any legislation of the Confederate States which this court can recognize, it is proper to observe that the legislation of the States stands on very different grounds. The same general form of government, the same general laws for the administration of justice and the protection of private rights, which had existed in the States prior to the rebellion, remained during its continuance and afterwards. As far as the acts of the States did not impair, or tend to impair, the supremacy of the national authority, or the just rights of citizens under the constitution, they are in general to be treated as valid and binding." Williams *v.* Braffy, 6 Otto (U. S.) 176, 184.

So also in Alabama, on an application by a judge of one of the judicial circuits for a mandamus or other appropriate writ to compel the controller to draw his warrant on the state treasurer for the salary, claimed by the applicant to be due him as judge, during a period covered by the American civil war, the court, PECK, C. J., used the following language: "In this case, much of the argument of the learned counsel on both sides was devoted to the question—What was the nature and character of the government of the so-called Confederate States and the government of this State during the existence of the late rebellion? It is a question that had much of my thoughts before the argument of this case, and my matured and deliberate judgment then was, and still is, that in no proper legal sense can either of them be *held* to have been *governments de facto*. We admit they were governments that had in their power the lives, liberty and property of all men within their borders, and did with them whatsoever they pleased; but no one, we think, who is able to speak of them with candor and without prejudice, will say they were governments friendly to liberty and equality. A *government de facto*, in the proper legal sense, we understand to be a government that unlawfully gets the possession and control of the rightful legal government, and maintains itself there, by force and arms, against the will of the rightful legal government, *and claims to* exercise the powers thereof. Such was not the character of either of said governments. The counsel for the appellee spoke hesitatingly of the government of the said Confederate States; did not seem to maintain without doubting that that government ever was a *government de facto*, but strongly and most earnestly insisted that such was the character of the government in this State during that period. They, or at least one of them, contended that the government in this State did get possession of the legal, rightful government in the State of Alabama. It is admitted, it had the possession of the territory of the State, and control over the people within said territory, but it did not and did not pretend to have the possession of that lawful constitutional government of said State that was admitted into the Union by the constitution and laws of the United States in the year 1819—the government that thereby became a constituent part and member of that great union of states and governments known and called 'The United States of America.' No, that government it destroyed. The government in this State during the rebellion never was, and never claimed to be, a part and member of the United States or the government thereof. It claimed to be, and was, a constituent part, and member of the said Confederate States, and being so, partook of the nature and character of that government, of which it formed a part; and it could have no other nature and character, any more than can the branch have a different nature and character from that of the vine. That the government of this State, and the government of the rebel States, were parts of and constituted the government of the Confederate States, we suppose no one will deny. They were, therefore, one in essence and substance with the said Confederate government. If that government was not in a proper legal sense a *government de facto*, neither were or could the governments of the several rebel States be such, each one of which, as we have said, forming and composing a part of the said Confederate government. They were, therefore, rebel governments and

nothing more—governments in hostility to, and not parts of, the government of the United States. They were not even struggling to get the possession of the rightful government, or to exercise its powers, but to set up and establish a new, separate, distinct, and hostile government, partaking in nothing in common with the legal rightful governments; but in everything, in nature, essence and character, utterly in opposition to, and using their utmost powers and strength, by military force and war, to overthrow them. This, for a time, they succeeded in doing, in the several rebel States, but altogether failed to accomplish, as to the United States, and were all of them, at length, overthrown and destroyed by the military forces of the United States. They came into being illegally, by force, and by force were subjugated and destroyed, and the rightful governments in most of the States have been reconstructed, restored and reunited with the government of the United States. It has been said, however, the government of the Confederate States has been recognized by the political departments of the United States as a *government de facto*. If that were so, we would feel bound so to recognize, as such, both it and the government of the several rebel States, of which it was composed, and by which it was formed; for in all political questions the courts follow and act in conformity to the decisions of the political departments of the government. But we deny that the political departments of the government of the United States have ever recognized the said Confederate government as a *government de facto*. It is true, the said Confederate government, from principles of humanity, was recognized *sub modo*, in a certain sense, as an organization, or government, if you please so to call it, illegal and traitorous in character, but having such power as rendered it necessary to treat with it, for the exchange and humane treatment of prisoners, etc., and, perhaps, in a few other special cases, but were always careful not to recognize it, in the proper sense of the terms, as a *government de facto*—a government that could impose upon the government of the United States, or of the several States, the obligation, either morally or legally, to pay its debts, or the salary of its officers." Chisholm, Controller, *v.* Coleman, 43 Ala. 204, 212.

The same course of reasoning has been followed in Louisiana. Suit was brought to recover damages for the loss of two hundred and seventy-five bales of cotton destroyed by fire. The defendant's answer averred that the cotton destroyed was burned by the militia, acting under orders from the regularly constituted authorities of the State, as well as by the authority of, and under the orders of, the officers of the Confederate States government, and that he, the defendant, as one of said militia, was compelled to obey the orders of said authorities. The court gave judgment in favor of the plaintiff (which was, however, afterwards set aside, on a plea of prescription which barred the action), TALIAFERRO, J., saying: "Was the authority under which the defendant acted a lawful authority? This inquiry, seemingly, though we apprehend not necessarily, involves the consideration of the much mooted question, did the late Confederate States constitute a *government de facto?* We regard this question rather as a political than a legal one. It does not in our view come properly within the range of judicial action. Courts should be governed in questions of this character by the authoritative declarations of the national government. Authorities are not wanting to sustain this opinion. But, it is urged upon us that the action of the general government during the war towards the States lately in rebellion, was such as to recognize them as a belligerent power, and as having a *government de facto;* and that they have been so acknowledged by other powers. This subject has been pressed upon our consideration with much ability and zeal in this case, as well as in others, and we deem it proper to examine it. In entering unwillingly upon this task, we shall first inquire into the character of this alleged recognition of the late Confederate States as a belligerent power by the United States government. When independent powers, governments *de facto et de jure*, engage in war against each other, they are called belligerents. Certain recognized rules and usages applicable to their condition of hostility and to their relations to neutral powers are called belligerent rights. The terms belligerent and belligerent rights are properly applicable only to sovereign powers engaged in war. In all other cases they apply *sub modo*, and in a limited and qualified sense. In the case of sovereign powers engaged in war they recognize each other as sovereigns. In the

case of rebellions, where one party strives to obtain its independence, and the other to reduce the insurgent to obedience, no such recognition occurs. Yet, in the latter case, modern warfare admits, in the interest of humanity, the humane treatment and exchange of prisoners; a concession to that extent, of a belligerent right in favor of the insurgent power. In blockading the southern ports during the late war, the United States government chose to exercise a belligerent right, when, as a sovereign, it might have accomplished the same object by interdicting commerce through those ports by municipal regulations. This act of blockading the southern ports and the exchange of prisoners are construed into a recognition by the United States of the alleged status of the Confederate States as a belligerent power. But constructive belligerency and constructive *governments de facto* are novel elements of international law, and not yet incorporated, we imagine, in the law of nations even in 'its newest state.' What is the evidence that the insurgent States were ever recognized as constituting a *de facto government* either by the United States or any other power? It is not shown, nor, we imagine, can it be, that any formal declaration of such recognition has ever been made by any government, by the issuing of any proclamation or State paper importing a national act. No ambassador, minister plenipotentiary, charge d'affairs, or other functionary of that order, was ever sent to Richmond to treat with the government of the Confederate States. No official of that character, sent by the government of the Confederate States to foreign powers was ever recognized and received in that capacity. If Lord John Russell, in speeches before political meetings, spoke hopefully of the Confederate cause, and if now and then a member of parliament said in his place that the Confederate States were a *government de facto* and ought to be recognized, it was matter of but little import. What ever else may have been said or done in England or in France touching these matters, it is certain that no solemn act of either government was ever announced declaring the Confederate government a *government de facto*. Conceding, however, that the Confederate States were a belligerent power, did that constitute them a *government de facto?* Certainly not. It is contended nevertheless that its *status* was that of a *de facto government*, because the insurgent States established a government and exercised jurisdiction over the country which they embraced. In examining this proposition, we must look dispassionately at the stern array of facts that come within the field of view. What then is a *government de facto?* A *government de facto* arises only where the established government has been subverted by a successful rebellion, and the new government exercises undisputed sway for the time being over the entire country; or, where the people of any portion of a country subject to the same government, throw off their allegiance to that government and establish one of their own; and show, not only that they have established a government, but also their ability to maintain it. This principle is founded upon reason and the fitness of things, and is therefore a rule of international law. . . . The uniform course of the United States towards the various provinces of Spain on the American Continent, which from time to time, within the last half century, have been in a state of revolt, has been scrupulously to abstain from the recognition of any of them as *de facto governments* until Spain herself had abandoned the contest, or it became morally certain that her power could never be reinstated. Now, at what time did the insurrectionary States, in the late unhappy conflict, exhibit to the world their ability to maintain their so-called government against the gigantic power of the United States? If they never did this, the claim set up for them—as a *de facto government*—must fail. Aside from the fact of their inability to maintain the government they set up being proved by the actual failure, it may justly be said that the result of the conflict was apparent from the beginning. What are the facts? The southern States revolted and established a government founded, as they declared, upon the great principle of slavery, and with the avowed purpose of perpetuating it. . . . Without money, without manufactures, and without producers, food, clothing and the munitions of war began to fail. No intervention by any of the powers of Europe was to be expected. The public sentiment of England, in unison with that of the sovereign, restrained the ministry; while the judgment and caution of Napoleon kept him from venturing

alone upon a measure by no means *free* from hazard, in view of his tenure of the throne of France, and of the well defined position of Russia touching intervention by any of the European powers. . . . With these facts glaringly before the eyes of the world, can it be said that the Confederate States at any time exhibited their ability to maintain the government they established? The advocates of the proposition that the Confederate States were a *de facto government* resort to English history for authorities to support their position. We think they are not fortunate in doing so. During the long continued wars carried on by the rival houses of York and Lancaster, when the kingdom was in turn held by the one or the other of the parties, *de facto governments* were alternately established because intervals of long duration occurred between these alternate occupations of the crown, and during which all strife had ceased. Such was the case during the usurpation of Cromwell. He was in the undisputed possession of the government for a long period during which he had no opposition. For this reason the Cromwell government was a *de facto government;* and we do not see that it proves anything that Sir Matthew Hale, an undoubted loyalist, held office under it, and that he afterwards held office under Charles the Second. The words of Lord Hale, quoted with such confidence, are very significant on this point. He says: 'The right heir of the crown during such time as the usurper is in plenary possession of it, *and no possession thereof in the heir*, is not a king within the act, on the subject of treason.' The authority of Sir Michael Foster is also to the same effect. He says: 'A king even *de facto* in the full and sole possession of the crown, he is a king within the statute of treason.' It is clear that all these examples drawn from English history, and the authorities cited, make good the premises we have laid down. They all show conclusively the conditions to be absolute and plenary possession without interruption and no possession of the realm in *the adverse claimant.* It is matter of history that these conditions were not fulfilled in the case of the Confederate government. From a very early period of the contest the Federal occupation of territory within the limits of the Confederate States was gradually extended, until the whole country was occupied, or at least, until the Confederate authority was entirely subverted. We conclude finally that by the principles of international law, and the general usage of nations, the late government of the Confederate States did not attain the status of a *government de facto.* The authority then set up under the government of the late insurgent States was illegal and void. It cannot therefore avail the plaintiff." Smith *v.* Stewart, 21 La. Ann. 67.

On the other hand, in some cases, a contrary opinion has been expressed by certain judges, who have held that these governments were *de facto governments.* A brief consideration of the reasoning upon which they have based this opinion, in view of the importance of the subject, will not be without interest, and will render it possible to compare the relative strength of the opposing views. Thus in Virginia, the supreme court of appeals *held* the Confederate government to be a *government de facto*, under the following facts: B, a resident of Indiana, during the late war, had a legacy left him which came into the hands of N as executor, and which was deposited in bank to N's credit. The executor reported it to a Confederate receiver, and it was confiscated under the Confiscation Acts of the Confederate States. In giving judgment against the legatee, the court, STAPLES, J., after distinguishing this case from Keppel's Admr. *v.* Petersburg R. Co., Chase's Dec. (U. S.) 167, cited above, because there, the conduct of the company afforded a reasonable inference that they were not involuntary accessories to the whole action of the government, while in this case had the executor not reported this legacy he would have been liable to heavy penalties, said: "We are not disposed, however, to rest the decision of this case upon this narrow and restricted view. In Walker *v.* Christian, 21 Gratt. (Va.) 291, 301, Judge Moncure, speaking for the court, said: 'It is immaterial to inquire whether the Confederate government was *de jure* or *de facto* only; and if *de facto only*, for what purpose and to what extent it was a *de facto government.* That it was such a government to a considerable extent and for many purposes, if not entirely and for all purposes, cannot be denied.' It is said, however, by an eminent federal judge that the Confederate government did not possess all the attributes of a

*government de facto* in the highest degree. The reason he assigns is, it never expelled the regular authorities from their customary seats and functions. It never held the national capital. It never asserted any authority to represent the nation. The conclusion he deduces, therefore, is, it must be regarded as an unlawful organization, and all its acts and proceedings for the confiscation of the property of lawful citizens must be treated as absolutely null and void. The test here suggested may be a correct one, when applied to a people having but one central, consolidated government. In such States or communities, as a general thing, the object of every revolutionary government is to overthrow and expel the existing government, to occupy the capital and give laws to the nation. So long as the organization falls short of this result, it may be a question whether it possesses the attributes of a *de facto government* in the highest degree. However this may be, the test suggested cannot in justice be applied to the Confederate States. They did not attempt or desire to occupy the national capital as their seat of government, nor to give laws to the people of the United States. The whole scope and object of the movement was a separation from the northern States; the formation of an independent confederation; the establishment of a new government over their own people within their own territorial limits and jurisdiction. How eminently successful this struggle was for four years, at least, in the attainments of these objects let the supreme court of the United States answer." The judge then quotes from Mauran *v.* Insurance Co., 6 Wall. (U. S.) 1, and continues: "All will acknowledge the force of this description, the accuracy and truth of the picture. If the laws and mandates of a government thus organized and powerful, will not protect those who were subject to its jurisdiction and yielded it obedience, it is idle to say that the citizens or subjects of a mere *de facto government*, in any case, can claim exemption under its authority." After commenting on the *Castine* case, the judge says farther: "Now, if the learned Chief Justice be correct in likening the Confederate government to the military occupation of Castine, it would seem that the same results must follow in both cases. The law of paramount force, which protected the citizen against the claim of the United States, would also protect the bailee or fiduciary, who had surrendered the funds in his hands to the supreme authority of the country. In such case it does not matter that such authority is denounced as unlawful and treasonable. The same thing may be said of every mere *de facto government*. It is unlawful because it is simply *de facto*. The right to confiscate the property of enemies during war does not depend upon the lawfulness of the government which enforces it. It is derived from a state of war, and is called the right of war. Accordingly, when things in action are confiscated, peace being made those which are paid are deemed to have perished; but those not paid revive and are restored to their true creditors. . . . It may be that the laws of the Confederate government can no longer be enforced, and that no person can claim exemption from punishment for treason under that authority; but what is to be said in respect to contracts made, rights vested, payments made, liabilities incurred, duties and obligations enforced while such laws were in operation? The government of the the United States was unable to afford any protection to this executor at the time of this transaction. Its courts were not only closed against him, but he was declared an enemy of the United States, and his property liable to capture and confiscation by the authorities of that government. Whatever security he had against violence and wrong—whatever protection for person and property was derived from the Confederate government. Protection and allegiance are correlative obligations. As the citizen is justified in obeying the laws which protect him, so his rights and liabilities in civil and local matters must be tested and settled by the rules of the government which has dominion over him. The government of the United States obtained many important advantages by the exercise of belligerent rights during the war. It seized and confiscated millions of dollars worth of property belonging to southern citizens who had taken no part in the struggle. It was relieved from all responsibility for acts done on southern soil and on the ocean by the armies and navies of the Confederate States. Its blockade of southern ports was respected; and its right to exert against neutral commerce all the

privileges of a party to a maritime war fully recognized. The people of the Northern States approved this policy of their government, and reaped all the advantages flowing from it. For the losses they thereby sustained they must for redress look to the government which claimed their allegiance and received their services. Considerations of natural justice and equity, the laws and usages of nations, require that the people of the south shall not be placed in the position of insurers of funds in their hands lost by the accidents of war. In considering this case, I have been content to concede that the government of the Confederate States was only a *government de facto*. Whether it was not, during its existence, something more is a proposition in regard to which statesmen and jurists will differ so long as a trace of the struggle remains; so long as the fundamental principles of the government excite discussion among men. The decision of that question is not rendered necessary in any aspect of this case. Should it ever arise, I trust this court will meet it with the gravity and deliberation its importance demands." Newton's Exr. *v.* Bushong, 22 Gratt. (Va.) 628, 634; s. c., note to Keppel's Admr. *v.* Petersburg R. Co., Chase's Dec. (U. S.) 167.

This argument was pushed to its full effect in another Virginia case, in which a suit was brought to recover the price of certain cattle. The defendant claimed that in purchasing the cattle he acted as a public agent, buying them for the use of the Confederate States. The court sustained him, *holding* that the Confederate government must be considered as a government, within the meaning of the rule that public agents contracting in behalf of a government are not personally bound by their contracts, MONCURE, P., saying: "It is immaterial to inquire whether the said government was one *de jure* or *de facto* only; and, if *de facto*, for what purposes and to what extent it was a *de facto government*. That it was at least such a government, to a considerable extent and for many purposes, if not entirely and for all purposes, cannot be denied. Indeed, it has been expressly so decided, even by the supreme court, in Thorington *v.* Smith, 8 Wall. (U. S.) 1, in which Chief Justice CHASE delivered the unanimous opinion of the court. It matters not that this 'government was never acknowledged by the United States as a *de facto government*,' in a general sense, nor that it was not 'acknowledged as such by other powers.' *Id.* p. 9. It is admitted, indeed cannot be denied, 'that the rights and obligations of a belligerent were conceded to it in its military character very soon after the war began' by the United States. *Id.* p. 10. But whether 'from motives of humanity and expediency' or otherwise, is immaterial. 'The whole territory controlled by it,' say the supreme court, 'was thereafter held to be enemies' territory, and the inhabitants of that territory were held, in most respects, for enemies. To the extent, then, of actual supremacy, however unlawfully gained, in all matters of government within its military lines, the power of the insurgent government cannot be questioned.' It is a great mistake to regard this government as a mere temporary and local outbreak or insurrection. It was not so regarded by the supreme court of the United States, even as early as the second year of the war. In the Prize Cases, 2 Black. (U. S.) 635, 673, decided in 1862, Mr. Justice Grier used this language: 'Hence, in organizing this rebellion, they have *acted as States* claiming to be sovereign over all persons and property within their respective limits, and asserting a right to absolve their citizens from their allegiance to the Federal Government. Several of these States have combined to form a new confederacy, claiming to be acknowledged by the world as a sovereign State. Their right to do so is now being decided by wager of battle. The ports and territory of each of these States are held in hostility to the general government. It is no loose, unorganized insurrection, having no defined boundary or possession. It has a boundary marked by lines of bayonets, and which can be crossed only by force. South of this line is enemies' territory, because it is claimed and held in possession by an organized, hostile and belligerent power.' Suppose the decision by this wager of battle had been different from what it was, as it well might have been, how would this case then have stood? Could it then have been said that the Confederate government was not a government within the meaning of the rule in question, when the debt involved in this case was created? Suppose this suit had been tried during the war,

would it have been then held that the Confederate was not *such* a government? Can the disastrous result of the war to the confederate cause, pending the suit, make any change in the law by which the question in controversy is to be determined? The Confederate government was perfectly organized, and exercised supreme power over the vast territory within its limits during the four years of its existence. Its lawful authority was universally acknowledged by all persons who were under its control, and most of them not only professed to be, but actually were, devoted to it and anxious for it success. The plaintiff and the defendant in this action both appear to have been of that number. The defendant was an agent of the government to purchase supplies for the vast army employed in fighting its battles, and the plaintiff voluntarily sold cattle to the defendant as such agent for the purpose of affording food for that army. Can the plaintiff now say that the Confederate government was not a lawful government, and therefore the defendant, a mere agent in buying the cattle for that government, is personally liable for the purchase money? As to these parties, and for all the purposes of this case, the Confederate States must be regarded as a government, either lawful or actual, when the purchase of the cattle was made; and the defendant did not become personally responsible, unless it was plainly intended by the parties that he should be so. It is a question of intention merely, and in order to make the agent liable, the intention must be very clearly proved, all the presumptions of law and fact being the other way." Wakker *v.* Christian, 21 Gratt. (Va.) 291, 300.

The chief authority, upon which those courts, in which the Confederate government has been held to be a *de facto government*, have based their conclusion, outside of the argument from the facts of the case, is two cases in the supreme court of the United States, namely, Mauran *v.* Ins. Co., 6 Wall (U. S.) 1, and Thorington *v.* Smith, 8 Wall. (U. S.) 1. These cases are as follows: In the first of these cases, suit was brought against the Alliance Insurance Company on a policy of insurance "against the adventures and perils of the seas, fire, enemies, pirates, assailing thieves, restraints, and detainments of all kings, princes, or people of what nation or quality soever." In the margin of the policy was the following: "Warranted by the assured free from loss or expense arising from *capture*, seizure or detention, or the consequences of any attempt thereat, any stipulations in this policy to the contrary notwithstanding." The vessel, on which this policy was issued, was seized on the 17th of May, 1861, at the mouth of the Mississippi river, on her way up to New Orleans by the officers and crew of the steamer Music, belonging to the so-called Confederate States. The Confederate flag was hoisted to her masthead and her captain and pilot were told that the ship was "a prize to the Confederate States." Verdict and judgment, upon these facts, having been given in favor of the insurance company, the question on error was, whether this taking of the vessel by the naval forces of the so-called Confederate States was a *capture* within the warranty of the assured in the margin of the policy? If it was, then the loss was not one of the perils insured against, and the judgment below was right. The court *held* that it was a capture within the warranty of the insured. NELSON, J., after discussing various cases of capture, saying: "Another illustration will be found in a capture by a *de facto government*, which government is defined to be one in possession of the supreme or sovereign power, but without right — a government by usurpation, founded perhaps in crime, and in the violation of every principle of international or municipal law, and of right and justice; yet, while it is thus organized, and in the exercise and control of the sovereign authority, there can be no question between the insurer and the insured as to the lawfulness of the government under whose commission the capture has been made. If any presumption could properly be indulged as to the perils against which the insured would most desire to protect himself, it might well be captures by these violent and irregularly constructed nationalities. The court in the case of Nesbitt *v.* Lushington, 4 Term 763, fitly described the character of the government contemplated in the clause respecting the restraints, etc., of kings, princes or people, namely: 'The ruling power of the country,' 'the supreme power,' 'the power of the country, whatever it might be'—not necessarily a lawful power or government, or one that had been adopted into the family of nations.

Now, applying these principles to the case before us, it will be seen that the question is not whether this so-called Confederate government, under whose authority the capture was made, was a lawful government, but whether or not it was a government in fact, that is one in the possession of the supreme power of the district of country over which its jurisdiction extended? We agree that all the proceedings of these eleven States, either severally or in conjunction, by means of which the existing governments were overthrown, and new governments erected in their stead, were wholly illegal and void, and that they remained after the attempted separation and change of government, in judgment of law, as completely under all their constitutional obligations as before. The constitution of the United States, which is the fundamental law of each and all of them, not only afforded no countenance or authority for these proceedings, but they were, in every part of them, in express disregard and violation of it. Still, it cannot be denied that by the use of these unlawful and unconstitutional means, a government in fact was erected greater in territory than many of the old governments in Europe, complete in the organization of all its parts, containing within its limits more than eleven millions of people, and of sufficient resources, in men and money, to carry on a civil war of unexampled dimensions; and during all which time the exercise of many belligerent rights were either conceded to it or were acquiesced in by the supreme government, such as the treatment of captives, both on land and sea, as prisoners of war; the exchange of prisoners; their vessels captured recognized as prizes of war, and dealt with accordingly; their property seized on land referred to the judicial tribunals for adjudication; their ports blockaded, and the blockade maintained by a suitable force, and duly notified to neutral powers the same as in open and public war. We do not inquire whether these were rights conceded to the enemy by the laws of war among civilized nations, or were dictated by humanity to mitigate the vindictive passions growing out of a civil conflict. We refer to the conduct of the war as a matter of fact for the purpose of showing that the so-called Confederate States were in the possession of many of the highest attributes of government, sufficiently so to be regarded as the ruling or supreme power of the country, and hence captures under its commission were among those excepted out of the policy by the warranty of the insured. We could greatly extend the opinion upon this branch of the case by considerations in support of the above view, but the question has undergone very learned and able examinations in several of the State courts, deservedly of the highest eminence, and which have arrived at the same conclusion, and to which we refer as rendering further examination unnecessary." Mauran *v.* Insurance Co., 6 Wall. (U. S.) 1. To this opinion Chief Justice CHASE and Mr. Justice SWAYNE dissented.

The cases referred to above by Judge NELSON are three in number: Fifield *v.* Ins. Co., 47 Pa. St. 166; Dole *v.* Ins. Co., 6 Allen (Mass.) 373; Dole *v.* Ins. Co., 51 Me. 465. In the Pennsylvania case, the question is so fully discussed, and both views drawn out that the language of WOODWARD, C. J., will bear quoting at some length. In this case suit was brought upon an insurance policy on the brig John Welsh, which had been captured by a privateer called the Jeff Davis, cruising under letters of marque issued by authority of the so-called Confederate States. The Jeff Davis subsequently captured other vessels and afterwards her crew were themselves captured and brought to port, where they were indicted, tried and convicted, but not sentenced, for piracy, in the circuit court of the United States. By direction of the president of the United States they were subsequently exchanged with the Confederate States as prisoners of war. The court all concurred that this was a capture within the excepting clause of the policy, although none of the judges except THOMPSON, J., agreed with all the opinions expressed by the Chief Justice. WOODWARD, C. J., said: "If the Jeff Davis was not a privateer she was a pirate, and if she was a privateer she was made so by the commission she bore. The legal effect of that commission, therefore must depend upon the *status* of the Southern Confederacy. That it is a government *de jure*, no man who is faithful to the constitution of the United States will for a moment contend. But is it not a *government de facto?* I do not find this kind of government sharply defined in any writers on public law, but I suppose

that any government, however violent and wrongful its origin, which is in the actual exercise of sovereignty over a territory and people large enough for a nation, must be considered as a *government de facto.* Vattel tells us that any nation which governs itself under what form soever without any dependence on foreign power, is a sovereign State. And our American ideas will accept from foreign nations no other authentication of the right to rule than the fact of ruling. General Jackson, in his message of December, 1836, in setting forth the uniform policy and practice of this government to recognize the prevailing party, in all foreign disputes, told congress that 'all questions relative to the government of foreign nations, whether of the old or new world, have been treated by the United States *as questions of fact only.*' And this sentiment has been repeated numberless times in our State papers. There is no doubt, therefore, that the Federal government is accustomed to concede, not only belligerent rights, but civil authority also, to *governments de facto.* Nor does it appear that an interval of peace is essential to the constitution of a *government de facto*, as was argued. The time of recognizing a new power is decided by each existing government for itself, and it may be delayed by the fact that the new power has had no peace, and a season of peace may be indispensable also to consolidate its administration; but where, as here, the inquiry relates merely to the *existence* of the new power, it would be very difficult to say that it did not exist because it did not exist in peace. To make war is one of the highest attributes of sovereignty, and quite as demonstrative evidence of vital existence as deeds of peace.

"The original thirteen States confederated in 1777, but did not achieve peace until 1783, and during those six years were in constant war, yet who doubts now—who ever did doubt?—that in all that interval they were a *government de facto?* The 'history of the times' tells us how the so-called government of the Confederate States came into existence. Certain States having acceded to the Federal Union with other States under a constitution perpetual and irrepealable, except by common consent, did in 1860 and 1861, without the consent of the other States, and in flagrant violation of the Federal compact, secede from that Federal Union and confederate together under the name of the Confederate States of America, and set up over themselves, in a written constitution, a general government, whose seat or capital is the city of Richmond, and whose asserted jurisdiction is coextensive with the territories of the seceded States. I have never seen their constitution, but I understand it resembles our own in many points, and that it establishes all the departments and functionaries of a regular republican government. It is a very unquestionable part of the history of the times that this government has carried on war, offensive and defensive, for more than three years, and that its belligerent rights have been recognized by the principal states of Europe, though as a civil power it has not obtained recognition by any of the nations of the earth. Now, when we find such a government actually exercising sovereignty over a territory larger and a people more numerous than those of our original thirteen States, is it possible that, if the status of that government must be declared, anything less can be said of it than that it is a *government de facto?* Obvious as the answer to this question may seem to be, it encounters, nevertheless, this serious difficulty. If secession did not dissolve the Union, as to the seceded States, and place them beyond the pale of the constitution, then they are still under the constitution, which in its tenth article declares that "no State shall enter into any treaty, alliance or *confederation, grant letters of marque or reprisal,* coin money, emit bills of credit," etc. How can they be a *de facto government* any more than a government *de jure* under the constitution of the United States? How can two sovereignties coexist for the same purposes, any more than two magnitudes can occupy the same space at the same time? The Federal government and the State governments, both sovereign in their respective spheres, can coexist over the same people, because governmental purposes and powers are divided between them, and so long as they exercise only the powers which they respectively possess under the constitution, they move in harmonious orbits. Thoughtless men sometimes allege that people cannot be subject to two sovereignties, and hence infer that State sovereignty is a doctrine subversive of the just authority of the Federal government; but if they would look

upon their children, who are subject to one sovereignty at home and another in school, they would see the riddle solved, and would learn how governments, existing for different purposes and clothed with different powers, may both be sovereign to the extent of their respective powers, and to the advantage of those who are subject to both jurisdictions. But the Confederate government exists for the *same purposes* within the seceded States, for which the Federal government was established, and hence the inconsistency. The one must displace the other. If the Federal government, who alone has power under our constitution to issue letters of marque and reprisal, still exists in the seceded States, however its functions may be hindered and suspended, I see not how the government of the Confederate States can have power to issue letters of marque and reprisal. It is a governmental power expressly lodged with the Federal government, and unless secession has had the effect to withdraw it, there it exists still in all the plenitude and exclusiveness of the original grant. The legal consequences of secession, in this particular, have not been distinctly and authoritatively declared. Sometimes secession is treated as a nullity, and the acts and ordinances of secession are ignored. According to this view the southern States are still integral portions of the Federal Union, and all that has happened within is mere insurrectionary resistance of the constitution and laws of the United States. If this be so, it must follow that the United States is the supreme government over the seceded territory, for its appropriate purposes, both *de jure* and *de facto*—its functions indeed temporarily suspended in certain districts, but its existence unimpaired. This view seems to me as fatal to the *de facto* pretensions of the Confederate States as to the rightfulness of their dominion. Assuredly they have no right to issue letters of marque and reprisal, if another government, clothed with the exclusive right, exists among them.

"The other view of secession is that it was a revolution which took the seceded States entirely out of the Union, and made them in respect to the Federal government foreign States. In the language of a distinguished congressional leader, 'having organized a distinct and hostile government, they have by force of arms risen from the condition of insurgents to the position of an independent power *de facto*—the constitution and union are abrogated so far as they are concerned, and, as between two belligerents, they are under the laws of war, and the laws of nations alone.' These are the two views of secession on which the public men of the country divide, and between which some of them oscillate. Which shall the judicial mind adopt? I answer, that view, if it can be ascertained, which the political departments of the Federal government have adopted. Not that the judiciary is ever, upon principle, to surrender its independence of judgment to the executive and legislative departments, but, since the foreign relations of the Federal government are wholly intrusted to the president and congress the judiciary must accept them, just as they have been recognized and established by the president and congress. It is only from the acts and declarations of these departments that we can know, judicially, what governments exist, and what rights we concede to them. This rule of decision was recognized by C. J. Marshall, in United States *v.* Palmer, 3 Wheat. (U. S.) 634, and in Foster *v.* Nielson, 2 Pet. (U. S.) 307, and was very distinctly reasserted by Mr. Justice Grier, in the Prize Cases, 2 Black (U. S.) 635, 670. But even upon this principle it would be very difficult to generalize the various, discrepant and sometimes inconsistent measures that have been taken against the rebellion as to enable us to declare whether the president and congress regarded the seceded States within or without the Union. Fortunately such a generalization is not necessary for the purposes of this particular case, because we have a fact here which is decisive of this case, however inconclusive it might prove in a larger application in connection with other facts. I allude to the fact that, after the conviction of the crew of the Jeff Davis for piracy in a court of justice, the president interposed and restored them to the authorities of the Confederate States. The depredations upon the Enchantress, for which they were convicted of piracy, were the same in character and legal effect as those committed against the John Welsh. The capture of one vessel was no less piratical than the other. Guilty of piracy, the president might have pardoned them for reasons of State, but he did not; he treated them as public enemies, and thus, in this instance,

recognized the belligerent rights of the power that sent them forth, and the validity of the commission under which they sailed. No declaration could be more emphatic that they were not pirates, and because it came from that department to whom it is our duty to look for a definition of our relations with all surrounding powers, whether friends or enemies, we accept it and follow it instead of the judicial proceedings which resulted in the conviction of piracy. I am very far from wishing to deduce too large inferences from this executive act, and am careful to make no *general* application of it. I would not infer from it alone that the president meant to recognize the Southern Confederacy even as a *government de facto*, nor that he considered secession a revolution that placed the States outside the Union, and I have no doubt that as a measure of policy it was dictated by motives of prudence and humanity; but in its bearing upon this particular case I cannot doubt that it was a recognition of the authority under which the Jeff Davis sailed. If all other vessels sailing under the same authority should be considered piratical, nay, if this very cruiser should hereafter be so considered and treated, yet for the time present, and as to the transaction now under investigation, I must regard the capture of the John Welsh as a capture *jure belli* and not piratical. That deference which is due to the constituted authorities of the country demands this conclusion. And the reasonings of the supreme court of the United States in the Prize Cases (2 Black 670), of this court in Chester's Case (7 Wright 492), and of the supreme court of Massachusetts in Dole *v.* New England Ins. Co., 6 Allen (Mass.) 373, as well as the debates in the House of Lords upon the president's proclamation of blockade of 19th of April, 1861, as given in the notes to Lawrence's last edition of Wheaton's International Law, pp. 248–255, all tend to support this conclusion. That I may, if possible, preclude all misunderstanding, I repeat that I do not place this conclusion upon the evidence of the recognition by our government of the general belligerent rights of the Confederate States, much less upon my own private views of the effect of secession, which I have not undertaken to set forth in this opinion, nor upon those of any member of this bench, but I place it upon the deliberate and well-considered act of the president in exchanging the crew of the Jeff Davis as prisoners of war—an act which, whatever its general effect, carries conviction to my judicial understanding that that crew must in this case be regarded as privateers, and not as pirates, and hence that the loss of the John Welsh was a 'capture' within the excepting clause of the policy, and not a loss by 'pirates, rovers, and assailing thieves.'" Fifield *v.* Ins. Co., 47 Pa. St. 166. The concurring opinion of Agnew, J., in this case is worth perusal.

The second United States case relied on by those who have *held* the Confederate government to be a *de facto government*, is that of Thorington *v.* Smith. In this case the question was the enforcement of a contract for the purchase of land made during the war. A note had been given for part of the purchase money, which note was expressed in dollars, and the chief question was whether this, under the evidence, was Confederate money or not. A subsidiary question, however, arose whether a contract for the payment of Confederate notes, made during the rebellion between parties residing within the so-called Confederate States, could be enforced at all in the courts of the United States. In answering this question in the affirmative, Chief Justice CHASE, after stating the origin of the governmental organization known as the Confederacy, used the following language: "What was the precise character of this government in contemplation of law? It is difficult to define it with exactness. Any definition that may be given may not improbably be found to require limitation and qualification. But the general principles of law relating to *de facto government* will, we think, conduct us to a conclusion sufficiently accurate. There are several degrees of what is called *de facto government*. Such a government, in its highest degree, assumes a character very closely resembling that of a lawful government. This is where the usurping government expels the regular authorities from their customary seats and functions, and establishes itself in their place and so becomes the actual government of a country. The distinguishing characteristic of such a government is, that adherents to it in war against the government *de jure* do not incur the penalties of treason, and, under certain limitations, obligations assumed by it in behalf of the country,

or otherwise, will, in general, be respected by the government *de jure* when restored. Examples of this description of *government de facto* are found in English history. The statute 11 Henry VII, C. 1, relieves from penalties for treason all persons who, in defence of the king, for the time being, wage war against those who endeavor to subvert his authority by force of arms, though warranted in so doing by the lawful monarch. But this is where the usurper obtains actual possession of the royal authority; not when he has succeeded only in establishing his power over particular localities. Being in possession, allegiance is due to him as king *de facto*. Another example may be found in the government of England under the commonwealth, first by parliament, and afterwards by Cromwell, as protector. It was not, in the contemplation of law, a government *de jure*, but it was a *government de facto* in the most absolute sense. It incurred obligations and made conquests which remained the obligations and conquests of England after the restoration. The better opinion doubtless is, that acts done in obedience to this government could not be justly regarded as treasonable, though in hostility to the king *de jure*. Such acts were protected from criminal prosecution by the spirit, if not by the letter, of the statute of Henry the Seventh. It was *held* otherwise by the judges by whom Sir Henry Vane was tried for treason in the year following the restoration. But such a judgment, in such a time, has little authority. It is very certain that the Confederate government was never acknowledged by the United States as a *de facto* government. Nor was it acknowledged as such by other powers. No treaty was made by it with any civilized State. No obligations of a national character were created by it, binding after its dissolution, on the States which it represented or on the national government. From a very early period of the civil war to its close, it was regarded as simply the military representative of the insurrection against the authority of the United States. But there is another description of government, called also by publicists a *government de facto*, but which might, perhaps, be more aptly denominated a government of paramount force. Its distinguishing characteristics are (1), that its existence is maintained by active military power, within the territories, and against the rightful authority of an established and lawful government; and (2), that while it exists it must necessarily be obeyed in civil matters by private citizens who, by acts of obedience rendered in submission to such force, do not become responsible, as wrongdoers, for those acts, though not warranted by the laws of the rightful government. Actual governments of this sort are established over districts differing greatly in extent and conditions. They are usually administered directly by military authority, but they may be administered also by civil authority, supported more or less directly by military force. One example of this sort of government is found in the case of Castine in Maine, reduced to British possession during the war of 1812. From the 1st of September, 1814, to the ratification of the treaty of peace in 1815, according to the judgment of this court in United States *v.* Rice, 4 Wheat. (U. S.) 246, 253, 'the British government exercised all civil and military authority over the place.' 'The authority of the United States over the territory was suspended, and the laws of the United States could no longer be rightfully enforced there, or be obligatory upon the inhabitants who remained and submitted to the conqueror. By the surrender, the inhabitants passed under a temporary allegiance to the British government, and were bound by such laws, and such only, as it chose to recognize and impose.' It is not to be inferred from this that the obligations of the people of Castine as citizens of the United States were abrogated. They were suspended merely by the presence, and only during the presence, of the paramount force. A like example is found in the case of Tampico, occupied during the war with Mexico by the troops of the United States. It was determined by this court, in Fleming *v.* Page, 9 How. (U. S.) 614, that, although Tampico did not become a part of the United States in consequence of that occupation, still, having come, together with the whole State of Tamaulipas, of which it is a part, into the exclusive possession of the national forces, it must be regarded and respected by other nations as the territory of the United States. These were cases of temporary possession of territory by lawful and regular governments at war with the country of

which the territory so possessed was part. The central government established for the insurgent States differed from the temporary governments at Castine and Tampico in the circumstance that its authority did not originate in lawful acts of regular war, but it was not, on that account, less actual or less supreme. And we think that it must be classed among the governments of which these are examples. It is to be observed that the rights and obligations of a belligerent were conceded to it, in its military character, very soon after the war began from motives of humanity and expediency by the United States. The whole territory controlled by it was thereafter *held* to be enemies' territory, and the inhabitants of that territory were *held*, in most respects, for enemies. To the extent, then, of actual supremacy, however unlawfully gained, in all matters of government within its military lines, the power of the insurgent government cannot be questioned. That supremacy did not justify acts of hostility to the United States. How far it should excuse them must be left to the lawful government upon the re-establishment of its authority. But it made obedience to its authority, in civil and local matters, not only a necessity, but a duty. Without such obedience, civil order was impossible. It was by this government exercising its power throughout an immense territory, that the Confederate notes were issued early in the war, and these notes in a short time became almost exclusively the currency of the insurgent States. As contracts in themselves, except in the contingency of successful revolution, these notes were nullities; for, except in that event, there could be no payer. They bore, indeed, this character upon their face, for they were made payable only 'after the ratification of a treaty of peace between the Confederate States and the United States of America.' While the war lasted, however, they had a certain contingent value, and were used as money in nearly all the business transactions of many millions of people. They must be regarded, therefore, as a currency, imposed on the community by irresistible force. It seems to follow as a necessary consequence from this actual supremacy of the insurgent government, as a belligerent, within the territory where it circulated, and from the necessity of civil obedience, on the part of all who remained in it, that this currency must be considered in courts of law in the same light as if it had been issued by a foreign government, temporarily occupying a part of the territory of the United States. Contracts stipulating for payments in this currency cannot be regarded, for that reason only, as made in aid of the foreign invasion in the one case, or of the domestic insurrection in the other. They have no necessary relations to the hostile government, whether invading or insurgent. They are transactions in the ordinary course of civil society, and, though they may indirectly and remotely promote the ends of the unlawful government, are without blame, except where proved to have been entered into with actual intent to further invasion or insurrection. We cannot doubt that such contracts should be enforced in the courts of the United States, after the restoration of peace, to the extent of their just obligation." Thorington *v.* Smith, 8 Wall. (U. S.) 1.

**Town Governments.**—In California it has been *held* that a statute providing that the legal voters of any township, incorporated city or town, should have the power to determine by ballot whether or not liquor should be sold within their limits, is unconstitutional; and that it is not helped by the constitutional power given to the legislature to establish a system of *town governments*. Therefore a conviction for selling liquor, within a prohibited district under this law, was void, the court, McKINSTRY, J., saying: "It is enough to say that this statute cannot be sustained as conferring on the towns the power referred to, because no 'towns' have ever been created in this State. Our constitution, in terms, makes it the imperative duty of the legislature to create certain local governments. 'The legislature shall establish a system of county and *town governments*, which shall be as nearly uniform as practicable throughout the State.' (Art. XI, § 4.) 'It shall be the duty of the legislature to provide for the organization of cities and incorporated villages,' etc. (Art. IV, § 37.) The behest of the constitution as to 'towns' will be obeyed when a system of *town governments* shall be established by law. When the system shall be established, the towns may make such local rules or by-laws as they shall be authorized to make by the statutes which shall give them life and entity. The

bestowal on them of the power to make proper local rules or by-laws will not be a delegation of legislative power conferred on the senate and assembly, because, as was said in Houghton *v.* Austin, 47 Cal. 646, the exercise of such power by the counties, towns, cities and incorporated villages, is recognized by the same constitution which confers the general legislative power upon the State legislature. But the constitution is not self-executing; the town governments must be created by statute. And, it will be observed, the constitution commands the legislature to establish a system of *town governments*. This form of expression conveyed a definite meaning, when the constitution was adopted and is at once understood by those familiar with the systems of *town government* elsewhere; it would be meaningless, unless applied with reference to organizations, in their general features at least, like those in other States, where systems of *town government* had been established. To establish a system of government, the duties of the several local officials must be defined, in some of whom (or in the inhabitants of the town acting in a public capacity) a discretionary action must be vested within the scope of the powers given by the organic law which creates the system. In view of the origin of towns and their history in other States, I can conceive of no system of *town government* which is not continuous, which does not furnish officers to whom is given (during their term of office) the management of the machinery of local government, and which does not provide a legislative assembly, whose enactments shall be the product of deliberation and mutual consultation. This last seems the very life of any such system heretofore known in the United States. If the subjects of local legislation are committed to the people of the town, they must be committed to them as to a deliberative body; a project for a local regulation must be submitted to the wisdom and discretion of the people in organized assembly, by whom, after proper discussion and consideration, it may be rejected, or molded into a rule to be enforced as law. In our country, the idea of legislation—in its broader sense, or as applied to local concerns—involves an examination into the merits of a proposed law by the assembled legislators. Under the system of *town governments* in New England, it has been the practice (by notice designating the questions to be presented) for the selectmen to call meetings of the voters of the town, which are presided over by a moderator and restrained by rules intended to secure orderly proceedings, at which the propriety and expediency of proposed measures may be considered, adopted or rejected. The voters of the town are supposed to be so few in number that they may act directly on matters of local concern, but they act as a subordinate, legislative and deliberative body, in every sense that their representatives would so act, if representatives were selected by them. The matters of local interest are discussed in the town meeting, before they are passed upon. 'The marked and characteristic distinction,' says Chief Justice Shaw, in Warren *v.* Charlestown (2 Gray 84–101), 'between a town organization and that of a city is, that in the former all the qualified voters meet, deliberate, act and vote; whereas, under a city government, this is all done by their representatives.' Mr. Quincy, in his 'Municipal History of Boston' (p. 28), in explaining the causes which led to the establishment of a city government for Boston, while he proves that the *town government* had outlived its usefulness, shows that before the city was incorporated all the qualified electors constituted the local legislature. He says: 'With a population upwards of forty thousand, and with seven thousand qualified voters, it was evidently impossible calmly to deliberate and act. When a town meeting was held on any exciting subject in Faneuil hall, those only who obtained places near the moderator could even hear the discussion.' The system of town governments, as it existed in New York prior to 1846, is fully explained in the eleventh chapter of the first part of the Revised Statutes of 1827–8. There, as in New England, the towns possessed certain of the faculties of a body corporate, could sue and be sued, hold lands and make contracts necessary to the exercise of their corporate powers. In New York, as elsewhere, the citizens of towns chose certain town officers, and when assembled as a deliberative body (justices of the peace presiding) made 'prudential rules and regulations,' with respect to local matters committed to their discretion. In some other States this power would seem to have been vested in boards of trustees, who con-

lation of public or private affairs.[1] Used as an adjective; em-

stituted the local parliaments. The legislature of California has never established a 'system of *town governments*.' . . . The exercise by the *town governments*, when they shall be established, of the power to make local rules will coexist with the power of the State legislature to make general laws, and will apparently (but apparently only) constitute an exception to the rule, that the power to make laws, placed by the constitution in the senate and assembly, cannot be delegated. When the mandate of the constitution shall have been obeyed, and a 'system of *town governments*' shall have been established, and when local legislatures shall have been organized under that system, the State legislature may confide to members of such local legislature the task of deliberating and acting upon matters purely local in their nature. The legislature may give to the *town governments*, when formed, the right to make local rules; but the legislature has no more right to delegate to the people living within certain territorial limits, but who have no distinctive political character or governmental organization, the power to make laws than it can delegate the same power to all the people of the State. The statute of March 18, 1874, under the provisions of which the petitioner was convicted, does not itself establish any system of *town government*. The only officers who are directed to perform any acts are county officers; the election is to be ordered by and the returns made to the supervisors. There is no provision for an assemblage of the people of the town for deliberation; the vote to be taken can in no way be said to express the result of such deliberation. The constitution intended that the opinion of a majority should govern as to town matters, but that it should be an 'organically expressed' opinion. The power to enact laws must be employed by the State legislature; that to make by-laws for a town by the local legislature, to become law or by-law it must first be considered by the appropriate deliberative body. The statute under consideration simply permits a species of *plebiscitum* with reference to a particular subject, in which the only option of the people of a township is to say 'yes' or 'no' to a complicated project. After this spasmodic effort at the polls, the '*town government*' (if this can be called one) subsides into inaction, without any form or power of self-vitalization, until again aroused to the exertion of its single function by the supervisors of the county. This statute furnishes neither a system nor a government. When M. de Tocqueville and other writers, who have studied our institutions in a philosophical spirit, have expressed their admiration for the system of *town governments* existing in New England, as affording an excellent school of preparation for the discharge by the citizen of his duties to the State, it was in view of the public discussions in reference to affairs of local, but sometimes absorbing, interest, at which all the qualified inhabitants of the town could be present, and in which all were authorized to take part. To substitute for such local legislation, where measures receive the sanction of the law only after public interchange of opinions, the machinery of a 'primary election' would be to degrade the whole system. That cannot be called a system of *town government* in which no deliberative assemblage is provided for, and in which a local law is adopted by the ballots of perhaps a bare majority, who vote secretly, and without consultation with the rest of the voters; who are actuated by motives which need not be publicly avowed, or controlled by reasons the weakness of which would be exposed by a public discussion." *Ex Parte* Wall, 48 Cal. 279, 318.

**1. For its Government.**—Where a State statute enacted that a railroad company, incorporated for the consolidation of certain other roads, should, "*for its government*, be entitled to all the powers and privileges and be subject to all the restrictions and liabilities" imposed upon a certain other railroad company, which latter corporation was exempt by law from all taxation upon its capital stock, it was *held* that the consolidated road was entitled to the same exemption, the court, WAITE, C. J., saying: "In all this class of cases the question is one of legislative intent, with a presumption against an intent to grant an exemption from taxation. Here there is no charter of a new corporation with power to build a new railroad. No new taxable property is created. The legislation contemplates nothing more

ployed in, by or for a government;[1] of or pertaining to a government.[2]

than the making of one railroad corporation out of two old ones, each of which has a completed railroad and the privilege of an exemption of its capital stock from taxation. If nothing at all had been said about the powers and privileges of the new corporation, the presumption would have been that it took all which were possessed by the two original companies at the time of their union. To rebut this presumption it is necessary that a contrary intention should appear. The question is not as to a grant of new powers, but as to the taking away of old ones. Such being the case, we cannot believe that the phrase "*for its government*" in the consolidating act was intended as a limitation on the powers and privileges of the new corporation. The natural meaning of the word *government* in such a connection is regulation and control, and we think it was used in that sense here. In reality it neither adds to nor takes from the force of the other words, and simply implies that the new corporation shall have the same charter rights and privileges, and be subject to the same charter restrictions and liabilities, as the Nashville & Chattanooga Co. Such were the charters of the old companies, and such was intended to be the charter of the new; no more, no less. As was said in the court below, 'The government of the corporation embraces every part of the conduct and business of the company in all its relations to the State, to the general public, to individuals, to its own stockholders,' and consequently the grant of powers and privileges *for its government* was in reality the grant of 'the powers and privileges of its corporate entity.' Tennessee *v.* Whitworth, 117 U. S. 139; s. c., 29 Am. & Eng. R. R. Cas. 211.

1. **Government Clerk.**—The Act 17 & 18 Vict., c. 36, § 1, requires that where a bill of sale is executed, the bill of sale or a copy shall be filed in the court of Queen's Bench within twenty-one days after the making or giving, "together with an affidavit of the time of such bill of sale being made or given, and a description of the residence and occupation of the person making or giving the same . and of every attesting witness to such bill of sale." Goods having been taken in execution, a claim was made to them under a bill of sale by which the defendant had assigned the goods to the claimant to secure repayment of £280. An interpleader summons was taken out, and at the hearing the *bona fides* of the bill of sale were established. In the affidavit of the execution of the bill of sale, the maker was described as "*government clerk*" and the attesting witness as "*insurance clerk*." The maker of the bill, in cross-examination stated that he was a clerk in the admiralty; but no evidence was adduced as to the occupation of the attesting witness as an insurance clerk. Objection was taken on behalf of the execution creditor to the validity of the bill of sale, on the ground that "*government clerk*" and "*insurance clerk*" were not a sufficient description of the occupation of the maker of the bill of sale and of the attesting witness respectively. The deputy judge *held* the objection to the description of the occupation of the maker of the bill of sale was valid, and on that ground gave judgment for the execution creditor, without deciding upon the second objection. On appeal the claimant under the bill of sale contended that the description of the maker of the bill of sale as "*government clerk*" was accurate, as he was a clerk in the admiralty, which is a government office; it showed what his occupation and position in life were. The respondent, the execution creditor, on the other hand, claimed that the description ought to show what government office the maker was in. The court gave judgment for the claimant under the bill of sale, BLACKBURN, J., saying: "The description of '*government clerk*' was perfectly accurate, and quite sufficient to give the necessary information. So I may add, though the case does not raise that point for our decision, the description of the witness as 'insurance clerk' is *prima facie* sufficient; it lies on those who say it is not to show that the witness was not what he is described." Grant *v.* Shaw, L. R., 7 Q. B. 700.

2. **Government or Other Stock.**—The Bankruptcy Act, 5 Geo. II, c. 30, provided that a bankrupt's certificate might be refused if within a year before his bankruptcy he had lost the sum of £100 by contracts for the purchase of "any stock of any company whatsoever, or any parts or shares of any government or public funds or securities."

**GOVERNOR.**—See MANDAMUS; STATES AND STATE OFFICERS.

I. Definition, 1400.
II. Term of Office, 1400.
III. Qualifications, 1400.
*Citizenship—Residence—Age—Re-election*, 1400.
IV. Powers, 1401.
1. *Power to Adjourn Legislature*, 1401.
2. *Power to Require Information from Subordinates*, 1401.
3 *Power of Appointment*, 1402.
V. Duties, 1404.
1. *Right to Refuse to Consider Legislative Acts*, 1404.
2. *When Liable to Mandamus*, 1405.
3. *Exemption from Judicial Process*, 1406.
4. *Commander-in-Chief of the Army and Navy*, 1408,
5. *Not an Officer of Election Within Act of Congress*, 1408.
6. *Salary*, 1408.

**I. DEFINITION.**—One who governs; especially one who is invested with supreme authority in the State; a chief ruler or magistrate.[1]

**II. TERM OF OFFICE.**—In all the States and territories of the United States the chief executive power is vested in the governor. He is elected by the people at a general election; in the territories he is appointed by the president of the United States and confirmed by the senate.[2]

**III. QUALIFICATIONS—Citizenship—Residence—Age—Re-election.**—In some of the States the governor must be a citizen of the United States.[3]

The Bankruptcy Act, 1849, 12 & 13 Vict., ch. 106, which contained similar provisions, used merely the words "*government* or other *stock*." These words, however, were taken to be as extensive as those in the earlier statute, and were read by reference to them so as to include railway shares. Wilberforce on Statute Law, 263. See, also, *Ex parte* Copeland, 2 De G. M. & G. 914; and *Ex parte* Matheson, 1 De G. M. & G. 448.

**Government Securities.**—These words will not include exchequer bills. By the third section of statute 1 & 2 Vict., ch. 117, which provides for the custody of moneys subscribed for parliamentary undertakings, it is enacted that the deposits to be paid into bank in the name of the accountant general of this and other courts, shall, until the same be paid out of court, be invested in £3 per cent. consolidated or £3 per cent. reduced bank annuities, "or any *government security or securities*." In support of a petition for the investment of certain deposits, it was proposed that they should be laid out in exchequer bills But ALDERSON, B., *held* that the words "*government security or securities*" would not apply to exchequer bills. *Ex parte* Chaplin, 3 Younge & Coll. 397.

1. Webster's Dictionary.

2. In Massachusetts and Rhode Island the governor's term of office is one year. In Alabama, Arkansas, Colorado, Georgia, Connecticut, Iowa, Kansas, Nebraska, Maine, Michigan, Minnesota, New Hampshire, Ohio, South Carolina, Tennessee, Texas, Vermont, and Wisconsin, two years. In New York and New Jersey, three years. In California, Delaware, Florida, Illinois, Indiana, Kentucky, Louisiana, Maryland, Mississippi, Missouri, Nevada, North Carolina, Oregon, Pennsylvania, Virginia, West Virginia and the territories, four years.

3. **Citizenship.**—In Arkansas, Colorado, Kentucky, Minnesota, New York, Oregon, Pennsylvania, Tennessee, Texas, Virginia, and Wisconsin, the governor must be a citizen of the United States. In Maine he must be a natural born citizen of the United States. In Iowa, Nebraska, and South Carolina he must have been a citizen of the United States two years. In California, Illinois, Indiana, Michigan and North Carolina, five years. In Florida, nine years. In Alabama, Louisiana,

His eligibility by reason of residence,[1] age,[2] and to re-election,[3] varies in the several States.

**IV. POWERS.**—Where power or duty is given to or imposed upon the governor by the constitution or the laws, such power is to be exercised or duty performed independently, and free from the interposition of any other department of the government.[4]

**1. Power to Adjourn Legislature.**—In most of the States the governor has power to adjourn the legislature. In Arkansas, California, Colorado, Connecticut, Florida, Illinois, Iowa, Kansas, Maine, Mississippi, Nebraska, Nevada, Ohio, Rhode Island, South Carolina, where the two houses of the legislature disagree with respect to time of adjournment, the governor may adjourn them until such time as he thinks proper, but not beyond the first day of the next regular session; but in Delaware, Massachusetts and New Hampshire, he can only adjourn the legislature for ninety days. In Kentucky and Pennsylvania, for a period not exceeding four months; and in Georgia and Vermont, to such time as he deems proper.[5]

**2. Power to Require Information from Subordinate Officers.** — In nearly all of the States he may require information in writing from the officers of the executive department upon any subject relating to the duties of their respective offices. In Alabama, Colorado, Nebraska, Massachusetts, Missouri and New Hampshire, from all officers or managers of State institutions; and in Alabama, Colorado, Illinois and Texas he may require such information to be given under oath. And in Missouri and Alabama,

Missouri and Virginia, ten years. In Delaware, twelve years. In Georgia, fifteen years. In Mississippi and New Jersey, twenty years.

1. **Residence.**—In Maine he must be *resident* in the State at the time of his election. In Minnesota he must have been a resident of the State one year. In Colorado, Iowa, Nebraska, Michigan, Mississippi, Nevada, North Carolina and South Carolina, two years. In Vermont, four years. In California, Illinois, Indiana, Maine, New York, Texas and West Virginia, five years. In Delaware, Georgia and Kentucky, six years. In Alabama, Arkansas, Massachusetts, Missouri, New Hampshire, New Jersey, Pennsylvania and Tennessee, seven years. In Maryland and Louisiana, ten years. In Arkansas, Connecticut, Florida, Maryland, Nevada and Wisconsin he must be a qualified elector of the state.

2. **Age.**—In California, Minnesota and Nevada he must be twenty-five years of age. In Alabama, Arkansas, Colorado, Connecticut, Delaware, Georgia, Illinois, Indiana, Iowa, Louisiana, Maine, Maryland, Michigan, Mississippi, Nebraska, New Hampshire, New Jersey, New York, North Carolina, Oregon, Pennsylvania, South Carolina, Tennessee, Texas, Virginia and West Virginia, thirty years of age. In Kentucky and Missouri thirty-five years of age.

In Louisiana no person can be governor who, within six months of his election, was a member of congress or held office under the United States. Stimson Am. St. Law, § 220.

3. **Re-election.**—In Kentucky, Missouri, New Jersey, North Carolina, Pennsylvania, Virginia and West Virginia the governor is not eligible for re-election. The constitutions and statutes of Delaware, Georgia, Indiana, Oregon and Tennessee provide for various terms respectively for which he shall not be eligible. In Massachusetts the governor must be possessed of a freehold estate in his own right within the state of the value of £1,000. Stimson's Am. St. Law.

4. Att'y General *v.* Brown, 1 Wis. 513.

5. See constitutions and statutes of the several States referred to.

any officer making a false report to him is guilty of perjury.[1]

**3. Power of Appointment and Removal.** — The power of appointment and removal, and the extent thereof, depends upon laws of the several States relating to the duties and powers of their governors respectively.[2]

1. Stimson's American Statute Law.

2. **Power of Appointment.**—In New York, the governor has no power during a recess of the senate and without its consent to appoint a major-general of the State national guard, to fill a vacancy occurring in time of peace. People *v.* Molineux, 53 Barb. (N. Y.) 9; People *v.* Molineux, 40 N. Y. 113.

The provision of the Revised Statutes authorizing the governor to supply vacancies that happen during the recess of the senate in offices to which an appointment has been made by the governor with the consent of the senate does not authorize him to make an appointment when the office is not actually vacant, and where the duties of the office continue to be performed by the officer whose term of office has expired as authorized by a previous section of the Revised Statutes. Tappan *v.* Gray, 9 Paige Ch. (N. Y.) 507.

**In Kentucky,** the governor has no power to fill a vacancy in the office of judges of the court of appeals, unless the unexpired term shall be less than one year, in which case he may fill such vacancy by appointment. Power of governor to fill vacancies, 79 Ky. 621.

**In Tennessee,** on the resignation of a supreme judge, under the constitution of 1835, the governor has no power to fill the vacancy longer than until the office could be filled by election; and it is his duty to order the election to be held, after the two months, during which notice was required by law to be given. Calloway *v.* Sturm, 1 Heisk. (Tenn.) 764.

**In Illinois,** under section 10, article 5, of the constitution of 1870, there may be two modes of appointment to office by the governor—one by and with the advice and consent of the senate and the other by the sole and independent act of the governor, without the consent of the senate. Under this section it is competent for the legislature, by law, to create an office and provide for the appointment of the officer without the assent of the senate. Wilcox *et al. v.* People, 90 Ill. 186.

**In Missouri,** the governor has not the power to fill by appointment a vacancy in the office of sheriff occurring after the constitution went into effect. State *v.* McAdoo, 36 Mo. 454.

**California.**—Where a mode of filling a vacancy in an office is provided by law, other than by the appointment of the governor, the governor has no power to fill such vacancy by his appointment. People *v.* Stratton, 28 Cal. 382. If the term of the incumbent of an office, filled by an appointment of the governor, which requires the confirmation of the senate, has expired, but he still continues to discharge his duties, there is no such vacancy in the office as will authorize the governor to fill it by the appointment of a successor, without the consent of the senate first had. Such a vacancy therein as will authorize the governor to fill the same, without the consent of the senate, can be caused only by the death or resignation of the incumbent or by the happening of some other event by reason of which the duties of the office are no longer discharged. People *v.* Bissell, 49 Cal. 407. The appointment to fill a vacancy in the office of superintendent of immigration for the port of San Francisco is complete so far as the governor is concerned, upon the delivery of the commission, and requires no confirmation by the senate. The governor cannot, after the commission for the vacancy is issued, revoke the appointment, or by any act affect the right of the appointee to the office for the period prescribed by the statute. People *v.* Cazneau, 20 Cal. 503.

Where there is a person in possession of an office who is expressly authorized by the statute or constitution to discharge its duties temporarily till the power upon whom the duty of election or appointment is devolved can regularly act, the governor has no power to appoint because no vacancy exists within the meaning of article 5, section 8, of the constitution. People *v.* Tilton, 37 Cal. 614.

**Maryland.** — Where an adjutant-general was in office holding during good behavior at the time of the adoption of a new constitution providing that the adjutant-general "shall be appointed by the governor by and with the advice and consent of the senate,"

and "shall hold his office for the term of six years," and the governor nominated another person to the office whom the senate refused to confirm or reject, and after its adjournment the governor issued a commission to his nominee, it was *held* that the 12th section of the 2nd article of the new constitution, making it the duty of the governor in case of any vacancy during the recess of the senate, in any office which he had the power to fill, to appoint some suitable person, did not confer on the executive the power to issue the commission, no vacancy existing. Watkins *v.* Watkins, 2 Md. 341.

The neglect of a governor resulting in the postponement of the issuing of a commission to a party entitled will not postpone the beginning of his term. Vogel *v.* State, 107 Ind. 374. See generally, People *v.* Reid, 6 Cal. 289; Taylor *v.* Hebden, 24 Md. 203.

**Power of Removal—Illinois.**—The substantive principle of section 12, article 5, of the Constitution, which provides that "the governor shall have power to remove any officer whom he may appoint, in case of incompetency, neglect of duty, or malfeasance in office, and he may declare his office vacant and fill the same as herein provided in other cases of vacancy," is, the power of removal contained in the first clause, and what follows in the last clause as to filling vacancies, is incidental and subordinate. Under the rules of construction, therefore, the last clause should not be held to control and govern the first, but should yield to and be made to conform to the first. The intention of the constitution of 1870 was to make the power of removal from office by the governor co-extensive with his power of appointment. Wilcox *v.* People, 90 Ill. 186. As to the governor's power of removal prior to the constitution of 1870, see Field *v.* People, 2 Scam. (Ill.) 79.

**Maine.**—Where one was appointed by the governor, with advice and consent of council, as reporter of the law court of Maine, and commissioned to hold his office "four years, unless sooner removed by the governor and council for the time being," and before the expiration of the four years the governor, without advice or consent of council, claimed to remove him from said office, it was *held*, that the reporter does not hold his office at the will and pleasure of the governor alone, and is not removable by him; that he is removable only by the governor by and with the advice and consent of the council. Opinion of the Justices, 72 Me. 542.

**Ohio.**—The power conferred on the governor of the State by section 1872 of the Revised Statutes, viz: to remove any commissioner for official misconduct, as amended by said act, to remove any member of the board of police commissioners, is administrative and not judicial in its nature; and therefore not in conflict with article 4, § 1, of the Constitution, conferring judicial power on the court of the State. State *ex rel.* Att'y General *v.* Hawkins, 44 Ohio St. 98; State *ex rel.* Att'y General *v.* Hawkins, (Ohio) 3 West. Rep. 125.

**Michigan.**—The governor's power of removal under the Constitution (article 12, § 8) which confers on him the power "to remove from office for gross neglect of duty, or for corrupt conduct in office, or any other misfeasance or malfeasance therein, either of the following State officers, to wit: The attorney-general or any other officer of the State, except legislative and judicial, elective or appointed, and to appoint a successor for the remainder of their respective unexpired term of office, and report the causes to the legislature at its next session, "can only be exercised for the specific causes mentioned in the constitution, and upon charges which shall specify the particular acts or neglect relied on to make out the cause alleged; and the respondent must have notice of these charges and specific allegations, and reasonable notice of a time and place where and when he will have an opportunity for a hearing thereon upon which he may produce proofs." And the governor has judicial power to examine into and pass upon these charges. Dullam *v.* Willson, 53 Mich. 393.

**Wisconsin.**—So long as the power of removal is vested in the governor, no other branch or department of the government can control its exercise nor have any right to question the motives of the executive. Att'y General *v.* Brown, 1 Wis. 513.

**Pennsylvania.**—Article 6, § 2, of the Constitution declares "the supreme executive power shall be vested in the governor." Section 8 declares he shall nominate, "and by and with the advice and consent of two-thirds of all the members of the senate appoint," certain officers named therein, "and such

**V. DUTIES.**—Generally it may be said that the duty of the governor is to see that the laws are faithfully executed, to inform the legislature, at the commencement of its session, and at other times when he deems it expedient, of the condition of the State, and to recommend such legislation as he thinks proper. Nearly every State, by its constitution or statutes, provides to this effect.[1]

**1. Right to Refuse to Consider Legislative Acts.**—Where the constitution requires every bill passed by the general assembly to

other officers as he is or may be authorized by the constitution or by law to appoint." Article 6, § 4, *inter alia*, provided "that appointed officers, other than judges of the courts of record and the superintendent of public instruction, may be removed at the pleasure of the power by which they shall have been appointed. The act of 18th April, 1878, § 1, declares: "Recorders of the cities of the first class shall be appointed by the governor by and with the advice and consent of the senate." By virtue of the provisions of article 6, § 4, of the Constitution, the governor has power *alone*, without the concurrence of the senate, to remove at his pleasure, during their terms of office, recorders of cities of the first class, appointed under the act of April 18th, 1878. Lane *v.* Commonwealth, 103 Pa. St. 481.

**New York.**—The removal of an officer appointed by the governor and senate can only be effected through the direct action of the senate upon an express *recommendation of removal* by the governor. Hence an allegation that the governor, by and with the consent of the senate, appointed another *in the place* of such officer is not equivalent to an averment of his having been removed. People *v.* Carrique, 2 Hill (N. Y.) 93.

**Power to Employ Counsel.**—The governor has no power to employ counsel to represent the interests of the State in litigation so as to give him a lien on the judgment recovered. Compton *v.* State, 38 Ark. 601.

The governor has no authority on behalf of the State to employ an attorney to attend to the taking of testimony in support of charges preferred before him against a county officer to procure his removal for official misconduct. Randall *v.* State, 16 Wis. 340.

**Power to Summon.**—The governor and council of Maine have no right to summon a person to attend and take his seat in the house of representatives, who, by the returns before them, was not voted for or being voted for was defeated. Opinion of the Justices, 70 Me. 583.

**Power to Offer Reward.**—The governor has no power under the statute of Alabama (Code § 3976) to offer a reward for the "unknown persons" by whom a murder has been committed. Hungerford *v.* Moore, 65 Ala. 233.

**Power to Respite.**—The governor of Mississippi has the power to grant a respite of the sentence of one convicted to be hanged for murder under the power given him in the constitution to pardon, and to fix a later day for the execution of the convict. *Ex parte* Fleming, 60 Miss. 910. "He has the unlimited and unrestricted power to pardon, and upon the principle that the greater includes the less must be held to have authority to postpone the execution of a sentence while engaged in a consideration of the question of exercising the pardoning power." Per CHALMERS, J. *Ex parte* Fleming, 60 Miss. 912.

**Power to Represent Other Officers of the State.**—When other State officers are absent from the State or fail to protect her interests, the governor, as the proper representative of the State, is bound to intervene and protect her interests. State *v.* Dubuclet, 22 La. Ann. 602.

1. See Constitutions of Maine, Vermont, Rhode Island, New York, New Jersey, Pennsylvania, Indiana, Illinois, Michigan, Wisconsin, Iowa, Minnesota, Kentucky, Nebraska, Maryland, Delaware, Virginia, West Virginia, North Carolina, Kansas, Tennessee, Missouri, Arkansas, Texas, California, Oregon, Nevada, Colorado, South Carolina, Georgia, Alabama, Mississippi, Florida, Louisiana, Arizona, Connecticut, Ohio.

In Alabama, Colorado, Illinois, Missouri, Nebraska, Texas and West Vir-

be sealed with the great seal of the State before being presented to the governor, he has a right to refuse to consider it if not so authenticated.[1]

**2. When Liable to Mandamus.**—There is some conflict of decision as to whether a mandamus will lie to compel a governor to perform an executive act. The courts of many States hold that it lies to enforce a ministerial act, not strictly comprehended under his executive and political functions. Other courts refuse the writ to compel executive action for any purpose, holding that the chief executive of the State must be regarded as invested with a discretion as to every official act.[2]

The rule that the governor of a State is exempt from judicial control is limited by some authorities to cases in which the duty in question involves the exercise of his judgment or discretion, and the duties are not, strictly speaking, *executive* duties.[3]

ginia it is his duty to furnish the legislature with estimates of the amount of money required to be raised by taxation.

1. Hamilton *v.* State, 61 Md. 14.

2. Wait's Actions and Defences, 366.

3. **When Mandamus Will Lie.**—A *mandamus* may issue to compel the governor to perform a ministerial act required by law and included within the powers confided to his discretion by the constitution. Harpending *v.* Haight, 39 Cal. 189; s. c., 2 Am. Rep. 432; Groome *v.* Gwinn, 43 Md. 572.

It will be issued to compel him to draw a warrant on the public treasurer for the payment of the salary of a State officer as fixed and required by statute. Cotten *v.* Ellis, 7 Jones (N. Car.) L. 550.

Where a sum of money is loaned by act of the legislature to a railroad company on its complying with certain terms and conditions in said act prescribed, and the governor is required, on the performance of these conditions by the company, to accept its bond for the faithful application and repayment of the money and to draw his warrant in its favor upon the custodian of the fund for the sum thus loaned, a *mandamus* will lie to compel the performance by the governor of this ministerial duty. Tennessee, etc., R. Co. *v.* Moore, 36 Ala. 371. So to compel him to issue bonds. Chamberlain *v.* Sibley, 4 Minn. 309; Pacific R. Co. *v.* Governor, 23 Mo. 353.

It will lie to compel him to issue a proclamation required by law that a company organized as a branch of the State bank was authorized to commence and carry on the business of banking. State *v.* Governor, 5 Ohio St. 528.

It will lie to compel him to issue a certificate to a person duly elected to an office. Magruder *v.* Swann, governor, 25 Md. 173. But see Hawkins *v.* The Governor, 1 Ark. 571.

So to compel him to sign a patent to give effect to a sale of lands of the State made by other State officers. Middleton *v.* Low, 30 Cal. 596.

**When Mandamus Will Not Lie—New Jersey.**—But where the governor is required by law to issue a commission in accordance with the determination of the board of county canvassers, the court will not award a *mandamus* directing a commission to be issued in conflict with such determination, although it appear affirmatively that the decision of the board of county canvassers was based upon illegal evidence and is contrary to the truth of the case. State *v.* Governor, 25 N. J. L. 331.

**Illinois.**—The supreme court has no control over the governor of the State to compel him to perform any public duty. People *ex rel. v.* Bissell, 19 Ill. 229; People *v.* Hatch, 33 Ill. 11.

Nor to compel him to deposit in the office of the secretary of State a bill which was passed by the general assembly and placed in the hands of the governor for his consideration, and which, it is alleged, has not been returned to the proper house within the time limited by the constitution with his objections. People *v.* Yates, 40 Ill. 127.

**In Louisiana** it has been *held* that the writ of *mandamus* will not lie to compel the chief executive officer of the State

**3. Exemption from Judicial Process.**—The governor is exempt from the process of the courts whenever engaged in any duty pertaining to his office, and his immunity extends to his subordinates and agents when acting in their official capacity.[1]

The executive in his person is subject to judicial control, as other citizens, but in the exercise of his executive functions he is entirely and absolutely independent of the judicial power in so far as his official action involves the exercise of judgment or discretion.[2]

to perform any act coming within the range of his duties as governor. State *v.* Warmouth, governor, 22 La. Ann. 1; s. c., 2 Am. Rep. 712; State *v.* Warmouth, 24 La. Ann. 351.

**Georgia.**—In *Georgia* it has been *held*, that however clear it may be as a general *legal* proposition that when a mere *ministerial* act is required to be performed by law on the part of an executive officer, and individual rights depend on the performance of that act, the proper tribunals of the country have jurisdiction to compel its performance; yet for *political* reasons alone the chief magistrate of the State cannot be compelled by *mandamus* to perform such ministerial act. Low *v.* Towns, governor, 8 Ga. 360.

**Maine.**—And in *Maine* the official doings of the governor cannot be controlled by *mandamus*. Dennett, petitioner, 32 Me. 508.

Where the governor cannot (as may have been contemplated) give direction to the management of affairs, in all the branches of the executive department because inferior officers of it decline to comply with his wishes, the interference of the judiciary is not authorized. Houston, etc., R. Co. *v.* Randolph, 24 Tex. 317.

**Indiana.**—A writ of mandate will lie against the governor of this State to enforce the performance of a ministerial duty not resting in his discretion. A ministerial act is one which a person performs in a given state of facts, in a prescribed manner, in obedience to the mandate of legal authority, without regard to, or the exercise of, his own judgment upon the propriety of the act being done. Gray, governor *v.* State *ex rel.* Cragin, 72 Ind. 567.

**Michigan.**—As regards the question of immunity from coercion by the courts, the governor of a State occupies a position analogous to that of the president of the Union—that of the head of the executive department of the Federal government, and a decision that the latter may be compelled by *mandamus* to perform a mere ministerial duty is not in point where the writ is sought against the governor. Sutherland *v.* Governor, 29 Mich. 320. The courts will not interfere with the discretion of the chief executive or subordinate him to their process. Ayres *v.* State Auditors, 42 Mich. 422.

The duty imposed upon the governor of Michigan by the acts of congress making a land grant for the construction of the Portage and Lake Superior Ship Canal and Harbor, and by the State legislature on the subject, to issue his certificate of the fact, when he shall be satisfied that the work has been done in conformity with the law, is not one of a purely ministerial character where he is left no discretion, and a *mandamus* to direct the governor to issue his certificate as required by the legislation was refused. Sutherland *v.* Governor, 29 Mich. 320.

1. Hartranft's Appeal, 85 Pa. St. 433; Thompson *v.* German Valley R. Co., 22 N. J. Eq. 111.

2. State *ex rel.* Resley *v.* Farwell, 3 Pin. (Wis.) 394.

See generally Rice *v.* Austin, 19 Minn. 108; s. c., 18 Am. Rep. 330; Jonesboro, etc., *v.* Brown, 8 Baxt. (Tenn.) 490; s. c., 35 Am. Rep. 713; Berryman *v.* Perkins, 55 Cal. 483.

In the case of Thompson *v.* German Valley R. Co., 22 N. J. Eq. 111, a *subpœna duces tecum* had been served on the governor of New Jersey, commanding him, by his individual name, to appear and testify before an examiner of the court of chancery, and bring with him an engrossed copy of a private statute which had been passed by the legislature, and had been sent him, as governor, for his approval. He refused to obey the *subpœna*, informing the court, at the same time, that he did not refuse out of any disrespect to the court or to the law, *but because he thought his duty required him not to appear or produce the paper required*,

*or to submit his official acts, as governor, to the scrutiny of any court.* An order was granted on the governor to show cause why he should not appear and testify. After argument, ZABRISKIE, Chancellor, said: "The governor cannot be examined as to his reasons for not signing the bill, nor as to his action in any respect regarding it. But there is no reason why he should not be called upon to testify as to the time it was delivered to him. That is a bare fact that includes no action on his part. To this extent, at least, I am of opinion that he is bound to appear and testify. But I will make no order on him for that purpose. Such order ought not to be made against the executive of the State, because it might bring the executive in conflict with the judiciary. If the executive thinks he ought to testify, in compliance with the opinion of the court, he will do so without order; if he thinks it to be his official duty, in protecting the rights and dignity of his office, he will not comply even if directed by an order. And, in his case, the court would hardly entertain proceedings to compel him by adjudging him in contempt. It will be presumed the chief magistrate intends no contempt, but that his action is in accordance with his official duty."

In Hartranft's Appeal, 85 Pa. St. 433, 447, GORDON, J., commenting on this case, says: "If we adopt this opinion as a sound exposition of the law, the case before us is determined; for the matter is left to rest solely on the opinion of the executive, although his opinion be clearly contrary to that of the court. We are inclined to think the conclusion thus reached is wise and discreet; and it is supported by the best text writers of our times."

"What, then, are the duties, powers and privileges of the governor? In the language of the constitution, article 4, section 2, 'The supreme executive power shall be vested in the governor, who shall take care that the laws be faithfully executed.' Also, same article, section 7: 'The governor shall be commander-in-chief of the army and navy of the commonwealth, and of the militia, except when they shall be called into the actual service of the United States.' He is, also, invested with the appointing and pardoning powers; the power to convene the legislature in cases of emergency, and to approve or veto bills submitted to him by the general assembly. It is scarcely conceivable that a man could be more completely invested with the supreme power and dignity of a free people. Observe, *the supreme executive power* is invested in the governor, and *he is charged with the faithful execution of the laws*, and for the accomplishment of this purpose he is made commander-in-chief of the army, navy and militia of the State. Who, then, shall assume the power of the people and call this magistrate to an account for that which he has done in discharge of his constitutional duties? If he is not the judge of when and how these duties are to be performed, who is? Where does the court of quarter sessions, or any other court, get the power to call this man before it, and compel him to answer for the manner in which he has discharged his constitutional functions as executor of the laws and commander-in-chief of the militia of the commonwealth? For it certainly is a logical sequence that if the governor can be compelled to reveal the means used to accomplish a given act, he can also be compelled to answer for the manner of accomplishing such act. If the court of quarter sessions of Allegheny county can shut him up in prison for refusing to appear before it and reveal the methods and means used by him to execute the laws and suppress domestic violence, why may it not commit him for a breach of the peace, or for homicide, resulting from the discharge of his duties as commander-in-chief? And if the courts can compel him to answer, why can they not compel him to act? All these things, we know, may be done in the case of private individuals; such an one can be compelled to answer, to account and to act. In other words, if, from such analogy, we once begin to shift the supreme executive power from him upon whom the constitution has conferred it to the judiciary, we may as well do the work thoroughly and constitute the courts the absolute guardians and directors of all governmental functions whatever. If, however, this cannot be done, we had better not take the first step in that direction. We had better, at the outstart, recognize the fact that the executive department is a co-ordinate branch of the government, with power to judge what should or should not be done within its own department, and what of its own doings and communications should or should not be kept secret, and that with it, in the exercise of these constitutional

**4. Commander-in-Chief of Army and Navy.** — By the constitutions of all the States, the governor is commander-in-chief of the militia, armies and navies, and of the militia of the commonwealths (except in Alabama, Arkansas, Colorado, Connecticut, Delaware, Florida, Illinois, Kentucky, Maine, Mississippi, Missouri, Nebraska, Nevada, North Carolina, Ohio, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, West Virginia, when they shall be called into the actual service of the United States).[1]

**5. Not an "Officer of Election" Within Act of Congress.** — The governor of a State is not an "officer of election," within the meaning of the act of congress of May 21, 1870, § 22, which makes it criminal for any *election* officer fraudulently to make any false certificate of the result of any congressional election.[2]

**6. Salary.** — The salary of a governor is but an incident of the office, and cannot be recovered until the title to the office is determined.[3]

powers, the courts have no more right to interfere than has the executive, under like conditions, to interfere with the courts. In the case of the State *v.* Warmouth, 22 La. Ann. 1, it was *held* (per TALIAFERO, J.,) that, under the division of powers, as laid down in the Federal and State constitutions, the judiciary department has no jurisdiction over or right to interfere with the independent action of the chief executive in the functions of his office, even though the act he is required to perform be purely ministerial. This is putting the matter on very high grounds, for, in such case, no other officer would be exempt from the mandatory power of the judiciary. No case could more forcibly exhibit the extreme reluctance of courts to interfere with the functions of the supreme executive, for the hypothesis put is the refusal of a governor to perform a duty cast upon him by law of a character strictly ministerial. We think, however, that the ground upon which this decision stands is substantial; for as the learned justice well argues, the difficulty arises in the attempt to establish a distinction between ministerial and discretionary acts as applied to the governor, and then to conclude that the former may be enforced by judicial decree; it is objected, however, that the doctrine is unsound in this, that it gives to the judiciary the large discretion of determining the character of all acts to be performed by the chief executive; that this would infringe his right to use his own discretion in determining the very same question; that he must necessarily have the unconditional power of deciding what acts his duties require him to perform, otherwise his functions are trammelled and the executive branch of the government is made subservient to the judiciary. The principle enunciated, in the above stated case, applies with greater force to that we now have under consideration; for, if the governor's discretion may not be interfered with in a matter purely ministerial, much more may that discretion not be interfered with in a case which pertains to his office and duties as commander-in-chief, in the discharge of which the constitution makes that discretion his peculiar and absolute prerogative." Per GORDON, J., Hartranft's Appeal, 85 Pa. St. 433, 444, *et seq.*

1. See State constitutions and statutes of several States. Stimson's Am. Statute Law.

In *Alabama, Kentucky and Missouri* he can command in the field only when authorized to do so by the legislature, and in *Maine, Massachusetts* and *New Hampshire* he cannot order the militia out of the State without the authority or consent of the legislature.

But a writ of *mandamus* is not issuable to direct him as commander-in-chief to perform a duty which is properly within the sphere of his duties, though the same is imposed upon him by statute. Mauran *v.* Smith, 8 R. I. 192; s. c., 5 Am. Rep. 564.

2. U. S. *v.* Clayton, 2 Dill. (U. S.) 219.

3. Baxter *v.* Brooks, 29 Ark. 174; Chadwick *v.* Earhart, 11 Oreg. 389.

Under the constitution of *Delaware* the governor is the *sole* judge of "extraordinary occasions" for convening

the legislature. Whiteman *v.* W. & S. R. Co., 2 Harr. (Del.) 514.

**Chief of Cherokee Nation "Governor" Within Statute.**—Under the statutes of *North Carolina* (Bat. Rev. ch. 35, § 8) which provide that "when any deed concerning lands in this State . . . . shall have been executed, and it may be desired to take the acknowledgment or probate thereof out of the State, but within the United States, it shall be lawful for any judge of a supreme, superior or circuit court within the State or territory where the parties may be to take the probate. . . . . And the certificate of such judge with the certificate of the governor of the State or territory annexed to such deed," etc., that he was such judge shall be sufficient to admit the deed to probate and registration in this State. A deed was offered which had been acknowledged, and which was certified to by the judge of the circuit court for the southern judicial circuit of the Cherokee nation and the chief of the Cherokee nation; objection was made that it was not properly proved; but the court *held* the probate of the deed sufficient, and ordered it to be registered, READE, J., saying: "It was discussed before us whether the Cherokee nation is to be considered a State or territory or a foreign nation. Its status is anomalous. It is certainly not a foreign nation, but is a part of the United States territory, using territory in its general sense. It is not a State in the sense in which the other States are called. Nor yet is it an organized territory as the organized territories are. And yet it is a territory of the United States set apart for the Cherokee nation with an organized government, legislative, executive and judicial, under the protection of the United States government, and under its tutelage and guardianship. And for the purposes now under consideration it must be considered a 'territory' 'within the United States.' Taking it to be a territory within the sense of our statute, still it is objected that the certificate is not by the '*governor*' of the territory. It is the proceeding before the judge and his certificate that constitute the probate. The only object of the *governor's* certificate is to prove to our courts here that he was a judge. That can best be done by the chief executive officer of a State or territory who carries its great seal, and such officer is in the United States called *governor*, except in the Cherokee nation, where he is called *chief*. He is, however, the governor of the 'Nation' and carries its seal. The governors of the States are frequently called chief executive officer, chief magistrate, commander-in-chief. And so we say king, sovereign, monarch, designating the same officer and office. Giving to our statute a liberal and useful construction, it means the chief executive officer in the State or territory bearing the great seal. There is no officer in the Cherokee nation called '*governor*,' so far as we know. And the 'chief' discharges the duties which usually pertain to the office of *governor*. The 'chief' is therefore for our purposes '*governor*.' Whitsett *v.* Forehand, 79 N. Car. 230.

**Word Governor as Descriptio Personæ.**—A complaint for foreclosure alleged that "A. W. R., Governor of the State of Wisconsin," claimed an interest in the mortgaged premises, and it was *held*, that the words "governor," etc., were mere *descriptio personæ*, and did not raise the question whether the court had jurisdiction of an action against the governor in his official capacity, COLE, J., saying: "The counsel for the respondent states in his brief that the main and important question in this case is, whether R., as governor of the State, was liable to be prosecuted in the circuit court for the purpose of cutting off any right or interest in the mortgaged property vested in him as the executive of the State. It is argued that the executive, being a co-ordinate branch of the government, is not liable to be sued in the courts of the State. Whether these propositions are correct or not, we shall not stop to inquire, for the reason that according to our understanding of the complaint, they do not arise in the case, and are not before us. The action is to foreclose a mortgage. It is alleged in the complaint that Alexander W. Randall, governor of the State of Wisconsin—with many other persons who are made parties defendant—claims to have some interest in the mortgaged premises. But what that claim or interest is does not appear, further than that it alleged to to be subsequent to the mortgage, and subject thereto. It is the usual allegation in a complaint for the foreclosure of a mortgage as against subsequent incumbrances. We are not authorized to assume from the words '*Governor* of the State of Wisconsin,'

**GRACE.**—See DAYS OF GRACE.

**GRADE.**—See note 1.

that Randall is sued in his official character as executive of the State; or that the State has any right or interest whatever in the mortgaged property to be affected by the litigation. On the contrary, we think the fair inference is, that Randall is a subsequent incumbrancer, or is in some way personally interested in the mortgaged premises. The words 'governor,' etc., are evidently merely *descriptio personæ*, and have no more significance, as here used, than any other title or description that might have been given him. They certainly do not show that he is sued in his official character as chief magistrate, or that he represents any interests which concern the State. If he is a subsequent incumbrancer, or is interested in the mortgaged property as trustee or otherwise, we do not suppose the fact that he is *governor* will prevent a foreclosure of the mortgage, or deprive the court of the power of making a decree barring his equities in the real estate." Bridgeport Savings Bank *v.* Randall, 15 Wis. 541.

1. **Grade of Crime.**—The constitution of *New York* provides that "courts of special sessions shall have such jurisdiction of offences of the grade of misdemeanors, as may be prescribed by law." By an act of the legislature, exclusive power to hear, try and determine "all cases of petit larceny, not charged as a second offence," was conferred upon the court of special sessions in M county. It was contended that this act was unconstitutional, because petit larceny was not an offence of the grade of misdemeanor. But it was *held* that the statutes of the State, by reason of the penalties imposed, had made petit larceny an offence of the grade described, and that the act was therefore constitutional. Said the court: "The section of the constitution referred to . . . . does not name any particular crime or offence, but includes all of a certain grade . . . . Grades of crime, in legal parlance, are always spoken of and understood as higher or lower in grade, or degree, according to the measure of punishment attached and meted out on conviction, and the consequences resulting to the party convicted. Punishments are attached by law to offences, according to what is deemed to be their heinousness, and other injurious consequences upon society. In this way they are ranked or graded, and by this rule the rank or grade of a crime is determined." People *v.* Rawson, 61 Barb. (N. Y.) 619.

**To Grade a Highway.**—A statute of Rhode Island provided for the compensation in damages of the injuries caused to the owners of abutting property "by any change in the grade of a highway." On the question as to whether this statute applied to a case where there was a change of grade in a highway in which the former grade had not been established by the public authorities, it was urged by counsel that if it were so construed as to include such case, it would follow that any existing highway which had been wrought might be regarded as graded, and consequently, that no such highway could be graded by order of the public authorities without entitling abutters injured by the change to damages,—a proposition that confessedly could not be maintained. But, said the court, which *held* that the case in dispute was included within the statute, in answer to this objection: "To grade a highway is to do more than simply prepare it for travel; for this may often be accomplished by slight superficial changes." Aldrich *v.* Aldermen of Providence, 12 R. I. 243.

**To Change the Grade of a Street.**—By the charter of a city, a grade established by the city could not be changed or altered except upon the petition of the owners of two-thirds in value of the property on both sides of the street where the change was to be made. The city, by ordinance, without any petition having been presented, caused a street with an established grade to be macadamized. The material used for macadamizing raised the street about twelve inches. It was *held* that the ordinance and the paving thereunder, were not in conflict with the charter. Said the court: "This was the only change (the change in the level of the street caused by the paving) that can be claimed, but it cannot be considered an alteration of the grade, for we will presume, in the absence of any proof to the contrary, that the surface of the street was left at the proper grade line to receive the material." Warren *v.* Henly 31 Iowa 31.

**GRAIN.** — Without a definition, it signifies corn in general, or the fruit of certain plants which constitute the chief food of man and beast, as wheat, rye, barley, oats, and maize.[1]

1. Webster's Dictionary.

**Flaxseed May be Grain.**—A policy of insurance that included "grain in stack and granary" was *held* to insure a stack of flax that was raised for the seed and not the fiber. Said the court: "After it (the flaxseed) has been ground and the oil largely extracted, the residuum is the 'oil cake' known to commerce, which is largely, if not exclusively, used as food for cattle and other beasts, and is highly nutritious. This being so, flaxseed comes within, to an extent at least, the definition of grain given by Mr. Webster; that is, it is an article used as food for man and beast. But if it be conceded flaxseed is not grain, strictly speaking, or is not so regarded in commercial transactions, this cannot be regarded as decisive of the question before us . . . In the case at bar the parties must, we think, have intended the policy to cover whatever was usually and ordinarily stacked on the farm or put it into a granary. The term grain was used, as being sufficient for this purpose. Wheat, rye, oats and flax would ordinarily be stacked together . . . As an abstract question, and with no reference to the intent of the parties, it is difficult to say as a matter of law in all cases that flaxseed is not grain, or may not have been included in such term . . . We, however, are content to ground our opinion upon the rule above stated, and what must be *held* to be the intent of the parties." Hewitt *v.* Watertown Fire Ins. Co., 55 Iowa 323.

**Oats is Grain.**—A leased to C certain premises for five years from April 1st. The lease contained a stipulation that if the lessor should sell a certain lot included in the land leased, that the lease should be null and void in regard to it. But it was further provided in the lease in regard to the sale of this lot as follows: "Should the said A sell the last mentioned lot at any time after the said C has planted the same (*i. e.*, planted it with corn), he shall have the privilege of sowing grain on the same." C planted corn on the lot in May, and A sold it in the following June. C sowed oats on the corn ground the succeeding spring, and subsequently entered and took the crop. The purchaser of the lot thereupon brought an action of replevin to recover the oats. But the court *held* that, there being nothing in the lease to show that grain was not used in its ordinary sense, it must be construed to include oats, according to Webster's definition, and that C, the tenant, was, therefore, entitled to the crop. Smith *v.* Clayton, 29 N. J. (L.) 357.

**Peas are Grain.**—A statute of South Carolina made it larceny to take from a field "any cotton, corn, rice, or other grain, fraudulently, with intent secretly to convert the same." In a prosecution under the statute, the indictment charged the defendant with "taking grain from a field." The proof was that he had taken a half bushel of peas. It was *held* that peas were included within the word grain as used in the statute. Said the court: "The legislature, I suppose, used the words *other grain* as words of common parlance, and in the same sense in which they were used in other acts. By reference to the act of 1817, relating to trading with slaves, it will be found that the legislature regarded peas as grain. The words are—corn, rice, *peas or other grain;* showing clearly that they were considered as much grain as corn and rice; and I am very confident that, in the published prices current, peas are put down with corn, wheat and oats under the general head of grain." State *v.* Williams, 2 Strobh. (S. C.) 474.

**Sugar Cane Seed is Grain.**—A statute of Georgia, passed in 1862, the purpose of which purported to be "to prevent the unnecessary consumption of grain by distillers and manufacturers of spirituous liquors in Georgia," provided that it should be unlawful for any person to make any spirituous liquors "out of any corn, wheat, rye, or other grain, except for medicinal purposes," etc., and under a license. In an indictment under the statute, it was *held* that millet, or sugar cane seed, was included in the phrase "other grain." Said the court: "The sugar cane seed comes clearly within this definition (Webster's definition of grain); for they are seeds used for food of man and beast, and during the war became, in some localities, a very important article of food." Holland *v.* State, 34 Ga. 455.

**GRANARY.**—See note 1.

**GRANDCHILD.**—See note 2. See, also, CHILD; ISSUE.

1. By a statute of New Hampshire it was provided as follows: "If any person shall in the night-time break or enter, or in the day-time break and enter, any dwelling-house or out-house adjoining thereto, or any office, bank, shop, store, warehouse, barn, granary, or mill, . . . and therein commit larceny, he shall be punished by confinement," etc. It was *held* that a building 21 feet by 15 feet placed on a market garden, and used for storing the tools and agricultural implements used there, such seeds as were sown there, and manures employed in the garden, was not a granary within the statute. Said the court: "To make a building a granary it must be devoted to the storage of grain; the principal and main use of it must be the storage of corn and grain. No corn or grain was stored in the building except such as was intended for sowing in the garden. It was a small, slight building set on the garden for the convenience of keeping in it such miscellaneous things as were used in carrying on the garden, tools, seeds, manures, etc. Keeping in it, among other things, small quantities of seed grain to be used on the garden would not make it a granary, as a distinct thing from shops, stores, warehouses, barns, etc., named in the statute, any more than a few bundles of hay kept in it for the horses worked there, would make it a barn." State *v.* Wilson, 47 N. H. 101.

2. **Great Grandchildren are not Grandchildren.**—Oxford *v.* Churchill, 3 Ves. & B. 59; 2 Williams on Exrs., p. 1103; Hone *v.* VanSchaick, 3 Barb. Ch. (N. Y.) 505; s. c., 3 N. Y. 538; Heyward *v.* Hasell, 2 S. C. 509. But see *dictum* by Northington, Lord Ch., in Hussey *v.* Berkeley, 2 Eden 194; s. c., Ambler 603. But, of course, when the term grandchildren is used in a will as descriptive of the beneficiaries, and it is evident that it was the intention of the testator to include under it great-grandchildren, such intention will be carried out by the courts. Hussey *v.* Berkeley, 2 Eden 194; s. c., Ambler 603; Pemberton *v.* Parke, 5 Binn. (Pa.) 601.

**Children of a Step-Child are not Grandchildren.**—Cutter *v.* Doughty, 7 Hill (N. Y.) 305, reversing the judgment of the supreme court in 23 Wend. (N. Y.) 513. Same will construed as to another point in 8 Paige Ch. (N.Y.) 375.

**The Widow of a Grandchild is not a Grandchild.**—Hussey *v.* Dillon, Ambler 603; s. c., 2 Eden 194.

**The Illegitimate Child of a Daughter is not a Grandchild.**—Ferguson *v.* Mason, 2 Sneed (Tenn.) 618.

# INDEX.


Fires caused by the operation of railways, 1
  Burden of proof, 9
  Care required, 3
  Contributory negligence, 16
  Engines, construction of, 5
  Failure of employee to watch over and extinguish fires, 6
  Fire communicated from one building to another, 13
  Liability, 2
  Negligence in the management of engines, 7
  Origin of fires, 7
  Rubbage in right of way, 14
  Speed, unlawful rate of, 7
  Spread of fire, 11
  Statutes, 2
  Witnesses, 19
Fish and fisheries, 23
  Common fishery, 23
  Common law, 28
  Constitutionality of statutes, 35
  Construction of statutes, 39
  Custom of Greenland, 31
  General usages, 32
  International, 28
  Navigable rivers, 24
  Navigable streams, 33
  Non-residents, 36
  Oysters, 32
  Private, 31
  Remedies, 39
  Right of fishery, 25
  Riparian owner, 27
  Sea fisheries, 24
  Several fishery, 24
  Shell-fish, 32
  Statutes, 34
  U. S. and Canada, 29
  Whale, 30
Fixtures, 41
  Agricultural, 57
  Assignees, 44
  Debtor and creditor, 45
  Definition, 41
  Domestic, 59
  Ecclesiastical, 59
  Effect of agreements, 61
  Executor or tenant for life and remainderman, 54
  Heir and executor, 47
  Landlord and tenant, 48
  Mortgagor and mortgagee, 50
Fixtures—*Continued.*
  Parties, 44
  Remedies, 64
  Rolling stock, 64
  Tenants in common, 54
  Test for determining, 43
  Time of removal, 62
  Trade, 60
  Vendor and vendee, 55
Floods, 67
  Act of God, 69
  Damage from wind and rain, 68
  Dams, 69
  Definition, 67
  Drains, 68
  Floats, 67
  Freshets ordinarily recurring, 69
  Frost, 68
  Goods injured by, 71
  High tide, 70
  Liability for, 67
  Liability of riparian owner, 68
  Natural state of stream, 69
  Overflow from river, 71
  Pipes, 68
  Railroads, 70
  Rivers, 68
  Streams subject to great freshets, 68
  Water stored, 69
Forbearance, 98
Forcible entry and detainer. 102
  Abandonment, 124
  Abatement of action, 165
  Abatement, pleas in, 158
  Accessories, 138
  Action, 127
  Action brought by second lessor, 135
  Action, commencement of, 146
  Against whom action may be brought, 137
  Agent, 122
  Agreement to extend lease, 135
  Amendments, 164
  Answers and defences, 157
  Appeal, 179
  Arrest, 108
  Authority of law, 111
  Boundaries, 129
  Boundary disputed, 109
  Building outside of tenant's enclosure, 117
  Certiorari, 181
  Color of title, 126

Forcible entry and detainer—*Continued.*
Common law, 104, 110
Complainant's estate and possession, [151
Complaint, 150
Constant presence of claimant, 120
Constructive possession, 103
Contract, possession under, 122
Control of another's land, 123
Costs, 176
Damages, 172
Defences in general, 159
Demand for possession, 139
Description of the property, 153
Disposition of issues, 163
Distinction, 103
Entry by owner in absence of tenant, [107
Entry in night-time, 114
Entry, manner of, 107
Entry, purpose of, 107
Entry under contract to repair, 109
Equity of redemption, 125
Evidence, 165
False affidavit, 109
Fire, destruction of building by, 124
Forcible detainer after unlawful entry, [109
Forfeiture of lease, 134
Form and verification, 157
Grantee of lessor, 135
Holding over, 112
Husband and wife, 124
Indictment, 148
Inquisition, 147
Intimidations, 116
Judgment, 174
Judgment, enforcement of, 177
Jurisdiction, 143
Landlord and tenant, 102, 108
Lessee against former lessee holding [over, 139
Marking, 121
Moving line fence, 116
Nature of the action, 102
Notice, 112, 142
Notice to quit, 139
Objection to evidence, 170
Occupant of rooms in another's dwel- [ling, 123
Parties to action, 129
Placing goods on premises, 120
Possession, 117
Possession after foreclosure, 141
Possession, what constitutes, 119
Pre-emption, 126
Procedure, 143
Public lands, 127
Re-entry by tenant, 135
Refusal to complete purchase, 124
Refusal to perform agreement, 112
Relinquishment of contract of sale, 125
Remedies, 104
Remedy when not applied, 106
Removing of fence, 114
Restitution of possession, 177
Reviews, 179
Scrambling possession, 118
Staking, 121
Forcible entry and detainer—*Continued.*
State of execution, 182
Statutes of limitation, 157
Summons, 146
Sureties, liability of, 183
Surreptitious entry, 109
Surrounding land, 109
Surveying, 121
Taxes, payment of, 123
Tenant entering by collusion, 135
Tenants holding over, 105
Threats, 116
Threats of bodily harm, 111
Threats of prosecution, 111
Title, how far considered, 126
Trespasser, 102
Trespasses, 120
Under-tenant, 135
Venue, 150
Verdict, 170
Void writ, 122
Waiver of notice, 141
Warrant, 146
What constitutes, 106
What constitutes forcible detainer, 110
What force or violence is sufficient, 112
Widow's possession in behalf of heirs, [118
Witnesses, 169
Foreclosure of mortgages, 185
Acknowledgment of debt, 203
Additional security, giving of, 190
Adverse possession, 228
Adverse possession by mortgagor, 199
Appeal, 277
Assignee in bankruptcy, 208, 217 [209
Assignee of mortgage without bond,
Assignee of note, bond, or debt, 209
Assignee of one of several notes, 207
Assignee *pendente lite*, 209
Assignor of mortgage, 220
Chattel mortgages, 278
Collateral, mortgage held as, 208
Corporations, 217
Decree, 240
Defence, 230
Deficiency, judgment for, 264
Definition, 185
Demand, necessity for, 188
Devisees, 215
Drunkards, 217
Election, notice of, 193
Election, right of, 192
Entry and possession by, 186
Equitable assignees, 208
Equitable assignment, 207
Equitable interest, owner of, 208
Executors and administrators, 215
Extension, consideration for, 190
Extension of time by parol, 190
Federal courts, 205
Foreign executors, 210
Forfeiture, relieving from, 193
Guarantors, 226
Guardians, 220

Foreclosure of Mortgages—*Continued.*
Heirs, 210, 215, 227
Husband and wife, 214, 226
Indemnity mortgage, 197
Infants, 217, 226
Insane, 217, 226
Instalment, failure to pay, 192
Interest paid in advance, 190
Interest, failure to pay, 192
Judgment creditors, 219, 227
Judgment creditors, 228
Jurisdiction, 206
Lapse of time, 200
Married women, 211, 213
Mechanic's lien, 219
Mortgage, power of sale in, 205
Mortgage, recognition of, 200
Mortgage to persons in official capacity, 211
Mortgagor having no interest, 211
Mortgagor's possession, presumption from, 200
Neglect to enforce mortgage, 200
Note barred, action on, 201
Note, payment on, before due, 190
Parties, 206
Payment on debt, 203
Payment when no time specified, 189
Personal representatives, 209
Pleadings, 229
Presumption of payment, rebuttal of, [198
Purchaser *pendente lite*, 218
Purchaser, remedies against, 272
Purchaser, rights of, 273
Receiver, 234
Remaindermen, 217, 225
Re-sale, 258
Reversioner, 217
Right of, when accrues, 188
Right of, when barred, 197
Sale by, 186
Sale, by whom made, 245
Sale, conduct of, 246
Sale, confirmation of, 257
Sale, duty of officer conducting, 248
Sale, foreclosure by, 204 [277
Sale, mortgage, power of foreclosure,
Sale not within statute of frauds, 248
Sale, proceedings before, 231
Sale, proceedings in, 205
Sale, proceeds of, 269
Sale, report of, 254
Sale, rights and liabilities of purchaser,
Sale, setting aside, 258 [249
Statutory foreclosure, 188
Strict foreclosure, 185
Tenants, 217
Tenants in common, 220
Third person, agreement with, 190
Trustees, 210, 216
Foreign assignments, 281
Assignments, 284
Choses in action, 284
Creditors, domestic, 285
Foreign assignments—*Continued.*
Creditors, for benefit of, 284
Creditors, foreign, 285
Debts, 284
Domicile, 283
Form of, 281
Goods following the owner, 283
Goods in transit, 283
Involuntary assignment, 284
Law of place, assignment repugnant
Marriage transfer, 283 [to, 287
Personal property, 281
Possession, where changed, 288
Real estate, exception as to, 287
Ship at sea, 283
Transfer of goods by, 282
Voluntary assignments, 286
Foreign attachment, 288
Absence, 294
Absence, protracted, 295
Appearance of defendant, 323
Bills and notes, 308
Cause of action which this remedy may
Certificate of stock, 311 [aid, 303
Character of remedy, 289
Cities, 297
Corporations, 298
Debts due defendant, 306
Definition, 288
Estate under administration, 315
Execution, 326
Foreign corporations, 302
Garnishee, rights of, 318
Judgment, 326
Jurisdiction, 317
Legacies, 314
Modification of remedy, 289
Money, 313
Non-resident debtors, 291
Non-resident present, 292
Partnership property, 311
Property *in transitu*, 301
Property, right to retain, 317
Publication, 321
Public corporations, 296
Real estate, 315
Removal, 295
Residence, facts showing, 293
Shares owned out of state, 311
Stocks, 310
Third person, property in hands of, 316
What may be attached, 305
Writ, 319
Writ, return of, 323
Foreign contract. *See* Conflict of laws.
Foreign corporations, 329
Actions by or against, 375 [399
Actions by or against non-residents,
Agents for service of process, 386
Attachment, 393 [in statutes, 346
Business, what constitutes doing, with-
Causes, incidents of, 402
Charter limitations, 336 [tution, 365
Citizens are not under federal consti-

Foreign corporations—*Continued.* [367
Citizens, standing as, in state courts,
Citizenship assumed with purpose of federal jurisdiction, 367
Comity, repeal of, 332
Comity the basis of recognition, 332
Consolidated corporations, 396
Consolidation, 404
Constitutional rights, 365
Creditors, protection of home, 405
Definition, 329
Devise, 361
Discrimination, 366
Dissolution, 404
Domicile, 330
Eminent domain, 364
Estoppel, 354
Exclusion of, 333
Exemption laws, 396
Franchise, special, 334
Garnishment, 393
Interstate commerce, 368
Invalid acts, 353
Judgments against, 390
Lease, 365
Liability for torts, 369
Liability to taxation, 369
Limitation of actions, 397
Limitations imposed by statute, 338
Limitations of powers, 334
Mortgages, 360
Name of, 330 [tions, 338
Non-compliance with statutory condi-
Patent rights, corporations holding,
Police laws, 368 [350
Powers as to meetings, 356
Powers as to personal property, 365
Powers as to real estate, 357
Powers, limitations of, 334
Powers made same as domestic corporations, 365 [rating, 331
Powers of, outside of state incorpo-
Policy of state controls admission, 335
Receivers, appointment of, 408
Receivers, recognition of, 409
Removal of causes, 401
Service of process, 382 [tory, 351
Statutes, constitutionality of retalia-
Taxation, 369
Torts, liability for, 369
Trustees, 365
Ultra vires, 354
Foreign executors and administrators,
Actions by and against, 420 [414
Actions cannot be had before taking out ancillary letters, 423
Administrators, grant of, 415
Administrators, no privity between different, 427
Administrators, original and ancillary, 431
Appointment, when made, 414
Assets, distribution of, in different jurisdictions, 430
Foreign Executors and Admrs.—*Cont'd.*
Assignee may sue upon choses in ac-
Authority over estates, 420 [tion, 425
Bonds, liability on, 420
Definition, 414
Distribution, 428 [will, 428
Executors, when appointed by same
Goods *in itinere*, 425.
Jurisdiction of courts, 433
Law governing, 419 [424
Payment, what will discharge debtor,
Rights and responsibilities, 418
Settlement, 428
Title to estates, 420 [ward.
Foreign guardian. *See* Guardian and
Foreign judgments. *See* Judgments.
Foreign laws, 435
Authentication, 438
Extra-territorial effect of, 435
Judicial notice, 435
Law or fact, question of, 438
Proof of, 435
Unwritten law, how proven, 438
Witnesses, competency of, 438
Written law, how proven, 437
Foreign liens. *See* Liens.
Foreign wills. *See* Wills.
Forestalling the market, 441
Forests. *See* Woods and forests.
Forfeiture, 443
Agency, 451
Alienation, 443
Attainder, 444
Body of the, 444
Charter, 445
Condition, 444
Contract, 444
Copyhold, 444
Corporate rights, 445
Covenants, 444
Crimes, 445
Deeds, 445
Definition, 443
Deposits, 446
Enforcement of, 446
Estate, 446
Evidence, 446
Injunction to restrain, 446
Insurance policy, 446
Lease, 447
License, 447
Marriage, 448
Mortgage, 448
Office, 448
Patents, 448
Relief against, 449
Rent, non-payment of, 448
Revenue laws, violation of, 449
Ship, 451
Statute, by, 449
Stock of corporations, 450
Taxes, 451
Wages, 451
Waiver, 451

Forfeiture—*Continued.*
Waste, 452
Forgery, 452
Acknowledgment of deed, 481
Acquiescence in previous, 453
Additions, 475
Alteration of instruments, 455, 468, 475
Appeal, 543
Artist's signature, 454
Attorney in fact, signing as, 453
Authority to sign, 453
Bail bond, 484
Bank notes, 482
Blanks, filling in, 471
Bond, 462
Book-keeper, 473
Book of original entry, 472
Book statements, 473
Capacity to injure, evidence to show,
Certificate of character, 481 [537
Check, 462
Clearance card, 483
Corporate stamp, 485
County warrant, 482
Damages, actual, need not be averred,
Date of order, changing, 458 [505
Date, using false, 472
Death, false proof of, 484
Deceased person, name of, 466
Deceive, must be calculated to, 461
Defence, matters of, 496
Definition, 453
Divorce, decree of, 484
Documents and secondary evidence thereof, 534
Dollar-mark, omission of, 463
Due-bills, 483
Entries, making false, 472
Erasures, 475
Essentials of the crime, 457
Evidence, 527
Extradition, 500
Extrinsic facts, averment of, 523
False charge in books, 458
False making, 458, 465
False representations, 474
Fictitious name, 457
Former proceedings, record of, 537
Fraud, 474
Guilty knowledge, averment of, 505
Guilty knowledge, proof of, 528
Handwriting, proof of, 534
Incorporation, averment of, 525
Indictment, 500
Instructions, 541
Instruments, description of, 510
Instruments the subjects of forgery,
Intent to defraud, 459, 493 [478
Intent to defraud, averment of, 506
Intent to defraud, proof of, 528
Joinder, 526
Jurisdiction, 497
Jury, question for, 541
Letter of introduction, 487
Forgery—*Continued.*
Letter of recommendation, 481
Letters, 488
Loan, requests for, 486
Memorandum, 483
Mortgage, 481 [another, 469
Mortgage, executing, on lands of
Name, acquiescence in use of, 466
Name, by use of same, 468
Name misspelled, 462
Name, to show forged, fictitious, 537
Name, use of fictitious, 469.
Offence, stating, in alternative, 503
Offence, stating, in different phrases, 504
Order and requests to pay money, 486
Order for goods, 456
Other forgeries, proof of, 530
Parol, 459
Party to be defrauded specified, 504
Pass-book, false entries in, 472
Pawn-broker's ticket, 483
Pecuniary condition of defendant, 537
Person, non-resident, 460
Possession with intent to utter, 495
Power of attorney, 486
Printed signature, 464
Punishment, 543
Seal, 456
Sentence, 543
Signature, falsely procuring genuine,
Sufficiency of evidence, 538 [467
Uttering and publishing, 489
Uttering, proof of, 531
Variance, 505
Venue, 497, 522
Verdict, 542
What is, 464
Who may commit, 489
Witness, competency of, 527
Words, omission of important, 462
Wrappers, imitation of, 487
Forma pauperis, 544
Affidavit, what is sufficient, 547
Application, when to be made, 548
Costs against executor, 547
Costs, liability for accrued, 547
Costs, liability for interlocutory, 546
Definition, 544
Dispaupered, who may be, 548
Executors, 546
Infants, 545
Law and equity, 544
Married women, 546
Non-residents, 546
Who may sue or defend, 545
Former acquittal. *See* Jeopardy. [*cata.*
Former adjudication. *See Res adjudi-*
Former conviction. *See* Jeopardy.
Former jeopardy. *See* Jeopardy.
Former recovery. *See Res adjudicata.*
Former suit pending, 549
Action at law and equity, 554
Action in another state, 554

Former suit pending—*Continued.*
Action in foreign country, 554
Action in state and federal courts, 553
Action must be between same parties, 552 [effective, 551
Action must be capable of being made
Action must be in competent court,
Action must be prior, 550 [551.
Action must be same cause and relief,
Action must still be pending, 551 [552
Appeal, pendency of, 555
Evidence, 555
General rule, 549
Writ of error, pending on, 555
Forthcoming bond, 565
Burden of proof, 571
Definition, 565
Forfeiture, 569
Form of, 565
Fraud in executing, 568
Lien, as a, 568
Object of, 565
Officer's return, 571
Property, description of, 568
Sureties, rights of, 571
Validity of, 567
Forwarding merchants, 573
Carriage, breaking of, 582
Carrier distinguished from, 575
Connecting carriers, 582
Consignee, duty to advise, 575
Definition, 573
"Forward," use of the word by carriers, 580
Negligence, burden of proof, 575
Ordinary care, bound to exercise, 574
Shipper, instructions by, 575
Franchise, 584
Amendment, reserved right, 627
Boom companies, 615
Carriers, duty as, 602
Contract as, 620
Crossings, 604
Definition, 585
Duty to build and operate railroads,
Eminent domain, 595, 634*f* [599
Excuses for failing to operate road, 606
Execution, sale on, 634*i*
Fences, 604
Fires, 604
Forfeiture, 634*k*
Gas companies, 614
Incidental powers, 593
Incidents, 593
Legislation effecting remedy, 624
Limitations as to property, contracts, etc., 632
Limitations of reserved rights, 630
Miscellaneous corporations, 615
Monopolies, 598
Mortgage, 634
Municipal aid, 597
Police power, 621
Presumption of being irrevocable, 628
Franchise—*Continued.*
Public character and duties of corporations, 587
Public duties of particular corporations, 599 [ment of, 615
Public duties, remedies for enforce-
Railroad companies, 599
Repeal, reserved right, 627 [under, 628
Reserved right, franchise controlled
Reserved right, limitations of, 630
Sales, 634
Station accommodations, 604
Statutes referring to persons, 625
Taxation, 634*k*
Taxation, exemption from, 596, 634*g*
Telegraph companies, 609
Telephone companies, 612
Transfer, 634
Water companies, 614
Fraud, 635
Actual fraud, 635
Agent, 648
Agents, fraud by, 642
Attorney and client, 648
Concealment, 645
Confidential relations, 649
Constructive frauds, 646
Courts, fraud upon, 642
Credit, concealment by buyers on, 646
Creditors, 648
Definition, 635
Duress, 649
Evidence, 653
Executors and administrators, 648
Fiduciary relations, 647
Laches, 653
Legal fraud, 635
Misrepresentations, 635
Parties on equal footing, 643
Party deceived, duty of, 643
Pleadings, 653
Remedies, 650
Representations, who may rely upon,
Scienter, 642 [643
Trustee, 648
Undue influence, 649
Frauds, statute of, 657
Acceptance, 729
Actual receipt, 729
Agent, memorandum by, 719
Assignment, grant and surrender of existing terms, 669 [of law, 670
Assignment or surrender by operation
Contracts not performable within a
Earnest-money, 736 [year, 685
Effect, 658
Equitable doctrines, 737
Estates in land, 664
Goods, contract for sale of, 704
History, 657 [of, 704
Interests in land, contract for sale
Leases, 666 [sideration of, 684
Marriage, promise made upon con-
Memorandum, 710

Frauds, Statute of—*Continued.*
Memorandum, contents of, 721
Part of goods, 735
Part payment, 736
Part performance, 738
Pleading the statute, 745
Promise for debt of another, 673
Signature to memorandum, 717
Subject-matter, 664
Time of acceptance, 735
Transfer by parol, 672
Fraudulent conveyance, 748
Action to set aside, 774
*Bona fide* purchaser, 756
Consideration, 759
Conveyance, 758
Creditors, 750
Debtors, 753
Definition, 748
Effect between parties, 771
Essentials, 748
Evidence, 776
Family, members of, 764
Form and nature, 761
Fraud, badges of, 770
Gift, 765
Husband and wife, 764
Intent, 753
Jurisdiction, 771
Pleading and practice, 776
Possession, retention of, 754
Preference, 768
Purchaser, 756
Purchaser without notice, 757
Remedies, 771
Subsequent creditors, 751
Fraudulent debtor, 780
Absconding debtor, 785
Consideration, 782
Debtor's transactions, badges of fraud, [780
Intent to defraud, 781
Punishment, 785
Relationship of parties, 784
Unusual transactions by debtor, 783
Fraudulent sales, 786.
Acts indicating change of possession, [894
Affirmation, 850
Agent, fraud of, 821
Agreement, effect of special, 859
Apparent ownership of original buyer, [837
Assent of parties, is none, 791
Assignment exacting release, 858
Assignments, voluntary, 857
Auction sales, 813
Bidders, combinations of, 831
Bill of sale acts, 862 [860
*Bona fide* purchaser, protection of, 832,
*Bona fide* purchasers, who are, 840
Buyer, duty of, 808
Buyer, when not protected, 808
Buyer's fraud, 822
Buyer's rescission, 816
By-bidders at auction, 813
Carrier treated as purchaser, 840
Fraudulent sales—*Continued.*
Chattel mortgages, fraudulent, 875
Competition, stifling, 831
Concealment, 802, 812
Consideration of transfer, 842
Consideration, restoration of, 849
Consideration, restoring, 806 [896
Continuance of change of possession,
Credit, misrepresentations of, 822
Creditors, assent of, 857
Creditors, fraud on, 851
Creditors, subsequent, 852
Custodian treated as purchaser, 840
Damages, 820
Damages to party deceived, 801
Dealer's talk, 810
Debt, payment of pre-existing, 842
Debt, transfer of pre-existing, 861
Deceit must be successful, 793
Deceive, design to, 799
Declarations of vendor, 860
Defeasible title, 836
Defects, sellers dealing with, 807
Defects, sellers need not point out, 808
Definition, 791
Delay in change of possession, 896
Delivery required, 890
Delivery, what constitutes, 890
Design not to pay for goods, 825
Design not to pay, proof of, 826
Design not to pay, remedies, 829
Employment of vendor, 896
Estoppel, 837
Execution defeating, 853 [800
Fact asserted, claiming knowledge of,
False pretences, criminally, 846
Fiduciary relation, 804 [valid, 856
Fraudulent transfer, between whom
Inducement to contract, 793
Insolvency, concealment of, 826
Insolvent, inducing sale to, 824
Insolvents, valid sales by, 856
Intent never to pay, 826
Judicial sales, chilling bids at, 832
Jury, fact for, 792
Legal consequences, 792
Matters open to observation, 803
Mercantile agency, false rating in, 829
Misrepresentation of the law, 796
Mistake distinguished from, 791
Mistaken identity, 844
Nature of fraud, 791
Notice, 841
Occupation, description of, 871
Opinion, mere expression of, 793
Opinions concerning value or cost, 795
Opinion, expressions of, 810
Personal chattels, 866
Possession, change of, 876
Possession, concurrent, 893
Possession, fraudulent, 843
Possession, retention of, 877
Preferences by insolvents, 854
Preferences not fraudulent, 855

Fraudulent sales—*Continued.*
Pretending knowledge, 801
Price, depressing, 830
Price, seller's statements as to, 809
Property, change in condition of, 807
Puffers at auction, 813
Ratification, 850
Ratification of contract, 819
Reckless statements, 801
Recommendation by third party, 823
Registration, 869, 873, 874
Remedies for fraud, 804
Representation, materiality of, 798
Representation, necessary, 792
Representations, reliance upon, 794, 811
Requisites of fraud, 792
Rescission by buyer, 816
Rescission, diligence in, 846
Rescission, requisites of, 849
Rescission, when barred, 851
Residence, description of, 871
Return of property, 817
Sale, averments of, 819 [stances, 859
Sale hurried under peculiar circum-
Seller's concealment or silence, 812
Seller's fraud, 807
Seller's liability for fraud, 811
Seller's option to affirm or disaffirm, 837
Silence, 804, 812
Strangers, liability in tort to, 797
Third person, transfer to, 837
Tort, evidence in, 793
Voidable title, 836
Warranty, 819
Freehold, 898
Agent's authority to contract, 933, 970
Carrier's obligation to refund excessive freight, 934 [914
Charter provisions relating to freight,
Classification, 946
Common law, 902
Connecting carriers, 927
Definition, 901
Discrimination, 941 [ities, 956
Discrimination against particular local-
[of goods, 946
Discrimination based upon character
[goods, 949
Discrimination based upon quantity of
Discrimination between different consignors or consignees, 954
Discrimination between termini, 967
Discrimination caused by grouping of places into districts, 965
Discrimination depending upon distance as between connecting carriers, 965
Discrimination depending upon distance as affected by competition, 961
Discrimination depending upon distance goods are carried, 959
Discrimination in packed parcels, 953
Discrimination, miscellaneous instances, 967
Freehold—*Continued,*
English freight statutes, 923
Equal protection of the law, state freight statutes as denying, 922
Excessive freight, remedies for, 934
Excessive freight, statutory penalties, 938 [of, 935
Excessive freight, voluntary payments
Freight charges, what may be included, 928
Freight statutes, construction of, 925
Freight statutes in U. S., 923
Goods of same class shipped under like circumstances, 945
Interstate commerce, state freight statutes as affecting, 918
Lawful freight rates, 928
Lien as effected by set-off, 977
Lien, effect of custom upon carriers, 975
Lien, effect of mistake upon carriers, 971
Lien, effect of notice upon carriers, 971
Lien, effect of ownership upon car-
Lien for freight, 969 [riers, 973
Lien, remedies involving, 978
Lien, sale to enforce, 979
Lien, waiver of, 978
Lien, what is included in, 975
Lien, when carriers are entitled to, 970
Limitations as to freight, effect upon purchasers, etc., 925
Long and short haul, 931 [upon, 949
Quantity of goods, discrimination based
Police power, state statutes, 907
Railroad commissions, 910
Rates, legality of, 928
Set-off as affecting lien, 977
Statutory regulations, 906
Fugitive from justice. *See* Extradition.
Funeral expenses. *See* Executors and administrators.
Future-acquired property, 987
Accession, 991
Assignments of, 991
Definition, 987
Execution lien, 989
Lien, 987
Lien of judgment, 988
Pledge of, 989
Statutory lien, 987
Substitution, 991
Will, passing by, 989
Gambling contracts, 992 [1021
Action to recover back money paid,
Agents, responsibilities of, 998
Agents, responsibility to, 1011
Bet, action against winner, 1001
Bet claimed by winner, 1001
Bets and wagers, 994, 995
"Calls," "puts," and "straddles," 1004
Cheating and unfair dealing, 1003
Common law, 993 [1003
Contracts in furtherance of gaming,
Definition, 993

Gambling contracts—*Continued.*
"Differences," 1004
Differences, dealings in, 1005
Election bets, 996
Entrance fees, 1001
"Future," 1004
Intent, evidence of, 1010
Legal consideration, under guise of, 997
License, effect of, 1003
Loans for gambling purposes, 1015
Lottery ticket, 1002
Margins, 1008
Money lost by play, 995
Mutual intent, 1008
Obligations and securities for gambling considerations, 1017
Option contracts, 1011
"Options," 1004
Prize, 1001
Sales for future delivery, 1004
"Short" sales, 1004, 1011
Speculative dealings, 1004
Stakes and stake-holders, 999
Statutory provisions, 994
Transactions out of jurisdiction where suit brought, 1020
Wager policies, 1002
Wagers, 995
Wagers on rise and fall of price, 1005
Game and game laws, 2023
Constitutional law, 1033
Decoying and enticing away, 1027
Definition, 1023
Game laws defined, 1027
Interstate traffic, 1029
Property in game, 1024
State discriminating against non-residents, 1032
Statutory regulations, 1028
Trespassing in pursuit of game, 1025
Gaming, 1033
Averment of place, 1059
Bet, description of, 1057
Bet, time and manner of, 1042
Bet, what constitutes, 1042
Bet, who may, 1042
Common gamblers, 1052
Definition, 1033
Description of game, 1054
Evidence, 1063 [1034
Game must contain element of chance,
Games within statute, 1036
Gaming-house, visiting, 1052 [1062
Indictment against common gambler,
Indictment and information, 1053
Indictment, joint, 1061
Joinder of offences, 1062
Judgment, 1064
Jurisdiction, 1053
Name of persons alleging, 1053
Publicity, 1045
Punishment, 1064
Value of things staked, 1043
Wager, 1042
Gaming—*Continued.*
What constitutes a crime, 1034
Gaming-houses, 1065
Charging the offence, 1084
Definition, 1065 [plements, 1088
Description of game and gaming im-
Description of places or houses, 1087
Gaming implements, seizure of, 1081
Indictment and information, 1084
Jurisdiction, 1084 [plements, 1066
Keeping gaming-house and gaming im-
Offences at common law, 1073
Offences under statutes, 1074
What places and things are within
Garnishment, 1096 [statute, 1066
Administrators and executors, 1138
Adverse claimants, 1237
Affidavit, 1111
Agents of the law, 1137
Answer, 1206
Answer, amendment of, 1210
Answer, effect of, 1225
Answer, garnishee's refusal to, 1211
Answer, judgment upon, 1249
Appeal, 1257
Assignees, 1145
Assignment, how affected by, 1179
Assignment of errors, 1262
Attachment and execution, a mode of,
Attachment, under, 1107 [1101
Attorneys at law, 1137
Bond, 1115
Clerk of court, 1144
Conflict of laws, 1254
Contingent liability, 1194
Contracts between defendant and gar-
Corporations, 1130 [nishee, 1189
Costs, 1264
Debts before maturity, 1165
Default, judgment upon, 1246
Definition, 1097
Effect of, 1198
Encumbrance or pledge, prior, 1185
Equity, aid of, 1256
Execution, under, 1110
Fraud, 1192
Garnishee, discharge of, 1249
Garnishee's defence, 1212
Garnishee's liability, proceedings to determine, 1202
General nature and scope, 1099
General object, 1100
Guardians, 1142
Interest, 1196
Joint debts and credits, 1166
Judgment, 1242
Judgment debtors, 1169
Judgment, force and effect of, 1251
Justice of the peace, 1144
Liability of garnishee, 1147
Negotiable paper, 1172
Non-residents, 1129
Notice to defendant, 1126
Oral examination of garnishee, 1204

Garnishment—*Continued.*
Possession necessary to charge garnishee, 1156
Proceeding at law, 1102
Proceeding *in rem*, 1103
Proceedings to obtain, 1111
Process, a, 1100
Public officers, 1135
Receiver, 1145
Record, amendment and correction of, 1264
Return, 1124
Sheriffs, 1142
Statutes, construction of, 1104
Statutory proceeding, 1098
Suits pending, 1169
Summons, 1116
Trial, 1232
Trustee, 1145
When may issue, 1105
Who may be charged as garnishee, 1128
Writ, 1116
Gas companies, 1268
Actions by and against, 1289
Constitutionality of charter, 1269
Contracts of municipalities, 1271
Damages for refusal to supply gas, 1286
Deposits, 1285
Duty to supply gas, 1283
Estoppel, 1282
Evidence, 1287
Exclusive privileges, 1277
Franchise, 1280
Fraudulent taking of gas, 1286
Gas fixtures, 1273
Highways and streets, 1276
Injunction, 1290
Insurance, 1290
Negligence, 1273
Nuisance, 1280
Larceny, 1287
Mandamus, 1289
Municipal control, 1288
Stock, 1271
Taxation, 1291
General average, 1293
Adjustment, 1306
Contribution, 1305
Contributory interest, value of, 1306
Damage to cargo by forced discharge, 1300
1299
Damage to cargo from various causes,
Damages incident to jettison, 1298
Definition, 1293
Deviation, 1303
Enforcement of claim, 1307
Expenditure, 1300
General average act, a, 1294
General average loss, 1296
Indiscriminate use of term, 1294
Jettison, 1297
Money raised abroad, 1303
Salvage, 1303
Stranding, voluntary, 1300
Gifts, 1308
Acceptance, 1351
Gifts—*Continued.*
Acceptance by donee, 1331
Bills and notes, 1320
Causa mortis, 1341
Checks, 1320
Chose in action, 1322
Conditional gift, 1332
Creditors, validity as to, 1341
Death, expectation of, 1346
Debt, forgiveness of, 1321
Declaration of trust, 1323
Deed of gift, 1331
Definition, 1309
Delivery, 1314, 1347
Delivery, constructive, 1320
Delivery to third party, 1318
Effect of gift, 1337
Equitable assignment, 1322
Executed contract, 1309
Executed, must be, 1313
Execution, effect of, 1351
Husband and wife, 1333
Inter vivos, 1313
Mental capacity, 1309
Parent and child, 1334
Proof, 1336
Property in possession of donee, 1319
Qualified gift, 1332
Revocation, 1351
Savings-bank book, 1324
Undue influence, 1310
What may be given, 1320, 1342
Who can make, 1309
Good will, 1366
Assets, 1371
Barter and sale, 1370
Locality, 1372
Name in trade, 1367
Partnership for term, 1370
Personal solicitation, 1369
Professional men, 1372
Restraint on vendor, 1368
Vendor's name, use of, 1370
Government, 1378
Governor, 1400
Appointment and removal, power of, 1402
Commander-in-chief, 1408
Definition, 1400
Duties, 1404
Judicial process, 1406
Legislative act, right to refuse to consider, 1404
Legislature, power to adjourn, 1401
Mandamus, 1405
Officer of election, not an, 1408
Powers, 1401
Qualifications, 1400
Re-election, 1401
Salary, 1408
Term of office, 1400
Words and Phrases:
Actual, 896
All my household furniture, 985
At and from, 982
By force, 100

Words and Phrases—*Continued.*
By reason of, 100
Consent first had, 22
Continued, 896
Contracting for, 89
Copper fit for manufacture, 40
Cost of fittings, 40
Fire-works, 20
Firing, 20
Firm, 20
Firmly, 20
First, 21
First class, 23
First cost, 21
First cousin, 21
First day, 21
First draw, 21
First heir male, 21
First inventor, 21
First mortgage, 21
First of the month, 21
First privilege, 22
First rate, 21
First received, 22
First son, 22
First term, 22
First tried, 22
Fiscal, 23
Fiscal will, 23
Fishing bill, 40
Fit, 40
Fit for cultivation, 40
Fit for distillation, 40
Fittings, 40
Fixtures and fixed furniture, 985
Flaw, 66
Flee, 66
Flee from justice, 66
Floating debt, 66
Floor, 71
Floor cloth, 71
Flotsam, 72
Flowing, 72
Fluid, 72
Flying switch, 73
Fodder, 73
Folio, 74
Follow, 75
Follow his business, 76
Follow the event, 75
Follow up, 75
Fœmus, 74
Foot, 76
Foot of the mountain, 77
For, 79
For and during, 94
For cash, 82
Force, 99
Force and arms, 99
Forced heirs, 100
Forced sale, 100
"For" construed to mean "from," 97
Foreign, 280
Foreign bills, 280

Words and Phrases—*Continued.*
Foreign bonds, 280
Foreign citizens, 280
Foreign dominion, 280
Foreigner, 441
Foreign fishing, 280
Foreign government, 280
Foreign markets, 280
Foreign paupers, 280
Foreign plea, 280
Foreign port or place, 280
Foreign state, 281
Foreign trade, 281
Foreign vessel, 281
Foreign voyage, 281
Forever, 442
Forge, 452
Forgiving, 90
For her own use, 91
For hire or grain, 91
For his services, 92
"For" in the sense of "for the use," "enjoyment," or "possession" of, 97
For or in behalf of, 81
For or in consideration of, 84
For or on account of, 79
For said firm, 92
Forswear, 564
Forth, 565
For that, 94
For the purpose, 96
For the time being, 93
For the use, 94
For this day and train only, 93
Forthwith, 571
For value received, 97
Forward, 580
For whom it may concern, 87
Fractional, 584
Fraternity, 634
Free, 898
Free from average unless general, 898
Free from mortality, 898
Freehold, 898
Freely to be possessed and enjoyed, [898
Freeman, 899
Frequent, 980
Fresh, 980
Freshet, 980
Fresh fish, 980
From and after, 982
Fresh sea, 980
From, 981
From time to time, 982
From the date of the day, 982
From the day, 982
From the dwelling, 982
From thenceforth, 982
From the person, 982
From the place of his abode, 981
Front, 982
Frontage, 65
Fruit, 983
Full, 983

Words and Phrases—*Continued.*
Full and complete cargo, 983
Full costs, 983
Full wages, 983
Fully to account, 983
Fund, 983
Furnace, 984
Furnish, 984
Furniture, 985
Furniture, goods and chattels, 985
Further, 986
Future, 986
Future earnings, 986
Future editions, 986
Future estate, 986
Future extensions or branches, 987
Gag, 992
Gain, 992
Gallon, 992
Gather, 1291
Gasoline, 1291
Gelding, 1291
General, 1292, 1308
Gentleman, 1308
Genuine, 1308
Getting out, 1308
Gin-house, 1355
Gist, 1355

Words and Phrases—*Continued.*
Give, 1355
Glass, 1356
Go, 1357
Gold, 1357
Good, 1357
Good faith, 1361
Goods, 1362
Gorge, 1372
Gotten, 1375
Government, 1378
Grace, 1410
Grade, 1410
Grade, 1411
Granary, 1412
Grandchild, 1412
Gum, 1292
Heard from, 982
If he shall see fit, 40
In consequence of, 100
In the first place, 22
New and additional, 980
Next immediately, 981
Personal chattels, 866
Show forth in evidence, 565
The funds, 984
Times of freshet, 980
With force, 100



WHOLE NUMBER OF PAGES, 1440.